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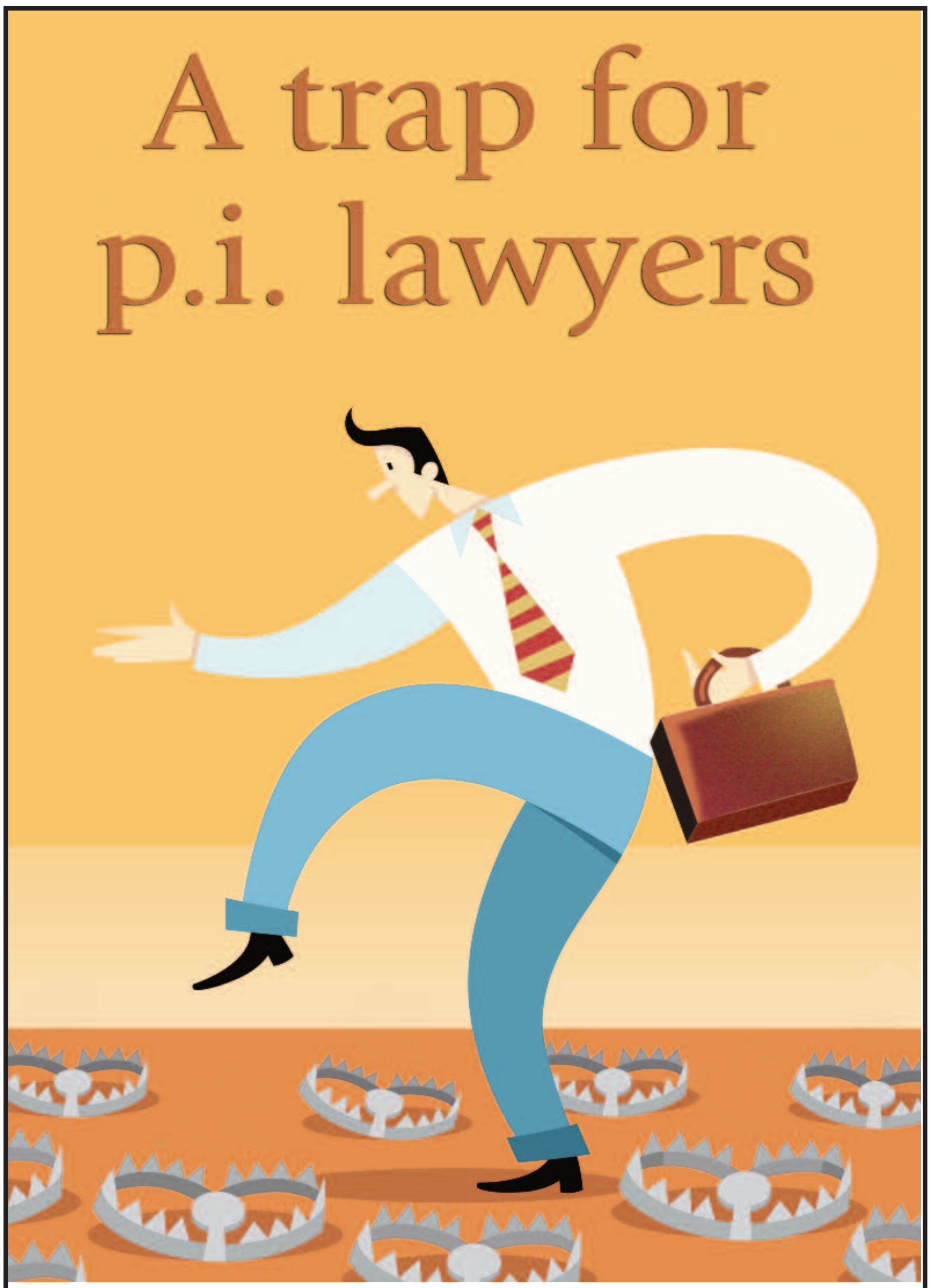

ERISA case prompts attorneys to check clients' plans

BY CORREY E. STEPHENSON

Personal injury lawyers whose clients have employee health benefit plans may want to pay attention to a new U.S. Supreme Court ERISA case, in order to protect their clients and themselves.

The case creates a "window and a trap," according to one plaintiff's p.i. lawyer: Lawyers need to check current cases to protect their attorney's fees and watch for plan administrators starting to change plan language to take advantage of the new case.

In *US Airways v. McCutchen,* the Supreme Court said an airline-issued ERISA plan could recoup all medical costs the plan paid for an employee from proceeds the employee recovered in a third-party personal injury suit.

Although the plan at issue was silent on whether the company was responsi-

■ See **Trap**, on PAGE 21

New law: Agency appeals easier

BY PETER VIETH

Lawyers who practice before state agencies may have an easier time getting circuit court judges to take a fresh look at their cases under a new law approved by the 2013 General Assembly.

Sen. John S. Edwards, D-Roanoke, said he sponsored Senate Bill 944 to give administrative law practitioners a better shot at an even-handed review of agency decisions. He said the current standard of review is so deferential to agency decisions that most lawyers don't even try to appeal an adverse ruling.

"Virginia's in the dark ages when it comes to administrative appeals," he said.

Removing 'reasonable basis'

Edwards' bill makes a change to the Administrative Process Act that governs procedures for challenging agency decisions. The act controls regulatory challenges under state agencies including the Department of Alcoholic Beverage Control, Department of Health Professions, the State Health Commission and the Department of Environmental Quality.


SEN. EDWARDS

Under the current law, a circuit judge's review is limited to ascertaining whether there was substantial evidence in the agency record upon which the agency could "reasonably" base its decision.

The "reasonable basis" standard will be gone when the new law takes effect July 1. The court's duty will be to determine whether there was substantial evidence in the agency record to support the agency decision.

Furthermore, if the appeal is based on a question of law, not fact, the review standard will be "de

■ See **Agency**, on PAGE 28

Rehearing petition may work, says court

BY PETER VIETH

ABINGDON – If the Supreme Court of Virginia denies your client's petition for appeal, take a serious look at a second try, members of the high court said at an April 26 "town hall meeting" on appellate practice.

Chief Justice Cynthia D. Kinser, joined fellow Justice Elizabeth A. McClanahan and Court of Appeals Judge Teresa M. Chafin, spoke before an overflow crowd of more than 250 lawyers at a Virginia State Bar Solo and Small-Firm Practitioner Forum in Abingdon.

Petitions for rehearing are not discouraged, and the odds for gaining an appeal may improve

■ See **Petition**, on PAGE 22


Photo courtesy of Frank Kilgore

JURISTS FROM SOUTHWEST VIRGINIA: JUSTICE ELIZABETH MCCLANAHAN, CHIEF JUSTICE CYNTHIA KINSER, APPEALS JUDGE TERESA CHAFIN

IMPORTANT OPINIONS

Page 10 | Convictions Vacated for 'Merger Problem'

In this fraud case involving a scheme to sell life settlement investments, the 4th Circuit interprets "proceeds" of the scheme as "net profits" and overturns defendant's money laundering convictions.

Page 14 | Voluntary Dismissal Allowed, With Condition

A plaintiff may voluntarily dismiss his med-mal suit alleging negligent laparoscopic removal of his gall bladder on the condition that he only refile in a Virginia state court, says an Abingdon U.S. District Court.

Page 16 | Complaint Stricken After Husband's Appearance

The Court of Appeals says a wife cannot take advantage of a 2012 statute allowing divorce by deposition or affidavit, as husband, who was living in Saudi Arabia, made a special appearance and claimed bigamy.

Supreme Court upholds limits on access to public records

By Deborah Elkins

Virginia does not have to extend public-records access to persons outside the commonwealth, the U.S. Supreme Court ruled April 29, denying out-of-staters' requests under the Virginia Freedom of Information Act for records on a child support case and on county real estate data.

Rhode Island resident Mark McBurney filed a VFOIA request with the Virginia Division of Child Support Enforcement, seeking information about why DCSE had delayed in filing a child support petition on his behalf, which he said had cost him nine months' worth of support.

McBurney argued that DCSE's denial of his request hindered his right to advocate on his own behalf and prohibited him from using Virginia's dispute resolution procedures, thus violating the federal Privileges & Immunities Clause. However, McBurney was able to get much of the information he sought from Virginia's Government Data Collection and Dissemination Practices Act, according to the Supreme Court.

California resident Roger Hurlbert, owner of Sage Information Services, sued over Henrico County's denial of records from the county assessor's office, which Hurlbert said interfered with his fundamental right to earn a living in his chosen profession of obtaining property records for his clients.

After denying Hurlbert's FOIA request, the county provided Hurlbert with an electronic copy of its 2008 real estate assessment database, which his lawyer declined to review. Real estate tax assessment records maintained by court clerks already are open to public inspection, the Supreme Court pointed out, including through online posting.

Virginia court rules provide noncitizens access to nonprivileged documents necessary for litigation, and Virginia law gives both citizens and noncitizens access to judicial records, the Supreme Court said in its unanimous opinion in *McBurney v. Young*, written by Justice Samuel A. Alito Jr.

But a statute such as the Government Data Collection and Dissemination Practices Act, used by McBurney, only offer a partial workaround, as it applies exclusively to government records about the person making the request, said Megan Rhyne, executor director of the Virginia Coalition for Open Government.

JUSTICE ALITO

The high court said FOIA laws are meant to make public officials accountable to citizens, and Virginia can draw a valid distinction between citizens and noncitizens because it's the citizens of the commonwealth who foot the bill for the fixed costs underlying agency recordkeeping.

Alito's opinion cited several other state FOIA statutes that discriminate against noncitizens, and the Supreme Court's validation of a financial reason for the distinction may encourage other budget-strapped states to change their laws.

National open-government advocacy groups were aware of that risk, according to Rhyne, who serves on the board of the National Freedom of Information Coalition, a group that signed onto an amicus brief filed by Washington, D.C., lawyer Samir Jain on behalf of transparency groups.

But the availability of alternative methods for the *McBurney* plaintiffs to get the information they wanted – a point emphasized by Alito – meant the state wouldn't

■ See **Access**, on PAGE 22

Virginia lawyers find trouble in Maryland

By Peter Vieth

A trio of Virginia-licensed lawyers recently found themselves facing criminal or disciplinary action in this state after first running afoul of authorities in Maryland.

A lawyer who pleaded guilty in Maryland to taking part in a small business loan fraud scheme said to involve more than $100 million in losses now has admitted to misappropriating millions in real estate loan money in Virginia.

Another lawyer faces reciprocal discipline in Virginia after being suspended in three jurisdictions for filing altered credit counseling reports in bankruptcy cases.

A third lawyer, who represented an NFL player while working out of his apartment in Arlington, has been suspended for six months based on flawed litigation that brought a sharp rebuke from a Maryland federal judge.

Millions lost in business and real estate loans

The criminal case involves Virginia lawyer Seung E. Oh, licensed in Virginia as Seung Oh Kang. The Great Falls resident is the former owner of Annandale's Washington Settlement Group, a title company involved in closings for real estate and business loans.

Oh, 44, who pleaded guilty in connection with a business loan scheme April 5 in Maryland, entered a guilty plea to wire fraud conspiracy April 30 in Alexandria federal court.

Oh misappropriated nearly $3.7 million in escrowed loan payments from Virginia real estate closings between 2007 and last year, according to an agreed statement of facts. She also admitted profiting from false or inflated charges on more than 115 short sale closings.

Oh allegedly diverted money from three separate closings on loans for a home in Vienna. She handled two refinances and a purported sale (with her husband as a "straw buyer") on the Vienna property. At the sale, she concealed from the title insurance company that the deeds of trust for each prior closing were all still unreleased.

In another transaction, Oh allegedly diverted nearly $2 million for her own purposes, money that was intended to pay off an earlier loan on the residential property.

Oh's Virginia fraud conviction came less than four weeks after her guilty plea to Maryland federal charges.

Oh admitted she helped close crooked loan deals for a company called "Jade Capital" that arranged loans for new or existing small businesses in the Mid-Atlantic area. According to federal prosecutors, many of the loans were based on phony documents designed to meet federal loan requirements.

The scheme cost taxpayers more than $100 million in loans to unqualified borrowers backed by the Small Business Administration, according to the U.S. attorney's office in Maryland. "The scope of this audacious scheme to fraudulently secure SBA-backed loans is outrageous," said SBA Inspector General Peggy E. Gustafson in a March 19 news release.

Oh pleaded guilty to bank fraud conspiracy and money laundering in Baltimore federal court. As part of her plea deal, Oh agreed to repay more than $11 million.

Oh is out on bond and scheduled to be sentenced in Maryland on July 9 and in Virginia on July 12. She faces up to 50 years in prison on the Maryland conviction and up to 30 years for the Virginia wire fraud count.

Oh currently is under an administrative suspension from the Virginia State Bar for failing to comply with a subpoena duces tecum and for nonpayment of dues, VSB officials said. Oh is subject to bar discipline in Virginia based on her felony convictions.

Oh's attorney, Roger E. Zuckerman of

■ See **Trouble**, on PAGE 22

CORRECTION

The story "Virtual Practice" in the April 29, 2013 issue of *Virginia Lawyers Weekly* mistakenly stated on page 21 that construction lawyer Christopher G. Hill has an office in Glen Valley. His non-virtual office is in Glen Allen, Va.

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324 pass February bar exam

There are celebrations and groans across the state as February bar examination takers learn of the results. Overall, more than 57 percent of those who sat for the exam on Feb. 26 and 27 passed.

A total of 324 passed out of 564 total takers, according to W. Scott Street III, secretary-treasurer of the Virginia Board of Bar Examiners. Of those, 206 had completed all requirements and were licensed, and 118 passed the exam but have not yet been licensed, most of whom are awaiting results from the Multistate Professional Responsibility Exam, Street said.

The VBBE has the lists of names of those who passed at www.vbbe.state.va.us/bar/barresults.html

Many of the new lawyers will be admitted to the Supreme Court of Virginia at a special session on June 3 in Richmond. The admission ceremony is arranged by the Young Lawyers Conference of the Virginia State Bar.

The pass rates for all applicants and for Virginia law schools, provided by the VBBE, are below. The University of Virginia takes top honors with a 90.48 percent overall pass rate. The rate is 100 percent for first-time Cavalier test takers. All of the Liberty University first-timers were successful as well.

— Peter Vieth

FEBRUARY PASS RATES

	First-time Takers Percentage	Overall Percentage
All Virginia Bar Exam Applicants	65.71%	57.45%
Virginia Law Schools:		
Appalachian School of Law	25.00%	42.86%
College of William and Mary	50.00%	61.11%
George Mason University	90.00%	75.00%
Liberty University	100.00%	64.29%
Regent University	66.67%	77.27%
University of Richmond	45.45%	50.00%
University of Virginia	100.00%	90.48%
Washington and Lee University	57.14%	40.00%

Source: VBBE

Publisher's Notebook

FOIA folly

The U.S. Supreme Court on April 29 upheld a Virginia law that says the commonwealth doesn't need to respond to Freedom of Information requests from people who live out of state.

The high court's reasoning in *McBurney v. Young* apparently hinged on economics. Virginia can draw a valid distinction between residents and nonresidents because the people of the commonwealth are the ones who pay the fixed costs required for agency recordkeeping.

And Attorney General Ken Cuccinelli crowed afterwards that the decision was "a victory for Virginia taxpayers."

You can ignore the AG's comment as election-year pablum but you can't ignore the general disdain that the high court seems to have toward FOIA.

The FOIA and other good-government sunshine laws were passed to provide transparency for the public. They were designed to allow the public to know what was going on, without having to dig too terribly deep.

In the unanimous opinion, Justice Samuel Alito reduces the function of FOIA laws to providing a "service."

"Virginia's FOIA law neither 'regulates' nor 'burdens' interstate commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all," he wrote.

Really?

The plaintiffs in *McBurney* were a guy in Rhode Island seeking state child support info and a man from California seeking data on property assessments in Henrico County.

Those are somewhat typical of the types of requests that someone outside the commonwealth might have.

Megan Rhyne, executive director of the Virginia Coalition for Open Government, noted several others in a post on the VCOG website.

Other out-of-staters with requests might include a woman in Indiana trying to get nursing home data for placement of her elderly mother. Or a grad student in Alabama trying to get election data for a school project. Or a man in Bristol, Tenn., who is worried about the condition of a bridge across the state line in Bristol, Va., and seeks inspection data.

Rhyne, addressing her piece to the nine justices, put it this way: "I don't think the opinion the lot of you embraced on Monday gives any thought to just how public records are used day in and day out by everyday citizens who are just trying to make sense of their world and how government is impacting it."

Here's the thing about the Virginia FOIA with its newly endorsed practice of spurning out-of-state requests.

It's awfully easy for a nonresident to ask someone here to make the request. You might even see someone seeking to handle those services for a fee (FOIA 'R' US, anyone?).

So it sets up an easily avoided hoop that makes this law pretty meaningless. Why have meaningless laws?

Some open-government advocates fear that other states will take a cue from *McBurney* and join the eight states that have resident-only FOIA laws. If that happens, you might see informal arrangements between businesses or companies to make FOIA requests in their states, similar to way that a law firm near a state border will work with a firm on the other side of the line. All it takes is a resident's signature, and the FOIA request or lawsuit is ready for filing.

Rhyne noted that the lawyer for the commonwealth, when making his argument before the Supreme Court, referred to FOIA laws as a "fad" of the 1960s.

A fad? No, that's wrong. A fad is something that goes out of style.

— Paul Fletcher

Read the Publisher's Notebook blog at valawyersweekly.com

4th Circuit limits winner's e-discovery cost recovery

By Deborah Elkins

Tech wizards may tell lawyers that e-discovery advances will cut litigation costs, but lawyers know that the more data is out there, the more their opponents want.

There may have been some hope for recovery of the costs for production of electronically stored information, or ESI, under the federal taxation-of-costs statute, 28 U.S.C. § 1920(4).

Federal courts apparently are split on the issue, as several judges in Virginia's Eastern District have noted. Although those Virginia courts have denied ESI cost recovery under § 1920(4), it was still an open question that had yet to be considered by the 4th U.S. Circuit Court of Appeals.

Until now. On April 29, the 4th Circuit turned away a broad-based bill of costs for ESI and upheld an award of a mere $218.59 of the more than $100,000 requested by the winning party in a dispute between wine merchants. Adopting the reasoning of a 3rd Circuit case, the 4th Circuit panel said in this case, the federal statute limited taxable costs to those identified by the district court: converting electronic files to non-editable formats, and burning the files onto discs.

Writing for the unanimous 4th Circuit panel, Judge Andre M. Davis described the early and ongoing discovery skirmishes that kept the meter running on ESI costs.

The Country Vintner of North Carolina sued Gallo Winery in a North Carolina federal court, alleging violations of the North Carolina Wine Distribution Agreements Act and the North Carolina Unfair and Deceptive Trade Practices Act.

Almost immediately, the parties clashed over the discovery of ESI, Davis said. The district court judge refused to grant a protective order to Gallo and ordered production of emails as proposed by Country Vintner.

Gallo collected more than 62 GB of data and forwarded it to its lawyers' firms for processing and review. Country Vintner proposed applying 19 search terms to all that data and noted a preference for receiving the ESI in a format compatible with the Summation review platform. Gallo had used different litigation support software, IPRO eCapture and kCura Relativity, to process the data, according to the 4th Circuit opinion.

Less than two months after Gallo began producing documents, the district court dismissed the unfair trade practices claim, then granted summary judgment for Gallo, which the 4th Circuit affirmed.

When Gallo filed its bill of costs under § 1920, it asked for $111,047.75 from Country Vintner for ESI-related charges in six categories, including charges for "flattening" and indexing ESI, extracting metadata, electronic "Bates Numbering," copying images onto a CD or DVD and management of electronic data processing and quality assurance procedures.

Rejecting the plaintiff's "crabbed interpretation" of the taxable-costs statute, the 4th Circuit said the provision's coverage of materials "used in the case" extended beyond materials attached to dispositive motions or produced at trial.

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News in Brief

Richmond's Phillips tapped as U.S. bankruptcy judge

The judges of the 4th U.S. Circuit Court of Appeals have named Richmond lawyer Keith L. Phillips to a seat on the U.S. Bankruptcy Court in the Richmond Division of the Eastern District of Virginia.

Phillips will succeed U.S. Bankruptcy Judge Douglas O. Tice Jr., who will retire June 30. Tice has served on the court since 1987. Phillips is expected to take his seat in the fall, according to a media advisory from the court.

Phillips is a principal of the Richmond law firm of Phillips & Fleckenstein PC.

He is a 1976 graduate of the College of William & Mary and earned his law degree from the University of Richmond in 1979. He clerked for U.S. District Judge Walter B. Hoffman in Norfolk after law school.

He has represented debtors, creditors, creditors' committees and trustees in all chapters under the bankruptcy code. He has been a mediator in bankruptcy-related disputes; he has served as a Chapter 7 trustee for 27 years and as a Chapter 11 trustee.

Virginia Tech families allowed appeal in shootings case

The Supreme Court of Virginia now says it will consider appeals from both sides of the Virginia Tech wrongful death trial.

The court has agreed to hear an argument from the families of two victims of the 2007 shootings that – if they prevail on appeal – could allow recovery of more than $100,000 each.

The two families won jury verdicts of $4 million each, but each award was capped at $100,000 under the Virginia Tort Claims Act.

The Supreme Court already had agreed to hear the state's argument that the families were not entitled to any recovery because university officials owed no duty to warn of danger from a third party.

The court decided April 25 to also consider whether Virginia Tech president Charles Steger should have remained in the case. Trial Judge William Alexander ruled the families' claim against Steger was barred because Steger had been sued in an earlier action that was dismissed.

With Steger as a defendant, the plaintiffs would have a chance to avoid the $100,000 cap of the VTCA.

The families had asked the Supreme Court to reconsider its earlier decision not to take up the Steger issue.

The original petition for appeal would have been considered only by a three-judge panel. The petition to reconsider went before the full court, with any judge having the ability to grant an appeal. The court's order granting the writ does not reflect which justice, or justices, agreed to take up the Steger issue.

Second request yields writ in Disthene case

The controlling shareholders in a closely held family corporation have won the chance to ask the Supreme Court of Virginia to block a court-ordered breakup of the company.

The granting of an appeal in the case involving The Disthene Group Inc. marks the second of two prominent cases last week in which disappointed litigants won an appeal from the Supreme Court after first striking out with a three-judge panel. In the other case, two families of Virginia Tech shooting victims won the chance to appeal a ruling that put a $100,000 cap on each family's potential recovery.

The Supreme Court's allowance of an appeal in the Disthene case puts a hold on plans to break up the family corporation and sell off its assets, which include a profitable Kyanite mine in Buckingham County and the somewhat less profitable Cavalier Hotel in Virginia Beach.


JUDGE ROUSH

Circuit Judge Jane Marum Roush ordered the corporate dissolution in August based on her conclusion that majority shareholders engaged in a "squeeze out" of minority owners.

The majority owners failed to persuade members of a three-judge panel to grant an appeal, but their petition for rehearing found favor with at least one of the seven justices.

"Corporate governance will be thrown into confusion" by Roush's ruling, the majority owners argued in their petition for rehearing, according to the Richmond Times-Dispatch.

The writs granted in the Disthene and Virginia Tech cases affirm the vitality of the Supreme Court's procedures for re-

■ See **News in Brief**, on PAGE 5

VSB Disciplinary Action

Effective May 1, the Virginia State Bar Disciplinary Board suspended the license to practice law of Michael C. Fasano of Manassas for 60 days for violating professional rules that govern scope of representation, truthfulness in statements to others, and misconduct, according to the VSB.

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News in Brief

questing a "second look" by the court.

Requests for appeals are initially considered by panels of three justices. A petition for rehearing is circulated to all of the sitting justices and any one of them can grant a rehearing and allow the appeal.

Huguely appeal is limited to two issues

An indisposed lawyer and a questionable juror are the bases of the two issues that may be considered by the Court of Appeals of Virginia in the case of George Huguely V, the former University of Virginia lacrosse player convicted of killing his ex-girlfriend.

Huguely was found guilty of second degree murder and sentenced to 23 years in prison for the 2010 death of fellow UVa student Yeardley Love.

Huguely's lawyers raised a number of issues in their bid for an appeal. A single judge of the Court of Appeals last week granted the appeal, but only on two issues.

The first issue is whether Huguely was denied a fair trial when the trial judge refused to delay the proceedings after one of Huguely's trial lawyers became ill. The other issue is whether one juror should have been struck from the panel because of doubts about her impartiality.

In a 14-page order dated April 23, the court rejected consideration of the absence of malice. Huguely's lawyers argued the evidence failed to show malice and supported only manslaughter. The reviewing judge – the judge's identity is not disclosed – reviewed the evidence of the couple's turbulent relationship and the details of Love's death.

"Appellant's behavior indicates his violent anger toward Love," the judge wrote. "The evidence supports the jury's finding that appellant acted with malice."

The appeals court judge also rejected the suggestion that the trial was tainted by the prosecution's failure to disclose details of the Love family's planned civil lawsuit against Huguely. The prosecution had signaled the possibility of a civil suit, and Huguely's lawyers – with reasonable diligence – could have learned the details, the judge said.

Either side can ask for a review of the writ decision by a three-judge panel.

VSU student president says hazing plea was coerced

(AP) The president of Virginia State University's student government association is asking a judge to set aside his hazing conviction, arguing that he only pleaded guilty because the prosecutor said he wouldn't graduate if he refused.

Brandon Randleman, 22, and three others pleaded guilty April 8 to an August hazing incident involving a student. All are members of Alpha Phi Alpha fraternity.

Randleman's attorney, Joseph Morrissey, claims in court papers filed late last month that Randleman told Petersburg Commonwealth's Attorney Cassandra Conover he was innocent and agreed to plead guilty only after the threat was made.

In a meeting shortly before the hearing, Conover told Randleman, "If you don't sign this (plea agreement), you are not graduating," Randleman alleged in the court filing, which asks that his conviction be tossed and that his case be set for trial.

Conover and the judge who accepted the pleas have recused themselves from the case. A special prosecutor from Chesterfield County has been appointed to handle Randleman's case, now set for May 23.

All three defendants waived their rights to an attorney before the April hearing and agreed to plead guilty. In exchange, they received 30 days of probation, a few hours behind bars, and agreed to comply with any conditions imposed by the university and the prosecutor. The charges would be formally dismissed in May if all conditions were met.

Morrissey began representing Randleman after the plea was entered.

"The defendant was arrested, brought before a magistrate and entered a plea in approximately 70 hours!" Morrissey wrote in the motion.

Conover said she's surprised by the allegations. She denies that she made any threats or pressured the students to plea.

"If they felt pressured, they should have said something," Conover said.

Randleman's stepfather, Milton L. Eley, supported his son's version of events in a sworn affidavit and alleged that Conover had a conflict of interest in prosecuting him because Randleman had two classes under Conover, who teaches at VSU, and had worked as an intern in Conover's office last spring.

The prosecutor said she doesn't see any conflict of interest "because the school was willing to have the matter taken under advisement and dismissed, and not have it go any further."

As student body president, Randleman also serves as the student representative on VSU's board of visitors.

Eley, who was present at the meeting with the prosecutor, claims he was "absolutely shocked" at her behavior. He claims that outside court when he defended Randleman that Conover replied, "Brandon may not have done anything wrong, but he was in the vicinity."

"We were very upset about the boorish manner in which she handled things, and we were very, very disturbed," Eley wrote.

Conover said she's puzzled by Eley's statements. Randleman's parents were "laughing and joking about how the matter was handled" after court, Conover said.

Also convicted were 22-year-old Leroy Amankrah, 23-year-old Christopher Barnes-Prevot and 28-year-old William Nicholson.

Virginia audit says half of court fines, fees go unpaid

(AP) Nearly half of the fines and fees levied by Virginia courts for traffic tickets and in criminal cases went unpaid over the past five years, according to a state audit.

The state Auditor of Public Accounts report found circuit and district courts assessed an average of $357 million in fines and costs from 2008 to 2012. The unpaid assessments cost the state about $171 million each year.

The report said collections vary greatly among circuit and district courts. Districts courts assessed more than 80 percent of the total fines and costs due to a much larger volume of cases, mostly traffic violations.

The annual collection rate was 60 percent for district courts, but that left an average of $127 million uncollected each year over the five-year period.

For circuit courts, the collection rate was 27 percent, leaving an average of $44 million uncollected each year.

The audit found understaffed court clerks and local prosecutors are unable to devote more time and resources to collection efforts. About 10 percent of unpaid fines involve people sent to jail who don't have the means to pay their fines.

Convicted offenders who don't pay their fines can have their driver's licenses suspended, and wages can be garnished if the Department of Taxation is notified. But auditors called the collection processes "disjointed."

The audit recommended that the General Assembly consider establishing a statewide collection unit. But Delegate Dave Albo, R-Springfield, suggested such collection efforts should be done on the local level.

Fairfax County Circuit Court Clerk John Frey said that the audit failed to recognize how difficult it is to get money from most offenders.

"If the person is indigent, if they have a court-appointed attorney, it's unrealistic to think we're going to be able to get a lot of money out of those folks," Frey said. "(Courts) are getting about as much as they can out of the system."

— Compiled from staff and wire reports

Divorce decree makes son 'dependent' past age 18

A divorce decree that called for a father to continue paying part of his son's health care coverage until the son was "no longer an eligible dependent" meant the father had to pay past the son's 18th birthday, the Virginia Court of Appeals said on April 30.

The parties' agreement, incorporated in the divorce decree, said the father was responsible for the dependent coverage "as long as such insurance is reasonably available to him through his place of employment."

See opinion digest for *Kolmetz v. Hitchcock* on page 16.

When the couple's son turned 18 and graduated from high school in June 2010, the father asked the trial court to terminate the order requiring him to pay health and dental insurance for the son. A Henrico County Circuit Court denied the motion and ordered the father to reimburse the mother for one-half the cost of the son's hospitalization insurance, including dental if available, for so long as the child was deemed a dependent, "per Southern Health."

In an unpublished opinion by Judge Robert J. Humphreys, the appellate court said the clear intent of the parties' property settlement agreement is that the duration of the father's obligation is not defined by the son's age, but by the availability of an insurance policy to the father through his employer, for coverage of the son.

Humphreys said the phrase "eligible dependent," when used in the context of insurance coverage, does not exclude a child who has reached the age of majority and graduated from high school. The panel affirmed the order to pay in *Kolmetz v. Hitchcock* (VLW 013-7-130(UP).

VERDICTS & SETTLEMENTS

Prostate cancer treatment had painful side effects

Defense Verdict

Plaintiff, age 69 at the time of trial, was diagnosed with prostate cancer in December 2007. He consulted with his urologist and then the defendant radiation oncologist about his treatment options. On May 1, 2008, plaintiff underwent prostate brachytherapy with defendant. The procedure involved inserting needles into the prostate gland and depositing 119 radioactive Iodine seeds to kill the cancer cells. In the months following the seed implantation procedure, plaintiff suffered urinary and bowel symptoms such as increased frequency, urgency, pain and occasional incontinence. Plaintiff, who was retired from his career at the Department of Defense, but working as a consultant for Booz Allen at the time, characterized his symptoms as extreme and actually considered suicide. He alleged that his symptoms forced him to resign from his dream job with Booz Allen. In time, plaintiff's symptoms


MITCHELL LEWIS

abated. He had seen no physician for his complaints in three years.

Plaintiff, who is retired in Florida, sued the defendant, contending that his implant was excessively hot, resulting in excessive symptoms and life-long suffering. Plaintiff testified that his post-op suffering surpassed that of concentration camp victims.

Defendant argued that the prostate brachytherapy procedure was an excellent implant because it cured the plaintiff of his prostate cancer and had minimal long-term side effects. Defense expert John Blasko, M.D., performed the first transperineal prostate brachytherapy procedure in the United States and is a world-renowned expert on the subject. He, along with a local radiation oncologist, both of whom had never testified at a trial before, explained that the plaintiff's post-op symptoms were typical. Plaintiff called one of his treating physicians during plaintiff's case-in-chief, who also testified that his post-op symptoms were classic and customary.

After four days of evidence, the jury deliberated for 45 minutes before returning a defense verdict.

[13-T-061]

Type of action: Medical malpractice
Injuries alleged: Permanent urinary and bowel dysfunction and pain due to excessive radiation to prostate
Name of case: Walsh v. Hanlan, M.D.
Court: Arlington Circuit Court
Case no.: 11-1664
Tried before: Jury
Judge: William T. Newman Jr.
Date: March 28, 2013
Demand: $4,000,000
Offer: None
Verdict or settlement: Defense verdict
Attorneys for defendant: Byron J. Mitchell and Kristina L. Lewis, Fredericksburg
Attorneys for plaintiff: Patrick M. Regan and Amy S. Gurgle, Washington
Insurance carrier: Professionals Advocate
Plaintiff's expert: Stephen J. Banks, M.D., radiation oncologist, Santa Rosa, Calif.
Defendant's experts: John Blasko, M.D., radiation oncologist, Seattle; Matthew Poggi, M.D., radiation oncologist, Alexandria

Plaintiff was thrown from balcony

$2,100,000 Verdict

Plaintiff was severely injured when the defendant intentionally picked him up and threw him over a second-story balcony railing at a hotel. Plaintiff incurred medical expenses of $52,000 and suffered permanent facial injuries.

[13-T-063]


BENNETT WASHBURN

Type of action: Personal injury
Injuries alleged: Facial fractures and pelvic fractures
Name of case: Remley v. Ruiz
Court: Chesapeake Circuit Court
Case no.: CR11003077-00
Date: March 22, 2013
Judge: E. Preston Grissom
Verdict or Settlement: Verdict
Amount: $2,100,000 (including $350,000 in punitive damages)
Attorneys for plaintiff: Carlton F. Bennett and Eric K. Washburn, Virginia Beach

College basketball player rendered paraplegic after nightclub shooting

$799,500 Settlement

The plaintiff, who had recently completed his eligibility as a starting forward on his college basketball team, was rendered a paraplegic after being shot multiple times by an assailant and his cohorts. The shooting occurred in the street in front of the defendant nightclub, after the plaintiff had gone to the club with several other basketball players to celebrate his birthday. The plaintiff made claims alleging negligent security and failure to protect the plaintiff from the assailant.

The assailant was sentenced to 15 years for his role in the shooting. Plaintiff's counsel wish to acknowledge the assistance of Fairfax attorney Peter S. Everett in drafting the complaint and defeating the demurrer filed by the defendant.

[13-T-065]


DAVIS KILDUFF

Type of action: Personal injury - negligent security and failure to protect
Injuries alleged: Multiple gunshot wounds resulting in left L3, right L1-2 paraplegia, neurogenic bladder, chronic pain, history of pressure ulcers and urinary tract infections
Court: Richmond Circuit Court
Date resolved: April 4, 2013
Verdict or settlement: Settlement
Amount: $799,500 (plus mediation costs)
Attorneys for plaintiff: Craig B. Davis and William B. Kilduff, Richmond
Plaintiff's experts: Dr. William O. McKinley, plaintiff's IME on injuries/paraplegia; Neil Sullivan, security; Kenny Miller

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Dentist cut patient's lip during crown removal

Defense Verdict

The plaintiff's lip was cut during the removal of a temporary crown. Plaintiff alleged that the defendant used a dangerous dental tool and excessive force while attempting to remove the temporary crown, instead of using safer alternatives. Plaintiff alleged that her labial artery and nearby muscle were


DILLMAN COLANERI

severed. Plaintiff also alleged that the defendant dentist's records were inadequate. Following the laceration, plaintiff required emergency treatment, including suturing. Plaintiff also required treatment with a plastic surgeon, including scar revision surgery, steroid injections, and multiple follow-up visits over a nearly two-year time period.

Her treating plastic surgeon (whom she called as a damages witness at trial) testified that some of her injuries (including altered sensation, hypersensitivity, and discomfort) would be permanent. Plaintiff requested $300,000 in her complaint and no settlement offer was ever made by the defense.

After a three-day trial, the jury returned a verdict for the defendant.

[13-T-064]

Type of action: Medical malpractice
Injuries alleged: Lip laceration
Court: Chesapeake Circuit Court
Case no.: CL12-1303
Tried before: Jury
Judge: V. Thomas Forehand Jr.
Date: April 10, 2013
Verdict or settlement: Defense verdict
Attorneys for defendant: Rodney S. Dillman and Julie M. Colaneri, Virginia Beach
Attorneys for plaintiff: John A. Heilig and Robert E. Moreland, Norfolk

Alternative Dispute Resolution

Ten tips for litigators to succeed in mediation

By Robert Wright

After observing parties succeed and fail in hundreds of mediations, I've come up with a top 10 list of tips for litigators to have a successful mediation.

1. Select the appropriate mediator.

Mediators vary in approach and style. Some use the facilitative model while others are more evaluative. One mediator may prefer to keep the parties in joint session as long as possible and may never convene a private meeting, while others use the private meeting early on.

The private meeting is a useful tool, especially when a monetary settlement is contemplated. It allows venting, sharing of sensitive information, and a chance to formulate your "pitch" before delivering it to the other side. If the message is delivered in a respectful and well ordered manner, it will increase the likelihood it will be fully considered.

CAUTION: What you reveal to the mediator in these private one-on-one meetings is typically confidential and not conveyed to the other side without your express consent. The mediator should make this clear before going into a private meeting. If you have any doubt about this (or any other aspect of the process), seek clarification from the mediator.

2. Prepare.

Parties do better when they are prepared. In essence, mediation is a form of facilitated negotiation. The more time you take to do your homework, the better.

Review the file: is everything in order? Do you have anything left to do?

Plaintiffs: Can you blackboard your damages or support them with jury verdict research? Have you prepared your client for a lowball opening offer?

Defendants: What can you say to encourage the plaintiff to settle? Do you have sufficient authority to respond to new information you learn at mediation?

Both: Do you have the right people coming to the table? Have you discussed risks and weaknesses of your case with your client? Are they emotionally prepared to be in the same room with the other person?

3. Create a concise, truthful and compelling mediation summary.

A mediation summary is different from a trial or case evaluation brief. Instead of trying to persuade a neutral, you must try to persuade the other side. If you were on the other side, what would you want to hear to encourage you to settle?

Don't be abusive: the old saying about flies and honey proves true throughout mediation. Keep exhibits to a minimum. If you are truthful in your representations, you don't need exhibits to prove it.

If you exaggerate or shade the truth, you lose credibility and trust with the other side (and the mediator).

Building trust is an important tool in persuading the other side. Unless you have a compelling reason not to disclose information, do so.

4. Formulate a reasonable opening offer.

Studies show the side which makes a reasonable opening offer "anchors" settlement negotiations, i.e., the final settlement amount is closer to their number. Use a "decision tree" to calculate your best and worst case scenarios and the dollar amounts for both.

Map out your monetary moves in advance, but be prepared to reward movement from the other side with a "double move" and always be ready to revise your "bottom line" if you receive new information.

5. Listen actively.

A good listener seeks to understand the other side, not just formulate a retort. Repeat some key phrases to let the other side know you hear them.

Empathize when possible: "I can see you are very upset over the accident and we are sorry you have had to endure the pain. We are prepared to put some significant dollars on the table today to help you get past it."

Ask for clarification, but don't resort to interrogation, and ask open-ended questions.

6. Participants: Carefully consider who to bring to mediation.

Will they help you reach settlement? Could they be so defensive as to be unable to admit their own mistakes or apologize for the mistakes of others? Could coaching make them helpful?

Do they have complete settlement authority? If not, can someone with full authority attend or can you guarantee ready access to authority? Many times cases don't settle without someone in authority listening to every aspect of the mediation.

Could a subject matter expert provide information on a technical or complicated area in dispute, such as construction, valuation or psychological issues to help resolve them or provide a range of options? If so, discuss their attendance with your mediator.

7. Deal with emotions before the mediation.

Emotions are often the fuel which ignites a conflict. Be sure your representatives (and you) have dealt with their emotions before mediation.

Identify hot buttons, and decide how to manage them in advance. If your opponent has called your client a liar, cheat or fraud in pleadings, they will likely do so in the mediation. When people feel attacked, they may build walls and lob grenades from behind them. Be prepared to help them guard against it. Ask them how they can let it go. Focus on solutions, not blame or retaliation. "She who keeps her temper, wins."

Anticipate what will make the other party react defensively and how you will deal with their hot buttons and defensive reactions. Figure out what you can do to avoid engaging in a war of words.

8. Identify key interests.

Mediation works best when parties reveal what really matters to them. Many times we think a dispute is purely about money. However, try to identify interests — both your side's and theirs — that lie beneath the money. Rate them on a scale of importance from 0 to 5. (I have a list of 25 universal needs and interests I use to do so.)

9. Empathize.

Let the other side know you hear them by acknowledging their situation. For example, "We are all sorry for your loss. We want to reach a settlement today to help you get on with your life." Notice there are no admissions, just an expression of sympathy and a desire to settle.

Next, make the legal or factual issues the "bad guy," as in, "We want to settle, but here's the problem keeping us from giving you what you want …" This invites the party to help solve the problem.

10. Focus on the future vs. the past.

You are trying to create an arrangement for your client's future. So, it makes sense to focus on the future rather than the past which caused the problems.

The past needs to be addressed, but then it needs to be left in the past. For example, "I acknowledge mistakes were made and I am committed to coming up with a solution." This type of statement acknowledges the past and then shifts to the present and future — the only two places where change is possible.

Robert E.L. Wright is an attorney and mediator based in Grand Rapids, Mich. He is chair of the Alternative Dispute Resolution Section of the State Bar of Michigan.

The Week's Opinions

U.S. Court of Appeals

Immigration

BIA Cites Improved Conditions in Peru

A Peruvian petitioner loses his appeal of a BIA decision that says he must be deported despite his fear of torture by government officials for his trial testimony about a police officer murdering petitioner's companion; the 4th Circuit upholds the BIA decision based on current conditions in Peru, evidence of petitioner's past torture and the possibility of his relocation within Peru.

After petitioner was convicted of petit larceny in the U.S. in 2010, the government issued an administrative order of removal. Petitioner was able to apply for protection under the Convention Against Torture because he expressed a fear that Peruvian government officials would torture him if he returned to Peru. An immigration judge granted withholding of removal, but the Board of Immigration Appeals reversed. The BIA said that Peruvian government officials had attempted to mitigate corruption and petitioner had not established that the officer who targeted him remained employed as a police officer.

Petitioner contends the BIA incorrectly used the "willful acceptance" standard rather than the "willful blindness" standard. Under the willful acceptance standard, an applicant must demonstrate that government officials had actual knowledge of his or her torture to satisfy the CAT's acquiescence requirement.

In concluding that the government would not more likely acquiesce in petitioner's torture upon his return to Peru, the BIA applied the factors outlined at 8 C.F.R. § 1208.16(c)(3). Throughout its analysis, the BIA did not impose any kind of actual knowledge requirement, indicating that its reasoning was not consistent with the willful acceptance standard. Instead, the BIA evaluated whether petitioner's attacker was likely to repeat his behavior and whether the government was likely to turn a blind eye to petitioner's torture in light of its response to the identified officer's earlier conduct and the current country conditions. The BIA's decision therefore conforms to the willful blindness standard and we need not remand the case to allow the BIA to correct its analysis.

This court further finds that the BIA decision is supported by substantial evidence. The BIA relied on three key points: country conditions and human rights violations in Peru, as evinced by the State Department's country report; evidence of petitioner's past torture and whether he could safely relocate within Peru.

We conclude the BIA used the correct standard and that substantial evidence supports the BIA's conclusions in the case.

Petition for review denied.

Suarez-Valenzuela v. Holder (Floyd) No. 12-1019, April 24, 2013; On Petition for Review; Jesse R. Heath for petitioner; Derek C. Julius, USDOJ, for respondent. VLW 013-2-081, 14 pp.

Administrative

Court Won't Review Security Clearance Case

An employee of a federal intelligence agency who alleges he lost his top-secret security clearance and his job after he married a Muslim woman cannot sue the agency for violation of his constitutional rights, reinstatement and back pay; the 4th Circuit says plaintiff was merely restating "speculative and conclusory" allegations of constitutional violations which the court does not have jurisdiction to review.

The statement of reasons provided by the National Geospatial-Intelligence Agency for the proposed security-clearance revocation listed: 1) plaintiff, his parents and his siblings held dual citizenship with the U.S. and Egypt; 2) plaintiff still had an Egyptian passport and would have to contact foreign national government officials to renounce his Egyptian citizenship and turn in his passport, increasing the potential that he would be monitored by foreign intelligence services; 3) plaintiff stated he was 80 percent certain his wife held dual citizenship with Jordan; 4) plaintiff reported continuing contact with multiple foreign nationals (including relatives), some of whom reside outside the U.S.; 5) plaintiff reported residing in Egypt from 2004 to 2007; 6) plaintiff's spouse had attended and graduated "from the Islamic Saudi Academy, whose curriculum, syllabus and materials are influenced, funded and controlled by the Saudi government"; and 7) information available through open sources identified plaintiff's wife as being or having been actively involved with one or more groups organized around their advocacy of or involvement in foreign political issues.

In challenging the revocation in this lawsuit, plaintiff alleges it was based solely on his wife's religion, Islam, her constitutionally protected speech and association with and employment by an Islamic faith-based organization.

Both plaintiff and the agency, appear to agree that no one has a right to a security clearance and that the grant of a security clearance is a highly discretionary act of the executive branch.

It is well established in our circuit that absent a specific mandate from Congress providing otherwise, federal courts are generally without subject-matter jurisdiction to review an agency's security clearance decision.

In this case, we need not decide whether and where to draw the line, if any, between the political question of reviewing the merits of a security clearance decision and the judicial question of whether an executive branch agency violated an individual's constitutional rights when denying or revoking a security clearance. We conclude plaintiff's complaint merely challenges the merits of the agency's security clearance decision and his conclusory constitutional claims are unsuccessful attempts to circumvent the undisputed proposition that we will not review the merits of a security clearance decision.

In its determination, the agency concluded plaintiff had failed to mitigate its concern of an "elevated foreign influence risk that is problematic and unacceptable to the national security" of the U.S., and this conclusion is one in which the agency should have the final say, and in which courts should not intrude.

Judgment for the agency affirmed.

Concurrence

Motz, J.: I join in holding that we lack jurisdiction to review the agency's revocation of plaintiff's security clearance. Like Judge Davis, however, I believe the complaint states a colorable constitutional claim. I also agree with Judge Davis that precedent prohibits us from reviewing the merits of the agency's individualized security clearance determination, even in light of plaintiff's colorable constitutional claim. I concur in the judgment.

Davis, J.: I concur in the majority opinion but with an important difference in emphasis. Reading the material allegations of the complaint in the light most favorable to plaintiff, the only thing that changed is he got married to a dual citizen Muslim activist who, before their marriage, robustly exercised her First Amendment rights of speech and association. I do not regard plaintiff's allegations as "conclusory"; rather, I regard them as "colorable" within the contemplation of our precedents.

The requirement that a security clearance be afforded a government employee only where it is clearly consistent with the interests of national security simply does not admit of judicial determination; it is a political question, not a judicially reviewable question.

Hegab v. Long (Niemeyer) No. 12-1182, April 25, 2013; USDC at Alexandria, Va.; Sheldon I. Cohen for appellant; Bernard G. Kim, AUSA, for appellee. VLW 013-2-082, 20 pp.

Criminal

No Mandatory Minimum for Crack Defendant

The 4th Circuit says a defendant who got a 10-year mandatory minimum sentence for participation in a crack cocaine distribution conspiracy must be resentenced, given that the threshold amount for the mandatory minimum to apply was raised to 280 grams by the Fair Sentencing Act, prior to defendant's sentencing.

Defendant also challenges the sufficiency of the evidence to support his conspiracy conviction. We will uphold a conspiracy conviction even if the defendant's involvement is minimal. A defendant may be convicted of conspiracy to distribute even if the evidence shows participation in only one level of the conspiracy charged in the indictment.

Here, defendant argues the government did not prove his knowledge of the multitiered conspiracy operating in western North Carolina, and instead, only put on evidence that he sold 3.5 ounces of crack cocaine to one buyer. Defendant argues the evidence only shows two independent buy-sell transactions, which does not equate to knowledge of a broader conspiracy.

Evidence of a defendant buying or selling a substantial quantity of drugs over a short period of time is enough to raise an inference of a distribution conspiracy. At trial, the government put on evidence that the 3.5 ounces of crack cocaine that defendant sold was enough to produce over 1000 crack rocks. Given that we have upheld convictions for intent to distribute charges for amounts much less than that involved here, it is fair to conclude that a reasonable juror could infer that when defendant sold such a quantity of crack cocaine over the course of two days, defendant knew the drug was going to be further distributed. It is hard to fathom that one would purchase in short order the equivalent of 1000 crack rocks for personal use.

Viewing the evidence in the light most favorable to the government, the evidence of the two consecutive buy-sell transactions, both of which involved substantial amounts of crack cocaine, was enough to support a conspiracy to distribute conviction. This conclusion is further buttressed by defendant's jailhouse conversation about the informant who identified a number of conspirators, indicating he was at least somewhat cognizant that the distribution scheme in question was larger than the two buy-sell transactions of which he was a part.

We further find the district court did not abuse its discretion in refusing to grant defendant permission to see his co-defendants' presentence reports or in denying him the use of expert testimony to help explain the ramifications of his co-defendants' plea agreements with the government.

While the district court may have correctly applied our precedent at the time it reached its sentencing decision, our holding in *U.S. v. Bullard,* 645 F.3d 237 (4th Cir. 2011), has been limited by the recent decision in *Dorsey v. U.S.,* 132 S.Ct. 2321 (2012). As the government concedes, the Fair Sentencing Act applies to all sentences imposed after its enactment, regardless of when the underlying crime was committed.

Affirmed in part, vacated in part and remanded.

U.S. v. Allen (Gregory) No. 12-4168, April 26, 2013; USDC at Asheville, N.C. (Reidinger) Aaron E. Michel for appellant; Amy E. Ray, AUSA, for appellee. VLW 013-2-083, 14 pp.

Administrative

State Gets Hearing Before Federal Fund Cut-Off

The 4th Circuit has jurisdiction to hear a state's challenge to a the federal Department of Education's refusal to waive the entire amount of money the state owed for failing to match federal special education funds with state funding; the State of South Carolina is entitled to notice and a hearing before the federal agency makes its decision.

The Individuals with Disabilities Education Act provides for grants of federal funds to states for education of disabled children. To be eligible for continued federal funds, a state may not reduce the amount of support it pays for special education below the amount provided in the preceding year. The secretary of the Department of Education may grant a waiver of this "maintenance of effort" condition under certain circumstances. In this case, the secretary granted South Carolina a waiver of only $36.2 million of the state's requested amount of $67.4 million, and then reduced the state's 2012 allocation by $36.2 million.

South Carolina filed this petition for review, challenging the secretary's denial of its request for a full waiver and its request for a hearing.

Because removing an eligibility condition imposed by 20 U.S.C. § 1412 is an action with respect to the eligibility of the state under § 1412, we readily conclude we have jurisdiction. We conclude the secretary's action in partially denying the state's request for a waiver was a determination made "with respect to the eligibility of the State" for funding and therefore we have jurisdiction to consider the petition under 20 U.S.C. § 1416(e)(8)(A). We also conclude the secretary's denial of the state's request for a full waiver was a determination that the state was "not eligible to receive a grant" in the amount of $36.2 million and therefore the secretary was required to provide the state with notice and an opportunity for a hearing *before* he made a final determination with respect to the waiver request.

We grant the petition for review and remand to allow the secretary to provide the state with notice and a chance for a hearing before he makes a final determination on the state's waiver request.

Petition for review granted and case remanded with instructions.

S.C. Dep't of Education v. Duncan, Sec'y of Dep't of Educ. (Niemeyer) No. 12-1764, April 26, 2013; On Petition for Review; Shelly B. Kelly, S.C. DOE, for petitioners; Alisa B. Klein, USDOJ, for respondent. VLW 013-2-084, 20 pp.

Criminal

Forfeiture Upheld for Healthcare Fraud

Claimants, whose doctor son fled to Turkey after indictment for healthcare fraud, cannot overturn civil forfeiture of their property seized as proceeds of fraud and money laundering; the 4th Circuit rejects the parents' claims that the district court erred by permitting remote testimony, mistakenly prohibited admission of certain documents and refused to give their proposed jury instructions.

A federal jury found that a residence and bank account derived from the proceeds of crimes committed by Dr. Mert Kivanc, the son of claimants Turan and Duygu Kivanc. The government had been investigating the physician for reports of overprescribing controlled substances. The government has not arrested him because in November 2007, he fled the U.S. for Turkey.

The FBI learned of a fraud scheme involving Remicade, a relatively expensive antibody drug that is infused into the vein to control certain autoimmune diseases such as rheumatoid arthritis. Dr.

(See **Opinions**, on page 9)

The Week's Opinions

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Cont'd

Kivanc's medical assistant pled guilty to conspiring to distribute controlled substances and testified in detail about the methods he and the physician used to fraudulently bill for Remicade, including billing for more Remicade than patients actually received; billing for infusions when patients received a less expensive steroid medication; billing for infusions patients did not receive and billing for Remicade paid for by other patients' health care benefits programs.

Based on further investigations of the physicians' financial dealings, the government filed a complaint for forfeiture in rem against the property in question, and the jury returned a verdict for the government.

Contrary to claimants' argument, the forfeiture action is not time-barred. Regarding the physician's first offense, the government began investigating him in April 2005; regarding the second offense, the FBI became aware of the Remicade fraud on Oct. 18, 2006, based on information from Dr. Kivanc's former employees. We conclude the Remicade health care fraud was a new "alleged offense" for purposes of § 1621.The fact that the government separately indicted Dr. Kivanc for each crime supports our conclusion. Because the government filed its complaint within five years of the discovery of the Remicade scheme in October 2006, the action was not time-barred.

Nor did the district court err by denying motions to permit Turan and Dr. Kivanc to testify remotely from Turkey. Both witnesses presented letters from treating physicians in Turkey who said the witnesses' health prevented them from returning to the U.S. to testify. We cannot conclude the district court abused its discretion as to each witness.

Admission of hearsay statements against Dr. Kivanc's interest and admission of two documents also are without merit. Even if Rule 804(b)(3)(B)'s corroborating circumstances requirement were somehow to apply, the district court did not abuse its discretion by admitting the challenged statements, which were largely provided by former employees of Dr. Kivanc's practice and involved attempts to cover up the scheme.

The challenged documents were Dr. Kivanc's pretrial affidavit and letter to his attorney. Claimants wanted to introduce these documents to refute witness testimony and conversations without reference to any specific document or recorded statements. Assuming Rule 106 applied to conversations and testimony, it would not apply here, when no introduced conversation was partially introduced or needed clarification. The district court did not abuse its discretion by denying claimants' request.

Finally, the trial court did not err in refusing to give claimants' proffered jury instructions on "proportionality," which was an incorrect statement of law on money laundering, and on claimants' characterization of the government's theory of the case.

Forfeiture order affirmed.

U.S. v. 4219 University Drive, Fairfax, Va. (Wynn) No. 12-1321, April 26, 2013; USDC at Alexandria, Va. (O'Grady) Jeffrey S. Jacobovitz for appellants; Karen L. Taylor, AUSA, for appellee. VLW 013-2-085, 20 pp.

Contract

Local Carriers Win Telecomm Case Against Sprint

The 4th Circuit upholds judgment for "CenturyLink" plaintiffs, a group of 19 local exchange carriers that entered into interconnection agreements with defendant Sprint Communications under the Telecommunications Act of 1996 in plaintiffs' breach of contract action filed after Sprint began to withhold payments under the agreement; the appellate court also upholds the district court judge's ruling that a belatedly discovered financial interest in CenturyLink held in a managed Individual Retirement Account did not require his recusal.

The district court concluded that, in refusing to pay the access charges as billed, Sprint breached its duties under the interconnection agreements (ICAs), which clearly included paying access charges for Voice-Over Internet Protocol (VoIP) originated traffic according to the jurisdictional endpoints of the calls. Central to the district court decision was its finding that § 38.4 of the ICA operated to apply the compensation regime for local, long distance intrastate, and long distance interstate traffic to VoIP calls. Although the district court did not find the relevant portions of the ICA to be ambiguous, it noted that if ambiguity existed, it would be construed against Sprint as the drafter of the ICA. The district court awarded CenturyLink $23,376.213.76, which consisted of damages under the breach of contract claim and prejudgment interest.

In the second phase of the litigation, the district court found that the North Carolina ICA did not specify a method for identifying local calls, but instead incorporated by reference a telecommunications industry publication that explicitly permitted use of the Billing Telephone Number (BTN) method. Alternatively, the district court again construed any ambiguity in the NC ICA against Sprint as the drafter.

On appeal, Sprint argues that the district court had no authority under the 1996 Act to interpret and enforce an ICA because its role is limited to reviewing a state commission determination, and no such determination occurred here. Sprint also contends the district court judge should have recused himself and vacated all orders and judgments in the case.

We hold that the 1996 Act does not require a state commission to interpret and enforce an ICA in the first instance. In an amicus brief, the Federal Communications Commission argues that reading the Act to grant exclusive authority to state commissions to interpret and enforce ICAs would be inconsistent with the broad adjudicatory authority that other sections of the Act confer on the FCC and the federal district courts. Finding this interpretation of the proper allocation of decisional authority between federal courts and state commissions consistent with our reading of the 1996 Act, we decline Sprint's invitation to follow the 3rd Circuit and accord deference to a position the FCC did not take.

Further, the balance tips against imposing an exhaustion requirement. Such a requirement would neither align with congressional intent nor serve one of the exhaustion doctrine's core purposes. We conclude neither the text of the 1996 Act nor prudential considerations compel federal deference to state commissions in the first instance.

As to the recusal issue, Sprint's argument fails to distinguish between direct ownership of securities and ownership of securities in a common investment fund over which a judge exercises no management responsibilities. The judicial recusal statute specifically carves out the latter situation from the definition of a "financial interest." The safe harbor exception created in 28 U.S.C. § 455(d)(4)(i) applies here. The district court judge's ownership of shares in CenturyLink does not constitute a "financial interest" in CenturyLink for purposes of § 455(b). The district court judge did not violate the recusal statute and therefore did not abuse his discretion in deciding that neither recusal nor vacatur was appropriate.

Turning to the merits of the case, the 4th Circuit rejects appellant's claims that: 1) the district court misconstrued the ICA as applying to long-distance VoIP traffic, and 2) CenturyLink impermissibly billed Sprint for local calls.

When viewed in conjunction with the ambiguity in the ICA's coverage of VoIP traffic over "Feature Group D" trunk transmission media, the parties' course of dealing reinforces our conclusion that the district court did not err in entering judgment for CenturyLink on its breach of contract claim.

Judgment affirmed.

Central Telephone Co. of Va. v. Sprint Communications Co. of Va. (Duncan) No. 12-1322, April 29, 2013; USDC at Richmond, Va. (Payne) Timothy J. Simeone for appellants; Michael J. Lockerby for appellees. VLW 013-2-089, 31 pp.

Criminal

No Civil Commitment for Sex Offender

The 4th Circuit says a district court did not clearly err in finding a serial sexual abuser of minors was ineligible for civil commitment because the government did not prove he suffered from a serious mental illness; the appellate panel does not reach the question of whether the re-incarcerated offender could control his dangerous impulses.

To civilly commit an individual under the Adam Walsh Child Protection and Safety Act of 2006, the government must establish by clear and convincing evidence that the individual previously engaged or attempted to engage in sexually violent conduct or child molestation; currently suffers from a serious mental illness, abnormality or disorder; and as a result, would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

Appellee, who is 34 years old, was convicted of six separate sex offenses between 1997 and 2004, four of which involved victims 13 years old and younger. On Jan. 9, 2012, a little less than six months before appellee's scheduled release, the government certified appellee as "sexually dangerous" and sought to have him civilly committed under the Walsh Act. The district court found the testimony of appellee's expert more persuasive and determined that the government failed to meet its burden on both the serious mental illness and volitional control prongs of the test. The government appealed. Appellee was released from prison in October 2012 after this court denied the government's request to stay his release pending its appeal.

On Dec. 12, 2012, a federal court found that appellee had violated conditions of his supervised release, revoked his supervised release and sentenced him to 13 months in prison. On Feb. 22, 2013, the Bureau of Prisons again certified appellee as meeting the criteria for civil commitment. Regardless of our disposition of this case, appellee will remain in custody until a district court rules on the second civil commitment attempt.

Even assuming, without deciding, that appellee's second certification rendered this appeal otherwise moot, we are still entitled to reach the merits of the government's appeal because the present case fits the test of "capable of repetition, yet evading review."

Were we to adopt a general rule of vacatur in Walsh Act cases involving multiple certifications, the government could strategically file successive certifications until it finds a court amenable to commitment, without facing any preclusive effect

(See **Opinions**, on page 10)

The Week's Opinions

U.S. Court of Appeals

Cont'd

from a previous court's denial of commitment. Most significantly, were we to agree with the dissent's recommended outcome, we would be infringing on appellee's right to due process. We previously have indicated – and now hold – that an individual cannot be certified indefinitely for civil commitment under the Walsh Act, without any final judicial determination regarding the validity of his confinement.

We hold that the district court did not err in finding that appellee has never suffered from pedophilia. The new evidence proffered by the government shows that appellee violated the conditions of his supervised release by spending nights away from his group residence and associating with a convicted sex offender. Although it is troubling when any offender violates the terms of his supervised release, neither of these violations are material to – or even speak to – the issue of whether appellee suffers, or has ever suffered, from pedophilia.

Our good colleague in dissent utters a failure to understand the rush to send an unnecessary signal that the release of a serial child sex offender was appropriate. Appellee is currently incarcerated and will remain incarcerated unless the district court determines, with the benefit of evidence concerning his supervised release violations, that appellee is not eligible for commitment.

It was in the district court's discretion not to follow the Diagnostic and Statistical Manual of Mental Disorders in determining whether appellee suffers from a serious mental illness under the Walsh Act. The district court reasonably found that the credibility of appellee's testimony was bolstered by the fact that the government produced no evidence that appellee has engaged in inappropriate sexual conduct with a prepubescent minor since 2000. Appellee's expert said appellee's abuse of a seven-year-old when appellee was in his late teens fit into his diagnosis that appellee suffered from delayed sexual maturation due to physical and sexual abuse.

In sum, the district court did not clearly err in finding that appellee currently does not suffer from a qualifying mental illness.

Judgment affirmed.

Dissent

Wilkinson, J.: I would dismiss this appeal as moot and vacate the judgment of the district court, leaving for another day the question of whether appellee should be committed following his actual release. Even if this case were somehow not mooted, I would at least remand it and afford the district court an opportunity to revisit its decision near the close of appellee's most recent incarceration resulting from his most recent misconduct. Considering appellee's lengthy list of convictions for sexual offenses, this is a case that was close even without the latest evidence. Why the rush? A bit of caution now may spare a child a painful future.

U.S. v. Springer (Wynn) No. 12-7687, April 29, 2013; USDC at Raleigh, N.C. (Boyle) Benjamin M. Shultz, USDOJ, for appellant; Eric J. Brignac, FPD, for appellee. VLW 013-2-086, 26 pp.

Civil Procedure

Winning Party's ESI Cost Recovery Limited

In a wine wholesaler's unfair practices lawsuit against Gallo Winery, the 4th Circuit clarifies which ESI expenses are taxable under the federal taxation-of-costs statute, and upholds a district court decision refusing to award costs for a broad array of ESI-related costs and awarding the winning winery only $218.59 for TIFF and PDF production of documents, of the $111,047.75 in ESI costs claimed by Gallo.

Here, the trial court entered an order taxing only the costs of converting electronic files to non-editable formats and transferring files onto CDs.

Plaintiff Country Vintner of North Carolina LLC sued Gallo Winery, alleging violations of the North Carolina Wine Distribution Agreements Act and the North Carolina Unfair and Deceptive Trade Practices Act. Almost immediately, the parties clashed over the discovery of ESI. Among other things, Country Vintner sought emails and other writings that referred to or related to the establishment of a business relationship between Gallo and Bodegas Esmeralda, Gallo's relationship with wine distributors and Gallo's appointment to import Alamos. Gallo moved for a protective order, asserting that it would cost $30,000 to process the email data of 24 employees, and up to $432,000 to review the data to guard against privilege waiver.

The district court denied the motion for a protective order and adopted Country Vintner's proposal for handling ESI: the court ordered Gallo to run searches on archived email and documents created in a one-year period by an initial set of eight identified custodians, using 16 search terms proposed by Country Vintner and any other terms suggested by Gallo that might produce relevant documents. The court ordered the parties to then meet and confer to agree upon a sequence for disclosure of the ESI on a rolling production. The court granted the motion to compel, to the extent that Gallo had additional relevant and responsive information that it had not yet provided to plaintiff.

In response to the court's order, Gallo, collected more than 62 GB of data and forwarded it to its lawyers' firms for processing and review. Plaintiff proposed applying 19 search terms to the 62 GB of data and noted a preference for receiving the ESI in a format compatible with the Summation review platform. Gallo had used different litigation support software, IPRO eCapture and kCura Relativity, to process the data.

Less than two months after Gallo began producing documents, the district court granted Gallo's motion to dismiss the unfair trade practices claim. Upon cross-motions for summary judgment, the district court granted summary judgment for Gallo, a judgment affirmed by this court.

Gallo filed a bill of costs in the district court, seeking to recover $111,047.75 from Country Vintner for ESI-related charges in the following six categories: 1) $71,910 for "flattening" and "indexing" ESI, for initial processing of data; 2) $15,660 for extracting metadata from the documents; 3) $178.59 for "TIFF Production" and "PDF Production"; 4) $74.16 for electronic "Bates Numbering," a "higher-tech version" of Bates stamping documents; 5) $40 for copying images onto a CD or DVD; and 6)) $23,185 for management of electronic data processing, quality assurance procedures, analyzing corrupt documents and preparing production of documents to opposing counsel.

The district court granted the motion in part, adopting the reasoning of the 3rd Circuit in *Race Tires Am. Inc. v. Hoosier Racing Tire Corp.,* 674 F.3d 158 (3rd Cir. 2012). The district court found that in this case, the only tasks that involved copying were the conversion of native files to TIFF and PDF formats and the transfer of files onto CDs. The court concluded that Gallo was entitled to recover $218.59 in ESI-related costs.

The district court said it was possible that the bill of costs contained other ESI-related expenses that were taxable, but concluded such costs were not readily discernible because Gallo had included various multi-task entries. The court awarded a total of $568.59, including $350 for clerk's fees.

On appeal, Gallo has dropped the request for Bates numbering and billable time related to Bates numbering, and seeks a remaining $101,848 in "ESI processing charges." We are not persuaded by Gallo's arguments, but neither do we embrace wholesale plaintiff's crabbed interpretation of the amended costs statute.

We first reject plaintiff's contention that § 1920(4) applies only to the costs related to materials attached to dispositive motions or produced at trial. To the extent that plaintiff has not waived this challenge, the argument fails on the merits.

We think Gallo's ESI processing charges do not constitute "costs of making copies … necessarily obtained for use in the case."

Gallo argues that its ESI-processing charges are taxable as fees for "making copies" because ESI has "unique features." Gallo contends ESI is more easily and thoroughly changeable than paper documents, it contains metadata and it often has searchable text. Gallo argues it had to remove ESI from container files, extract and index text to make it searchable, copy metadata and load the data onto a "review platform" to allow the native files and their associated metadata to be viewed and their text to be searched as if the native files were being opened in the software applications that created them.

In *Race Tires,* the 3rd Circuit held that, of the numerous services performed by ESI vendors in that case, only the scanning of hard copy documents, the conversion of native files to TIFF, and the transfer of VHS tapes to DVD involved "copying" within the meaning of § 1920(4).

We find the 3rd Circuit's reasoning persuasive. The court properly took into account the statute's history, its plain language and the Supreme Court's narrow contemporary interpretation of the costs taxable under § 1920. In this case, subsection (4) limits taxable costs to those identified by the district court: converting electronic files to non-editable formats, and burning the files onto discs.

That Gallo will recover only a fraction of its litigation costs under our approach does not establish that our reading of the statute is too grudging in an age of unforeseen innovations in litigation-support technology.

Nor are Gallo's costs recoverable as "fees for exemplification." Other circuits are split over the meaning of "exemplification" as used in § 1920(4). We need not determine in this case which view is most harmonious with the statute. Gallo's charges include neither authentication of public records nor exhibits or demonstrative aids, and the district court correctly concluded they did not qualify under the "exemplification" provision.

Judgment affirmed.

The Country Vintner of North Carolina LLC v. E.&J. Gallo Winery Inc. (Davis) No. 12-2074, April 29, 2013; USDC at Raleigh, N.C. (Britt) Garrick A. Sevilla for appellant; Stephen D. Busch for appellee. VLW 013-2-087, 24 pp.

Criminal

No Money Laundering Convictions Under 'Merger Problem'

In this fraud case involving a scheme to sell life settlement investments, which resulted in nearly $100 million in losses for investors, the 4th Circuit interprets "proceeds" of the scheme as "net profits" and overturns defendant's money laundering convictions; the court affirms defendant's remaining fraud convictions, but vacates defendant's sentence and remands for resentencing.

Defendant maintains that his money laundering convictions are barred by the "merger problem" identified in *U.S. v. Santos,* 553 U.S. 507 (2008), since those convictions are based on allegations that he paid the expenses of completed frauds with money that the frauds generated. We agree.

Here, defendant's case creates a merger problem very similar to that present in *U.S. v. Cloud,* 680 F.3d 396 (4th Cir. 2012), which involved a scheme to convince people to invest in real estate that, unbeknownst to the buyers, Cloud had recently purchased for a lesser amount.

Here, the money laundering counts at issue concerned commission payments to Houston Investment Center (HCI) sales agent Tim Bromseth. These payments, like the those in *Cloud,* were for services that played a critical role in the underlying fraud scheme in that it was the promise of payment for services rendered that enticed HIC and Bromseth to obtain investors for the A&O Company. As such, defendant was no different than the felon who uses the stolen money to pay for the rented getaway car or the initial recipient of the wealth in any wealth-acquiring crime with multiple participants. The commission payments were essential expenses of the illegal activity. Thus, the merger problem we identified in *Cloud* arises in this case as well, and, following *Cloud,* we correct it by defining "proceeds" as "net profits."

Under this definition, while payment of the commissions may have constituted evidence of the fraud underlying the money laundering charges, the payments did not constitute money laundering. We therefore hold that the district court erred in rejecting defendant's contrary argument and denying his motion for judgment of acquittal as to those counts.

The government contends reversal of the money laundering convictions should not warrant a full resentencing since all of defendant's sentences for these counts were ordered to be served concurrently with the three consecutive 240-month sentences he received for the other fraud convictions. However, the error is not harmless in light of the court's imposition of a separate special assessment for each count, and a remand is appropriate so the district court may consider whether the reversal of the money laundering convictions warrants any change in sentence.

There was ample evidence to convict defendant of conspiracy to commit mail fraud, mail fraud and securities fraud. Evidence showed defendant not only was aware of misrepresentations being used to lure in clients, but he was making such misrepresentations himself. Considering his central role with A&O, a jury might have reasonably inferred that he knew of A&O's misrepresentations concerning its number of employees, number of offices, years of experience and record of success. Evidence also demonstrated his willingness to lie about his own involvement with A&O. Several witnesses also testified about defendant's role in creating and disseminating the "A&O History Sheet" and POM document, both of which contained false information about defendant's educational background while failing to disclose his forgery plea. Extensive evidence also documented defendant's participation in sham sales and the transfer of millions of dollars to himself and another person who controlled the business.

Finally, the district court did not err in holding defendant responsible at sentencing for losses of funds that were invested with A&O before he became an equity partner.

We reverse defendant's money laundering convictions but affirm the remainder of his convictions, vacate his sentence and remand for resentencing.

U.S. v. Abdulwahab (Traxler) No. 11-5093, April 29, 2013; USDC at Richmond, Va.; William J. Gonyea Jr. for appellant; Jessica A. Brumberg for appellee. VLW 013-2-088, 24 pp.

(See **Opinions**, on page 11)

The Week's Opinions

U.S. District Court

EASTERN DISTRICT

Employment Discrimination

Employer Response to Hearing Disability 'Reasonable'

A hearing-impaired employee of defendant county's alcohol and drug services program was not a "qualified individual" who could recover under the Americans with Disabilities Act; the Alexandria U.S. District Court says her requests for accommodation were untimely and in any event, there is ample evidence that she was terminated for poor performance.

Plaintiff has failed to carry her burden of establishing a prima facie case for both failure to accommodate and wrongful termination under the ADA. She has not demonstrated that she is a qualified individual with a disability under the ADA.

It is undisputed that "hearing" is a major life activity pursuant to the ADA. However, the medical evidence from plaintiff's two expert audiologists demonstrates that plaintiff's hearing impairment does not substantially limit her ability to hear, even without hearing aids. Plaintiff's audiological test on Oct. 20, 2009, indicates her ability to hear tones and words at a conversational level was normal in her left ear and normal in her right ear at a slightly louder level. Testing between 2009 and 2010 indicated that while plaintiff may have difficulty in understanding words in high frequencies in settings where background noise is present, as long as plaintiff could view the face of the speaker, she would have no trouble understanding conversation.

Given the medical documentation available for the time period when plaintiff was employed by the county, plaintiff cannot establish that her hearing impairment substantially limited her ability to hear. Plaintiff's ability to hear at normal conversational levels, even with background noise present, was depicted by her experts as "normal" in 2009 and "100 percent" in 2010.

The county did not fail to provide reasonable accommodations for a known disability that would have allowed plaintiff to successfully perform her job duties. Plaintiff began taking excessive unscheduled absences from work during the last six weeks of her county employment, showed a disrespectful attitude towards her co-workers and had incidents of insubordination.

Plaintiff alleges she first disclosed her disability on Oct. 16, 2009 and requested accommodations, but did not ask for any specific accommodations. Once the county received the ADA Accommodation Request Form and current medical documentation on July 13, 2010, a tape recorder for plaintiff to use at work was purchased the very next day. Other recommendations from the audiologist were already in place, such as good lighting, providing hard copies of slides and agendas prior to meetings, being able to face the person speaking and a desktop computer. However, in response to the purchase of the tape recorder, plaintiff indicated she would not attend staff meetings until *all* of her accommodations were provided as recommended by the audiologist.

The ADA does not require an employer to provide the specific accommodations requested by the disabled person, so long as the accommodation provided is reasonable. Here, the county did provide reasonable accommodations when considering the facts and circumstances in this case, despite plaintiff's failure to provide a specific request for accommodations and a proper diagnosis in a timely manner.

Here, numerous memoranda provided to plaintiff between May 2010 and July 2010 demonstrate that she was not performing her job to the county's legitimate expectations during that time. It is well documented that plaintiff was provided with work improvement plans, feedback via emails, oral reprimand and communications regarding her insubordination, rude behavior at work, failure to follow directives and failure to consistently show up for work. All of these attempts to address plaintiff's insufficiencies at work were given to her prior to her submission of the ADA Accommodations Request Form on July 13, 2010. There is ample evidence that the county separated plaintiff from employment for multiple, legitimate, nondiscriminatory issues.

Summary judgment for defendant Fairfax County.

Mongrut-Avanzini v. Commonwealth of Virginia (Hilton) No. 1:12cv152, April 22, 2013; USDC at Alexandria, Va. VLW 013-3-214, 10 pp.

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Intellectual Property

Court Rejects Claim for Pipe Patent

The Alexandria U.S. District Court upholds the USPTO's rejection of plaintiff's claims seeking to patent the a spirally formed pipe.

On May 17, 1999, plaintiff filed a '922 application with the U.S. Patent and Trademark Office. The Examiner rejected claims 1-9 of plaintiff's application, but the Patent Trial and Appeal Board reversed the Examiner's rejections. The Examiner reopened the prosecution of the patent and include new prior art for silos and storage tanks, but then made new rejections. Plaintiff again appealed, but the board affirmed the Examiner's decisions. Plaintiff appealed to the Federal Circuit U.S. Court of Appeals, which affirmed the board.

On March 11, 2006, plaintiff filed his current application with the USPTO, entitled "horizontally Produced Large Diameter Spirally Formed Pipe." The application was a continuation-in-part of the May 1999 filing. The Examiner rejected all of plaintiff's claims, determining that they were unpatentable. The Examiner's decision was partially affirmed by the board, which accepted the Examiner's rejections as to claims 1-3, 5-8, 12-14 and 16 for obviousness. The board reversed the Examiner's rejections as to claim 4, 9 and 15, finding that plaintiff's recited subject matter was patentable over the prior art. Plaintiff filed a request for rehearing, alleging the board overlooked or misapprehended whether certain referenced prior art was directed to non-analogous art. Plaintiff also claimed the board relied on new grounds to reject the application when it explained that a person of ordinary skill in the art would inherently know to increase the pipe wall thickness when the diameter of the pipe increases. The board maintained its earlier determination and also found that plaintiff had waived his non-analogous art argument, but explained that the prior art references relied upon constituted analogous art.

Following the board's final affirmation of the rejection, plaintiff filed this suit on Nov. 7, 2011. Plaintiff has not offered new evidence to support his position, which would otherwise require the court to review the issue de novo. Without any additional substantive evidence to consider from plaintiff, there remain no genuine issues of material fact in terms of the use of analogous art. USPTO's decision, as a matter of law, was not arbitrary, capricious or an abuse of discretion.

Defendant has provided substantial evidence to support its obviousness and analogous art findings. Plaintiff's claims 1-3, 5-8, 12-14 and 16 were properly rejected by the Examiner and those rejections were properly affirmed by the board. The only new, objective evidence provided by plaintiff for secondary considerations concerns copying by Contech Construction Products of Ohio and Pacifica Corrugated of California. None of this evidence shows that Contech or Pacific produced a pipe consistent with the pipe plaintiff seeks to patent. Plaintiff's claims seek to patent the product and not the production method for producing his pipe. The evidence provided by plaintiff is not sufficient to overcome defendant's prima facie case of obviousness.

Summary judgment for defendant.

Johnston v. Rea (O'Grady) No. 1:12cv440, April 9, 2013; USDC at Alexandria, Va. VLW 013-3-213, 12 pp.

Securities Fraud

Post-Discovery Complaint Amendment Allowed

In an investor's suit alleging defendant technology company and its founder committed securities fraud, an Alexandria U.S. District Court overrules defendants' objections and accepts the magistrate judge's recommendation to allow plaintiff to file a second amended complaint and motion to compel.

In his first amended complaint, plaintiff alleged defendants committed securities fraud by

selling plaintiff investor a series of notes as investments to allow defendant company to bring to the U.S. technology the individual defendant's uncle allegedly developed in Korea to convert plastic waste into oil.

Plaintiff's second amended complaint (SAC) expands upon the allegations of the first amended complaint, providing additional factual allegations derived from discovery materials only recently provided by defendants. The SAC also added several causes of action against additional parties, in part pertaining to what plaintiff alleges were fraudulent transfers from defendants Mr. Han and Environ to family members and into other entities associated with defendants. Plaintiff also made new requests for relief.

The court does not find the magistrate judge's ruling to have been clearly erroneous or contrary to law. The magistrate judge held that plaintiff was entitled to pursue the additional claims and to add additional defendants and claims that came to light once defendants finally produced discovery. The court finds that such a position is reasonable. This court has considered the circumstances of this case in arriving at its decision, taking into consideration the delays in discovery, the breadth of the recently procured discovery and the allegations regarding the allegedly fraudulent transfer of plaintiff's investment.

Defendants purportedly made a Rule 68 offer of judgment on March 13, and the magistrate judge's ruling would have fallen within the 14-day period for plaintiff to respond to the offer. This court is not aware of any authority that holds that, under these circumstances, a Rule 68(a) offer of judgment immediately divests a court of jurisdiction. To allow defendants to "race to the courthouse" in order to divest this court of jurisdiction when additional defendant parties had already been identified, and thereby crystalize those alleged fraudulent transfers that allegedly preclude realization of this court's entry of judgment upon counts II and V, would be tantamount to a manip-

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U.S. District Court

Cont'd

ulation of this court's jurisdiction and would endorse an unacceptably narrow understanding of Article III's case-or-controversy requirement.

This court believes the interests of justice would best be served by allowing plaintiff to file a second amended complaint.

Carlucci v. Han (Cacheris) No. 1:12cv451, April 16, 2013; USDC at Alexandria, Va. VLW 013-3-212, 18 pp.

Contract

'Facilities' Charges Not Authorized by ICAs

In this suit by CoreTel Virginia LLC against Verizon Virginia LLC, the Alexandria U.S. District Court grants partial summary judgment to Verizon in this dispute over certain charges under interconnection agreements entered into under the Telecommunications Act of 1996.

The Telecommunications Act of 1996 compels incumbent local exchange carriers (ILECs) like Verizon to negotiate contracts, known as interconnection agreements (ICAs) with competitive local exchange carriers (CLECs) like CoreTel. CoreTel and Verizon are party to two ICAs, both of which were originally interconnection agreements between Verizon Virginia and Cox Virginia Telecom Inc. which CoreTel subsequently adopted.

At issue here are interconnection charges, referred to as "facilities" charges, which consist of network resources that provide a physical link connecting CLEC and ILEC networks such as trunks, ports and multiplexing. Also at issue are the termination charges, known as "intercarrier compensation," for resources within each network used to complete incoming calls to the appropriate end user. These charges can be broken down into reciprocal compensation, intrastate switched access and interstate switched access. The interconnection agreements (ICAs) govern the terms of physical interconnection of networks, the exchange of traffic between the parties, and payment of intercarrier compensation for termination of locally dialed traffic. CoreTel's bills violate the terms of the ICA as nothing in the contract authorizes CoreTel to charge for trunk ports and multiplexing that CoreTel uses when it receives calls from the Verizon ILECs.

CoreTel has purportedly billed Verizon ILECs for roughly $1.7 million for facilities charges including multiplexing and trunk ports that Verizon ILECs supposedly ordered.

The ICA itself does not authorize CoreTel to bill Verizon for these facilities because they do not provide entrance facilities to Verizon. Verizon is entitled to partial summary judgment on count II of the amended complaint as it pertains to CoreTel's facilities invoices only.

Further, CoreTel does not dispute that they billed reciprocal compensation charges to Verizon ILECs for every call delivered over the local connection interconnection trunk groups or that third-party and non-local interLATA calls were delivered over those trunk groups. Under the ICA, CoreTel may not bill reciprocal compensation charges that include third-party and non-local interLATA calls in addition to the local calls. As a result, Verizon is entitled to partial summary judgment on counts III and IV of the amended counterclaims and counts I and II of the amended complaint regarding the reciprocal compensation invoices to the Verizon ILECs for third-party and non-local interLATA traffic.

Finally, the court grants summary judgment in favor of defendants on counts V-VII of the amended counterclaims and partial summary judgment in defendants' favor on counts I and II of the amended complaint as they relate to the switched access charges. Because CoreTel did not provide Verizon with the switched access service in its state or federal tariff, it cannot bill or collect its composite tariff rate from Verizon.

CoreTel Virginia LLC v. Verizon Virginia LLC (Hilton) No. 1:12cv741, April 22, 2013; USDC at Alexandria, Va. VLW 013-3-210, 14 pp.

Employment Discrimination

Undischarged Debtor Can Pursue Race Bias Claim

Although plaintiff delayed disclosing to a bankruptcy judge that he had filed an EEOC charge against his employer, the Richmond U.S. District Court denies employer's motion to dismiss plaintiff's Title VII suit based on employer's arguments that only the bankruptcy trustee has standing to pursue the race bias claim, and plaintiff is judicially estopped from pursuing his suit.

In defendant's view, because the basis of plaintiff's claims arose prior to his filing a bankruptcy petition, and because plaintiff did not, until recently, disclose these claims to the bankruptcy court, they remain the property of the bankruptcy estate. The great weight of authority, however, expressly rejects defendant's position. Although the 4th Circuit has not taken a position on the issue, every appeals court to rule on it – not to mention a large number of bankruptcy courts – has held that Chapter 13 debtors have standing to sue on their own, even though their pre-petition causes of action belong to the bankruptcy estate.

This court holds that plaintiff, as debtor in possession pursuant to Chapter 13 of the U.S. Bankruptcy Code, maintains standing to bring civil actions in court.

Also, this court finds that the bankruptcy court did not "accept" plaintiff's position that he had no legal claims against defendant, for the bankruptcy court has yet to grant plaintiff relief or close his bankruptcy action. Thus, defendant fails to establish one of the factors critical to a judicial estoppel determination, namely, that a court must accept plaintiff's prior inconsistent position.

Courts have repeatedly emphasized that "acceptance" in this context means the bankruptcy court has not merely confirmed debtor's bankruptcy plan but has also taken the ultimate step of granting the debtor relief (i.e., discharge or repayment). All the leading cases – both within this circuit and otherwise – in which courts have invoked judicial estoppel involved debtors who had already completed bankruptcy and typically gotten relief as well.

The court denies the motion and allows the action to proceed.

Royal v. R&L Carriers Shared Services LLC (Gibney) No. 3:12cv714, April 22, 2013; USDC at Richmond, Va. VLW 013-3-207, 12 pp.

Real Estate

No Redress for Claimed Foreclosure Damages

Property owners who lost their property to foreclosure have not met the case-or-controversy requirement for the Richmond U.S. District Court to exercise jurisdiction over their claims for a loss of equity in the property, rents on the property, inconvenience and damage to their credit record, and the court dismisses their claim alleging the "bogus" appointment of a substitute trustee.

Plaintiffs have sufficiently alleged an injury in fact for standing purposes, but have failed to show causation. Plaintiffs allege defendant BB&T violated Va. Code § 55-59.3 by failing to identify the correct trustee in the advertisement of foreclosure, and that it also violated the deed of trust by executing, through the substitute trustee, a trustee's deed, which purported to convey title of the property to BB&T. These actions were sequential and bore a common hallmark: but to the allegedly invalid substitution of trustee, they would have been perfectly lawful. Therefore, rather than tracing back the purported injuries to one of the alleged violations of law, plaintiffs instead must demonstrate that but for BB&T's allegedly invalid execution of the substitution of trustee, the foreclosure process would not have been triggered or would have resulted in less severe injuries. Plaintiffs failed to make this showing.

Plaintiffs admit they defaulted on the note. Thus, BB&T acted within its rights in proceeding with foreclosure. If taken as true, the allegation that BB&T invalidly appointed the substitute trustee does not undermine the causal event of plaintiffs' default: their failure to make payment. The date on which the alleged injuries became practically inevitable was the date on which plaintiffs fell into arrears, not the date on which BB&T executed the substitution of trustee.

The lack of causation or redressability places this case beyond the court's constitutional jurisdiction.

Douglas v. Branch Banking & Trust Co. (Payne) No. 3:12cv854, April 17, 2013; USDC at Richmond, Va. VLW 013-3-206, 13 pp.

Criminal

No Conditional Release for Drug Defendant

Although a 19-year-old defendant charged with dealing "spice" had a clean criminal record, the Newport News U.S. District Court denies release on conditions, as it considers him a flight risk and a danger to the community, based on his mother and sisters living in Egypt, large sums of cash found in his home and car and evidence that he knows how harmful the drug is but continued to distribute it.

This court is reviewing the magistrate judge's detention order pursuant to 18 U.S.C. § 3145(b). The court takes into account the available information on the following factors: the nature and circumstances of the crime charged; the weight of the evidence against defendant; the history and characteristics of defendant; and the nature and seriousness of the danger to any person or the community that would be posed by defendant's release.

Because the indictment charges defendant with a violation of the Controlled Substances Act, 21 U.S.C. §§ 801-64, which carries a maximum term of imprisonment of more than 10 years, there is a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person as required or the safety of the community.

Defendant proffered evidence favorable to the contention that he should be released on conditions, including a clean criminal record. The presumption in favor of detention is rebutted, but the evidence still shows an incentive to flee, as well as a danger to the community.

The evidence against defendant is strong. The government proffered information about a detailed log book in defendant's writing and with his name that listed transactions for "spice," the analogue. Also, law enforcement made controlled buys and confidential informants made and confirmed purchases. This factor shows an incentive to flee.

While defendant asserts this area is home, he has only resided here for five of the last 15 years. His only family here is his father, who is on supervised release for income tax evasion, and a sister, who is a codefendant in this case. The remainder of his family, his mother and three other sisters, reside in Egypt. His current family situation provides an incentive to flee. Defendant's clean criminal record is to his credit. However, officers discovered over $100,000 hidden at his residence. Further, while he was being ticketed for reckless driving while out on bond, the police found upward of $10,000 cash in his vehicle. These facts demonstrate defendant has the financial means to flee, and an incentive to flee in order to keep this money which will otherwise likely be subject to forfeiture.

Lastly, the government proffered evidence that defendant has witnessed third parties alleged to have consumed spice, including his sister, having a serious adverse reaction, including seizures, hyperventilation and hysterics – sometimes requiring hospitalization. The government proffered that defendant continued to deal the analogue, indicating he did so aware of the harm it caused, and accordingly, would be a danger to the community if released.

The court finds defendant has a strong incentive to flee and is a risk to the community.

Defendant proposes use of a third-party custodian with electronic monitoring, as conditions of release. The proposed custodian had a record of alcohol abuse from the 1990s until 2007 that had resulted in multiple misdemeanor convictions. Since 2007, it appears that custodian has avoided alcohol abuse and has become an exemplary member of society, even serving in leadership positions to help others with the same struggles with which she is dealing. However, she does not appear to be an acceptable candidate to serve as defendant's custodian, even with electronic monitoring. Her relationship with defendant is insubstantial. She stated she knows defendant from occasionally seeing him while purchasing cigarettes at defendant's father's store. When asked about defendant's age, she missed the mark by six years, guessing he was 25, when he is age 19. She did not seem to be at all aware that defendant had a mother and three sisters in Egypt. The fact that she had a customer relationship with defendant's father at the store where the illegal activity allegedly occurred is not sufficient to persuade this court that her custodianship could assure defendant's appearance at later proceedings and the safety of the community.

The court finds defendant is a risk of flight and there are no conditions that could be reasonably fashioned to assure his return for further proceedings.

U.S. v. Soliman (Jackson) No. 4:13cr13-4, April 19, 2013; USDC at Newport News, Va. VLW 013-3-204, 6 pp.

Criminal

No Continuance for Mental Disability Probe

A Norfolk U.S. District Court denies a motion filed by defendant, an alleged Somali pirate, for a continuance of six to 12 months in order to develop evidence to support a claim of intellectual disability precluding imposition of the death penalty; defendant has failed to show a change in circumstances since he agreed to the court's earlier order setting deadlines on issues that included mental disability under *Atkins v. Virginia*.

Since the initial indictment was filed in March 2011, the court has taken steps to accommodate the logistical challenges of this case without compromising the efficient administration of justice. The court has continued the trial date multiple times in response to changing circumstances of the case.

On April 17, 2012, the government filed a notice of intent to seek the death penalty; the notice was unsealed on May

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1, 2012. Thereafter, the court developed multiple detailed scheduling timetables, all in close consultation with counsel. Most relevant to the instant motion, the court entered an agreed order regarding procedures under *Atkins v. Virginia,* 536 U.S. 304 (2002).

This motion focuses on the "adaptive skills" element of the test used for *Atkins* issues. Adaptive behavior is a broader category and more amorphous than intellectual functioning. Adaptive skills analysis often requires detailed investigation of a defendant's background, especially in the absence of objective documentary evidence of standardized testing. The practical difficulties of obtaining such information from Somalia, and defining the baseline standards by which a rural Somali defendant's adaptive skills should be judged, represent the predicate for this motion.

The circumstances described in this motion do not warrant a six- or 12-month continuance. Defendant devotes much of the motion to describing the political violence in Somalia and the resulting challenges his defense team has faced in conducting its investigation. As a result of these circumstances, the defense team did not experience much success from their in-country investigation until approximately August 2012, when they were able to interview members of defendant's family. But defense counsel understood those challenges when they agreed to the deadlines set forth in the court's orders, particularly the agreed *Atkins* order of Feb. 22, 2013. Defendant must justify this request with reference to circumstances that have changed since entry of the *Atkins* order.

He fails to do so. The only change that occurred between the *Atkins* order and the instant motion, filed just four weeks later, was the involvement of Dr. James R. Patton, an adaptive skills specialist. Since being retained, Dr. Patton has developed baseline standards to measure the adaptive skills of nomadic Somalis. The defense team now seeks additional time to conduct a follow-up investigation and questioning of defendant's family members and acquaintances in Somalia.

The necessity for such a follow-up is questionable, given that Dr. Patton must have relied on some studies to develop his baseline standards. Second, given the current tumultuous situation in Somalia, and the nomadic existence of defendant's family and acquaintances, who were previously located, it is highly doubtful that the defense team can accomplish the task they seek to undertake, directly or through an agent, or improve upon the research already conducted and relied upon by Dr. Patton. The defense team has not convinced the court that the costs of delay and the expenditures associated therewith have any reliable probability of success, considering the nature of the follow-up activities sought in Somalia.

Defendant may renew the motion pending the outcome of the *Atkins* hearing.

U.S. v. Salad (Smith) (Published) No. 2:11cr34, April 10, 2013; USDC at Norfolk, Va.; Benjamin L. Hatch, AUSAs; Larry M. Dash, FPD. VLW 013-3-216, 11 pp.

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WESTERN DISTRICT

Civil Rights

Prisoner Protests Forcible Removal to Cell

Plaintiff inmate at U.S. Penitentiary Lee has not stated claims for excessive force and deliberate indifference to his serious needs, based on allegations that defendant correctional officers picked him up to take him to a new cell during cell rotation, after plaintiff slumped on the floor and refused to move, and the Roanoke U.S. District Court dismisses this *Bivens* action.

Plaintiff's own complaint shows that for several days he refused to do just about everything that prison staff asked of him. He capped off his intransigence by requesting a cell rotation and then slumping to the floor and refusing to stand and walk when guards attempted to escort him to a new cell. Whatever his claimed reason for such behavior (a purported fear for his safety), the facts show that prison staff lifted plaintiff off the floor for the purpose of moving an obstinate prisoner to a new cell, and not in a malicious and sadistic effort to cause harm. The court finds plaintiff's excessive force claim is frivolous and dismisses it.

Plaintiff claims prison staff showed deliberate indifference to his medical needs both in the aftermath of his cell rotation and by permitting him only two brief psychological counseling sessions. His allegations establish little but that he sought medical attention, received it, and believes it was deficient. In fact, plaintiff received treatment immediately after the incident and in the weeks following, and medical staff prescribed medications, x-rays, a shoulder sling and orthopedic surgery. Dr. Forbes performed one psychological evaluation and then another after plaintiff demanded it. Without more, plaintiff's disagreement with medical staff about his course of treatment does not form the basis for a viable Eighth Amendment claim.

Plaintiff's own factual allegations show he created a series of difficult situations for prison staff and that prison staff offered measured responses that created no discernible foundation for constitutional liability. The court dismisses his claim pursuant to 28 U.S.C. § 1915(b).

Noble v. Zych (Wilson) No. 7:13cv195, April 30, 2013; USDC at Roanoke, Va. VLW 013-3-217, 7 pp.

Medical Malpractice

Voluntary Dismissal Allowed, With Condition

A plaintiff may voluntarily dismiss his suit alleging negligent removal of his gall bladder by laparoscopic surgery, on the condition that he only refile any suit arising from this same set of operative facts in a Virginia state court; however, the Abingdon U.S. District Court denies defendant physician's motion for attorney's fees and costs.

Prior to the suit in Abingdon federal court, plaintiff sued defendant and the Smyth County Community Hospital in Smyth County Circuit Court, but took a voluntary nonsuit of that case prior to

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trial as a matter of right under Virginia law. After the case was filed in this court, plaintiff filed a third suit in Smyth County over the surgery, this time naming only the hospital as a defendant, asserting liability as defendant physician's employer. Plaintiff is a citizen of Virginia and defendant is now a citizen of North Carolina, permitting federal diversity subject-matter jurisdiction. The hospital is a citizen of Virginia and could not be joined in the suit against the physician in this court.

The state court suit against the hospital has been set for trial. Plaintiff has filed a motion seeking to voluntarily dismiss this action without prejudice, pursuant to Fed. R. Civ. P. 41(a)(2). The earlier nonsuit in state court was apparently prompted by an adverse ruling on a discovery issue and it appears the latest case has been assigned to a different judge.

Rule 41(a)(2) authorizes me to order a voluntary dismissal on terms the court considers proper.

I will grant plaintiff's motion for voluntary dismissal without prejudice so that the Smyth County action may proceed, as both parties desire. However, to protect defendant physician from the possibility of having to defend against future additional suits arising out of his medical services to plaintiff, the dismissal of this action without prejudice will be upon the condition that plaintiff not institute or pursue in any action against any party arising out of the same operative facts in any court other than the Virginia state courts. Should plaintiff institute or pursue such an action in any other court, the dismissal of this action will automatically become prejudicial.

The court denies defendant physician's request for attorney's fees. While the course of this litigation has been tortuous and unconventional, I find defendant has not established the kind of subjective bad faith that would warrant sanctioning plaintiff's counsel under 28 U.S.C. § 1927.

The court also denies costs under Fed. R. Civ. P. 41(d). Defendant has moved for an award of his costs to defend *this* action, but the rule provides only for payment of the costs of the *previous* action. Moreover, much of the expenses in defending the first state court action will likely be of value in defending the state court action that is currently pending. I find an award of costs under Rule 41(d) inappropriate in this case.

Glass v. Baquero (Jones) No. 1:12cv25, April 22, 2013; USDC at Abingdon, Va.; Robert H. Hovis III for plaintiff; Sean P. Byrne for defendant. VLW 013-3-202, 6 pp.

Contract

Contract Assignee May Sue for Breach

A Charlottesville U.S. District Court says plaintiff building contractor, who was assigned a contract for construction of an office for an auto body shop in Culpeper, may sue defendant North Carolina company, for breach of contract based on alleged faulty workmanship that resulted in water damage and mold problems that required the contractor to compensate the owner.

M.D. Russell Construction contracted with Wayne's Erecting, a North Carolina LLC, to construct the office building. The contract was assigned to plaintiff Smart Choice, a building contractor based in Boston, Va. Wayne's Erecting was notified of the assignment and the company signed an unconditional waiver and release certifying that it had been paid in full for all labor, services, equipment and material furnished to Smart Choice of the auto body project.

In this suit, Smart Choice claims Wayne's Erecting breached the contract by ignoring project drawings and constructing the building incorrectly. Smart Choice alleges defendant's faulty workmanship has resulted in water damage and mold problems.

Assuming the truth of Smart Choice's allegations, the court concludes the amended complaint contains adequate facts to state a plausible claim for relief. The amended complaint specifically alleges that Smart Choice was assigned the contract under which Wayne's Erecting was aware of the assignment. These allegations are supported by the waiver and release attached to the amended complaint, pursuant to which Wayne's Erecting certified that it had been "paid in full for all labor, services, equipment or material furnished to Smart Choice Construction on the job of … Bates Auto Body." On this record, the court is of the opinion that Smart Choice's amended complaint is sufficient to withstand the pending motion to dismiss, and that defendant's argument is best left for summary judgment after both parties have had the opportunity to conduct discovery regarding this issue.

Smart Choice Corp. v. Wayne's Erecting LLC (Conrad) No. 3:12cv21, April 17, 2013; USDC at Charlottesville, Va. VLW 013-3-215, 3 pp.

Civil Procedure

No Jurisdiction from Kickstarter Donors

Although defendant JoeyBra LLC received three donations from Virginia donors on Kickstarter .com, and shipped its pocketed-bra product to Virginia donors, the Charlottesville U.S. District Court nevertheless does not have personal jurisdiction over the two individual defendants in this patent infringement suit, and the court dismisses the two defendants.

Plaintiff filed this patent infringement case in May 2012, which stems from a design patent, the '541 patent, that plaintiff received in 2001 for a bra design with pockets. Plaintiff became aware of defendants' product, the JoeyBra, shortly after defendants Kyle Bartlow and Mariah Gentry entered their concept into a business plan competition held in Washington in April 2012. Plaintiff contends the JoeyBra features a pocketed design that infringes on his patent, and plaintiff moved for a preliminary injunction to halt defendants' website sales and other promotional activitites during the pending litigation.

On Oct. 3, 2012, I denied defendants'

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motion to dismiss as to defendant JoeyBra LLC. However, in light of new information that JoeyBra LLC had three Kickstarter donors from Virginia, and defendants' correction of a few prior disclosures, I found that plaintiff had demonstrated the possibility of supplementing its jurisdictional allegations through additional information. I granted plaintiff's request for further discovery.

Considering the overall appearance of the claimed design and the allegedly infringing product, for the purpose of this preliminary injunction motion, I find that plaintiff has failed to show that he is likely to succeed on the merits of his claim for infringement. While defendants have not submitted prior art in this case, a brief parent search reveals that a pocketed bra is, in fact, not a "very novel element." Further, though the pocket on defendants' JoeyBra product is, like plaintiff's claimed design, on the side of the bra (rather than the cup), the size, orientation and accessibility of that feature appear to be substantially different; as a consequence, and more significantly, the carrying capacity and overall functionality of the allegedly infringing product also appear substantially different. The pocket on plaintiff's design appears to be fit for a key, and after 12 years since receiving his patent, he does not have a product on the market. Defendants' JoeyBra product, on the other hand, holds an iPhone and credit cards, among other items. At this point, for the purpose of plaintiff's motion for a preliminary injunction, I find that plaintiff has not established a reasonable likelihood of success on his infringement claim.

Plaintiff also has failed to demonstrate irreparable harm, and the court finds the balancing of the equities and the public interest do not require issuance of a preliminary injunction. The court denies the motion for a preliminary injunction.

Earlier, this court denied a motion to dismiss as to defendant JoeyBra LLC. The court now grants defendants' motion to dismiss for lack of personal jurisdiction as to the individual defendants.

All sales and distribution of defendants' JoeyBra product are done solely through JoeyBra LLC, so that this court could not properly exercise personal jurisdiction over the individual defendants under the stream of commerce theory. There is nothing in the record suggesting that Bartlow or Gentry, as individuals, committed a necessary "affirmative act" in Virginia for this court to exercise personal jurisdiction over them. The record confirms that neither defendant has travelled to Virginia to promote their product, reach out to potential donors, make sales or otherwise advance their business. There is no evidence the individual defendants directed their Kickstarter campaign specifically to Virginia. Gentry states that the individual defendants do not run any ads in Virginia, nor do they target any ads toward Virginia. Even without considering the fiduciary shield, defendants' advertising campaign on Kickstarter.com cannot, by itself, be the basis for this court to exercise personal jurisdiction over the individual defendants.

In regards to the three Kickstarter donations defendant received from Virginia residents and the products that were shipped, the fiduciary shield doctrine buffers corporate officers from personal jurisdiction when their official duties were their only contact with a forum state. Defendants' Kickstarter page is titled "JoeyBra, the first sexy and comfortable bra! by JoeyBra," and prominently features pictures and favorable reviews of the product. The record also shows those three Virginia donors received the JoeyBra product in return for their $30 contributions, and that the individual defendants did not directly profit from donations that their company received.

In short, the individual defendants" advertisement on Kickstarter.com is personal in nature for the purpose of promoting their JoeyBra product. There is no evidence that either defendant committed any affirmative act in Virginia to support this court's exercise of personal jurisdiction over them.

Robinson v. Bartlow (Moon) No. 3:12cv24, March 22, 2013; USDC at Charlottesville, Va. VLW 013-3-153, 15 pp.

Civil Procedure

No Interlocutory Appeal for Claim Dismissal

The buyer of a Tazewell business that manufactured mine safety equipment may amend its complaint arising from the sellers' Distributor Analysis projection of high sales for a key product line, despite allegedly knowing the mines that had not yet installed the technology had contracted with a competitor, but the Abingdon U.S. District Court denies plaintiff's request for leave to file an immediate appeal of the court's earlier order dismissing certain claims.

Plaintiff Pyott-Boone Electronics Inc. (PBE) asserts claims arising from a business transaction in which PBE's predecessor, PBE Acquisition Inc. (PBE Acquisition) purchased from PBE's stockholders all of the outstanding capital stock of the company. After the closing, PBE Acquisition merged into PBE, which survives.

Earlier, this court granted a motion to dismiss, finding that the Stock Purchase Agreement (SPA)'s choice of law provision selecting Delaware law precluded application of the Virginia Securities Act. I further found that plaintiff's claims for breach of the implied covenant of good faith and for fraud based on extra-contractual misrepresentations were barred under Delaware law by the SPA's merger, integration and anti-reliance provisions. Finally, I found that plaintiff had not alleged sufficient facts to state a plausible claim for breach of contract and so was not entitled to declaratory relief.

In its proposed first amended complaint (FAC), plaintiff has alleged sufficient facts to plausibly show that defendants were aware at the time of the sale that four Material Customers intended to materially reduce their purchases from plaintiff PBE. Count one of the first amended complaint is therefore not futile on its face.

For the same reason, count six of the proposed FAC is not futile. Count six seeks a declaratory judgment that plaintiff is entitled to indemnification pursuant to § 10.02(b) of the SPA. This section of the SPA provides indemnification to the buyer of the company for any proven breaches of the express representations and warranties contained in section 3.02 of the SPA. Because plaintiff has alleged sufficient facts to state a claim for breach of the express warranties of section 3.02(r)(i), the claim for indemnification of damages caused by that alleged breach is also not futile on its face.

Although plaintiff has alleged facts that would tend to show that defendants were aware that four Material Customers intended to reduce their purchases from PBE at the time the parties entered into the agreement, that allegation does not prove that plaintiff's consent to the inclusion of that warranty was procured by fraud. Rather, those facts, if proven true, would simply show that the defendants committed a breach of contract. Plaintiff's request for leave to amend by asserting count five of the proposed FAC would be futile and must be denied.

Given that the court has granted plaintiff leave to amend its complaint, allowing an immediate appeal of the prior claims as well will only increase the economic and temporal burden of litigation on both the parties and the courts. I decline to enter a final judgment on plaintiff's prior claims under Fed. R. Civ. P. 54(b).

Pyott-Boone Electronics Inc. v. IRR Trust for Donald L. Fetterolf Dated Dec. 9, 1997 (Jones) No. 1:12cv48, March 21, 2013; USDC at Abingdon, Va.; Eric D. Brandfonbrenner for plaintiff; Thomas M. Wolf for defendants. VLW 013-3-132, 19 pp.

Va. Court of Appeals

Domestic Relations

Complaint Stricken After Husband's Appearance

Although wife tried to use a 2012 statute allowing divorce by deposition or affidavit in certain circumstances, husband, who was living in Saudi Arabia when served, entered a special appearance and moved to dismiss on the ground of bigamy, and the Court of Appeals affirms the trial court order striking wife's divorce case.

In 2012, the General Assembly modified Va. Code § 20-106(A) to allow a spouse to obtain a divorce by relying on depositions or affidavit, without leave of court, in limited circumstances. The interpretation of this statute is an issue we review de novo.

As a threshold matter, the divorce must be based on the grounds set forth in (A)(9) of Code § 20-91, i.e, the parties have lived separate and apart for one year, or for six months if there are no minor children and the parties have entered into a separation agreement. Where the grounds for divorce are derived from subdivision (A)(9) of Code § 20-91, Code § 20-106(A)(i) allows a party to rely on depositions or affidavits without leave of court when the parties have resolved all issues by a written settlement agreement. That provision plainly does not apply there. Subpart (ii) of § 20-106(A) also allows a party to rely on depositions of affidavits without leave of court when there are no issues other than the grounds of the divorce itself to be adjudicated. This ground likewise does not apply to the case at bar.

We note that the trial court's ruling that the "responsive pleading" under § 20-106(A)(iii) must be a *timely pleading* under Rule 3:8 is not the subject of an assignment of cross-error by husband. The only issue before us is whether an appearance by a party defeats the application of Code § 20-106(A)(iii) and thus precludes wife from relying on an affidavit to corroborate her separation from husband for more than a year.

Wife does not dispute that husband made an appearance through his attorney. Instead, she argues that Code § 20-106(A)(iii) authorizes her to rely on an affidavit or deposition without leave of court unless husband has *both* filed a responsive pleading *and* made an appearance.

Wife's interpretation is contrary to the plain language of the statute. The phrase "has failed to file a responsive pleading or to make an appearance as required by law" is most naturally read to impose two separate circumstances, the filing of a responsive pleading *or* an appearance, either of which will defeat divorce by affidavit or deposition without leave of court. This reading is not only consistent with the plain language of Code § 20-106(A)(iii), it also is consistent with the overall purpose of Code § 20-106(A), which, as evidenced by subsection (i) and (ii), is to allow the use of depositions or affidavits without leave of court only when

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the divorce is, aside from the ground of divorce itself under subsection (ii), uncontested. When the defending party enters an appearance to challenge the divorce, that party obviously is not proceeding in an uncontested fashion.

We deny husband's request for attorney's fees on appeal.

Judgment affirmed.

Cruz v. Cruz (McCullough) No. 1910-12-4, April 30, 2013; Fairfax Cir.Ct. (Kassabian) Michael C. Miller for appellant; Michael A. Ward for appellee. VLW 013-7-126, 6 pp.

UNPUBLISHED OPINIONS

Editor's Note: Pursuant to Va. Code § 17.1-413, these opinions are not designated for publication.

Criminal

Upset Mom's Messages Were Threats

A majority of the Court of Appeals affirms mother's misdemeanor conviction for making telephone threats but reverses and dismisses her conviction for interfering with a 911 call for lack of evidence she disabled or destroyed any device required under the statute charged, Va. Code §18.2-164(B)(2); the dissent argues both convictions should be reversed because mother's voice mail messages taken in context did not threaten illegal acts, but rather to hire an attorney to expose the truth.

Husband and wife separated over son's legal problems; husband went to live with two other individuals. Husband and wife argued when husband returned to the marital residence for his clothes. Wife threw a drinking glass at husband; the glass shattered against his head causing bleeding into his eye. Wife tried to grab husband's cell phone from his hand and told him not to call 911. Husband called 911 and was able to give his home address, phone number and ask for an ambulance; he also yelled "send the police" as wife grabbed his phone and left the residence. After emergency responders arrived, the 911 dispatcher continued trying to reach husband. Husband obtained a protective order resulting in wife and her daughter being evicted. Wife left two messages blaming the two individuals and their 13 year-old daughter for the eviction and ruining her life. The messages were replete with cursing, graphic name calling and accused the individuals and their daughter of sexual acts. The messages warned that the individuals would get what was coming back to them and they would all go down with her because she was telling everything she knew, and the truth would come out. The jury convicted mother of assault and battery, making threatening phone calls and interfering with a 911 call.

On appeal, mother challenges the sufficiency of evidence to support her convictions for making threatening phone calls and interfering with a 911 call. We affirm her conviction for making threatening phone calls but reverse and dismiss her 911 interference conviction for insufficient evidence. The record evidence was sufficient to create a jury issue whether three of mother's statements constituted threats. *U.S. v. Maisonet,* 484 F. 2d 1356 (4th Cir. 1973), is instructive: an inmate's letter addressed to a judge's home reasonably could be interpreted as a threat of injury. We agree with mother that there is insufficient evidence for her 911 interference conviction. The commonwealth's case focused and the jury was instructed on § 18.2-164(B)(2). This statute by its terms requires proof that the defendant destroyed or disabled a communication device. Such proof is totally lacking here.

Affirmed in part, and reversed and dismissed in part.

Concurrence and dissent

Alston, J. : I would reverse both convictions. Mother's messages considered in context were not threatening as a matter of law. She did not threaten anything illegal, but rather, to hire a lawyer and expose the truth. *Maisonet* cited by the majority is distinguishable.

Alexander v. Commonwealth (Frank) No. 0126-12-4, April 30, 2013; Stafford Cir. Ct. (Deneke) G. Price Koch for appellant; Aaron J. Campbell, AAG. VLW 013-7-127(UP), 16 pp.

Criminal

Overwhelming Evidence Supports Revoking Parole

The Court of Appeals affirms the trial court order revoking suspension of defendant's sentences for grand larceny and burglary: overwhelming evidence shows a continuing pattern of criminal activity that renders harmless the trial court's alleged error in admitting statements about other burglaries in which defendant is a suspect.

Defendant was convicted of grand larceny and burglary and received prison sentences that were suspended. During a major power outage in August 2011, two city businesses were burglarized by kicking in glass with lottery tickets stolen. About a month later, defendant's mother and sister tried to redeem the stolen tickets and identified defendant as their source. In November 2011, at 3:00 a.m., a police detective responded to a robbery at a convenience store. Lottery tickets were among the items stolen. The glass door was broken and surveillance video disclosed an individual in dark clothes kicking the glass. An hour later, another officer who had viewed the surveillance video spotted defendant wearing a similar jacket and arrested him on outstanding warrants for grand larceny and forgery. The two officers went to the home address defendant provided and were greeted by a woman who identified herself as his mother and showed them to defendant's basement bedroom. Walking through the house, one officer saw a grocery bag of lottery tickets in plain view. A duffel bag in defendant's room contained substances that tested positive for cocaine and heroin. A stripped vehicle in the garage had a VIN matching one stolen from an address less than half-mile away. A form with defendant's signature approved crushing or destroying a vehicle reported stolen in June 2011. After two new misdemeanor charges were filed in another locality, the commonwealth moved to revoke the suspension. Over defendant's objection, one police officer was allowed to testify about the August 2011 burglaries in which defendant is a suspect. The trial court citing overwhelming evidence of a pattern of criminal conduct revoked the suspension and imposed active sentences of five years and nine months, and seven years and nine months.

On appeal, defendant challenges on hearsay and Sixth Amendment grounds admitting the officer's testimony about burglaries in which he is a suspect. We affirm. We agree with the trial court that the evidence supporting revocation is overwhelming and renders harmless the alleged error in admitting the officer's testimony. Defendant acknowledges the two new misdemeanor charges in another locality – that alone supports revocation. The police also found physical evidence of drugs and involvement in two car thefts.

Judgment affirmed.

Baines v. Commonwealth (Chafin) No. 0805-12-2, April 30, 2013; Richmond Cir. Ct. (Jenkins) Joan J. Burroughs for appellant; Leah A. Darron, Sr. AAG. VLW 013-7-128(UP), 6 pp.

Domestic Relations

Guardian's Appeal Fails, Parent Reclaims Child

The Court of Appeals affirms the trial court returning child to mother and dissolving two protective orders after mother relocated to another state; mother has maintained stable employment and housing with only one positive drug screen in 2012 after completing a drug court program; although guardian's arguments lack merit, we decline to impose attorney's fees as this appeal is not frivolous.

In April 2010, the local department of social services (DSS) took custody of one of mother's two children after her boyfriend threatened the family with a butcher knife; protective orders were entered for both children. In December 2011, the juvenile and domestic relations (JDR) district court entered orders for permanency planning to return child to mother, continuing the protective orders with review in June 2012, and returning custody to mother. The guardian appealed the permanency planning and protective orders but not the custody order. After setting an August 2012 appeal hearing date, the trial court in June 2012 dissolved the protective orders and the guardian appealed. Mother completed a drug court program and had one positive screen for PCP in June 2012. She had difficulty managing money and wrote bad checks on her mother's account she agreed to repay and no criminal charges were filed. She lost one job but obtained another and maintained stable housing. She moved to another state where her father lived shortly before the appeal hearing date. She received some financial assistance from her maternal grandmother. She was unable to return for the appeal hearing due to her father not being able to get her to the train station in time. The trial court dissolved the protective orders and entered a permanency planning order returning child to mother.

On appeal, guardian argues that mother's move violated the Interstate Compact on the Placement of Children. We agree with DSS that this Compact by its plain terms was inapplicable: mother had legal custody of both children when she moved out-of-state. Guardian cites no authority to support that mother was precluded from moving to another state. Contrary to guardian's argument, no due process violation occurred when the trial court dissolved protective orders included in guardian's appeal. The evidence supports the trial court's orders: mother maintained steady employment after losing one job and housing; she completed a drug court program and had only one positive drug screen in 2012. While guardian's arguments lack merit, we decline to impose appellate attorney's fees for this appeal that is not frivolous.

Judgment affirmed.

Dover v. Alexandria Dep't of Community and Human Servs. (McCullough) No. 1625-12-4, April 30, 2013; Alexandria Cir. Ct. (Dawkins) Dale Warren, GAL; Richard F. Gibbons Jr. for appellee. VLW 013-7-131(UP), 8 pp.

Domestic Relations

Incorporated PSA Extends Parent Insurance Duty

The Court of Appeals affirms the trial court requiring father to reimburse mother for one-half of the cost of son's medical and dental insurance for as long as the carrier considers him eligible as a dependent; the parties' property settlement agreement (PSA) does not define "eligible dependent" and a logical interpretation is for father's obligation to continue so long as son is eligible.

Parents divorced in 2000 by a final decree incorporating a PSA. The PSA required parents to share the cost of son's health and dental insurance "until such time as the child is no longer an eligible dependent," and required husband to maintain coverage "As long as such insurance is reasonably available through his place of employment." In November 2009, after mother discovered son was not covered, the juvenile and domestic relations (JDR) district court granted mother's motion to amend to require father to reimburse her for half of the cost of son's coverage. Father contributed from March 2010 through September 2011, after son turned 18 and graduated in June 2010. In October 2011, father moved to terminate his obligation. The JDR court agreed with father but the circuit on appeal held that his contribution continues as long as coverage is reasonably available.

On appeal, father disputes continuing his obligation. We affirm construing the terms of the PSA, controlling under Va. Code § 20-100(C), according to normal rules of contract interpretation. The final decree and PSA can be harmonized and interpreted logically to continue father's obligation as long as carrier considers son an eligible dependent. The PSA does not define the term "eligible dependent"; the usual and ordinary meaning considering numerous insurance statutes does not exclude a child based on attaining the age of majority and graduating from high school. The TANF statute father cites is inapposite. Father's objection to the trial court's jurisdiction was not presented below as required by Rule 5A:18. The circuit court clearly had subject matter jurisdiction as to child support and its modification. Father submitted to its jurisdiction in seeking to amend the contribution order he did not appeal. No grave injustice or denial of essential rights appears to warrant considering father's jurisdictional objection. To the contrary, Virginia recognizes and enforces child support obligations after majority provided by a PSA incorporated in a divorce decree.

Kolmetz v. Hitchcock (Humphreys) No. 1464-12-2, April 30, 2013; Henrico Cir. Ct. (Hicks) Taylor B. Stone for appellant; Barbara S. Picard for appellee. VLW 013-7-130(UP), 10 pp.

Domestic Relations

Husband Wins Reversal on Car & Support

On husband's appeal of a final divorce decree, the Court of Appeals reverses and remands two trial court rulings on a car husband purchased after separation and on child support; although husband's remaining arguments lack merit, his appeal is not frivolous and appellate attorney's fees are denied.

Husband and wife separated in 2007, after 13 years of marriage and five children, three of them minors. Husband is an attorney. Wife has a high school education and has worked sporadically in low wage-earning fields. They own a 1990 Jeep Wrangler. Post-separation, husband purchased a 2004 BMW with help from his father. Wife sued for divorce in 2009 alleging adultery and sought custody, child and spousal support. Husband failed to file tax returns for numerous years and wife sought sanctions for noncompliance with discovery. As a sanction, the trial court limited husband to evidence included in his second set of interrogatories. In August 2010, husband moved for a custodial evaluation and agreed to pay for it but then failed to do so. The trial court in a December 14, 2011, letter opinion awarded wife the marital residence, apportioned to husband all of the unpaid tax liability; awarded wife $1,170 monthly child support, and monthly spousal support of $2,380 based on the gross disparity of incomes and evidence of husband earning over $100,000 annually. The court valued the jeep at $3,050 based on a national guide wife offered and classified the BMW as marital property. It also imposed attorney's fees on husband, then $75,534. The

(See **Opinions**, on page 14)

The Week's Opinions

Va. Court of Appeals

Cont'd

trial court denied husband's February 3, 2012, motion seeking a rehearing or a hearing on entry of the final decree. On April 5, 2012, the court entered a final decree imposing $82,000 attorney's fees on husband, then on April 9, responded to wife's March 2012 motion for clarification by requiring sharing of medical expenses exceeding $250 in proportion to income. The trial court denied husband's May 3, 2012 motion to suspend execution as untimely.

On appeal, husband advances 38 assignments of error, 13 are procedurally defaulted for noncompliance with the Rule 5A:20(e) requirement to brief supporting principles of law or authorities. With the exception of the BMW, we affirm the trial court's equitable distribution determinations. The court considered the factors in Va. Code § 20-107.3(E), including husband's adultery, in awarding wife the residence. However, the trial court erred in classifying the BMW as marital; wife did not overcome the presumption that this vehicle purchased post-separation is separate. The trial court properly valued the Jeep based on the national guide wife offered. Husband was properly allocated the entire tax liability in view of his complete control of the parties' marital finances. We agree with husband that the child support amount should be adjusted; the trial court failed to determine a presumptive amount as required by § 20-108.2 which can then be adjusted for shared custody under subsection (G)(3). We disagree with husband that the split custody guidelines apply. Husband shows no abuse of discretion in the amount of spousal support or its indefinite duration. Husband cites no authority for requiring wife to prove his income and he failed to meet his burden of imputing income to wife. The trial court's alleged error in admitting wife's testimony about her discussion with a realtor on housing costs is harmless: other record evidence supports awarding the marital residence to wife and her expenses. Nor was it an abuse of discretion to disallow questioning wife about her sexual history. Section 20-99(6) authorizes the trial court to award attorney's fees and costs as equity and justice requires. The court accepted wife's testimony that her mother loaned her funds. The record supports awarding attorney's fees to wife: husband cites no authority limiting the award based on the size of the marital estate; he perpetuated and prolonged the litigation. Husband received notice of wife's motion for clarification 21 days before the court ruling and he filed no response, objecting after the court ruled. Waiving endorsement under Rule 1:13 was permissible and violated no due process rights. Husband's motion to stay execution was untimely under the 21 day rule of Rule 1:1. *Davidson v. Commonwealth,* 246 Va. 168 (1993), cited by defendant is inapposite: no final order had been entered. We decline to award appellate attorney's fees to either party as this appeal addressed important and substantial issues.

Judgment affirmed in part, reversed in part and remanded.

Milam v. Milam (Alston) No. 0837-12-4, April 30, 2013; Rappahannock Cir. Ct. (Thacher) Kirk T. Milam pro se for appellant; Peter W. Buchbauer for appellee, for appellee. VLW 013-7-131(UP), 28 pp.

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Va. Circuit Court

Creditor's Rights

Guarantors' Dec Action Against Bank Time-Barred

A hotel company and three guarantors on loans for three parcels in Fredericksburg waited too long to bring their fraud claims based on loan documents including a swap agreement that let plaintiffs exchange a variable interest rate for a fixed interest rate; even if the claims were not time-barred, they have no merit, says the Fairfax Circuit Court.

In 2001, plaintiff Sun Hotel Inc. bought three parcels of property in Fredericksburg, using seller financing, and refinanced the property from defendant BB&T in 2004. The loan was memorialized by a commercial note dated Feb. 6, 2004, for $8.55 million between Sun Hotel and BB&T. At the same time, Bharat Patel, Nalini Patel and Jay Patel each signed a guaranty agreement for Sun Hotel's debt. In early 2006, Sun Hotel entered into an interest rate swap agreement with BB&T through which Sun Hotel could obtain a fixed interest rate for its variable rate loan.

Sun Hotel signed a note modification agreement and an ISDA master agreement with a schedule to the master agreement, on Jan. 26, 2006, and Jan. 31, 2006, respectively, to lock in a fixed interest rate, given rising interest rates in the market. Through the swap agreement documentation, Sun Hotel verified that BB&T was acting only at arm's length and was not the hotel's agent, broker, advisor or fiduciary in any respect in relation to the swap agreement.

Eventually, Sun Hotel defaulted and in March 2012, BB&T assigned the note, deed of trust and guarantees to SummitBridge Credit Investments III, who sold the property at foreclosure in March 2012 and exercised its right to confess judgment against the Patels for the deficiency.

Sun Hotel and the Patels filed this declaratory judgment action alleging fraud.

Because the underlying action is fraud, a two-year statute of limitations applies. This claim is time-barred as it was not filed until 2012 and the alleged fraud reasonably should have been discovery by January 2006 when the swap agreement was signed.

Even if this court found that the claim was not time-barred, the claim for declaratory judgment is dismissed based on the fact that no actual controversy exists between the parties. The language of the loan documents, swap agreement and guarantees is clear. Sun Hotel and the Patels did not take issue with the provisions in any of these documents until the swap agreement no longer worked in their favor. They now quarrel with the various documents because they are unhappy with their choice to enter into some of the agreements. The agreements are binding and they contain clear and unambiguous language. Sun Hotel and the Patels cannot back out of them by inventing a controversy that does not exist.

The Patels should have reasonably discovered that the documents did not render the guarantees non-recourse. The documents they signed in January 2006 specifically reference the guarantees. Also, the accompanying credit support documents also specifically stated that the guarantees were incorporated and remained in full force and effect. A reasonably prudent person would have read the loan documents and recognized that the guarantees remained in full force and effect in January 2006. The language of the guarantees specifically prohibits oral modification and waiver. Since the Patels had nothing in writing from BB&T, they reasonably should have known that the guarantees were still enforceable in January 2006 when they signed the swap agreement. Their claims to the contrary are not sustainable.

Because there is no separate claim for negligent misrepresentation in Virginia, this court is dismissed as the Patels already assert a constructive fraud claim against BB&T.

Because Sun Hotel and the Patels' claims are asserted well beyond the applicable limitations periods, and because plaintiffs have failed to sufficiently plead various causes of action asserted against BB&T, the plea in bar and demurrer are sustained on all counts.

Sun Hotel Inc. v. SummitBridge Credit Investments III LLC (Ney) No. CL 2012-14062, Jan. 23, 2013; Fairfax Cir.Ct.; Brian Loffredo for plaintiffs; Mary Zinsner for defendant BB&T; Richard C. Sullivan for defendant SummitBridge. VLW 013-8-044, 17 pp.

Real Estate

Refusal Right Not Triggered by Transfer

A restaurant tenant cannot claim its Right of First Refusal has been breached by a transfer of the property from a living trust that took the property upon the owner's death, to her son, who was the trustee and sole beneficiary of the trust; the Fairfax Circuit Court says the Right of First Refusal was not triggered because the landlord never received an offer from anyone to buy or convey the property.

The sole owner of the property died in 2007 and her will devised the property to a living trust, which had one trustee and beneficiary, decedent's son, Robert O. Beckner. In 2008, Robert, in winding up the estate, executed a deed to retitle the property from the trust's name (of which he is the sole beneficiary) to his name, individually.

Defendants argue that the transfer of the property from the trust to Robert is a transaction incidental to an inheritance and therefore not a conveyance which would trigger the Right of First Refusal. Plaintiff FriendCo argues that the plain language of the lease states that *any conveyance* will trigger the Right of First Refusal and this includes a conveyance by deed from a trust to a beneficiary.

The Right of First Refusal provision in the lease states that "Landlord agrees that … it shall not sell, offer to sell, accept any offer to buy or convey … unless and until Landlord shall have first offered Tenant the opportunity to purchase" the property.

By this provision, the operative language in the Right of First Refusal in the lease agreement is triggered in there instances, when the Landlord 1) sells, 2) offers to sell, or 3) accepts any offer to buy or convey the property. In any such event the landlord shall first give the Tenant by written notice the opportunity to purchase the property upon the identical terms and conditions as set forth in the notice. Among other things, the notice provision makes the price of the intended sale known to the Tenant in order that it might evaluate whether it wishes to purchase the property.

The Right of First Refusal is not triggered here because the Landlord never received *an offer* from anyone to buy or convey the property. The "conveyance," by the very words in the provision, is coupled with "any offer to buy or convey." It is not a stand-alone conveyance. Were it so, there would be no necessity for a notice.

Here, there was never an offer to buy or convey the property. There were not "identical terms and conditions" of a proposed sale. The conveyance was by an heir of the landlord (the trust) to an heir of the landlord (Robert). The conveyance was for no consideration. In short, this conveyance was not the sort of conveyance as set out in the lease.

Summary judgment for defendants.

(See **Opinions**, on page 19)

ADR

ALTERNATIVE DISPUTE RESOLUTION

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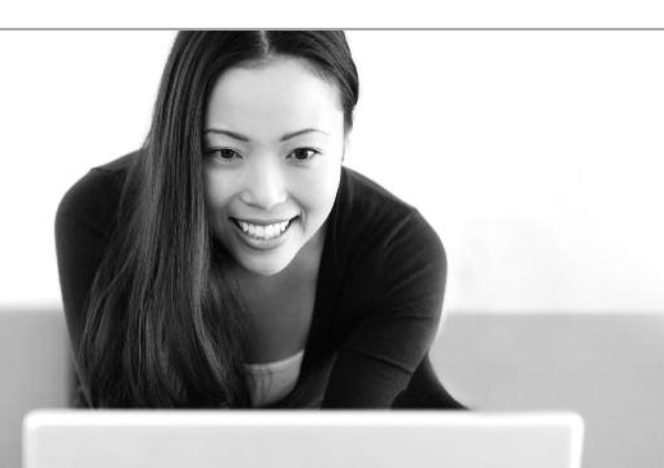

The Week's Opinions

Va. Circuit Court

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FriendCo Restaurants Inc. v. Beckner (Ney) No. CL 2012-3598, March 14, 2013; Fairfax Cir.Ct.; Michael C. Gartner for plaintiffs; Craig J. Franco for defendants. VLW 013-8-046, 6 pp.

Real Estate

Objections to Condemnation Petition Fail

A Fairfax Circuit Court denies VDOT's motion to strike a property owner's objections to VDOT's petition in condemnation for a partial taking of a parcel in Chantilly for the widening of Route 50.

The owner of the property, Dulles Properties, objects to the amount of compensation offered by the Virginia Department of Transportation, in that it does not represent just compensation and is inadequate under Virginia and federal law. Dulles Properties further objects that VDOT's acquisition leaves Dulles Properties with an uneconomic remnant, but that VDOT has not offered to acquire the entire property as is required by Va. Code §§ 1-219(G) and 25.1-417(A)(9). Dulles further objects that VDOT's current taking does not fully reflect the right of way planned to be taken in connection with the project.

None of the authorities cited by VDOT address the issue presented here. More importantly, VDOT's argument ignores the genesis of inverse condemnation in Virginia. The Virginia Supreme Court in *Swift & Co. v. City of Newport News,* 105 Va. 108 (1906), that when the provision of a constitution, as our does, forbids damage to private property and points out no remedy, and no statute affords one for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.

The Virginia Supreme Court in 2008 in *Kitchens v. City of Newport News,* found that Va. Code § 8.01-187 did not constitute the exclusive remedy for plaintiffs seeking just compensation for a taking because the General Assembly, when it enacted that Code provision, would have specifically stated on the face of the statute if it had intended the statutory proceeding to supersede ordinary causes of action. The court held that Article I, § 11 takings claims may be pursued by a common law action.

Based on the foregoing, it is clear that the common law provides a remedy. Although Code §§ 1-219.1(G) and 25.1-417(A)(9) do not expressly delineate a remedy to VDOT's finding that the portion of the land that is not subject to the taking is not an "uneconomic remnant," the language of these sections also does not state there is no remedy for an alleged wrongful determination that a parcel of land is not an "uneconomic remnant." And how could they, given the constitutional protection afforded landowners? Because courts are required to apply the plain meaning of statutes, and are not free to add language, nor to ignore language contained in statutes, this court is unable to conclude that there is no remedy available to Dulles Properties.

Motion to strike and dismiss is denied.

Comm'r of Highways v. West Dulles Properties Inc. (Ney) No. CL 2012-12252, March 4, 2013; Fairfax Cir.Ct.; Robert R. Dively Jr. for petitioner; Laura E. Lucas for respondent. VLW 013-8-047, 9 pp.

Domestic Relations

Medical Expense Duty Owed Till Graduation

A husband is ordered to pay wife $617.94 as reimbursement for medical expenses, in accordance with the terms of the parties' property settlement agreement incorporated into their final divorce decree; the Fairfax Circuit Court declines to include in the sum awarded to wife her claimed expenses for dental insurance premiums, which are not mentioned in the PSA or divorce decree.

Wife also claims four emergency room visits of $600, which occurred from July 17, 2011 to April 27, 2011. Husband contends these visits should not be included in the calculation because they occurred after the parties' child emancipated. Although the child turned 18 on Dec. 7, 2011, he did not graduate from high school until June 14, 2012, and under the agreement, support continued until the date of graduation. As such, $600 in emergency room visit expenses claimed by wife will be included in the calculation of expenses owed by husband.

Wife also claims unpaid pediatrician, dental and medication expenses. These expenses will be included in the calculation. Wife claims husband owes $3,367.99. Husband claims he owes only $924.99. However, based on the documentation provided by the parties, the court reaches a different figure. The court deducts payments already made either directly to the child's pediatrician or to wife for unreimbursed dental expenses.

(See **Opinions**, on page 20)

ADR

ALTERNATIVE DISPUTE RESOLUTION

The Week's Opinions

Va. Circuit Court

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Tanner v. Tanner (White) No. CL 2008-8928, Jan. 8, 2013; Fairfax Cir.Ct.; Dorothy M. Isaacs for plaintiff; Catherine D. Tanner, pro se. VLW 013-8-049, 5 pp. and exercised its right to confess judgment against the Patels for the deficiency.

Sun Hotel and the Patels filed this declaratory judgment action alleging fraud.

Because the underlying action is fraud, a two-year statute of limitations applies. This claim is time-barred as it was not filed until 2012 and the alleged fraud reasonably should have been discovered by January 2006 when the swap agreement was signed.

Even if this court found that the claim was not time-barred, the claim for declaratory judgment is dismissed based on the fact that no actual controversy exists between the parties. The language of the loan documents, swap agreement and guarantees is clear. Sun Hotel and the Patels did not take issue with the provisions in any of these documents until the swap agreement no longer worked in their favor. They now quarrel with the various documents because they are unhappy with their choice to enter into some of the agreements. The agreements are binding and they contain clear and unambiguous language. Sun Hotel and the Patels cannot back out of them by inventing a controversy that does not exist.

The Patels should have reasonably discovered that the documents did not render the guarantees non-recourse. The documents they signed in January 2006 specifically reference the guarantees. Also, the accompanying credit support documents also specifically stated that the guarantees were incorporated and remained in full force and effect. A reasonably prudent person would have read the loan documents and recognized that the guarantees remained in full force and effect in January 2006. The language of the guarantees specifically prohibits oral modification and waiver. Since the Patels had nothing in writing from BB&T, they reasonably should have known that the guarantees were still enforceable in January 2006 when they signed the swap agreement. Their claims to the contrary are not sustainable.

Because there is no separate claim for negligent misrepresentation in Virginia, this count is dismissed as the Patels already assert a constructive fraud claim against BB&T.

Because Sun Hotel and the Patels' claims are asserted well beyond the applicable limitations periods, and because plaintiffs have failed to sufficiently plead various causes of action asserted against BB&T, the plea in bar and demurrer are sustained on all counts.

Sun Hotel Inc. v. SummitBridge Credit Investments III LLC (Ney) No. CL 2012-14062, Jan. 23, 2013; Fairfax Cir.Ct.; Brian Loffredo for plaintiffs; Mary Zinsner for defendant BB&T; Richard C. Sullivan for defendant SummitBridge. VLW 013-8-044, 17 pp.

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The sole owner of the property died in 2007 and her will devised the property to a living trust, which had one trustee and beneficiary, decedent's son, Robert O. Beckner. In 2008, Robert, in winding up the estate, executed a deed to retitle the property from the trust's name (of which he is the sole beneficiary) to his name, individually.

Defendants argue that the transfer of the property from the trust to Robert is a transaction incidental to an inheritance and therefore not a conveyance which would trigger the Right of First Refusal. Plaintiff FriendCo argues that the plain language of the lease states that *any conveyance* will trigger the Right of First Refusal and this includes a conveyance by deed from a trust to a beneficiary.

The Right of First Refusal provision in the lease states that "Landlord agrees that … it shall not sell, offer to sell, accept any offer to buy or convey … unless and until Landlord shall have first offered Tenant the opportunity to purchase" the property.

By this provision, the operative language in the Right of First Refusal in the lease agreement is triggered in three instances, when the Landlord 1) sells, 2) offers to sell, or 3) accepts any offer to buy or convey the property. In any such event the landlord shall first give the Tenant by written notice the opportunity to purchase the property upon the identical terms and conditions as set forth in the notice. Among other things, the notice provision makes the price of the intended sale known to the Tenant in order that it might evaluate whether it wishes to purchase the property.

The Right of First Refusal is not triggered here because the Landlord never received *an offer* from anyone to buy or convey the property. The "conveyance," by the very words in the provision, is coupled with "any offer to buy or convey." It is not a stand-alone conveyance. Were it so, there would be no necessity for a notice.

Here, there was never an offer to buy or convey the property. There were not "identical terms and conditions" of a proposed sale. The conveyance was by an heir of the landlord (the trust) to an heir of the landlord (Robert). The conveyance was for no consideration. In short, this conveyance was not the sort of conveyance as set out in the lease.

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None of the authorities cited by VDOT address the issue presented here. More importantly, VDOT's argument ignores the genesis of inverse condemnation in Virginia. The Virginia Supreme Court in *Swift & Co. v. City of Newport News,* 105 Va. 108 (1906), that when the provision of a constitution, as ours does, forbids damage to private property and points out no remedy, and no statute affords one for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.

The Virginia Supreme Court in 2008 in *Kitchens v. City of Newport News,* found that Va. Code § 8.01-187 did not constitute the exclusive remedy for plaintiffs seeking just compensation for a taking because the General Assembly, when it enacted that Code provision, would have specifically stated on the face of the statute if it had intended the statutory proceeding to supersede ordinary causes of action. The court held that Article I, § 11 takings claims may be pursued by a common law action.

Based on the foregoing, it is clear that the common law provides a remedy. Although Code §§ 1-219.1(G) and 25.1-417(A)(9) do not expressly delineate a remedy to VDOT's finding that the portion of the land that is not subject to the taking is not an "uneconomic remnant," the language of these sections also does not state there is no remedy for an alleged wrongful determination that a parcel of land is not an "uneconomic remnant." And how could they, given the constitutional protection afforded landowners? Because courts are required to apply the plain meaning of statutes, and are not free to add language, nor to ignore language contained in statutes, this court is unable to conclude that there is no remedy available to Dulles Properties.

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TRAP | *Every practitioner needs to review plan language about fees*

■ continued from PAGE 1

ble for chipping in for attorney's fees, the high court applied the "common fund" doctrine and reduced US Airways' recovery on a pro rata share.

That way, McCutchen would not serve as the airline's "collection agent" at no cost, Justice Elena Kagan wrote in the court's April 16 opinion.

"Plan provisions should always take precedence," or parties will always be left wondering what will happen, said Scott Macey, president and CEO of the ERISA Industry Committee, an organization of plan sponsors that filed an amicus brief in support of US Airways. Macey praised the decision for putting plan provisions above equitable remedies.

The decision is drawing close scrutiny from plaintiffs' personal injury attorneys.

"Every practitioner right now needs to take a look at plan documents to ascertain the language about attorney's fees," said Leesburg lawyer Peter C. Burnett. "If the plan is silent, according to *McCutchen,* the claimant can seek an offset for a pro rata portion of the attorney's fees."

Attorneys who fail to examine the relevant plan documents and later realize that their client will be funding legal costs out of his or her own pocket may face a malpractice claim, Burnett cautioned.

And attorneys should be prepared for plan sponsors to update plan language as *McCutchen* "gives plans a roadmap of how to write their policies and eliminate the common fund doctrine out of their plans," added Charlottesville lawyer Kyle McNew.

Even if plans do change their language, however, plaintiffs may still have an option, McNew said.

The *McCutchen* decision "takes one litigation negotiation threat out of the quiver but it doesn't change a practical solution, where each party gets a little less than they want – but each gets something," said McNew.

Contract trumps equity

James McCutchen's dispute about ERISA liens and attorney's fees began with a car accident. He was injured by a third party's negligent driving and his employer-sponsored health benefits plan paid his medical bills, totaling $66,866.

McCutchen retained attorneys and sought to recover all of his accident-related damages, estimated at $1 million. But the case settled for just $10,000 because the driver had limited insurance and three other people had been seriously injured or killed. McCutchen also received $100,000 from his own insurer. Forty percent of his total $110,000 recovery went to his attorneys, leaving him with $66,000.

Pursuant to § 502(a)(3) of ERISA, the plan sought reimbursement for its medical expenses with an equitable lien.

Relying on principles of equity, McCutchen argued that US Airways' right to reimbursement didn't kick in until he had recovered all of his total damages and – at the very least – the plan should contribute its fair share towards attorney's fees.

A Pennsylvania federal court disagreed but the 3rd U.S. Circuit Court of Appeals reversed, ruling for McCutchen.

The U.S. Supreme Court agreed to settle a split among the federal appellate courts. The justices embraced contract principles to hold that the plan language trumped equitable principles and that US Airways had a clear right to reimbursement.

McCutchen "cannot rely on theories of unjust enrichment to defeat US Airways' appeal to the plan's clear terms," Kagan wrote for the five-person majority. "Those principles…are 'beside the point' when parties demand what they bargained for in a valid agreement."

While the court emphasized that "if the agreement governs, the agreement governs," McCutchen's plan was silent as to the allocation of attorney's fees. With no clear plan language, the court looked to the common-fund doctrine as the appropriate default.

"Given the contractual gap, the common-fund doctrine provides the best indication of the parties' intent. No one can doubt that the common-fund rule would govern here in the absence of a contrary agreement," Kagan wrote. "Without cost sharing, the insurer free rides on its beneficiary's efforts – taking the fruits while contributing nothing to the labor."

The court said that in certain circumstances – including McCutchen's – a beneficiary is made worse off by pursuing a third party. Instead of leaving McCutchen $866 in the hole, the justices remanded the case for a determination of US Airways' final reimbursement based on its contribution towards attorney's fees.

'A window and a trap'

The opinion "creates a combination of a window and a trap for practitioners," Burnett explained.

Current cases may include clients with a plan that is silent as to attorney's fees, leaving them room to rely on *McCutchen* to offset their reimbursement requirements – the window.

But the trap occurs as time goes by and insurers update their plans with language abrogating the common fund doctrine, Burnett said.

Not surprisingly, plan sponsor attorneys indicated they have already begun the process of updating plan language.

Richmond lawyers Patricia McCullagh and Thomas C. Foster said they plan to address the issue with their employer clients, particularly larger employers with self-insured, broad-based group health plans.

Macey said several plan sponsors indicated to him they are sitting down with counsel to review their plan language and update if necessary, although the decision to specifically address attorney's fees is a strategic one.

If plan language states that it will not contribute to a third-party claim, a beneficiary may decline to pursue it.

"If I get hit in a car wreck and have to go through the discomfort of having a defense attorney combing through my medical records and calling me a liar and a malingerer, subjecting myself to depositions and discovery for a small pittance, it may not be worth it," McNew said.

Attorneys often sign onto cases without knowing about a plan's ERISA lien, he added, in part because the clients rarely know the terms of their plan and the plan itself may be slow to respond to requests for documents.

But personal injury attorneys still have one option, not addressed in the court's decision.

In a hypothetical case, a plan pays $150,000 in medical bills and the claimant can recover $100,000. "If the plan is going to claim its full lien, then there is zero incentive on the part of the plaintiff to bring his claim," Burnett explained.

To achieve some sort of recovery for all parties, he advocated for a practical solution.

"Call up the plan and say: 'Virginia being an anti-subrogation state, you don't have the ability to bring the claim yourself. Half or one-third of a loaf is better than none, so why don't we go three ways on this claim?'" Burnett explained. The $100,000 is divided between the client, the attorney and the plan and then each party gets something.

"I've done that in claims ranging from $100,000 to $1 million over the last 20 years and I can't remember a plan saying no and that it would cut off its own nose to spite itself," Burnett said.

McNew agreed. By negotiating a deal, insurers don't have to wait and worry about a possible trial or appeal. "No one is exuberant but it is a realistic business decision for all parties," he said. "And nothing in *McCutchen* prevents that."

Macey acknowledged that plan sponsors could be amenable to such a solution although such a decision would be on a case-by-case basis.

Foster and McCullagh agreed.

"A plan may be willing to compromise with the employee and their attorneys even though they have the right to demand full repayment up front and collect a compromise amount," Foster said.

RECOVERY | *4th Circuit upholds an award of merely $218.59*

■ continued from PAGE 3

Still, the panel upheld the district court's award of a mere $218.59 for Gallo's TIFF and PDF production of documents, of the $111,047 in ESI costs requested by Gallo.

The advantages of ESI processing did not mean the costs could be shoehorned into the cost-recovery statute, under the 4th Circuit panel's reasoning.

Gallo argued that its ESI-processing charges were taxable as fees for "making copies" because ESI has "unique features." Gallo pointed out that ESI is more easily and thoroughly changeable than paper documents, it contains metadata and it often has searchable text. Gallo argued it had to remove ESI from container files, extract and index text to make it searchable, copy metadata and load the data onto a "review platform" to allow the native files and their associated metadata to be viewed and their text to be searched as if the native files were being opened in the software applications that created them.

"That Gallo will recover only a fraction of its litigation costs under our approach does not establish that our reading of the statute is too grudging in an age of unforeseen innovations in litigation-support technology," Davis concluded.

TROUBLE | *Three Virginia lawyers run into problems in Maryland*

■ continued from PAGE 2

Washington, did not immediately respond to a request for comment.

Fudging forms in bankruptcy court

In a separate case, a Virginia-licensed bankruptcy lawyer has been disciplined by federal courts in Washington, Maryland and Virginia for allegedly submitting falsified court forms.

Authorities accused Sandy Y. Chang of The Chang Law Firm of Rockville, Md., of cutting corners to try to show compliance with a 2005 bankruptcy reform law. The law requires bankruptcy debtors to show they have received credit counseling within 180 days before they file for bankruptcy.

Chang repeatedly submitted altered certificates to show compliance with that law, according to findings by three federal courts. A Maryland lawyer charged with investigating Chang's practice found "evidence that forgery and fraud on the Court represents a standard and systemic business practice at the Chang law firm."

Based on Chang's explanations, the lawyer initially concluded her violations were the result of "ignorance and inexperience" rather than improper motive. Later revelations suggested otherwise.

"In fashioning my original recommendation, I felt that sanctions deserved to be mitigated because I believed Chang's 'empty head, pure heart' allocution," wrote lawyer Lawrence F. Regan Jr. in 2011. "Now, it appears that Chang may present the Court with not just an empty head, but an impure heart," he wrote.

The U.S. District Court for the District of Maryland agreed with Regan's assessment last November, suspending Chang from practice in Maryland federal courts for one year.

The Maryland court noted other discipline imposed on Chang. She agreed to a one-year suspension from the U.S. Bankruptcy Court for the Eastern District of Virginia beginning Nov. 17, 2011. Chang also had agreed to give up practice in the Washington federal courts for one year beginning Dec. 2, 2011. She is shown as suspended by the D.C. Bar's web site.

Based on the suspension by the Maryland federal court, the VSB has ordered Chang to show why she should not receive a similar penalty in Virginia. A hearing is currently scheduled for May 17, according to the VSB. In the meantime, the VSB has suspended Chang's Virginia license effective April 5.

Fumbled lawsuit

In a third case, a Fairfax lawyer has accepted a six-month suspension after admitting he made a false statement to a Maryland judge to explain an ill-founded lawsuit filed on behalf of a former NFL standout.

The suit filed by Timothy P. Harris led to an inquiry by the Maryland federal court and a finding by the judge that the "actions of Mr. Harris … should not be tolerated."

Harris was licensed in Virginia in 2007 and, in 2010, established what he called the Esquire Firm. His letterhead referenced a Fairfax office, but the Esquire Firm operated out of Harris' apartment in Arlington, according to the VSB. Harris was the only person who worked at the Esquire Firm, the VSB said.

Despite his limited professional appointments, Harris had a client. He represented Leigh Bodden, an NFL cornerback with a solid track record, including five interceptions for the New England Patriots in 2009.

Bodden claimed he was the victim of a "classic bait and switch scheme" when he tried to buy a condominium in Miami's fashionable South Beach neighborhood. The owners refused to refund Bodden's deposit after selling his condo to someone else, he alleged in a lawsuit.

Harris took up Bodden's cause, but he sued in Maryland federal court even though one of the defendants was incorporated in Maryland. The Maryland connection undermined the lawsuit's federal diversity jurisdiction.

What's more, Harris relied on a young Maryland lawyer to file the suit he prepared, since he was not licensed in Maryland.

Harris acknowledged the lawsuit was flawed, but explained he wanted to file in federal court to facilitate settlement, according to the findings of a VSB subcommittee.

The outcome was not favorable for Bodden. The defendants filed a motion to dismiss, Harris failed to file any opposition, and the judge granted the motion.

The Maryland judge threatened sanctions, saying the defects in the lawsuit should have been obvious "even to the most newly minted attorney."

Harris prepared an affidavit explaining he was responsible for the suit, absolving the Maryland attorney of any misconduct, and blaming the ill-founded suit on a "former associate" no longer employed at his office.

In fact, Harris never employed an associate and he alone was the author of the Bodden lawsuit, according to the VSB findings.

U.S. District Judge Roger W. Titus noted Harris had been suspended by the VSB two months after the suit was filed for nonpayment of more than $800 in dues and other charges. Bodden –the client – told the judge at a hearing he had no idea the suit was being filed.

Because Harris was not a member of the bar of the Maryland federal court, Titus did not attempt to impose any discipline himself, instead referring his findings to the VSB.

Based on the ill-fated Maryland lawsuit, and an unsuccessful suit to recoup Bodden's failed real estate investment with a Chicago developer, a VSB disciplinary board subcommittee certified multiple misconduct charges against Harris. The VSB disciplinary board accepted an agreed six-month suspension on April 3.

ACCESS | *High court upholds states resident-only FOIA*

■ continued from PAGE 2

necessarily avoid costs for data gathering and production.

"I don't think [*McBurney*] is carte blanche for a total lockdown for information being sought by noncitizens," Rhyne said. "It's sort of a pointless restriction" that won't necessarily save state officials any time. Out-of-state data seekers will just turn to in-state middlemen to get what they want, Rhyne said.

Further clamp-down by states could provoke a stronger reaction from the data industry, which also filed an amicus brief in *McBurney*, according to Rhyne.

PETITION | *Appellants have nothing to lose by asking for rehearing*

■ continued from PAGE 1

with a second-round petition to the Virginia high court.

The Abingdon forum came just days after the Supreme Court agreed to hear appeals in two noteworthy cases that were initially rejected by the court. Petitions for rehearing were successful in both the Virginia Tech shootings case and the possible breakup of The Disthene Group Inc., a closely held corporation that owns The Cavalier resort hotel in Virginia Beach, the long-time site of the VSB's annual meeting.

Although they made no reference to either of those cases, Kinser and McClanahan suggested a petition for rehearing is nearly always worth a try. The initial bid for an appeal goes to just a panel of three justices. The petition for rehearing is circulated to all seven justices.

"I can't think of any reason not to do it if you believe you have a reason to do it," McClanahan said.

If you do file a petition for rehearing, put your best argument right up front, Kinser said. "You need to catch our attention in the first paragraph," she said.

"We have so much to read, it's really important to tell us right in the beginning why somebody should grant your petition," Kinser said.

Temper the emotional appeal

Stick to the legal issues in your appeal briefs and leave the emotion for the trial courtroom, Kinser advised.

Kinser said she was reading a brief in a personal injury case about six months ago, going through "pages and pages" of details about the plaintiff's injuries.

"But the atrociousness of the accident and how awful the injuries were and how huge the medical bills were had nothing to do with the issue…. I didn't need to know all that," she said.

"I felt it was an attempt by the attorney to speak to my emotions," Kinser said, adding with emphasis, "It doesn't work."

"Brevity is the key," Kinser said. "Tell me what I need to know in as few words as possible."

Ponder that next case

Kinser also appreciates advocates who are ready at oral argument to discuss the potential effect of their cases beyond the immediate win or lose decision for the parties.

"I'm worried about the next case. We always have to worry about what the consequences of our decision are going to be in the next case, because it has precedential value," Kinser said.

"When it is obvious that the attorney has thought about those things and is able to engage me in that dialogue and help me with that question, it's most useful," Kinser said.

In his role as moderator, Kevin E. Martingayle of Virginia Beach said he has heard conflicting advice about whether to concede the weakness of any appellate points. Kinser said it's best to acknowledge a losing argument and move on. "We respect your candor," she said.

McClanahan expressed amazement that some lawyers skip the opportunity to file a reply brief to address their opponents' arguments. "If you don't address it, you're probably going to get asked about it at oral argument," she said.

Kinser said she was surprised at the "ingenuity" of lawyers in their interpretation of the requirement for a separate "Assignments of Error" section in their petitions for appeal.

Sometimes, lawyers will list the assignments only in the table of contents. In other briefs, the assignments will be found sprinkled among the argument section of the petition, Kinser said.

"We want them listed under a heading, all together," Kinser said. The justices struggle with when a variation complies with the rules and when it does not, she said. "If it doesn't, then we're not going to consider it," she added.

Avoiding waiver

To avoid waiving an argument, "you need to put your finger on the error," Kinser said.

"You've got to point to the error in the trial court," she said. "It is not enough just to say the verdict was contrary to the law and the evidence."

If the trial lawyer failed to make an objection at the right time or forgot to make a record of the trial judge's ruling, an appeal to the "ends of justice" is not likely to save the day, Kinser said.

"If that's all you've got to hang your hat on, good luck," Kinser said. She said she could not recall the "ends of justice" standard being applied in any civil case.

"It is for that extremely rare exception where there has truly been an injustice," Kinser said.

A lawyer asked whether the court might change its policy barring reimbursement for professional binding of petitions for appeal filed by court-appointed counsel. Kinser explained the policy was a cost-saving measure.

"If you can get the General Assembly to give us some more money, we might change our minds," Kinser said. "We have a budget and we have to stay within that budget."

Budget strictures also have affected progress toward paperless courts. "We are moving in that direction. We are not where we wanted to be on e-filing because of budget issues," Kinser said.

McClanahan offered insight into the writing process for court opinions. "Every chambers is different on a first draft," she said. Some justices write all their opinions from scratch. Other justices have their law clerks do first drafts and then take it from that point forward, she explained.

Hat trick

In response to a lawyer's query, McClanahan explained the Supreme Court selects opinion authors by literally drawing numbers out of a hat.

Discussion ensued about which type of hat was used. The justices put to rest any concern that it was a hat associated with any particular university.

Kinser said it was a bowler type of hat that used to belong to former clerk David B. Beach.

"Yeah, that was my hat," Beach said in an interview after the Abingdon forum. He described the hat as a fedora. By now, the hat may look more like something Charlie Chaplin wore. "It had a crease in it," he said.

When he was clerk, Beach explained, he told his wife the opinion writer was selected by drawing numbers from a hat, "but it's really a box," he said.

"She said, 'You need a hat,'" Beach recalled, and his wife went out and bought one.

That was in the mid-1980s, and the hat has been used since to determine who will write each Supreme Court opinion.

"By the time I retired, it was a part of history," Beach said. The hat stayed with the court, but the court presented Beach with a retirement gift of a new hat, with an expression of gratitude inscribed in the hat band.

Professionalism

Members of the Abingdon panel had thoughts on professionalism.

Chafin urged lawyers to participate in their communities, outside the courthouse. "If we participate in community projects and give of our time and our expertise, I think that our profession will be richly rewarded in our reputation," she said.

Kinser urged lawyers and judges to treat one another with respect and dignity. "Because, if we do that, between the bench and the bar, then I think the public sees that and it increases our respect within the community," she said.

Kinser repeated her call for pro bono service by every lawyer. "I hope that I have not forgotten what's it's like to practice law, because it's tough. It's a hard profession, but we still have that responsibility to serve," she said.

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AGENCY | Appeal of agency actions easier under new law

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novo" – the court will owe no deference to the agency's determination.

The old standard made administrative practice "almost medieval," Edwards told lawyers at a recent meeting of the Roanoke Bar Association. "The lord of the manor always wins. The commonwealth always wins," he said.

Experts disagree over impact

Whether the new law will make an appreciable change in practice depends on who you ask.

"I'm hoping judges will see this as a significant change in the law," Edwards said at the RBA meeting.

"A reviewing court is now required to give less deference to the findings of the agency," said Prof. John Paul Jones of the University of Richmond law school, an expert on administrative law.

Under the previous standard, the reviewing court was required to give deference to the judgment of the agency as long as it was reasonable, according to Jones. "I read the new statute as allowing the reviewing court to substitute its own judgment as long as it is reasonable," he said.

Jones said the standard will be much like that of a court reviewing a jury verdict – the jury's factual findings can be overturned only for want of substantial evidence, but questions of law are considered on their own.

Not everyone sees a pronounced reduction in deference to agency decisions.

"I really don't think it's going to increase appeals or change the standard of review," said Jeannie A. Adams of Richmond, who often represents hospitals and other health care providers in the State Health Commissioner's certificate of public need program. The standard remains deferential to the agency, as she reads the new law.

"I think ultimately there's going to have to be a case that fleshes out the language," Adams said.

Richmond lawyer Brian L. Buniva is deputy general counsel in charge of environmental health and safety for manufacturer Sequa Corp. He said the existing standard was a closed door for many appeals of agency rulings. "If the only basis was a challenge to a factual finding, you might as well forget it," he said.

While the new law makes no dramatic change in the language, Buniva said judges will presume the Assembly meant to have an impact. "I think it probably will lead to greater scrutiny of the record to determine if there is substantial evidence," he said. "How that's really going to play out is anybody's guess."

"I think it's going to provide a little more consistent application of the law on administrative reviews," Edwards said. "At least this will give judges greater authority to oversee the lawfulness of administrative agency decisions."

Original bill was toned down

The bill originally submitted by Edwards would have allowed either party to put additional evidence in the record, meaning the reviewing court would not be considering the same record as the agency below.

The attorney general's office said allowing an augmented record would increase the number and complexity of appeals to the point where six new state lawyers and three paralegals would have to be hired.

Edwards agreed to drop the augmented record provision. "I wanted to make sure we had no fiscal impact," he said. If the bill were deemed to have a fiscal impact, it might have been sent to the Senate Finance Committee, a step Edwards said he wanted to avoid.

"The way the bill ended up is quite difference from the way it was introduced," Buniva said.