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School principal's Twitter account not a public forum

By Nick Hurston

A high school principal's Twitter account wasn't a public forum and he didn't violate the First Amendment by blocking the school board chair from the public account, the Eastern District of Virginia has held.

While the plaintiff established the injury in fact required for standing, U.S. District Judge Claude M. Hilton granted summary judgment to the defendants.

The plaintiff "did not act under color of law to create a public forum on the Twitter Account," the judge wrote. "Thus, there was no First Amendment violation when [he] blocked Plaintiff from the Twitter Account. Therefore, there is no underlying constitutional violation to give rise to *Monell* liability against the School Board."

The opinion is *Sawyers v. Prince William County School Board, et al.* (VLW 023-3-616).

Twitter account

Ryan Sawyers was a former chair at-large of the Prince William County School Board, or PWCS, during which time he had numerous conflicts with the principal of Patriot High School, Dr. Michael Bishop.

Without the knowledge, input, approval or involvement of PWCS, Bishop created a Twitter account with the handle @PioneersPHS using his personal email address. There, he posted about his profession and personal interests.

The Twitter account was neither used for school governance nor to solicit public input about policies or his job performance. Bishop never obtained feedback from the community and the photo on the account wasn't the school's official

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Will bars adult child from moving into widow's home

By Jason Boleman

A trial court correctly applied a prior Virginia Supreme Court ruling to bar a decedent's adult child from moving into the family home where he allowed his widow to live, the Court of Appeals of Virginia has held.

The home was bequeathed to the decedent's two adult children, subject to the right of his widow to reside in the home "for so long as she is physically and mentally able to do so."

One of the children had sought to move into the second floor of the home and split the residence into two apartments. The children further sought to charge rent to the widow, among other requests.

"We find that the trial court did not misinterpret precedent or [the] will, that the stipulated facts support the judgment, and that the trial court did not abuse its equitable discretion in balancing the parties' concurrent rights in the property," Judge Stuart A. Raphael wrote.

Raphael's opinion in *Larsen Stack, et al. v. Larsen* (VLW 023-7-373) was joined by Judges Lisa M. Lorish and Dominique A. Callins.

Background

Erik Larsen bought a 101-acre parcel in 1972. He, his first wife, and their children — Pamela and Kirk — moved into a house on the property in 1976. Pamela and Kirk grew up there until the mid-1980s; Erik and his wife lived there until her death in 2005. Erik later married Sandra, who has lived in the home for more than 15 years.

The two-story home has an unfinished basement. The first floor contains the kitchen and a bedroom and bathroom, while the second floor has a study, two bathrooms and three bedrooms, including the primary bedroom.

Erik died in 2017. In his will, the property was bequeathed to Pamela and Kirk, subject to Sandra having the right to live in the home for as long as she is able. Per the opinion, Sandra uses the second-floor primary bedroom as her room and the study as an office. She also used the first-floor bedroom before

■ See **HEIRS** on PAGE 23

Filing lis pendens is not a 'process'

By Nick Hurston

In a matter of first impression, a Virginia circuit court has dismissed a malicious abuse of process claim grounded solely in the filing of a *lis pendens* after finding that it wasn't a "process" reachable by the claim.

The *lis pendens* was filed against real estate affected by a complaint for specific performance that was eventually nonsuited. The defendants in that case sued the prior plaintiffs alleging that their filing of the *lis pendens* was tortious.

Judge David Bernhard of the Fairfax Circuit Court dismissed the claim with prejudice.

"Because a *lis pendens* does not command an action but instead merely republishes the information in the complaint, this Court finds that the filing of a *lis pendens* is not a 'process,'" he wrote. "The Court thus holds that a *lis pendens* is just a 'filed declaration,' and like the recording of a mechanic's lien, is not a 'process' reachable by the confines of the tort of malicious abuse of process."

The decision is *Givago Growth, et al. v. iTech AG, LLC, et al.* (VLW 023-8-066).

Overview

As co-owners of residential property in McLean, Givago Growth and Constanza Valdes entered into a partnership with Artifact, LLC, to renovate and sell it. Without informing Givago or Valdez, Artifact obtained financing from iTech — with 50% interest.

But Artifact used the proceeds for other projects. Unable to make the loan payments, Artifact assigned iTech a share of the proceeds when the house was sold. Two months later, iTech sued Givago and Valdez for specific performance of the project.

iTech also filed a *lis pendens* thereby notifying prospective purchasers that there was litigation pending affecting the property. The property was under contract at the time; the purchasers refused to complete the sale.

Artifact filed for bankruptcy and the trustee filed a mechanic's lien against the property, which was eventually satisfied. iTech then nonsuited its case.

Givago and Valdez sued iTech and its law firm for several claims, including malicious abuse of process.

iTech and the law firm filed pleas in bar and demurrers, arguing that filing of a *lis pendens* wasn't a "process" under Virginia law and couldn't be the factual basis for a claim of malicious abuse of process.

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Where a company was required to maintain a "loss fund" to secure payments on insurance claims, but the company was now insolvent, an insurance company was entitled to an injunction requiring specific performance because monetary damages would not be obtainable.

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Where appellant claimed his home was sold at a foreclosure sale without adequate notice, the relevant statute precludes him from obtaining rescission of the sale.

Page 8 | Sheriff sued for allegedly violating deputy's rights

Where a reasonable jury could find that a deputy sheriff in the Virginia Beach Sheriff's Office was terminated for speech he made as a private citizen, the sheriff's motion for summary judgment was denied.

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Conviction for false allegation of law firm forgery upheld

By Nick Hurston



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The Court of Appeals of Virginia has upheld the conviction of a man who falsely reported to police that his former attorney had forged his signature on a retainer agreement just days after being ordered to pay the law firm its unpaid fees.

The defendant testified that he contacted police for clarification about whether he electronically signed the law firm's engagement letter. He never intended to mislead the police and he never described the commission of a crime, he claimed.

Judge Robert J. Humphreys said those arguments were unavailing.

"The only reasonable conclusion from such circumstances was that [the defendant] reported false information to the police to mislead them that [the attorney], or someone at her law firm, unlawfully forged his name on the document," Humphreys wrote.

Because he failed to raise the issue below, the court found no reason to apply the ends of justice exception to consider whether the trial court abused its discretion by restraining the defendant's ability to file more lawsuits.

Judges Junius P. Fulton III and Mary B. Malveaux joined Humphreys in *Star v. Commonwealth* (VLW 023-7-359).

Fee dispute

Michael Star contacted Alexandria attorney Charisse Hines to collect civil judgments he had obtained. Hines's office emailed Star an engagement letter and fee agreement for a $1,200 retainer and $300 hourly rate. Star was instructed to sign the letter and email it back.

Hines received a copy of the agreement with a DocuSign signature above Star's printed name. After Star paid the retainer, Hines filed documents to collect on the judgments but made no court appearances. Star later decided he wanted to represent himself.

However, Star kept submitting inquiries and requests for information and documents to Hines. Hines continued to respond. Once the retainer was exhausted, Hines invoiced Star for $741 for unpaid services. Star sued to recover the retainer and Hines counterclaimed for $741.

Entering judgment for Hines, the general district court found that Star signed the engagement letter and fee arrangement with DocuSign and, thus, agreed to the terms for retention and payment of fees.

Forgery report

Rather than appeal the general district court's ruling, Star complained to police three days later that Hines forged his electronic signature on their documents.

Hines provided police with the engagement letter and fee arrangement signed by Star using DocuSign, as well as a "Certificate of Completion" from DocuSign indicating that the engagement letter had been properly signed using Star's email.

When the police questioned him about the forgery allegation, Star said he never used email to provide his electronic signature although he did have a laptop computer. The police then charged Star with making a false report under Virginia Code § 18.2-461(i).

Trials

Next, Star filed a civil complaint in the Alexandria Circuit Court alleging that Hines forged his signature on the engagement letter and fee agreement.

In its dismissal order, the circuit court said finding the engagement agreement to be valid and enforceable was essential to the general district court's dismissal of Star's claim and granting of Hines's counterclaim.

Further, the order stated that Star's forgery claim was precluded by the doctrine of collateral estoppel because the general district court's judgment was final and valid and Star failed to appeal.

Finally, the court found that Star sued Hines without just cause in violation of Va. Code § 8.01-271.1 and ordered an injunction preventing him from filing any future claims in that court against Hines relating to the retention agreement or any aspect of Hines's representation.

At his criminal trial, Star admitted hiring Hines and paying the retainer. He claimed to have given police a copy of Hines's engagement letter with his "wet" signature that he signed while at the law office, as well as one with the DocuSign signature he hadn't seen before the first trial.

Star testified that he understood the nature of forgery, that contacting police was "a proper civil duty" and that he simply wanted clarification about whether the DocuSign agreement was signed by him.

The court found Star guilty of filing a false report. Star appealed.

'Unavailing'

Star admitted he contacted police, but claimed he neither knowingly reported a false crime with the intent to mislead nor that he described the commission of a crime.

Humphreys said that, under § 18.2-461(i) it is unlawful to knowingly give a false report about the commission of any crime to law enforcement with the intent to mislead.

"The statute does not require that such false report lead to the filing of a false charge, much less result in a false conviction," the judge said. "That a 'false report of a crime might leave open hypothetical defenses to such falsely reported crime does not excuse or decriminalize [the] lie.'"

Because proving intent by direct evidence often is impossible, Humphreys noted that intent may be proved by circumstantial evidence.

Here, the judge said the only reasonable conclusion was that Star reported false information to the police to mislead them with forgery allegations against Hines. He found Star's claim that he contacted police seeking clarification to be unavailing.

"Star sought out the assistance of the police, who are responsible for enforcing Virginia's criminal statutes not dispensing legal advice," Humphreys said. "The timing of Star's call to the police — just days after losing his case to Hines — also supports his intent to mislead the police."

Star's civil forgery lawsuit against Hines further supported that conclusion.

"Given all of these facts and circumstances, a reasonable finder of fact could conclude beyond a reasonable doubt that Star was guilty of knowingly making a false report of a crime with the intent to mislead," the judge wrote.

No injustice

Star maintained that the circuit court abused its discretion by enjoining his ability to file lawsuits. Although he failed to raise that issue, Star asked for consideration under the ends of justice exception to Rule 5A:18.

Humphreys said that exception was narrow and to be used sparingly where there was an error for which failure to apply the ends of justice provision would result in a grave injustice.

"Thus, the 'ends of justice' exception to Rule 5A:18 'requires proof of an error that was "clear, substantial[,] and material,"' he explained. "'[A] defendant must affirmatively show that a miscarriage of justice has occurred, not that a miscarriage might have occurred.'"

Only very limited circumstances meet the exception's high bar, such as convictions without a required element, based on a void sentence or of a non-offense, the judge said.

Here, Star failed to meet that high burden and the court refused to invoke the ends of justice exception.



Richmond business law firm's attorneys join Williams Mullen

By Jason Boleman

Ten attorneys from KVCF, a Richmond-based business law firm, have joined Williams Mullen as of Oct. 1.

Thomas Voekler, who was managing partner at KVCF and continues on as partner at Williams Mullen's Richmond office, said the move has been more than a decade in the making.



VOEKLER

"We talked to Williams Mullen prior to forming KVCF when I joined, and we reformulated KVCF back in 2012," Voekler told Virginia Lawyers Weekly.

In the years since, the entities chatted off and on, and Voekler said the firms began serious discussions about eight months ago to see if the move would make sense long term for the KVCF team.

Voekler said the move was presented as an opportunity to the team at KVCF to "transition" to Willaims Mullen. Given differing corporate structures, Voekler noted that the move was technically not a merger of the firms.

"We had the opportunity to present to everybody that wanted to an opportunity to transition over to Williams Mullen, which just meant that KVCF was not going to have any attorneys anymore and was going to terminate existence," Voekler said.

Joining Voekler in Williams Mullen's Richmond office are Richard "Chip" Cunningham Jr., S. Edward Flanagan, Cindy Heidel, Stephanie Karn, Kathy Lawrence, Mehanna Borostyan, Melanie J. Ramsey and John L. Watson.

T. Rhys James joined the firm's Virginia Beach office from KVCF, which Voekler noted was "a great opportunity for him to join an existing office there" after working in Virginia Beach for the past six years.

In sum, 15 people, including two paralegals and support staff, made the transition to Williams Mullen from KVCF.

Cunningham, Flanagan, Heidel, Karn, Lawrence and James also joined the firm as partners, while Borostyan, Ramsey and Watson joined as associates.

Williams Mullen first announced the addition of the KVCF attorneys in late August, with the attorneys officially joining Williams Mullen on Oct. 1. The date also marked the closure of KVCF, whose website currently redirects users to Williams Mullen.

For Voekler, part of the motivation to make the move was the ability to focus more on the practice of law rather than administrative functions, which he said took up 90% of his day at KVCF.

"That's just one of things that comes with managing a smaller firm," Voekler said. "So, for the partners especially, the



opportunity was to focus on what we do best, and Williams Mullen has a phenomenal team here to support us."

Voekler noted that clients responded positively to the move, adding that rates are staying the same and that clients receive the benefits of having more in-house capabilities at a larger firm.

"For our clients, what we get is a more diversified practice, we get a very similar mindset and being very business oriented," Voekler said.

He added that the move added ancillary practices the team needed, including complex tax representation and a deeper bench to support clients in complicated matters.

Voekler praised the Williams Mullen team for making the transition over easy and helping with the move.

"They helped us with things that we didn't even contemplate," Voekler said. "Moving an entire firm is quite an administrative undertaking and the amounts that they undertook on our behalf was incredible."

July bar exam passage rate just under 75%

By Jason Boleman

Just under three-quarters of candidates who sat for the Virginia Bar Exam in July passed the test, according to data from the Virginia Board of Bar Examiners.

Of the 582 persons who sat for the July exam, 391 passed and have completed all other admission requirements and are licensed to practice law by the Virginia Board of Bar Examiners as of Oct. 12. Another 45 persons passed the exam but were placed on the "blue list" due to outstanding requirements for admission to the bar.

This year's overall pass rate was 74.91%, down slightly from the 75.48% rate last July but generally flat based on data from recent years. With the exception of the July 2020 exam, which had the highest pass rate in 22 years, July bar exams since 2015 have seen overall pass rates between 71% and 75%, according to data available on the VBBE website.

Of first-time test takers, 77.24% passed the exam, down roughly two-and-a-half percentage points from July 2022.

Among Virginia's law schools, the University of Virginia led the way with a perfect overall pass rate for the second year in a row. The data from the VBBE did not list how many UVa. graduates sat for the exam. The College of William and Mary, George Mason University and Liberty University joined UVa. with pass rates of 90% or higher.

The bar exam results for Virginia law schools are below.

The admission ceremony for the newly licensed attorneys will be held on Dec. 6 and will be conducted by the Supreme Court of Virginia. The ceremony will be co-hosted by the Virginia State Bar Young Lawyers Conference at the Greater Richmond Convention Center.

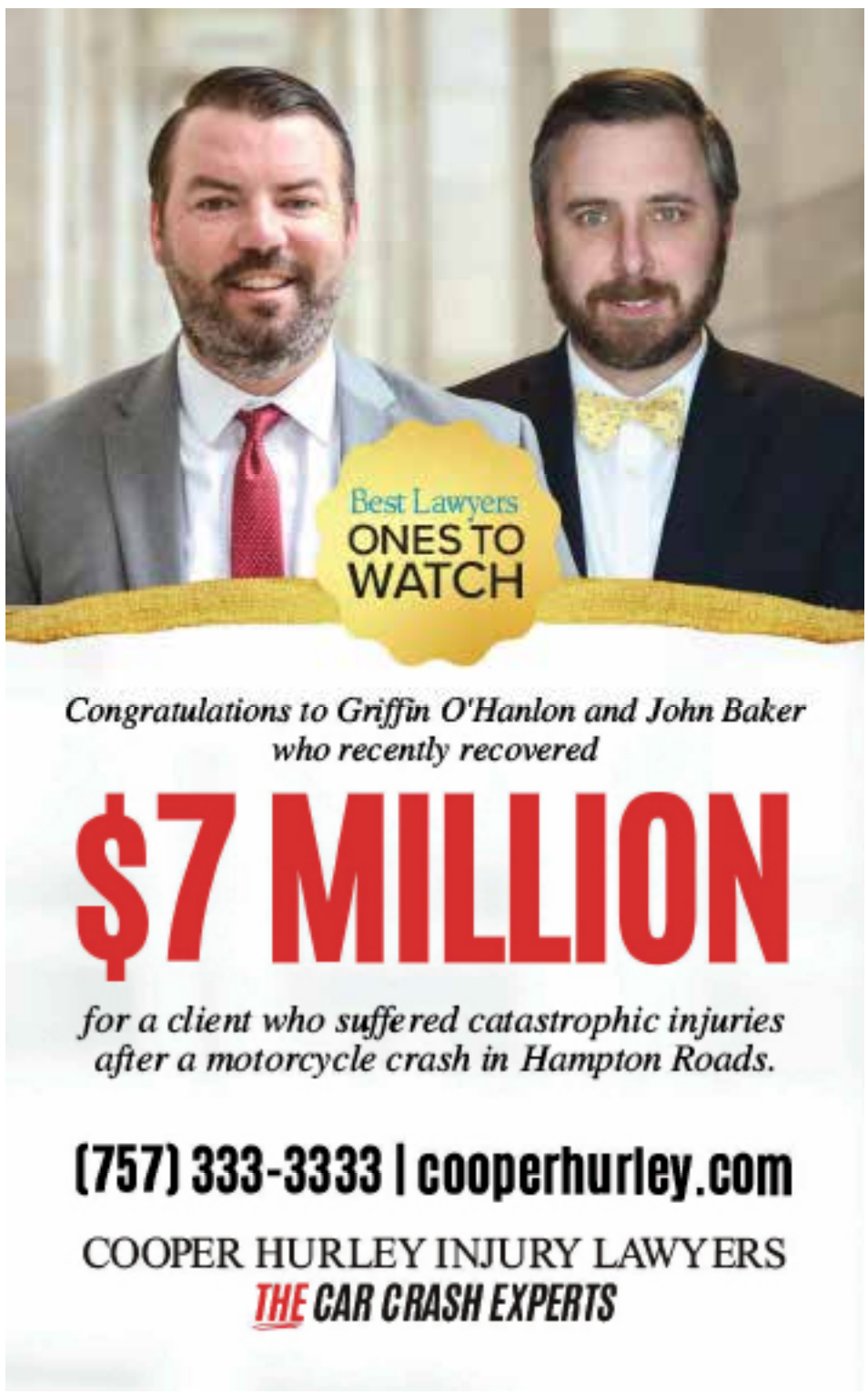
The February 2024 bar exam will be held on Feb. 27 and 28, 2024 at the Fredericksburg Expo & Conference Center in Fredericksburg. The filing deadline for the exam is Dec. 15.

The February 2023 exam had an overall pass rate of 63.27%, down over two percentage points from February 2022 but higher than the pass rates of every other February exam dating back to 1999.

	First-time Takers Percentage	Overall Percentage
All July 2023 Bar Exam Applicants	77.24%	74.91%
Virginia Law Schools:		
Appalachian School of Law	75.00%	76.92%
College of William and Mary	93.94%	94.03%
George Mason University	90.00%	90.70%
Liberty University	89.29%	90.00%
Regent University	85.19%	86.67%
University of Richmond	75.00%	73.33%
University of Virginia	100.00%	100.00%
Washington and Lee University	77.42%	77.42%

Source: Virginia Board of Bar Examiners

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News in Brief

VSB Disciplinary Action

Ordered and effective Oct. 5, 2023, pursuant to Rules of the Supreme Court Part Six, Section IV, Paragraph 13-24, the Virginia State Bar Disciplinary Board summarily suspended Kelley Elizabeth Clements Keller of Carlisle, Pennsylvania's license to practice law in the commonwealth of Virginia based on her suspension on May 1, 2023, lasting one year and one day, by the Supreme Court of Pennsylvania, No. 177 DB 2022. She was ordered to appear before the board on Oct. 27, 2023, to show cause why the same discipline that was imposed in Pennsylvania should not be imposed in Virginia.

**

Effective Oct. 10, 2023, the Third District, Section I Subcommittee of the Virginia State Bar issued a public reprimand without terms to Michael Ben Gunlicks of Richmond for violating the professional rules that govern diligence, communication and declining or terminating representation. This was an agreed disposition of misconduct charges.

Supreme Court reinstates ban on electronic skill games

(AP) A ban on electronic skill games in Virginia went back into effect Oct. 13 after the state Supreme Court vacated an injunction that allowed thousands of the betting machines to remain in gas stations, bars and convenience stores.

The injunction was issued by a lower court in an ongoing lawsuit that argues the ban is a violation of free speech. But a panel of three Supreme Court justices found that the suit is unlikely to succeed.

"Although at times it is difficult to determine where a particular activity falls on the speech/conduct continuum, no such difficulty is present when the activity being regulated is gambling. We long have viewed gambling as conduct that may be heavily regulated and even banned by the Commonwealth as an exercise of its police powers," the panel wrote in its order.

The games look and play like slot machines, though manufacturers say there is an element of skill involved.

The General Assembly passed legislation outlawing skill games in 2020, but former Gov. Ralph Northam delayed it for a year to help the state raise money for COVID-19 relief efforts.

The ban then took effect in 2021, but the lawsuit resulted in an injunction that allowed games already registered with the state's Alcoholic Beverage Control Authority to continue until the issue is resolved.

Lawsuit dropped after board adopts transgender policy

(AP) A Washington-based attorney confirmed Oct. 18 that his firm was dropping litigation it filed last month regarding Republican Virginia Gov. Glenn Youngkin's new policies on transgender students because the school board his firm sued has since adopted guidelines consistent with the governor's.

But the firm could potentially still bring other litigation in districts that are bucking the administration's guidance, said Charles Cooper of Cooper & Kirk, which is widely known for its work on conservative legal causes.

Attorneys from the firm represented two parents who sued the Virginia Beach School Board seeking the enforcement of Youngkin's policies, which roll back many accommodations for transgender students urged by the previous Democratic administration.

The policies have prompted an outcry from LGBTQ advocates and Democratic lawmakers, who say they codify discrimination and could harm an already vulnerable population. Republicans, religious groups and other advocates have praised the new policies, saying they protect the rights of parents in their children's education.

The lawsuit was filed after a proposed Virginia Beach school board resolution to adopt the policies was introduced and failed in August. But the school board has since reconsidered, adopting policies the district says are consistent with the governor's.

The plaintiffs voluntarily dismissed the case this week, Cooper said.

"We applaud the Virginia Beach School Board for its action last week in adopting transgender policies that protect the rights of all parents and students," the governor added in a statement.

The school district said in a statement provided by spokesperson David Schleck that the board's vote was not related to any impending lawsuit involving the governor's policies.

Under the new Youngkin administration guidelines, teachers and students have the right to refer to a transgender student by the name and pronouns associated with their sex assigned at birth. The policies also say that students who are minors must be referred to by the names and pronouns in their official records unless a parent approves the use of something else.

The policies call for school systems' sports teams to be organized by the sex assigned at birth, meaning that transgender girls would be unable to participate on girls' sports teams. And they say school divisions may not encourage teachers to conceal information about a student's gender from his or her parents.

The Virginia Beach School Board had "grappled" with the model policies since their approval in mid-July, trying to reach consensus on meeting the community's needs while following the administration's guidance, the district's statement said.

The revised regulations, which are "consistent" with the governor's, will go into effect at the start of the second quarter grading period, Nov. 8, according to the statement.

Youngkin and Republican Attorney General Jason Miyares have said school boards must adopt the new rules. But the state law that required the administration to proffer the guidelines is silent on enforcement.

The model policies developed by Democratic Gov. Ralph Northam's administration were greeted favorably by advocates for transgender students, but many school boards did not adopt them. At the time, the Department of Education told school districts failing to comply that they assumed all legal risks for noncompliance.

As under the Northam administration, school boards across the state have taken varied approaches to Youngkin's guidance. Some have adopted the policies while others, particularly in more liberal jurisdictions, have not.

Cooper said he couldn't say with certainty that his law firm would file suit elsewhere. But he said he suspected there would be other schools boards that are "more dug in on revisiting the model policies" and that his firm would be ready to assist.

Candidates face questions about residency requirements

(AP) Virginia state lawmakers are required to live in the district they represent, as well as in any district they might be seeking to represent. If they move out of their district, the state constitution says they are out of office.

Those requirements, combined with political maps that took effect this year, have created a headache for some candidates.

At least two sitting lawmakers seeking reelection in new districts say they are living either with or in the home of a relative rather than with their immediate family, in order to meet the residency requirements.

But for one of those two, Democratic Del. C.E. "Cliff" Hayes, a private investigative company's findings that were provided to The Associated Press by the House Republican caucus raise questions about that claim.

Hayes said Oct. 13 that he's following the rules. He reported to state officials earlier this year that he was living in a Chesapeake home that's in both the 77th District, which he currently represents, and the new 91st district, which he's running in this fall.

In an interview, Hayes acknowledged that he owns another property, where he said his wife lives and he sometimes spends time. But he said he is living with his brother-in-law in the home indicated on his paperwork, which he said had long been in his wife's family and used to be a rental property.

The report, dated Sept. 30, says a private investigations company with an active state license was hired to look into an allegation that Hayes was not living at that address.

According to the report, three vehicles registered to Hayes have been "routinely parked" at a different home, the one where Hayes says his wife lives. That home is also in the 91st district but not the 77th, according to a publicly available state tool that shows which political districts addresses fall into.

A car registered to Hayes' wife has also been seen at the home, the report said. None of those vehicles were ever seen at the address Hayes listed on his state paperwork.

A range of other vehicles were, however, seen at the house listed on his paperwork, according to the report, which said surveillance was conducted in the month of September "at various hours of the day and night."

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News in Brief

Judicial Council, Committee on District Courts recommend additional judgeships around the commonwealth

The Judicial Council has recommended the creation of four additional circuit judgeships.

At its Oct. 17 meeting, the council recommended creating new judgeships in the following circuits:

- 1st Judicial Circuit: Chesapeake
- 9th Judicial Circuit: Charles City, Gloucester, James City County/Williamsburg, King William, King and Queen, Mathews, Middlesex, New Kent, Williamsburg/James City County and York County Poquoson
- 15th Judicial Circuit: Caroline, Essex, Fredericksburg, Hanover, King George, Lancaster, Northumberland, Richmond County, Spotsylvania, Stafford and Westmoreland
- 25th Judicial Circuit: Alleghany, Augusta, Bath, Botetourt, Buena Vista, Craig, Highland, Rockbridge, Staunton and Waynesboro

At its Oct. 19 meeting, the Committee on District Courts recommended the creation of an additional judgeship in each of the following districts:

- 20th Judicial District Juvenile & Domestic Relations District Court
- 31st Judicial District Juvenile & Domestic Relations Court

Finally, the Committee on District Courts concluded on Oct. 19 that there is a necessity to fill the following vacancies:

- 20th Judicial District General District Court: retirement of Judge Deborah C. Welsh on June 30, 2024
- 3rd Judicial District Juvenile & Domestic Relations District Court: Retirement of Judge Alotha C Willis on Jan. 1, 2024
- 16th Judicial District Juvenile & Domestic Relations Court: Retirement of Judge Frank Somerville on June 30, 2024
- 19th Judicial District Juvenile & Domestic Relations District Court: Retirement of Judge Gayl Y. Branum Carr on July 31, 2024
- 20th Judicial District Juvenile & Domestic Relations District Court: Retirement of Judge Avelina S Jacob on Dec. 31, 2023
- 27th Judicial District Juvenile and Domestic Relations District Court Retirement of Judge Robert C. Viar Jr. on June 30, 2023.

Members of the Judicial Council of Virginia can be found on the court's website, https://www.vacourts.gov/courtadmin/judpolicies/jc_members.pdf

Maps of Virginia's judicial circuits and districts also can be found on the court's website, https://www.vacourts.gov/courts/maps/home.html

Hayes said he and his wife have five vehicles, and he sometimes drives different ones.

"I didn't want to abandon my constituents, so I moved into our rental property. We ended the lease," he said.

In a statement provided by a House Democratic caucus spokeswoman, he added: "As my constituents well know, I have been proud to represent this community that I have lived and worked in for my entire life. Any allegations to suggest otherwise are unfounded, partisan musings from a party attempting to distract from their own wrongdoings,"

Hayes is running against Republican Elijah Colon, who has not reported raising any funds for his campaign. The 91st District is strongly Democratic and includes parts of Chesapeake and Portsmouth.

The once-a-decade redistricting process that adjusts each state's political maps to account for population shifts was handled this year by a pair of independent experts, with sign-off granted by the Supreme Court of Virginia.

The maps were drawn without regard to protecting incumbents, which left many Assembly members doubled or tripled up in districts. Some opted to retire, challenge each other in primaries, or move.

The state constitution is clear that a senator or delegate who moves from the district to which they were elected "shall thereby vacate his office." Virginia's part-time General Assembly is not actively meeting, but members are paid on a monthly basis and receive health care and other benefits.

Tim Anderson, an attorney and former House member who resigned this year to run in what was ultimately an unsuccessful state Senate primary, said his benefits ended as soon as he stepped down.

Delegates are paid their $17,640 annual salary throughout the year, Anderson said. Members are also eligible for a "phenomenal" health care plan, state retirement benefits, an office allowance and a legislative assistant, who also receives a salary and benefits, he added.

Another delegate, Nadarius Clark, resigned earlier this year to run in a new district.

Nick Freitas, the GOP nominee in a Culpeper County-area seat that's strongly Republican, has also faced questions about his residency. After his chief of staff initially declined to answer a specific question from radio station WMRA about whether Freitas had moved out of his home, Freitas told the Culpeper Star-Exponent that he had and was living at a home owned by his mother. His paperwork filed with the state shows that home is in his current and would-be future districts.

"None of this is ideal, but the bottom line, I had the chance to continue to represent the district I have been representing for eight years," Freitas, who couldn't be reached Oct. 13, told the newspaper.

Other concerns have flared this cycle.

Tim Griffin, the Republican nominee in a deeply conservative Lynchburg-area district, has faced questions about where he lives since his party's nomination contest. He recently refused to divulge his address to The Daily Progress, and Cardinal News reported that a group of concerned Republicans had hired a private investigator to look into the situation.

His campaign didn't respond to an emailed interview request Oct. 13.

Former speaker will seek congressional seat

(AP) Former Virginia House Speaker Eileen Filler-Corn has decided against a bid for governor in 2025 and will instead run next year to represent the competitive Northern Virginia congressional seat being vacated by a fellow Democrat, U.S. Rep. Jennifer Wexton.

Filler-Corn, who has served in the Virginia General Assembly since 2010 and was the first woman and first Jewish person to hold the post of speaker, discussed her decision with The Associated Press on Oct. 17 before filing official paperwork.

She made the case that she had overseen a period of tremendous progress in Richmond and said she wants to bring her legislative expertise to a "broken" Washington where a speaker-less GOP House majority was "truly taking us backward, making America weaker."

"I have a record for getting the job done, protecting Virginians from all sorts of Republican chaos and extremists," Filler-Corn said.

Filler-Corn's move leaves two other presumptive candidates, U.S. Rep. Abigail Spanberger and Richmond Mayor Levar Stoney, in the 2025 Democratic gubernatorial primary field that could still grow.

Filler-Corn, who confirmed in March she was exploring a bid for governor, said she began to be approached at political events about the possibility of a run in the 10th District after Wexton announced last month she would not seek reelection in 2024.

Wexton, a well-regarded former prosecutor and state legislator whom Filler-Corn said is a personal friend, disclosed in April that she had been diagnosed with Parkinson's disease. Wexton said at the time that she hoped to keep serving for years to come, but she then shared in September that she had received a modified diagnosis of a more severe form of the disease. Wexton has said she will serve out the remainder of her term.

"This is an unfair, devastating reality that she now has to navigate," Filler-Corn said, adding that she had discussed her plans with Wexton.

The open seat dynamic in the Loudoun County-centered 10th District — Filler-Corn said she lives just outside it — could set up a competitive race with implications for party control of the U.S. House. Wexton ousted Republican Rep. Barbara Comstock in 2018, and the district became slightly more conservative in the last redistricting process, according to an analysis by the nonpartisan Virginia Public Access Project.

Filler-Corn is a strong fundraiser who led the Democratic House caucus during the national scandal and party strife that exploded after the 2019 discovery of a racist photo in former Gov. Ralph Northam's medical school yearbook.

While representing her Fairfax County-based district, she helped the party flip control of the House and Senate later that year and took over the speakership in 2020. Democrats used two years in full control of state government to act on reams of progressive priorities, expanding voting rights, rolling back limits on abortion, passing greater restrictions on firearms, legalizing marijuana and ending the death penalty.

But the party lost its House majority in the 2021 election cycle, and Filler-Corn — who works outside the legislature in her own strategic consulting business — was ousted as the Democratic caucus's leader.

In the interview, Filler-Corn, 59, said she thinks her legislative record will resonate with voters, and she pledged to be a strong voice for the Jewish community in Congress.

The commonwealth prohibits its governors from serving consecutive terms. That's led to intense speculation about Republican Gov. Glenn Youngkin's next political move, as well as early jockeying in effective shadow campaigns for the office.

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Verdicts & Settlements

Wrongful Death

Officers tased, shot man during warrantless search

$1,750,000 settlement

Type of action: Wrongful death
Injuries alleged: Death
Name of case: *Sylvia H. Berry, Administrator of the Estate of Henry Kistler Berry, III, Deceased v. Albin T. Pearson and Dwight A. Pitterson*
Court: Newport News Circuit Court
Case no.: CL2105711B-00
Name of judge or mediator: Judge Thomas S. Shadrick (Ret.)
Date resolved: 1/24/2023
Special damages: $6,879 in funeral expenses
Demand: $15,000,000
Verdict or settlement: Settlement
Amount: $1,750,000
Attorneys for plaintiff: John R. Fletcher and Scott J. Flax, Norfolk; Michael T. AtLee and Richard Y. AtLee, Newport News

Description of case: Plaintiff's decedent was a 43-year-old, unemployed single father, who had recently lost custody of his 9-year-old son because of paranoid and delusional behavior which had developed over several months preceding the incident giving rise to this cause of action.

Defendants Calvin T. Pearson and Dwight A. Pitterson were uniformed police officers employed by the city of Newport News. Decedent called 911 to report what he believed was evidence of physical abuse of his son which he observed while FaceTiming with his son earlier on the day of the incident. After Pitterson called the child's mother and received assurances that decedent's son was alright and that the decedent was in mental health crisis, Pitterson and Pearson responded to the decedent's home, viewed the FaceTime video, and told the decedent that he knew the boy was unharmed and with his mother, and admonished him to stop calling 911 about his son.


FLETCHER


FLAX

About four hours later, the decedent called 911 again, requesting that officers other than Pearson and Pitterson respond to his residence to view the same FaceTime video. Upon learning this, Pearson, the shift sergeant, assembled a group of three other officers, including Pitterson, in the parking lot of the decedent's condominium residence with the expressed intent of arresting the decedent for falsely summoning law enforcement. Pearson made no effort to obtain an arrest warrant for this alleged misdemeanor, which was not committed in his presence.

The officers knocked on the decedent's door, and when the decedent opened the door and asked the officers if they would look at the FaceTime video depicting the injury to his son, one officer asked him to step outside. When the decedent refused to step outside, the officers barged into his condominium as the decedent was trying to close the door. The officers had no search warrant permitting entry into decedent's home without his consent, nor did there exist exigent circumstances for doing so.

While attempting to apprehend the decedent and restrain him, the officers used multiple tactics, including the deployment of a Taser by Pitterson. During the course of tasing the decedent, Pitterson misdeployed the probe mode of the taser at the ineffectual distance of less than one foot, failing to disable the decedent, and then deployed the second set of probes, inadvertently tasing Pearson and another officer, who were restraining the decedent as he sat on the floor of his living room with his back against the wall. Within seconds of being tased, Pearson, who was on the ground next to the decedent, pulled his service revolver and fired one shot into the decedent's back which passed through his heart and exited his left chest. The decedent died within minutes.

The plaintiff alleged that the officers' attempt to arrest the decedent, as well as their entry into his condominium, were illegal, that all subsequent efforts to physically restrain the decedent were batteries, and that the officers were grossly negligent in the use and deployment of the taser, the use of deadly force and the use of excessive force throughout the course of this arrest.

The defendant officers claimed that they in good faith believed decedent was committing a misdemeanor in their presence when he came to the door with a phone in his hand, that their entry into his home and their attempts to arrest him were therefore legal and that their actions in apprehending and restraining the decedent, and the ultimate use of deadly force, were reasonable and necessary under the circumstances.

Plaintiff's counsel John R. Fletcher provided case information.
[023-T-111]

Wrongful Death

Patient died after Coumadin dosage was not adjusted

$550,000 settlement

Type of action: Wrongful death
Injuries alleged: Death
Name of judge or mediator: Judge Thomas S. Shadrick (Ret.)
Date resolved: 6/28/2023
Special damages: $5,000 funeral bill
Demand: $1,500,000
Offer: $550,000
Verdict or settlement: Settlement
Amount: $550,000
Attorney for plaintiff: Carlton F. Bennett, Virginia Beach

Description of case: Doe, was admitted to Woe Assisted Care Center in March 2018 for rehabilitation following above the knee bilateral amputations. Doe, age 60, had multiple comorbidities including chronic kidney disease, cardiac valve replacement and diabetes. She was progressing with rehab with her prosthetic legs.


BENNETT

Doe had been placed on anti-coagulant therapy (Coumadin). For her safety, her Coumadin had to be monitored; her labs were frequently collected, her INR and PT levels assessed and the Coumadin dosage adjusted to prevent elevation of the INR and PT beyond a safe therapeutic range.

On Nov. 7, 2018, pursuant to the routine assessment of these levels, blood was drawn and submitted to the lab by Woe's staff for analysis. The routine is that the lab would notify Woe's staff of the levels, and the staff would then notify the Coumadin Clinic, and then receive orders as appropriate for changing the Coumadin dosage. On Nov. 8, 2018, a nurse at the facility was notified by the lab that Doe had an INR value greater than 9 and a PT value greater than 83, which are critical values requiring immediate attention and adjustment of her Coumadin dosage. However, the night nurse who took the call failed to record the lab results in Doe's chart and failed to report it to any of the other staff of Woe and failed to document it in any manner. Woe continued to administer Coumadin on Nov. 8, 9 and 10. On the morning of Nov. 11, 2018, Doe appeared ill, lethargic and her speech was slurred. She was sent to the emergency room, but became unresponsive in the ambulance and was pronounced dead shortly after her arrival at the hospital.

Carlton F. Bennett, counsel for the plaintiff, provided case information.
[023-T-104]

Personal Injury

Tractor-trailer T-boned vehicle, injuring passenger

$285,000 settlement

Type of action: Personal injury
Injuries alleged: Right arm displaced spiral fracture
Name of case: *Jackson v. Heflin*
Date resolved: 3/16/2023
Special damages: $63,893.94
Demand: $300,000
Offer: $285,000
Verdict or settlement: Settlement
Amount: $285,000
Attorney for plaintiff: Emily E. Smith, Fredericksburg

Description of case: On May 6, 2022, the plaintiff was a passenger in a vehicle that took an improper left hand turn on a flashing yellow arrow in front of an oncoming tractor-trailer, causing the tractor-trailer to T-bone the plaintiff's host vehicle.

As a result of the collision, the plaintiff sustained a displaced spiral fracture in her right arm that required surgical intervention in the form of an open reduction and internal fixation, or ORIF.

The total specials were $63,893.94. There was a $300,000 per person liability policy with multiple claimants. Ultimately, a settlement of $285,000 was reached, which left $15,000 in remaining coverage for the other injured individuals.

Emily E. Smith, counsel for the plaintiff, provided case information.
[023-T-102]



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The Week's Opinions

■ U.S. District Court – Eastern District

Administrative

Applicant failed to raise argument

Where a woman challenging the denial of disability insurance benefits argued the magistrate judge erred in recommending that the court grant the defendant's motion for summary judgment, but her argument why the magistrate judge erred was not presented to the magistrate judge, she forfeited the right to de novo review on this issue.

Background

Leslie G. brought this action under 42 U.S.C. § 405(g) seeking judicial review of the final decision of the Social Security Commissioner denying her claim for a period of disability and disability insurance benefits under the Social Security Act. The magistrate judge recommended that plaintiff's motion for summary judgment be denied and that the defendant's motion for summary judgment be granted.

Plaintiff makes one objection, in which she contends that the report and recommendation should be rejected based on intervening authority from the Fourth Circuit in Shelley C. v. Comm'r, 61 F.4th 341 (4th Cir. 2023). The court understands plaintiff's argument to be that, under Shelley C., the administrative law judge erred in determining that plaintiff had a "moderate" impairment in concentrating, persisting or maintaining pace because, in doing so, the administrative law judge improperly relied on a lack of objective evidence regarding plaintiff's bipolar disorder and anxiety disorder.

Analysis

This issue was never raised before the magistrate judge. Plaintiff's appeal before the magistrate judge focused exclusively on errors in the administrative law judge's residual functional capacity determination at step four of the sequential inquiry and the administrative law judge's consideration of vocational expert testimony at step five.

Indeed, plaintiff's arguments took the finding of "moderate" impairment in concentrating, persisting or maintaining pace as a given and proceeded to argue other errors "despite" that finding. In other words, before the magistrate judge, plaintiff did not challenge the administrative law judge's determination of moderate limitations in concentrating, persisting or maintaining pace at step three.

Accordingly, neither the defendant nor the magistrate judge addressed this issue. The court notes that, although Shelley C. may provide new authority on this issue, the issue itself was available to be raised had the plaintiff chosen to do so. By failing to raise the issue that is now the basis of her objection upon initial review, the plaintiff has forfeited the right to de novo review on this issue. Instead, the court reviews plaintiff's objection for clear error. Finding none, the court overrules plaintiff's objection.

Report and recommendation adopted. Plaintiff's objection to report and recommendation overruled. Plaintiff's motion for summary judgment denied. Defendant's motion for summary judgment granted.

Leslie G v. Kijakazi, Case No. 2:22-cv-369, Sept. 29, 2023. EDVA at Norfolk (Allen). VLW 023-3-627. 4 pp.

Consumer Protection

Borrowers allege RICO conspiracy

Where borrowers alleged a company was "intimately entwined" with a conspiracy to commit a substantive offense under the Racketeer Influence and Corrupt Organizations, or RICO, Act, and that its sole reason for existence was to contribute to the conspiracy's success, they plausibly alleged a RICO conspiracy.

Background

This case comes out of a long series of litigation concerning Matt Martorello, who allegedly engaged in a so-called "rent-a-tribe" online lending operation to make usurious short-term loans with interest rates in the triple digits. Breakwater Holdings LLC was established under the laws of the Cook Islands and, according to the complaint, is one of several entities allegedly entangled within an elaborate corporate racketeering enterprise established by Martorello. Breakwater has filed a motion to dismiss.

RICO § 1962(c)

Plaintiffs allege that Breakwater violated RICO through the "collection of unlawful debt." To establish a claim under 18 U.S.C. § 1962(c), plaintiffs must show: "Defendants (1) conducted the affairs of an enterprise (2) through the collection of unlawful debt (3) while employed by or associated with (4) the enterprise engaged in, or the activities of which affect, interstate or foreign commerce."

Breakwater first argues that Fed. R. Civ. P. 9(b) governs the pleading standard for RICO claims and, under this heightened standard, plaintiffs have not pleaded the RICO claims with enough specificity. Rule 9(b)'s standard applies only to RICO claims sounding in fraud. Here, RICO defines "unlawful debt" in terms of "gambling activity" or "lending money. . at a rate usurious under State or Federal law," not in terms of fraud. Therefore, the Rule 9(b) standard does not apply.

Second, Breakwater argues that "Plaintiffs have failed to plausibly allege that their purported injuries were proximately caused by any conduct of Breakwater." When evaluating RICO proximate causation, "the central question is whether the alleged violation led directly to the plaintiff's injuries."

Here, plaintiffs are the "direct victims" of the RICO enterprise. By making "payment[s] of unlawful and usurious rates of interest on loans made by the Enterprise," plaintiffs suffered a direct, material economic injury. Breakwater's alleged act of concealing and distributing the profits from the scheme is logically related to plaintiffs' injuries.

Breakwater next contends that it did not "conduct or participate" in the affairs of the enterprise and that RICO cannot be applied to conduct on which Breakwater engaged "abroad" (outside of the United States) because of "the presumption against extraterritoriality." First, the circumstances surrounding plaintiffs' alleged injuries support a finding that they were domestic in nature. However, because the complaint does not allege that Breakwater directed, directly or indirectly, the RICO enterprise's affairs as is required for liability under § 1962(c), this claim is dismissed, with leave to amend.

RICO § 1962(d)

"[T]o prove a RICO conspiracy, the Plaintiffs must establish: (1) that two or more people agreed to commit a substantive RICO offense; and (2) that the defendant knew of and agreed to the overall objective of the RICO offense." The court already has found on multiple occasions that plaintiffs have adequately alleged "that two or more people agreed to commit a substantive RICO offense." The plaintiffs adequately allege that, from its very inception, Breakwater was intimately entwined with the conspiracy and its sole reason for existence was to contribute to the conspiracy's success.

Virginia usury laws

Breakwater argues that it cannot be held liable because it never "lent money or received repayment in connection with any loan" and because it "is not a party to any of the loan agreements." These arguments fail because plaintiffs have properly alleged that Breakwater is an entity "receiving" usurious payments. It is immaterial that Breakwater itself did not collect the loans as long as it eventually "received the payments, even if not directly."

Unjust enrichment

Breakwater argues that "there are no facts demonstrating that any conduct by Breakwater is a but-for or proximate cause of Plaintiffs' alleged injuries." However, neither but-for nor proximate cause is one of the elements of a claim for unjust enrichment under Virginia law. Even if it was an element or lack thereof was a defense, the complaint adequately alleges that Breakwater's actions caused plaintiffs' injuries.

Civil Conspiracy

Plaintiffs have properly pleaded that there was an agreement between two or more persons for the purpose of accomplishing an unlawful purpose (the collection of unlawful debts). In addition, as explained above, plaintiffs suffered economic damage as a result of the enterprise.

Breakwater's motion to dismiss granted in part, denied in part.

Galloway v. Martorello, Case No. 3:19-cv-314, Oct. 5, 2023. EDVA at Richmond (Payne). VLW 023-3-641. 29 pp.

Consumer Protection

Servicer sued for allegedly misapplying prepayments

Where a loan servicer allegedly misapplied prepayments such that less of the amounts were applied to principal and more was applied to interest calculated using an unduly high principal amount, the claims under the West Virginia Consumer Credit and Protection Act, or WVCCPA, survived the motion to dismiss.

Background

On Sept. 20, 2022, Gary and Lisa Tederick filed putative class action complaint alleging LoanCare LLC violated the WVCCPA, benefited from unjust enrichment and converted their funds. LoanCare has filed a motion to dismiss.

Pre-suit notice

LoanCare contends that plaintiffs' failure to comply with the statutory pre-suit notice requirement bars plaintiffs' WVCCPA claims. Plaintiffs counter the pre-suit notice requirement is "inconsistent with the Federal Rules of Civil Procedure and is displaced by those Rules in federal court."

The text of § 46A-5-108(a) states "An action may not be brought … until 45 days after the consumer has informed the … debt collector … of the alleged violation and the factual basis for the violation." That kind of mandatory prerequisite "conflicts with Rule 3 by adding additional, procedural steps for commencing a suit beyond those that Rule 3 contemplates." Because the pre-suit notice requirement of § 46A-5-108(a) conflicts with Rule 3 and Rule 3 is valid, Rule 3 controls. Failure to plead pre-suit notice does not mandate dismissal of Count One.

Debt collection

LoanCare next argues the Tedericks do not allege unfair "debt collection" practices covered by the WVCCPA, but rather "loan servicing" activities that are not covered by the statue. The court finds that plaintiffs allege sufficient facts to demonstrate LoanCare engaged in "debt collection" and qualifies as a "debt collector."

The WVCCPA's definition of "debt collection" is broad, as it encompasses "any action … in the collection of claims owed or due." Because LoanCare's application of payments affects the amount owed on the loan and the amounts the Tedericks paid to LoanCare, LoanCare's activity falls within "any action … in the collection of claims owed." At a minimum, the issue of whether LoanCare acted as a "debt collector" in this case is likely best resolved after further fact development, rather than at the motion to dismiss stage.

W. Va. Code § 46A-2-127

LoanCare argues the Tedericks fail to allege sufficient facts to support their claims under West Virginia Code § 46A-2-127 regarding alleged fraudulent, deceptive or misleading representations. LoanCare asserts plaintiffs must meet the heightened pleading standard under Rule 9(b) but fail to do so. The court agrees. Plaintiffs fail to lay out the "who, what, where, when, and why" of the alleged fraud.

W. Va. Code § 46A-2-128

To the extent the Tedericks allege violations of § 46A-2-128 involving "fraudulent, deceptive or misleading representations," their claim fails to satisfy Rule 9(b) for the

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same reasons as their claim under § 46A-2-127. Yet plaintiffs' complaint contains sufficient facts to state a claim under § 46A-2-128 for unfair or unconscionable conduct.

Unjust enrichment

Plaintiffs allege LoanCare benefited from unjust enrichment at their expense through the alleged misapplication of prepayments. Because "an implied contract and an express one covering the identical subject matter cannot exist at the same time," there is no implied contract over application of loan payments, and no claim for unjust enrichment can exist.

Conversion

Plaintiffs allege LoanCare had "an obligation to return or otherwise treat in a particular manner" their mortgage payments, but after they sent payment to LoanCare, LoanCare allegedly misapplied the payment such that less of the prepayment amounts were applied to principal and more was applied to interest calculated using an unduly high principal amount. That money paid in allegedly "owed" interest is a sum sufficiently capable of identification for the purpose of stating a claim upon which relief can be granted.

LoanCare argues the Tedericks have no right of immediate possession because they voluntarily submitted payment to LoanCare, thereby relinquishing ownership of the funds. Although West Virginia has not clearly answered whether a voluntary payment negates a claim of conversion over that money, the court is not convinced it does.

Indispensable parties

LoanCare avers the putative class claims implicate every LoanCare client and investor, all servicers and subservicers involved with every class member's loans and Fannie Mae as necessary parties. LoanCare fails to show why the court "cannot afford complete relief among existing parties" without joining the parties it proposes are necessary. And none of the "interested parties" LoanCare identifies or suggests to exist have sought to join this suit or otherwise "claim[ed] an interest relating to the subject of the action."

Defendant's motion to dismiss granted in part, denied in part.

Tederick v. LoanCare LLC, Case No. 2:22-cv-394, Oct. 2, 2023. EDVA at Norfolk (Jackson). VLW 023-3-637. 38 pp.

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Employment

Sheriff sued for allegedly violating deputy's rights

Where a reasonable jury could find that a deputy sheriff in the Virginia Beach Sheriff's Office was terminated for speech he made as a private citizen, the sheriff's motion for summary judgment was denied.

Background

William D. Fowler was hired as a Deputy Sheriff in the Virginia Beach Sheriff's Office, or VBSO, in 2007. Kenneth W. Stolle was elected Sheriff of the City of Virginia Beach in November 2009, and was reelected in 2013, 2017 and 2021. Fowler sued Stolle, asserting claims under the U.S. Constitution and Virginia Constitution. Stolle has filed a motion for summary judgment.

Speech claim

To make out a speech claim, the plaintiff must show "(1) … the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) … the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) … the employee's speech was a substantial factor in the employee's termination decision." By failing to address each statement or type of statement asserted by the plaintiff, the defendant has failed to show that he is entitled to summary judgment on the plaintiff's speech claim.

Nonetheless, even if the defendant had comprehensively addressed the plaintiff's speech claim, the record shows that the claim survives summary judgment. The defendant has not shown that any of the plaintiff's speech — his conversation(s) with the defendant and other superiors at the VBSO, his conversations with his subordinates, his statements on social media and his appearances in political advertisements for Delegate Convirs-Fowler — was made pursuant to his "official responsibilities." Thus, the defendant has failed to show that the plaintiff did not speak as a private citizen.

Moving on to the second factor, the plaintiff's speech was clearly political in nature, and to some degree it may have had "particular value to the public" in light of his employment status. Regarding the third factor, the defendant testified in his deposition that the plaintiff "talking about politics at work" was "one of the reasons" the defendant considered when deciding "whether to keep him or not."

Association claim

In Elrod v. Burns and Branti v. Finkel, the Supreme Court recognized that public employees may be fired for political reasons if "the hiring authority can demonstrate that [political] party affiliation is an appropriate requirement for the effective performance of the public office involved." The Fourth Circuit has applied the Elrod-Branti exception in a handful of cases, some of which deal with very similar circumstances to these: a sheriff firing a subordinate employee for (allegedly) political reasons. When these cases are viewed together, the contours of the Elrod-Branti exception in cases involving deputy sheriffs are sufficiently clear: deputy sheriffs primarily engaged in traditional law enforcement activities fall within the exception, and deputy sheriffs primarily serving as jailers do not.

Whether the plaintiff's role as a deputy sheriff was more like that of a jailer or more like a traditional law enforcement officer is not entirely clear on the present record. Several material facts are disputed, and the undisputed facts tend to favor the plaintiff. For these reasons, the defendant has failed to show that he is entitled to summary judgment.

Qualified immunity

Defendant argues that qualified immunity applies because a sheriff "in Sheriff Stolle's position in late 2021 could have reasonably concluded that plaintiff more closely aligned with a law enforcement deputy than with a custodial deputy, thus supporting his decision not to reappoint plaintiff." The court is not so sure.

Two prior Fourth Circuit decisions have established a zone in which firing a deputy sheriff for political reasons was clearly established as unconstitutional: where the deputy sheriff's job duties resemble those of a jailer. On this record, there are disputes of material fact exist regarding the duties of the plaintiff's former position.

If these factual disputes are resolved in favor of the plaintiff, the record may show that the plaintiff's asserted rights were "clearly established" "at the appropriate level of specificity." Thus, these factual disputes preclude summary judgment on the issue of qualified immunity.

Defendant's motion for summary judgment denied.

Fowler v. Stolle, Case No. 2:22-cv-504, Oct. 2, 2023. EDVA at Norfolk (Walker). VLW 023-3-638. 44 pp.

Employment Discrimination

Employee's ADA claims are dismissed

Where an employee alleged her former employer violated the Americans with Disabilities Act, or ADA, but she was not disabled, failed to exhaust her retaliation claim and her remaining ADA claims were not plausible, her suit was dismissed.

Background

Danielle Taylor alleges six counts against Revature LLC, her former employer, pursuant to the ADA: (1) discriminatory discharge; (2) failure to accommodate; (3) retaliation; (4) hostile environment; (5) confidentiality and (6) an interference. Defendant has filed a motion to dismiss.

Initial matters

Defendants argue that plaintiff's additional amendment to add a seventh claim should be stricken because she failed to obtain defendant's consent and the court did not grant leave to amend. The court agrees. As plaintiff has not received leave of court to file an amendment and defendant did not consent, plaintiff's amendment is improper and will be stricken. Plaintiff also did not obtain leave of court to file her second surreply as required by the local rules. As such, the court grants defendant's motion to strike the second surreply.

Plaintiff asks to strike defendant's motion to dismiss the interference claim and motion to strike. Even if a motion to strike could be addressed to a motion to dismiss or motion to strike, plaintiff has not made a showing that the facts or issues raised in those motions are "outside the issues in the case, prejudicial to Plaintiff, or otherwise inappropriate."

Analysis

For an ADA claim to survive a motion to dismiss, plaintiff must adequately allege that she is a "qualified individual with a disability." Here, plaintiff has failed to allege sufficient facts to establish that she has an actual disability. Plaintiff has failed to allege any facts identifying a physical or mental impairment in her complaint or provide any medical documentation of a physical or mental impairment.

Plaintiff asserts in her opposition that her ADA claims should still survive because she adequately pleaded that she had a "record of" a disability and that she was "regarded as" disabled. Plaintiff has failed to allege sufficient facts to support that she had a record of disability.

Plaintiff's "regarded as" claim likewise fails. Plaintiff's complaint does not allege that defendant viewed plaintiff as unable to work in the information technology industry generally. Additionally, plaintiff's complaint does not allege that defendant regarded plaintiff as "substantially limited in her ability to perform her specific job" due to her need to use written speech over verbal communication. The allegation that defendant engaged in discussions regarding plaintiff's claimed medical challenges does not lead to the plausible inference that defendant perceived her as disabled.

Given that plaintiff has failed to allege sufficient facts that she is a qualified individual with a disability under the ADA, the court will dismiss Count One (discriminatory discharge claim); Count Two (failure to accommodate claim) and Count Four (hostile work environment) claims.

The court also dismisses Count Three (retaliation) because plaintiff failed to exhaust this claim. In her EEOC charge, plaintiff failed to select the box for retaliation. Additionally, in the narrative section, she described her claims specifically as "hostile environment and failure to provide a reasonable accommodation," but did not mention retaliation. Her retaliation claim also fails on the merits because there are either no adverse employment actions or causal connection.

The court also dismisses Count Five (confidentiality) because plaintiff has not pleaded that she provided any of the kinds of medical information to defendant that is covered by the statute, and does not allege that defendant disclosed any such information. Finally Count Six (interference) alleges that defendant's written policy dissuades employees from participating in the ADA process because it says the company "does not have to give you an accommodation" which she found intimidating. Because defendant's accommodation policy is not contrary to the ADA, this claim is dismissed.

Defendant's motion to strike granted. Defendant's motions to dismiss granted. Plaintiff's motion to strike back denied.

Taylor v. Revature LLC, Case No. 1:22-cv-1153, Sept. 28, 2023. EDVA at Alexandria (Alston). VLW 023-3-623. 23 pp.

Insurance

Title insurer liable for covered loss

Where an insured alleged an insurer breached the title policy by failing to pay for covered losses, and at least one of the "Covered Risks" was triggered by the underlying facts and not precluded by an exclusion, the insured's motion for summary judgment was granted.

Background

This is a breach of contract case arising from a title insurance policy held by plaintiff Landfall Trust LLC and issued by defendant Fidelity National Title Insurance Company. Plaintiff alleges that defendant breached the policy contract in part by failing to compensate plaintiff for losses allegedly covered under the policy.

The case is presently before the court on the parties' renewed cross-motions for summary judgment. The overarching issue to be decided by this court is whether plaintiff has established as matter of law that defendant caused the occurrence of one of the three "Covered Risks" in the insurance policy that plaintiff raises in its complaint: (1) "Title being vested other than as stated in Schedule A"; (2) "Any defect in or lien or encumbrance on the Title" or (3) "Unmarketable title."

Analysis

Based on how plaintiff drafted its complaint, plaintiff's arguments on the first "Covered Risk" rest on the HOA declaration. Exception seven precludes plaintiff's arguments on this theory. Accordingly, the court finds for defendant and against plaintiff on this issue and holds that exclusion seven bars plaintiff's pursuit of this theory as a matter of law, and plaintiff thus cannot recover based on Covered Risk one.

To recover under Covered Risk two, plaintiff must establish that Fidelity issuance of the Second Binder revealed "[a]ny defect in or lien or encumbrance on the Title" insured in the insurance policy. Unfortunately for plaintiff, however, recovery is once again barred by exception seven, as the purportedly established defects all arise from the HOA declaration.

Plaintiff's final avenue for recovery, Covered Risk three, requires plaintiff to establish that Fidelity's issuance of the Second Binder caused the occurrence of the "Unmarketable title" Covered Risk as defined in the insurance policy. But unlike plaintiff's first two theories, this theory does not rely on the factual existence of the HOA easement itself.

On the merits of plaintiff's "Unmarketable title" claim, the dispositive factual issue is whether Crotty backed out of the purchase due to "alleged or apparent" factual or legal doubt or questions as to the validity of the title that he was attempting to purchase. The undisputed facts reveal that Crotty refused to close (at least in part) because of questions Crotty had about the validity of title to Lots 9 and 10 that were raised by the Second Binder that Fidelity issued.

Even viewing the facts in the light most favorable to Fidelity, the facts show that Crotty rescinded the contract at least in some part due to alleged or apparent questions about title which, under Virginia law, would entitle him to back out of the purchase. That is all plaintiff need show to establish Fidelity's liability for breach under this theory of liability

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and entitle plaintiff to summary judgment.

Plaintiff's renewed motion for summary judgment granted. Defendant's renewed motion for summary judgment denied.

Landfall Trust LLC v. Fidelity National Title Insurance Company, Case No. 3:22-cv-194, Oct. 2, 2023. EDVA at Richmond (Young). VLW 023-3-639. 30 pp.

Insurance

Mutual company is 'corporation' for diversity

Where an insured argued the defendant was a mutual company of which he is a member, thus destroying diversity jurisdiction and requiring remand of the removed case to state court, his argument was rejected. The defendant was a corporation for purposes of determining diversity of citizenship.

Background

110 South Perry LLC operates a residential building at 110 South Perry Street in Petersburg, Virginia. Perry bought an insurance policy from AutoOwners Insurance Company. In August 2022, Perry suffered substantial property damage after a storm. Perry reported the damage and filed a claim with Auto-Owners, but Auto-Owners denied it. Perry sued Auto-Owners in the circuit court for breach of contract and for an appraisal to determine the amount of damages.

After timely filing its answer, Auto-Owners removed the case to this court. Contemporaneously, Auto-Owners filed a citizenship disclosure form identifying itself as a citizen of Michigan. However, Perry's complaint alleged that, because Auto- Owners is a mutual company of which Perry is a member, 'Auto-Owners has the citizenship of its members, including [Perry]." In other words, Perry alleged that Auto-Owners is also a citizen of Virginia, a fact which, if correct, would destroy diversity of citizenship, the asserted basis for subject matter jurisdiction.

Analysis

The Fourth Circuit has not directly decided whether mutual insurance companies are corporations under their states' laws for diversity purposes. However, all other courts that have considered the question have found mutual insurance companies qualify as corporations. The Supreme Court has at least twice upheld diversity between mutual insurance companies and their out-of-state policy holders.

And several federal courts of appeals have deemed mutual companies to be corporations. District courts have decided the issue that way as well. Finally, the Michigan Supreme Court has decided that mutual insurance companies are corporations under Michigan law. All of this leads to the conclusion is that Auto-Owners is a corporation for purposes of determining diversity of citizenship.

Perry argues that, because AutoOwners' charter is entitled "articles of association" rather than "articles of incorporation," it is an unincorporated entity. But that is a matter of semantics, not substance, because the articles refer to themselves as "articles of association" and "articles of incorporation" interchangeably.

Perry also argues that Auto-Owners' self-identification as a mutual company and not a corporation is dispositive. But that has never mattered in any of the cases discussed earlier, in which courts held that mutual insurance companies are corporations. And the argument elevates form over substance.

Third, Perry also mistakenly argues that, because Auto-Owners is organized under the Michigan Insurance Code, instead of the Michigan Business Corporation Act, it cannot be a corporation. That comparison is relevant because the Fourth Circuit has instructed that the statute of incorporation is outcome determinative. But Perry's argument misses the mark. The decision upon which it relies only decided that the Michigan Insurance Code did not afford appraisal rights to stockholders, not that the insurance company in question was not a corporation at all.

Remand to state court denied.

110 South Perry LLC v. Auto-Owners Insurance Company, Case No. 3:23-cv-175, Sept. 28, 2023. EDVA at Richmond (Payne). VLW 023-3-626. 13 pp.

Insurance

Homeowners' bad faith claim is dismissed

Where homeowners alleged that their insurance carrier acted in bad faith in denying a claim, but they failed to provide any information as to what common law duty arose outside of the contractual obligations of the parties, this claim was dismissed.

Background

Liberty Insurance Corporation issued a homeowners insurance contract to Nannie and Preston Talley. This suit arises out of a fire at the Talley's home. In its complaint, Liberty asserts a claim for breach of contract and requests the court enter declaratory judgment in its favor. The Talleys filed a four-count counterclaim. Liberty has moved to dismiss Count Four of the counterclaim, which alleges that Liberty engaged in bad faith conduct in carrying out its contractual duties.

Analysis

The Supreme Court of Virginia has held that "to avoid turning every breach of contract into a tort … the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." While there are circumstances that would support both tort and breach of contract actions, such circumstances require that a party successfully pleads the separate contractual and common law duties of the opposing party.

Where contractual obligations are the only duty present between the parties, there is no basis for separate tort liability: "[b]ut for the existence of the … agreement," neither of the parties "would have owed any fiduciary duty" to the other. As a result, the insured party under a contract must allege more than mere breach of contract to prevail on a tort claim of bad faith.

In Count Four of the counterclaim, defendants allege that the plaintiff engaged in bad faith conduct in carrying out its contractual duties. Defendants did not, however, provide any information as to what common law duty arose outside of the contractual obligations of the parties, as required by Virginia law. By omitting such information, defendants have failed to carry their burden of pleading sufficient facts to give rise to a plausible claim to relief.

Additionally, even if the defendants had provided additional information, Virginia law disfavors free-standing tort claims for bad faith in carrying out obligations under insurance contracts. Indeed, some Virginia courts have outright found that there is no tort cause of action for bad faith in Virginia. Regardless, the rationale ensuring that every breach of contract does not give rise to a tort claim compels dismissal of Count Four of defendant's counterclaim.

Plaintiff's motion to dismiss Count Four of defendants' counterclaim granted.

Liberty Insurance Corporation v. Talley, Case No. 3:22-cv-715, Sept. 28, 2023. EDVA at Richmond (Young). VLW 023-3-625. 6 pp.

Intellectual Property

Defendants show venue is improper in EDVA

Where two companies sued for patent infringement showed that neither is incorporated in the Eastern District of Virginia and neither has a regular or established place of business in the Eastern District of Virginia, venue was improper as to them, and the claims asserted against them were dismissed.

Background

Trend Micro Inc. filed this suit against Open Text Inc., or OTI, Open Text Corp., or OTC, Open Text Public Sector Solutions Inc., or OTPSS and Webroot Inc, alleging patent infringement and seeking damages. Defendants have filed motions to dismiss.

Venue

Defendants allege that plaintiff's claims against OTI and Webroot should be dismissed for improper venue because neither is incorporated in the Eastern District of Virginia and neither has a regular or established place of business in the Eastern District of Virginia. To establish that a defendant in a patent case has a regular or established place of business, "(1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant."-

Plaintiff has not clearly established an agency relationship between OTPSS and OTI, such that OTPSS's Arlington location should be imputed to OTI. Second, while plaintiff argues that the Virginia locations also qualify as a regular or established place of business because OTI employees work there, this court finds that neither the Arlington location nor the Dulles location can be imputed to OTI.

Finally, plaintiff argues that some OTI employees have home offices in this district and those home offices constitute OTI's established regular or established place of business. However, the law is clear that an employee's home cannot, on its own, establish venue.

Plaintiff next asserts that Webroot has a regular or established place of business in this district because OTPSS's Arlington location is also imputed to Webroot, given that it is a division of OTC. The court agrees with defendants that plaintiff has not met its burden of proving that OTPSS is Webroot's agent. As with OTI, plaintiff has not established that Webroot directs or control OTPSS. It has already been established that OTPSS is purposefully isolated from other Open Text corporate affiliates.

Plaintiff makes similar claims regarding the Arlington location as it did for OTI, and for the same reasons, this court finds that plaintiff's argument fails. In sum, this court concludes that venue is improper for both OTI and Webroot, and plaintiff's claims against these entities will be dismissed in this regard.

Personal jurisdiction

Plaintiff argues that this court has specific personal jurisdiction over OTC because plaintiff's claims arise from alleged patent infringement committed by OTC in Virginia. The court finds that the exercise of specific personal jurisdiction over OTC does not comport with Due Process, because OTC did not purposefully avail itself of the privilege of conducting business in Virginia. Even if plaintiff had shown a prima facie case of personal jurisdiction, moreover, OTC has met its burden of showing that asserting personal jurisdiction is otherwise unreasonable. This court also denies plaintiff's motion for jurisdictional discovery because it finds that plaintiff has not sufficiently alleged OTI or Webroot's purported contacts with Virginia.

OTPSS

Plaintiff alleged that all defendants, including OTPSS, infringed its patents by making, selling, using or offering to sell the accused products within the United States. OTPSS argues that the complaint is deficient as to OTPSS because the complaint uses the term "Defendants" generally and thus did not put OTPSS on notice of how it could have infringed plaintiff's patents when it does not make or sell software.

Because plaintiff has alleged that all defendants, including OTPSS, used, sold, offered to sell and/or imported the accused products, and alleged that OTPSS provides professional services derived from Open Text products, it is reasonable to infer that OTPSS faces a potential infringement charge based on the use of the products rather than on the manufacture or sale.

In the alternative, defendants argue that any remaining claims be transferred to the Western District of Texas because this case has no connection to this court, the "parties are already litigating similar patents and technology, involving the same accused

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products, in the Western District of Texas" and the interests of justice and convenience of the parties favor transfer. However, because venue as to OTPSS is not proper, the cause of action against OTPSS could not have been brought in the Western District of Texas within the meaning of the transfer statute.

OTI, Webroot and OTC's motions to dismiss granted. OTPSS's motion to dismiss or transfer denied. Plaintiff's motion for jurisdictional discovery denied.

Trend Micro Incorporated v. Open Text Inc., Case No. 1:22-cv-1063, Sept. 29, 2023. EDVA at Alexandria (Alston). VLW 023-3-635. 35 pp.

Tort

Litigant can't sue judges who presided over prior cases

Where a woman sued the judges who previously adjudicated her state and federal cases, they were entitled to absolute immunity against the claims.

Background

Jeannette Soto Santini, proceeding pro se, filed this action, naming nine defendants. Plaintiff's complaint stems from events surrounding her March 2021 eviction, state court proceedings with her previous landlord (Ashley Meadows) and her disagreements with the defendant judges' adjudication of state and federal cases plaintiff has filed. Three of the defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim.

'Rooker-Feldman'

Although plaintiff claims to bring a federal tort claim against the defendants, the complaint's allegations arise from her discontentment with various state court judgments. Plaintiff's complaint fails to raise any new and independent claims against Meadows, Andrew Palanzi (an attorney) or against defendant judges Jason S. Rucker and William J. Minor Jr., that have not already been adjudicated during the prior state court proceedings.

Rather than appealing any of the prior state court judgments, plaintiff initiated this civil action to ask the court to redress harm plaintiff allegedly suffered as a result of those previous rulings. Because plaintiff's complaint is essentially a direct appeal of state court judgments, the court lacks jurisdiction over her claims and must dismiss this civil action pursuant to the Rooker-Feldman doctrine.

Raymond Morrogh

With respect to Raymond Morrogh, plaintiff states that she is suing him because he told her "you need a lawyer" in apparent response to her complaints about defendant judges. By alleging a federal tort claim, plaintiff presumably seeks to invoke the Federal Tort Claims Act, or FTCA, as the basis for the court's jurisdiction over Morrogh.

Claims brought under the FTCA can only be made against the United States, not a private citizen. Therefore, plaintiff's claims against Morrogh are not actionable under the FTCA and as such, the court lacks subject matter jurisdiction over this claim. Accordingly, the court will, on its own, dismiss plaintiff's complaint against Morrogh.

Judicial immunity

Judge Novak argues that plaintiff's claims against him must be dismissed as he is entitled to absolute immunity for his judicial decisions in plaintiff's first federal case. Absolute judicial immunity can only be overcome if the judge's action either (1) was "undertaken in the 'clear absence of all jurisdiction'" or (2) constituted a "non-judicial act." Neither of these two exceptions apply to any of the defendant judges in this case. Accordingly, plaintiff's claims against defendant judges must be dismissed.

Defendants' motions to dismiss granted.

Santini v. Rucker, Case No. 1:23-cv-124, Oct. 5, 2023. EDVA at Alexandria (Giles). VLW 023-3-640. 14 pp.

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■ U.S. District Court – Western District

Administrative

Disability insurance benefits claim denied

Where an administrative law judge explained his reasoning for discounting a doctor's opinion, and sufficiently discussed the claimant's kidney disease, his decision that the claimant was not disabled was affirmed.

Background

Garnett H. filed this action challenging the final decision of the Commissioner of Social Security finding him not disabled and therefore ineligible for disability insurance benefits and supplemental security income under the Social Security Act. Garnett alleges that the administrative law judge, or ALJ, erred by failing to properly consider one of the medical opinions in the record and by failing to discuss his stage III chronic kidney disease. Both parties have filed motions for summary judgment.

Medical opinion

Garnett's argument fails because the ALJ explained his reasoning for discounting Dr. Conley's opinion. The neuropsychological test results, which showed inattentiveness, restlessness and slow response time, also showed adequate "mental status, unimpaired practical judgment, average intellect, normal verbal memory, abstract concept formation and mental flexibility." The ALJ explained that Dr. Conley's opinion was not consistent with those test results.

Further, the ALJ found that Dr. Conley had "opined on an issue []

reserved to the Commissioner," and thus had "not provide[d] articulation about the evidence that is inherently valuable or persuasive to the issue of whether the claimant is disabled." The ALJ sufficiently explained that the mixed test results, and Dr. Conley's opinion on an issue reserved for the commissioner, provided reason for the ALJ to discount Dr. Conley's opinion. I find that the ALJ's assessment of Garnett's impairments was sufficient.

Chronic kidney disease

Garnett next asserts that the ALJ committed error in formulating Garnett's physical residual functional capacity by failing to consider or discuss his stage III chronic kidney disease. The court disagrees.

The ALJ's discussion of Garnett's kidney disease was sufficient. The ALJ recognized that Garnett "receives medical treatment for kidney disease, indicating that his body retains fluid, and his urine output is slow." The ALJ repeatedly referenced Garnett's occasional lower extremity edema. In explaining his decision to limit Garnett to light work, the ALJ stated that Garnett had been "doing well with regard to his kidney impairment."

Garnett disputes the accuracy of this conclusion, however it originated in a treatment record on which the ALJ partially based his determination. Further, the ALJ does not have to address every piece of inconsistent evidence; rather, the ALJ must author an opinion which shows how the evidence of record supports the decision made.

Attacking whether substantial evidence exists requires more than simply identifying medical records or statements that are inconsistent with the ALJ's findings. A claimant must show that the ALJ used an improper legal standard, did not consider a relevant portion of the record, did not satisfy the duty of explanation or the overwhelming weight of inconsistent evidence overcomes the very low substantial evidence standard. The Fourth Circuit has been clear that an ALJ's findings "as to any fact, if supported by substantial evidence, shall be conclusive." Here, Garnett has done no more than question the ALJ's conclusion.

Contrary to Garnett's contentions, the ALJ provided a detailed summary of Garnett's physical impairments, medical records, testimony and opinion evidence. The ALJ was required to create a narrative discussion that builds "an accurate and logical bridge from the evidence to his conclusion," which the ALJ did in his discussion of the medical and non-medical evidence, Garnett's alleged symptoms and the medical opinions of record.

This narrative discussion allows this court to see how the evidence in the record — both medical and non-medical — supports the residual functional capacity determination. Because I was not "left to guess" at how the ALJ reached his residual functional capacity determination, I find that the ALJ's conclusion is supported by substantial evidence.

Plaintiff's motion for summary judgment denied. Defendant's motion for summary judgment granted.

Garnett H v. Commissioner Social Security Administration, Case No. 6:22-cv-00039, Sept. 28, 2023. WDVA at Lynchburg (Ballou). VLW 023-3-629. 12 pp.

Civil Rights

Detainee alleges officials failed to protect him

Where a detainee alleged that correctional officials left his cell door open despite knowing that neighboring inmates had violent histories, that he was subsequently assaulted by another inmate and that the assault resulted in a serious injury, his failure to protect claim survived the officials' motion to dismiss.

Background

Raymond Michael Cobb was an inmate at the New River Regional Jail when he was assaulted by another inmate. Cobb filed suit against various jail officers and officials, all of whom filed a motion to dismiss. Because the inadequate medical care argument in defendants' motion requires the court to consider matters beyond the pleadings (medical records), the court considers that part of the motion as a partial motion for summary judgment.

Failure to protect

Cobb has plausibly alleged a significant physical injury that resulted from his assault. The injury was serious enough to consider surgery on his eye socket. Defendants do not argue that plaintiff's injury was not objectively serious.

On the subjective component, Cobb alleges that Cohen and Turner were deliberately indifferent for failing to take steps to prevent the assault from occurring. He alleges that assaults in this area were a known and ongoing issue, and that the assaults could have been prevented by serving food through the tray hole with the door closed. This is sufficient to plead a plausible deliberate indifference claim against Cohen and Turner.

Inadequate medical care

An Eighth Amendment claim of deliberate indifference based on inadequate medical care has two components. Again, there is no dispute or argument that Cobb's injury that resulted from his assault was objectively serious. On the subjective component, however, the evidence provided by defendants establishes that they were not deliberately indifferent to Cobb's medical needs. Cobb received prompt medical attention from medical providers. The failure to be transferred to Roanoke Memorial Hospital was Cobb's decision.

Moreover, not having surgery was also Cobb's decision after consultation with a surgeon. Finally, defendants did not interfere with or delay Cobb's treatment. Defendants are entitled to summary judgment on Cobb's Eighth Amendment claim regarding his medical care.

Supervisory liability

Cobb's complaint fails to plausibly allege Ferguson had any supervisory authority with respect to Cohen or Turner. Ferguson is not mentioned anywhere in the complaint's allegations aside from being named as a defendant in the caption. Similarly, Cobb does not plausibly allege that Crigger, who accompanied plaintiff to the emergency room after his assault, had a role as supervisor of Cohen or Turner.

Cobb alleges that Hatley and Anders, Cohen, and Turner's supervisors, "allowed them to perform their duties in that manner." This conclusory assertion does not plausibly allege that Hatley or Anders had "actual or constructive knowledge" that Cohen or Turner were engaged in conduct that posed a "pervasive and unreasonable risk" of injury to plaintiff.

Similarly, Cobb alleges that Hoag was "responsible for the safety of all inmates housed in the New River Valley Regional Jail." This is not a plausible allegation that Hoag had actual or constructive knowledge of the risk, or that her response was so inadequate that it demonstrates deliberate indifference.

Remaining claims

Defendants note that Cobb makes a reference to negligence. To the extent that Cobb is attempting to allege such a claim, defendants are entitled to sovereign immunity as Commonwealth employees.

Cobb makes various allegations about the grievance procedures at the New River Regional Jail. To the extent that Cobb is alleging a claim based on purported deficiencies with the grievance procedures, Cobb has no constitutional claim.

Defendants' motion to dismiss granted in part, denied in part. Defendants' partial motion for summary judgment granted.

Cobb v. Haug, Case No. 7:22-cv-00610, Sept. 27, 2023. WDVA at Roanoke (Dillon). VLW 023-3-606. 14 pp.

Civil Rights

Jail director defeats deficient supervision claim

Where a detainee alleged the Director of Support Services failed to adequately supervise the medical department, resulting in him being denied adequate medical treatment, but the director did not have the authority to prohibit or approve a particular medication or course of treatment and regularly corresponded with medical staff when issues related to the detainee came to her attention, the director was granted summary judgment.

Background

Gregory Leon Hammer, a Virginia detainee proceeding pro se, filed this action under 42 U.S.C. § 1983, against medical and other staff at Middle River Regional Jail, alleging that they failed to provide him with, or interfered with him receiving, constitutionally adequate medical care concerning his seizures and failed to supervise medical staff regarding the same. Nurse Chestnut and Major Nicholson (Director of Support Services) have moved for summary judgment.

Medical records

The evidence in the record conclusively establishes that Chestnut first became aware that Hammer was seeking his medical records when he submitted a medical request on June 26, 2019, asking Middle River to obtain his medical records from other providers. On that date, Middle River had already received Hammer's medical records from Western State and Central State. Chestnut

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responded to Hammer's request and advised him that Middle River had received his medical records from Central State.

The evidence also establishes that Chestnut was not present when any physician ordered that Hammer's medical records be obtained. Chestnut explained that when a medical provider orders outside medical records to be obtained, it is the duty of the nurse accompanying that provider to ensure that the records are requested and obtained. Chestnut also attests that she was not aware of any order by a doctor or physician's assistant to obtain Hammer's medical records from another facility.

Based on the evidence, the court cannot conclude that Chestnut intentionally delayed or interfered with the acquisition of Hammer's medical records. But even if Chestnut had intentionally delayed the medical records, there is no evidence it the record to show that it affected Hammer's medical treatment.

Medical treatment

The evidence also conclusively establishes that, when Chestnut medically cleared Hammer on October 6, he had not had any reported seizure activity for 16 days and that it was routine practice to hold a detainee in the medical unit for a few days following a seizure. Chestnut states that she was not aware that Hammer was not currently complying with his prescription or that a doctor had ordered him to remain in the medical housing.

In any event, Hammer has not demonstrated that Chestnut knew of and disregarded any serious risk of harm posed by allowing him to be transferred out of the medical department. The only difference his housing assignment could have had on his treatment would be the speed at which medical staff could potentially respond to purported seizure activity based on their proximity to his cell.

In this instance, there is no evidence that there was a significant delay in the time it took for medical staff to respond to Hammer's alleged seizure, and Hammer has not shown that he suffered any significant harm or risk of harm. At most, he suffered two minor abrasions that did not require any medical treatment.

Nicholson

Hammer argues that Nicholson failed to adequately supervise the medical department resulting in him being denied adequate medical treatment. It is uncontroverted that Nicholson is not a medical professional and that she relies on the judgment of Keen Mountain's medical staff in determining and treating a detainee's medical needs. Her job, to put it simply, is to make ensure that Middle River inmates have access to medical care; it is not to determine what type of care that they receive. She does not have the authority to prohibit or approve a particular medication or course of treatment for a detainee.

The evidence also shows that Nicholson regularly corresponded with medical staff when issues related to Hammer came to her attention, and each time Hammer reached out to her, she responded to his complaints. Based on the record, the court cannot conclude that Nicholson was deliberately indifferent to, or tacitly authorized, any denial or delay of Hammer's medical treatment. To the contrary, the undisputed facts lead to the ineluctable conclusion that Nicholson fully satisfied her administrative duties vis-à-vis Hammer and his purported medical needs.

Defendants' motion for summary judgment granted.

Hammer v. Chestnut, Case No. 7:20-cv-00526, Sept. 27, 2023. WDVA at Roanoke (Cullen). VLW 023-3-605. 25 pp.

Civil Rights

Detainee didn't exhaust religious practice claims

Where a detainee failed to administratively exhaust his claims of retaliation, harassment and that he was denied a Nation of Islam, or NOI, religious study guide, and did not argue that he was prevented from doing so through no fault of his own, defendants were granted summary judgment on these claims.

Background

Malcolm Muhammad, a Virginia detainee proceeding pro se, filed this civil action under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, or RLUIPA, against numerous Virginia Department of Corrections and Wallens Ridge State Prison employees. This matter is before the court on the defendants' motion for summary judgment. The defendants argue that Muhammad's claims of retaliation, harassment and that he was denied a NOI religious study guide class are barred because he failed to exhaust available administrative remedies.

Analysis

The evidence conclusively establishes that Muhammad did not file any other informal complaint or regular grievance regarding alleged retaliation or harassment by Wallens Ridge staff. Muhammad has provided no evidence to the contrary. Thus, Muhammad failed to exhaust the VDOC's administrative remedies concerning his claims of retaliation and harassment by Wallens Ridge staff. Further, Muhammad does not contend that he was prevented from exhausting administrative remedies through no fault of his own.

Regarding Muhammad's request for a NOI study guide class, Muhammad's regular grievance was not accepted during the intake process and did not satisfy the exhaustion requirement. Thus, he failed to exhaust the administrative remedies available to him regarding his complaint about a NOI study guide class. In fact, the evidence submitted by Muhammad in support of his claims confirms that he did not exhaust administrative remedies as to this specific claim. Muhammad also does not allege that he was prevented from exhausting administrative remedies through no fault of his own.

Based on review of the parties' submissions, the court concludes that the defendants have easily met their burden of demonstrating that Muhammad failed to properly exhaust available administrative remedies regarding his retaliation and harassment claims and his NOI religious class claim before filing suit.

Defendants' motion for partial summary judgment granted.

Muhammad v. Fleming, Case No. 7:17-cv-00481, Sept. 30, 2023. WDVA at Roanoke (Cullen). VLW 023-3-633. 11 pp.

Civil Rights

BLM leader's suit against law enforcement dismissed

Where the president of Black Lives Matter Shenandoah Valley sued Augusta County law enforcement officials after they twice arrested him during protests, but the officers had a probable cause for the arrests because the man was violating a county noise ordinance, his suit was dismissed.

Background

In December 2022, Antwhon Suiter, appearing pro se, filed a three-count amended complaint seeking damages and equitable relief against Augusta County, Sheriff Donald Smith, Deputy M. Obenschain and Deputy E. Metlenko.

Suiter is the President of Black Lives Matter Shenandoah Valley. On two occasions, Smith allegedly "[i]nstructed" Obenschain and Metlenko to "[a]rrest" Suiter and charge him with violating the noise ordinance for "chanting and signing" with a megaphone. This suit arises out of those arrests. Defendants have filed a motion to dismiss.

Agusta County

In Virginia, a county cannot be held liable for the policies or practices of independent "constitutional officers," such as the local elected sheriff, because those officers "do not depend upon … the governing bodies of their counties or cities for their authority." "Therefore, Augusta County is not responsible for actions taken by the Sheriff or his agents" at the protests. The county is dismissed with prejudice.

Eleventh Amendment

Smith, Obenschain and Metlenko correctly note that the Eleventh Amendment bars Suiter's claims for damages against them in their "official" capacities. The Eleventh Amendment also bars Suiter's requests for retrospective declaratory or injunctive relief holding that these state officials "violated" his federal constitutional rights in the summer of 2021. Accordingly, those official-capacity claims will be dismissed on immunity grounds.

The Eleventh Amendment does not bar Suiter's as-applied challenge to Augusta County's Noise Ordinance statute § 15-7(A), under federal First Amendment principles, which arguably seeks prospective injunctive relief against Smith in his official capacity to prevent Smith from detaining or charging Suiter the next time he uses a megaphone at an otherwise peaceful protest. Additionally, although the Virginia Supreme Court "has not settled the scope of an implied right of action under Article I, § 12," some lower state courts have recognized a private right of action where, as here, the plaintiff challenges the constitutionality of a state law or local ordinance.

Statute

Section 15-7(A) is a content-neutral "time, place, and manner" regulation of First Amendment protected speech and activities. It therefore "must be 'narrowly tailored to serve a significant governmental interest'" and "must 'leave open ample alternative channels for communication of the information' that [Suiter] wishes to communicate.'"

First, § 15-7(A) explicitly leaves open "ample alternative channels" for Suiter to communicate his message against police brutality — it merely "prohibits the use of noise-amplifying machines 'in such a manner or with such volume' that it exceeds 65 decibels at the property line." Second, Suiter does not allege any facts suggesting § 15-7(A) is not "narrowly tailored" to serve the county's significant interest in protecting its residents from excessively loud machine-amplified noises.

First Amendment retaliation

"The plaintiff pressing a retaliatory arrest claim must plead and [ultimately] prove the absence of probable cause for the arrest." Defendants argue Suiter has failed to plead the absence of probable cause because he "acknowledges that he operated a megaphone" while protesting with others "who were growing progressively louder" and he "does not deny that the noise emanating from the megaphone exceeded the 65 decibels" set out in the county code. The court agrees.

Suiter alleges that he was using a megaphone while chanting and singing with "multiple people" when he was detained. He does not allege that he "complied with the 65-decible threshold during the protest, []or that [he] took any noise-related precautions from which the court could presume compliance for purposes of a motion to dismiss."

Remaining claims

The Fourth Amendment protects a person and his "effects[] against unreasonable searches and seizures" by government actors. As explained above, Suiter's complaint does not sufficiently allege the deputies lacked probable cause to believe that he was violating § 15-7(A) when they detained him. Accordingly, Count Two will be dismissed.

In Count Three, Suiter tries to assert a free-standing Fourteenth Amendment "deprivation of rights" claim based on the First Amendment retaliation claim in Count One and the Fourth Amendment claim in Count Two. The First Amendment and Fourth Amendment each "provide[] an explicit textual source of constitutional protection against th[e] sort" of governmental conduct complained of in Count Three. Accordingly, those "Amendment[s], not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

Defendants' motion to dismiss granted.

Suiter v. County of Augusta, Case No. 5:22-cv-00063, Sept. 27, 2023. WDVA at Harrisonburg (Urbanski). VLW 023-3-604. 23 pp.

Commercial

Damages determined in condemnation action

Where the landowner did not have any admissible evidence to prove diminution of value resulting from the taking of a portion of her property for the construction of a natural gas pipeline, the assessment by the contractor's expert as to the amount of just compensation owed to the landowner was accepted.

Background

Mountain Valley Pipeline, or MVP, is constructing a natural gas pipeline. Among the easements along the approved route, MVP is taking 0.33 acres of temporary workspace on parcel no. VA-RO-5228, owned by defendant Elizabeth Terry. The total amount of land comprising VA-RO-5228 is 200 acres.

MVP is also taking 9.89 acres on parcel no. VA-RO-054, which is also owned by Ms. Terry. The total amount of land comprising VA-RO-054 is 160 acres. The two parcels are non-contiguous.

On March 31, 2021, the court issued an opinion and order granting summary judgment to MVP as to the amount of just compensation for VA-RO-5228. On Sept. 27, 2021, the court granted MVP's motion to exclude experts, denied the landowner's motion to file supplemental memoranda regarding comparable sales and highest and best use and granted MVP's motion in limine with respect to evidence of conceptual subdivision.

Before the court are the following motions: (1) defendant's motion for reconsideration; (2) MVP's motion for summary judgment and (3) MVP's second motion in limine.

Reconsideration

The landowner asks the court to reconsider its decision granting MVP's motion to exclude her experts: Dennis Gruelle, Sean Horne, Linda DeVito and Larry Florin. In asking the court to reconsider its rulings, the landowner relies only upon arguments previously presented to the court. The court considered and rejected those arguments, and the landowner offers no reason or justification for the court to change its analysis. Therefore, the landowner's motion to reconsider will be denied.

Summary judgment

Based on the court's exclusion of the landowner's proposed expert testimony, as well as the exclusion of landowner's testimony by agreement, the landowner does not have any admissible evidence to prove diminution of value resulting from the pipeline. Therefore, there are no genuine issues of material fact, and MVP is entitled to summary judgment as to the amount of just compensation owed to the landowner.

MVP disclosed appraisals from Jared Schweitzer and Joseph Thompson. Schweitzer found just compensation in the amount of $68,571. Thompson found just compensation in the amount of $82,346. MVP agrees to just compensation in the larger amount found by Thompson. Thus, the court will grant MVP's motion for summary judgment and enter judgment accordingly. Because the court is granting summary judgment, MVP's second motion in limine is moot.

Defendant's motion to reconsider denied. Plaintiff's motion for summary judgment granted. Plaintiff's second motion in limine denied as moot.

Mountain Valley Pipeline LLC v. 9.89 acres of land and 0.33 acres of land owned by Elizabeth Lee Terry, Case No. 7:19-cv-00145, Sept. 29, 2023. WDVA at Roanoke (Dillon). VLW 023-3-611. 7 pp.

Constitutional

Police acted reasonably in detaining teen girl

Where a 14-year-old girl sued police officers because of a physical altercation that ensued after she refused to obey their directions, but the officers acted reasonably, they were granted summary judgment.

Background

The events at issue arise out of a series of violent fights between feuding high-school students that broke out throughout the River Ridge Mall in Lynchburg on March 7, 2020,

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and the ensuing police response.

In the midst of this pandemonium, officers repeatedly commanded Aniya Hicks (then-14 years' old) to "get back" from an individual who was handcuffed and under arrest for fighting — her then-boyfriend. Plaintiff disregarded the orders, yelling she was going to stay right there.

When the officer tried to handcuff plaintiff, she resisted, pulling back. Plaintiff and the officer had a physical altercation, leading to plaintiff kicking and screaming on the ground. As plaintiff was still resisting handcuffs, another officer assisted the first, using his arm to keep her down. When plaintiff sat up, she had sustained a gash on her face, requiring stitches.

Plaintiff sued the City of Lynchburg and three officers involved in the March 2020 incident: Hughes, Breton and Godsie. Following the dismissal of certain claims, the following claims remain: excessive force in violation of the Fourth Amendment, assault and battery, gross negligence, malicious prosecution and municipal liability. Defendants have filed a motion for summary judgment.

Excessive force

Courts apply a two-part inquiry in ruling upon an assertion of qualified immunity at the summary judgment stage: (1) whether the facts, "[t]aken in the light most favorable to the party asserting the injury … show the officer's conduct violated a [federal] right and (2) whether the right in question was "clearly established" at the time of the violation.

Here, the totality of circumstances demonstrates that each of the defendant officers' actions vis-à-vis plaintiff were reasonable. Plaintiff's excessive force claim therefore fails. In any event, the court concludes that the defendant officers are entitled to qualified immunity because they did not violate any clearly established constitutional right.

Plaintiff points to three cases to argue that the officers' conduct violated clearly established law. All concern materially different factual postures far removed from the case at hand, and none constitute clearly established law demonstrating the defendant officers' conduct was unlawful.

Assault and battery and gross negligence

Because the defendant officers are entitled to summary judgment on plaintiff's excessive force claim under § 1983, so too must plaintiff's assault and battery and gross negligence claims fail, brought against the same officers based upon the same conduct.

Virginia malicious prosecution

In Virginia, a plaintiff in a malicious prosecution case ultimately must prove "by a preponderance of the evidence that the prosecution was: (1) malicious; (2) instituted by, or with the cooperation of, the defendant; (3) without probable cause; and (4) terminated in a manner not unfavorable to the plaintiff."

Defendants argue that plaintiff has not satisfied the third element. Upon its review of the record, the court readily concludes that Hughes had probable cause to support the charge for assault and battery on a law enforcement officer.

'Monell' claim

As plaintiff has framed this claim, this single incident on March 7, 2020, demonstrates the city did not adequately train its officers on the use of force. But "a single incident is almost never enough to warrant municipal liability." Plaintiff's failure-to-train claim also fails because plaintiff has not pointed to any specific deficiency in the city's excessive force policy. Plaintiff's claim was similarly undeveloped with respect to alleged deficiencies in training on de-escalation.

Lastly, plaintiff has raised a Monell claim under a ratification theory. This argument similarly fails because the court has held that there was no underlying constitutional violation in this case. Nor has plaintiff presented any evidence that the city's ratification of prior similar, unlawful uses of force caused any such unlawful use of force here—and again, there is none.

Defendants' motion for summary judgment granted.

Hicks v. City of Lynchburg, Case No. 6:21-cv-00043, Sept. 30, 2023. WDVA at Lynchburg (Moon). VLW 023-3-631. 35 pp.

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Constitutional

Parents sue DSS employees following child's removal

Where parents alleged that two Department of Social Services' employees removed their minor child based on a predetermined reason and that the employees knew a positive drug test was not evidence of abuse, the Fourteenth Amendment claim survived the employees' motion to dismiss.

Background

Jessica Nicole Stoots and John Lewis Phillips sued three employees of the City of Roanoke, in both their individual and official capacities, alleging violations of their First, Fourth, Fifth and Fourteenth Amendment rights in relation to the removal of their child, "CMP," at Carilion Roanoke Memorial Hospital. Now before the court are multiple motions.

Second brief

After oral argument on the motion to dismiss and without first obtaining leave of court, plaintiffs filed a second brief in opposition to defendants' motion to dismiss. The court will grant defendants' motion to strike plaintiffs' second response brief and deny plaintiffs' motion for leave to re-file it.

Donald Goss

Plaintiffs do not allege that Goss played any role in the removal itself or was otherwise involved in the events at issue. Instead, it appears that they are seeking to hold Goss liable simply because he supervised Sparti and Jarvis. But they have not alleged any facts to establish a supervisory liability claim. All individual-capacity claims against Goss must be dismissed.

Official capacity

As for the official capacity claims against Goss and the other defendants, such claims are effectively claims against the entity for which they work. But there is no allegation that the defendants were acting according to Department of Social Services custom or policy or that any deprivation suffered by plaintiffs was caused by such a custom or policy. All official-capacity claims against all defendants are dismissed.

Fourth Amendment

Plaintiffs claim that Sparti and Jarvis violated their Fourth Amendment rights by entering Stoots' hospital suite without a warrant. But Sparti and Jarvis were acting in an investigative capacity. Even in the context of the home — where one's expectation of privacy is greatest — the Fourth Circuit has held that "investigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context."

Plaintiffs also allege that defendants violated the Fourth Amendment by removing CMP without a prior court order. But the parent-plaintiffs cannot assert a claim for violation of the Fourth Amendment on her behalf. And, in any event, Sparti and Jarvis are entitled to qualified immunity regarding this claim.

14th Amendment

The sole claim that survives the motion to dismiss is plaintiffs' Fourteenth Amendment claim against Sparti and Jarvis. Accepting the facts in the amended complaint as true, the court cannot agree that Sparti and Jarvis had "some evidence" of abuse. According to the amended complaint, the removal of CMP was predetermined before Sparti and Jarvis arrived on Sparti's second visit; Sparti knew that the positive drug test was not evidence of abuse and Sparti and Jarvis also gave other reasons for the removal, but the bases for these reasons occurred after the removal decision had been made. And because the law was clearly established that, at a minimum, some evidence of abuse was required for an emergency removal, they are not entitled to qualified immunity, based on the allegations in the complaint.

Malicious prosecution

This claim fails. A plaintiff's malicious prosecution claim fails if he cannot prove a lack of probable cause; here, the J&D court ruled that there was probable cause for CMP's removal. Further, it does not appear from the amended complaint that there was a favorable resolution of the proceedings.

Fifth Amendment

Plaintiffs also claim that Sparti and Jarvis violated their Fifth Amendment rights by continuing to converse with and question them after they indicated they would not speak to anyone from Child Protective Services without an attorney present. Plaintiffs' allegations fail to state a Fifth Amendment claim for numerous reasons, including that a violation of the right to counsel recognized in Miranda — even assuming one somehow occurred here — does not give rise to a § 1983 claim.

Remaining claims

Lastly it appears that plaintiffs assert various violations of the First Amendment, Fourth Amendment and Fourteenth Amendment in relation to the continued removal of CMP and allegations that Sparti lied in the affidavit filed with the J&D court. Sparti is entitled to absolute immunity from any First, Fourth or Fourteenth Amendment claims arising from her filing of the removal petition, and plaintiffs make no factual allegations against Jarvis as to those claims.

Defendants' motion to strike granted. Plaintiffs' motion for leave to file their second opposition brief denied. Defendant's motion to dismiss granted in part, denied in part.

Stoots v. Sparti, Case No. 7:22-cv-00196, Sept. 29, 2023. WDVA at Roanoke (Dillon). VLW 023-3-630. 27 pp.

Contract

Company must comply with insurance policy

Where a company was required to maintain a "loss fund" to secure payments on insurance claims, but the company was now insolvent, an insurance company was entitled to an injunction requiring specific performance because monetary damages would not be obtainable.

Background

Southern Coal Corporation brought several contract and tort claims against Brickstreet Mutual Insurance Company stemming from Brickstreet's performance under Southern Coal's workers' compensation and employers' liability insurance policies in 2017. Brickstreet filed a counterclaim for breach of contract resulting from Southern Coal's failure to reimburse Brickstreet for claims and expenses under the policies.

The court granted Brickstreet's motion for summary judgment (both as to Southern Coal's claims and its own breach-of-contract counterclaim) as to the merits. Now pending before the court is Brickstreet's "motion for appropriate remedies."

Injunctive relief

Brickstreet claims it has suffered an irreparable injury that cannot be remedied at law because Southern Coal is unlikely to pay a damages award "given its financial status, other judgments against it, and a history of non-payment." Thus, Brickstreet continues, the only way to ensure" that Southern Coal itself complies with its contractual obligations and replenishes the Loss Fund" is "a permanent injunction requiring Southern Coal's specific performance under the contracts."

In denying Brickstreet's initial request on summary judgment for an injunction for specific performance, this court reasoned that Brickstreet had not yet shown Southern Coal to be insolvent and that monetary damages will not be obtainable. However, since then, Brickstreet has amassed evidence demonstrating that Southern Coal is, in fact, insolvent.

The deposition of Southern Coal's corporate representative revealed that Southern Coal and its subsidiaries have no operations or employees, are not mining coal, do not have any income nor any open bank accounts, do not anticipate any operations or profit and do not have any viable assets to liquidate. The corporate deponent conceded that Southern Coal both (1) would not be able to pay a money judgment in this case and (2) has millions of dollars in judgments currently pending against it.

In its briefing, Southern Coal claims it is "not insolvent, but merely inactive." The difference, at least according to Southern Coal, is that its debts are being paid and its judgments satisfied—only by other entities within the "Justice family operations," not by Southern Coal itself. But that proposed distinction is misleading at best, and entirely inaccurate at worst, given the definition of insolvency as courts understand it. Accordingly, the court finds that an order requiring specific performance is necessary to maintain the status quo.

Outside of attempting to draw a line between inactivity and insolvency, Southern Coal makes two other arguments as to why an injunction would be inappropriate, both of which fail. As a result, the court finds that an injunction requiring specific performance by Southern Coal is the appropriate remedy here.

Attorney's fees

Under Virginia law, parties to a contract may allocate attorneys' fees and costs via an indemnity clause. Here, the parties' agreement provides for the recovery of attorneys' fees "incurred by [Brickstreet] in connection with the collection or enforcement of any of [Southern Coal's] obligations to [Brickstreet]."

After the court deferred ruling on the issue of attorney's fees and costs, Brickstreet provided Southern Coal with invoices for attorneys' fees incurred through Sept. 30, 2022, in the amount of $245,929.76. Moreover, pursuant to the parties' stipulation, Southern Coal does not challenge this amount of attorney's fees and agrees that this sum is owed under the contract.

The court finds the agreement both fair and reasonable in light of difficult issues ably litigated in this case, and commends the parties and their skilled counsel in reaching such amicable resolution. Accordingly, the court will award Brickstreet attorney's fees in this amount.

Defendant's motion for appropriate remedies granted.

Southern Coal Corporation v. Brickstreet Mutual Insurance Company, Case No. 7:19-cv-00457, Sept. 28, 2023. WDVA at Roanoke (Dillon). VLW 023-3-607. 12 pp.

Criminal

Mistrial denied in complex trial

Where the defendant moved for a mistrial on the grounds that she was in the hospital and unable to effectively communicate with her counsel, her motion was denied. But the court continued the trial to a date later in the month.

Background

Pending before the court is an oral motion for mistrial brought by defendant Jennifer Rae McDonald. Her counsel argues that Ms. McDonald is currently unable to attend trial

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as she is in the hospital and that she is unable to effectively communicate with counsel or participate meaningfully in her own defense.

Second, defendant argues that the cumulative effect of delays in this trial have resulted in likely prejudice to her, because the jury may be unable to retain information about evidence in this case, which the court previously designated as complex. Third, counsel argues that the jury may speculate about the reasons for the delays, attribute them to Ms. McDonald or believe that she had attempted to harm herself in some way.

The United States notes that the medical information so far provided is not a complete medical record and, in particular, it does not indicate if Ms. McDonald may be able to participate in the trial or when. It further contends that the medical information provided so far does not reflect that McDonald's continued participation in this trial would seriously jeopardize her health or life.

The court suggested a continuance or suspension of trial for a brief time, provided the jury is available, as a viable alternative to mistrial. The government also opposes any continuance of the trial, on largely the same basis, contending that the medical record is incomplete. It also made oral motions for the court to issue a trial subpoena for Ms. McDonald's medical records and for the court to hold an evidentiary hearing, with a medical professional present to testify, on the need for continuance or mistrial.

Government's motions

Because the court believes that the fuller medical records will assist it in determining whether a longer continuance or a mistrial is warranted, it grants the motion for trial subpoena. As to the government's request for an evidentiary hearing, the court recognizes its authority to seek additional medical information from defendant's physicians, but it declines to order such a hearing at this time.

Mistrial

First, as to the defendant's argument that a mistrial is warranted solely as a result of her medical condition, the current record before the court does not support that assertion. There is insufficient information provided to the court to allow it to determine that a continuation or suspension of trial, with defendant's presence at trial at a later date, is not a feasible alternative to a mistrial. Moreover, even with sufficient medical information, such as a physician's opinion, the court is not bound to follow those opinions.

Based on the limited record before this court, the court notes that at least a temporary continuance is required, as defendant is currently hospitalized following a recent surgery. The week of October 23 is the earliest week that ensures the court, counsel and the proper number of jurors can all be present to hopefully conclude this trial.

Second, the court disagrees with defendant that the "cumulative" delays in this case warrant a mistrial. The court notes that prior continuances were not objected to by any party and that most of them were at the request of defendant or her counsel to accommodate personal obligations or health matters.

Further, mitigating measures that should cure any prejudice to either party from the hiatus. These include giving counsel ample time for closing arguments, the fact that jurors will have the benefit of all the exhibits as well as their own notes and the extensive jury instructions.

Third and finally, the court has taken great pains to ensure that the jurors were simply told by court personnel that delays were the result of unexpected circumstances. Thus, insofar as they have been informed by the court, they do not know that the circumstances relate to anyone's health, let alone defendant's. The court also has repeatedly instructed the jurors not to read anything about this case and to avoid media coverage about the case. Jurors are presumed to follow the court's instructions.

Defendant's oral motion for mistrial denied. Government's oral motion for trial subpoena granted. Government's oral motion for evidentiary hearing denied.

United States v. McDonald, Case No. 5:21-cr-00012, Sept. 28, 2023. WDVA at Harrisonburg (Dillon). VLW 023-3-628. 8 pp.

Employment

Former federal employee's retaliation suit dismissed

Where a former Department of Agriculture director alleged that she was constructively discharged in retaliation for reporting suspected fraud, but she failed to administratively exhaust her claims and failed to properly serve the defendants, her suit was dismissed.

Background

Jesse Hines Turner brought this action alleging that she was constructively discharged from her role as a County Executive Director with the United States Department of Agriculture's Farm Service Agency in retaliation for reporting suspected fraud. Turner claims that, through their actions related to her alleged constructive termination, various individuals involved with the Farm Service Agency violated (1) the False Claims Act; (2) Virginia's whistleblower-protection laws and (3) her First Amendment rights. Defendants have filed a motion to dismiss.

Service

Turner attempted to serve defendants in their individual capacities by delivering copies of the summons and complaint to people she alleges were defendants' authorized agents; she did not serve defendants personally, at their dwellings or usual places of abode or in compliance with state law. As defendants represented at the hearing, these purported agents appear to be no more than colleagues at defendants' workplaces who are unrelated to this action. And defendants, through sworn declarations, claim that they did not authorize any agent to accept service of process on their behalf.

Turner has not met her burden of proving adequate service because she has not provided evidence to rebut defendants' declarations that they had not appointed "anyone to accept personal service" for them. Even if the individuals who received the summons and complaint represented themselves as able to receive service for defendants, that would still not prove that they were actually defendants' authorized agents for purposes of accepting service.

Turner contends that her insufficient service of process should be excused because "Defendants had actual notice of the claims" and "any imperfections regarding service of process were inadvertent." But "[a]ctual notice does not equate to sufficient service of process, even under the liberal construction of the rules." This especially applies when a plaintiff fails to serve a defendant properly despite being warned about insufficient service before Rule 4(m)'s 90-day time limit expires. For these reasons, Turner's claims against defendants will be dismissed without prejudice.

Exhaustion

As an alternative ground for dismissing the complaint in its entirety, defendants contend that Turner failed to exhaust the available administrative remedies. In determining if the claims should be dismissed on this ground, the determinative issue is whether defendants are USDA officers or employees.

The court finds that each defendant is a USDA officer or employee, and Turner did not exhaust available administrative remedies against them. Therefore, the court must also dismiss her claims on this ground.

Defendants' motion to dismiss granted.

Turner v. Howell, Case No. 4:22-cv-00130, Oct. 5, 2023. WDVA at Danville (Cullen). VLW 023-3-634. 28 pp.

Sanctions

Pro se plaintiff avoids sanctions

Where the court denied the pro se woman's motion to disqualify the defendants' attorney, but the defendants failed to show that her motion specifically violated the applicable rules, their request for sanctions was denied.

Background

This matter is before the court on a motion for sanctions filed by defendants Sameer Patel, Patel & Dalrymple PLLC and Anchor Title & Escrow LLC. They seek sanctions against the pro se plaintiff, Crystal VL Rivers, for including them as parties to her amended complaint, and for filing one motion seeking to disqualify attorney Christopher E. Miller from representing the Patel defendants in this action. They contend Rivers's argument violated Rule 11(b)(1)-(2) in two different ways.

First, that she "attempt[ed] to advance [an] entirely novel" argument for extending Virginia Rule 1.8(j)-(k) to ordinary attorney-client transactions. To the Patel defendants, Rivers's motion to disqualify Mr. Miller's representation was really an "attempt[] to advance the entirely novel legal concept that receiving a fee from a client for work performed is the same as acquiring a proprietary interest in a cause of action."

Second, the Patel defendants take issue with Rivers's claims that "'Miller derived a profit form the income obtained by the Defendants in matters relating to the circumstances described fully in the Amended Complaint [and that] Miller is subject to testimony.'"

Analysis

I share the Patel defendants' concern that Rivers improperly tried to disqualify Mr. Miller from representing them in this case. Based on the arguments and record before the court, however, I am constrained to conclude the Patel defendants have not shown that the "specific conduct" they describe.

First, the Patel defendants read far too much into Rivers's bare-bones filing. The motion was frivolous because it repeated the same vague, speculative allegations describing purported conflicts of interest after this court explained in detail why those same allegations did not show any conflict of interest recognized by Virginia Rules 1.7, 1.8, 1.9, 1.10 or 3.7.

But Rivers was not using it "to advance the entirely novel legal concept that receiving a fee from a client for work performed is the same as acquiring a propriety interest in a cause of action" under Virginia Rule 1.8(j)-(k). Accordingly, the Patel defendants have not shown Rivers's motion violated Rule 11(b)(2) in this specific respect.

Before Rivers filed her motion, she was on notice that "Virginia's rules do not prohibit" Mr. Miller from representing the Patel defendants in this case "simply because" he knows or works with them. She also could have easily discovered that Rule 3.7(a) applies only where "the lawyer is likely to be a necessary witness" to a contested issue. Contrary to the Patel defendants' suggestion, however, there does not appear to be any reason why Rivers should have known that Mr. Miller joined Patel & Dalrymple in April 2022, and therefore that he could not possibly "be a necessary witness regarding events that took place in 2019." Accordingly, they have not shown that Rivers' motion violated Rule 11(b)(2) in this specific respect.

Finally, the Patel defendants' Rule 11(b)(1) argument relies entirely on their subjective beliefs that River's "only conceivable motivation" for trying to disqualify Mr. Miller was to "'harass, cause unnecessary delay, or needlessly increase the cost of litigation.'" Based on the limited record before the court, I find that the Patel defendants have failed to show Rivers's motion violated Rule 11(b)(1) of the Federal Rules of Civil Procedure.

Patel defendants' motion for Rule 11 sanctions denied.

Rivers v. Wynne, Case No. 6:22-cv-00034, Sept. 30, 2023. WDVA at Lynchburg (Hoppe). VLW 023-3-632. 10 pp.

Tort

Doctor's defamation claims dismissed

Where a doctor who has espoused highly disputed views regarding COVID-19 vaccines sued the Washington Post after it reported on his speech, but he failed to show the challenged statements about a matter of public concern were actionable or were made with actual malice, his suit was dismissed.

Background

Dr. Robert Malone sued the Washington Post for defamation, defamation by implication and insulting words. The challenged Washington Post article examines the advocacy of plaintiff — a "medical doctor and infectious-disease researcher" who has espoused highly-disputed views regarding COVID-19 vaccines.

Quoting both plaintiff and other medical experts, the story identifies plaintiff's position as contrary to the views articulated by government officials and many medical experts. And this critique is the centerpiece of plaintiff's defamation claim. In short, he protests that critical statements by rival doctors and the Washington Post are defamatory. Defendant has filed a motion to dismiss.

Defamation

The Washington Post article at issue takes a side in a public debate over the efficacy of COVID-19 vaccines. Unhappy with what he apparently views as the Post's hyperbolic opposition to his position, plaintiff invites the court to settle the matter. The law, however, counsels that the court decline plaintiff's invitation to pick winners and losers in a scientific debate, such as that at issue here.

Further still, plaintiff cannot enter a public debate and then cry foul when his views are criticized. Even if defendant's statements were actionable — and they are not — plaintiff's defamation claim would still fail because he did not plausibly allege that defendant acted with the necessary intent.

Defamation by implication

A defamation by implication cause of action arises when "a plaintiff alleges that he has been defamed not by statements of fact that are literally true but by an implication arising from them …." Important here, the First Amendment "greatly restrict[s] the common law where the defendant is a member of the press, the plaintiff is a public figure, or the subject matter of the supposed libel touches on a matter of public concern." Accordingly, a plaintiff must plausibly allege that the challenged language not only imparts a "false innuendo" but also "suggest[s] that the author intends or endorses the inference."

In the present case, plaintiff merely claims that the "strong gist and implication of the Statements is that Dr. Malone is intentionally dishonest, deceitful, immoral, unethical and dangerous, and that he is unfit to practice medicine;" he further posits that "WaPo carefully chose its words and purposefully misrepresented facts" by ignoring his point of view. Both statements are conclusory, stating no facts that would make it plausible that defendant intended or endorsed any defamatory meaning in the challenged statements. And "conclusory allegations" will not do.

Insulting words

Virginia's insulting words statute creates a private cause of action against the use of words "which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace." Virginia courts routinely treat an action for insulting words the same as "an action for slander or libel, for words actionable per se, with one exception, namely, no publication is necessary."

Consequently, the Fourth Circuit has determined that defamation and insulting words claims "must ineluctably 'rise or fall together.'" It follows that, for the same reasons we dismissed plaintiff's defamation claim, the court must also dismiss plaintiff's insulting words claim.

Anti-SLAPP

Even if plaintiff had alleged plausible claims for relief in his complaint — and again, he has not — defendant would still be immune from liability under Va. Code Ann. § 8.01-223.2 — unofficially known as Virginia's anti strategic lawsuit against public participation statute, since defendant's statements were about a matter of public concern and were not published with actual malice.

When deciding whether to award attorney fees pursuant to the statute, other courts have examined whether the action is "frivolous, unreasonable, or without foundation[;]" whether "there is substantial basis in fact and in law for the non-prevailing party to pursue the action[;]" whether the plaintiff "acted out of an improper motive[;]" whether there is an "imbalance in resources" and

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whether an award of fees would unfairly discourage other plaintiffs from bringing colorable claims. In this case, the above factors weigh against awarding attorney fees and costs to defendant.

Defendant's motion to dismiss granted.

Malone v. WP Company LLC, Case No. 3:22-cv-00046, Sept. 29, 2023. WDVA at Charlottesville (Moon). VLW 023-3-610. 19 pp.

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Real Estate

No rescission in foreclosure sale case

Where appellant claimed his home was sold at a foreclosure sale without adequate notice, the relevant statute precludes him from obtaining rescission of the sale.

Further, he is not entitled to equitable rescission because he did not plead that with additional time, he would have been able to obtain financing to cure his default. The trial court correctly granted appellee's demurrer to appellant's claims.

No rescission

"The amended complaint alleges that Parrish never received a notice more than 60 days before the scheduled foreclosure sale listed in that notice.

"We assume, without deciding, that the statute's exception to the notice requirement for postponed sales does not apply when the homeowner never received a notice of foreclosure 60 days before any given previously scheduled sale, even if the foreclosure auction ultimately takes place more than 60 days after a homeowner received a previous notice.

"Under that assumption, Parrish pleaded that the notices he received did not comply with Code § 55.1-321. But this '[f]ailure to comply with the requirements of notice' does not entitle Parrish to the remedy he seeks — rescinding the sale. …

"To the contrary, the statute expressly states that such a failure 'shall not affect the validity of the sale.' … What is more, the statutory scheme governing deeds of trust distinguishes between remedies for defects in personal notice of a foreclosure sale and remedies for defects in notice by newspaper advertisement.

"The latter is grounds to 'render a sale of the property voidable by the court.' …The General Assembly chose to provide a remedy of rescission in one instance and not the other, and we must apply the 'manifest intention of the legislature, clearly disclosed by its language.' …

"And the General Assembly retained this unambiguous language despite making other amendments to the statute. … The failure to provide notice by mail more than 60 days before a scheduled foreclosure sale, as required by Code § 55.1-321(A), is a '[f]ailure to comply with the requirements of notice' that does not impact the validity of a completed sale. …

"Thus, Parrish has failed to state a claim for statutory rescission."

Deed of trust

"Parrish then repackages his same argument in an effort to state a claim under Code § 55.1-320, which provides default rules for interpreting a deed of trust.

"One such rule is that for 'owner-occupied residential real estate,' the trustee 'shall not sell the property secured by the deed of trust without receiving an affidavit signed by the party that provided the notice required by § 55.1-321 confirming the notice was sent to the owner, with a copy of such notice attached to the affidavit.' …

"And '[p]rior to commencing a foreclosure sale with respect to such real estate, the trustee shall provide copies of such affidavit and notice, with any personal financial information redacted, to each potential bidder.' …

"Thus, Parrish argues that because the underlying notice did not comply with Code § 55.1-321, the trustee did not — and could not — comply with Code § 55.1-320(10), and this failure is separate grounds for rescission.

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This argument falls short. Under Parrish's theory, every violation of the notice requirements of Code § 55.1-321(A) would also violate Code § 55.1-320(10) because the trustee could not 'receive an affidavit' confirming that the § 55.1-321(A) notice requirements had been complied with if those requirements were not in fact met.

"But Code § 55.1-320 lacks express language stating that a failure to comply with its provisions is grounds to rescind a foreclosure sale. Cf. Code § 55.1-322(E) (failure to comply with notice by advertisement 'render[s] a sale of the property voidable by the court').

"And reading Code § 55.1-320(10) to include an implied statutory rescission remedy would undermine the General Assembly's decision in Code § 55.1-321(C) to exclude rescission as a remedy for violations of the personal notice requirements."

Equitable rescission

"Virginia courts have 'never held that equitable rescission is available in cases where a plaintiff fails to plead that he or she incurred any damages or suffered any harm caused by an alleged breach of a deed of trust.' …(emphasis added). …

"Parrish failed to plead a cause of action that could support an equitable rescission claim. He pleaded that the trustees' failure to provide sufficient notice as required by the deed of trust caused him harm, including 'lost equity' in the home, because with adequate notice (60 days instead of 30) he 'would more than likely have found a way to stop the foreclosure, as a last resort by [Chapter 13] bankruptcy.'

"Because Parrish had already filed an earlier bankruptcy, he pleaded that 'a second bankruptcy would have resulted in an automatic stay for 30 days during which he could have moved for an extension of such a stay.'

"Yet Parrish ultimately only pleaded that additional notice would have given him more time to delay the sale, not that more time would have enabled him to come up with additional funds to pay off his debt and avoid the foreclosure. …

"Parrish failed to plead that he 'had the ability to cure [his] default,' so his complaint lacks a sufficient causal link between the alleged lack of notice and his injury. … Without a link between the alleged wrong and the proposed remedy, we must affirm the circuit court's decision to sustain the demurrer."

Affirmed.

Parrish v. Callahan, et al., Record No. 1342-22-3, Oct. 3, 2023. CAV (published opinion) (Lorish) From the Circuit Court of Augusta County. (Dryer) Henry W. McLaughlin (Law Office of Henry McLaughlin, P.C., on briefs), for appellant. Quinton B. Callahan (Kevin M. Wheeler; Katherine M. Mann; Clark & Bradshaw, P.C., on brief), for appellees. VLW 023-7-3791, 15 pp.

■ Va. Court of Appeals – Unpublished

Civil Practice

Failure to state claim against judge

Where a pro se plaintiff named a circuit court judge as the defendant in her complaint but did not otherwise mention the judge, the circuit court correctly dismissed plaintiff's complaint with prejudice.

Analysis

"Assuming, without deciding, that Burkhardt has a right of action to pursue her claimed right to testify before the grand jury, Burkhardt's petition failed to articulate why Judge Azcarate was responsible for the violation of that claimed right.

"'While a complaint need not "descend into statements giving details of proof in order to withstand demurrer," it must contain "sufficient allegations of material facts to inform a defendant of the nature and character of the claim.'" …

"Burkhardt's suit was not a petition for a writ of mandamus, but a civil lawsuit naming Judge Azcarate as defendant; however, Burkhardt's petition did not provide any basis for Judge Azcarate to determine the nature or character of Burkhardt's claim.

"The complaint contained no assertion that Judge Azcarate impaired Burkhardt's asserted right to appear before the grand jury. In fact, the complaint did not contain any assertion that Judge Azcarate had any involvement whatsoever in the empaneling, supervision, or procedures of the grand jury.

"Furthermore, the petition failed to articulate any specific claim, any elements necessary to support such a claim, nor any facts to support such a claim.

"Accordingly, Burkhardt's petition wholly failed to state a claim against Judge Azcarate and the circuit court did not err when it sustained Judge Azcarate's demurrer."

Affirmed.

Burkhardt v. Azcarate, Record No. 1908-22-4, Oct. 3, 2023. CAV (unpublished opinion) (Humphreys) From the Circuit Court of Fairfax County (Sharp). Bonnie Burkhardt, pro se. (Jason S. Miyares, Attorney General; Steven G. Popps, Deputy Attorney General; Jacqueline C. Hedblom, Senior Assistant Attorney General; Thomas J. Sanford, Assistant Attorney General; Robert B. McEntee, III, Assistant Attorney General, on brief), for appellee. Appellee submitting on brief. VLW 023-7-380, 4 pp.

Civil Practice

Appeal arguments waived in tax exemption case

Where appellant did not assign error to the trial court's alternate rulings in this tax exemption case, the trial court's decision to dismiss his petition for a writ of mandamus is affirmed.

Background

The Constitution of Virginia mandates that service-disabled veterans, such as appellant Gray, are entitled to a motor vehicle tax exemption. A county revenue commission sent a letter and form to service-disabled veterans erroneously stating they would lose the exemption if they did not submit an exemption form by a certain deadline in 2022.

The commissioner drafted a 2023 letter that corrected the erroneous statement.

Appellant filed a petition for a writ of mandamus to compel the commissioner to provide the exemption without submitting a form.

"The circuit court held a hearing on the Commissioner's motion to dismiss … [and] … issued a letter opinion granting the Commissioner's motion.

"The court found that Gray lacked standing to press his claim given his concession at the hearing that neither he nor any other eligible veteran had lost or would lose the tax exemption.

"In addition, the circuit court found that the enabling legislation for the constitutional amendment granting the exemption permitted '[a]ny locality [to] establish procedures for a veteran to apply for the exemption and may enact any ordinance necessary for administration of the exemption.' …

"Thus, Gray had failed to allege 'the existence of a specific right to be enforced' or that the Commissioner was 'not performing a specific duty required of [him].'

"Moreover, the circuit court found that Gray had an adequate remedy at law under Code §§ 58.1-3668(D) and -3980 to seek a correction of any erroneous assessment. In those circumstances, the circuit court held, 'mandamus does not lie.' …

"The circuit court entered final judgment dismissing and denying Gray's petition[.] … Gray noted the following objections to the final order:

"'The Judge Baugher errored when he misapplied the law and misunderstood a key piece of evidence. Ignoring the 2022 letter and based all his decisions on the re-drafted 2023 letter that was filed with the court 24 days after the complaint was filed. Ignoring rules of the courts and ignored my statement that I could not hear.' Gray timely appealed the circuit court's judgment.'"

Gray appealed.

Waiver

"Although Gray challenges the circuit court's failure to rule on his constitutional claim, he failed to assign error to the circuit court's holdings that he lacked standing and had an adequate remedy at law. Thus, his claim on appeal challenging only the circuit court's failure to rule on his constitutional claim is waived.

"'It is well-settled that a party who challenges the ruling of a lower court must on appeal assign error to each articulated basis for that ruling.' … (emphasis added). …

"This Court concludes that the circuit court's holding that mandamus did not lie because Gray had an adequate remedy at law under Code §§ 58.1-3668(D) and -3980 'serves as an adequate and independent legal basis for denying' Gray's petition for a writ of mandamus. …

"'The requirement that a litigant who seeks the issuance of a writ of mandamus must have no adequate remedy at law is deeply imbedded in the jurisprudence of this Commonwealth.'"

Affirmed.

Gray v. Cullers, Record No. 1638-22-3, Oct. 3, 2023. CAV (unpublished opinion) (per curiam) From the Circuit Court of Rockingham County (Baugher). (Michael S. Gray, on brief), pro se. Appellant submitting on brief. (Thomas H. Miller, Jr.; Sheila K. Paladino; Office of the County Attorney for Rockingham County, on brief), for appellee. Appellee submitting on brief. VLW 023-7-383, 8 pp.

Domestic Relations

No flaws in court's equitable distribution

Where the court made an equitable distribution of the parties' marital assets, any error in the trial court's calculation of how long the parties were married is harmless. The length of the marriage is just one of many factors a court considers "when determining equitable distribution."

Most arguments waived

"From the outset, we find that we are unable to review many of wife's arguments due to an inadequate record. 'On appeal, we presume the judgment of the trial court is correct and the burden is on the appellant to present to us a sufficient record from which we can determine whether the trial court has erred in the respect alleged by appellant.' …

"We conclude that complete transcripts, or a written statement of facts in lieu of transcripts, from the February 3, 2022 pretrial conference and the April 11, 2022 and the June 24, 2022 hearings are indispensable to a determination of wife's challenges to the circuit court's rulings concerning GAL fees, child support, custody, survivorship benefits, and wife's contribution to the marital residence and husband's retirement account.

"Even though wife is proceeding pro se, she still 'must comply with the rules of court.'"

The Week's Opinions

Length of marriage

"Wife argues the circuit court erred in calculating the length of the parties' marriage at 8.5 years. The parties were married in 2008 and separated in 2018, but had separated years before for approximately 18 months.

"When calculating the length of the marriage, the circuit court considered the parties' previous 18-month separation and found that the length of the marriage was 8.5 years, instead of 10 years.

"Assuming without deciding that the circuit court erred in calculating the length of the marriage, the error was harmless. …

"'Under the doctrine of harmless error, we will affirm the circuit court's judgment when we can conclude that the error at issue could not have affected the court's result.' …

"The duration of the marriage is only one of numerous factors that a circuit court is required to weigh when determining equitable distribution. …

"After classifying the parties' property as separate or marital, the circuit court then appropriately considered the factors of Code § 20-107.3(E) in fashioning the award of equitable distribution. There is no evidence that the circuit court's award was impacted by its calculation of the duration of the parties' marriage.

"Therefore, even assuming error, any such error was harmless."

Child's 529 account

"Wife argues that the circuit court erred in failing to award her a marital share of the child's 529 account. We reject this argument as the parties resolved ownership of the 529 Plan in a written agreement, signed by each party.

"Husband submitted the agreement as an exhibit at the final hearing. This Court has stated, 'to the extent that the parties have already stipulated to a particular disposition of their property, the court may not decree' an equitable distribution award that is inconsistent with that contract. …

"Therefore, in the present case, the circuit court could not distribute the 529 Plan in a manner that contradicted the terms of the parties' agreement."

Affirmed.

Marino v. Marino, Record No. 1057-22-1, Oct. 3, 2023. CAV (unpublished opinion) (Fulton III) From the Circuit Court of the City of Virginia Beach (Padrick). Oksana Marinaro, pro se. Robert Jeffries; Bretta Z. Lewis, Guardian ad litem for the minor child (Wolcott Rivers Gates, on brief), for appellee. VLW 023-7-388, 11 pp.

Domestic Relations

No compliance with notice requirements

Where appellant did not provide notice that he filed a statement of facts in lieu of a transcript, the court cannot consider his appeal of a child visitation order. The circuit court's order allowing mother to relocate the parties' children to Florida is affirmed.

Notice requirements

"A transcript or properly filed written statement of facts in lieu of a transcript is indispensable for a review of father's assignments of error on appeal. …

"[F]ather filed a written statement of facts in lieu of a transcript, but the trial judge did not sign it. '[A] written statement becomes a part of the record' if three conditions are met. …

"These conditions include:

"(1) that the written statement of facts is filed in the clerk's office of the circuit court within 60 days after entry of judgment,

"(2) that 'a copy of the statement is mailed or delivered to opposing counsel along with a notice that the statement will be presented to the trial judge between fifteen and twenty days after filing,' and

"(3) that 'the trial judge signs the statement and the signed statement is filed in the office of the clerk.' …

"'[O]nce the appellant has complied with the first two elements of Rule 5A:8(c), he or she has established prima facie compliance with the requirements of the rule.'"

Indispensable

"[A]lthough father timely filed his written statement of facts in lieu of a transcript, he did not provide mother or the guardian ad litem with the requisite notice that the statement of facts would be presented to the trial judge 'no earlier than 15 days nor later than 20 days' after its filing. …

"Because father failed to establish prima facie compliance, he is not entitled to a remand for the trial judge to consider and sign the proposed written statement of facts in lieu of a transcript. 'Consequently, the statement of facts is not "a part of the record."' …

"Without a transcript or written statement of facts in lieu of a transcript, we cannot ascertain whether the evidence supports the circuit court's findings regarding the [children's] relocation. Moreover, with no record of the arguments father made or the positions he took at the circuit court hearing, we cannot know whether he presented the specific arguments to the circuit court which he advances on appeal. …

"We also have no way to evaluate whether his appellate argument repudiates a position that he may have taken in the circuit court. … Certainly, we cannot say whether the circuit court abused its discretion as father claims.

"We conclude that a transcript, or a written statement of facts in lieu of a transcript, from the circuit court hearing is indispensable to deciding father's assignments of error."

Affirmed.

Lewis v. Myrick, Record No. 0167-23-2, Oct. 3, 2023. CAV (unpublished opinion) (per curiam) From the Circuit Court of the City of Richmond (Cardwell). (Misty D. Whitehead; JustLaw, PLLC, on brief), for appellant. No brief or argument for appellee. VLW 023-7-393, 5 pp.

Family Law

Finding of child abuse and neglect affirmed

The trial court properly determined that a child's father was liable for abuse and neglect after the child witnessed him kill mother by injecting her with cyanide and then sought "to avoid prosecution, obstruct witnesses, and subvert the Department of Corrections' restrictions[.]"

Further, the court correctly entered a protective order in the child's favor even though father was serving a life sentence for mother's murder.

Abuse and neglect

"Father first challenges the circuit court's finding of abuse and neglect. Father states that at the time of mother's death, the child resided with the maternal grandparents, and continues to do so, and that the child 'is loved' and 'is safe.'

"Father contends that, as such, there is 'no reason to determine that [the child] meets the definition of an abused or neglected child.' Father also argues that '[m]ere incarceration of a parent does not render the child automatically abused or neglected.'

"Code § 16.1-228(1) defines an abused or neglected child as any child '[w]hose parents … create[] or inflict[], threaten[] to create or inflict, or allow[] to be created or inflicted upon such child a physical or mental injury by other than accidental means, or create[] a substantial risk of death, disfigurement or impairment of bodily or mental functions.'

"'[T]he statutory definitions of an abused or neglected child do not require proof of actual harm or impairment having been experienced by the child.' …

"Father does not dispute the circuit court's holding that the child was present when father murdered mother and the child witnessed mother's 'agonizing death.'

"Father also does not challenge the circuit court's conclusion that father's 'numerous methods and mechanisms' of sending coded messages in order to avoid prosecution, obstruct witnesses, and subvert the Department of Corrections' restrictions was indicative of father's on-going threat to the child.

"Moreover, contrary to father's argument, the circuit court did not base its finding on father's incarceration, but rather on father's underlying violent and threatening actions.

"Neither the murder of the child's mother in front of the child, nor the subsequent efforts to harass and intimidate mother's family — the child's caregivers — suggest father values the child's well-being or safety.

"Based on the totality of the record, the circuit court did not err in finding that the child was abused or neglected."

Protective order

"Father also challenges the circuit court's imposition of a protective order on behalf of the child. Father alleges that the protective order was unnecessary and overreaching because the maternal grandparents were not required to permit contact between father and the child.

"Father asserts that the Commonwealth could have, but did not, request a no-contact order between father and the child during the criminal trial; therefore, he claims that it is not necessary.

"Finally, father asserts that because he is serving a life sentence, a protective order is unnecessary as the Department of Corrections has avenues to prohibit contact between father and the child.

"The record supports the circuit court's judgment that a protective order restricting father's contact with the child was appropriate to protect the child's welfare. …

"[F]ather does not dispute the circuit court holding that father's past use of coded messages demonstrated his willingness to evade restrictions the correctional authorities may place on his communication with the child.

"Moreover, although father was serving a life sentence, father does not deny the possibility the Commonwealth could release father early and that any restrictions imposed upon his release were not guaranteed.

"Finally, father's reliance on the lack of a no-contact order from the criminal trial as evidence that a protective order is unnecessary is not persuasive, as the subject proceeding was properly before the circuit court in a separate and distinct proceeding brought on behalf of the child.

"Considering the totality of the record, the circuit court did not err in imposing a protective order against father."

Affirmed.

Merlino v. City of Virginia Beach, Record No. 1583-22-1, Oct. 3, 2023. CAV (unpublished opinion) (Friedman) From the Circuit Court of the City of Virginia Beach (Mahan). (Gregory K. Pugh, on brief), for appellant. Appellant submitting on brief. (Mark D. Stiles; Christopher Boynton; Christianna Doughtery-Cunningham; Jennifer Peterson, Guardian ad litem for the minor child; Office of the City Attorney; Petersen Law, PLC, on brief), for appellee. Appellee and Guardian ad litem submitting on brief. VLW 023-7-384, 7 pp.

Personal Injury

Examining doctor's deposition properly excluded from evidence

Where appellee was injured in a vehicle crash, the trial court properly excluded an examining doctor's deposition because the doctor violated the court's order imposing limitations on what he could ask appellee, and by referring to the Rule 4:10 medical examination as an independent medical examination.

Multi-vehicle crash

Layton was injured when Elze hit the back of Layton's vehicle. The impact propelled Layton's vehicle into the rear of the vehicle in front of her.

"A neurologist diagnosed Leyton with permanent whiplash, caused by the December 2018 car accident, and prescribed steroids and a muscle relaxant.

"Leyton also received nerve block injections. Leyton regularly experienced significant pain, had difficulty moving her head, experienced headaches, and had persistent lower back pain.

Leyton sued Elze for negligence. "The trial court entered a consent order under Rule 4:10 for Leyton to submit to a medical examination by Dr. Ian Wattenmaker.

"In relevant part, the trial court's order limited Dr. Wattenmaker's questions of Leyton during the examination to 'the medical standard of care associated with the patient/plaintiff's history and any complaints since the plaintiff's deposition in February 2022.'

"The trial court's order also prohibited counsel and Dr. Wattenmaker from referring to the examination as an independent medical examination.

Examination

"Dr. Wattenmaker conducted the Rule 4:10 examination[.] … In his written report, under a heading titled 'History of Present Illness,' Dr. Wattenmaker noted that he had questioned Leyton about the car accident, including how it occurred and what symptoms she felt afterward.

"He also inquired about Leyton's past medical history. Dr. Wattenmaker opined, before reviewing Leyton's medical records, that her symptoms at that time could not be anatomically explained by the December 1, 2018 car accident and therefore were not caused by the accident.

"Dr. Wattenmaker then reviewed Leyton's medical records and reached the same conclusion—that she did not suffer any permanent injury because of the car accident."

Deposition

"At his deposition, Dr. Wattenmaker explained that one of 'the most important aspect[s]' of his examination 'was the history [he] obtained from' Leyton. Dr. Wattenmaker asked Leyton whether she had any prior difficulty with symptoms or conditions involving her neck or lower back before the car accident.

"Dr. Wattenmaker reviewed Leyton's provided history and medical records and determined that Leyton had experienced neck and lower back pain before the car accident. Dr. Wattenmaker also referred to the examination as an independent medical examination more than once during his deposition. …

"Leyton moved to exclude Dr. Wattenmaker as a witness at trial or to strike portions of his testimony because he had not limited the scope of his examination and questions to events after Leyton's deposition in February 2022 and referred to his examination as an independent medical examination. …

"After reviewing the transcript of Dr. Wattenmaker's deposition, the trial court found that it was not possible to exclude Dr. Wattenmaker's consideration of Leyton's history from the deposition because it was 'very clear' that Dr. Wattenmaker's answers were given in relation to his 'treatment history and the history that he took.' Thus, the trial court excluded Dr. Wattenmaker's testimony in its entirety."

The matter proceeded to trial. "The jury awarded Leyton $203,000 in damages.

"On appeal, Elze argues that the trial court erred in finding that the Rule 4:10 order precluded Dr. Wattenmaker from asking Leyton about her medical history. Elze also argues that the trial court's sanction for the Rule 4:10 violation — the blanket exclusion of Dr. Wattenmaker's testimony — was overbroad and prejudicial."

Rule 4:10 order

"Elze argues that the trial court erred in finding that the Rule 4:10 order precluded Dr. Wattenmaker from asking Leyton about her medical history.

"She asserts that the order plainly allowed questions pertaining to the history of Leyton's claimed injuries and that the trial court's interpretation of the order was overbroad and unreasonable. We disagree.

"Paragraph 4(d) of the Rule 4:10 order expressly provides that Dr. Wattenmaker was 'permitted to only ask questions associated with the medical standard of care associated with the patient/plaintiff's history and any complaints since the plaintiff's deposition in February 2022.' (Emphasis added).

"That language can be understood in more than one way and is, therefore, ambiguous.

"After considering the language and structure of the order, the trial court noted that it 'would be more persuaded that the limitation was only applying to complaints if it was broken down into separate sub paragraphs.'

"The trial court found, however, that 'if you read [the] sub paragraph … with appropriate grammar and sentence structure,' the inquiry was limited to history and complaints after February 2022.

"Based on that interpretation of its own order, the trial court found that the limita-

The Week's Opinions

tion applied to the entirety of the subparagraph. We find the court's interpretation was reasonable and, therefore, within the trial court's discretion."

Exclusion of testimony

"We cannot say that the trial court abused its discretion in excluding Dr. Wattenmaker's testimony. Elze identified two passages that she believed could be redacted from the deposition transcript.

"However, the trial court considered the transcript in its entirety and found that because Leyton's history was the foundation of Dr. Wattenmaker's examination, deposition, and ultimate opinion, there was no way to strike Dr. Wattenmaker's use of Leyton's history in violation of the order.

"Indeed, Dr. Wattenmaker stated that one of the most important aspects of his examination was the medical history he obtained from Leyton. …

"As the trial court found, it is readily apparent from the deposition transcript that Dr. Wattenmaker's answers directly related back to the history he took, which violated the express provisions of the agreed order.

"'[A]n appellate court should not simply rubber stamp every discretionary decision of a trial court.' … It was, however, within the trial court's discretion to exclude Dr. Wattenmaker's testimony.

"The trial court found itself without the ability to sufficiently sanitize the references to Leyton's history after considering the transcript as a whole. Thus, the trial court did not abuse its discretion when it excluded Dr. Wattenmaker's deposition testimony."

Affirmed.

Elze v. Leyton, Record No. 1358-22-4, Oct. 3, 2023. CAV (unpublished opinion) (Annunziata) From the Circuit Court of Fairfax County (Smith). Alicia Lehnes Summers (Stephanie M. Dahl & Associates, on briefs), for appellant. Michael J. Shevlin (Shevlin Smith, P.C., on brief), for appellee. VLW 023-7-385, 9 pp.

■ Va. Circuit Court

Civil Practice

Mechanic's lien will be enforced

Where a fire destroyed defendant's home, plaintiff contractor can enforce a mechanic's lien on the property after defendant did not fully pay for the restoration.

Statement of the case

"[T]he Court provides its post-trial ruling on the 'Amended Suit to Enforce Mechanic's Lien and Complaint for Breach of Contract' filed by Plaintiff Premier Restorations, LLC ('Premier') and the 'Counterclaim' filed by Defendant Rhona Barnes.

"Premier filed a mechanic's lien in response to Barnes's failure to pay for Premier's restoration construction services after Barnes's home was destroyed by fire. Premier seeks a decree to enforce the lien, asking the court to order the sale of Barnes's property to recover its damages or, alternatively, a judgement in its favor.

"In addition, Premier seeks prejudgment interest and attorney's fees.

"In her counterclaim, Barnes seeks damages for work that Premier allegedly improperly performed or failed to perform.

"At trial, Premier did not introduce any evidence regarding the mechanic's lien. As a result, Barnes moved to strike the mechanic's lien claim, and the Court took the motion under advisement. The Court finds that the mechanic's lien was perfected and properly before the Court.

"Therefore, the Court denies Barnes's motion to strike Premier's mechanic's lien claim. The Court also grants Premier's request for enforcement of the Mechanic's Lien against the property at issue, and the Court orders the sale of the property, with the proceeds from the sale used to satisfy the mechanic's lien pursuant to the Code of Virginia.

"Finally, the Court denies Premier's request for prejudgment interest and attorney's fees and denies Barnes's counterclaim."

Lien perfected

"To perfect a mechanic's lien in Virginia, a claimant must file the lien within ninety days of completion or termination of the work associated with the amount claimed in the lien. …

"Additionally, the memorandum of lien must include specific information and can only include sums due for labor or materials furnished within 150 days before the last day of work prior to filing the lien. …

"Finally, the claimant must initiate a suit to enforce the lien within six months of the lien filing or within 60 days of completion of work, whichever is later. …

"Premier offered no evidence regarding the Mechanic's Lien during its case in chief at trial. However, it is undisputed that Premier filed with the Court on June 7, 2022, the Mechanic's Lien, which includes an affidavit in which Premier, via its agent, swore that Barnes was and is justly indebted to Premier in the amount of $109,185.71, plus interest.

"Premier attached a copy of the Mechanic's Lien to the Complaint and Barnes admitted in her Answer that Premier had filed the referenced lien. Therefore, the Court holds that, under the circumstances, the Mechanic's Lien is before the Court and can be considered as evidence.

"Premier established at trial that the last day of work was within ninety days of the Mechanic's Lien's filing.

"However, the analysis concerning the 150-day limitations period for claimed work under the lien is more complicated, as no evidence was presented at trial regarding whether the lien includes only work within the 150-day limitations period. …

"There do not appear to be any Virginia cases discussing whether the claimed amount in a mechanic's lien relating to labor and materials provided during the 150-day limitations period (1) must be affirmatively proven by the claimant or (2) is presumptively valid when certified to be accurate and not challenged by the respondent. …

"Premier swore via affidavit that Barnes was and is 'justly indebted' to Premier in the amount stated in the Mechanic's Lien, plus interest. This affidavit arguably is an affirmation by Premier that the Mechanic's Lien complied with all statutory requirements, including that the amount claimed related only to labor and materials provided during the 150-day limitations period.

"Further, Barnes did not assert that the Mechanic's Lien improperly included amounts that were outside the 150-day limitations period, either pretrial or at trial, and therefore has waived or is estopped from advancing any such claim. …

"Based on the circumstances present here, the Court rules that the Mechanic's Lien is presumptively valid.

Contract claim

"Pursuant to the Contract, Premier was obligated to complete the Restoration Services and any change order work. In return, Barnes was obligated to endorse and forward to Premier all checks she received [from her insurer] for the Restoration Services immediately upon receipt, to pay for any change order work before the work commenced, and to pay the full contract price for the work upon completion. …

"The failure to make a significant payment due under a contract can constitute a material breach. …

"Based on the evidence introduced at trial—including Barnes's admission that she did not forward to Premier a check in the amount of $43,770.68 and that she could not remember if she had not forwarded other checks—the Court finds, by a preponderance of the evidence, that Barnes failed to forward to Premier checks totaling $109,185.71. The Court also finds that, based on the evidence presented at trial, Barnes failed to pay for the change order work in advance, as required."

Counterclaim

Barnes alleges the following work problems: (1) rotted floor joists and an associated entryway flooring failure; (2) failure to reinstall exterior deck planking removed to erect a new exterior wall; (3) improper plumbing installation resulting in sewage backup; (4) HVAC heat malfunctions; and (5) failure to replace, rather than repair, the rear exterior door. …

"Premier demonstrated that the rotted floor joists were present in a part of the house outside Premier's work area and that the resulting flooring issues are, therefore, not Premier's responsibility.

"Premier also provided evidence that reinstallation of the deck planking—when the deck was outside the scope of work—was precluded by the rotted condition of the planks.

"Both the sewage backup and the HVAC problems occurred months after Barnes moved back into the house[.] … Finally, Premier provided evidence that the rear exterior door was, in fact, replaced. …

"Barnes alleges that Premier never installed hardwood flooring, a roof over the front porch, utility room shelving, a shower door, a linen closet, carpet in the master bedroom and closet, and a garage. All of these items, however, were addressed by change orders that Barnes requested, reviewed, and ultimately accepted."

Barnes claims certain punch list tasks and warranty work were not performed. "Because Premier concedes that the punch list consists of incomplete work Premier agreed to perform and that the other items are covered by the warranty provided by Premier, the Court finds that Premier is obligated to complete the punch list items and the warranty work[.] …

"With the exception of the punch list items and the work covered by the warranty, the Court finds that Barnes failed to prove that she is entitled to recover on her counterclaim."

Premier Restorations v. Barnes, Case No.: CL22-10509, Sept. 22, 2023. In the Circuit Court of the City of Norfolk (Lannetti). Konstantine Kastens, Jesse Gordon for the parties. VLW 023-8-063, 16 pp.

Civil Practice

No bifurcated trial for liability and damages

Where plaintiff estate administrator alleges defendant hospital's "failure to properly treat the [decedent's] injury resulted in his death," defendant's motion to hold a bifurcated trial as to liability and damages is denied.

Further, a video of the decedent, in which he described "his version of events, the extent of his injuries, and his personal thoughts" is admissible under the dead man's statute.

A post-incident report will be excluded from evidence because it is "an unauthenticated document of a third-party containing multiple layers of hearsay." The court takes under advisement whether the report can be used for other purposes, such as impeachment. The report may also contain party admissions.

No bifurcation

"Defendant moves to bifurcate liability from damages in two separate trials, stating a likelihood that the jury would be confused by evidence presented in a combined trial for a survivorship and wrongful death action.

"Defendant argues that the jury may improperly consider damages evidence presented in one action that would be irrelevant or nonprobative. Defendant asserts that the 'only way to avoid undue prejudice' is to first hold a bifurcated trial on liabilities followed by a damages trial based on Plaintiff's election of remedies.

"Defendant relies on Va. Code Section 8.01-272 and Allstate v. Ins. Co v. Wade, 265 Va. 383, 392 (2003), to assert that the court's authority to order separate trials is applicable to the bifurcation of issues.

"Defendant contends that Virginia Section 8.01-281(8) provides litigants the ability to move the courts to order separate trials on individual issues.

"Defendant also points the court to dicta contained in Centra Health v. Mullins, 277 Va. 59, 78 (2009) (recognizing potential for bifurcation of liability from damages).

"In response, Plaintiff argues that bifurcation in this case is not authorized as Va. Code Section 8.01-272 authorizes separate trials of claims, not issues.

"Plaintiff also asserts that no Virginia Court has interpreted Va. Code Section 8.01-281(8) to authorize the bifurcation of trial proceedings or the bifurcation of liabilities and damages in a personal injury or wrongful death case.

"Instead, Plaintiff contends that Va. Code Section 8.01-379.3 prohibits bifurcation of a negligence action for personal injury or wrongful death.

"Assuming, without deciding, that the dicta in Centra approves of bifurcation, the burden on the moving party likewise includes an obligation to establish that the complained of evidence is of such nature that it would lead to confusion. …

"While there is always the possibility that a jury could conflate the relevance of various forms of damages, the Defendant has failed to establish that a jury cannot be properly guided through carefully and deliberately crafted instructions to guide them on the appropriate form of deliberations.

"Indeed, Centra Health stands for just this proposition because it shows that a jury was instructed correctly in such a fashion.

"The purpose of jury instructions is to fully and fairly inform the jury as to the law of the case applicable to the particular facts, and not to confuse them. … The jury is presumed to follow the court's instruction."

The motion to bifurcate is denied.

Dead man's statute

"Defendant moves the Court to exclude Mr. Hall's [the decedent's] recorded statement. Defendant argues that Mr. Hall made statements that are uncorroborated by medical records and lack sufficient trustworthiness to warrant a hearsay exception. Defendant further argues that the video contains hearsay within hearsay.

"Plaintiff counters that Mr. Hall's statements fall squarely within the statutory hearsay exception known as the 'Dead Man's Statute' under Va. Code 8.01-397.

"The statute provides: 'In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.

"'In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party.' … (emphasis added). …

"As an initial matter, the Commonwealth's Dead Man's Statute appears to be unique in its scope and breadth relative to similar laws of the Commonwealth's sister-states. It allows unsworn, uncorroborated statements of non-testifying declarants that are at the heart of the evil the rules against hearsay seek to mitigate. …

"The expansive nature of the statute has generated negative commentary from the courts that have reviewed it. … Despite the criticism, the courts have nonetheless ac-

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knowledged the legislature's prerogative in establishing the statutory exception. …

"Defendant counters that use of the term 'may' by the legislature provides the court with the discretion to reject what Defendant claims is an unreliable and contrived piece of evidence.

"The authorities run counter to this interpretation.

"First, Shumate [v. Mitchell], 296 Va. 532 (2018) reaffirmed that 'relevance is the only statutory limit on what declarations are admissible.' … (citing Gelber v. Glock, 293 Va. 497 (2017).

"Second, Gelber makes clear that a court that excludes such a statement under the Dead Man's Statute, does so at its peril. See Gelber, 293 Va. at 512 (reversing trial courts exclusion of statement)."

The video will be admitted as evidence.

Report

"[T]he Virginia Department of Health completed a Medicare/Medicaid compliance survey at [defendant] Sheltering Arms Hospital. … The VDH Report included specific findings pertaining to the treatment and condition of Mr. Hall. …

"It is uncontroverted that the VDH Report is a collateral investigation prepared by the Commonwealth for purposes of compliance with the federal Medicare and Medicaid programs. …

"This standard is separate and apart from the standard of care relevant to this matter. Moreover, the report is an unauthenticated document of a third-party containing multiple layers of hearsay.

"Because the report has the potential to mislead the jury on the standard of care, and because it provides the opinions of experts who may not be available for cross-examination, the report will not be admitted as a stand-alone document. …

"Despite this finding, the court cannot rule out the potential for other uses of the VDH Report at trial. The report has potentially admissible uses for impeachment and may contain party admissions. Accordingly, Defendant's motion is granted in part and taken under advisement in part."

Capehart v. Sheltering Arms Hospital, Case No.: CL22-1687, Sept. 6, 2023. In the Circuit Court of the City of Richmond (Thorne-Begland). Carlton F. Bennett, Kenneth T. Roeber, Michelle L. Warden for the parties. VLW 023-8-061, 6 pp.

Civil Practice

Untimely claims in partnership matter

Where plaintiffs claim certain defendants, among other things, breached fiduciary duties, engaged in fraudulent misrepresentation and were unjustly enriched in this partnership matter, defendants' plea in bar based on the statute of limitations is granted in part.

Plaintiffs are not entitled to equitable tolling of the statute of limitations.

Fiduciary duty

In response to Count II (breach of fiduciary duty), defendants Carroll and Ferraguto Jr. argue that there is no fiduciary duty "between the members of an LLC, or between a member and a manager of an LLC[.] …

"This argument is, of course, a demurrer, and … the subject of this opinion is exclusively the plea in bar.

"Defendants then argue that, even if breach of fiduciary duty was recognized as a cause of action in Virginia, the claim would be barred because the statute of limitations has expired. …

"[T]he plaintiffs allege that when the defendants encumbered SLV property at least four times without written consent, they breached the fiduciary duty of care, loyalty, candor, and good faith to the plaintiffs. ….

"[T]he plaintiffs allege that when the defendants failed to provide accurate financial reports and failed to keep the Plaintiffs generally informed regarding the transactions of SLV and others, they breached the fiduciary duties of care, loyalty, candor, and good faith to the plaintiffs.

"Assuming that these mortgages were improper — and it appears that they were — the most recent occurred in March 2018. Plaintiffs filed their complaint April 5, 2022, more than four years after the most recent improper mortgage.

"Virginia Code §8.01-248 prescribes a two-year statute of limitations for actions such as this. Virginia Code § 8.01-249(1) states that a cause of action for fraud accrues when the fraud is discovered or by the exercise of due diligence reasonably should have been discovered. (Emphasis added).

"The plaintiffs filed this action more than four years after the last improper mortgage was recorded. The question becomes then, when did the Plaintiffs discover the breach, or, when should the Plaintiffs have discovered the breach by the exercise of due diligence.

"That question then raises the issue of whether the statute of limitations was equitably tolled by the defendants' alleged misconduct in hiding their alleged breaches from the Plaintiffs.

"The Plaintiffs recognize this when they state in their brief that the defendants have narrowed down the issue too far—in other words, it is not just the recording of the mortgages, but the entire misconduct of the defendants that is the basis for this Count. That matter will be discussed infra."

As an alternative, in Count III, plaintiffs argue that defendants aided and abetted a breach of fiduciary duty.

"The analysis above of Count II applies with equal force to this analysis of Count III. It comes down to whether the Defendants caused the Plaintiffs not to discover the breach. Plaintiffs claim that the statute has not expired because the misappropriation was not discovered until the property was sold in 2021."

Count V

"Virginia Code §8.01-248 prescribes a two-year statute of limitations for fraudulent misrepresentation. Therefore, of the enumerated alleged fraudulent misrepresentations, only the statements of 2020 and 2021 were timely filed.

"Defendants allege that the 2020 and 2021 representations fail because the plaintiffs do not allege damages from those false representations. However, that is a matter to be decided on demurrer, not a plea in bar."

Other counts

"Count VI alleges unjust enrichment. … The Virginia three-year statute of limitations applicable to oral contracts also applies to unjust enrichment. … The accrual of a cause of action begins to run at the time the unjust enrichment occurred, which is the moment expected compensation is not paid, not when the party knew or should have known of the unjust enrichment. …

"Count VIII alleges a violation of the Virginia Business Conspiracy Statute[.] … Defendants claim that this count is based on the alleged breach of fiduciary duty which is subject to a two-year statute of limitations.

Count IX alleges conspiracy to injure another in trade, business or profession. "[T]he defendants allege that this count is barred by the four-year statute of limitations."

Analysis

"I find that all statutes of limitations except those made in 2020 and 2021 in Count IV have expired. The Court will now assess whether an equitable tolling of the statute of limitations has occurred. I find that it has not.

"First, 'It is well-established that statutes of limitations are strictly enforced and must be applied unless the General Assembly has clearly created an exception to their application.

"'A statute of limitations may not be tolled, or an exception applied, in the absence of a clear statutory enactment to that effect. Any doubt must be resolved in favor of enforcement of the statute.' …

"Here, there certainly is no clear statutory enactment to support a tolling of the statute of limitations.

"Next, Plaintiffs have alleged fraud on the part of the defendants. Fraud can be an extraordinary circumstance that can toll the statute of limitations. …

"Throughout the nine-year relationship the litigants had, there were numerous red flags that should have put the plaintiffs on notice that the defendants were not dealing with the plaintiffs with candor.

"It appears that there were instances of possible fraud that might have caused the plaintiffs not to file suit against the defendants, but not so many instances that would have lulled Plaintiffs into waiting until 2022 to file this action.

"Plaintiffs did not act with due diligence and thus an equitable tolling of the statute of limitations is not available to them. … 'Equity aids the vigilant, not those who sleep on their rights.' …

"The Plea in Bar is granted in its entirety except as to the statements made in 2020 and 2022 alleged in Count IV."

Rizer, et al. v. Illinois Land Investors 1, et al., Case No.: CL-2022-4524, Sept. 27, 2023. In the Circuit Court of Fairfax County (Smith). Bernard E. Goodman, F. Douglas Ross for the parties. VLW 023-8-065, 7 pp.

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Civil Practice

Filing lis pendens not a 'process'

Where plaintiffs sued defendants for malicious abuse of process after defendants recorded a lis pendens on plaintiffs' property, defendants' demurrers and pleas in bar are sustained with prejudice. The recording of a lis pendens "is not a 'process' reachable by the confines of the tort of malicious abuse of process."

Overview

Plaintiffs Givago Growth, LLC, and Constanza Valdes hold title to a house. Plaintiffs contracted with Artifact, LLC to renovate and sell the house. Without plaintiffs' knowledge, Artifact contracted with iTech to obtain financing for the project.

Artifact was unable to make the loan payments and assigned iTech a share of the proceeds when the house was sold. iTech sued defendants "for specific performance of the joint venture agreement they had with Artifact to which iTech was never a party."

iTech also filed a lis pendens "thereby notifying prospective purchasers of such house that there was litigation pending affecting the property. When the lis pendens was filed, the property was under contract for sale, and the purchasers refused to buy the property because of the lis pendens.

Artifact filed for bankruptcy. The trustee "filed a mechanic's lien against the property," which was eventually satisfied. iTech then nonsuited its case.

Givago Growth and Valdes, the plaintiffs in the case before the court, sued iTech and a law firm for several claims. At issue is the claim for malicious abuse of process. iTech and the law firm filed pleas in bar and demurrers.

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"Plaintiffs argue that the filing of the lis pendens is a 'process' and thus can be the factual basis for a claim of malicious abuse of process. Defendants respond that the filing of a lis pendens is not a 'process' under Virginia law, because the lis pendens merely republishes information contained in the complaint and cannot in turn be the factual basis for a claim of malicious abuse of process."

Discussion

"To withstand a demurrer to a claim for malicious abuse of process Plaintiffs must plead '(1) the existence of an ulterior purpose and (2) an act in the use of the process not proper in the regular prosecution of the proceedings.' … (emphasis added).

"At issue in this case is not whether Plaintiffs properly pled their claim in terms of the elements averred. Rather, the question is whether, by relying solely on the filing of the lis pendens as the factual basis for such a claim, the tort of malicious abuse of process is barred as unsustainably pled.

"Under Virginia law, a 'process' is defined 'in terms of "the mandate of a court order under its seal, whereby a party or an officer of the court is commanded to do certain acts."' …

"A lis pendens is "'merely a notice of the pendency of the suit to anyone interested and a warning … [to] examine the proceedings therein to ascertain whether the title to the property was affected or not by such proceedings.'" …

"The filing of a lis pendens 'merely republishes the key information from the complaint.' …

"The Supreme Court of Virginia has guided that the affirmative defense of absolute privilege applies to the filing of a lis pendens, because it 'merely republishes the key information from the complaint,' and '[i]t would therefore be incongruous to extend the [applicable] privilege to [the] complaint but not to its associated lis pendens when confronted with the allegation that it has slandered a title.' …

"At the same time, the Supreme Court has never extended such privilege to non-defamation torts, such as malicious abuse of process, tortious interference with contractual relations, and civil conspiracy. …

"So, the question ensues whether though itself subject to privilege, the lis pendens can serve as the unprivileged factual predicate for the non-defamation tort of malicious abuse of process. …

"[I]t would thus similarly be incongruous to deny the viability of a malicious abuse of process claim that is based merely on the filing of the complaint, but to allow such a claim solely based on the filing of a lis pendens."

Not a 'process'

"In the instant case, the filing of a lis pendens is cast as the sole factual basis underlying Plaintiffs' claim against Defendants for malicious abuse of process.

"A lis pendens is like a mechanic's lien in being a notice that impacts property. A mechanic's lien must be perfected to be enforced, and the mere filing of such a lien is insufficient to support an abuse of process claim. …

"If a lis pendens were to be read to constitute a 'process' as contemplated within the tort of malicious abuse of process, this would lead to the functionally inconsistent interpretation that absolute privilege applies to a complaint and to a lis pendens filed in notice thereof, but that the privileged lis pendens would be dispossessed of such an affirmative defense when recast as the basis for the tort of malicious abuse of process.

"A lis pendens is just a 'filed declaration,' and like the recording of a mechanic's lien, it is not a 'process' reachable by the confines of the tort of malicious abuse of process. …

"For these reasons, when a lis pendens is the sole basis for the claim, the same may not be miscast as a malicious abuse of 'process,' thereby evading the absolute privilege afforded to a complaint and the associated lis pendens that has merely provided recordation notice thereof."

Givago Growth, et al. v. iTech AG, et al., Case No.: CL-2023-5669, Oct. 4, 2023. In the Circuit Court of Fairfax County (Bernhard). Bernard E. Goodman, F. Douglas Ross for the parties. VLW 023-8-066, 8 pp.

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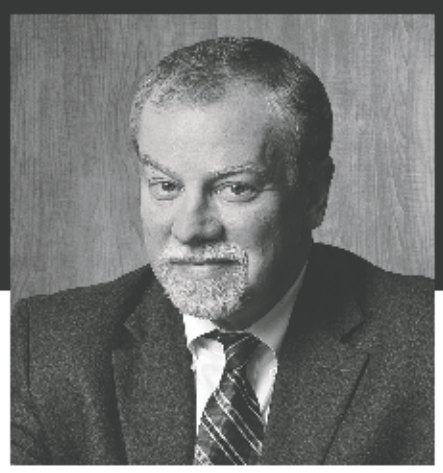
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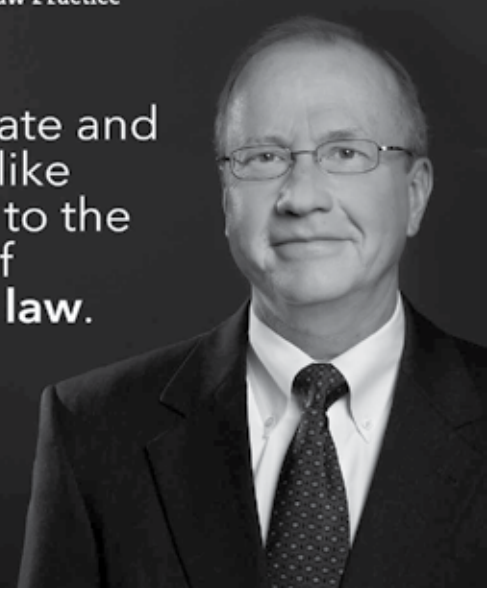
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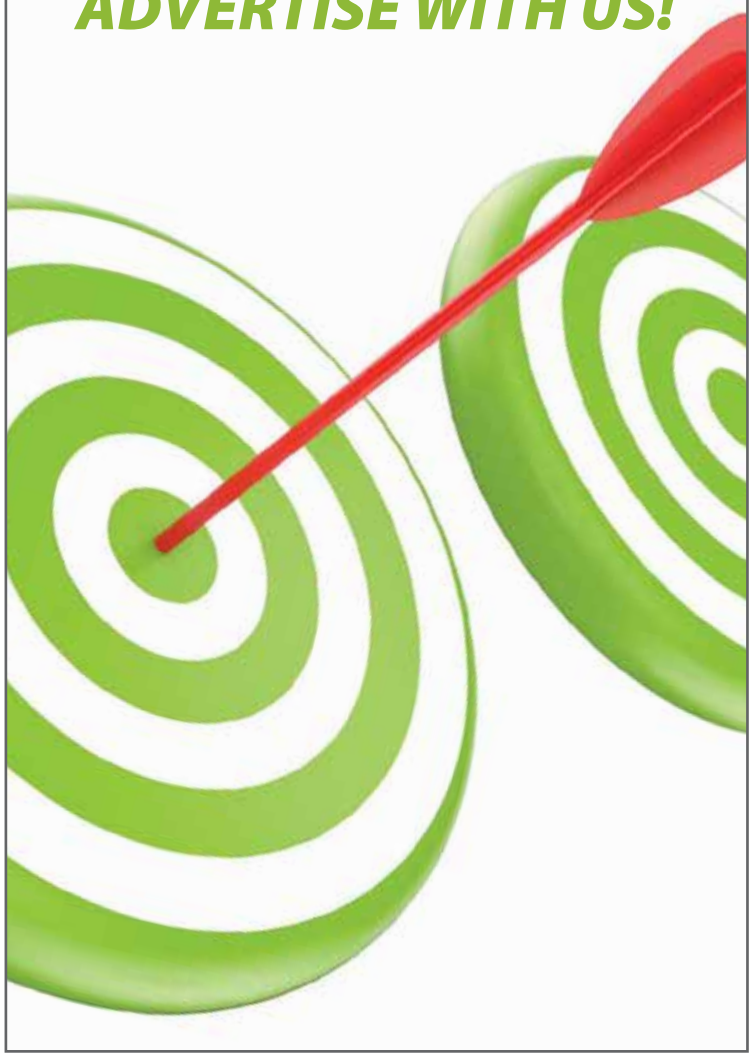
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PROCESS

■ continued from page 1

Virginia Lawyers Weekly first reported on this case when the Virginia Supreme Court unanimously ruled that the filing of a *lis pendens* is part of a judicial proceeding for purposes of establishing absolute privilege against a defamation claim. (See "First impression: Absolute privilege may apply to lis pendens" Nov. 1, 2022)

'Similarly incongruous'

A claim for malicious abuse of process requires pleading the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceedings.

Bernhard said the issue in this case wasn't whether Givago properly pled the elements of their claim.

"Rather, the question is whether, by relying solely on the filing of the *lis pendens* as the factual basis for such a claim, the tort of malicious abuse of process is barred as unsustainably pled," he wrote.

Virginia defines a process in terms of "the mandate of a court order under its seal, whereby a party or an officer of the court is commanded to do certain acts," the judge explained.

"A *lis pendens* is '"merely a notice of the pendency of the suit to anyone interested and a warning … [to] examine the proceedings therein to ascertain whether the title to the property was affected or not by such proceedings,"' Bernhard pointed out.

Thus, the filing of a *lis pendens* merely republishes key information from a complaint. The notice of *lis pendens* was purely incidental to the underlying action, without which it wouldn't exist.

Citing a prior round of litigation between the parties, Bernhard noted the Supreme Court of Virginia's opinion that an affirmative defense of absolute privilege would apply here.

In that decision, Justice William C. Mims wrote for the court that "it would 'incongruous to extend the [applicable] privilege to [the] complaint but not to its associated *lis pendens* when confronted with the allegation that it has slandered a title.'"

However, the Supreme Court has never extended that privilege to non-defamation torts, such as malicious abuse of process, tortious interference with contractual relations, and civil conspiracy.

Consistent with the Supreme Court's guidance, Bernhard held that "it would thus similarly be incongruous to deny the viability of a malicious abuse of process claim that is based merely on the filing of the complaint, but to allow such a claim solely based on the filing of a *lis pendens*."

Not a 'process'

Bernhard pointed to 2011's *Smith v. Miller and Smith at Pembrooke* in which the Fairfax Circuit Court dismissed an abuse of process claim because its sole factual allegation was the filing of a *lis pendens*.

"The suggestion from the *Smith* case is that the filing of a *lis pendens* is to be viewed as just 'the institution of legal proceedings,'" he wrote.

That ruling was consistent with those of other states, including West Virginia, Kentucky and California.

Here, the plaintiffs cast the filing of a *lis pendens* as the sole factual basis underlying their malicious abuse of process claim.

Bernhard compared a *lis pendens* to a mechanic's lien, both being notices that impact property. He also pointed out that a mechanic's lien must be perfected to be enforced; doing so was insufficient to support an abuse of process claim.

"If a *lis pendens* were to be read to constitute a 'process' as contemplated with-



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in the tort of malicious abuse of process, this would lead to the functionally inconsistent interpretation that absolute privilege applies to a complaint and to a *lis pendens* filed in notice thereof, but that the privileged *lis pendens* would be dispossessed of such an affirmative defense when recast as the basis for the tort of malicious abuse of process," he wrote.

Instead, the judge found that a *lis pendens* was just a filed declaration like the recording of a mechanic's lien and wasn't a process to be maliciously abused.

"For these reasons, when a *lis pendens* is the sole basis for the claim, the same may not be miscast as a malicious abuse of 'process,' thereby evading the absolute privilege afforded to a complaint and the associated *lis pendens* that has merely provided recordation notice thereof," Bernhard concluded.

The judge sustained the defendants' demurrers and pleas in bar with prejudice.

One claim remaining

Elizabeth Payne-Maddalena of Bernzweig Leonard in McLean represented iTech in the latest round of litigation and argued the defensive motions to Bernhard.

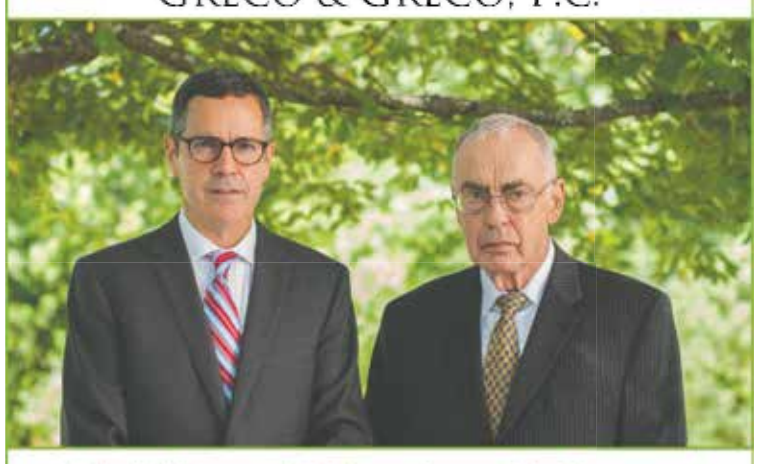
"Judge Bernhard was very careful to make his decision consistent with prior rulings, including the Supreme Court's opinion from the slander of title case in which we weren't defending iTech," she told Virginia Lawyers Weekly.

While the tortious interference claim against her client remains active, Payne-Maddalena neither anticipates the plaintiffs will seek interlocutory appeal nor is she sure what arguments they would raise.

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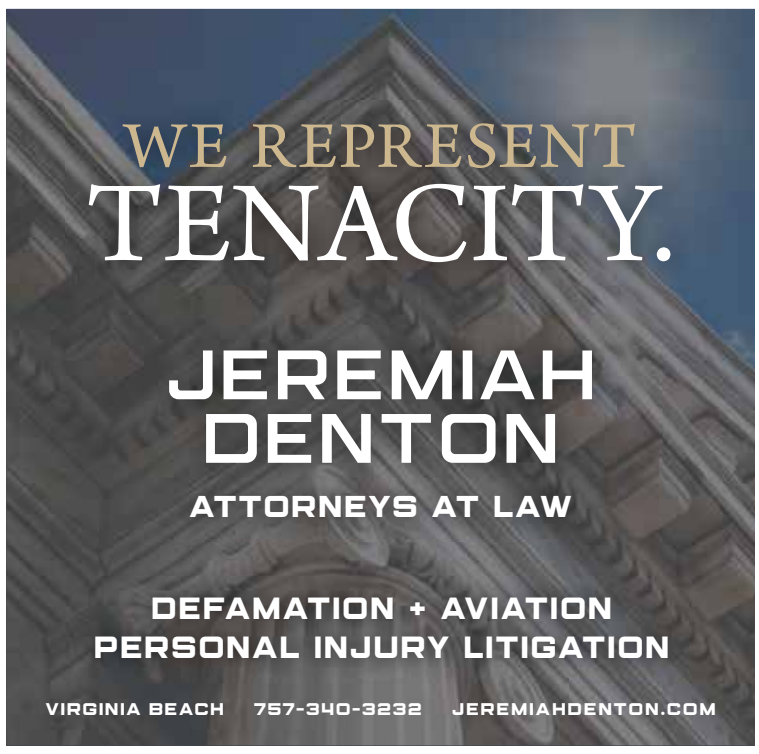
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HEIRS

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and after Erik's death, and still uses it in times of extreme heat or cold.

The property also contains a cell phone tower on a parcel leased to Beacon Towers, which is required by Erik's will to pay monthly rent payments to Sandra as long as she lives in the home.

The present litigation stems from Pamela and Kirk's demand that Sandra pay rent and real estate taxes, with a further disagreement over who was responsible for property insurance. Additionally, the children said the Beacon Towers rental payments should go to them to deliver to Sandra, rather than be paid to her directly.

Pamela also sought to divide the home into two apartments. She wanted to install a locking door at the top of the stairs and move herself into the second floor, restricting Sandra to the unfinished basement and ground floor.

Sandra sued Pamela and Kirk for a declaratory judgment, with the children filing a counterclaim. After reviewing the filings, the trial court found that Erik intended for Sandra "to be able to live alone in the residence, 'without his children residing with her.'" The court further found that the house would require major renovations to be suitable for two separate apartments.

The court ruled that Pamela and Kirk could not divide the house, that Sandra does not need to pay rent and that the Beacon Towers payments shall be made directly to Sandra. The court permitted periodic inspections of the property by the children, given at least 24 hours' notice to Sandra and that it is at an agreeable time for all parties, and that the children have unfettered access to the remainder of the property.

Pamela and Kirk appealed.



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Analysis

On appeal, the children argued the trial court misapplied Supreme Court of Virginia precedent in *Larsen v. Stack* — a case involving the same parties — by declining to divide the residence, giving Sandra exclusive, rent-free use of the home and restricting their inspection rights.

Raphael said the court made no error in refusing to divide the home.

"The Supreme Court held in *Larsen* that while Pamela and Kirk have 'concurrent rights to use and access the property,' they cannot interfere with Sandra's right 'to live on the property by herself,'" the judge wrote, noting that the decision also established that Sandra could live in the home "free from molestation and interference."

Raphael said the facts support that dividing the residence would interfere with Sandra's rights; she would lack privacy after being relocated to the first floor and "forcing the parties to use the kitchen and other shared space on the first floor would also be impractical given the animosity between them."

The judge pointed out that the house has a single electrical meter and heating and cooling system, and the computer and phone lines enter via the second-floor office, making it impossible to divide without "major renovations."

On the issue of inspection rights, Raphael again cited the decision in *Larsen*.

"We find no abuse of discretion in the chancellor's determination that a 24-hour notice requirement would not be enough by itself to protect Sandra's privacy," the judge wrote.

The children argued on appeal that giving Sandra exclusive use of the residence "essentially ousted them from the home."

Raphael disagreed.

"[T]he trial court did not alter any party's rights," he noted. "It simply applied the terms of the will as authoritatively construed in *Larsen*."

The court's finding that Pamela and Kirk could not exclude Sandra from the second floor "did not entitle the children to rent; the children had no such right to exclude her in the first place," Raphael added.

On the issue of the Beacon Towers rent payments, Raphael again found no error in interpreting the will, which granted Sandra the right "to receive the monthly rental payments… for as long as she resides in [the] home."

"The will does not require those moneys to pass through the children's hands first," Raphael wrote.

The children also did not join the cell tower company as a party on the counterclaim, an objection they raised for the first time on appeal. As such, Raphael declined to vacate paragraph three of the final order, which explicitly states that the Beacon Towers payments "shall be made directly to Sandra."

Raphael left intact the trial court's ruling, finding proper application of the will and the Larsen precedent.

Roanoke attorney Jay O'Keeffe, who represented Sandra, told Virginia Lawyers Weekly he is "grateful for the court's well-reasoned decision, and we look forward to putting this matter behind us."

Counsel for Pamela and Kirk declined to comment on the case.

SOCIAL MEDIA

■ continued from page 1

logo.

When Bishop blocked Sawyers from the account, Sawyers filed suit against him and the school board for declarative and injunctive relief under the First Amendment and sought Monell liability.

Meanwhile, PWCS had passed regulations governing official social media accounts, none of which Bishop obeyed. He only made the Twitter account private after Sawyers filed suit.

All parties moved for summary judgment.

'Injury in fact'

Hilton explained that Sawyers' standing depended on proof that he suffered an injury in fact that was fairly traceable to the defendants' action and likely would be redressed by a favorable decision.

An injury in fact is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," the judge noted.

Because Sawyers sought declaratory and injunctive relief, he was required to establish an ongoing or future injury in fact. Hilton looked to *O'Shea v. Littleton*, which said a plaintiff seeking "declaratory or injunctive relief … must establish an ongoing or future injury in fact."

However, the 4th U.S. Circuit Court of Appeals has relaxed the injury in fact requirement for standing in First Amendment cases, the judge pointed out.

"While Plaintiff has not attempted to follow the Twitter account at the time these motions were filed, plaintiff still states his interest in interacting with the Twitter account," Hilton said. "There are other ways of interacting with Twitter accounts that do not involve following it, including replying, retweeting, and liking posts, which are allowed even if an account is not following another account set to public."

Further, Bishop hadn't disavowed future enforcement or deleting of posts by other Twitter users. Thus, Sawyers had standing to file this case.

'Color of law'

The defendants claimed that Bishop didn't create or use his Twitter account under the color of law and therefore it wasn't a public forum subject to the First Amendment. And, even if the First Amendment were violated, Bishop claimed entitlement to qualified immunity.

"What is fairly attributable to the state and constitutes action under color of law, 'is a matter of normative judgment, and the criteria lack rigid simplicity,'" Hilton wrote, adding that courts must analyze the totality of the circumstances to resolve whether the action "bore a 'sufficiently close nexus' with the State to be 'fairly treated as that of the State itself.'"

Here, Bishop set up the Twitter account without permission or input from PWCS. He has always operated it by himself and has never complied with PWCS's regulations.

Unlike Bishop, however, the high school operated an official Twitter account as a source of information that was recognized by PWCS and linked to the school's website. PWCS never officially recognized Bishop's Twitter account as a source of information.

Hilton also said Bishop didn't use his account to perform actual or apparent job duties.

"Even though Dr. Bishop is the principal of Patriot HS and many of his posts on the Twitter Account were related to Patriot HS, simply working for a school does not vest an employee with the unilateral power to open a First Amendment public forum on a personal social media account," the judge wrote.

Bishop wasn't acting under color of law when he created and operated the Twitter account or when he blocked Sawyers. Thus, his Twitter account wasn't a First Amendment public forum.

'Monell' liability

Hilton decided not to apply the reasoning from 2019's *Davidson v. Randall* to extend Monell liability to PWCS. The Fourth Circuit in *Davidson* found that, in some cases, an elected official's personal social media account can become a First Amendment public forum.

Pointing out that the *Davidson* analysis didn't include public employees such as high school principals and the *Davidson* facts weren't present here, Hilton refused to extend its rationale to this case.

Unlike in *Davidson*, Bishop never encouraged or invited discourse with the public in his official capacity on his Twitter account. Hilton rejected Sawyers' argument that the relationship between Bishop's content and Patriot HS made it a public forum.

"An individual's unilateral choice to post content on social media related to a job or an employer does not transform that social media account into an account controlled or owned by an employer, and Plaintiff can point to no PWCS policy or regulation that supports such a claim," the judge wrote.

Because Bishop's Twitter account wasn't a public forum, there was no First Amendment violation when he blocked Sawyers and no underlying constitutional violation giving rise to Monell liability against PWCS.

Hilton granted summary judgment to the defendants.

Further proceedings

Charlottesville litigator Evan Mayo said his client decided to sue after PWCS refused their second FOIA request.

"We had gotten two inconsistent answers as to whether the social media documents were in their possession, custody or control and whether they were part of a public transaction," he told Virginia Lawyers Weekly.

Mayo was confident that *Davidson* opened the door for a finding that a non-elected public official could open a public forum on social media.

"The Fourth Circuit's ruling didn't appear to derive from whether the person was an elected official, but rather the fact that they had the apparent authority of the locality," he pointed out.

In addition to the appeal of this ruling, Mayo has argument scheduled for December in the Prince William County Circuit Court on his client's mandamus petition regarding the FOIA request.

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