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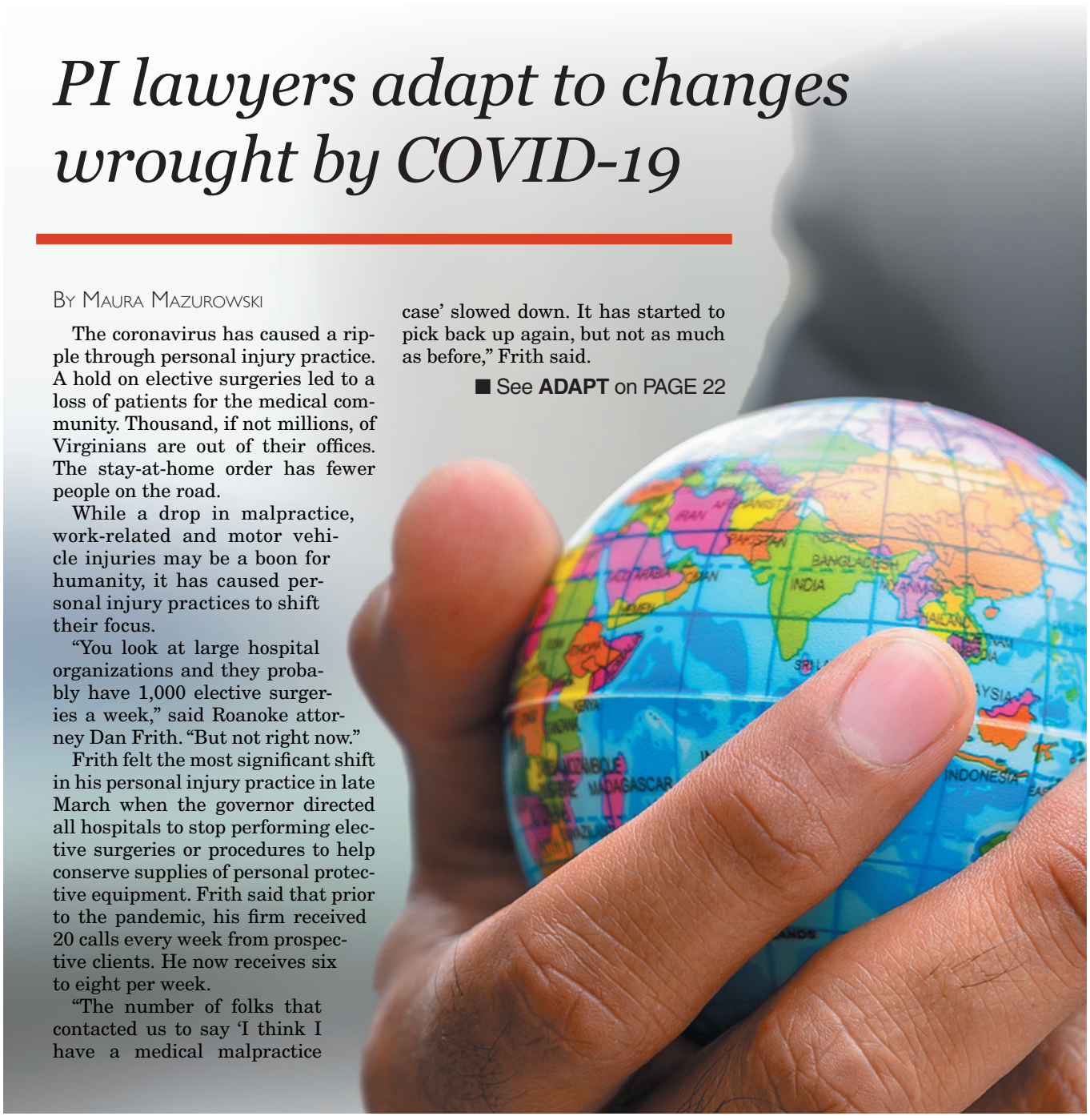
A NEW WORLD ORDER

PI lawyers adapt to changes wrought by COVID-19



By Maura Mazurowski

The coronavirus has caused a ripple through personal injury practice. A hold on elective surgeries led to a loss of patients for the medical community. Thousand, if not millions, of Virginians are out of their offices. The stay-at-home order has fewer people on the road.

While a drop in malpractice, work-related and motor vehicle injuries may be a boon for humanity, it has caused personal injury practices to shift their focus.

"You look at large hospital organizations and they probably have 1,000 elective surgeries a week," said Roanoke attorney Dan Frith. "But not right now."

Frith felt the most significant shift in his personal injury practice in late March when the governor directed all hospitals to stop performing elective surgeries or procedures to help conserve supplies of personal protective equipment. Frith said that prior to the pandemic, his firm received 20 calls every week from prospective clients. He now receives six to eight per week.

"The number of folks that contacted us to say 'I think I have a medical malpractice case' slowed down. It has started to pick back up again, but not as much as before," Frith said.

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Supreme Court acts to help move civil cases

By Peter Vieth

MCKEE

Just a day after statewide bar groups asked for action to move civil cases along during the COVID-19 pandemic, the Supreme Court of Virginia responded with a new judicial emergency order May 6.

The order drops any tolling of discovery deadlines as of May 18, encourages trial judges to use remote conferencing and opens the door to courtroom hearings later this month. But the order emphatically directs that no jury trials are to take place at least until June 7.

On May 5 – a day before the latest court order – six statewide bar associations wrote to Chief Justice Donald W. Lemons warning that thousands of hearings and trials had been continued in Virginia courts, many not yet rescheduled.

"When the courts reopen, trial judges will face a tidal wave of motions to be heard which has the potential to overwhelm the already heavily-burdened dockets of the circuit and district courts," the letter read.

It was signed by leaders of the Virginia Bar Association, the Virginia Trial Lawyers Association, the Old Dominion Bar Association, the Virginia Association of Defense Attorneys, the American Academy of Matrimonial Lawyers and the Virginia Family Law Coalition. The letter showed copies going to the other six justices of the Supreme Court.

Discovery to resume

VBA President Alison M. McKee

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Discovery misstep nets $21K in sanctions

By Peter Vieth

Despite a "suspicious" omission of unfavorable medical information, a Norfolk judge refused to hobble a medical malpractice case because the plaintiff and his lawyer dragged their feet in supplementing discovery responses.

The defendant hospital claimed there was a "blatant abuse of the discovery process," but the plaintiff's lawyer – in an affidavit – described only an "oversight, not an attempt to hide" damaging details of an out-of-state doctor visit.

Norfolk Circuit Judge Mary Jane Hall chastised both the plaintiff and counsel Carlton F. Bennett of Virginia Beach for failure to take the discovery process seriously. Hall, however, refused to dismiss the lawsuit or block any challenge to the damaging evidence, opting instead for a fee award of $21,667. Bennett, through his own counsel, said the sanction has been paid and the case is going forward.

Hall's March 9 order is *Robbins v. Sentara Hospitals* (VLW 020-8-046).

Causation damage

Plaintiff Richard Robbins underwent knee surgery at Sentara Virginia Beach General Hospital. He contends he suffered permanent injury from negligent bladder management by Sentara's nurses.

Robbins' disclosure of subsequent treating providers failed to include any reference to a visit to a urologist at Johns Hopkins in Baltimore for a second opinion on his bladder issues. The Baltimore visit was referenced in a Virginia urologist's office note.

Spotting that note, a Sentara lawyer asked for a signed authorization to get the Johns Hopkins records. Robbins complied, but he changed the expiration date of the authorization so that it would expire in three weeks. That window proved too short after the first request went to the wrong office. It took more than four months for the defendant to get the records.

The records were a torpedo strike: "Discussed that his enlarged bladder capacity has likely occurred over the span of many years and that this is not the result of a bladder injury sustained from surgery and spinal anesthesia," the Baltimore urologist had written.

The Johns Hopkins records were "obviously quite harmful" to Robbins' theory that Sentara caused his bladder problems," Hall said.

Sentara assumed the worst, according to Hall's order. The hospital's lawyers said Bennett had earlier told defense counsel there was nothing of substance

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IN THIS ISSUE

Northam expands provider immunity in pandemic

By Peter Vieth

Amid the COVID-19 pandemic, a governor's order may limit, but not eliminate, virus liability exposure for some health care providers.

Responding to a bid for broader and more specific liability protection for medical professionals in the pandemic emergency, Gov. Ralph Northam last month offered new, particularized examples of immunity protection.

Northam's immunity expansion does not cover anyone other than "health care providers" and may not help assisted living facilities and other elder care services. The governor's April 28 order expands protection to shortages of staff and prevention equipment, among other conditions.

The order seemed unlikely to forestall a rise in nursing home litigation in the wake of the pandemic. Lawyers on both sides are bracing for an onslaught of complaints from families of COVID-infected patients.

Nancy F. Reynolds of Roanoke, who advises and defends long term care facilities, said plaintiffs' attorneys are receiving daily calls from residents' families.

"The discussions are about telephones not being answered at the facilities, failure to inform them of COVID-19 prevention measures, how to discharge family members and learning about positive cases in the media first," Reynolds said.

The primary concern involves failure to communicate, a lapse not covered by the governor's order, Reynolds said.

Immunity in effect

Northam's Executive Order 60 builds on longstanding, but untested, emergency liability protection.

The order "reinforces certain existing statutory liability protections for Virginia healthcare workers," the governor's office said in a news release. Due to COVID-19, public and private healthcare providers are operating with limited resources and may be forced to serve patients outside of conventional standards of care, Northam said.

"It is in the public interest to afford healthcare providers involved in the delivery of healthcare impacted by COVID-19 with adequate protection against liability for good faith actions or omissions taken in their efforts to combat this health emergency," Northam said in his order. He noted the order does not affect liability in the case of gross negligence or willful misconduct.

Only 'health care providers' protected

Northam acted at the request of the medical community.

As fears of COVID-19 lawsuits arose, a coalition of professional associations – led by the Medical Society of Virginia – composed a request for Northam to add some specifics to the state's two vaguely worded statutes

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VIRGINIA LAWYERS WELLNESS

BY MAURA MAZUROWSKI

It's OK if you're not being 'productive' right now

If "social distancing" is this year's buzzword, then "productivity" is its runner up. Scrolling through social media, it seems everyone is trying to learn a new quarantine skill. Some people are crocheting couches for their cat. Others have picked up a push-up challenge. Most everyone is baking bread.

Someone, somewhere decided that we're supposed to use this pandemic as a time to learn a language, renovate the house or write a novel because, as many memes have told us, Shakespeare managed to crank out "King Lear" during the bubonic plague.

This need to be extremely productive may help some people manage stress. But for others, it's adding insult to injury during an anxiety-inducing time. How are you supposed to learn how to make sourdough from scratch when it's tough enough to make it through the day without having an emotional breakdown?

"There's a huge push of people thinking that because we are home right now, we can be productive and that we're all going to be able to stay as focused as we were a month or so ago," productivity expert Racheal Cook told The Washington Post. "But that's just not the case."

Hear this loud and clear: You are not failing if you are not being "productive" right now. And if the list of things you feel like you're supposed to be doing is starting to stress you out, then it's time to re-evaluate what this self-imposed pressure is doing to your mental health.

Here are some things to keep in mind if you are feeling under pressure to be productive with your newfound "free time."

Do what you can

Whenever you start feeling down about not doing "enough," remind yourself that getting yourself through the day right now *is* enough. You'll have some days during quarantine where you feel like trying a new recipe or going on a run. Other days, you'll have little motivation to do anything but watch Netflix and lay on the couch. And that's okay. Haven't you been meaning to finish "Mad Men" for a few years now, anyways? Now's the perfect time to do that.

You don't need to strive to do something new or innovative every single day. Take each morning as it comes, understand that some days will be harder than others and be okay with doing nothing if nothing is what you need.

Be kind to yourself

When it comes to being productive, we often set expectations too high for ourselves. And when we don't complete every single item on the unrealistic to-do list that we create, it's easy for us to get bogged down. That's especially true right now when we're told that we have "more time" to be getting things done.

Remember that there are no rules on how much you should or shouldn't do during a worldwide pandemic. Accept that you are doing your best, and recognize that practicing self-compassion is more important than mastering banana bread.

That said, having a little bit of structure every day can help.

Create a (realistic) list of goals

If you're struggling with feeling as though you're not being as productive as you'd like, or are having a hard time accomplishing work that needs to get done, start setting a manageable to-do list for yourself. Set daily and weekly goals of tasks you want to get done – but don't set your standards too high. If you want to pick up running, start with three 20 minute runs a week rather than an hour every day.

Hear this loud and clear:
You are not failing if you are not being "productive" right now.

Also keep in mind that these tasks can be things that you already do everyday, such as making breakfast, walking the dog or checking in with your family or friends. Being able to "check" things off of a list often feels like a reward; that you've completed a job well-done. And if you start giving yourself gratification for small accomplishments, it could help you find the motivation or desire to pick up bigger goals, as well.

If all else fails, do nothing

This may seem counterintuitive if you're trying to have a productive day. But sometimes stressing about everything you want to accomplish makes it more difficult to get anything done.

Give yourself time and space to breathe and just be. Let yourself feel the reality and stress of today. Remember that it's okay to do nothing if that's all you can manage to do.

I'm pretty sure Shakespeare didn't write all of his own stuff, anyway.

What makes a good leader? Eight qualities to consider

By Joseph D. Steinfield
BridgeTower Media Newswires

If you Google the words "leadership qualities" you will find no shortage of entries. Rather than open those links and write about what others have to say, I decided to offer observations based on my own experience.

Show empathy. This word is little more than a century old, and it has more than one meaning. But you can boil it down to the ability to put oneself in the other person's shoes. Which is not to say that we can always understand what someone else is going through, but if you can put your own opinion, bias or point of view aside and recognize that others may see or feel things differently, you are doing what good leaders do.

Listen closely. Good listening skills are an essential part of leadership, because those who have them understand that effective decision-making, more often than not, comes from getting information and advice from others. One practical way to improve this skill, despite the fact that it involves touching your face, is to use your thumb and index finger to pinch your lips together. Another, perhaps safer, way is to adopt a self-imposed rule: Speak last.

Be patient. "Act in haste, repent at leisure," the expression goes. Sometimes leaders have no choice but to make quick decisions and hope for the best. But usually there is time. The words "I'll sleep on it" are often the right ones.

Pay attention to detail. It is all well and good to see the world from 30,000 feet, but a good leader must be willing to dig in, ask questions and learn about the subject at hand. This quality is the opposite of "following one's gut," though some successful leaders claim to be doing just that.

More likely, they have studied the facts and the available options and only then decided whether the original instinct was the right way to go.

Delegate responsibility. Good leaders take their turns when it comes to standing guard at night, but effective leadership means an ability to delegate responsibility. "I'll do it myself," or "only I can do it" are recipes for bad outcomes. Besides, delegating real responsibility is the best way to turn members of the team into stakeholders.

Share the credit/take the blame. Leaders should share the credit because it's the right thing to do, and it instills a sense of commitment and a willingness to work even harder. The other side of the coin is taking the blame when things go wrong, for at least two reasons: A failure of leadership may have contributed to an unhappy outcome, and it may not be any one person's fault, or for that matter anyone's fault. Sometimes it's just bad luck. But another day will come, and team members will never forget who had their back.

As the sign on President Truman's desk said, "The buck stops here."

Use meetings effectively. It isn't enough to have a shared vision. Leaders have no choice but to hold meetings. Things to keep in mind:

- A good leader plans ahead and circulates an agenda in advance, whenever possible. Having a written agenda helps keep meetings short, which is always better than long.
- Attendance matters, so a reminder the day before is critical, as is an invitation to those unable to be there to attend by phone.
- A successful meeting is one in which many voices are heard, not just those who shout the loudest.
- A leader shouldn't call on just one person for fear that the person will feel picked on or that others will think the leader is playing favorites. But asking for comments from several people, including those on the phone, will ease tensions and help raise the right questions and produce good ideas.
- Meetings don't exist for their own sake; they are supposed to lead somewhere. So be sure someone keeps a record and, before you adjourn, think about what comes next and ask the group about it. Since one meeting often leads to another, try and set the next date. And be sure to circulate the minutes to all, including group members who did not attend.

Integrity matters. This one speaks for itself.

Joseph D. Steinfield practices law in Boston.

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providing limited immunity to health care providers for actions during disasters.

The statutes are Va. Code §§ 8.0-1-225.01 and -225.02.

After some fine tuning at the behest of trial lawyers, the revised request was delivered to Northam's office April 9.

The request asked Northam to make it clear that the statutory immunity had been triggered by the COVID-19 pandemic. The professionals also sought language in a gubernatorial order that would bring assisted living facilities, home care, adult day care and hospice services within the same immunity as "health care providers."

Northam's order clarified that the virus emergency had triggered the statutory protections. But Northam did not expand the immunity of the Code to assisted living facilities and the other elder-care services.

"The governor's office did not think he had the constitutional authority to extend the statutory protection to include assisted living facilities and the others," said Clifford L. Deal III, a Henrico County surgeon now serving as president of the Medical Society. "It is expected in the special session that the General Assembly will be asked to address these liability protections for others," Deal said in a statement released by the MSV.

As requested, Northam's order deems certain conditions to be "lack of resources" that would excuse substandard care:

- Shortages of protective equipment
- Shortages of trained staff
- Out-of-credential care
- "Crisis standards of care" and
- Innovative use of supplies/equipment.

Northam's order "provides some clarity to Virginia's existing statutes that protect health care providers," Deal said.

Trial lawyers cautious

Absent Virginia's immunity provisions, the COVID-19 crisis would seem to provide fertile ground for malpractice lawsuits. As of May 6, there were 2,902 virus cases and 405 deaths in Virginia long term care facilities.

Some nursing homes were hit hard. At least 50 people died in an outbreak at the Canterbury Rehabilitation and Healthcare Center in Henrico County, a 190-bed facility. At the 97-bed Accordius Health home in Harrisonburg, 22 had died as of May 5, according to a published report.

The Canterbury infection rate was close to 70%. Figures like that suggest a failure of infection control, said Jeffrey J. Downey of McLean, whose practice includes elder neglect and abuse.

Patients and families "should be able to target the worst offenders," Downey said, expressing concern about the Northam order. "There are a lot of nursing homes that dropped the ball on COVID-19 protections," he said.

But Reynolds, the lawyer for long term care facilities, said her contacts with the plaintiff's bar suggest trial lawyers will avoid infection cases. The disease can be carried by patients and staff members who show no signs that they've been infected.

"It's just not fair to hold nursing homes accountable when they can't identify those who have been exposed," she said.

Robert Carter of Appomattox said he's one of those plaintiffs' lawyers who will stay away from ordinary infection claims.

"It's really hard to prevent that which you cannot see," he said.

While early infections may have been largely unpreventable, later patient exposures could give rise to claims, Reynolds said. If exposure to visitors is cut off and new cases appear more than two weeks later, shortfalls in staff monitoring could be blamed. A failure to screen staff would not be immunized under the Northam order, Reynolds said.

She urged all long term care facilities to adhere strictly to federal guidelines and "communicate with the families of the residents like never before."

Carter said he's concerned elder care facilities will use the governor's order to argue that more ordinary lapses – falls, pressure sores and medication errors – should be immunized because they were caused by pandemic-related shortages.

The impact of the order will depend on how judges interpret it, Carter said.

Guest Columnist

Business valuation in the time of the plague

By James W. Korman

KORMAN

Say your client or their spouse has an ownership interest in a business, and that business is marital property. Since the nationwide shutdown began, the value of that business has gone down. What do you do now?

Everyone hopes this stay-at-home order will come to an end, and that that happy day is not far off. But in the meantime, you have an equitable distribution to deal with. Virginia Code § 20-107.3 provides that the valuation date of marital property shall be "as of the date of the evidentiary hearing on the evaluation issue."

For your case, that means now. Year 2020. And irrespective of what that business might have been worth on Dec. 31, 2019, now means now. AKA, the day of the hearing.

But where the business in 2020 is worth a half or even a third of its year-end 2019 value, you may have a problem. Your options are limited. They could include:

- alternative valuation date,
- extended conversations with a business valuation expert,
- creative settlement terms, or
- seeking a court order that reaches an equitable resolution.

The predicate for any of these options is to first retain a qualified business valuation expert and do it early. "Qualified" means someone who is usually, but not always, a CPA, is experienced in divorce valuations, has an impressive resume, knows what he/she is doing and has testified before and is known to the court.

Importantly, not all business valuations are related to divorce. Some are done for tax purposes, estate purposes, business sale or finance purposes. Expertise with those does not ensure expertise in the divorce context. It is probably best to retain an expert who has done valuations for divorce cases.

The entire universe knows what is now going on with the economy. So, find out from your expert right at the beginning what information he/she needs to do a valid valuation. Get that information as soon as you can. You then must have extended conversations with your expert about how to approach the situation. Can the valuation be legitimately based upon the last three years profits and losses? Is there an accepted valuation method which will allow for future economic recovery? Can anything be concluded from existing contracts, accounts receivable and business in the pipeline? With each of these you need to determine from your expert if they are viable, reasonable or arguable. What are the technical weaknesses and strengths of each approach? What variables are there, depending upon the method and the criteria? How much is "science" and how much is opinion? What differences in the facts would change the conclusions?

Analysis

Alternative valuation date, which is provided for in Virginia Code § 20-107.3, is not, in the author's experience, generally favored or granted by the court. Absent some compelling facts, it is usually a low percentage motion. But is the COVID19 crisis and its impact on the economy a compelling fact? Might it improve your chances to win a motion for an alternative valuation date?

Here's the problem: the business is no longer worth what it was in 2019. It may never again reach that value. A judge who grants that motion, and who later makes an equitable distribution award based upon a 2019 valuation, will at the least be subject to scrutiny on appeal. The current depreciated value of the business is nobody's fault. It is not a consequence of the wrongdoing of either party, and it was unforeseeable.

Bottom line: the odds of prevailing on a motion for an alternative valuation date are long at best.

> *The entire universe knows what is now going on with the economy. So, find out from your expert right at the beginning what information he/she needs to do a valid valuation. Get that information as soon as you can.*

Court order

The odds are not good on seeking an out-of- the-ordinary court order, either. The judge must conform the court orders to the law. That means the judge cannot literally divide in kind an asset if it is in the name of only one of the spouses. The judge therefore must make an award in lieu of the equitable interest in the marital component of that business.

So, you are back to value. The most likely determination by the court will be based upon a division of the value on the date of the hearing. Any chance the court will bifurcate the hearing, decide everything else and leave the division of marital property until later?

It's possible, but isn't likely unless both parties so stipulate, as the Code of Virginia § 20-107.3 provides that the court shall determine equitable distribution "upon decreeing a divorce." But under that same Code section, the court could have the power to bifurcate, so long as you reserve that right in your orders.

"The court, on the motion of either party, may retain jurisdiction in the final decree of divorce to adjudicate the remedy provided by this section when the court determines that such action is clearly necessary, and all decrees heretofore entered retaining such jurisdiction are validated," according to the Code.

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The remaining alternative-crafting a creative settlement solution is the best option. However, the spouse who owns the business interest is incentivized to use the current depreciated value. Particularly if that spouse has confidence that the business will become substantially more valuable in the future. If you represent the "out-spouse", you might even be tempted to nonsuit, if you can, in the hope that the business will have an increased value when the re-filed complaint is heard.

If, however, you can work with opposing counsel to reach a fair and reasonable settlement, what are some provisions you can consider?

Taking a ride with the business

The out-spouse is often risk averse, but one option can be that he/she becomes a beneficial owner of a negotiated percentage of the marital part of the business. This solution could be the best way to assure that no one gets cheated if the business value skyrockets or declines in future years.

You may want to add a floor and a ceiling value (in no event less than $X, and in no event more than $X) to control the parameters. It is essential, though, that you include a non-compete provision so that the in-spouse doesn't just go across the street and open another business. Also, a full-time and attention provision may not be fully enforceable, but you can include a sanction if it is violated.

Of course, you must define "full time". You must also have an anti-dilution and non-alienation clause, so that the value of the out-spouse's derivative interest isn't artificially diminished. The out-spouse must have at least an annual right to audit the company books. You can retain an expert to do the review. The in-spouse must be obligated to make the requested information available. A pre-drafted confidentiality agreement will usually be required.

Some business entities restrict an actual transfer of an ownership interest. In that case, you can provide for a quasi-trust interest for the benefit of the out-spouse. That spouse won't be an actual owner, nor will he/she be sitting at the board of directors' table. But he/she can, by agreement between the spouses, direct how the derivative share will be liquidated.

The parties may also want to agree to a time limit by which that right can be exercised. Of course, if all or part of the in-spouse's interest is sold in an arm's length transaction, the out-spouse should then be entitled to liquidate the designated percentage. This can get complicated if the "sale" is really an exchange for an interest in another entity. The safest thing to do in that event might be to have a provision that will trigger the buyout for the out-spouse using the value that was established between the marital business and the acquiring entity.

In the end, having the court resolve this is not the best option. Negotiation or mediation are the way to go. But if your opposing counsel just won't cooperate, you are going to have to rely on your expert for effective and convincing court testimony. That expert will be called upon to predict what is inherently uncertain: the future of the U.S. economy.

Good luck.

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News in Brief

VSB Council election results announced

Nine new members will join the Virginia State Bar Council in June along with two returning members who won re-election. Elections for Council seats were held in five circuits last month.

The most activity was in Fairfax County, where 11 candidates competed for six seats on Bar Council. Brian C. Drummond was elected to a second term. Joining him will be Sandra L. Havrilak, Christie A. Leary, Luis A. Perez, Susan M. Butler and Susan M. Pesner.

In Virginia Beach, lawyers re-elected Ryan G. Ferguson to a second term and elected Bretta Marie Zimmer Lewis to an open seat.

Richmond lawyers elected Neil Talegaonkar, Ninth Circuit lawyers elected Susan B. Tarley of Williamsburg and 15th Circuit lawyers elected Allen F. Bareford of Fredericksburg.

The June Bar Council meeting at Virginia Beach has been cancelled. If another meeting is not scheduled before then, the next Bar Council meeting is set for Oct. 23.

Judge not disqualified despite paying parking fees to lawyer

A routine $25 monthly parking charge should not automatically bar a judge from hearing cases involving a lawyer who co-owns the parking space, the Supreme Court of Virginia says.

When the Virginia Judicial Ethics Advisory Committee split on whether rental of a single parking space would create a conflict of interest between a lawyer and a judge, the justices came down on the side of lenience.

The court on May 1 approved Judicial Ethics Advisory Opinion 19-4 saying a judge may hear cases involving a lawyer who co-owns a company that rents a parking space to the judge, as long as parties and other attorneys waive any objection.

The judge had few options for parking, according to the factual scenario. When the judge moved into a new residence, the only secure and convenient option for parking was to rent a space for $25 a month from a limited liability company. The LLC rented spaces for $25 a month on a first come-first served basis as they become available. There was no contract and fees could be paid on intervals chosen by the renter.

The judge later discovered the LLC was co-owned by an attorney who regularly appeared before the judge. The judge asked whether renting the space required the judge to step aside from cases involving the attorney, and whether any such disqualification could be waived.

The majority of the Judicial Ethics Advisory Commission saw little likelihood of a real-world conflict. The judge would not be *per se* disqualified from hearing the lawyer's cases, the panel concluded.

The "nature of the payment appears to be a routine, periodic payment of a relatively small sum of money, with no other indications of frequent contract negotiations, dispute, or entanglements," the committee wrote. "There is also no indication that the business relationship is an effort to curry favor with the judge, or, conversely, to force the judge's disqualification."

But the judge would have to disclose the relevant facts to the parties and attorneys who could then waive the judge's disqualification, the committee said.

A minority of the JEAC disagreed.

"No matter how the judge decides an issue or case involving the attorney, the judge risks being subject to a claim of bias," the minority wrote. The judge could be seen as giving favorable treatment to a business partner or – conversely – seen as unfairly attempting to show objectivity with an unfavorable ruling, the minority said.

The identity of the minority element of the commission was not disclosed by a spokesperson for the Supreme Court, who cited a provision for the confidentiality of committee proceedings.

The JEAC is made up of six judges, four attorneys and one lay member. Chesterfield General District Judge Pamela O'Berry is the current chair.

Bar to require email address for every lawyer

The Supreme Court of Virginia has approved a rule change to require an email "address of record" for every Virginia lawyer.

The change is among a package of rule amendments recommended without dissent by the Virginia State Bar Council in February. Among the changes is a separation of "retired" and "disabled" lawyers in VSB membership classifications. Also reworked is the categorization for active members of the bar who are temporarily banned from practice for administrative reasons.

The changes come through a May 1 Supreme Court order. The amendments are effective June 30.

The email address of record "was a change that seemed timely and appropriate based on the realities of the modern practice of law," the VSB said in its March 9 petition to the court. Email addresses "are ubiquitous, often free for the user and an efficient and cost savings means to communicate with members," the VSB said.

A required email address of record "will facilitate more rapid communication that inures to the benefit of the members and the VSB," the bar said.

Providing an email address to the bar would not necessarily expose the lawyer to unwanted messages, the bar said. The VSB said an attorney's email address of record is considered "personal information" and would not be disclosed in response to a FOIA request. The VSB said it would not disseminate an email address of record if a member "affirmatively requests that it not be used for other than official VSB business."

The VSB said the disaggregation of disabled and retired status "seemed logical."

"In short, it was meant to eliminate the connotation and association that resulted by conjoining the two classes into one status," the VSB said in its petition to the court.

"It should not be inferred or implied that a retired lawyer is disabled. Conversely, a disabled lawyer is not necessarily retired and may again return to practice in the future before attaining the age of 70," the VSB said.

The illogical lumping of the two groups created complications for lawyers trying to transfer from either status to the other or to active, associate or emeritus status, the bar said.

The Supreme Court order also resolves a "practical conundrum" regarding lawyer classification, according to the VSB petition. Lawyers suspended for administrative or disciplinary purposes are still "lawyers," but are not able to engage in the active practice of law.

Questions arose about whether such an attorney would have to complete CLE requirements, pay dues and certify insurance coverage under bar rules.

"This ill-defined categorization for active members who temporarily are

■ See **NEWS IN BRIEF** on PAGE 6

VSB Disciplinary Actions

On April 29, the Virginia State Bar Disciplinary Board summarily suspended the license of Cheryl S. Thomas of Virginia Beach pursuant to rules governing board procedures upon impairment.

OBITUARIES

Ruth Ellen Kuhnel

Roanoke attorney Ruth Ellen Kuhnel died May 2. She was 58.

Born in Mississippi, Ms. Kuhnel pursued her undergraduate studies at the University of Mississippi and earned her law degree from the Washington & Lee University law school.

Ms. Kuhnel had a varied and accomplished career. She first served as counsel to the Roanoke County/Salem Department of Social Services. During that time. Ms. Kuhnel litigated both in juvenile and domestic relations court and circuit court. After five years with the Department of Social Services, Ms. Kuhnel was appointed county attorney of Roanoke County in 2015.

She was actively involved in her community. She served as president of the Junior League of the Roanoke Valley and on the executive board of the local Susan B. Komen affiliate. She also served on the session of Second Presbyterian Church and taught youth Sunday school.

Ms. Kuhnel is survived by her husband, Paul; her son, Wilson; her sister and brother-in-law, Teresa and David Flautt; and two nephews.

Henry Jarvis

Retired attorney Henry Jarvis died April 20. He was 97.

A Norfolk native, Mr. Jarvis received his undergraduate degree from Hampden-Sydney College in 1944. Following graduation, he went on to serve in the U.S. Army Air Force in World War II and earned his law degree from the University of Virginia in 1949.

After leaving the service and obtaining his law degree, Mr. Jarvis practiced law in the Norfolk, Fries and Floyd courthouses. He served as county judge in Floyd County before coming to Richmond, where he worked for Lawyers Title Insurance. He later worked as a legislative attorney for the City of Richmond before retiring as city attorney.

Mr. Jarvis is survived by his son, Thomas; his granddaughters, Margaret and Sarah; and many nieces and nephews.

News in Brief

banned from the practice of law necessitated a redefinition," the VSB said.

Under the change, a lawyer otherwise admitted who has not satisfied membership requirements or is under a disciplinary or administrative suspension would still be an active member, just not "in good standing."

Supreme Court clarifies speedy trial status

As Virginia trial judges sought the correct approach to virus-related speedy trial issues for criminal defendants, the Supreme Court of Virginia added an extra bit of guidance on May 1.

The court made it clear the court's emergency orders toll the running of statutory speedy trial periods for criminal prosecutions from March 16 to May 17 or until a later date to be determined. The clarification turns on the distinction between the state speedy trial statute and the constitutional right to a speedy trial.

An April 14 opinion from a Roanoke County judge said Virginia trial judges had taken different approaches to whether the Supreme Court's orders automatically tolled the statutory speedy trial clock.

In the May 1 clarification order, the high court said its March 16 order directed trial courts to continue all criminal matters, including jury trials, "subject to a defendant's right to a speedy trial."

"In this context, the 'right to a speedy trial' refers to a criminal defendant's constitutional right to a speedy trial," the court said May 1.

The court's March 27 order authorized courts "under certain precautionary circumstances" to hear criminal cases if necessary to avoid violating a defendant's right to a speedy trial.

"Like the similar provision in the March 16 order, the 'right to a speedy trial' provision in the March 27 order refers only to a criminal defendant's constitutional right to a speedy trial," the court said.

Virginia standing pat on July bar exam

The July bar exam in Roanoke is still on schedule, according to the Virginia Board of Bar Examiners.

The VBBE announced on May 1 that it remains committed to administering the Virginia bar exam in July at the Berglund Center in Roanoke.

The board had been watching the flow of information about the COVID-19 pandemic and what other states were doing. As of May 5, only 19 jurisdictions had announced they would cancel or postpone their July bar exams, according to the National Conference of Bar Examiners.

Enough states planned to stick with the July 28 and 29 exam dates that the NCBE said it would support that session with multi-state exam materials.

"The COVID-19 pandemic presents numerous challenges, and we appreciate your patience as we consider how to administer the bar exam safely," the VBBE said on its website.

"Final decisions and details regarding the July Bar Exam will be made as soon as possible based upon available information, including guidance from the CDC and the Virginia Department of Health, state and local restrictions on gatherings, and test venue availability," the VBBE said.

The board said any changes to the bar exam plans will be announced on its website.

Homeowners' boards can meet remotely

Lawyers for homeowners' associations in Virginia cheered recent state action that allows community association boards to meet online during the virus emergency without requiring any one member to be physically present.

The allowance for remote board meetings carries requirements for notice, member access and meeting minutes, according to guidance from the Alexandria firm of MercerTrigiani.

Without the governor's amendment package and General Assembly approval, community associations would be required to arrange meetings where two members are physically present and an audio link connects other members.

"Actions taken at an improper meeting are subject to challenge and put board members at risk for personal liability for actions taken," according to a notice from the MercerTrigiani firm.

Amendment 28 to the state budget bills provides relief, allowing boards to meet remotely if the nature of the emergency makes it unsafe for the board to meet in person and the purpose of the meeting is business that is statutorily required or necessary to continue operations.

The relaxed meeting requirements last only until June 30.

GMU professor sues after sanctions for sex talk

FALLS CHURCH (AP) A prominent George Mason University professor who studies the link between happiness and human sexuality is suing the school, saying he was wrongly punished for frank sexual discussions with students that prompted complaints.

Psychology professor Todd Kashdan filed the lawsuit in 2019. A judge in U.S. District court in Alexandria dismissed the suit last month, but Kashdan is appealing to the 4th U.S. Circuit Court of Appeals in Richmond.

Kashdan acknowledged in the lawsuit that he spoke about his own personal exploits in class, describing his sexual encounter with a woman who insisted that others watch the sex act. He also admitted inviting his grad students to his home for a party in which they all sat in a hot tub while he described his experiences in a German brothel.

Kashdan, though, maintains that such talk was entirely appropriate for a teacher whose topics include human sexuality.

The public sex act, he said, was an example of exhibitionism and "fit into Plaintiff's pedagogical approach of utilizing examples, stories, case studies, and interesting scientific research so that students better understand and remember what they are being taught," Kashdan's lawyers said in the lawsuit.

The hot tub party, he said, should be viewed no differently than a swimming pool.

Kashdan was named George Mason's Faculty of the Year winner in 2010, and his research on a variety of topics has received significant publicity. In 2017, he was featured in a variety of popular media after conducting a study of 152 undergraduates that found, perhaps unsurprisingly, a link between sexual activity and happiness.

Kashdan did not return a call or email seeking comment.

U.S. District Judge Liam O'Grady dismissed Kashdan's lawsuit on April 23.

- Compiled from staff and wire reports

Verdicts & Settlements

Auto Accident

Passenger's back hurt when dump truck slid into car

$300,000 settlement


BASILONE

Plaintiff was a passenger in an automobile collision with a loaded dump truck at an intersection controlled by a traffic light in Norfolk. It was raining at the time and the roads were wet. The defendant truck driver stated that the traffic light turned yellow and that he started to slow down and that when the light turned red he was unable to get the truck to stop. The truck therefore slid into the intersection. The truck struck the car in which the plaintiff was a passenger that was going in the opposite direction and making a left turn at the traffic light.

Plaintiff's driver was an acquaintance who had offered him a ride that day, and plaintiff was never able to locate the driver or the car to obtain photographs of the damage from the collision. This vehicle turned out to be uninsured, and the case was pursued solely against the trucking company and its driver.

Plaintiff had extensive pre-existing degenerative changes in his cervical and lumbar spine which were aggravated by the collision. He had surgery after the collision for an anterior cervical discectomy and fusion, which accounted for the majority of his medical bills.

There was a claim for lost wages that was disputed. Much of plaintiff's past employment had been in odd jobs and informal types of employment for cash, for which he had never received any pay stubs or earnings statements or any W-2 or 1099 forms. Therefore his past employers were not helpful in supporting or corroborating his previous employment.

The defendants had a records review performed by orthopaedic surgeon John Aldridge who opined that plaintiff's MRIs from before and after the collision were unchanged, that he likely would have needed the surgery he underwent at some point regardless of the accident, that the accident did not accelerate the need for the surgery and that plaintiff was capable of returning to his prior employment.

The defendants attempted to have Aldridge perform a Rule 4:10 exam of plaintiff, however this was denied by the court as it was requested for the first time in the afternoon prior to the defendant's expert disclosure deadline and was deemed to have been requested out of time under the court's scheduling order.

Type of action: Personal injury
Injuries alleged: Aggravation of pre-existing cervical and lumbar degenerative disc disease and disc herniations
Name of case: *Sawyer v. Bonney Bright Sand Company, et al.*
Court: Norfolk Circuit Court
Date resolved: 02/24/2020
Special damages: Medical bills of $126,382
Verdict or settlement: Settlement
Amount: $300,000
Attorney for plaintiff: John E. Basilone, Norfolk
Plaintiff's experts: Treating physicians Rebecca Britt, M.D. (emergency medicine); Mark Kerner, M.D. (orthopaedics);, and Paul Mitchell, M.D. (neurosurgery)
Defendant's experts: John Aldridige, M.D. (records review); Don Jackson, CRC (vocational consultant); Benjamin Lenhart, CPA (forensic accountant)
Insurance carrier: Travelers
[020-T-037]

Auto Accident

Man suffered herniations in low-impact rearender

$400,000 settlement


CORRELL

Plaintiff was a 50-year-old male involved in a low-speed rear-impact motor vehicle collision in March 2019 in Clarke County. There was a near month-long gap in care as plaintiff attempted to self-medicate despite ongoing discomfort. He began conservative treatment with analgesics and chiropractic therapy but continued to have neck pain and subsequently underwent an anterior cervical discectomy and fusion in July 2019.

Chiropractic care continued several months following the surgical procedures. In the demand, plaintiff utilized the AMA Guides to the Evaluation of Permanent Impairment to demonstrate permanent impairment due to the causally related herniations. Plaintiff's demand also included references to studies that indicated that pre-existing arthritic degeneration made plaintiff more susceptible to bodily injury than a person without arthritis.

Type of action: Personal injury
Injuries alleged: Herniations with accompanying radiculopathy, necessitating discectomy and fusion.
Date resolved: 03/26/2020
Special damages: Medical Specials Billed - $119,588.48. Lost Wages - $23,400
Demand: $500,000 (Liability Limits)
Offer: $228,500
Verdict or settlement: Settlement
Amount: $400,000
Attorney for plaintiff: Beau Correll, Winchester
Insurance carrier: National General Insurance
[020-T-039]

Auto Accident

Driver passed out due to heavy coughing, rearended woman

$200,000 settlement


O'HANLON


BAKER

Plaintiff was rearended on an Interstate 564 exit ramp as she was waiting to enter the naval base for work. She was transported from the scene by an ambulance to a local emergency room with complaints of cervical pain and discomfort in her upper extremity. One week following the collision, plaintiff followed up with an orthopaedist. Subsequent MRIs revealed rotator cuff tears in both of plaintiff's shoulders. Initial efforts to treat the rotator cuff tears with conservative care were unsuccessful, therefore necessitating surgical repair of both tears.

GEICO denied liability and contested the causal relationship of plaintiff's rotator cuff injuries. Defendant driver alleged that he passed out due to heavy coughing while exiting Interstate 564 and, as a result, was unconscious when he collided into plaintiff's vehicle. Defendant was diagnosed with cough-induced syncope and had at least two witnessed episodes of lost consciousness caused by coughing in the months following the wreck. However, under examination at his deposition, defendant acknowledged that he had a lengthy history of heavy coughing that would cause moments of "blacking out" and that he had never sought medical treatment for this issue.

Plaintiff's rotator cuff tears were also contested from a causation standpoint. Plaintiff had been treated for frozen shoulder in both of her shoulders within the past five years. GEICO retained an orthopaedist who conducted a forensic records review and opined that plaintiff's rotator cuff tears were degenerative in nature and pre-dated the wreck.

Six weeks before trial, counsel engaged in mediation with Alan Rashkind. Due to the COVID-19 crisis, mediation was conducted virtually with all participants in separate locations.

The virtual mediation resulted in a $200,000 settlement.

Type of action: Personal Injury
Injuries alleged: Bilateral rotator cuff tears and cervical strain
Court: Norfolk Circuit Court
Tried before: Mediation
Name of Mediator: Alan Rashkind
Date resolved: 04/24/2020
Special damages: $102,758 in medical expenses
Verdict or settlement: Settlement
Amount: $200,000
Attorneys for plaintiff: Griffin M. O'Hanlon and John G. Baker, Norfolk
Insurance carrier: GEICO
[020-T-038]

Man riding in hotel van suffered TBI, stroke

$400,000 settlement


LOPATTO

Plaintiff was a passenger in December 2017 in a hotel van traveling from National Airport to a hotel in Arlington County. No seat belts were available. Van operator was allegedly reckless and hit a curb or made an abrupt stop. Plaintiff struck his head on the side window or pillar of the van. *De bene esse* deposition of the passenger seated immediately behind plaintiff was strong on reckless driving that caused plaintiff to strike their head.

Plaintiff, who primarily complained about neck pain, sought ER treatment within hours of injury. Plaintiff was ultimately diagnosed by symptoms and from EEG with post-concussion and traumatic brain injury. Plaintiff notably suffered grade-10 stroke within 86 days of the Dec. 2017 van injury.

A causal link of stroke to head injury and overall damages were disputed. Plaintiff had also made a successful TBI claim after a February 2014 crash when he was a passenger in a taxi in California. In addition, plaintiff gave notice of a subsequent head injury occurring in September 2018 while being transported in a passenger van in Wisconsin.

The

principal reason that resolved the case was through referral for a settlement conference to sitting Judge Louise M. DiMatteo of the Arlington County Circuit Court.

Judge DiMatteo mediated a settlement 10 days before the trial date.

Case Name: *Doe v. Roe Hotel*
Court: Arlington County Circuit Court
Plaintiff's Attorney: John S. Lopatto, Alexandria and Washington, D.C.
Special Damages: $34,000
Verdict or Settlement: Settlement
Date Resolved: August 2019
Amount: $400,000
Plaintiff's Experts: Dr. Peter Bernad, neurologist, Alexandria; Miriam Beadle, Ph.D., neuropsychologist, Washington D.C.; Dr. Marissa Kruger, neuro-optometrist, Lakewood, Colorado; Dr. Thomas Wagner, orthopedic surgeon, Falls Church.
Defendant's Experts: Dr. Thomas A. Gennarelli, neurosurgeon, West Chester, Pennslyvania; Dr. James A. Merikangas, psychiatrist; neurologist, Washington, D.C.
[020-T-040]

The Week's Opinions

■ 4th U.S. Circuit Court of Appeals

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Criminal

Lack of explanation in child porn sentence was error

Where there was no explanation for why a defendant convicted of transporting and possessing child pornography was barred from using an electronic device to access the internet, and from maintaining a social networking account without prior approval from his probation officer, that was plain error. However, it was proper to consider the defendant's future earnings potential when determining his ability to pay an assessment under 18 U.S.C. § 3014(a).

Background

Benjamin McMiller was sentenced to 121 months' imprisonment and a lifetime term of supervised release for transporting and possessing child pornography. On appeal, McMiller argues that the district court erred in two discrete ways at sentencing: (1) by ordering McMiller to pay special assessments pursuant to the Justice for Victims of Trafficking Act of 2015 and (2) by imposing, without explanation, special conditions of supervised release banning McMiller for life from accessing the internet or operating a social networking account without the approval of his probation officer.

Special assessments

We begin with McMiller's challenge to the special assessments that the district court imposed pursuant to 18 U.S.C. § 3014. Because McMiller did not object to the special assessments, we apply plain error review.

McMiller argues that the district court plainly erred by ordering the assessments without making an explicit finding of "nonindigence" and, alternatively, by finding that he was "nonindigent" based on his future earnings potential. We disagree.

The district court's ruling reflects at least an implicit determination that McMiller was "non-indigent," and we conclude that this implicit finding was both adequate under the circumstances and not plainly erroneous. McMiller made no objection to the financial report in the pre-sentence report or to the imposition of the special assessments, and he affirmatively emphasized his master's degree and employment history in seeking a downward variance.

Under these circumstances, the district court did not plainly err in failing to make a more explicit finding that McMiller was "nonindigent," or in determining that it would be "feasible" for McMiller to pay the assessments while on supervised release. We also agree with our sister circuits that a district court may consider a defendant's future earnings potential when determining his ability to pay an assessment under 18 U.S.C. § 3014(a).

Special conditions

We next consider McMiller's challenge to the "sex offender conditions of supervision" imposed by the district court. McMiller seeks to vacate two of the conditions, which prohibit McMiller from owning or using any electronic device capable of accessing the internet and from maintaining any social networking account without prior approval from his probation officer. Because McMiller did not object to these conditions at the time of his sentencing, we again apply plain error review.

A sentencing court's duty to provide an explanation for the sentence imposed also requires that the court explain any special conditions of supervised release. The district court did not adhere to these precedents in imposing the special conditions of supervised release at issue here. Instead, in summarily ordering McMiller to comply with the "standard sex offender conditions of supervised release that have been adopted by the Court in the Western District of North Carolina," the court appeared to rely on a standing order imposing such conditions in all cases involving sex offenses within that district.

Moreover, contrary to the government's suggestion, we cannot glean the district court's reasons for imposing the challenged conditions by examining the rationale for the sentence "as a whole." The court referred only to a "sentence of 121 months" when discussing the sentencing factors of 18 U.S.C. § 3553(a), and made no attempt to link its explanation for McMiller's term of confinement with the term or conditions of supervised release. Under our precedent, the district court's failure to give an explanation for the special conditions of supervised release is reversible plain error.

Accordingly, we vacate special conditions nine and 13 as procedurally unreasonable and remand to the district court for further explanation. We affirm the balance of McMiller's sentence.

Affirmed in part, vacated in part and remanded.

United States v. McMiller, Appeal No. 18-4744, March 30, 2020. 4th Cir. (Keenan), from WDNC at Charlotte (Conrad). Ann Loraine Hester for Appellant, Anthony Joseph Enright for Appellee. VLW 020-2-080. 13 pp.

Civil Rights

Failure to raise arguments below was waiver

The owner of a gun range, his employee and their respective limited liability companies challenging the denial of a license to sell firearms waived arguments made on appeal that were not raised below.

Background

Charles Richard Alsop Gilbert Jr., Bryon Gossard and their respective limited liability corporations appeal the district court's judgment dismissing their complaint, which alleged federal constitutional and state law tort claims arising out of the denial of Gossard's application for a federal firearms license.

Analysis

The appellants contend the district court erred in dismissing the due process and tort claims against Bureau of Alcohol, Tobacco, Firearms and Explosives Investigator Gretchen Arlington. They ask the court to consider their arguments on appeal despite not filing a response to the government defendants' motion to dismiss, asserting in a conclusory manner that they have demonstrated a "fundamental error" that would allow such review. We disagree and conclude that the appellants have waived their right to challenge the dismissal of the claims against Arlington.

The appellants' arguments take issue with the district court's reasoning, but otherwise do not demonstrate "exceptional circumstances" that constitute "fundamental error or a denial of fundamental justice." This is not a case where the district court solely relied on their lack of response to grant the motion to dismiss.

Instead, the district court undertook an extensive review of the merits of the government defendants' motion and the nature of the appellants' claims. It offered thorough explanations—and in some cases more than one reason—why the claims were subject to dismissal. We therefore affirm the dismissal of the claim against the government defendants.

Although the appellants have not waived all of their arguments challenging the district court's decision to dismiss the claims against the private defendants, their remaining claims are no more meritorious. The district court dismissed the *Bivens* claim after observing that neither the Supreme Court nor this court have recognized *Bivens* actions "brought against private actors or corporations, even when they are so closely aligned with federal officers that it might be said that they are acting under color of federal law."

Relatedly, the court observed that the § 1983 claim was improper because Andrew Raymond, a principal of a separate Maryland gun range, was not a state actor, so at best that claim could be amended to be a *Bivens* claim, which would result in dismissal for the same reasons the initial *Bivens* action was dismissed. Lastly, the court observed that even if the claims were construed or amended to be state tort law claims, it would decline to exercise supplemental jurisdiction over these claims under 28 U.S.C. § 1367.

The appellants do not take issue with the court's legal conclusion about the unavailability of a *Bivens* or § 1983 claim under the facts alleged. Instead, they argue that the district court's reason for declining to exercise supplemental jurisdiction over a recrafted state tort claim would no longer be valid if we agree with them that any of the other federal claims should not have been dismissed.

But we have not reversed any of the federal claims, so this argument lacks merit. The district court would still be well within its discretion to decline to exercise jurisdiction over an amended complaint raising purely state law claims.

The district court next dismissed the existing state tort claims after concluding that they were untimely under Maryland's three-year statute of limitations and rejecting the argument that the claims would be timely under the relation-back doctrine because the original complaint did not raise these claims or name the private defendants. On appeal, the appellants abandon their reliance on the relation back doctrine and have raised an entirely new argument: that the district court erred by failing to consider whether the claims would have been tolled under Maryland's "continuing harm doctrine." Because they failed to raise this argument in the district court, it has been waived and we decline to consider it.

Affirmed.

Gilbert v. United States Bureau of Alcohol, Tobacco, Firearms and Explosives, Appeal No. 18-1215, March 27, 2020. 4th Cir. (per curiam), from DMD at Greenbelt (Chuang). Athan T. Tsimpedes for Appellants, Robert K. Hur, Molissa H. Farber and David A. Martella for Appellees. VLW 020-2-081. 11 pp.

Criminal

SORNA applies to materials showing child sex act

Although the defendant was not a sexual abuser and did not directly engage with a minor, his possession of materials depicting a child involved in a sex act violated the Sex Offender Registration and Notification Act, or SORNA. Since he was not homeless during "a meaningful portion of time" covered by the indictment, his claim that registration requirements constituted cruel and unusual punishment was rejected. Restrictions on his computer use was necessary to protect the public.

Background

Christopher Mixell entered a conditional guilty plea to failing to register as a sex offender as required by SORNA. As permitted by his plea, Mixell advances two primary arguments on appeal related to the district court's denial of his two motions to dismiss the indictment: (1) his underlying Oregon offense of "encouraging child sexual abuse in the second degree" did not qualify as a "sex offense" under SORNA and, thus, he was not required to register and (2) SORNA's registration requirements as applied to him, a homeless or transient individual, constitute cruel and unusual punishment under the Eighth Amendment. Additionally, Mixell contends that the district court imposed an unlawful condition of supervised release.

Oregon offense

Under SORNA, a "sex offender" is "an individual who was convicted of a sex offense." As relevant here, a "sex offense" is "a criminal offense that is a specified offense against a minor."

In 2010, Mixell pleaded guilty to, and was convicted of, "encouraging child sexual abuse in the second degree." In his plea agreement, Mixell admitted that he "possessed (by computer) a photograph depicting [a] child engaged in [a] sexual act."

We reject Mixell's assertion that his conduct was not "against a minor," because he did not interact with a minor or otherwise engage in conduct directed toward such a minor. Instead, the phrase "against a minor" simply requires a determination that the victim of the offense was a minor.

Therefore, although Mixell was not depicted in the video as the sexual abuser, and did not attempt to contact or otherwise engage with a minor, his possession of materials depicting a child involved in a sex act is "conduct that by its nature is a sex offense against a minor" under SORNA's residual clause. Accordingly, the district court did not err in denying Mixell's motion to dismiss the indictment on this basis.

Eighth Amendment

Mixell next argues that the district court erred in denying his motion to dismiss the indictment because SORNA's registration requirements constitute cruel and unusual punishment as applied to him, a homeless or transient individual. The district court determined that Mixell's as-applied challenge failed as a factual matter, because he was not homeless during "a meaningful portion of time" covered by the indictment.

We conclude that the district court did not clearly err in finding that Mixell was not homeless to a substantial degree during the period charged in the indictment. According to the parties' stipulated facts, Mixell resided at a property where he worked during a portion of the period charged in the indictment and at the time of his arrest on April 24, 2017. While Mixell had been "transient" and "homeless for periods of time" during 2017, he failed to specify the duration of such periods of time. Thus, the district court did not clearly err in concluding that Mixell's as-applied challenge failed.

Computer monitoring

Finally, Mixell challenges the district court's imposition of computer and internet monitoring as a special condition of his supervised release. He asserts that the condition unlawfully infringes on his rights under the First and Fourth Amendments. According to Mixell, any condition that requires real-time monitoring of an individual's computer and internet use is per se unlawful. We disagree and decline to adopt such a broad rule.

The special conditions imposed here do not prevent Mixell from having access to such social networking sites. Rather, his use of the internet merely will be monitored for a discrete time period to ensure compliance with his terms of supervised release. The challenged condition is rea-

The Week's Opinions

sonably related to Mixell's present circumstances and his prior offense, as well as to the need to protect the public.

Affirmed.

United States v. Mixell, Appeal No. 18-4563, April 1, 2020. 4th Cir. (per curiam), from WDVA at Charlottesville (Moon). Astrid Stuth Cevallos for Appellant, Jean Barrett Hudson for Appellee. VLW 020-2-082. 11 pp.

Criminal

Attempted assault qualified as 'crime of violence'

The defendant's previous conviction for attempted assault under New York law constituted a "crime of violence" under the Sentencing Guidelines because the elements of New York attempt categorically match generic attempt and the statute requires specific intent and violent force.

Background

Jerome Collins pled guilty to possession of a firearm by a convicted felon. The presentence report stated he had two prior convictions for crimes of violence. Based on these two prior crimes of violence, appellant's base offense level was calculated at 24 under the Sentencing Guidelines. Appellant argued his prior New York conviction should not qualify as a crime of violence, which would have decreased his base offense level to 20.

The district court overruled appellant's objection. After calculating a guidelines range of 77 to 96 months of imprisonment, the district court sentenced appellant to 84 months.

Standard

In the district court, appellant argued New York attempted assault is not a crime of violence because New York *assault* is not a categorical match for generic assault. In this court, however, appellant abandoned that argument and argues only that New York *attempt* is broader than generic attempt. Appellant argues his objection to the classification of the offense as a crime of violence was sufficient to preserve the issue. The government, on the other hand, argues the objection was too generic to properly alert the district court to the true "grounds on which it [was] based."

Because appellant does not prevail even under the preserved error standard, this court needs not decide whether appellant's objection was sufficient to preserve the error. The court assumes the standard of review is de novo.

Merits

Appellant does not contest on appeal that the completed offense of New York first degree assault is a crime of violence. The question we are left to answer, and the source of much debate here, is whether attempted first degree assault is also a crime of violence.

Because attempt is subject to the categorical approach, its elements must categorically match generic attempt. The first point of contention here is whether New York attempt categorically matches the *mens rea* requirement of generic attempt -- specific intent. This court holds New York attempt does require specific intent. Accordingly, the court holds the *mens rea* element of New York attempt categorically matches the *mens rea* required by generic attempt.

Finally, we must determine whether New York attempt's *actus reus* categorically matches the *actus reus* required by generic attempt. Pursuant to New York's general attempt statute, a defendant must "engage[] in conduct which tends to effect the commission of [the] crime." Appellant argues this statute is broader than generic attempt because it punishes conduct that falls short of a "substantial step" by only requiring conduct that is "potentially and immediately dangerous."

However, New York has clarified that its standard requires "conduct that came dangerously near commission of the completed crime." New York's highest court has described this standard as "more stringent than the Model Penal Code 'substantial step' test," which has been adopted by this court. The First, Second and Ninth Circuits have agreed. We see no reason to disagree with our sister circuits on this point and therefore hold that New York attempt does require a substantial step.

In sum, we hold appellant's prior New York conviction for attempted assault is a crime of violence pursuant to the force clause because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." The elements of New York attempt categorically match generic attempt, and subsection one of the assault statute requires specific intent and violent force.

Affirmed.

Dissenting opinion

Gregory, C.J., dissenting:

Because New York attempt does not categorically require specific intent, appellant's prior attempt offense is overbroad. As a result, we should reverse the district court's holding that appellant's New York offense is a categorical match with the generic characterization of attempted aggravated assault. I respectfully dissent from the majority's holding to the contrary.

United States v. Collins, Appeal No. 18-4525, March 31, 2020. 4th Cir. (Thacker), from WDNC at Charlotte (Conrad). Melissa Susanne Baldwin for Appellant, Anthony Joseph Enright for Appellee. VLW 020-2-083. 30 pp.

Arbitration

Change of circumstances negated arbitration exclusion

Where an agreement involving defense contractors excluded Title VII claims from arbitration "unless and until federal law no longer prohibits the Firm from mandating arbitration of such claims," and PricewaterhouseCoopers LLP no longer performs the work that prohibited mandatory arbitration, the exclusion was inapplicable and the Title VII claims were subject to arbitration.

Background

PwC hired Shannon Ashford in March 2015 as an associate in its Columbia, South Carolina advisory group. To confirm her employment, Ashford electronically executed an employment agreement containing arbitration provisions. However, the agreement expressly excluded "[c]laims that arise under Title VII of the Civil Rights Act of 1964 . . . unless and until federal law no longer prohibits the Firm from mandating arbitration of such claims."

Later, Ashford sued PwC, alleging race discrimination under Title VII and 42 U.S.C. § 1981 and retaliation under Title VII. PwC moved to compel arbitration, and to stay or dismiss the proceedings. The district court granted PwC's motion as to Ashford's § 1981 claim but denied it as to her Title VII claims.

Exclusion

Under precedent from the Supreme Court and this court, we must read the Title VII exclusion in favor of arbitration if we can reasonably do so. Thus, we ask if the agreement can be read to permit arbitration here.

We conclude that it can. The key language from the agreement is "unless and until federal law no longer prohibits the Firm from mandating arbitration of such claims." Critically, this language does not say that the only way PwC can mandate arbitration of Title VII claims is if federal law no longer prohibits PwC from mandating arbitration due to a change in law. Instead, it looks more broadly as to whether PwC is no longer prohibited from mandating arbitration of Title VII claims, regardless of the reason.

The pertinent legal prohibition is the Franken amendment, which bars defense contractors from mandating arbitration of Title VII employment claims. At the time the agreement was drafted, PwC performed the type of defense contracting work that subjected it to the Franken amendment.

Since both the law and the facts were required to prohibit PwC from mandating arbitration of Title VII claims, a change in either could result in federal law "no longer prohibit[ing] PwC from mandating arbitration" of such claims. Here PwC ceased performing the type of defense contracting work that subjected it to the Franken amendment. As a result, the federal law prohibiting mandatory arbitration of such claims no longer applied to PwC.

Scope

Next, PwC argues it established that the "Firm" as referred to in the agreement was no longer prohibited from mandating arbitration of Title VII claims. The agreement defined the "Firm" to include "[PwC] and/or any of its subsidiaries or affiliates based in the United States."

The resolution of this issue centers on whether PwC was permitted to show that only PwC was no longer prohibited from mandating arbitration of Title VII claims or whether PwC was required to show that PwC and all its affiliates and subsidiaries were no longer prohibited. The inclusion of "or" in the definition of the "Firm" is critical. By using "or," the parties agreed Title VII claims were subject to arbitration if PwC or any of its subsidiaries or affiliates were no longer prohibited from mandating arbitration of Title VII claims.

Ashford sued PwC, her employer. Therefore, we need only determine if it is prohibited by federal law from mandating arbitration of Title VII claims. Since, as set forth above, it no longer is, the Title VII exclusion does not apply.

Unconscionability

Having determined that the Title VII exclusion does not prohibit the arbitration of Ashford's Title VII claims, we must next consider whether that provision was unconscionable.

The record does not support a conclusion of procedural unconscionability. And, while the lack of procedural unconscionability is fatal to Ashford's argument, substantive unconscionability is also lacking. We remand this case to the district court with instructions to dismiss the complaint and compel arbitration.

Reversed and remanded with instructions.

Ashford v. PricewaterhouseCoopers LLP, Appeal No. 18-1958, April 3, 2020. 4th Cir. (Quattlebaum), from DSC at Columbia (Currie). Helgi C. Walker for Appellant, John Charles Ormond Jr. for Appellee. VLW 020-2-084. 12 pp.

Criminal

Video upload satisfies child porn 'transportation' element

Where the defendant moved a video containing child pornography from his laptop to a Dropbox, he satisfied the "transportation" element, even if there was no evidence that he shared, attempted to share or intended to share the video.

Background

Robert Michael Fall asks the court to reverse his conviction of receipt, possession and transportation of child pornography for four reasons.

Search

Fall first argues that the physical evidence should have been suppressed as fruit of the poisonous tree—the improper warrantless search of his computer that S.D. and her boyfriend found in the guest bedroom and took to the Virginia Beach Police Department, or VBPD.

While this court has not addressed the private search doctrine in the context of electronic devices, our sister circuits have utilized varying approaches when confronted with this issue. Some have held that there must be an exact one-to-one match between electronic files viewed by a private party and files later examined by police. Ohers have allowed a more permissive application of the private search doctrine to electronic searches.

This court needs not determine the outer boundaries of the private search doctrine in the context of electronic searches for this circuit because, even if the search was not proper under the private search exception, the denial of the motion to dismiss should be affirmed under the good faith exception to the exclusionary rule.

Multiplicity

Fall next claims that Count Seven, which charged him with possession of child pornography, was multiplicitous of three counts charging him with receiving child pornography. Fall, however, did not raise this argument by pretrial motion. Thus, his argument is untimely.

The circuits that have addressed the question are split as to whether to review an unpreserved challenge to a multiplicitous indictment for plain error or whether the claim is altogether waived. While this court has not previously addressed this issue, it does not need to weigh in on this split because Fall's argument fails even under plain error review.

Transportation

Fall next argues that there was insufficient evidence for a reasonable jury to find that he transported a pornographic video. While acknowledging that he moved a video containing child pornography from his laptop to a Dropbox account, Fall contends that the district court improperly denied his motion for acquittal because there was no evidence that he shared, attempted to share or even intended to share the video.

But as with his multiplicity argument, Fall failed to properly preserve this issue. Although he moved for acquittal on Count Six after the close of the government's case, Fall failed to renew the motion after trial. Thus, this argument, which this court would normally review de novo, is waived.

But even if this claim was not waived, Fall's argument is without merit. Fall improperly conflates the offense of transportation with the offense of distribution. Transportation, which is the basis of Count Six, does not require conveyance to another person. Moreover, other circuits have held that simply uploading child pornography to a website constitutes transportation.

Because the government established Fall transported child pornography from his laptop's hard drive to an online file-sharing website, his transportation charge was based on sufficient evidence. This remains true even if the government presented no evidence that anyone other than Fall accessed the file-sharing account. Last, Fall's use of the internet in the transmission of child pornography satisfies the interstate commerce element.

Evidence

Finally, Fall argues that there was insufficient evidence to convict him for receipt of child pornography in Counts Three, Four and Five. He claims that because the images charged in these counts were stored in the laptop's temporary internet files, it is possible they appeared at the bottom of a webpage and downloaded onto his computer without his knowledge.

The record here contained evidence of over 10 years of illicit conduct across multiple devices and thousands of images and videos of child pornography. Under the deferential standard of review applicable to the jury's verdict, there was ample evidence from which a reasonable jury could have found Fall guilty on these counts.

Affirmed.

United States v. Fall, Appeal No. 18-4673, April 3, 2020. 4th Cir. (Quattlebaum), from EDVA at Norfolk (Morgan). Mark Diamond for Appellant, Elizabeth Marie Yusi for Appellee. VLW 020-2-085. 22 pp.

■ U.S. District Court – Eastern District

Civil Rights

Officer involved in fatal tasing denied immunity

An officer who allegedly tased a mentally ill man was unable to dismiss a § 1983 claim because it was not clear his use of the taser was proportional, and he was denied qualified immunity because he allegedly

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continued to tase the decedent once he was pinned to the ground. Claims against the Chief of Police, other officers and the Town of South Hill were dismissed.

Background

Violet Smith brings this civil rights action against 33 defendants, including 20 unnamed police officers. Smith's claims arise from the death of Sabin Marcus Jones, a mentally ill individual who died after being tased. Defendants have moved to dismiss all counts in the amended complaint.

Multiple claims are dismissed

The court dismisses all claims against the South Hill Police Department because it is not an entity that can be sued separately from the Town of South Hill. Next, because the 11th Amendment bars official capacity claims, the court will dismiss all claims against the individual sheriff defendants in their official capacity. Finally, because Smith's official capacity claims against employees of South Hill are redundant of her claims against the town, all counts against the individual South Hill defendants brought against them in their official capacities are dismissed.

Section 1983 and 1985 claims

Smith brings a § 1983 excessive force claim against all defendants. With respect to Officer Watters, who tased Jones, the court cannot conclude, at this early stage, that Officer Watters' use of the taser was proportional. And, for purposes of this motion to dismiss, the court cannot conclude that qualified immunity protects Officer Watters from liability because, assuming the truth of Smith's well pleaded factual allegations, it certainly was not reasonable for officers to continue to tase Jones once he was pinned to the ground.

With respect to Smith's § 1983 excessive force claim against Chief of Police Stuart Bowen, as Officer Watters's supervisor. Smith fails to state a supervisory liability claim. Smith's allegations pertain only to the tasing of Jones and do not include allegations of widespread or continuous abuse by Officer Watters.

Next, although the Town of South Hill employed Officer Watters at the time he tased Jones, Smith cannot hold the Town of South Hill liable for a § 1983 violation based solely on that relationship. Therefore, the court will dismiss Smith's claim against the Town of South Hill, which she brought under a respondeat superior theory of liability.

The court will also dismiss Smith's claim against the Town of South Hill that she based on its alleged failure to train its police officers. A showing that the Town of South Hill failed to properly train a single officer, such as Officer Watters, or that Jones's death could have been avoided if the responding officers had received additional training, will not suffice.

Smith makes no allegation that any of the remaining individual defendants were present when Officer Watters tased Jones. Therefore, the court will dismiss Smith's § 1983 excessive force claim against the remaining individual defendants.

Smith also states that defendants deprived Jones of his civil rights by using excessive force, by depriving him of medical care and by depriving him of life and physical liberty. Because defendants took Jones to the hospital immediately after Officer Watters tased him, Smith fails to state a deprivation of medical care claim. And, because Smith supports her § 1985 claim with only conclusory allegations, she fails to state a § 1985 conspiracy claim against all defendants.

False arrest claim

Because the officers arrested Jones pursuant to an Emergency Custody Order, signed by a Virginia magistrate and requested by Jones's aunt, Smith fails to state a claim for false arrest under either § 1983 or Virginia law.

Remaining claims

Because Smith alleges that Jones died due to defendants' actions and the wrongful death statute provides the exclusive remedy for such a claim, Smith has failed to state a survivorship claim. However, because the wrongful death statute applies only to a claim under state law, and Smith has disavowed any state law claims in her amended complaint, the wrongful death claim must also be dismissed.

Finally, Smith seeks "injunctive relief to correct government procedure to prevent future injury." Because Jones has passed, Smith fails to state a claim for prospective injunctive relief.

Smith v. Town of South Hill, Case No. 19-cv-46, March 20, 2020. EDVA at Richmond (Lauck). VLW 020-3-176. 58 pp.

Bankruptcy

Disagreement with decision is no basis for appeal

Where the issues on appeal were not controlling questions of law but were disagreements with the bankruptcy court's application of settled law to facts, interlocutory appeal was denied.

Background

On Aug. 9, 2019, Wayne Services Legacy Inc., the successor entity to the Toys-Delaware debtors, initiated an adversary proceeding against Donlen Trust, seeking to recover funds allegedly owed to Wayne Services pursuant to an agreement under which Donlen Trust agreed to pay Toys-Delaware a portion of the proceeds derived from the sale of vehicles that Donlen Trust leased to Toys-Delaware.

On Nov. 7, 2019, Donlen Trust filed a motion to dismiss Wayne Services' adversary proceeding, asserting that the bankruptcy court lacked personal jurisdiction over Donlen Trust, that Wayne Services failed to state a claim in Count One of its Complaint and that the bankruptcy court lacked subject matter jurisdiction over Counts Two, Three and Four of the Complaint.

On Jan. 28, 2020, the Bankruptcy Court issued a memorandum opinion and order denying Donlen Trust's motion. This matter now comes before the court on Donlen Trust's motion for leave to file interlocutory appeal.

Controlling questions of law

Donlen Trust argues that the questions it seeks to appeal — namely, (1) whether Wayne Services stated a plausible turnover claim against Donlen Trust for the lease proceeds; (2) whether the Bankruptcy Court may exercise subject matter jurisdiction over Wayne Services' claims and (3) whether the bankruptcy court may exercise personal jurisdiction over Donlen Trust — constitute controlling questions of law within the meaning of 28 U.S.C. § 1292(b), because each question requires little consideration of the facts and proves completely dispositive of the adversary proceeding.

As to whether Wayne Services stated a plausible claim in Count One, the court agrees with Wayne Services that such a question does not constitute a controlling question of law. Donlen Trust challenges the Bankruptcy Court's *application* of settled law to those allegations. Such a question proves best suited for appeal after a final judgment, when the Bankruptcy Court has made a final determination not only of the plausibility of Wayne Services' turnover claim under settled law, but its viability as well.

Donlen Trust likewise fails to present a controlling question of law as to the Bankruptcy Court's subject matter jurisdiction over Wayne Services' claims. Donlen Trust believes that the Bankruptcy Court got it wrong. But "[c]ounsel's disagreement with the Court is simply not reason enough to grant an interlocutory appeal." Moreover, Donlen Trust concedes that the bankruptcy court's jurisdiction over Counts Two, Three and Four necessarily relies on Count One, the plausibility of which, as explained above, proves inappropriate for interlocutory review.

Neither does Donlen Trust present a controlling question of law as to the Bankruptcy Court's resolution of its personal jurisdiction challenge. Donlen Trust again challenges only the bankruptcy court's application of settled law to the facts of this case. Such a challenge proves better suited for appeal after a final judgment by the Bankruptcy Court.

Remaining factors

Because Donlen Trust fails to present a controlling question of law suitable for interlocutory appeal, the court need not address the remaining factors under § 1292(b). That said, the court finds that none of the questions presented appear appropriate for interlocutory appeal under those factors.

Motion for leave to file interlocutory appeal denied.

Donlen Trust v. Wayne Services Legacy Inc., Case No. 20-cv-092, April 1, 2020. EDVA at Richmond (Novak). VLW 020-3-177. 16 pp.

Employment Discrimination

Hostile environment claim against UR dismissed

A former Associate Dean of the School of Arts and Sciences at the University of Richmond who alleged the Dean criticized and humiliated her, stripped her of responsibilities and barred her from working with other personnel, causing her to resign, failed to allege conduct sufficient to satisfy the "severe or pervasive standard." Her hostile work environment claim was dismissed.

Background

Dr. Della Dumbaugh, a former Associate Dean of the School of Arts and Sciences at the University of Richmond, brings this action under Title VII of the Civil Rights Act of 1964. She alleges that the Dean, Dr. Patrice Rankine, criticized and humiliated her, stripped her of responsibilities and barred her from working with other personnel, causing her to resign her post as Associate Dean. The university has moved to dismiss the amended complaint for failure to state a claim.

Analysis

To survive a motion to dismiss on a hostile work environment claim, a plaintiff must plead sufficient facts showing that the conduct "(1) was unwelcome, (2) was because of her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer."

In her original complaint, Dumbaugh pled facts showing that Rankine made offensive and insulting comments to her, disrespected and mistreated her, unfairly and publicly criticized her and reassigned tasks without telling her. The court, however, concluded that those facts failed to meet the severe or pervasive standard.

In her amended complaint, Dumbaugh provides more detail about her allegedly hostile interactions with Rankine and shows that Rankine also mistreated other female faculty and staff. Dumbaugh's amended complaint continues to show that Rankine disrespected and mistreated her.

Dumbaugh, however, proceeds under essentially the same facts as alleged in her original complaint. She does not describe any of her interactions with Rankine in substantially different detail or include new instances of allegedly hostile conduct. Rather, most of Dumbaugh's new allegations either describe the effect Rankine's conduct had on other women or involve conclusory assertions about the motivation behind Rankine's conduct. The new details in Dumbaugh's amended complaint do not "nudge[ ] [her] claim[ ] across the line from conceivable to plausible."

Thus, Dumbaugh has not pled new or materially different facts that give rise to an actionable hostile work environment claim. Accordingly, Rankine's conduct does not qualify as severe or pervasive. Dumbaugh, therefore, fails to state a hostile work environment claim.

Defendant's motion to dismiss granted.

Dumbaugh v. University of Richmond, Case No. 19-cv-57, March 27, 2020. EDVA at Richmond (Gibney). VLW 020-3-179. 7 pp.

Administrative

Tariff provides federal jurisdiction, dooms complaint

An "artfully pleaded" complaint for damages that asserted only state law claims was nevertheless removable to federal court because it sought to alter the terms of a tariff filed with the Federal Energy Regulatory Commission, or FERC. That same tariff mandated dismissal of the suit under the filed-rate doctrine.

Background

This case arises from an unprecedented January 2014 weather event during which, as plaintiff Old Dominion Electric Cooperative, or ODEC, describes, the mid-Atlantic region "experienced unique cold weather conditions known as 'the Polar Vortex Event' including record low temperatures across the United States."

ODEC, a nonprofit wholesale generation utility operating three facilities in Virginia and Maryland brings four state law claims against defendant PJM Interconnection LLC for damages stemming from the Polar Vortex of 2014. PJM is a "regional transmission organization" that exercises "broad responsibility relating to the supply of wholesale electric power" throughout the 13 states in the mid-Atlantic region.

On Feb. 22, 2019, ODEC filed the operative amended complaint against PJM in Henrico County Circuit Court, asserting two claims for breach of contract, a claim for unjust enrichment and a claim for negligent misrepresentation. PJM removed the case to this court, claiming federal question jurisdiction. One week later, PJM filed the motion to dismiss. ODEC then filed the motion to remand, arguing that its amended complaint did not invoke federal jurisdiction because its claims arose only under state law and did not raise a substantial federal question.

Motion to remand

The substantial federal question doctrine permits removal of a state law claim where "plaintiff's ability to establish the necessary elements of his state law claims must rise or fall on the resolution of a question of federal law." As a threshold matter, ODEC's claims fall within "the terms of the relationship" between ODEC and PJM as articulated under federal law.

At the time of the 2014 Polar Vortex, a tariff PJM filed with FERC capped the prices at which ODEC and other generators could offer their capacity at $1000 per megawatt hour. Because FERC approved the PJM tariff, that rate held the force of federal law. ODEC, as a generator capac-

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ity resource, was required to "respond to [PJM's] directives to start, shutdown or change output levels of [its] generation units." As ODEC concedes, had it failed to respond to PJM's directives, it would have been forced to declare a "forced outage" and would have been subject to monetary penalties, again, arising under federal law.

The promises made by PJM, then, did not represent independent contractual terms: they were part and parcel of the relationship and the responsibilities delegated to the parties under federal law. And because the instant suit "seeks to alter the terms of th[at] relationship . . . set forth in a filed tariff," this court possesses subject matter jurisdiction.

While the amended complaint studiously avoids any mention of federal law, a "plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." And even a cursory reading of ODEC's artfully pleaded claims reveal their inherently federal nature. Finally, the conclusion that ODEC's claims arise out of the PJM tariff and operating agreement are borne out by the case law evaluating similar questions. As a result, ODEC seeks to alter a federal tariff, and this court has jurisdiction.

Motion to dismiss

Because ODEC's claims for damages arise under and implicate the PJM tariff, binding case law teaches us that those claims "effectively challenge[]" the rate set by FERC and run afoul of the filed-rate doctrine.

First, the award of damages to ODEC would have the effect of discriminating between utility generators under the PJM tariff. Second, awarding damages to ODEC would contravene the rate-making authority of federal authorities and functionally require this court to set a reasonable rate. Indeed, despite addressing cases in different procedural contexts and under different theories of recovery, every administrative agency or court to address ODEC's claims – and other similar cases arising out of the 2014 Polar Vortex – have found that the filed-rate doctrine bars the type of equitable relief ODEC seeks here.

Plaintiff's motion to remand denied; defendant's motion to dismiss granted

Old Dominion Electric Cooperative v. PJM Interconnection LLC, Case No. 19-cv-233, March 31, 2020. EDVA at Richmond (Lauck). VLW 020-3-180. 29 pp.

Employment

Employee's report was beyond scope of anti-retaliation statutes

Where a former employee alleged he was terminated for reporting to his superiors that the company was underreporting profits on nongovernmental commercial contracts, he did not have a viable retaliation claim under the Defense Contractor Whistleblower Protection Act or the National Defense Authorization Act. His disclosure fell outside the statutory protection afforded by those statutes.

Background

Eugene Ficarra has sued his former employer for retaliation, in violation of § 2409 of the Defense Contractor Whistleblower Protection Act, and reprisal, in violation of § 4712 of the National Defense Authorization Act.

The first amended complaint alleges that defendant SourceAmerica, plaintiff's employer, terminated plaintiff after he reported to his superiors that SourceAmerica was underreporting its profits on nongovernmental commercial contracts. Defendant has filed a motion to dismiss the first amended complaint for failure to state a claim.

Analysis

The parties' dispute focuses sharply on whether plaintiff's disclosure as alleged in the first amended complaint is a disclosure covered by either statute.

Plaintiff argues that he reasonably believed that his disclosure was evidence of "a violation of law, rule, or regulation related to a Department [of Defense or NASA] contract" and evidence of "a violation of law, rule or regulation related to a Federal contract." But plaintiff's disclosure clearly does not fit within this statutory language; even assuming plaintiff's disclosure concerns "a violation of law, rule, or regulation," his disclosure is not "related to" a Department of Defense, NASA or other federal contract, nor could plaintiff have reasonably believed that it was.

Clearly, plaintiff's disclosure was related only to nongovernmental commercial contracts. Specifically, plaintiff allegedly reported to his superiors that SourceAmerica was underreporting profit from CyclePoint's nongovernmental commercial contracts. The only tenuous connection between plaintiff's disclosure and the federal government is that the first amended complaint alleges that SourceAmerica's consolidated financial statements included the underreported profit from CyclePoint's nongovernmental commercial contracts and that those consolidated financial statements were submitted to AbilityOne as part of AbilityOne's evaluation of SourceAmerica's financial stability.

This tenuous connection is far too attenuated to meet the "related to" statutory requirement of either statute. To conclude otherwise would sweep within the ambit of both statutes virtually every manufacturer or other organization that sells products both to the federal government and to private entities, even though the alleged underreporting of profit does not have any connection to any federal contract. That interpretation stretches these statutes far beyond the plain language of those statutes and thus far beyond what the drafters of those statutes could have reasonably intended.

The "related to" language in both § 2409 and § 4712 requires an actual nexus between a plaintiff's disclosure and a DoD, NASA or federal contract; no such nexus exists here. This conclusion is further supported by the well-settled principle that statutes must be construed as a whole.

And the other types of disclosures explicitly protected within the same provision of § 47124—gross mismanagement of a federal contract and a gross waste of federal funds—underscore the importance of a significant connection between the protected disclosure and a federal contract. Because the other protected disclosures in § 4712 must explicitly involve federal contracts, it follows that the "related to" language in § 4712 and § 2409 requires that there be an actual nexus between the employee's disclosure and a federal contract for the disclosure to be protected under the statutes. No such nexus exists here.

Quite apart from the fact that SourceAmerica's nongovernmental commercial contracts are not "related to" any federal contract, the first amended complaint also fails to allege, as required by §§ 2409 and 4712, the "law, rule, or regulation" that plaintiff reasonably believed SourceAmerica violated. The conduct that the first amended complaint alleges plaintiff reported to his superiors does not constitute a violation of any of the federal statutes or regulations identified by plaintiff, and no reasonable person could conclude otherwise.

Given that plaintiff has attempted to state retaliation claims pursuant to § 2409 and § 4712 twice and that plaintiff was provided a third opportunity to provide evidence of the required elements to state these claims via supplemental briefing, it is clear that further attempts at amendment would be futile. Accordingly, the first amended complaint must be dismissed with prejudice.

Defendant's motion to dismiss granted.

Ficarra v. SourceAmerica, Case No. 19-cv-1025, April 1, 2020. EDVA at Alexandria (Ellis). VLW 020-3-181. 10 pp.

■ U.S. District Court – Western District

Contract

Additional documents needed to resolve contract dispute

Although the defendants in a suit claiming breach of contract, indemnification and engineering and design malpractice argued the plaintiff's common law indemnification claim should be dismissed, their motion was denied because they did not provide the settlement, design services and other agreements required to understand the context of the contractual relationship.

Background

This is a diversity action brought by Contech Engineered Solutions LLC for breach of contract, indemnification and engineering and design malpractice arising out of the design and construction of wastewater treatment projects in Mora, New Mexico and Gloucester, Virginia.

Defendant ACS Design LLC is a water and wastewater engineering firm. Defendant Apptech Solutions LLC is a water and wastewater manufacturing and engineering solutions provider to the civil engineering industry. Defendant David Early is the sole current member of ACS Design and Apptech. Defendant Scott is a former member of ACS Design and Apptech.

ACS Design, Early and Easter move to dismiss Contech's claim for common law indemnification. Apptech has not made an appearance in this case.

Analysis

Defendants move to dismiss Contech's claim for common law indemnification. They argue that under Virginia (and Ohio) law, no duty of indemnity can be implied when there is an express contractual provision for indemnity between the parties. In response, Contech clarifies that the amended complaint alleges that Contech has an indemnification agreement under the design services agreement with ACS Design, but not Early and Easter.

The amended complaint also alleges that Early and Easter, along with the other defendants, are signatories to the settlement agreement, which according to Contech permits claims for indemnity and other losses incurred by Contech for engineering activities performed by defendants on certain projects. Contech's claims address design errors made by ACS Design both during the time when the design services agreement was in effect and after the settlement agreement was executed.

Contech asserts that the settlement agreement created an independent obligation for Early, Easter, ACS Design and Apptech to cooperate with Contech by providing engineering and related services at no cost to Contech for the projects listed on schedule A of the settlement agreement. As such, ACS Design may be responsible for errors made while the design services agreement was in effect and (along with the other defendants) after the settlement agreement was in effect.

The court finds that it must deny defendants' motion to dismiss. First, the court does not have before it the settlement agreement, the design services agreement or any other agreement referenced in the amended complaint. Without seeing the entire settlement agreement and the other agreements, especially the design services agreement, the court lacks the critical context that is necessary to understand the full extent of the contractual relationship between the parties and how it was allegedly breached.

As the moving parties, it was defendants' responsibility to provide these documents so the court could make a fully informed determination as to whether defendants are entitled to dismissal of Count Five. Given the nature of the claims and what seems like a complicated contractual arrangement, and the court finding itself without the benefit of the contracts, the court finds that the issue is best resolved after further factual development, not on the pleadings.

Defendants' motion to dismiss denied.

Contech Engineered Solutions LLC v. Apptech Solutions LLC, Case No. 19-cv-762, April 6, 2020. WDVA at Roanoke (Dillon). VLW 020-3-192. 7 pp.

Employment

Claim that termination based on refusal to join in criminal act fails

The former employees' amended complaint did not allege facts plausibly suggesting they were asked or directed to engage in a criminal act by insurance providers that could lead to prosecution under Virginia law, or that their termination was based on their refusal to do so.

Background

Plaintiffs William Richard Hulkenberg Sr., Ronald Jones, Larry Bowen, William Richard Hulkenberg Jr., Jeremy Hulkenberg and Andrew Hall bring claims of wrongful termination against Anabaptist Healthshare, Kingdom Healthshare Ministries LLC, Unity Healthshare LLC, OneShare Health LLC, Alex Cardona and Tyler Hochstetler.

On Oct. 17, 2019, the court dismissed with prejudice claims arising under the first two exceptions under *Bowman v. State Bank of Keysville*, 331 S.E.2d 797 (Va. 1985), but allowed the former employees to replead, amplify and amend their claims under the third *Bowman* exception. This matter is now before the court on defendants' motion to dismiss the five-count amended complaint.

Analysis

A claim under the third *Bowman* exception requires allegations that an employer "asked[] or directed" an employee to engage in a criminal act, which could lead to the employee's prosecution under Virginia law. Such a claim also requires a "refusal" to engage in that criminal act and a causal link between that refusal and the plaintiff's termination, such that the termination was "based on" that refusal.

However, the former employees have not set forth facts making it plausible that it would have been a crime to have assisted with the defendants' insurance products under Virginia law. They have not alleged that the defendants lacked a license to transact in insurance in Virginia, or that defendants' license has been revoked or surrendered at any time. Accordingly, it is not plausible that the former employees would have been subject to criminal penalties in Virginia for assisting with the defendants' products.

In Count Two, the former employees allege that defendants stole information from their former business partner, and that they were fired for refusing to further engage in embezzlement of information. The former employees, however, fail to plausibly allege that they could have been prosecuted for theft of information and that they were fired for refusing to carry out instructions to do as much. There are no facts in the amended complaint that would allow the plausible inference that the copying at issue was criminal under Virginia law. In addition, no facts alleged make it plausible that refusing to copy this information had anything to do with the former employees' termination.

Likewise, turning to Count Three, the court cannot find it plausible to infer (i) that there was a crime of financial embezzlement; (ii) that the former employees were asked and refused to take any part in it and (iii) that they were fired as a result.

Count Four alleges that a former employee was asked to disseminate a purportedly "fraudulent" report in order to induce the selling of defendants' "unlicensed and illegal health insurance ser-

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vice plans." However, no facts asserted in the amended complaint make it plausible that such a use of the report would have been a criminal act. As to the remaining former employees, the amended complaint does not allege, except in conclusory fashion, that any of them had anything to do with the report. And it is "purely hypothetical" that the former employees would have been subject to prosecution under Virginia's criminal laws.

Finally, looking to Count Five, the court concludes that the former employees' *Bowman* claim premised on aiding and abetting fails for the same reasons that each of the claims based on substantive alleged crimes fail. As a result, the court will dismiss this claim as well.

Defendants' motion to dismiss granted.

Hulkenberg v. Anabaptist Healthshare, Case No. 19-cv-00031, April 7, 2020. WDVA at Charlottesville (Conrad). VLW 020-3-193. 12 pp.

Criminal

Ineffective assistance of counsel claim succeeds

While the court could not reach the merits of defendant's claim that his trial counsel provided ineffective assistance regarding a plea deal because the claim was raised too late and had already been rejected by the Fourth Circuit, the trial counsel's failure to object to the overstatement of the quantity of crack cocaine in the PSR was constitutionally ineffective and prejudiced the defendant.

Background

In his petition brought pursuant to 28 U.S.C. § 2255, Oshay Terrell Jones asks the court to look past the many procedural mistakes in this case and reach the substance of his two ineffective assistance of counsel claims.

Jones argues first that, but for bad legal advice from his trial counsel, he would have taken a favorable plea deal. Jones also contends his trial counsel erred in failing to object to the drug weight calculated in the presentence report, particularly the amount of crack cocaine Brandon Snead purchased from Jones.

The government, while acknowledging the erroneous advice of Jones' trial counsel, stands on procedure and insists that the court lacks jurisdiction to provide a remedy.

Plea offer claim

Two procedural hurdles stand in the way of the court reaching the merits of the plea offer claim. First, his Rule 60(b)(3) motion, filed as it was on May 21, 2018, is time barred under Rule 60(c) as it was filed more than a year after the court's dismissal of his § 2255 petition on Jan. 18, 2017, or the denial of his Rule 59 motion on March 10, 2017.

Nonetheless, the court will consider whether the time for filing Jones' Rule 60(b)(3) motion should be extended under the doctrine of equitable tolling. Jones argues that the government misrepresented the nature of plea offers available to him in its motion to dismiss. However, given his knowledge of the plea offer extended to him, Jones can hardly blame his untimely filing of his Rule 60(6)(3) motion on the claimed misleading position taken by the government in its motion to dismiss.

Even were the court to find equitable tolling applied to Jones' Rule 60(6)(3) motion concerning the plea offer claim, it is otherwise procedurally barred because the Fourth Circuit has held that claim to be abandoned, finding Jones' arguments to the contrary to be "not credible." As a result, regardless of the substantive merits of Jones's plea offer claim, the time limits of Rule 60(c) and the Fourth Circuit's prior ruling on abandonment prevent this court from reaching the merits of that claim.

Drug weight claim

The same is not true with the Snead drug weight claim. As regards that claim, Jones relies on the "catch-all clause" of Rule 60(6)(6). Unlike Rule 60(b)(3), a motion under Rule 60(b)(6) is not bound by the hard and fast one-year time limit; it need only be brought within a reasonable time.

Jones complains that trial counsel failed to object to the miscalculation of the drug weight attributable to him in the PSR. In that regard, Jones claims that the probation officer mischaracterized Brandon Snead's trial testimony as to the amount of crack cocaine Snead purchased from him. Jones asserts that neither this court nor the court of appeals addressed this argument in their habeas rulings.

The government argues that the Fourth Circuit's ruling on direct appeal precludes Jones' habeas claim. Jones argues that his appellate counsel did not raise on direct appeal the Snead drug weight claim. On this score, Jones' point is well taken as his appellate brief does not directly address the issue Jones now raises regarding the overstatement in paragraph 41 of the PSR.

Unlike in his direct appeal, Jones clearly raised the Snead drug weight claim in his habeas petition. Jones asserts that the court misunderstood the Snead argument and never addressed it, instead characterizing, and dismissing, his claim as challenging the reliability of the government's witnesses. Jones is again correct.

The court finds that trial counsel's failure to object to the overstatement of the quantity of crack cocaine purchased by Snead was constitutionally ineffective and prejudiced Jones by inflating the Base Offense Level used for sentencing.

Defendant's Rule 60(b) motion granted in part, denied in part.

United States v. Jones, Case No. 13-cr-00038, April 9, 2020. WDVA at Roanoke (Urbanski). VLW 020-3-194. 36 pp.

Negligence

Whether grapes caused slip and fall is jury question

A jury will decide whether grapes on the floor caused a shopper at Sam's Club to slip and fall, and whether Sam's Club or its employees had actual or constructive notice of the grapes. As these are questions for the jury, the shopper's "safety expert" is excluded from testifying at trial.

Background

On May 10, 2018, Angela Patterson was shopping at Sam's Club in Roanoke, with her husband, Mark, and 17 year-old son, N.P., Patterson asserts that she did not notice nor was she concerned by anything on the ground in the back aisle of the Sam's Club. Patterson then slipped and fell on a sticky substance, severely injuring her right leg.

Patterson claims that a grape "or similar substance" was gathered by Sam's Club employees and "was kept for a period of time" in an office. After the fall, Patterson's husband saw three grapes (two of which were on the floor) near where Patterson fell and N.P. saw Aja Pleasant, a Sam's Club manager, pick up two to three grape pieces from the floor. Additionally, Tyler Moore, a Sam's Club employee, claims to have seen grapes in the same aisle up to six hours before the fall occurred. Mr. Moore also told a manager about the grapes, but he was directed to not pick them up.

Patterson alleges that Sam's Club was negligent for failing to discover, warn customers of and remedy a dangerous condition that led to her fall and substantial bodily injury. Patterson has identified William Marletta, Ph.D., as a safety expert in support of her case.

Sam's Club has moved for summary judgment. It also seeks to exclude Dr. Marletta.

Summary judgment

Sam's Club argues that Patterson is unable to prove that a grape (or multiple grapes) proximately caused her to slip and fall. According to Sam's Club, neither Patterson nor her husband actually saw her slip on a grape.

Patterson has alleged from the beginning that she slipped on what she thought was a grape, and the record shows that numerous witnesses saw remnants of a grape on the floor and on Patterson's pantleg after the slip and fall. In her response brief, Patterson points to seven instances in the record which refer to a grape causing her fall, including her husband's sworn testimony regarding seeing grapes after the fall, Mr. Moore's affidavit that he saw grapes at the scene up to six hours before the fall and Ms. Pleasant's sworn testimony that she had possession of a grape after the fall.

The court finds that the undisputed presence of a grape or grapes at the scene of the incident is sufficient to create an issue of fact as to whether or not it caused Patterson's slip and fall. Accordingly, the court concludes that there is sufficient evidence in the record for a reasonable jury to find that Sam's Club, and specifically a grape, was the proximate cause of Patterson's injury.

Sam's Club also argues that Patterson failed to show that it or its employees had actual or constructive notice of the defective condition. Viewing the evidence in the light most favorable to Patterson, a Sam's Club employee was aware of the dangerous condition as early as six hours before the incident occurred and made no attempt to warn customers or clean the floor. Further, multiple Sam's Club employees walked past the location of the incident multiple times and did nothing to address the dangerous condition. For these reasons, the court finds that a reasonable jury could find that Sam's Club had actual, or at a minimum, constructive notice, of the dangerous condition that led to Patterson's injury. Accordingly, the court will deny Sam's Club motion for summary judgment.

Expert

Because Dr. Marletta's testimony relies on the existence of a grape and a grape is not visible from the video footage, his testimony is purely speculative. Dr. Marletta's testimony merely recites what he sees on the video. Determining whether a grape caused Patterson's injury, and whether a grape was even present at the scene, are questions that are left for the jury to decide.

Defendant's motion for summary judgment denied; defendant's motion to exclude expert granted.

Patterson v. Sam's East, Inc., Case No. 19-cv-329, April 3, 2020. WDVA at Roanoke (Urbanski). VLW 020-3-195. 11 pp.

Intellectual Property

Affirmative defenses not subject to Twombly and Iqbal

Although prior decisions applied the pleading standards in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to affirmative defenses, the recent trend declines to do so. But, even under the less-stringent standards of Rule 8(b), the unclean hands, estoppel and inequitable conduct affirmative defenses lacked factual support.

Background

Tippman Engineering LLC and Innovative Refrigeration System Inc. are competitors in the field of cold storage. In 2018, both parties submitted bids to install a blast freezer system in a warehouse owned by Dothan Warehouse Investors LLC. Dothan hired Innovative, which installed a blast freezer that allegedly infringes various of Tippman's patent claims. Thus, Tippman filed this action seeking damages for patent infringement.

Innovative asserts that Tippman's amended complaint fails to state a claim and asserts the affirmative defenses of noninfringement, unclean hands, waiver or estoppel, inequitable conduct or exhaustion and invalidity for lack of novelty or obviousness.

Tippman moved to strike Innovative's affirmative defenses.

In response, Innovative filed a motion for leave to file a first amended list of affirmative defenses. Although Tippman consented to Innovative's motion, it maintained its objection to several of Innovative's amended affirmative defenses. Accordingly, the court will construe Tippman's motion to strike as challenging Innovative's first amended affirmative defenses.

Analysis

Tippman argues that the court should apply the pleading standards set forth in *Iqbal* and *Twombly* to Innovative's affirmative defenses and, therefore, strike all of the defenses for failure to allege sufficient facts. The recent trend "has been not to apply the *Twombly/Iqbal* standard to affirmative defenses." The court agrees with the more recent cases from this district and declines to apply a heightened pleading standard to affirmative defenses.

The court finds that Innovative's second affirmative defense, noninfringement, satisfies the "contextually comprehensible" standard. Innovative's third affirmative defense states, in its entirety, "[t]he claims in the First Amended Complaint are barred by the Plaintiff's unclean hands." Innovative's defense of unclean hands is "threadbare" and provides insufficient notice of the nature of the defense. Accordingly, the court will grant Tippman's motion and strike this defense.

Tippman argues that Innovative's fourth affirmative defense fails to give notice as to what conduct constituted a waiver of its rights or "misleading" conduct warranting estoppel. In its answer and amended defenses, Innovative gives no indication what "misleading, deceptive, and unlawful conduct" supports its estoppel defense. By contrast, Innovative has provided a sufficient factual basis for its waiver defense.

Innovative's fifth affirmative defense states only that "[t]he asserted patent is invalid for one or more reasons, including Plaintiff's inequitable conduct and/or exhaustion (first sale doctrine)." In its brief in opposition, Innovative merely states that "discovery is necessary to uncover the factual bases for this defense," and that "*if either of these defenses are applicable*, then the factual bases of these defenses are within Plaintiff's realm of knowledge." Innovative has all but admitted that its fifth affirmative defense lacks factual support. Accordingly, that defense will be stricken.

In affirmative defense six, Innovative alleges that the claims at issue "are anticipated or rendered obvious to one of ordinary skill in the art by" several other patents. Again, the court finds this defense to contain sufficient factual allegations. While Innovative's defense alone may not specify exactly what claims are at issue, a review of the prior art cited by Innovative should elucidate which claims Innovative intends to challenge. Thus, in the context of Tippman's complaint and the prior art on which Innovative relies, Tippman has sufficient notice of Innovative's defense.

Plaintiff's motion to strike affirmative defenses granted in part, denied in part.

Tippman Engineering LLC v. Innovative Refrigeration Systems Inc., Case No. 19-cv-00087, April 2, 2020. WDVA at Harrisonburg (Dillon). VLW 020-3-200. 8 pp.

■ Va. Supreme Court

Criminal

Habeas relief denied in malicious wounding case

Appellant is not entitled to habeas corpus relief from his aggravated malicious wounding conviction based on ineffective assistance of counsel.

The Week's Opinions

Even if trial counsel had called an expert to testify about how long appellant's daughter had been suffering from brain bleeding, such evidence would not have been outcome-determinative.

The evidence presented showed that the child was "fine" when she was left in appellant's care, appellant admitted that he shook his daughter and a medical examination revealed "a 'constellation' of injuries" that were not detected during two prior hospital visits on the weekend that the injuries were discovered.

Overview

When R.S., the infant daughter of appellant, Andrew Stephens (Stephens), and Amber Stevens, was three months old, Amber left R.S. in appellant's care while she attended National Guard training. Appellant took R.S. to the hospital on Nov. 2 and Nov. 3, 2012, because she was experiencing irregular breathing and vomiting after eating. "Nothing abnormal was found either time and each time Stephens was given feeding instructions and sent home with R.S."

On Nov. 4, Stephens called 911 after R.S. went limp, started to groan and had irregular breathing. She was ultimately sent to Children's Hospital of the King's Daughters (CHKD) after displaying "seizure activity."

A CT scan revealed R.S. had bleeding on both sides of her brain. She also had a fractured clavicle that was less than 10 days old, retinal bleeding and a small bruise on her back.

Stephens was charged with maliciously wounding R.S. Following his conviction for aggravated malicious wounding and an unsuccessful appeal, he petitioned for a writ of habeas corpus.

Stephens claimed that Wheeler, his trial counsel, provided ineffective assistance because he did not call an expert to testify about how long R.S. had bleeding in her brain.

Stephens also claimed Wheeler should have objected to the commonwealth's expert, Dr. Lamb, because her testimony went to "the ultimate issue in the case."

The circuit court dismissed the petition.

Analysis

To establish an ineffective assistance claim, a petitioner must show counsel performed deficiently and such performance was prejudicial, that is, the performance denied a petitioner a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

Stephens claims he was prejudiced by the lack of expert testimony about the "age and onset" of R.S.'s brain bleeding and by the commonwealth's expert testifying as to the ultimate issue in the case.

"Stephens overlooks the great weight of the evidence and key facts in making such assertions; we cannot do the same when deciding this appeal. …

"The medical records admitted into evidence indicate that, upon examination, in November 2012, R.S. had both chronic and acute subdural hematomas. A chronic subdural hematoma is an injury at least 14 days old.

"In the medical records, it is noted that R.S.'s mother represented that Dr. Dilustro, a neurosurgeon who treated R.S., told her that R.S. had chronic subdural hematomas, which may have happened at birth. Amber also made that assertion in an affidavit in support of the instant habeas corpus petition.

"There is no testimony or affidavit or medical record which confirms that any such statement was made by Dr. Dilustro or which would explain the relevance of any such statement to the charges brought against Stephens. There is no affidavit from Dr. Dilustro as to what his testimony would have been if he had been called as a witness.

"At trial, Dr. Lamb testified that Dr. Dilustro was a part of the treatment team for R.S. and that she had reviewed his notes before reaching her conclusion that R.S. had suffered abusive head trauma. When asked on cross-examination, Dr. Lamb stated that any injuries that occurred at birth, including subdurals and retinal hemorrhaging, would have resolved before November when she examined R.S.

"In addition to acute subdural hematomas, the medical records indicate the existence of chronic subdural hematomas as well. There is no allegation that Stephens caused the chronic subdural hematomas. …

"The failure to present expert testimony that R.S. had a prior head injury, which inexplicably re-bled while she was in the care of her father does not create a reasonable probability that presentation of that trial testimony would have changed the outcome of the case.

"This conclusion is bolstered by consideration of evidence in the record that the child was fine when she was left with Stephens, that although he claimed 'not to go to town on her,' Stephens admittedly shook his infant daughter while she was in his care, and that Dr. Lamb and Dr. Uscinski agree that there was acute bleeding in R.S.'s brain which caused her to suddenly fall ill the weekend of November 4, 2012.

"Additionally, when R.S. was examined at CHKD on November 4, 2012, she suffered from a 'constellation" of injuries, which had not been detected upon her previous medical examinations that weekend.

"Considering this record, it is clear that Stephens failed to carry his burden of proving that his trial counsel's failure to call Dr. Dilustro or another neurosurgeon as a witness resulted in prejudice to him sufficient to satisfy the prejudice prong of the *Strickland* test."

Further, the failure to object to Dr. Lamb's testimony did not prejudice Stephens. "Stephens did not object to nor assign error to Dr. Lamb's report, which was admitted into evidence. Dr. Lamb's report mentions 'abusive head trauma' three times and explains why R.S.'s symptoms and injuries, in Dr. Lamb's opinion, were highly concerning for abusive head trauma.

"Dr. Lamb's report also mentions that R.S.'s other injuries, the clavicle fracture and the small bruise on her back, were concerning for 'inflicted' trauma.

"Thus, even if Wheeler had objected and Dr. Lamb's testimony regarding an inflicted traumatic brain injury had been excluded, her opinion as to abusive head trauma and 'inflicted' trauma would have been before the jury anyway."

Therefore, "there is not a reasonable probability that Wheeler's failure to object to Dr. Lamb's testimony resulted in a different outcome for Stephens."

Stephens v. Clarke, Record No. 190510 (Order) April 30, 2020, Newport News Cir. Ct. Jonathan Paul Sheldon George Arnold Somerville for Appellant, Aaron Jennings Campbell, Lauren Catherine Campbell for Appellee. VLW 020-6-029, 10 pp.

■ Va. Court of Appeals – Unpublished

Criminal

Appellant sufficiently identified in robbery and carjacking case

Where appellant was convicted as one of the perpetrators of a robbery and carjacking, and for using a firearm while committing the robbery, the victim's identification of appellant was sufficient to sustain the convictions.

Credibility

"[A]ppellant challenges the sufficiency of the evidence to establish that he was one of the perpetrators, contending that Barker's [the victim's] identification was 'inherently incredible.' He points to various inconsistencies in Barker's testimony, Barker's inability to identify appellant during the first photo spread, Barker's failure to clearly describe appellant to Detective Lowery shortly after the incident, Barker's allegedly equivocal identification during the lineup, Barker's erroneous description of appellant as 'light skinned,' and Barker's vague descriptions of all three assailants.

"In sum, appellant attacks the credibility of Barker's identification of appellant."

Attention to detail

"Barker had a good opportunity to view the second robber at the time of the incident. After the men had taken all of Barker's belongings, Barker came 'chest to chest' with the man. Barker testified that they were 'facing each other' and, from that close proximity, Barker was looking 'at him in his face.'

"Thus, Barker had an excellent opportunity to view appellant at the time of the crime, and his identification was reliable[.]"

"Barker demonstrated his high degree of attention to the second robber's features by relying on his head shape, bushy eyebrows, and nose in making the identification. Barker also exhibited a high degree of attention regarding each of the robbers' actions, statements, and weapons.

"Barker observed that the first robber walked to Barker's left side, pointed the gun at Barker's head, and demanded that Barker 'give him everything,' including the PIN to his debit card. Barker also specifically noted that appellant was not armed, stayed in front of Barker, kicked him in the head, and removed his shoes, pants, and gold diamond earring.

"Barker continued watching appellant as he threw Barker's belongings into the back seat of the car, which provided Barker the opportunity to specify appellant's height and build. Barker's high degree of attention during the incident translated into three unequivocal identifications of appellant as the second robber.

"Indeed, on the day of the incident, Barker saw a picture of appellant on Facebook and positively identified him as the second robber based on his 'head shape and bushy eyebrows.' Barker also testified that when he saw appellant at the preliminary hearing he had 'no doubt' that appellant was the second robber."

Positive identification

"It is undisputed that Barker did not identify appellant during the first viewing of the photo lineup, and Barker testified that he was only able to positively identify appellant during the second viewing after appellant's face was partially covered by a manila folder.

"However, an 'in-court identification' that is 'unequivocally positive' is the 'most significan[t]' factor 'on the subject of [a witness'] level of certainty' …

"And in this case, Barker provided two unequivocally positive in-court identifications of appellant, first at the preliminary hearing and then at trial. Additionally, while appellant's trial was approximately twenty-one months after the carjacking, Barker positively identified appellant in a Facebook photo *on the same day* as the incident."

Jury's decision

"Appellant argues nevertheless that Barker's testimony was 'inherently incredible.' He notes that Barker did not mention appellant when he emailed the Facebook photo to Lowery. Appellant further contends that Barker did not positively identify appellant during the second viewing of the photo lineup; instead, appellant invites this Court to adopt Detective Farnsworth's testimony that Barker's identification was equivocal.

"Appellant also argues that it is 'simply unbelievable' that Barker's confidence in his identification of appellant improved between the photo lineup and his in-court identifications. …

"[T]he jury in this case heard an in-depth cross-examination of Barker regarding those issues as well as conflicting testimony, even from the victim. And appellant's counsel capably argued those differences and inconsistencies to the jury. Nevertheless, after considering all of the evidence, the jury credited Barker's account and convicted appellant. …

"[W]e hold that Barker's testimony was not inherently incredible, and we will not accept appellant's invitation to reweigh the facts and reach the opposite conclusion of the jury."

Affirmed.

Jones v. Commonwealth, Record No. 0426-19-1, April 7, 2020. CAV (Frank) from Norfolk Cir. Ct. (Hall) Kristin Paulding for appellant, Elizabeth Kiernan Fitzgerald for appellee. VLW 020-7-072, 14 pp. Unpublished.

Criminal

Defense motion to strike venire members denied

Where, at appellant's trial for possessing a firearm after being convicted of a violent felony, defense counsel sought to strike two members from the jury pool after they indicated a belief that appellant would be more likely to possess a firearm because he did so in the past, the trial court correctly denied the motion.

Despite their preconceived notions, they both indicated to the court that they would apply the presumption of innocence to appellant Stevens and weigh the evidence fairly.

The two members of the venire, Armstrong and Pinney, each answered affirmatively during voir dire when defense counsel asked, "Do you think [Stevens is] more likely to possess another firearm because he's done so in the past?"

Based on their responses, Armstrong and Pinney were questioned further. When the court ruled the two would not be struck from the venire, defense counsel used a peremptory strike to exclude Pinney. Armstrong sat on the jury, which convicted appellant and gave him a five-year sentence.

Analysis

"[B]oth Armstrong and Pinney were very forthcoming about their preconceived notions and how they would nonetheless put those aside to weigh the evidence in this case and hold the Commonwealth to its burden.

"The circuit court was incredibly detailed in its assessment of each, noting that both were clear in saying that 'I'm going to hold the Commonwealth to their burden[;] I will apply the presumption of innocence[;] I'll weigh the evidence fairly.'

"The circuit court emphasized both potential jurors' truthful demeanor, stating that 'they were very sincere about their efforts to be fair.' Although the transcript reflects that Pinney made statements like 'I think I can,' when asked if she could resist having the 'prior conviction sway [her] one way or the other,' this Court has no way to know how she delivered that statement, whether her tone was definitive or equivocating.

"As such, we defer to the circuit court, who was able to observe her demeanor and tone when evaluating whether she should be struck for cause. …

"Contrary to what is required to constitute a manifest error, the record here plainly demonstrates that both Armstrong and Pinney could and would lay aside their preconceived notions. … Neither showed that they had an 'opinion of that fixed character which repels the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already.' …

"The circuit court, which was able to observe and question them during *voir dire*, found that they both demonstrated the ability and willingness to weigh this case fairly and apply the presumption of innocence.

"In light of this, we cannot say the record demonstrates any manifest error or abuse of discretion in denying both motions to exclude Armstrong and Pinney from the jury for cause."

Affirmed.

Stevens v. Commonwealth, Record No. 1275-18-2, April 7, 2020. CAV (Atlee) from Richmond Cir. Ct. (Marchant) Angela L. Porter for appellant, A. Anne Lloyd for appellee. VLW 020-7-074, 7 pp. Unpublished.

The Week's Opinions

Criminal

'Nunc pro tunc' amendment of sentencing order denied

Where appellant did not identify any specific clerical mistake in a sentencing order, the trial court correctly construed appellant's motion for a nunc pro tunc order as a challenge to the sentence, rather than a motion to correct an error in the order.

And, because more than 21 days had passed since the order was issued, Rule 1:1(a) prevented the court from considering the motion.

An October 15, 2003, sentencing order is at issue in this case. The order imposed 20-year sentences after appellant was convicted of statutory burglary and malicious wounding. The order also noted that appellant had violated his probation on a 1995 involuntary manslaughter conviction and imposed the five-year balance of appellant's sentence on that conviction. The sentences, totaling 45 years, were to be served consecutively.

On Sept. 10, 2018, appellant filed a pro se motion for a nunc pro tunc order, claiming that the 2003 sentencing order contained errors, although he "did not identify the specific language to be corrected." The trial court ruled it no longer had jurisdiction over the matter and denied the motion.

Not specific

"Appellant contends that the circuit court erred in ruling that Rule 1:1(a) barred its consideration of his motion under Code § 8.01-428(B) to correct the alleged clerical errors in the 2003 sentencing order. …

"The rule provides in part: 'All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer.'

"Appellant contends, however, that Code § 8.01-428(B) provides an exception to Rule 1:1(a) that allowed the court to consider his motion. Code § 8.01-428(B) provides: 'Clerical mistakes in all judgments or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order.' …

"[A]ppellant conceded at oral argument that he had identified no error, ambiguity, or omission in the October 15, 2003 order, nor does the order reflect any lack of clarity. …

"Because appellant did not identify any specific clerical mistake in the 2003 sentencing order, the circuit court construed his motion as a challenge to the sentence imposed, rather than a motion to correct an error in the order. Thus, Code § 8.01-428(B) did not apply."

Further because the 21-day period in Rule 1:1(a) was long expired, the trial court could not address appellant's motion.

Affirmed.

Palmer v. Commonwealth, Record No. 1109-19-1, April 7, 2020. CAV (Frank) from Northampton Cir. Ct. (Lewis) John I. Jones for appellant, Matthew P. Dullaghan for appellee. VLW 020-7-070, 6 pp. Unpublished.

Domestic Relations

Wife awarded percentage of extra retirement benefits

Where the parties' divorce settlement provided that wife was entitled to a fractional share of husband's 10-year retirement plan, the fractional share applies to additional amounts husband accrued when he worked three years past the retirement date contemplated in the parties' agreement.

Background

The parties' settlement agreement entitled wife to receive a monthly share of husband's 10-year retirement benefit plan payments. Wife filed a motion to enforce the agreement because she had not received any payments.

The settlement contemplated that husband would retire "on 'the last day of the fiscal year of the firm in which Husband reaches age 66[.]'" However, he continued to work for three more years.

Wife argued that her payment should be based on the actual benefit husband receives, not the benefit he would get based on his contemplated retirement date.

The parties also disputed how the retirement payments would be apportioned for tax purposes.

"Both parties agreed that Husband's firm would not pay Wife directly. Wife argued that Husband, however, could apportion her share of the retirement benefit plan payments to her through a form 1099-MISC, so that each party would have his or her separate income and 'that [Wife] can then pay taxes on her proportionate share.' …

"Husband, a former tax attorney and certified public accountant … opined that the method suggested by Wife 'can be labeled as … taxable income shifting' and that if he used the method suggested by Wife, he 'would be subject to double taxation and all the penalties associated with the same.' He argued that, per the settlement agreement, as Wife's income from the retirement payments could not be apportioned to her in gross, he should pay her net of tax. …

"The circuit court held that the settlement agreement provides for the marital share of the retirement benefit payments to be calculated by including all the years that Husband worked as an active partner (including the three additional years as an active retired partner)[.] …

"Concerning the tax treatment of the retirement benefit payments, the circuit court ordered Husband to pay [Wife] the gross amount of her share of the Unfunded Retirement Benefit Plan payment and [Wife] shall be solely responsible for the income taxes on her share of the Unfunded Retirement Benefit Plan."

Retirement benefit

There is no issue that the fractional share of husband's retirement benefit due to wife is 34.1 percent.

"What *is* at issue is whether the language of the settlement agreement provides that the marital share includes part of the retirement benefit payments increased by the three years that Husband worked for his firm beyond the retirement date defined in the settlement agreement … or whether the marital share is limited to what Husband would have received on that date regardless of when Husband actually retired."

The settlement provides "that 'Wife shall be entitled to one-half of the marital share of those payments, payable to Wife on an "if, as, and when" basis.' … "The plain and reasonable reading of this provision is that Wife is to receive her portion if Husband receives payment, as he receives payment, and when he receives payment.

"Husband did not begin receiving this retirement benefit payment until he became an inactive retired partner on January 1, 2018, but the agreement does not have language that creates an exception for how Wife's portion should be calculated in the eventuality that Husband worked longer as a partner at his law firm than the settlement agreement anticipated and delineated.

"The fraction remains the same for dividing the proverbial pie (i.e., the total benefit payments), even though the total number of years Husband worked as a partner increased, thus increasing the ultimate size of the pie (i.e., the total amount of retirement benefits paid over the ten years that Husband receives them under the law firm's partnership agreement). …

"[W]e hold that the circuit court did not err in interpreting the settlement agreement to include the extra three years of Husband's employment as a partner in his firm in making the calculation of retirement benefit payments owed to Wife."

Tax treatment

"The settlement agreement creates a preference that 'pension payments shall be apportioned between Husband and Wife in proportion to the amount of the pension payments received by each, and that Husband and Wife shall cooperate and take necessary and appropriate actions to report the proper amounts of income related to the pension payments in each of their respective tax returns.'

"Alternatively, however, the settlement agreement provides that, in the event that 'said benefits cannot be apportioned between the Husband and the Wife for tax purposes, the Husband shall pay to the Wife her share of said benefits "net of tax", the Wife's net share to be calculated using the Husband's effective income tax rate.'

"Neither party disputes the fact presented to the circuit court that Husband's firm will not make payments directly to Wife. Since the law firm will not pay and apportion the retirement benefit payments directly to Wife, the preference established in the settlement agreement – i.e., direct apportionment between Husband and Wife before taxes – is foreclosed. …

"[T]he alternative set forth by the settlement agreement applies. The settlement agreement states: 'Provided, however, that in the event the Husband is required by relevant IRS regulation to claim 100% of said benefits on his Federal and State income tax returns, and said benefits cannot be apportioned between the Husband and the Wife for tax purposes, the Husband shall pay to the Wife her share of said benefits 'net of tax', the Wife's net share to be calculated using the Husband's effective income tax rate.'

"Therefore, we hold that the circuit court erred in its interpretation of the settlement agreement regarding the apportionment, taxation, and payment of the retirement benefit payments and in ordering Husband to pay Wife 'the gross amount of her share' without reducing it by the taxes owed on that payment by the recipient – Husband.

"We, therefore, reverse the circuit court on this assignment of error."

Affirmed in part, reversed in part and remanded for reconsideration of the attorney's fee award to wife in light of the fact that husband partially prevailed on appeal.

Woloshin v. Woloshin, Record No. 1147-19-4, March 31, 2020. CAV (Beales) from Arlington Cir. Ct. (DiMatteo) John K. Cottrell for appellant, Rebecca R. Masri for appellee. VLW 020-7-063, 12 pp. Unpublished.

Domestic Relations

Wife must repay support payments

Where the parties' property settlement agreement provided that husband's support payments to wife would end if she remarried, she must reimburse husband for support payments he made after she remarried, up until the time she attempted to notify him by certified mail.

Overview

The parties divorced on Nov. 16. 2015. Their property settlement agreement required Smith to pay Davis $1,693 per month in spousal support and provided that if Davis remarried, "the payments by Husband to Wife for her support and maintenance shall immediately cease forever."

Davis remarried on March 18, 2017. Smith continued to pay her support from April 2017 to August 2018. In November, 2018, Smith filed a complaint. He claimed Davis did not advise him that she had remarried, causing a support overpayment of $28,781.

In her answer, Davis asserted she sent Smith letters in March and September 2017, advising him she had remarried. She also stated that she sent Smith a certified letter in March 2018, which was returned as undeliverable.

At a hearing, the parties agreed that Davis received 17 months of support after she remarried. Smith's counsel said the evidence would show that Smith first became aware that Davis remarried was at a child support hearing in August 2018. Davis's counsel argued "that Davis had notified Smith of the remarriage on three separate occasions and that any amounts deposited into the account over and above the amount of child support that Smith still was required to pay Davis were simply gifts to her."

Smith testified that after he learned Davis had remarried, he stopped sending support payments and sent her a demand letter demanding repayment. He denied receiving any letters from her.

Davis admitted she was in court with Smith twice after she remarried and did not mention her remarriage on either occasion. She explained that she had already notified him and that since the divorce, she decided "all communications between them 'needed to be in writing.'"

The trial court ruled that Davis had not satisfied her obligation to advise Smith until she sent the certified letter and it was returned as unclaimed and unable to be forwarded. The court ruled Davis must reimburse Smith $20,316, the amount he paid in support from the time Davis remarried until the time the certified letter was sent. The court also ruled that the remaining overpayments "would be deemed to be a gift."

Davis appealed.

Analysis

"The plain language of the PSA provides that upon Davis's remarriage, Smith's obligation to pay spousal support to her 'shall immediately cease forever.' The agreement is clear that it is Davis's remarriage – not Davis's notification to Smith of her remarriage – that triggers the cessation of Smith's obligation to pay spousal support. Accordingly, as soon as Davis remarried, Smith's duty to pay spousal support ceased.

"The next sentence of the parties' PSA providing that Davis had an 'affirmative duty to advise' Smith of her remarriage sets out the requirement that Davis advise Smith of her remarriage 'as soon as it occurs' in order to ensure that he was aware that his obligation had ceased.

"When read as a whole, this provision of the PSA clearly communicates a sense of urgency in Davis's responsibility to inform Smith of her remarriage. The PSA required Davis to not simply provide notice, but gave her an affirmative duty to actually advise Smith of her remarriage 'as soon as it occur[red]' so that his payments to her could 'immediately cease forever.' Davis did not comply with this requirement. …

"Instead, the evidence shows that she continued to remove the support payments from the bank account on the same day or the very next day after Smith deposited not only the child support but also the spousal support.

"Moreover, while Smith usually deposited child support and spousal support together in one payment into Davis's account, the bank statements entered into evidence show that, immediately following her remarriage, she removed Smith's deposit by making two transfers – one for the child support and one for $1,693 (the exact amount of the spousal support).

"The trial court could certainly infer from all of this information that Davis knew Smith was still making the spousal support payments. Reviewing the totality of these circumstances, we conclude that Davis did not satisfy her 'affirmative duty to advise Husband' of her remarriage 'as soon as it occur[red]' under the terms of the parties' PSA – so that the payments would 'immediately cease forever' – when she sent him the two letters by regular mail.

"She did not actually advise or tell him (or otherwise make sure he knew) of her remarriage – while continuing to accept and withdraw his payments of spousal support. …

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"Furthermore, the case law cited by Davis does not support the proposition that Smith's continued spousal support payments to her under the circumstances of this case were gifts. When Smith made additional payments to Davis, he was not attempting to unilaterally alter the parties' agreement and was not simply providing Davis with numerous gifts, despite their contentious relationship and divorce.

"Instead, because of Davis's failure to advise him of her remarriage, he believed he was paying Davis in accordance with the required terms of the PSA."

Conclusion

"For all of these reasons, especially including the pertinent language of the parties' PSA, we affirm the trial court's judgment directing Davis to repay Smith $20,316 in spousal support payments made after Davis's remarriage[.] …

"Smith has abandoned his assignment of cross-error so we do not need to reach the question of whether Davis needed to repay Smith the additional $8,465 he made in spousal support payments after she sent him the certified letter – or the question of whether Davis's certified letter under these circumstances satisfied the requirements of the parties' PSA for advising Smith of Davis's remarriage."

Affirmed.

Smith v. Smith, Record No. 1137-19-4, April 7, 2020. CAV (Beales) from Culpepper Cir. Ct. (Whitlock) Monica J. Chernin for appellant, Elliot H. DeJarnette for appellee. VLW 020-7-073, 12 pp. Unpublished.

Domestic Relations

Wife precluded from presenting evidence

Where wife did not comply with the court's scheduling order, the court correctly granted husband's motion in limine to preclude her from presenting any evidence at the divorce trial.

Prior proceedings

After a three-year separation, husband filed for divorce. Wife, acting pro se, filed an answer and a counterclaim. Husband responded. The circuit court issued a scheduling order, which required the parties to exchange witness and exhibit lists 15 days before trial.

Husband timely filed his witness and exhibit lists. He identified 20 witnesses and many documents relating to real estate, income, banking and retirement information, personal property, custody matters, separate property and attorney's fees.

Wife did not file witness and exhibit lists and did not object to the lists husband filed.

After the deadline passed, husband contacted wife. She acknowledged she filed nothing with the court. Husband scheduled a motion in limine to bar her from presenting any evidence at trial.

The night before the motion hearing, wife faxed husband her witness and exhibit lists. "At the hearing, husband argued that wife had not fully responded to discovery and had listed six people who had not been identified in discovery as possible witnesses.

"Husband asserted that it would be 'unfair and prejudicial' to him if she were allowed to present any evidence. Wife conceded that she had not fully responded to discovery and that she did not timely file her list of witnesses and exhibits. …

"[T[he circuit court granted husband's motion in limine and held that wife was 'prohibited from presenting evidence, testimony, witnesses, and exhibits at the trial.'" Wife endorsed the court's order without objections.

At trial, husband presented witnesses who testified about financial matters, the parties' separation and husband's relationship with the parties' children. Wife was given the opportunity to cross-examine husband's witnesses. She asked "a few questions regarding custody." An accounting expert, Rosenberg, testified about husband's monthly disbursements from a partnership and "opined about husband's cash flow after taxes. …

"Husband also testified about the parties' bank accounts, retirement accounts, and vehicles. Husband requested that each party keep their own accounts and vehicles. Husband stated that wife had worked during their marriage but quit her job after the parties' separation. …

"Husband submitted as exhibits copies of wife's resume, her employment records, her salary history, and her educational diplomas and certificates. …

In closing argument, wife focused on custody, arguing it was in the children's best interest for her to have physical custody. She made no argument about equitable distribution or support.

"The circuit court accepted husband's evidence regarding his income. It also agreed that it was proper to impute income to wife based on her earnings from her previous employment. The circuit court next reviewed the custody factors of Code § 20-124.3 and ordered that joint legal custody, with primary physical custody to father, was in the best interests of the children. The circuit court declined to order spousal support 'based upon the imputation of income.'"

Wife appealed.

No evidence

"On appeal, wife acknowledges the following provision in the scheduling order: 'Any exhibit or witness not so identified and filed will not be received in evidence, except in rebuttal or for impeachment or

unless the admission of such exhibit or testimony of the witness would cause no surprise or prejudice to the opposing party and the failure to list the exhibit or witness was through inadvertence.'

"Focusing on the purported lack of surprise, wife argues that she should have been permitted to testify. Wife, however, fails to address the second requirement of the exception stating that 'the failure to list the exhibit or witness was through inadvertence.'

"Wife admitted that she had not complied with the order. The record does not reflect that wife's failure to notify husband of her witnesses and exhibits until the night before the hearing on the motion in limine was inadvertent. Furthermore, wife did not proffer what her excluded evidence or testimony would have been."

The trial court correctly granted husband's motion in limine to bar wife from presenting trial testimony.

Imputed income

Wife left her job, which paid more than $127,000 a year, after the parties' separation. Husband protested because the job "provided health insurance and income to support the children." Wife had "a master's degree in financial management[.]" After she quit her job, wife obtained a real estate license but "never pursued it as a career; at the time of final hearing, she sold retail online. …

"Wife did not object to the admission of documents relating to her employment or education and did not cross-examine husband about her employment." The circuit court correctly imputed "an annual income of $127,300 to wife. …

"Husband's brother testified that husband received monthly disbursements for his interests in his family's partnerships. … Wife did not ask husband's brother any questions regarding husband's income."

Husband provided his 2015, 2016, and 2017 tax returns, which showed his distributions from his family's partnerships.

"Rosenberg, husband's expert witness, reviewed husband's tax returns and offered his opinion regarding husband's total annual distributions and annual cash flow, net of taxes. Rosenberg prepared a report to explain his analysis, and the report was admitted into evidence without objection. Wife did not cross-examine Rosenberg. …

"Considering the totality of the record, the circuit court did not err in calculating husband's income based on Rosenberg's opinion."

Fees

The circuit court acted within its discretion by awarding husband half of his requested attorney's fee. Husband is also entitled to appellate attorney's fees, which will be calculated on remand.

Affirmed and remanded.

Daniel v. Daniel, Record No. 1189-19-4, March 31, 2020. CAV (Haley) from Arlington Cir. Ct. (Newman) John K. Cottrell for appellant, Laura C. Dove for appellee. VLW 020-7-061, 15 pp. Unpublished.

Workers' Comp

Payment application not barred by laches

A medical service provider's application to the Virginia Workers' Compensation Commission to recover an unpaid balance owed by the city of Newport News for treating an injured employee was not barred by laches, even though the application was made 16 years after the employee's last doctor's visit.

Background

The claimant worked for the Newport News fire department. In 1995, she filed a workers' compensation claim for wage and medical benefits. The parties agreed that claimant would receive temporary total disability benefits and medical benefits "for as long as necessary."

Claimant treated with Peninsula Neurosurgical Associates. She had back surgery in August 1995, was diagnosed with disk disease likely related to her workers' compensation injury in 1999 and was treated with steroids for back pain about a year later.

In 2002, she underwent surgery for back pain and was treated about five years later for back pain. The total cost for the doctor visits and treatment was $12,833. The bills were submitted to the city's third-party administrator.

"Neurosurgical Associates received $6,714.18 for services rendered, but the remaining balance of $6,168.82 was not paid. Sixteen years after claimant's last doctor's visit and almost twenty years after some of the treatment at issue, Neurosurgical Associates filed an application with the Commission seeking reimbursement from the City for the unpaid balance of $6,168.82. …

"Neurosurgical Associates also requested an award of attorney's fees. The City defended on the grounds of 'laches, spoliation, [and] prejudice to [the City] due to unreasonable delay.'"

The deputy commissioner conducted a hearing. Both parties called McCord, who was Neurosurgical Associates' office manager since 1987. Johnson, the city's acting director of human services, testified on behalf of the city.

McCord said she discovered the unpaid balance during an audit of workers' compensation files. She conceded that she never notified the city but stated there was never any agreement that it would not seek full payment.

Johnson stated that the city was self-insured and used a TPA since the early 1990s. Shortly after the claimant's injury, the city began using FARA as its TPA and then switched to other TPAs. FARA merged with another TPA in 2017.

"The City entered into evidence a document depicting records from the FARA database to which the City had access; Johnson testified that there was nothing in the records indicating any reason for the discrepancy in the payments. Johnson was unaware of whether any explanation of benefits had accompanied any of the payments related to claimant."

The city asked Johnson about a case in which a medical provider sought made a claim for an underpayment (the Hargrave case) in 2005 and FARA was able to produce documents. Neurosurgical Associates objected on relevancy grounds.

"The City explained that it was attempting to show, through the Hargrave case evidence, 'that there had been prior claims from 2005 where FARA was able to produce documents' but that no documents from that company were now currently available because of Neurosurgical Associates' delay in filing its claim."

The deputy commissioner sustained the objection but permitted the city to proffer what the evidence would have been.

"The City proffered that the records from the Hargrave case demonstrated that, in 2012, FARA had documentation allowing the City to assert defenses to a medical provider's claim regarding alleged underpayment related to a 2005 surgery.

"The City reasoned that if FARA maintained those records in the Hargrave case, it would have maintained them in the instant case. As a result, the City argued that, if Neurosurgical Associates had sought reimbursement while FARA was still a going concern, the City would have had access to similar documents that might assist it in defending against the application for payment."

The deputy commissioner concluded that laches did not bar Neurosurgical Associates' claim and that the spoliation doctrine did not apply. On the merits, "the deputy commissioner concluded that the medical services fell within the award of benefits and that the record supported a finding that the charges fell within the prevailing community rate.

"Accordingly, the deputy commissioner granted the application and ordered the City to pay Neurosurgical Associates the outstanding balance.

"Furthermore, the deputy commissioner awarded Neurosurgical Associates $3,000 in attorney's fees under Code § 65.2-713 because he concluded that the City 'failed to prove that any of [its] defenses … were reasonable.'"

The full commission affirmed the award of medical payments to Neurosurgical Associates but reversed the attorney's fee award. "Specifically, as regards the City's laches argument, the Commission 'decline[d] to infer and presume that [Neurosurgical Associates] abandoned its claim' and found that the City 'did not sufficiently prove it was prejudiced by [Neurosurgical Associates'] actions' in failing to pursue the application for payment earlier. …

"Having not been asked to do so in the City's written statement, the Commission did not address the deputy commissioner's evidentiary ruling related to the Hargrave case evidence."

Ruling

The city faults the full commission for excluding the Hargrave case evidence. But that ruling came from the deputy commissioner, not the full commission. And, the city specifically asked the full commission not to address the deputy commissioner's evidentiary ruling. As a result, we will not address the merits of the city's argument that the deputy commissioner should have allowed the evidence.

"As the party with the burden to establish the laches defense, the City had to both produce evidence that it had been prejudiced by Neurosurgical Associates' delay in filing its application and have that evidence persuade the Commission as fact finder that the City had, in fact, suffered prejudice. …

"[T]he City attempted to meet its burden largely by noting the passage of time, namely that nearly two decades had passed from the time claimant received some of the care at issue and when Neurosurgical Associates filed its application for payment with the Commission.

"Although a two-decade delay is significant, the Commission was not convinced that the City had suffered actual prejudice, finding that the City 'did not sufficiently prove it was prejudiced' by Neurosurgical Associates' delay in pursuing its application for payment. We cannot say that the Commission's conclusion in this regard represents an abuse of discretion. …

"[T]he doctrine of laches is not subject to … bright-line rules. … Thus, we must

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reject any argument that amounts to the passage of time 'alone' being sufficient to 'establish laches[.]' … Because we cannot create a hard and fast rule that the mere passage of time always entitles a party to the laches defense, we cannot say that the Commission, on this record, abused its discretion in finding a lack of the necessary prejudice."

However, "there was nothing unreasonable about the City's assertion of the laches defense in this matter. Accordingly, the Commission did not err in declining to award Neurosurgical Associates attorney's fees pursuant to Code § 65.2-713(A)."

Affirmed.

City of Newport News v. Peninsula Neurosurgical Assocs., Record No. 1315-19-1, March 31, 2020. CAV (Russell) from the Virginia Workers' Compensation Comm'n. Adonica Baine for the city of Newport News, Philip J. Geib for Peninsula Neurosurgical Assocs. VLW 020-7-060, 14 pp. Unpublished.

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■ Va. Court of Appeals – Published

Criminal

Character evidence excluded at manslaughter sentencing

Where appellant pleaded no contest to a voluntary manslaughter charge, she waived the right to present a self-defense claim. As a result, the trial court correctly barred appellant from presenting character evidence about the victim.

Background

The commonwealth's evidence showed that appellant and Randy Jones, the victim, met at a convenience store on Oct. 22, 2018. He invited appellant back to his residence, where they used cocaine. Appellant fatally shot Jones in his bedroom.

One bullet traveled through the sleeve of his coat and struck his head. The bullet path suggests that Jones "may have had his arm on top of his head in a defensive position[.]" Another bullet was found in the wall opposite of where Jones' body was found. Appellant took his credit card, a shell casing and the rest of the drugs.

Several hours later, she used Jones' credit card to buy cigarettes, which she sold for drugs. Appellant initially denied shooting Jones or using his credit card but later confessed.

The commonwealth proffered that appellant's version of the events "was inconsistent with both the victim's injuries and the forensic evidence[.]" She pleaded guilty to voluntary manslaughter in exchange for dismissal of other charges.

At her sentencing hearing, appellant sought to introduce evidence from a woman who had an eight-year relationship with Jones. The woman described several instances of domestic assaults, resulting in an arrest and the issuance of several protective orders. She further stated that Jones made multiple threats to kill her and tried to strangle her.

Appellant also sought to introduce evidence of Jones' convictions of being a felon in possession of a firearm and a 2017 assault conviction.

"The court agreed with the Commonwealth that after pleading no contest to voluntary manslaughter, appellant could not introduce evidence of Jones's character under the self-defense exception to Virginia Rule of Evidence 2:404(a). It found that the character evidence was not relevant to the issues before the court at sentencing.

"The court also was unpersuaded by appellant's argument that the proffered evidence rebutted the victim impact statement from Jones's wife stating that he 'was a very loving person and all that know him knew his heart.'"

Appellant testified that on the night of the incident, she tried to leave Jones' residence but he tackled her. She agreed to go back inside but once there, Jones held her at gunpoint, demanded that she undress and return the drugs she was hiding. Appellant said she grabbed his gun, which discharged in the ensuing struggle.

Appellant's family members testified about her non-violent nature.

The court imposed a 10-year sentence, followed by three years of supervised probation.

Discussion

"Appellant argues that evidence of the victim's prior acts of violence was 'relevant and probative to [her] motive and circumstances surrounding the offense for which she was being sentenced.' She asserts that the court abused its discretion in excluding the proffered evidence.

"In general, '[e]vidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion.' …

"However, an exception to this rule exists in a criminal trial; if 'an accused adduces evidence that he acted in self-defense, evidence of specific acts is admissible to show the character of the decedent for turbulence and violence, even if the accused is unaware of such character.'

"[A]ppellant waived the right to present a self-defense claim by entering a no contest plea. 'When an accused enters a voluntary and intelligent plea … to an offense, he waives all defenses except those jurisdictional.' …

"Therefore, because appellant entered a no contest plea, the self-defense exception to Rule 2:404(a) is inapplicable in this case. …

"By pleading no contest to voluntary manslaughter, appellant did not challenge the Commonwealth's evidence that she unlawfully killed Jones 'in the course of a sudden quarrel, or mutual combat, or upon a sudden provocation and without any previous grudge, and the killing [was] from the sudden heat of passion growing slowly out of the quarrel, or combat, or provocation.'"

Relevancy

"At sentencing, appellant sought to introduce character evidence about Jones to lend credibility to her version of events on the evening she shot him to death. She asserted that Jones's gun discharged during a struggle after he threatened her at gunpoint and that Jones's violent nature further supported that he was the initial aggressor. This version of events, if found credible at trial, would have excused her act of shooting Jones to death. …

"Appellant sought to admit the evidence to excuse her criminal act, not to explain it. Therefore, the court's finding that the character evidence was irrelevant to the issues at sentencing did not amount to an abuse of discretion because the court properly weighed and considered all relevant factors in making its determination. …

"In her victim impact statement, Jones's wife referred to him as a 'very loving person' and described the grief she endured as a result of his death and her difficulty in explaining his absence to her young grandson. Appellant asserts that because Jones's wife described him as a 'very loving person,' she commented on Jones's general character and thereby put his reputation at issue.

"However, the statement merely referred to Mrs. Jones's personal relationship with her husband, and the bond that his family shared with him. The statement did not reference Jones's reputation in the community.

"Therefore, the court did not abuse its discretion in finding that the victim impact statement did not place Jones's character at issue, and the court properly excluded the character evidence that appellant sought to introduce."

Affirmed.

Meekins v. Commonwealth, Record No. 0459-19-2, April 28, 2020. CAV (O'Brien) from Richmond Cir. Ct. (Hairston). Lauren Whitley for Appellant, Rosemary V. Bourne for Appellee. VLW 020-7-095, 10 pp. Published.

■ Va. Circuit Court

Civil Practice

Court will not seal infant settlement terms

Where the parties in this medical malpractice case, a minor, his mother and several defendants, made a pretrial settlement of plaintiffs' claims, the court will not seal the settlement terms.

Although the wrongful death statute requires settlement terms to be included in a petition for the court's approval and the infant settlement statute does not, the considerations in each instance are the same – judicial review of a settlement while exercising judicial discretion "that the public by default has a right to observe."

Overview

Shortly before trial of plaintiffs' medical malpractice claims, the parties reached a settlement and presented it for the court's approval under Code § 8.01-424. The sketch order provided that defendants denied liability but agreed to pay and distribute an amount listed in an attached schedule.

The court questioned a provision that would seal the schedule from public inspection. The court holds that it may not seal the schedule and thus denies without prejudice a motion to seal the infant settlement.

Discussion

There is a strong presumption in Virginia of public access to judicial records. It is settled law that wrongful death settlements, which are subject to judicial approval, cannot be sealed. At issue in this case is whether the parties can redact terms of an infant settlement, which, like a wrongful death settlement, is subject to the court's approval.

"Because the Court finds no principled distinction between the two judicial approval hearings, it must default to the statutory presumption of openness of Virginia Code § 17.1-208 and treat both hearings openly. …

"Textually, it is true the wrongful death statute specifically mandates the settlement terms be in the petition for approval, whereas the infant settlement statue does not contain such language. Practically, however, this is a distinction without a difference. In both cases the General Assembly mandates that a judge review a settlement, exercising judicial discretion that the public by default has a right to observe."

The parties in this case reached their settlement after mediation and rely on the mediation statute's confidentiality provisions as a reason to seal the settlement. But mediated settlements, for the most part, "are free from judicial review[.] … Infant settlements are not. …

"So long as settling parties must win the Court's approval of their settlement, the Court must exercise its discretion publicly."

Finally, there is no "particularized showing of any harm to the child stemming from the public release of the settlement terms."

The motion to approve the settlement is denied without prejudice.

Brown v. Tashman, et al., Case No. CL-2017-16202. April 21, 2020; Fairfax Cir. Ct. (Oblon). Robert T. Hall for plaintiff, Susan L. Mitchell, Catherine E. Donnelly for defendants, Gwena Kay Tibbits, guardian ad litem for the infant. VLW 020-8-042, 9 pp.

Civil Practice

No appeal of failure to dissolve protective order

The court, sua sponte, concludes that it lacks appellate jurisdiction to review the juvenile and domestic relations district court's denial of appellant's motion to dissolve a protective order.

More to be done

Code § 16.1-296 governs jurisdiction of appeals from a juvenile and domestic relations district court to a circuit court. The first sentence of Code § 16.1-296(A) sets out the general rule that only final orders may be appealed. 'A final order is one which disposes of the whole subject, gives all the relief contemplated, … and leaves nothing to be done in the cause.' …

"A protective order does not meet the requirements of that general rule. '[A] protective order is not, strictly speaking, a final order that leaves nothing to be done in the cause. The protective order is an ongoing concern that remains under the jurisdiction of the court and, may, upon a motion and after a hearing, be extended, modified or dissolved at any time.'"

However, " [t]he last sentence of Code § 16.1-296(A) specifically provides that protective orders issued pursuant to Code § 16.1-279.1 are 'final orders from which an appeal may be taken.' …

"The questions in this case, then, are (1) whether or not the JDR court order denying the appellant's motion to dissolve the protective order is a 'final' order that falls within the category of appealable orders pursuant to the general rule found in the first sentence of Code § 16.1-296(A); (2) whether or not the order is a 'protective order issued pursuant to Code § 16.1-279.1 in cases of family abuse …' from which an appeal may be taken pursuant to the final sentence of Code § 16.1-296(A); and (3) whether or not any other statutory provision confers jurisdiction upon this Court?

"All 3 questions must be answered in the negative."

Concerning the first question, the "JDR court's denial of appellant's motion to dissolve the previously issued protective order cannot be understood to have disposed of the whole subject of the case. … The very ongoing nature of the case means that the entire subject has not be disposed of."

Concerning the second question, an order denying a motion to dissolve a protective order clearly is not a protective order.

As to the third question, a circuit court has jurisdiction over motions to modify, dissolve or extend a protective order but only for protective orders issued by the circuit court.

As a result, the court lacks jurisdiction over an appeal of the JDR court's denial of appellant's motion to dissolve a protective order.

Appeal dismissed for lack of jurisdiction.

Ortiz v. Chappelear, Case No. CL-20-1637. April 8, 2020; Virginia Beach Cir. Ct. (Mahan). VLW 020-8-035, 4 pp.

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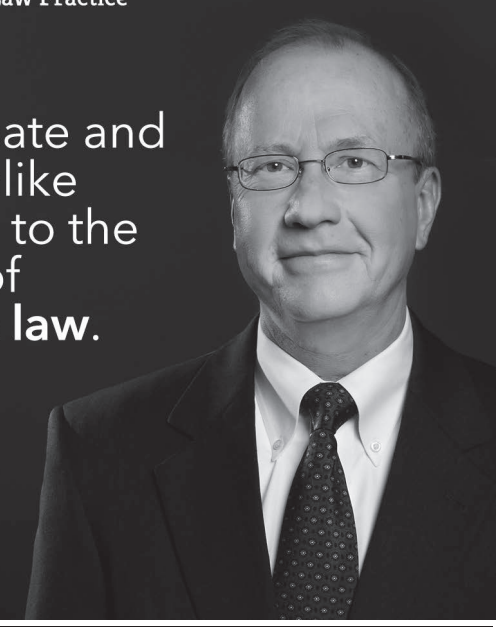

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VIRGINIA Lawyers Weekly

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said the letter was prompted in part by concerns that courts were taking inconsistent approaches in civil matters during the pandemic.

"Many attorneys and courts are interpreting this Court's Orders to provide that all discovery deadlines are tolled during the judicial emergency," the lawyers wrote. The lawyers asked the high court to clarify that discovery should be continuing.

The justices complied. Prior orders tolling case-related deadlines did not apply to discovery deadlines, the court said.

"In all civil cases, any tolling of deadlines and obligations arising out of Part Four of the Rules of the Supreme Court of Virginia shall terminate as of the effective date of this order (May 18, 2020)," the court said. All discovery issued with a deadline during the judicial emergency shall be due with 21 days after May 18, the court said.

"Litigants are encouraged to resolve as many pretrial matters as possible with or without the assistance of the courts," the order continued.

Remote hearings

The lawyers asked for a directive that remote hearings go forward on any motions that do not require *ore tenus* evidence. The joint letter also sought rescheduling of continued matters and authorization of signing and filing of documents using electronic or scanned signatures.

Those steps would allow cases to move forward "and allow a measured and staggered resumption of civil litigation," the letter said.

Virginia Beach family law practitioner Andrew T. Richmond helped organize the letter-writing effort. He said a significant barrier to remote hearings has been the earlier directive that all parties must agree before a court can hear matters by video or teleconference.

"Especially in family law cases, there is just always someone who doesn't want to the motion to be heard. The cases that need to have a hearing the most are not getting heard," Richmond said.

It was not clear if the Supreme Court was sticking with the all-party consent requirement. That prerequisite was not mentioned in the March 6 order.

"Courts should continue to conduct as much business as possible by means other than in-person court proceedings," the court said. "In all civil and criminal matters, courts are encouraged to continue and even increase the use of video conferencing, telephone, teleconferencing, email, or other means that do not involve in-person contact. These methods are preferred over in-person court proceedings," the order said.

The order said all courts are authorized to accept pleadings, orders and other documents that are electronically signed, including those for which the electronic signature is accomplished by scanning.

The new court order did not mention rescheduling of continued matters.

Transition teams

The court acknowledged concerns about the "growing backlog" of cases, pointing to the shortage of staff in district level courts.

Virginia trial courts continued about 673,000 cases from March 16 to May 1, the court said.

"For courts that were already understaffed, it will be a serious challenge to reduce this backlog while doing their best to keep current cases from adding to the delay," the order read.

The court announced that, effective May 18, all courts could hold in-person, non-emergency hearings if they determine it is safe.

The court said it was already thinking about how to eventually return to full operation. Transition to "normal operating process and procedures" should be accomplished through transition teams assembled by chief judges of the circuits and districts, the court said.

"Transition plans are not 'one size fits all,'" the order said. "While localities are well suited to adjust their practices and procedures to their unique circumstances, there are some matters that are subject to the unequivocal orders of this Court. The prohibition against jury trials is one of them," the order said.

Additional guidance for moving from emergency to routine operations "shall be provided by the Office of the Executive Secretary," the court said.

McKee said the VBA was grateful for the additional guidance.

"The order facilitates access to justice and will decrease the burden on the court system once the worst of the pandemic passes by, allowing civil cases to progress as best they can under these unusual circumstances," McKee said.

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For attorneys John Johnson and John Shea – of Roanoke and Richmond, respectively – social distancing and the stay-at-home order created the most significant societal shift that caused their number of new cases to drop.

"I do a fair amount of workers' compensation defense work… And when people aren't working, they're not in their workplaces and they're not having work-related accidents," said Johnson.

Shea, a plaintiffs' attorney, said that automobile accidents are the "bread and butter" of any personal injury firm. But when people are ordered to stay at home, they're inevitably going to drive less, which makes them "less likely to be harmed than if they were out in the world," he said.

Though no reports have been done to measure any decrease in Virginia traffic, it's a pattern being noticed by others, as well. Last month, Virginia's Department of Transportation picked up several transportation projects "due to the significant decrease in traffic as a result of school closures, increased telework and limitations on public gatherings."

While there has been a downtick in the most common types of personal injury cases across the board, there is an increase that all of these lawyers can agree on: an increase in inquiries about nursing homes.

"A lot of family members feel that the facility their family member was residing in didn't test appropriately. If they test, they didn't do it timely enough. or they didn't quarantine people off or take steps to prevent further spreading in the facility," Frith said.

He noticed the increase in personal injury inquiries regarding patients in nursing homes in late March; the calls picked up in April. And though Frith anticipates these types of inquiries will continue, he said it would require "fairly unusual circumstances" for his firm to take on a case from a nursing home.

"It's very difficult with regards to nursing homes, folks are there because they need additional care and treatment they can't receive at homes… Unfortunately, those folks are very susceptible to contracting infectious diseases," he said.

Shea has seen an increase in calls related to nursing homes, as well, particularly in the Richmond area. On April 14, at least 45 residents of the Canterbury Rehabilitation & Healthcare Center in Henrico County had died after falling ill with COVID-19, making it the largest outbreak at a long-term care facility in the entire country, according to an analysis by The New York Times.

On April 30, Canterbury Rehab officials reported the facility's 50th coronavirus-related death.

Shea agrees that personal injury attorneys will be hesitant to pursue cases against nursing homes because healthcare providers are the "heroes" of the coronavirus outbreak.

"They're on the frontlines of this pandemic, and it might be viewed by jurors as being inappropriate to bring litigation against healthcare providers in the middle of a once-in-a-generation problem" Shea said.

Gov. Ralph Northam signed an executive order providing some limitation of liability for medical providers, but he did not include assisted living facilities and other elder care services, apparently because he did not believe he had the power to do so. (See story, page 2).

Clifford Deal, president of the Medical Society of Virginia, said he expects legislation in the special session of the General Assembly to address additional protections for those facilities.

Though non-emergency surgeries and dental procedures resumed in Virginia on April 30, Frith doesn't expect a significant increase in new clients until the fall.

"If someone has surgery today and things don't go well, they'll probably sit tight on things for a few months… That's usually how it goes," Frith said. "If people have surgery in May, we won't hear from them until August or September."

Johnson anticipates this "delay" in new cases to extend even longer for defense attorneys like himself who are reacting to what is being filed by plaintiff's lawyers on the other side.

"If it takes them a while to investigate the case before they decide to pursue it, then we're not going to hear from them until even further down the road," Johnson said.

SANCTIONS |

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in the records to delay the deposition and mediation.

"What is clear is that these records are in fact highly relevant, and Plaintiff and/or his counsel deliberately gave evasive and incomplete responses to discovery to avoid production of case dispositive evidence," the hospital said in a motion for sanctions. "This is a blatant abuse of the discovery process and necessitates the imposition of sanctions," the lawyers wrote, as cited by Hall's order.

The hospital's legal team is led by Mary Elizabeth Sherwin of Norfolk.

The delay had forced the cancellation of the plaintiff's deposition and a scheduled mediation session.

Judge's admonishment

Bennett hired Alan B. Rashkind of Norfolk as personal counsel in the dispute, and both Robbins and Bennett submitted affidavits. Bennett said the failure to produce identifying information about the Johns Hopkins doctors "was an oversight, not an attempt to hide the visit or its outcome," Hall quoted from the affidavit.

Bennett said Robbins never mentioned the doctor's statements about the cause of his bladder problems. Robbins said he did not believe he told Bennett about what the Baltimore urologist said about the cause of his problems.

Bennett said he never saw the Johns Hopkins records until Sentara shared them in support of the sanctions motion.

Sentara hammered the suspicious circumstances, Hall said, while Robbins and his counsel denied any intentional concealment. Hall said she had no basis to disbelieve the explanations of Robbins and Bennett.

"It might be suspicious and uncannily coincidental that this particular harmful record was the one that both the client and the lawyer forgot about, but the Affidavits state that the omission was inadvertent. The Court therefore has no basis to conclude otherwise," Hall wrote.

But even inadvertent discovery failures can support a motion for sanctions, the judge continued. Bennett did not supplement Robbins' interrogatory answer when the Johns Hopkins issue emerged, Hall said.

"Plaintiff's counsel never outlines any attempt that he made to obtain that record despite his knowledge that it existed," Hall wrote.

The judge wasn't finished.

"Litigants need to take the discovery process seriously from start to finish. Plaintiff and his counsel did not here. They should have disclosed a visit to a world-renowned hospital for a second opinion about the very condition that caused Plaintiff to bring this malpractice suit; and once the omission came to Plaintiff's attention he and his counsel should have addressed the oversight immediately. They did not," Hall wrote.

Sentara asked for dismissal or to take the causation issue from the jury, but Hall said those remedies should be reserved for intentional concealment or misconduct. She determined to award fees related to the failure to disclose the Johns Hopkins record.

Robbins did not challenge the bills submitted by Sentara's counsel, but Hall subtracted $1,326 for reviewing the sanctions order and preparing the summary of costs.

Speaking on Bennett's behalf, Rashkind said afterward that the suspicions of nefarious conduct were unfounded.

"But the information should have been provided. It wasn't. There was a sanction ordered. The sanctions have been paid. And the case goes forward," Rashkind said.

The dispute should not obscure the contentions of the lawsuit itself, Rashkind added.

Sherwin declined to comment as the case remained pending.

A jury trial was scheduled for July 1, according to online court records.

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