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A "Certifiable" Argument: Application for Certified Questions to the Supreme Court of Virginia Under Rule 5:40

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I. Introduction to Rule 5:40

The Supreme Court of Virginia's closely-divided decision in *Quisenberry v. Huntington Ingalls, Inc.*,[1] represents the Court's most recent decision resulting from a certified question of law from another court (here the Eastern District of Virginia) to the Supreme Court, pursuant to Virginia Supreme Court Rule 5:40. This article will seek to explain the rarely invoked procedure, including the legal standard for obtaining certification and review, the history of the rule, trends in its use, and the impact of prominent decisions.

Rule 5:40 provides a mechanism by which certain courts (other than Virginia state courts) may refer discrete questions of law to the Virginia Supreme Court. The Virginia Supreme Court enjoys total discretion over whether to accept such invitations, in order to review determinative questions of law for which there is no controlling precedent. In order for any federal court or the highest court of any state, territory, or district, to certify a question of law to the Virginia Supreme Court, the certifying court must enter an order that complies with Rule 5:40's strict requirements.

Although the current form of Rule 5:40 dates back to 2012, the Court's authority to hear certified questions has a long history in Virginia, originally rooted in Virginia's Constitution. Specifically, Article VI, Section 1 provides the Court with original jurisdiction to "answer questions of state law certified by a court of the United States or the highest appellate court of any other state." As now codified in Rule 5:40(c), the certifying order must include (among other things) the following: the nature of the controversy in which the question arises; the question of law to be answered; a statement of all facts relevant to the question certified; a brief statement explaining how the certified question of law is determinative of the proceeding in the certifying court; and a brief statement setting forth relevant decisions, if any, of the Supreme Court and the Court of Appeals of Virginia (and the reasons why such decisions are not controlling).[2]

The Court reviews questions of law under the narrow set of circumstances set forth in Rule 5:40.

"CERTIFIABLE ARGUMENT" — cont'd on next pages

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The Court will only hear certified questions where there is a question of law,[3] the issue is determinative, and there is no controlling precedent. Because Rule 5:40 provides for review of certified questions of law *only*, matters usually end up before the Virginia Supreme Court on a motion to dismiss, a motion for summary judgment or, alternatively, where the parties have stipulated to the facts.[4]

II. The Dual Layers of Discretion Under Rule 5:40

At the outset, even before the Supreme Court of Virginia decides to accept a certified question, the certification by the court where the matter is pending is itself discretionary. As courts asked to certify questions have made clear, if the issue is not dispositive, then the question therefore cannot be certified under Rule 5:40.[5] Likewise, there must a lack of controlling precedent.[6] In terms of what constitutes such a lack of authority, at least one court has refused to certify a question where "there is not a paucity of controlling authority; rather the pertinent decisions here are simply difficult to reconcile."[7]

That said, even where there is a dispositive question of law on which there is no controlling precedent, the underlying court may choose not to certify for any number of reasons. For example, in *West American Insurance Co. v. Bank of Isle of Wight*,[8] the court exercised its discretion and refused to certify despite finding the matter satisfied the requirements of Rule 5:42 and was therefore eligible for certification. In doing so, the court looked at the imposition on the time and resources of the Supreme Court of Virginia and the parties, the delay in adjudicating the pending matter, and the availability of persuasive authority.[9] Other courts have reached comparable decisions based on similar considerations.[10]

In the event a question is certified, the underlying court must enter an order certifying the question of law to the Court before it may be heard. In terms of how the question becomes framed, as a matter of practice, litigants regularly petition the certifying court by filing a motion for certification.[11] In some cases, the certifying court will prepare the order and then give the parties an opportunity to revise its language before submitting it to the Virginia Supreme Court.[12]

Finally, the Virginia Supreme Court also has the discretion to decide not to hear certified questions.[13] The result of two layers of discretionary review (in addition to the strict requirements of Rule 5:40) is that it is rare for the Court to hear certified questions. Even when it does, and the collective efforts at framing the issue(s) notwithstanding, the Virginia Supreme Court will frequently take the question under consideration and then restate it.[14]

III. Trends

Historically, Rule 5:40 has been invoked sparingly with the Court taking up only 26 certified questions in published opinions since 1987, when the Rule's predecessor was implemented.[15] Its use over that time period has been fairly consistent but accelerating slightly: 1987 – 1997 (eight cases), 1998 – 2008 (seven cases), and 2009 – present (eleven cases). There are notable bumps, however, around 1987/1988 and 2012, which coincide with when the original rule was put in place and its subsequent amendment in 2012. Approximately half of the certified questions come from the Fourth Circuit. Of the remaining cases, a majority come from the Eastern District of Virginia. The Court has only heard a few certified questions from the Western District of Virginia and one each from the Second and Third Circuits, Northern District of Illinois, and United States Supreme Court.

Generally, the subject matter of certified questions has been limited to a few substantive areas. Unsurprisingly, given that they are limited to questions of law, many of the certified questions taken up by the Court have concerned questions of statutory interpretation or insurance coverage – issues that are well-suited to resolution without reference to the underlying facts.[16]

Further, the Court has also decided several prominent issues relating to tort law, despite typically being fact intensive.[17] Perhaps because of that, those decisions have had profound impacts on the development of Virginia law and, as noted below, have been hotly contested decisions. The remainder of the certified questions arose in a range of one-off areas of law, including criminal, obscenity, and due process.[18]

Another notable trend is an increase in the rate of dissenting opinions. Although the first case decided under Rule 5:42 included a dissenting opinion,[19] most of the dissents – six out of nine – have come since 2012.[20] Many of the cases with dissenting opinions involved tort law.[21]

IV. Impact of Certified Questions

The Court's opinions resolving certified questions play an important role in the development of Virginia law. For example, 2012 saw opinions on two controversial certified questions that transformed their respective areas of tort law and included vigorous dissents.[22] In Wyatt, an unmarried couple disagreed about whether to raise their child.[23] The mother secretly hired an attorney to have the child adopted and then lied on the birth certificate indicating she did not know the father's address.[24] The mother then worked with an out-of-state adoption agency to have the baby adopted without the knowledge of the father.[25]

The father brought a claim for tortious interference with parental rights, to which the defendant responded that the plaintiff failed to state a claim.[26] Upon certification, the majority acknowledged that the tort was "clearly absent from the Virginia Code" but, in expanding the common law of Virginia, looked to the existence of related historic causes of action and how other common law jurisdictions had addressed the issue.[27]

VanBuren involved a question of whether a plaintiff could assert a claim for wrongful discharge in violation of public policy against an actor other than the employer.[28] Plaintiff was employed as a nurse and alleged that her supervisor sexually harassed her and, when she rejected his advances, fired her.[29] The majority held that the tort can extend beyond the employer to cover someone who was acting in violation of public policy and participated in the wrongful firing.[30]

In *Kiser*, the Third Circuit certified a question regarding the statute of limitations for asbestos related diseases.[31] Virginia law recognizes the so-called "single disease" rule, meaning that the statute of limitations begins running for all injuries (both those presently diagnosed and those that have not yet been diagnosed) with the discovery of the first asbestos-related disease.[32] Because the diseases are viewed as indivisible, claims for subsequently discovered asbestos related diseases may be barred.[33] The majority acknowledged that this put the plaintiff in a difficult position but held that the legislature was in charge of making policy decisions and had enacted the statute which the Court must enforce.[34]

Similarly, in the recent *Quisenberry* case, the defendant moved to dismiss the claim for a "take-home" asbestos exposure because the defendant shipyard – the employer of the plaintiff's husband – did not owe a duty to its employees' family members who, in the eyes of the law, were strangers to the shipyard.[35] The majority held that the shipyard owed a duty because it was foreseeable that the exposure would reach family members.[36]

It is no surprise that the first case decided under Rule 5:42 is also the most cited and representative of many of the trends that would later appear.[37] In that case, school districts sued asbestos manufacturers to recover abatement costs.[38] The defendants argued that the action was barred by the statute of limitations and the plaintiffs responded that Va. Code § 8.01-250.1 had revived that cause of action for a five-year period.[39] The Court ultimately found for the defendants, holding that the revival of the cause of action deprived defendants of a property interest without due process and therefore the application of the statute was unconstitutional.[40]

Dunlap is the second most cited certified question case and, as with *Gypsum*, involves the statute of limitations.[41] There, the Fourth Circuit certified two questions about whether tortious interference may serve as the "predicate unlawful act for a claim under the Virginia business conspiracy statute" and whether a two or five-year statute of limitations would apply.[42] With regard to the first, the Court reasoned that while a breach of contract was insufficient to sustain a claim under the business conspiracy statute because the duties arose solely from the contract itself, tortious interference was a different matter because that claim was "predicated on the common law duty to refrain from interfering with another's contractual and business relationships" and did not depend on the contract.[43] Once that was established, the only question was whether the five-year statute of limitations for injury to property applied or whether

the two-year statute of limitations for breach of contracts applied.[44] The Court found that because "tortious interference is not an allegation of nothing more than disappointed economic expectations, which are redressed by the law of contracts," the five-year statute applied.[45] *Dunlap* is regularly cited by trial and appellate courts for its answers to both of the certified question as well as its discussion about civil conspiracy as a basis for liability.

V. Conclusion

Rule 5:40 provides an important but very limited mechanism for obtaining review of novel questions of law by the Virginia Supreme Court. Although rarely utilized, the Court's opinions on certified questions dramatically reshape Virginia law. Counsel in cases turning on questions of Virginia law in other jurisdictions should always be aware of the opportunity to certify such questions to the Supreme Court of Virginia. ❋

(Endnotes)

1. ___ Va. ___, 818 S.E.2d 805 (2018).

2. In January of 1987, the Virginia Supreme Court amended its rules to expressly state the procedure for submitting certified questions of law for the Court's review. *See* Va. Sup. Ct. R. 5:42. In 2012, the rules were amended such that certification is now governed by Va. Sup. Ct. R. 5:40, although the procedure remained substantially unchanged.

3. One notable exception can be found in *Commonwealth v. Am. Booksellers Assoc.*, 236 Va. 168, 177, 372 S.E.2d 618, 624 (1988), where the Supreme Court of the United States certified to the Supreme Court of Virginia a fact-intensive pair of questions to gauge the constitutionality of Virginia statutory law under the First Amendment.

4. *See, e.g., Aetna Cas. & Sur. Co. v. Dodson*, 235 Va. 346, 348, 367 S.E.2d 505, 506 (1988); *Beach Robo, Inc. v. Crown Cent. Petroleum Corp.*, 236 Va. 131, 132, 372 S.E.2d 144, 145 (1988).

5. *Williams v. Charlottesville Sch. Bd.*, No. 96-2564, No. 96-2692, 1998 U.S. App. LEXIS 10081, at *2 (4th Cir. May 18, 1998)(per curiam) ("We deny the School Board's motion for certification of a question to the Virginia Supreme Court because the issue is not determinative of this appeal"); *O'Brien v. Appomattox Cty.*, 293 F. Supp. 2d 660, 667 (W.D. Va. 2003) (certification would not resolve all disputed issues).

6. *Coles v. Jenkins*, 24 F. Supp. 2d 599, 600 (W.D. Va. 1998).

7. *Tandberg, Inc. v. Advanced Media Design, Inc.*, Civil Action No. 1:09cv863, 2009 U.S. Dist. LEXIS 109185, at *13 n.5 (E.D. Va. Nov. 23, 2009).

8. 673 F. Supp. 760, 764 (E.D. Va. 1987).

9. *Id.* at 764-65.

10. *See O'Brien*, 293 F. Supp. 2d 660, 667 (W.D. Va. 2003) (certification would cause undue delay); *Jordan v. Sandwell, Inc.*, 189 F. Supp. 2d 406, 420-21 (W.D. Va. 2002) (certification would cause undue delay and the Fourth Circuit could decide on its own to certify the matter on appeal).

11. *Nat'l R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402, 404-05, 404 S.E.2d 216, 217 (1991).

12. *Boyd v. Bulala*, 877 F.2d 1191, 1200-01 (4th Cir. 1989) ("the opinion shall be released to counsel who shall have the right within fifteen days to suggest changes in the statement of facts, the questions of law and the authorities referred to, all to the end that there may be a full and complete certification to the Supreme Court of Virginia of the questions proposed").

13. *C.F. Tr., Inc. v. First Flight Ltd. P'ship*, 306 F.3d 126, 141 (4th Cir. 2002).

14. *See Quisenberry*, __ Va. at __, 818 S.E.2d at 807; *VanBuren v. Grubb*, 284 Va. 584, 588-89, 733 S.E.2d 919, 921 (2012); *Corns v. Sch. Bd. of Russell Cty.*, 249 Va. 343, 345, 454 S.E.2d 728, 729 (1995); *Blount v. Clarke*, 291 Va. 198, 201-02, 782 S.E.2d 152, 153 (2016); *Va. Soc'y for Human Life v. Caldwell*, 256 Va. 151, 155-56, 500 S.E.2d 814, 815 (1998).

15. It is unknown to the authors whether certified questions may have led to unpublished orders during this time period, or whether there is a mechanism by which an invitation to address a certified question may have been initially accepted but later withdrawn for some reason.

16. *Small v. Fannie Mae*, 286 Va. 119, 747 S.E.2d 817 (2013); *Beach Robo, Inc.*, 236 Va. at 132, 372 S.E.2d at 145; *Nat'l R. Passenger Corp.*, 241 Va. at 404-05, 404 S.E.2d at 217; *Corns*, 249 Va. 343, 454 S.E.2d 728; *Va. Soc'y for Human Life*, 256 Va. 151, 500 S.E.2d 814 (1998); *Perez v. Capital One Bank*, 258 Va. 612, 522 S.E.2d 874 (1999); *Adams v. Alliant Techsystems*, 261 Va. 594, 544 S.E.2d 354 (2001); *Dodson*, 235 Va. at 348, 367 S.E.2d at 506; *Stern v. Cincinnati Ins. Co.*, 252 Va. 307, 477 S.E.2d 517 (1996); *Hilfiger v. Transamerica Occidental Life Ins. Co.*, 256 Va. 265, 505 S.E.2d 190 (1998); *First Am. Title Ins. Co. v. W. Sur. Co.*, 283 Va. 389, 722 S.E.2d 637 (2012); *TravCo Ins. Co. v. Ward*, 284 Va. 547, 736 S.E.2d 321(2012); *City of Chesapeake v. States Self-Insurers Risk Retention Grp., Inc.*, 271 Va. 574, 628 S.E.2d 539 (2006).

17. *See VanBuren*, 284 Va. 584, 733 S.E.2d 919; *Wyatt v. McDermott*, 283 Va. 685, 725 S.E.2d 555 (2012); *Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 736 S.E.2d 910 (2013); *Quisenberry*, __ Va. at __, 818 S.E.2d 805; *Dunlap v. Cottman Transmission Sys.*, LLC, 287 Va. 207, 754 S.E.2d 313 (2014); *O'Neill v. Windshire-Copeland Assocs., L.P.*, 267 Va. 605, 595 S.E.2d 281 (2004).

18. *United States v. Blackman*, 270 Va. 68, 72-73, 613 S.E.2d 442, 443 (2005); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 398 (1988); *Vaughan v. Murray*, 247 Va. 194, 197, 441 S.E.2d 24, 25 (1994); *Blount*, 291 Va. at 201-02, 782 S.E.2d 153.

19. *Sch. Bd. v. United States Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (1987).

20. *See VanBuren*, 284 Va. at 588-89, 733 S.E.2d at 921; *Wyatt*, 283 Va. at 689, 725 S.E.2d at 556; *Small*, 286 Va. at 123, 747 S.E.2d at 819; *Kiser*, 285 Va. 17, 736 S.E.2d at 913; *Blount*, 291 Va. 198, 782 S.E.2d 152 ; *Quisenberry*, __ Va. at __, 818 S.E.2d at 814; *Cf. Stern*, 252 Va. at 309, 477 S.E.2d at 518 (1996); *Hilfiger*, 256 Va. at 267, 505 S.E.2d at 191 (1998).

21. *Wyatt*, 283 Va. 685, 725 S.E.2d 555; *Quisenberry*, __ Va. __, 818 S.E.2d 805, *Stern*, 252 Va. 307, 818 S.E.2d 517; *VanBuren*, 284 Va. 584, 733 S.E.2d 919, and *Kiser*, 285 Va. 12, 736 S.E.2d 910.

22. *Wyatt*, 283 Va. 685, 725 S.E.2d 555; *VanBuren*, 284 Va. 584, 733 S.E.2d 919.

23. *Wyatt*, 283 Va. at 689-91, 725 S.E.2d 556-57.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 692-703, 725 S.E. 2d at 558-64.

28. *VanBuren*, 284 Va. 584, 733 S.E.2d 919.

29. *Id.* at 587-88, 733 S.E.2d at920-21.

30. *Id.* at 593, 733 S.E.2d at 924.

31. 285 Va. at 17, 736 S.E.2d at 913.

32. *Id.* at 25, 736 S.E.2d at 918.

33. *Id.*

34. *Id.* at 28-29, 736 S.E.2d at 920. *Kiser* provides additional instruction in the importance of seeking certification of Virginia-specific questions to the Supreme Court of this Commonwealth. After the defendants obtained summary judgment in a federal MDL court in Philadelphia on application of Virginia's "single disease" statute of limitations, on appeal the Third Circuit opined that it was "subject to doubt" whether Virginia considered to observe this minority view. The Third Circuit certified the question to the Supreme Court of Virginia, which held that Virginia considers to observe this common law rule. Mr. Schneider was counsel to one of the defendants in *Kiser* and presented the arguments on behalf of all of the defendants in the MDL court.

35. *Quisenberry*, __ Va. at __, 818 S.E.2d at 807-09.

36. *Id.* at __, 818 S.E. 2d at 814.

37. *United States Gypsum Co.*, 234 Va. at 41-42, 360 S.E.2d at 330.

38. *Id.* at 34-35, 360 S.E.2d at 326-27.

39. *Id.*

40. *Id.* at 37-40, 360 S.E.2d at 327-29.

41. *Dunlap*, 287 Va. 207, 754 S.E.2d 313; *see also United States Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325.

42. *Dunlap*, 287 Va. at 211, 754 S.E.2d at 315.

43. *Id.* at 213-19, 754 S.E.2d at 316-20.

44. *Id.* at 219, 754 S.E.2d at 320.

45. *Id.* at 222, 754 S.E.2d at 321. ✦

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Message from the Chair • Nathan Veldhuis

We are almost half-way through the Bar year, and your Board of Governors has already accomplished so much. The Board collaborated with the Federal Law Section to put on a highly successful CLE at the United States District Court with Judges Payne and Gibney. The CLE was very well attended and concluded with a reception during which attendees had a short tour of the courthouse followed by the opportunity to mingle with the Richmond federal judges and their law clerks.

The Board has also been awarded a CLE slot for next summer's Annual Meeting. The CLE is entitled, "Achieving Civility in Discovery," will involve a star-studded panel, and is being put on by the Litigation Section with help from the Construction Law and Public Contracts Section along with the Senior Lawyers Conference. At the moment, that CLE is scheduled for June 14 at 8:30 am. The schedule is still being developed and the Board has applied for and pushed for the CLE's being awarded the coveted slot of a "Showcase CLE" in which case the date and time are likely to change. More updates to come in that respect.

We have also unanimously agreed to help the Young Lawyer's Conference financially in putting on their Rule of Law Day which takes place at the University of Richmond and concentrates on helping middle school and high school children understand the way the law works, from meeting members of the General Assembly to working on fictitious cases. Students will learn generally about the Rule of Law and receive extraordinary glimpses into how the law works in Virginia. The idea of the Rule of Law program is to educate these children on the importance of the Rule of Law and to encourage them to consider careers in the practice of law.

We are also planning our Spring CLE, which is more "practice pointer" centered. And we will be assisting in a mentorship program in which more experienced attorneys would be available to help new lawyers in the practice of law. That is headed up largely by the Senior Lawyers Conference and other interested members of the Bar.

With respect to the Litigation Section's newsletter, the Board has decided to continue to send out the newsletter via email, but with a significant difference in format. From now on, members will receive the newsletter in .PDF form as an attachment to the email, and will also now receive a short description of each article in the body of the email with a hyperlink to that article immediately below it, such that members may click on hyperlinks which lead directly to articles in which they are particularly interested. For those who wish to print the newsletter or to view the entire newsletter on their computer, the .PDF version provides that option. With respect to the newsletter, I want to remind all members that we are always looking for articles, practice pointers, and other materials which would be of particular interest to our members. If any member of the Litigation Article has such an article or wishes to submit such an article for publication, please send the material to Jennifer Franklin, our newsletter editor, at jrfranklin@wm.edu. Another feature of the newsletter, which many members do not realize is that past editions of the newsletter are searchable by key word, authors' names, etc. through the Virginia State Bar's website. This is a valuable source of information, giving members of the Bar access to all current and past issues of the newsletter. Please give it a try to see how helpful it can be in researching for your own case.

As the Bar year continues, I will continue to update our members with the various activities your Board is working on and new developments within the Section. For now, please pencil in the Litigation Section's CLE at the Annual Meeting in Virginia Beach on June 14th 8:30 am. I would also like to take this moment to sincerely wish each and every one of you a very Happy, Healthy, and Successful New Year. ❋

Critical Changes to Va. S. Ct. Rules 1:1 and 1:11 that Every Litigator Needs to Know: How Final is the Finality of Judgments, Orders and Decrees in Your Case

Views from the Bench and Bar

By The Honorable Thomas D. Horne and Nathan Veldhuis

Effective November 1, 2018, Va. S. Ct. Rule 1:1, respecting the finality of Orders and Decrees has been amended. A retitling of Va. S. Ct. Rule 1:11 respecting Motions to Strike the Evidence also became effective on that date. While the change to Rule 1:11 does not warrant much further scrutiny, the changes to Rule 1:1 do. What follows sets out the change to Va. S. Ct. Rule 1:1, how it is a departure from prior practice, and some observations from the bar and bench on the significance of the changes.

Va. S. Ct. Rule 1:1, as amended, states the following [the italicized portions representing the changes effective November 1, 2018]:

RULE 1:1. Finality of Judgments, Orders and Decrees.

(a) *Expiration of Court's Jurisdiction.* -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. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree shall be the date it is signed by the judge either on paper or by electronic means in accord with Rule 1: 17.

(b) *General Rule: Orders Deemed Final. -Unless otherwise provided by rule or statute, a judgment, order or decree is final if it disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done by the court except the ministerial execution of the court's judgment, order or decree.*

(c) *Demurrers. -An order sustaining a demurrer or sustaining a demurrer with prejudice or without leave to amend is sufficient to dispose of the claim(s) or cause(s) of action subject to the demurrer, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue. An order sustaining a demurrer and granting leave to file an amended pleading by a specific time is sufficient to dispose of the claim(s) or cause(s) of action subject to the demurrer, if the amended pleading is not filed within the specific time provided, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue.*

(d) *Pleas in Bar and Motions for Summary Judgment. -An order sustaining a plea in bar*

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or sustaining a plea in bar with prejudice or without leave to amend is sufficient to dispose of a claim(s) or cause(s) of action subject to the plea in bar, as is an order granting a motion for summary judgment, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue or enter judgment for the moving party.

(e) *Motions to Strike. In a civil case, an order which merely grants a motion to strike, without expressly entering summary judgment or partial summary judgment or dismissing the claim(s) or cause(s) of action at issue, is insufficient to dispose of the claim(s) or cause(s) of action at issue.*

Va. S. Ct. Rule 1:11, which was formally titled "Striking the Evidence," is now titled *Motion to Strike* the Evidence. The remainder of Rule 1:11 remains unchanged and provides:

> If the court sustains a motion to strike the evidence of either party in a civil case being tried before a jury, or the evidence of the Commonwealth in a criminal case being so tried, then the court shall enter summary judgment or partial summary judgment in conformity with its ruling on the motion to strike.
>
> If the court overrules a motion to strike the evidence and there is a hung jury, the moving party may renew the motion immediately after the discharge of the jury, and, if the court is of opinion that it erred in denying the motion, it shall enter summary judgment or partial summary judgment in conformity with its ruling on the motion to strike.

Amended Rule 1:1 reflects, in part, what has been found in the case law respecting the finality of orders. In reflecting upon the finality of orders, the Supreme Court of Virginia held that:

> [g]enerally speaking, a final order for purposes of Rule 1:1 "is one which disposes of the whole subject, gives all the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the order." … once the twenty-one day period expired in this case without the entry of orders vacating or suspending the nonsuit orders, each action of the trial court taken thereafter was a nullity. … Because the trial court lost jurisdiction to take the actions that followed the expiration of the 21-day period after entry of the nonsuit orders, we will reverse the judgment appealed from, reinstate the nonsuit orders, and enter final judgment …."[1]

While amended Rule 1:1 tracks precedent in defining finality, it makes a departure from the case law as to what language is required of the trial court to establish finality in its orders and decrees with respect to dispositive pleadings. In this regard, it is important to keep in mind two principles applicable to the entry of all orders and decrees.

First, it is a, "well established law of this Commonwealth that the circuit court speaks only through its written orders."[2] Second, that while orders and decrees are to be endorsed by counsel, the Court may modify or dispense with the endorsement requirement in its discretion. Thus, even though counsel may not have had an opportunity to review the order reflecting the action taken from the bench or letter opinion, it will still become final twenty-one days after entry.[3] This would, for purposes of this commentary, include those actions taken with respect to demurrer, pleas, and motions for summary judgment.

Prior to the adoption of the amendment to Rule 1:1, it had been the long held requirement to the finality of an order sustaining a demurrer that the order provide for a dismissal of the claim.[4] Under the current Rule, the action sustaining a demurrer, without more, bars further action on that claim.

Finality of the order reflecting the ultimate disposition of the case must await 21 days following the entry of the judgment or order disposing of the entire matter before the court. However, those claims that were barred by the court on demurrer, plea in bar, and summary judgment may not be revisited and are final orders 21 days after entry unless modified,

vacated, or suspended **within those 21 days**.

The practitioner must be vigilant in reviewing orders of the Court. No longer is it necessary that the Court dismiss the claims to which the demurrer has been sustained. The inclusion of the language dismissing the claim put the parties on notice that, absent reconsideration by the court or an amendment to the pleading, the action of the court would preclude further review of the specific claim.

It is clear under the amended Rule, that a plaintiff suffering an adverse decision on their specific claim by reason of a demurrer, plea, or summary judgment, should he or she wish to have the Court revisit or reconsider its ruling must do so within 21 days of the entry of the order reflecting the adverse action.

As a practical matter, pleadings may go through several iterations or amendments during their life before the Court. Many times demurrers, pleas, and motions for summary judgment are considered by a judge on Motions Days and their disposition reflected orally from the bench and memorialized in hand-written orders drafted by the attorneys and submitted to the Court for entry. No longer will lawyers be able to assert the lack of finality to decisions by the trial court that do not specifically reflect a dismissal of the claim.

Thus, while the amended Rule constitutes a change in the way demurrers, pleas, and motions for summary judgment are considered final for purposes of final review by the trial court, in practice the impact will not be significant. However, the practitioner must scrutinize closely orders of the court to ensure a decision of the trial court does not become final without express direction that the claim(s) that are the subject of the demurrer or plea are dismissed.

Lastly, while the amended Rule requires that the granting of a motion to strike in a civil case must be accompanied by the granting of summary judgment or partial summary judgment and dismissal of the claim to dispose of the cause of action, this rule would not apply to motions to strike defensive pleadings that are found legally insufficient or to motions to dismiss. It is to be noted that Rule 1:11 has been amended to retitle the rule to make clear that Motions to Strike the Evidence are what are intended.

A View from the Bench:

The demurrer is the most often used dispositive responsive pleading. It permits the Court to review and determine the legal sufficiency of a pleading. Often a party may seek particulars of a claim or to consider other documents by way of *craving oyer*, motions for summary judgment or partial summary judgment, while similarly used to challenge the legal sufficiency of a pleading, typically will await the conclusion of discovery.

Most litigants will be given an opportunity to amend their pleadings to correct a defect should the demurrer be sustained and a request made to plead over.

In drafting orders reflecting the finding of the Court, the attorney should relate the sustaining of the demurrer or plea, or granting of summary judgment or partial summary judgment, to a specific count or to the nature of the allegation(s) found legally deficient.

Once the order is drafted and presented to the judge for signature, follow up to ensure when it is signed. If the matter is taken under advisement by the judge, track the progress of the order through the review process established by that court. This will naturally include the clerk's office or chambers.

Remember, under the new rule the mere recording of the fact of sustaining of the demurrer, plea, or motion for summary judgment, without more, will be final after the passage of 21 days. Do not assume that because part of your pleading survives demurrer or plea in bar that there is not finality to the count found insufficient as a matter of law.

Finally, if a demurrer, plea, or summary judgment is sustained or granted, that finding alone is sufficient, without dismissing the claim, to dispose of the claim. Be attentive to the orders and follow up on cases where you seek reconsideration.

Orders granting a motion to strike are treated differently under the amendment to the Rule. If the Court merely grants a motion to strike "without expressly entering summary judgment or partial summary judgment or dismissing the claim(s) or cause(s) of action at issue, such a finding is insufficient to dispose of the claim(s) or cause(s) of action at issue." Motions to strike the evidence are referenced in Rule 1:11. The Supreme Court appears to have

related this portion of Rule 1:1 to motions to strike the evidence in civil cases.

The Supreme Court is requiring us to do our homework and carefully read the orders prepared in a case, and keep track of their progress through the Clerk's Office and Court. If you are running out of time, request the entry of a suspending order pursuant to Rule 1:1.

Thoughts from the Bar:

The bench is correct that attorneys in Virginia will need to "do their homework and carefully read the orders prepared in every case;" and, attorneys must watch the case's progress to ensure they know when the 21-day period begins to run. In addition, when drafting and reviewing such orders, Virginia lawyers should be mindful of the clarity of Court Opinions and Orders, in order to ascertain their finality and their potential appealability. ❊

(Endnotes)

1. *James ex rel. Duncan v. James*, 263 Va. 474, 481-84, 562 S.E.2d 133, 137 -39 (2002)(citations omitted).
2. *Berean Law Group, P.C. v. Cox*, 259 Va. 622, 626, 528 S.E.2d 108, 111 (2000).
3. *See Smith v. Stanaway*, 242 Va. 286, 410 S.E.2d 610 (1991).
4. *Commercial Bank of Lynchburg v. Rucker*, 2 Va. 350, 24 S.E. 388 (1896); *London Virginia Mining Co. v. Moore et al.*, 98 Va. 256, 35 S.E. 722 (1900); *Bibber v. McCreary*, 194 Va. 394, 73 S.E.2d 382 (1954)(and cases cited therein). ✦

A VIEW FROM THE BENCH

How Mindfulness Can Improve Our Legal Practice

By the Honorable Jeanette A. Irby,
Twentieth Judicial Circuit of Virginia

"When in haste, rest in the present. Take a deep breath and come back to here and now."

~ Dan Millman

What Is Mindfulness?

I used to think of "mindfulness" as new age nonsense. But a recent course on mindfulness for judges has convinced me that mindfulness is a powerful tool—based on scientific research—that anyone in the legal profession can use to improve their practice.[1] Mindfulness in its simplest terms is nonjudgmental, moment-to-moment awareness.[2] But being present in the moment, without our attention wandering, is easy to say and hard to do.

Why Does Mindfulness Matter in Court?

A lawyer who is not fully present during Court can miss important cues and information. Checking a phone, tablet or laptop for emails, texts or documents—even those relevant to a hearing in progress—can result in missed opportunities to be an effective advocate in real time. Here are three common missteps I notice in court because of distracted minds:

- An attorney does not respond adequately to the present objection, exhibit, or witness because they are anticipating the next objection, exhibit, or witness;
- An attorney errantly proceeds based on an expected answer to a question instead of the *actual* answer; and
- The Court asks one question, and an attorney answers a different question.

How to Start: Take a Breath

So how can we be mindful? One simple strategy is to breathe, something that we have been doing since the moment we were born. I used to just think of breathing in the physical sense—the process

The Honorable Jeanette A. Irby is a judge on the Loudoun County Circuit Court.

of inhaling oxygen and exhaling carbon dioxide to stay alive—but I have learned the incredible impact breathing can have on our state of mind. For example, think about how many times we tell ourselves to just "take a deep breath" when we are under stress. The expression, "take a deep breath" means to intentionally breathe in a different way so that we can pause and start anew.

How to Continue: Practice

There are many ways to practice mindful breathing, such as meditation, but the key is to practice.[3] To have an impact, practicing mindfulness, like practicing law, has to be done frequently, with intent and purpose. Mindfulness exercises strengthen the mind as physical exercises strengthen the body.[4]

How to Practice Mindfulness in Court

There are several ways attorneys can practice mindfulness in Court:

- Listen to what is being presented in real time, not the objection you lost or the objection you want to make.
- Do not let opposing counsel distract you with their objections and other behaviors.
- Listen with all of your senses; observe nonverbal behaviors.
- Be aware that you may need to tweak or abandon your original strategy because of what is actually before the Court to consider.
- Be calm to model behavior for your client. You feel comfortable in court, and your client likely does not.
- Listen to the specifics of what a judge is asking and respond to those requests.

In sum, I urge you to consider how mindfulness can help you be the most effective advocate you can for your clients. I encourage you as a first step to take a deep breath when you enter Court and to use listening and continued awareness of your breath to stay in the present. ❊

"I really believe that breath, in and of itself... can become the ultimate self-healing tool."

~ Cary-Hiroyuki Tagawa

(Endnotes)

1. Any insights that the author has gathered are due in large part to "Mindfulness for Judges," presented by The National Judicial College. Faculty members, Honorable Patricia A. Blackman, Colleen Camenisch, M.B.A., Professor Yvonne Stedman, and William J. Brunson, Esq. If you want to explore the science (pro and con) behind this topic: see MIND THE HYPE, NCBI (Jan. 2018), https://www.ncbi.nlm.nih.gov/pubmed/29016274; Alvin Powell, *When Science Meets Mindfulness*, HARVARD GAZETTE (Apr. 9, 2019), https://news.harvard.edu/gazette/story/2018/04/harvard-researchers-study-how-mindfulness-may-change-the-brain-in-depressed-patients.
2. "Mindfulness" originated as a Buddhist term, associated with a kind of meditation focused on the breath. Jon Kabat-Zinn, Ph.D., a doctor from the University of Massachusetts and a practitioner of Buddhism has integrated contemplative practices into American modern medicine, corporate culture and the military. Dr. Kabat-Zinn then wrote and published a book, *Full Catastrophe Living*, in 1990. Kabat-Zinn explains that mindfulness generally involves paying attention in a specific, sustained, nonjudgmental way. John Kabat-Zinn, FULL CATASTROPHE LIVING (2d ed. 2013).
3. These apps are designed to help you develop meditation techniques: HEADSPACE, https://www.headspace.com/science (last visited Dec. 29, 2018); INSIGHT TIMER, https://insighttimer.com/ (last visited Dec. 29, 2018); STOP, BREATHE, THINK, https://www.stopbreathethink.com/ (last visited Dec. 29, 2018).
4. Pamela Casey, *Mindfulness and the Courts*, NAT'L CTR. FOR STATE COURTS (2018), https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2018/Mindfulness-and-the-Courts.aspx.

Reasonable Reliance in the Commonwealth

By Kevin Gerrity

It is not unusual in my practice as a criminal defense attorney to represent a client who claims he or she was given assurances that the conduct they are accused of, whether a criminal charge or violation of a condition of probation, was permissible. Clients will often refer me to a prior attorney, current probation officer, law enforcement officer, or others to confirm such assurances. Unfortunately, such representations are often untrue, uncorroborated, or simply not sufficient as a legal defense. However, in my opinion, an underutilized area of criminal defense is the doctrine of reasonable reliance.

The doctrine of reasonable reliance in the criminal realm is an affirmative defense, derived from the Due Process Clause of the Fourteenth Amendment. It is a very selectively carved out exception to, "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution, [a principle] deeply rooted in the American legal system."[1] Despite the general rule, "[t]he criminal statute under which the defendant is being prosecuted cannot constitutionally be applied to the defendant without violating Due Process of law, where government officials have misled the defendant into believing that his conduct was not prohibited."[2] At the very heart of this doctrine are Due Process concerns of fundamental fairness and substantial justice.[3]

As the Court of Appeals of Virginia in *Palmer v. Commonwealth*,[4] reaffirmed in 2006, *Miller v. Commonwealth*[5] remains the defining case of reasonable reliance in Virginia, ruling the doctrine to be available to a defendant, "for reasonably and in good faith doing that which he was told he could do, by a public officer or body charged by law with responsibility for defining permissible conduct with respect to the offense at issue."[6] The *Miller* and *Palmer* cases applied a doctrine defined in a trilogy of United States Supreme Court cases: *Raley v. Ohio*, *Cox v. Louisiana*, and *United States v. Pennsylvania Industrial Chemical Corp*.[7] Taking from federal precedent, the Virginia Court of Appeals identified three elements the defendant is tasked with proving by a preponderance of the evidence:

> (1) [t]hat he was assured that the conduct giving rise to the conviction was lawful; (2) that the assurance was given by a "government official," i.e., "a public officer or body charged by law with responsibility of defining the permissible conduct with respect to the offense at issue"; and (3) that, based on the totality of the circumstances, reliance upon the advice was reasonable and in good faith.[8]

Any defense attorney intending on satisfying this first prong should plan on strong corroboration of his client's representation that he was given an assurance, as such claims are common and often viewed with suspicion by judges. The corroboration often will come through third-party testimony and written exhibits, such as emails.

It must be clear that an "affirmative assurance" was given.[9] Assurance is defined as "something that inspires or tends to inspire confidence."[10] It is interesting to note that the case law on this subject indicates there must be an "active misleading" by the government official involved.[11] There is no indication, nor would it be logical to assume when examining the cases in their entirety, that the misleading be intentional. Nevertheless, the assurance is an "active misleading" because it is incorrect and it must not be merely vague or contradict other advice given.[12]

It is a further requirement that the defendant must seek to determine if the conduct in question is legal and not merely rely on unsolicited advice or on his or her own interpretation of a law or court order.[13] While it is preferable that the defendant seek out an affirmative assurance on the specific conduct which led to the criminal or administrative action, a related assurance can suffice.[14] In *Davis v. Commonwealth*, the appellant appeared in court with

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his girlfriend, who was petitioning for the dismissal of several matters involving the appellant, including the dissolution of a protective order.[15] Believing the protective order to have been dismissed based upon what was verbally stated from the bench, the appellant believed it was permissible for him to possess a firearm as the protective order was the only barrier preventing him from doing so.[16] The appellant did not specifically seek an assurance from the court about the legality of his possessing a firearm, nor was he the party moving to dismiss the protective order.[17] Nevertheless, the Court of Appeals determined that the request by the defendant's girlfriend for dismissal of the order and subsequent verbal assurance from the court that the order was dismissed were sufficient to satisfy this first element of the test.[18]

The second element to be proven is the one that has been most often litigated in the Virginia Appellate Courts. In *Miller*, *Palmer*, and most recently in *Davis*, the major issue considered was whether a "government official" gave the assurance in question. "[A] government official's status as a 'state actor' has not alone been sufficient to invoke the defense…"[19]

In *Miller*, the appellant, a convicted felon, not only asked his probation officer if he could possess a muzzle loading rifle, he also asked representatives of the Bureau of Alcohol Tobacco and Firearms (ATF) as well as the Virginia Department of Game and Inland Fisheries (VDGIF).[20] All three inquiries were made to state actors.[21] However the Court ruled that agents of the ATF are not tasked with enforcing state law and that the VDGIF is tasked with enforcing a different title of the Virginia Code other than what the defendant was inquiring about.[22] Therefore, it was not reasonable for *Miller* to rely on their assurances.[23] The Court did rule that Miller's probation officer was tasked with defining permissible conduct for *Miller* after carefully defining the role of a probation officer over a probationer.[24]

It is encouraging to note that, in *Davis v. Commonwealth*, the Virginia Court of Appeals accepted Appellant's argument that a judge, in certain circumstances, can be a government official who can be relied upon for the purposes of this defense. While courts do not dispense legal advice, "judges do have a duty to interpret and apply the law and therefore their statements can implicate the reasonable reliance defense."[25] "It would be an act of 'intolerable injustice' to hold criminally liable a person who had engaged in certain conduct in reasonable reliance on a judicial opinion instructing that such conduct is legal."[26] It is likely that reliance on judicial rulings going forward will broaden the reach of this defense.

The third prong of the test as provided in *Miller* is arguably the most subjective and one that was ultimately left to the trial court in *Palmer* and *Davis*. The reliance of the defendant must be reasonable and in good faith. While it is not entirely clear at this time, a reasonable person standard is likely to be applied to determine if a defendant's reliance was in fact reasonable. This determination will often depend on the extent and quality of the corroboration of the defendant's representation of the assurance given. The good faith aspect should be easily met if the defendant's evidence clearly demonstrates that he or she sought out the advice by providing a clear, unambiguous question or questions, and did not withhold any important information.

Before employing this defense on behalf of your client, it is important to keep in mind that the doctrine appears to be constrained by applying only to crimes *malum prohibitum* (acts that are wrong because prohibited) not acts that are *malum in se* (acts inherently or essentially evil). In other words, it may be reasonable to rely on an assurance from a government employee that your license is valid and you are free to drive, but not reasonable to commit murder or robbery despite an assurance from a state actor. The *Miller* case potentially further limits this defense in the future by stating in dicta that, "the seriousness of the crime at issue as well as other policy concerns may preclude the application of the defense as a matter of law."[27] In giving this caveat, the Court cites several federal decisions which state that policy considerations may come into play when considering the applicability of this doctrine.[28]

Despite such limitations and concerns, as stated in my opening remarks, I believe this area of the law is underutilized and will continue to grow more important as our laws become more numerous and complex. Consider that from 1995 through 2016 the federal government has enacted 4,312 laws and 88,899 regulations which are in addition to each state's laws and regulations.[29] Many criminal laws

passed recently require no mens rea in order for a person to be found guilty. Most if not all of these crimes are *malum prohibitum* crimes.

How does the average citizen keep up with all of the federal and state laws, let alone regulations? While such laws support an ever growing and specialized legal community, the task is impossible. Even after advising your clients about the permissibility of his proposed actions, you should encourage your clients, whenever possible, to seek advice from government employees specifically tasked with regulating whatever aspect of their lives they have questions about. Their inquiries should be specific and honest, and they should insist on an unambiguous assurance in response. The interaction should be documented.

I have witnessed clients being advised incorrectly of what is and is not lawful conduct by law enforcement, employees of the Department of Motor Vehicles, probation officers, court personnel, and more. Should your client not have had the foresight to seek out legal counsel before acting but did seek the advice or permission of a government employee, I hope that on at least one occasion you are able to successfully raise this defense. ❇

(Endnotes)

1. *Cheek v. United States*, 498 U.S. 192, 199 (1991).
2. *Miller v. Commonwealth*, 25 Va. App. 727, 736, 492 S.E. 2d. 482, 487 (1997).
3. *Id.*
4. 48 Va. App. 457, 462, 632 S.E. 2d. 611, 613 (2006).
5. 25 Va. App.727, 492 S.E.2d 482.
6. *Palmer*, 48 Va. App. at 462, 632 S.E. 2d. at 613 (quoting *Miller*, 25 Va. App. at 737, 739, 492 S.E.2d at 487, 489).
7. *Raley v. Ohio*, 360 U.S. 423 (1959); *Cox v. Louisiana*, 379 U.S. 559 (1965); *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973).
8. *Palmer*, 48 Va. App. at 464, 632 S.E.2d at 614 (quoting *Branch v. Commonwealth*, 42 Va. App. 665, 671, 593 S.E. 2d 835, 837 (2004)).
9. *Miller*, 25 Va. App. at 738, 492 S.E.2d at 488.
10. *Assurance*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/assurance (last visited Dec. 29, 2018).
11. *Miller*, 25 Va. App. at 741, 492 S.E.2d at 490 (citing *United States v. Aquino-Chacon*, 109 F.3d 936, 939 (4th Cir. 1997)).
12. *Miller*, 25 Va. App. at 741, 492 S.E.2d at 490.
13. *Claytor v. Commonwealth*, 52 Va. App. 644, 655, 751 S.E. 2d 686, 691 (2013).
14. *Davis v. Commonwealth*, 68 Va. App. 725, 734-735, 813 S.E. 2d 547, 551-552 (2018).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Miller*, 25 Va. App. at 739, 492 S.E.2d at 488
20. *Id.* at 741, 492 S.E.2d at 489-90.
21. *Id.* at 742, 492 S.E.2d at 490.
22. *Id.* at 742-43, 492 S.E.2d at 490-91.
23. *Id.*
24. *Id.* at 743-44, 492 S.E.2d at 491.
25. *Davis*, 68 Va. App. at 734, 813 S.E. 2d at 551.
26. Id. at 733-34, 813 S.E.2d at 551 (quoting *United States v. Brady*, 710 F. Supp. 290, 294-95(D. Colo. 1989) (quoting, *Kratz v. Kratz*, 477 F. Supp. 463, 481 (E.D. Pa. 1979))).
27. *Miller*, 25 Va. App. at 745, fn. 6, 492 S.E.2d at 491, fn. 6.
28. *Id.*
29. Clyde Wayne Crews, Jr., *How Many Rules and Regulations Do Federal Agencies Issue?*, FORBES.COM (Aug. 15, 2017, 12:48 PM), https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/#69b0d5c41e64.

Case Summaries • Robert E. Byrne, Jr.

Case: *Ronda Maddox Evans, Adm'r of the Estate of Jerry Wayne Evans v. Nacco Materials Handling Group, Inc.*, 295 Va. 235, 810 S.E.2d 462 (2018).

Author: Stephen R. McCullough, J.

Decided: March 22, 2018

Lower Ct: David B. Carson, J. (City of Roanoke)

Facts: Decedent was operating a lift truck at work. The truck had an alarm that was to sound if the operator left the truck without applying the parking brake. The truck had several visible warnings, advising that the parking brake should be applied. Decedent parked the truck on an incline and exited it. No alarm sounded. The truck eventually rolled back on Decedent, killing him. The truck's parking brake was determined to be out of adjustment.

Decedent's Estate filed suit against several parties including the truck's manufacturer. At trial, the Estate presented evidence that the parking brake was defectively designed because it could be adjusted by the operator. The jury found for the plaintiff on the negligent design theory and awarded $4.2 million. The trial court set aside the verdict, finding the Decedent contributorily negligent as a matter of law. Both parties appealed.

Analysis: Virginia does not follow strict liability as it applies to products. Here, the plaintiff failed to carry its burden of showing that the product violated government regulations, industry norms or practices, or consumer expectations. A jury is entitled to conclude that a product is unreasonably dangerous if the plaintiff can point to an alternative design that is safer.

The jury could have concluded that an alternative design would have prevented the accident in question. But, the evidence established that components of the parking brake would wear out over time, thereby likely causing owners to operate with defective brakes rather than take their trucks out of service to be fixed. As such, the proposed redesign may have created more of a safety hazard than the current design. The plaintiff therefore failed to prove that the brake was unreasonably dangerous.

Regarding the Estate's argument that the warnings were "inadequately designed," the jury instruction in question examined whether the warning was adequate, not whether it was adequately designed. But the finding instruction and verdict form did not provide the jury with an option to find for the plaintiff on a failure to warn theory. The jury's verdict was therefore a defense verdict on the failure to warn.

Result: Affirmed.

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Case: *Cherry v. Lawson Realty Corp.*, 295 Va. 369, 812 S.E.2d 775 (2018).

Author: Stephen R. McCullough, J.

Decided: May 3, 2018

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

Facts: Plaintiff tenants filed suit against their landlord and a real estate company for injuries sustained in their rented apartment from mold exposure. Plaintiffs contended that no mold was present during the move-in inspection, but that water infiltration later caused mold growth. Plaintiffs' complaint asserted several counts, including breach of contract, negligence, fraud, and violations of the Virginia Residential Landlord Tenant Act.

The trial court dismissed the negligence and negligence per se counts, claiming that Va. Code § 8.01-226.12 both created a cause of action and abrogated common law claims for personal injury claims in the landlord/tenant context. Plaintiffs appealed.

Analysis: Statutes in derogation of the common law must be strictly construed, and a statutory change in the common law must be limited to that expressly stated in the statute or necessarily implied by its language.

Here, nothing in § 8.01-226.12 evinces an intent to abrogate common law tort liability or immunity beyond what is stated in the provision. The language of the provision does not state such an intent, the provision actually requires the party with maintenance responsi-

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bilities to "comply with any other applicable provisions of law," and because this language necessarily includes common law claims, those claims remain intact despite this legislative change.

Result: Reversed and remanded.

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Case: *Coward v. Wellmont Health System, d/b/a Lonesome Pine Hospital, et al.*, 295 Va. 351, 812 S.E.2d 766 (2018).

Author: D. Arthur Kelsey, J.

Decided: May 3, 2018

Lower Ct.: David B. Carson, J. (Wise County)

Facts: Mother gave birth, discussed possibility of placing child up for adoption, and was given the contact information of potential interested parents. The potential parents met with Mother and indicated that marijuana found in Mother's system might jeopardize her parental rights. Mother verbally agreed for potential parents to adopt and later signed a written contract terminating her parental rights and assigning custody to the potential parents. Mother did not claim to be incapacitated or otherwise coerced, and signed additional pleadings granting custody to the potential parents.

Mother later revoked her consent to the adoption, and a J&DR court awarded Mother exclusive custody. Mother sued the potential parents and the medical facility where she gave birth, claiming interference with her parental rights. The trial court sustained the medical facility's demurrer, which was appealed.

Analysis: Virginia recognizes tortious interference with parental rights as a cause of action. A party is subject to liability when that party interferes with a parent's rights while knowing that the parent does not consent. Here, the complaint does not allege that any of the defendants knew of or approved any threats or misrepresentations the potential parents made, nor does the complaint allege a conspiracy. Because such an inference is not warranted from the complaint, the trial court's ruling was correct.

Result: Affirmed.

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Case: *Dorothy C. Davis, Derivatively on Behalf of Woodside Props., LLC v. MKR Development, LLC*, 295 Va. 488, 814 S.E.2d 179 (2018).

Author: Stephen R. McCullough, J.

Decided: May 31, 2018

Lower Ct.: James F. D'Alton, Jr., J. (City of Hopewell)

Facts: Plaintiff Davis owned 72% of Woodside Properties, and she asserted that MKR Development, a property management company that managed Woodside Properties' properties, had mismanaged funds and refused to provide an accounting. Plaintiff filed a derivative suit against MKR alleging breach of fiduciary duties, unjust enrichment, and other theories. Plaintiff did not present a demand to MKR, claiming that any such demand would have been futile.

Arguing that Plaintiff failed to make a demand pursuant to Va. Code § 13.1-1042, the defendants filed a plea in bar and demurrer. The trial court agreed with defendants and dismissed the complaint.

Analysis: A derivative suit permits a shareholder to pursue a corporate claim. Filing such a suit requires the shareholder to prove that they have demanded action from the governing body of the entity. The statutory provision at issue requires a shareholder to present a demand or explain the "reasons for not making the effort." In addition, the code recognizes that equitable principles like the futility exception supplements the code provisions regarding derivative suits. Taken together, these provisions indicate that the General Assembly's silence on the futility exception does not abrogate the exception. The trial court thus erred by not applying the futility exception.

Result: Reversed and remanded.

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Case: *CGI Federal Inc. v. FCi Federal, Inc.*, 295 Va. 506, 814 S.E.2d 183 (2018).

Author: Elizabeth A. McClanahan, J.

Decided: June 7, 2018

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

Facts: FCi and CGI entered a teaming agreement to capture a federal government contract. CGI, due to its large size, was not eligible to bid on the contract, so it teamed with FCi, which was

the proper size but lacked the capabilities, to jointly perform the contract.

The teaming agreement required FCi to bid as the general contractor and include CGI as a subcontractor. CGI was prohibited from working with other parties that were competing for that contract. In the event FCi won the contract, the teaming agreement set forth how the parties would negotiate a subcontract. In the event the parties could not reach agreement on the terms of a subcontract within 90 days, the teaming agreement would expire.

FCi was awarded the contract, and FCi negotiated a settlement with a competitor after the award was challenged. This settlement effectively reduced CGI's workshare. Work was initiated under the contract, and FCi eventually terminated CGI due to a staffing dispute.

CGI filed suit against FCi, asserting that FCi's breach caused lost profits under various theories. The jury returned a verdict for CGI and awarded $11,998,000. FCi sought to set aside the verdict on the grounds the amended teaming agreement was unenforceable and because certain damages were not recoverable. The trial court granted the motion to set aside. CGI appealed.

Analysis: The trial court did not err in overturning the jury's verdict on the breach of contract claim because the amended teaming agreement did not create an enforceable obligation. Instead, the teaming agreement created a framework for the parties to follow to negotiate a final subcontract in good faith.

Turning to the fraudulent inducement claim, FCi did not challenge the jury's liability finding and therefore challenges only the measure of damages. In Virginia, a party that makes fraudulent representations cannot rely on the terms of a fraudulently procured contract to defeat a claim for tort damages. Lost profits are not recoverable under a fraudulent inducement claim when those damages are premised on a contract's unenforceable provisions.

A contract procured by fraud is voidable by the injured party, but that party's election to sue for contractual damages affirms the contract and constitutes consent to be bound by the contractual provisions. Here, a party cannot recover on a quasi-contractual claim where the contract precludes such recovery.

Result: Affirmed.

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Case: *Canody v. Hamblin*, 295 Va. 597, 816 S.E.2d 286 (2018).

Author: Stephen R. McCullough, J.

Decided: July 19, 2018

Lower Ct.: Michael T. Garrett, J. (Nelson County)

Facts: Canody challenged the order probating a will, which was a document consisting of three computer-generated pages of the same font and font size. A notary testified that she notarized the will, which witnesses observed. Canody claimed that the trial court erred by considering testimony to establish the testamentary nature of the pages offered by probate and by failing to require the will proponent to authenticate the entirety of the will.

Analysis: Virginia law requires that testamentary intent be ascertained from the face of the document, without reference to extrinsic evidence. The trial court in this case heard testimony to establish that the pages in question had not been substituted and that they were consistent with the decedent's stated testamentary intentions.

Canody next asserts that the will proponent in this probate proceeding was required to authenticate all three pages of the will. The Court disagreed, ruling that the proponent of a will must prove compliance with the statutory requirements for the execution of a will.

Result: Affirmed.

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Case: *McCulley v. Brooks & Co. Gen'l Contractors, Inc.*, 295 Va. 583, 816 S.E.2d 270 (2018).

Author: D. Arthur Kelsey, J.

Decided: July 19, 2018

Lower Ct.: W. Reilly Marchant, J. (City of Richmond)

Facts: Landlord filed suit against a commercial tenant and its guarantor for unpaid rent. Landlord obtained a default judgment against the guarantor by posted service but did not follow statutory requirements by mailing process and filing a certificate of mailing. The landlord obtained a default judgment against the guarantor.

The guarantor was summoned to answer debtor's interrogatories and moved to vacate the default judgment on the grounds that service of process was improper. The trial court heard the matter and ruled that while the initial

service of process was defective, the guarantor waived any defect by participating in post-judgment proceedings. Guarantor appealed.

Analysis: A party that makes a general appearance prior to the entry of a final judgment waives any defects to service of process. But a party's appearance after a judgment is rendered does not retroactively convert a prior void judgment into a valid one.

A litigant may nevertheless forfeit the right to challenge a judgment based on principles of equitable estoppel. The guarantor never manifested an intention to treat the judgment as valid, and nothing in the record indicates that vacating the judgment would impair another's substantial interest of reliance on the judgment. As such, the trial court erred by denying the motion to vacate the judgment.

Result: Reversed and final judgment.

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Case: *Catjen, LLC v. Hunter Mill West, L.C.*, 295 Va. 625, 817 S.E.2d 139 (2018).

Author: Cleo E. Powell, J.

Decided: July 26, 2018

Lower Ct.: Robert J. Smith, J. (Fairfax County)

Facts: Hunter Mill West executed a $1,000,000 note to Catjen's predecessor in interest. The note secured real property. The note contained a clause appointing an attorney-in-fact in the event of default, which also allowed the attorney to confess judgment for the defaulted amount, plus various costs. Hunter Mill West defaulted and filed for bankruptcy protection. Catjen foreclosed and confessed judgment.

Hunter Mill West sought to set aside the judgment, arguing that Catjen's interest calculation was grossly incorrect. Hunter Mill West lost and filed a motion to reconsider, which the court granted. Catjen then moved for a nonsuit, claiming that the trial court's decision to reconsider the judgment amount reopened the case and permitted a nonsuit. The trial court denied the motion for a nonsuit and awarded the amount calculated by Hunter Mill West. Catjen appealed.

Analysis: First, Catjen argues that Code § 8.01-433 does not permit a trial court to enter a confessed judgment over the objection of the party seeking the judgment. The confessed judgment statute grants a limited opportunity for a debtor to assert an adequate defense or setoff to the claim. If the court reduces or sets aside a confessed judgment, the matter must proceed to trial on the merits. Here, the trial court did not docket the matter for trial, and that constituted error.

Second, Catjen argued that the trial court's judgment was contrary to the bankruptcy court's order and the terms of the note. The trial court's failure to resolve the matter on the merits prevented the trial court from addressing these points, so these matters are unripe for consideration.

Third, Catjen's argument that the trial court erred by not granting the nonsuit is rendered moot, as Catjen is entitled to relief under its first assignment of error.

Result: Vacated, reversed, and remanded.

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Case: *Commonwealth of Virginia v. Commonwealth of Virginia, ex rel., Hunter Laboratories, LLC*, 296 Va. 32, 817 S.E.2d 318 (2018).

Author: Stephen R. McCullough, J.

Decided: August 9, 2018

Lower Ct.: Thomas P. Mann, J. (Fairfax County)

Facts: Relators filed a qui tam action, alleging that laboratories defrauded Medicaid by overcharging for certain tests. The Relators filed suit after the Commonwealth declined to intervene. The Relators prevailed in the action and a dispute arose regarding how to calculate the Relators' share of the recovery. The trial court agreed that the Relators' share should be 28% of the gross recovery, not 28% of the net recovery.

Analysis: The applicable code section states that a Relator is entitled to a share of the "proceeds of the award or settlement." The language of the statute contains no qualifying language insofar as the award or settlement is concerned. Given that the General Assembly has used the limiting word "net" when referring to "proceeds" in dozens of instances, the General Assembly is aware of this distinction and elected not to employ it. As such, the trial court's ruling is correct.

Result: Affirmed.

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Case: *Primov v. Serco, Inc.*, 296 Va. 59, 817 S.E.2d 811 (2018).

Author: S. Bernard Goodwyn, J.

Decided: August 23, 2018

Lower Ct.: Bruce D. White, J. (Fairfax County)

Facts: Plaintiff asserted that he entered an employment agreement with Defendant whereby Defendant agreed to provide hazard pay due to dangerous working conditions. Plaintiff filed suit against Defendant, claiming that he was not paid the requisite hazard pay. Plaintiff attached the employment agreement to his complaint. The employment agreement contained a provision requiring the parties to attempt to resolve any suits first by submitting them to mediation.

Defendant filed a plea in bar, asserting that Plaintiff failed to satisfy a condition precedent by not pursuing mediation. The trial court agreed that the mediation provision was a condition precedent and ruled that the plaintiff failed to satisfy the provision. The trial court sustained the plea in bar and dismissed the matter with prejudice.

Analysis: Plaintiff appealed, contending that the trial court's dismissal was incorrect. Instead of dismissal, plaintiff argues that the trial court should have either granted leave for mediation to occur or permit the case to proceed. Here, ignoring the condition precedent deprived the defendant of the benefit of its bargain.

The appropriate remedy for this noncompliance is a dismissal without prejudice, so long as it does not prejudice the opposing party. In this case, however, evidence supports the trial court's decision to dismiss with prejudice. The underlying matter had been fully litigated before being nonsuited on the eve of trial; the plaintiff never sought to halt proceedings to pursue mediation; and the practical effects of a dismissal with prejudice would be identical to the effects of a dismissal without prejudice. In light of these things, the trial court did not commit a clear error.

Result: Affirmed.

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Case: *Kerns v. Wells Fargo Bank, N.A.*, 296 Va. 146, 818 S.E.2d 779 (2018).

Author: D. Arthur Kelsey, J.

Decided: September 27, 2018

Lower Ct.: W. Reilley Marchant, J. (City of Richmond)

Facts: Plaintiff Kerns had a mortgage loan agreement with Defendant bank. Plaintiff defaulted, and Defendant accelerated Plaintiff's debt and initiated foreclosure proceedings. More than five years after Defendant accelerated the debt, Plaintiff claimed that Defendant breached the requisite agreement by not providing an opportunity to cure. Defendant filed a plea in bar based on the statute of limitations, claiming that the breach in question was the debt acceleration, which had occurred more than five years before the suit was filed. The trial court agreed with Defendant and dismissed the suit.

Analysis: Plaintiff filed suit five years to the day after the foreclosure sale occurred. The limitations period begins to run on the date of accrual, and the accrual date depends on the type of claim asserted and the nature of the accrual. For a breach of contract action, the claim accrues when the breach occurs, not when the resulting damage is discovered. But a separate statutory provision specifies that the claim must be brought within five years after the cause of action accrues.

There is a distinction between a cause of action and a right of action. A right of action cannot accrue until there is a cause of action. In this case, the trial court correctly concluded that the limitation period began when the defendant accelerated the debt and made the entire amount due. This would have been correct whether the breach of contract claims were viewed as a right of action or a cause of action under the relevant statutory provisions.

Result: Affirmed.

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Case: *Terry, Administrator of the Estate of Peter Ambrister v. Irish Fleet, Inc., d/b/a Boulevard Cab, et al.*, 296 Va. 129, 818 S.E.2d 788 (2018).

Author: Elizabeth A. McClanahan, J.

Decided: September 27, 2018

Lower Ct.: Pamela S. Baskervill, J. (City of Petersburg)

Facts: Defendants were a company and employee that were dispatchers for taxicabs. Defendants received a number of troubling calls from a

potential passenger. Defendant dispatched the decedent to pick up the passenger, and the passenger then fatally shot the decedent.

Plaintiff administrator brought a wrongful death action against the defendants for the murder of her husband, claiming that Defendant's negligence was the proximate cause of the decedent's death. Plaintiff claimed that Defendant assumed a duty, and that Defendant negligently dispatched decedent given its knowledge of the potential danger. Defendant demurred, and the trial court sustained the demurrer. Plaintiff appealed.

Analysis: Because decedent was killed by a passenger, Defendants are liable only if they owed decedent a duty to warn or protect him from a criminal assault by a passenger. There must be a special relationship between the parties before a duty can arise. Unless such a relationship exists, the defendant will owe a duty only if it expressly undertook such a duty by expressly communicating its intention to do so. There can be a duty that may be impliedly assumed by a defendant's conduct, but that implied undertaking may not give rise to an assumed duty to protect against a third party's criminal act.

Here, the complaint does not sufficiently allege a special relationship. The defendants did not agree to promise to warn drivers about the dangers of passengers. Instead, Plaintiff's theory is based on an implied voluntary undertaking. There was no specifically described undertaking, and it is, by its nature, ambiguous. As such, the trial court did not err by sustaining the demurrer.

Dissent: The majority creates a rule in Virginia, not supported by case law, the Second Restatement of Torts, or other jurisdictions, that an assumption of duty must be express. The allegations made in the complaint and the inferences establish an assumption of duty.

Result: Affirmed.

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Case: *June Haynes-Garrett v. Drew A. Dunn, et al.*, ___ Va. ___, 818 S.E.2d 798 (2018).

Author: Elizabeth A. McClanahan, J.

Decided: October 4, 2018

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

Facts: Plaintiff rented a vacation house for one week that was owned by the Dunns and managed by a realty company. Plaintiff suffered serious injuries at the house during her stay. Plaintiff filed suit against the Dunns and the realty company, claiming that they failed to maintain the property in a safe condition, failed to inspect the floors, and failed to warn about a hidden, dangerous condition.

The Dunns argued that Plaintiff failed to prove that they breached a duty they owed her. According to them, their relationship was one of landlord-tenant, and they accordingly owed no duty of care. Plaintiff argued that the relationship was, instead, one of innkeeper-guest or, at a minimum, one of owner and invitee.

The trial court granted the Defendants' motions to strike at the conclusion of Plaintiff's evidence.

Analysis: Under the common law, a landlord owes no duty to maintain in a safe condition any part of the premises under the tenant's exclusive possession. An innkeeper, in contrast, owes an elevated standard of care to its guests, and it requires an innkeeper to take every reasonable precaution to protect their guests and their property. The innkeeper's higher duty is based, in part, on the fact that it maintains direct and continued control of the property, including by having a continued presence.

Here, the property in question was not a public place available for all travelers. It was a second house that was available for rent, only by families, during certain times of the year. In addition, the evidence demonstrated that the Dunns and the realty company did not maintain possession or control of the property during the rental period. The evidence showed that the defendants intended for the Plaintiff and her family to have exclusive possession and enjoyment. These things being true, the Dunns were akin to landlords and did not owe a duty to the Plaintiff.

Result: Affirmed.

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Case: *Jacqueline Bogle Meuse, et al. v. Bruce Henry, et al.*, ___ Va. ___, 819 S.E.2d 220 (2018).

Author: Donald W. Lemons, C.J.

Decided: October 4, 2018

Lower Ct.: Nolan B. Dawkins, J. (City of Alexandria)

Facts: Plaintiff parties filed suit alleging a variety of counts arising out of the defendants' operation of a trust. Defendants moved to compel arbitration pursuant to an arbitration clause in the Operating Agreement. Plaintiff argued that the arbitration provision was unenforceable. The trial court disagreed, granted the motion compelling arbitration, and the matter was submitted to an arbitrator.

The plaintiff sought certain discovery in the arbitration, and the panel of arbitrators denied the request. A multi-day arbitration ensued with substantial evidence presented, including expert opinions. The arbitrators found for the defendants on all counts and issued an award of attorney's fees and costs, as well as some equitable relief.

Defendants moved to confirm the arbitration award in circuit court. Plaintiffs opposed and sought to vacate the award, claiming the arbitrators exceeded their authority and entered an award that violated public policy. The trial court disagreed and upheld the arbitration award. Plaintiffs appealed, raising four assignments of error.

Analysis: An arbitration award on appeal will be examined based only on the specific statutory criteria contained in the arbitration act. The party attacking the award bears the burden of proving the award's invalidity.

When examining whether arbitrators exceeded their authority, the reviewing court is concerned only whether the arbitrators had the power to decide the issues at question. Arbitrators exceed their authority when they act beyond the terms of the contract that provides their authority.

Here, the plaintiffs have not established that the provisions of the agreement in question are void ab initio. As such, the trial court did not err by refusing to vacate that part of the arbitration award that upheld the challenged provisions.

As far as the arbitrators' refusal to issue subpoenas is concerned, the arbitrators' refusal to issue was an exercise of their statutory authority. As such, they did not exceed their powers.

The arbitrators' refusal to issue subpoenas was not tantamount to a refusal to hear evidence material to the controversy, which is recognized ground for invalidating an award. Here, the record indicates that the plaintiffs were not deprived of their ability to present material information.

Finally, the record in this case establishes that the attorney's fee and costs award was justified. The arbitrators determined that the plaintiffs' suit was without reasonable cause, thus supporting the award in question.

Result: Affirmed.

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Case: *Quisenberry v. Huntington Ingalls Inc.*, ___ Va. ___, 818 S.E.2d 805 (2018).

Author: Leroy F. Millette, Jr., S.J.

Decided: October 11, 2018

Facts: The Eastern District of Virginia presented a certified question to the Supreme Court of Virginia, which the Supreme Court restated:

Does an employer owe a duty of care to an employee's family member who alleges exposure to asbestos from the work clothes of an employee, where the family member alleges the employer's negligence allowed asbestos fibers to be regularly transported away from the place of employment to the employee's home?

In the case, a workers' employment routinely exposed him to asbestos, and the fibers often attached to his clothing. The worker's daughter helped launder the worker's clothes, thereby inhaling asbestos fibers. The daughter was diagnosed with malignant pleural mesothelioma due to her exposure and she later died. The daughter's estate filed suit, claiming that the employer knew of the dangers that asbestos posed, including to her.

The employer sought to dismiss the case and moved to certify the question to the Supreme Court of Virginia.

Analysis: Whether a legal duty exists in tort is a pure question of law. A person must exercise due care to avoid injuring others. A duty is owed to those "within reach of a defendant's conduct." Although there must be a relationship between the parties, the relationship is not a social one but is based on those who are placed in the zone of a recognizable risk of harm.

The fact that the harm in this case occurred at a location removed from the employer's business is irrelevant. Here, because the employees did not have a place to do laundry or drop their clothes at work, it was foreseeable that the clothes would be worn home and the asbes-

tos would be exposed to others. As such, the employer owed a legal duty.

Dissent: The majority conflates causation and duty and, in doing so, creates a duty to a potentially unlimited class of plaintiffs.

Result: Certified question, as restated, answered in the affirmative.

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Case: *Francis Hospitality, Inc. v. Read Properties*, LLC, d/b/a/ Coldwell Banker Comm. Read & Co., ___ Va. ___, 820 S.E.2d 607 (2018).

Author: Elizabeth A. McClanahan, J.

Decided: November 21, 2018

Lower Ct.: John T. Cook, J. (City of Lynchburg)

Facts: Read Properties filed suit against Francis Hospitality and another entity for breach of a lease contract, intentional inference with contract, and statutory business conspiracy. After a bench trial, the trial court ruled that the defendants had breached a lease agreement. The trial court also found the defendants liable for intentional interference with a contract despite the defendants' argument that one could not tortiously interfere with their own contract. And it was that tortious interference, the trial court concluded, that formed the predicate unlawful act that justified the conclusion that the defendants had committed statutory business conspiracy. Defendants appealed.

Analysis: On appeal, the defendants argue that they cannot interfere with their own contract. Virginia law has recognized that only a party outside of the contractual relationship can interfere with a contract, and a party cannot interfere with his own contract. Because the statutory conspiracy claims are based on the intentional interference, those claims must fail.

Result: Reversed and final judgment.

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Case: *Sweely Holdings, LLC v. Suntrust Bank, et al.*, ___ Va. ___, 820 S.E.2d 596 (2018).

Author: D. Arthur Kelsey, J.

Decided: November 21, 2018

Lower Ct.: Daniel R. Bouton, J. (Madison County)

Facts: Suntrust loaned $18.3 million to Sweely, and Sweely offered personal property and four parcels of real estate as collateral. Sweely defaulted, and the parties attempted a workout of the loans. Sweely claimed that during those discussions Suntrust misrepresented the value of the collateral.

The parties entered a workout agreement whereby Sweely would either make payments to Suntrust or convey the collateral. Sweely was unable to make payments and conveyed collateral.

Sweely filed suit against Suntrust and employees alleging breach of contract, fraud in the inducement, and constructive fraud. The trial court sustained the defendants' demurrer and dismissed the case.

Analysis: A contract must be construed as a whole and the parties' intent must be derived from the entire instrument. Each part must be interpreted in light of all other parts. What the parties claim they might have said, or what they should have said, cannot alter what they actually said. Following these well-established principles, the trial court did not err by dismissing the breach of contract claims.

Regarding the fraud claims, the trial court properly applied the justifiable-reliance doctrine. Fraud requires clear and convincing evidence, and any reliance upon misrepresentations must be reasonable. The parties were in an adversarial relationship and were represented by counsel. The allegations in the Amended Complaint coupled with relevant documents and the parties' arguments, demonstrate that any reliance was unjustified as a matter of law.

Result: Affirmed.

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