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"REHEAR YE, REHEAR YE": THE SUPREME COURT OF VIRGINIA AND PETITIONS FOR REHEARING UNDER RULE 5:37

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Given the importance of finality in judgments and of stare decisis, judges and practitioners alike have long recognized the rarity with which the Supreme Court of Virginia has granted rehearing on the merits of an appeal.[1] Indeed, over the past quarter century, such rehearings have been granted in far less than one percent of the appeals taken.

Over the course of the last twelve to eighteen months, however, the Court has granted rehearings in five different cases touching on different legal questions and subjects. These opinions run the gamut, from merely tinkering with the language of an opinion to completely reversing 7-0 decisions. The purpose of this article is to review the history of rehearings in the Supreme Court and to see what (if any) trends or patterns may be discerned from the Court's more recent activity.

I. Rule 5:37's Requirement of "Good Cause" to Be Awarded a Rehearing[2]

Rule 5:37 governs petitions for rehearing in the Supreme Court of Virginia. Procedurally, there are two time periods of which a petitioner must be aware. First, within ten days of the decision for which a rehearing will be sought, the petitioner must put the Court on written notice of its intent to seek rehearing. Second, within thirty days of the decision, the petitioner must file (electronically) its petition.[3] "No petition for rehearing shall be granted unless one of the

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[1] This article is limited to rehearings on the merits. It does not address attempted rehearings at the petition stage of an appeal.

[2] In 2010, during the Supreme Court's restructuring of the Rules, former rules 5:39 and 5:39A were combined into Rule 5:37. The new Rule 5:37 shortened the length of the petition for rehearing from 14 pages to 10 pages. Taken in conjunction with the new font requirements introduced in 2010, the page limit was significantly reduced. Sup. Ct. R. 5:6(a).

[3] Va. Sup. Ct. R. 5:37(d)(1); *see also* Va. Code § 8.01-675.2 ("[A] notice of a petition for rehearing shall be filed as provided by the Rules of Court and the petition for rehearing shall be filed within thirty days after the entry of the judgment with the clerk, who shall note the date of such filing on the order book."). In 2005, the

Justices who decided the case adversely to the applicant determines that there is *good cause* for such rehearing."[4] The Court has given no formal treatment—in the form of discussion in any opinion—of what constitutes "good cause" within the meaning of Rule 5:37.

II. The Court's Historical Reticence toward Rehearing Cases

However, two of the Court's members have made clear to members of the Virginia Bar that such rehearings are not granted as a matter of course: "To prevail, the petitioner for rehearing must convince a member of the court who voted with the majority that there is good cause to reconsider the issues. This is a difficult burden to meet; rehashing previously made arguments is a waste of time."[5] This sentiment has been echoed—a bit more pointedly—by Judge McCullough of the Virginia Court of Appeals, who explained that "[u]nless [a] decision was very close, a petition for rehearing is almost always a waste of paper. Even in close cases with a divided court, the likelihood of success is slim."[6]

It has been in light of this predisposition disfavoring rehearings that litigants have tried to determine whether asking the Court to reconsider an opinion or order was worth the effort and expense. Because so few were granted, many chalked up their losses and moved on. The historical data are likewise consistent with the admonitions of Virginia's appellate judges. Indeed, over the past twenty-five years, the Court has issued approximately seventeen opinions or orders related to petitions for rehearing, amounting to fewer than one per year. Of those suits, six have been in criminal cases.[7]

Thus, while nearly twice as many rehearings were granted in civil cases during that period of time,[8] when compared to the Supreme Court's overall caseload,

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Supreme Court began requiring petitioners to file their petitions for appeal electronically, absent leave of Court, removing the necessity of filing 20 paper copies of the petition. The change effectively eliminates the "expense hurdle" that had been associated with requesting rehearing and made it easier for parties to make their requests.

4 Va. Sup. Ct. R. 5:37(e) (emphasis added); *see also* Va. Code § 8.01-675.2 ("The Supreme Court, on the petition of a party, shall rehear and review any case decided by such court if one of the justices who decides the case adversely to the petitioner certifies that in his opinion there is good cause for such rehearing.").

5 Hon. Cynthia Kinser & Hon. S. Bernard Goodwyn, *Some Observations by the Judges,* 8.305(D), *in* Appellate Practice—Virginia and Federal Courts (R. Terrence Ney 5th ed. 2012).

6 Hon. Stephen R. McCullough, *Chapter 6: Motions Practice in State and Federal Courts*, 6.703, *in* Appellate Practice—Virginia and Federal Courts (R. Terrence Ney ed., 5th ed. 2012).

7 Jaynes v. Commonwealth, 276 Va. 443 (2008); Miles v. Commonwealth, 272 Va. 302 (2007); Orbe v. Johnson, 267 Va. 567 (2004); Lenz v. Warden of Sussex I State Prison, 267 Va. 318 (2004); Powell v. Commonwealth, 261 Va. 512 (2001); Atkins v. Commonwealth, 257 Va. 160 (1999).

8 John Crane Inc. v. Hardick, 284 Va. 329 (2012); AES Corp. v. Steadfast Ins. Co., 283 Va. 609 (2012); Nunnenkamp v. Copenhaver, 2011 Va. Lexis 240 (2011); Uniwest Constr., Inc. v. Amtech Elevator Servs., Inc., 281 Va. 509 (2011); Kellermann v. McDonough, 278 Va. 478 (2009); Taboada v. Daly Seven, Inc., 273 Va. 269 (2007); Kondaurov v. Kerdasha, 271 Va. 646 (2006); Tanner v. State Corp. Comm'n, 265 Va. 148 (2003); Nationwide Mut. Ins. Co. v. Housing Opportunities Made Equal, Inc., 2000 Va. Lexis 56 (2000); Winnie W. Fun v. Virginia Military Inst., 245 Va. 249 (1993); Tazewell Oil Co., Inc. v. United Virginia Bank/Crestar Bank, 243 Va. 94 (1992).

the number of petitions granted is in itself negligible. For example, the Supreme Court's docket for the last five years reveals this information:

	2006	2007	2008	2009	2010	2011
Total Petitions for Appeal	2741	2634	2615	2639	2485	2333
Appeals Granted	198	208	170	187	221	152
Cases Decided By Opinion	116	130	124	114	117	119
Opinions on Rehearings on the Merits	0	2	0	1	0	1

As can be observed from this data, whatever else can be said about the difficulty of having an appeal granted in the first instance, it has been very difficult to convince the Court to reconsider a ruling once it has been made.

III. 2011-2012: The Year of Rehearings

It is against this historical backdrop that the Court's activity over the last eighteen months in the area of rehearings must be viewed. It is worth noting at the outset that, over the past five years, the composition of the Supreme Court has undergone a number of changes. Indeed, only two of the seven justices who served as recently as the 2008 term remain on the Court, Justice Kinser (elevated to Chief Justice in 2011) and Justice Lemons. Due to a variety of mandatory retirements (Justices Lacy and Koontz), ascensions to the Fourth Circuit Court of Appeals (Justices Agee and Keenan) and the death of Chief Justice Hassell, five new justices have been appointed. Three of those—Justices Mims, McClanahan, and Powell—have taken their seats on the bench since 2010.

Of the five rehearings granted, four have already resulted in opinions.[9] As a percentage of the rehearings, this recent activity represents *more than a quarter* of those granted over the last twenty-five years. A brief discussion of the four cases in which rehearing opinions have been issued follows.

A. UNIWEST CONSTRUCTION, INC. V. AMTECH ELEVATOR SERVICES, INC.[10]

In *Uniwest*, a general contractor hired a subcontractor to perform repair work on an elevator in a commercial property. Two employees of the subcontractor were injured on a job site and filed suit against the general contractor, who ultimately reached settlements with both plaintiffs. The issues on appeal were the contractual duties to defend and indemnify owed by the subcontractor (and its insurer) to a general contractor.

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[9] The fifth case, *Funkhouser v. Ford Motor Co.*, deals with the admissibility of evidence in a failure-to-warn case of four previous accidents for the purpose of demonstrating the defendant's knowledge of an alleged hazardous condition. Ford sought and was granted a rehearing. That rehearing was conducted on November 1, 2012. The Virginia Association of Defense Attorneys filed an amicus brief in this case, which can be found herein at page 701.

[10] 280 Va. 428 (2010).

The Court began its opinion by noting that Virginia's public policy, as found inVirginia Code section 11-4.1, prohibited the general contractor from being indemnified for its own negligence. To the extent that the trial court struck down parts of the parties' contract on this basis, the Supreme Court affirmed the decision. Nevertheless, the Court unanimously held that several provisions in the operative construction and insurance contracts obligated the subcontractor and its insurer to indemnify and defend the general contractor from the negligence of the subcontractor. Because the trial court had found to the contrary under these provisions, the Supreme Court remanded for further consideration of the "relative liability" of the general contractor and subcontractor in order to calculate the damages owed by the latter to the former.

In their petition for rehearing, the general contractor and its insurer asked the Supreme Court to reconsider use of a "relative liability" standard to determine the extent of the subcontractor's insurance company's obligation to the general contractor. According to the general contractor—and looking to the language of the insurance policy in question—the test instead was simply whether the underlying tort action brought by the subcontractor's employees "arose out of operations" conducted by the subcontractor. The Supreme Court granted rehearing and issued a two-page supplemental opinion.[11]

Noting that this question had not been "reached by the circuit court because it erroneously determined that [the general contractor] was not an insured" under the subcontractor's policy, the Court added consideration of this question to its remand order. The Court withdrew that portion of the original opinion discussing "relative liability" but also made clear that it was "express[ing] no opinion as to whether relative liability is relevant" to the insurance policy.[12]

B. NUNNENKAMP V. COPENHAVER[13]

Nunnenkamp centered on the limitations period to be applied to a cause of action to rescind a deed of gift on the basis of undue influence. The defendant argued in the trial court that the applicable limitations period was the two-year statute of limitations governing fraud. The plaintiff made two arguments in response. First, he asserted that the five-year statute of limitations applicable to written contracts applied. Alternatively, it was the plaintiff's position that the doctrine of laches applied instead of a statute of limitations at law. The trial court accepted the defendant's argument and granted judgment in his favor. On appeal, the Supreme Court reversed the trial court and remanded the case to the trial court to determine whether, applying the doctrine of laches, the plaintiff's rescission action was time-barred.

The defendant moved for reconsideration, arguing that while the plaintiff had raised the issue of laches in the trial court, the trial court's refusal to apply the

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[11] 281 Va. 509 (2011).

[12] *Id.* at 510.

[13] 2011 Va. LEXIS 240 (July 29, 2011). The opinion on rehearing is the only electronically available opinion from this case, given that the original opinion was withdrawn on April 22, 2011.

doctrine of laches had not been asserted in the plaintiff's assignment of error. The Supreme Court granted rehearing and agreed with the defendant. Citing Rule 5:17, the Court explained that the plaintiff had not properly assigned error to the trial court's refusal to apply laches. Accordingly, the Supreme Court set aside its original opinion reversing the trial court and instead affirmed the trial court's decision granting judgment in favor of the defendant.

C. AES CORPORATION V. STEADFAST INSURANCE CO.[14]

Like *Uniwest*, the decision in *AES Corporation* also dealt with insurance coverage. The issue in *AES Corporation* was whether the insured, who had been sued in another jurisdiction for damages caused by its alleged contributions to global warming, had sufficiently pled an occurrence within the meaning of its policy. The Court explained that for insurance purposes, *occurrence* is synonymous with *accident.* An accident, in turn, is an event that happens "by chance, or unexpectedly."[15]

There was no serious contention by the insured that the allegations of intentional tort were covered.[16] Instead, the argument advanced by the insured was that because the underlying tort suit also asserted claims of negligence, the claims fell within the definition of occurrence—and therefore the insured was at least entitled to a defense, if not liability coverage—within the policy. Rejecting that argument, the Court began its analysis by reasoning that

> the dispositive issue . . . is not whether the action undertaken by the insured was intended, but rather whether the resulting harm is alleged to have been a reasonably anticipated consequence of the insured's intentional act . . . . Thus, resolution of the issue of whether [the] Complaint alleges an occurrence covered by the policies turns on whether the Complaint can be construed as alleging . . . injuries . . . resulting from unforeseen consequences that a reasonable person would not have expected.[17]

The Court then looked to the tort claimants' allegation of "clear scientific consensus" regarding the natural and probable consequences of the defendant's alleged acts. Thus, according to the Court, "[e]ven if [the insured] were negligent and did not intend to cause the damage that occurred, the gravamen of . . . [the] claim is that the damages . . . sustained were the natural and probable consequences of [the insured's] intentional emissions." From there, the Court

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[14] 282 Va. 252 (2011).

[15] *Id.* at 260.

[16] Indeed, as the Court explained, "an intentional act is neither an 'occurrence' nor an 'accident' and therefore is not covered by the standard policy." *Id.*

[17] *Id.* at 261.

concluded that when the insured knows or should know of the consequences of his actions, there is no occurrence and therefore no coverage.[18]

The insured sought and was awarded a rehearing.[19] While the petition for rehearing is not available electronically either through Lexis or the Supreme Court of Virginia's web site, a sense of the arguments likely advanced in the petition can be gleaned from a reading of the appellate blog maintained by the insured's appellate counsel, Steve Emmert. In his analysis of the opinion, Mr. Emmert expressed his belief that the opinion would

> work a fundamental change in the way tort claims are pleaded in Virginia. In the past, plaintiff's lawyers, careful to avoid jeopardizing insurance coverage by pleading intentional torts, have included at least one negligence-based claim, so the insurer can't strand the tort defendant. Such claims typically included the very same "or should have known" language, in order to state that negligence claim. As of today, that won't be good enough to keep an insurer in the case.[20]

If this was the argument advanced in the petition for rehearing, it did not gain much traction. Indeed, in affirming its original opinion, the Supreme Court—other than reshuffling and rewording a few sections—reissued what was in substance the same opinion as that initially issued in the case.

D. JOHN CRANE, INC. V. HARDICK[21]

Hardick addressed a death claim brought against a product supplier by the estate of a former Navy sailor who alleged exposure to asbestos-containing products while serving aboard fighting ships. In addition to alleging exposure in the territorial waters of the United States, the estate also alleged exposures that occurred while Hardick was aboard ships on the high seas. The estate brought its claim under general maritime law.

The issue on appeal was whether the estate's claim for damages—based upon an "indivisible" injury that included significant amounts of high seas exposure—was limited to pecuniary damages as provided for under the Death on the High Seas Act ("DOHSA")[22] or whether the estate could pursue a full complement of pecuniary and nonpecuniary damages (including pain and suffering and loss of society). In its original opinion, the Supreme Court unanimously held that the estate could recover no nonpecuniary damages. It struck the jury's award of approximately $3.5 million in damages for pain and suffering and loss of society.

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18 *Id.* at 262.

19 283 Va. 609.

20 *See* L. Steven Emmert, Virginia Appellate News & Analysis, *at* http://www.virginia-appeals.com/scv_opinion.aspx?id=396, last visited on Nov. 2, 2012.

21 John Crane, Inc. v. Hardick, 283 Va. 358 (2012). The authors' firm serves as Virginia counsel to John Crane Inc.

22 46 U.S.C. § 30301 *et seq.*

The estate sought rehearing, arguing that the Jones Act,[23] rather than DOHSA, was the statute to which the Court should refer for the available remedial scheme in a general maritime law action. In an interesting development, the Supreme Court not only granted the rehearing on the merits of the plaintiff's argument but also sua sponte raised the issue of whether the defendant had adequately preserved in its assignment of error its challenge to the award of pain and suffering damages.[24]

In its opinion on rehearing, the Court decided the issue preservation question in favor of the defendant. But on the merits, despite the Jones Act applying only to claims against employers, the Court unanimously reversed its earlier opinion with respect to the claim for pain and suffering damages and held that such damages were available to the estate of a Navy sailor.

IV. Conclusion

A review of the handful of cases in which rehearings have been granted in the last eighteen months does not reveal any meaningful pattern—or any definition of what constitutes "good cause" under Rule 5:37—for determining the type of case that may be granted rehearing in the future. The cases cover claims at law and in equity. They include contract and tort disputes, and they include claims prosecuted under both Virginia law and the law of other sovereigns.

That fact notwithstanding, and while it is too early to know whether this trend will continue, it appears that parties that wish to have the Court take a second look at its initial rulings may have a better chance of convincing the Court to do so than in years past.

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[23] 45 U.S.C. § 59.

[24] John Crane, Inc. v. Hardick, 284 Va. 329 (2012). The authors have been unable to identify another instance in which, at the petition to rehear stage, the Court sua sponte raised as an issue the preservation of error under Rule 5:17.