

What's New at the Court of Appeals of Virginia and Supreme Court of Virginia

2021 Small Firm and Bench Bar Forum

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Abingdon, Virginia

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The New Court of Appeals of Virginia

Senate Bill 1261

- History and Background
- Effective Date of January 1, 2022
- Appeal of right to the Court of Appeals in virtually all cases

The New Court of Appeals of Virginia

Six New Judges

- Five sitting as of 9/1/21
- One will sit in November 2021 (replace Judge Petty)
- Diversity of the new Court of Appeals

The New Court of Appeals of Virginia

Senate Bill 1261

- Where do I file my appeal on 1/1/22?
- What happens to pending cases on 1/1/22?
 - NOA filed in Supreme Court before 1/1/22
 - Criminal cases in Court of Appeals automatically granted

The New Court of Appeals of Virginia

Senate Bill 1261

- Oral argument
- The appendix
- New rules!

The New Court of Appeals of Virginia

What does it mean?

- More appeals?
- Longer appeals?
- Decreased or increased costs?
- More letter opinions?

The “New” Supreme Court of Virginia

- The Supreme Court of Virginia retains its current size and petition process.
- Some cases still go directly to the Supreme Court.
- Becomes a true certiorari court.

Electronic Filing

Effective June 1, 2021, all filings are electronic in the Supreme Court and Court of Appeals of Virginia.

Questions of First Impression

- Code § 15.2-1812 does not apply retroactively to statues/war memorials erected before 1997 when the statute was enacted (*City of Charlottesville v. Payne*)
- The functional loss of use of a body part under Code §65.2-503 should be measured prior to a surgical prosthetic joint replacement (*Loudoun County v. Richardson*)
- Virginia's cluster development statute, Code § 15.2-2286.1, does not apply when a proposed cluster development is not located entirely within an area designated for water and sewer service (*Stafford County v. D.R. Horton*)

Questions of First Impression

- Attorney's fees are recoverable as damages for breach of a covenant not to sue (*Bolton v. McKinney*)
- Code § 8.01-229(D) tolls the limitations period when a defendant commits an obstructive act with the intent to obstruct a future plaintiff's filing of an action, regardless of whether the cause of action has accrued at the time of the obstructive act (*Mackey v. McDannald*)
- A motion craving over may be used to make the legislative record of a local government proceeding part of the complaint when the record is essential to the claim (*Byrne v. City of Alexandria*)

Questions of First Impression

- (1) An insurer's payments pursuant to an insurance policy are not immune from garnishment as "proceeds of the sale or disposition" of property held in trust under Code § 55.1-136(C)
and
- (2) a husband and wife did not own a contractual right to an insurance payment as tenants by the entirety with the common-law right of survivorship (*Jones v. Phillips*)
- "Fair market value" on a date certain is not sufficient to ascertain the sale price with sufficient certainty so as to permit a court to compel specific performance of an option contract for the sale of land (*Wilburn v. Mangano*)

Motions Craving Oyer

Byrne v. City of Alexandria, 298 Va. 694 (2020)

- The motion craving oyer has long been a remedy afforded to a litigant who has been sued on a claim based upon a written document mentioned in a plaintiff's pleading but not made a part of the record.
- The SCOV has expanded oyer to include production of a wider range of documents than those available at common law.
- A motion craving oyer may be granted only where the missing document is essential to the claim.
- Circuit court did not abuse its discretion in granting defendant's motion craving oyer of local government's legislative record.

Cross-Examination

Graves v. Shoemaker, 851 S.E.2d 45 (2020)

- Cross-examination of an expert about money received from an insurance carrier is proper if there is a “substantial relationship” between the witness and an insurance company that has a financial interest in the outcome of the case
 - A substantial relationship exists when there is a potential for bias because of the witness’s interest in the case
 - Substantial relationship ≠ direct relationship
 - An insurer’s payment of a considerable sum of money to an expert for his prior testimony favorable to its insureds can be enough to establish a substantial relationship

Duty in Tort

Shoemaker v. Funkhouser, 2021 WL 1133790 (2020)

§318 Second Restatement of Torts

- A landowner has a duty to exercise reasonable care to control the conduct of a third party who has been granted permission by the landowner to use his land to prevent that person from harming others or from conducting himself so as to create an unreasonable risk of bodily harm to others
- The duty applies when the landowner is present, knew or should have reason to know that he has the ability to control the third person, and knows or should know of the necessity and opportunity for exercising such control
- Being present = in a place where oversight can be exercised
- **Holding:** The Funkhousers owed a duty to their neighbors not to grant permission to their grandson to shoot targets on their property in the direction of the neighbor's house located within sight of their house when they knew or should know that the bullets are likely to strike that house

Duty in Tort

Shoemaker v. Funkhouser (con't)

Dissent:

- The “and/or” pleading defect
- Complaint is missing critical allegations
- Presence means physical presence with the licensee at the time of the tort
- Reporter’s Note to Section 318

Questions?

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