Supreme Court of Virginia Review of Civil Cases
April 2020 – April 2021

Monica T. Monday[1]

1. ATTORNEY DISCIPLINE

Baumann v. Va. State Bar, 299 Va. 80 (2021).

In July 2015, Craig E. Baumann, a general practice attorney in Northern Virginia since 1978, accepted representation of Ella Wright. Wright retained Baumann in response to a letter she received from an attorney representing her stepchildren. The letter demanded Wright produce a copy of her late husband's trust agreement, provide an "accounting of the property, liabilities, and receipts of the trust," and provide certain items of personal property to the stepchildren.

Wright asked Baumann to resolve the dispute. Wright indicated she did not want to provide a copy of the trust to the stepchildren and did not want to provide an accounting. Baumann agreed to accept the representation in exchange for a $7,5000 flat fee which would require an additional $15,000 advanced fee if the matter went to court. Wright signed a fee agreement which stated the $7,500 flat fee was "nonrefundable" and "earned upon the acceptance of representation." Wright tendered the $7,500 fee and these funds were deposited into Baumann's trust account.

Shortly after, Baumann contacted counsel for the stepchildren, faxed a copy of the trust agreement to their counsel, and coordinated times for the stepchildren to acquire the items of personal property designated for them in the trust documents. Through communications stretching until August 2016, Baumann did not address the demand for an accounting.

Wright later contacted Baumann to inform him that the stepchildren had picked up all of the items of personal property and she terminated the representation. Wright requested a statement of the services Baumann rendered and any incurred expenses. Baumann provided a document to Wright that alleged he had "(1) read a 179-page trust document, performed legal research, and advised Wright 'concerning the same,' (2) contacted various parties 'as needed'; (3) guaranteed his availability to Wright instead of the opposing party, (4) prepared the matter for litigation, and (5) closed Wright's file." Baumann asserted he had earned the entire $7,500 fee. Baumann did not inform Wright that the accounting issue remained unresolved.

A few days later, the attorney for the stepchildren contacted Baumann and renewed the request for an accounting. Baumann forwarded the email to Wright, stating "this came in by email today." Wright then retained Dezio, an attorney who specialized in trusts and estates. Dezio later testified that the trust was actually 38 pages, not 179, and that Wright was not obligated to provide an

[1] Thank you to Gentry Locke associates David Berry, Charlie Calton, Caley DeGroote, Andrew Gay, Alicha Grubb, Jeff Miller, Court Shipman, Kirk Sosebee, Imani Sowell, and Ryan Starks for contributing to this outline, and to Gentry Locke Legal Assistant Extraordinaire Rebecca Lugar for making it look good.

accounting to the stepchildren as they were not qualified beneficiaries. Dezio resolved the accounting issue in one phone call to counsel for the stepchildren. Dezio concluded that Baumann had not performed the services he claimed and requested that Baumann refund a portion of the $7,500 fee. Baumann refused.

Wright filed a bar complaint against Baumann. The Virginia State Bar ("VSB") conducted a preliminary investigation and charged Baumann with misconducted. Baumann contested the charge and refused to stipulate to certain facts in an offer of private reprimand from the VSB. A hearing was held and the District Committee determined Baumann violated Rule 1.2(a) by failing to accomplish the objectives of the representation and Rule 1.5(a) by charging an unreasonable fee. Baumann was given a public admonition with terms requiring him to return $5,000 to Wright and complete eight (8) hours of continuing legal education in ethics.

On appeal, Baumann argued the Board applied an incorrect legal standard in affirming the Committee's findings, that the VSB disciplinary system was unconstitutional, and that the evidence failed to establish that he violated any disciplinary rules. The Supreme Court affirmed.

On the issue of the appropriate legal standard, the Court held that under *de novo* review the Board was required to review the record to determine if the District Committee's decision was supported by "substantial evidence." The Board was required to review the entire record and not be limited to the "findings of fact" included in the Committee's determination.

Next, a disciplinary rule is presumed to be constitutional and any resolution of doubt regarding a rule's constitutionality is in favor of its validity. Baumann asserted that the disciplinary system impermissibility discourages attorneys from contesting charges of misconduct through the scheme of offering private discipline only if the charges are not contested. Baumann was entitled to receive notice of the disciplinary charges asserted against him and an opportunity to defend himself, which occurred. He was not entitled to any further constitutional due process, and he did not have a constitutional right to receive private discipline following a public disciplinary hearing.

On Baumann's sufficiency challenge, the Court held that the Board did not err in determining Baumann violated Rules 1.2, 1.4, and 1.5. The record established that Baumann did not consult with Wright regarding the means by which the objectives of the representation would be accomplished, did not resolve the accounting issue, did not adequately communicate with Wright, and that his fee was not justified by "the time and labor required" to resolve the underlying legal matter or the "results obtained" by the representation.

2. ATTORNEY'S FEES

St. John v. Thompson, 854 S.E.2d 648 (2021).

Ernest S. Elsea, II, was physically and cognitively impaired, and vulnerable to undue influence. James Charles St. John befriended Elsea and the two became close. St. John learned that Elsea was the beneficiary of a number of trusts and owned a $100,000 firearms collection.

St. John capitalized on Elsea's fear that his family would take his property and put him in a nursing home. He persuaded Elsea to transfer his firearms to a trust St. John controlled, the JCS Trust; had Elsea sign a durable POA and then used the POA to obtain trust and estate planning documents; persuaded Elsea to put additional property held by the Ernest Stuart Elsea, II Trust UA into the JCS Trust; and induced Elsea to sign a codicil to his will naming St. John and his girlfriend as beneficiaries. St. John later moved away, and Elsea revoked St. John's POA. St. John then revoked Elsea's appointment to the JCS Trust so he could not control the firearms.

Elsea's agents, the Thompsons, brought an action against St. John for fraud, undue influence, an accounting, recovery of firearms, and breach of fiduciary duty. The circuit court found that St. John exerted undue influence and committed fraud, and ordered the return of the firearms. The court rejected the other claims. The court also ordered St. John and the JCS Trust to pay attorney's fees in the amount of $108,211. In doing so, the circuit court awarded all but $10,000 of the requested fees, finding that the projected $10,000 to collect the judgment was not recoverable. St. John appealed.

The Supreme Court affirmed the award of attorney's fees. In *Prospect Development Company v. Bershader*, 258 Va. 75 (1999), the Court held that "in a fraud suit, the chancellor, in the exercise of his discretion, may award attorney's fees to a defrauded party." Contrary to St. John's argument, an award of fees does not depend on a showing of "egregious fraud." Rather, fees are proper if the court exercises its discretion to award equitable relief, and also determines that the circumstances surrounding the fraud and the nature of the relief granted compel an award of attorney's fees. The circuit court did not abuse its discretion in awarding attorney's fees here.

The Supreme Court also rejected St. John's challenge to the amount of the fees awarded. The court explained on the record its review of the factors pertaining to the reasonableness of the fees claimed, as required by the Court's precedent, and evidently considered and rejected the arguments St. John raised on appeal.

Finally, the Supreme Court rejected St. John's argument that the case should be reversed because the Ernest S. Elsea, II Trust UA, which he alleges owned some of the firearms at issue, was not a party to the case. The circuit court found that Elsea owned the firearms individually, and the record does not support the conclusion that this trust included the firearms at issue. Therefore, this trust was not a necessary party to the case.

The judgment was affirmed, and the case was remanded to the circuit court for a determination, in the discretion of the circuit court, whether additional attorney's fees should be awarded.

Bolton v. McKinney, 2021 Va. LEXIS 24, 2021 WL 1220801 (2021).

In a question of first impression, the Supreme Court held that attorney's fees are recoverable as damages for breach of a covenant not to sue.

Following a business divorce, Bolton and McKinney entered into a Settlement Agreement and Global Mutual Release of Claims that included a mutual covenant not to sue. Less than a year

later, McKinney sued Bolton twice in state court and once in federal court for claims covered by the Settlement Agreement. The suits resolved in Bolton's favor and he incurred more than $80,000 in attorney's fees in defending the actions.

Bolton later brought an action against McKinney alleged breach of the Settlement Agreement, seeking recovery of his attorney's fees incurred in defending the earlier actions. The court granted partial summary judgment on liability, but determined that attorney's fees could not be awarded as damages because, under the American Rule (which Virginia follows), attorney's fees are usually only recoverable when authorized by statute or contract, and the Settlement Agreement was silent on the subject.

The Supreme Court reversed. The Court first observed that other courts are divided on the issue. Those jurisdictions that do not allow for the award of attorney's fees reason that the parties can provide for attorney's fees in the contract if they so choose and/or that the covenant not to sue is a shield rather than a sword.

The Supreme Court found more persuasive the reasoning of courts that have permitted attorney's fees as damages for breach of a covenant not to sue. The rationale employed by such courts is that attorney's fees are direct or consequential damages of a breach of this type of agreement. Thus, an award of damages in such a scenario does not seek an award of fees within the meaning of the American Rule. Rather, an award of attorney's fees helps to put the non-breaching party in the position it would have been in had the breach not occurred. Under these circumstances, the lawsuit itself is the object that the bargain intended to prohibit.

Without altering Virginia's adherence to the American Rule, the Court held that damages for a breach of a covenant not to sue may be the amount of the attorney's fees incurred in defending actions that breached the agreement. Therefore, the circuit court erred in failing to award as damages the amount of attorney's fees Bolton incurred in defending the lawsuits McKinney initiated.

3. CONTRACTS

Wilburn v. Mangano, 851 S.E.2d 474 (2020).

In a question of first impression, the Supreme Court held that the term "fair market value" on a date certain is not sufficient, without more specificity, to provide a mode for ascertaining the sale price with sufficient certainty so as to permit a court to compel specific performance of a contract for the sale of real estate.

Before her death, Jeanne Mangano executed a will, devising certain real property to her two daughters (Wilburn and Snell). Mangano also granted her son, the other party to this action, an option to purchase the property within one year of the probate of her will for a purchase price equal to the real estate tax assessment of the property in the year Mangano died. But then, Mangano executed a codicil to the will, changing the purchase price to the "fair market value at the time of

[her] death." Mangano died. Her son Anthony exercised his option to purchase the property, but the parties could not agree on a price.

Anthony filed suit to determine whether the will or the codicil controlled. A jury found the codicil was valid, and therefore controlled the transaction. The sisters then filed suit to compel Anthony to purchase the property at the midpoint between two real estate appraisals the sisters had received. Anthony filed a demurrer, arguing that the price term in the option contract was not specific enough to be enforced. The circuit court agreed and dismissed the lawsuit. The Supreme Court affirmed.

Contracts relating to the sale of land must be complete, certain and definite in their material terms, including price. An option contract that does not provide a fixed price, or that provides a mode of fixing a price that would still require subsequent agreement of the parties, is incomplete. A court cannot compel parties to agree to a material term of a contract, including price. The option contract in this case set the price at "the fair market value," which is a specific term that means the value a seller is willing to accept and the buyer is willing to pay. "There is no single, fixed approach to determine fair market value." Because, by its very nature, the term "fair market value" cannot be known with certainty, the court cannot compel specific performance. Because the term "fair market value" fails to provide a price or mode for ascertaining price with sufficient certainty, the circuit court properly sustained Anthony's demurrer.

4. DEFAMATION

Bryant-Shannon v. Hampton Roads Community Action Program, Inc., 2021 Va. LEXIS 34, 2021 WL 1307139 (2021).

Bryant-Shannon sued the Hampton Roads Community Action Program, Inc. ("HRCAP") for defamation. She alleged that HRCAP's interim executive director, Vick, defamed her in a disciplinary form, which was later republished during a Virginia Employment Commission ("VEC") hearing.

Bryant-Shannon was a long-term employee at HRCAP. The former Executor Director had approved Bryant-Shannon's leave for vacation. Vick later wrote up Bryant-Shannon in the disciplinary form for: abusing her paid vacation leave; communicating with staff while on vacation; and failing to comply with office policy. Bryant-Shannon was later terminated, and the VEC denied her claim for unemployment benefits.

The circuit court sustained HRCAP's demurrer because it found that the statements in the disciplinary form were not defamatory. It also sustained HRCAP's special plea of absolute privilege for statements made at the VEC hearing. The Supreme Court affirmed.

First, the statements in the disciplinary form did not contain the requisite defamatory sting to be actionable as defamation. The statements did not accuse Bryant-Shannon of anything and were instructions from a supervisor to improve clarity in communications and comply with office policy. Because none of these statements made Shannon appear odious, infamous, or ridiculous, or would otherwise subject her to contempt, shame, scorn, or disgrace, they are not actionable as defamation.

Second, the republication of the disciplinary form at the VEC hearing is protected by an absolute privilege. Under Code §60.2-623(B), "information furnished" to the VEC may not be used in "any judicial or administrative proceeding" not arising under Title 60.2. Because the current action does not arise under Title 60.2, the statements made and information furnished to the VEC during Bryant-Shannon's hearing are absolutely privileged.

Viers v. Baker, 298 Va. 553 (2020).

Baker was a newly-elected Commonwealth's Attorney in Dickenson County. He assured Viers, a long-time administrative employee of the office, that he would retain her. Three days after taking office, Baker told Viers that his office was dirty and fired her. Later that day Baker met with his predecessor and complained that he could not access the office computer. His predecessor said that he had removed his password, but gave Baker information allowing him to create a new one.

Several days after firing Viers, Baker told attendees at a local Democratic committee meeting that he had fired Viers because his office computer had been wiped clean and he could not use it. He also told the county administrator he fired Viers because she had tampered with his computer.

Viers sued Baker for defamation and intentional infliction of emotional distress. Baker demurred to both claims, and pleaded qualified and absolute prosecutorial immunity under 42 U.S.C. § 1983. The circuit court sustained the demurrers. It concluded that Baker enjoyed absolute immunity from defamation because his statements concerned his office computer. As for the intentional infliction of emotional distress claim, the circuit court held that Viers was an at-will employee and her allegations did not rise to clear and convincing evidence.

The Supreme Court affirmed dismissal of the intentional infliction of emotional distress claim because Baker's conduct was not outrageous or intolerable. All Baker did was lie about his reason for firing Viers. This conduct is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

However, the Supreme Court reversed dismissal of the defamation claim. Virginia law, not federal law, governs questions of absolute immunity. Federal immunity law applies to state officials only when they are subjected to claims under federal law. Here, Baker is not entitled to absolute immunity because there was no claim raised under federal law.

Absolute immunity derives from judicial immunity. Judges are entitled to absolute immunity except when they act in clear absence of all jurisdiction. Other state officials may be entitled to quasi-judicial immunity (but not absolute immunity) if they are: (1) performing judicial functions; (2) acting within their jurisdiction; and (3) acting in good faith.

Quasi-judicial immunity affords absolute immunity to prosecutors from civil liability for acts within the scope of their duties and intimately associated with the judicial phase of the criminal process. Baker is not entitled to quasi-judicial immunity for false statements he made justifying his reason for discharging Viers.

5. ELECTIONS

Townes v. Virginia State Board of Elections, 299 Va. 34 (2020).

The Virginia State Board of Elections ("VSBE") filed a petition to remove the appellants, Townes and Silvestro, from the City of Hopewell Electoral Board. The VSBE's petition alleged that (1) the appellants had failed to fulfill their statutory obligation to hire and supervise a General Registrar; (2) the appellants repeatedly violated VFOIA's open meeting requirements; and (3) the appellants "refused to adhere to recognized standards of fairness and uniformity in preparation of ballots for the November 2018 mid-term election."

At trial, the circuit court, over appellants' objection, instructed the jury to apply a preponderance of the evidence standard in evaluating whether the appellants should be removed from office. Using that standard, the jury found that the appellants had neglected or misused their office or were incompetent and that such neglect, misuse or incompetence had a material adverse effect upon the conduct of the Hopewell Electoral Board.

The appellants appealed; and the Supreme Court granted three assignments of error:

(1) The circuit court erred when it instructed the jury that the Commonwealth's burden of proof was a showing by the preponderance of the evidence as opposed to clear and convincing evidence;

(2) The circuit court erred in allowing the Commonwealth to expand its grounds for removal beyond the grounds pled in the petition by permitting the Commonwealth to introduce the following evidence: evidence that appellants held more than three meetings that did not comply with VFOIA's open meeting requirements, evidence of meeting agendas that were not made available for public inspection, evidence that meeting minutes that were not being created or posted on Hopewell's website; and

(3) The circuit court abused its discretion and erred in excluding the following evidence proffered by the appellants: (1) evidence of training and education the appellants received, (2) the 2018 Virginia Joint Legislative Audit and Review Commission report regarding the Operations and Performance of Virginia's Department of Elections, (3) the 2016 Report from the General Registrar/Electoral Board Working Group, and (4) the political party affiliation of witnesses.

On the first assignment of error, the Supreme Court reversed the circuit court's judgment. The correct burden of proof for removing a public official under the removal statute is clear and convincing evidence, and not preponderance of the evidence, because the proceedings are "quasi-criminal in nature due to the high penalty they impose on a removed official."

On the second assignment of error, the Supreme Court held that the circuit court did not err in allowing the Commonwealth to introduce the evidence identified in assignment of error 2 above. Under the notice pleading standard, a pleading must state the essential facts and legal claims to notify the defendant of the nature of the case. The petition here specified that "on <u>at least</u> three

occasions" the appellants had violated VFOIA's open meeting requirements, and included exhibits that contained additional information regarding these violations. The petition and exhibits gave the appellants sufficient notice of the scope of the VFOIA violations and of the Commonwealth's intent to introduce at least three occasions on which the appellants violated VFOIA.

As to the third assignment of error, the Supreme Court held that the circuit court abused its discretion in excluding some, but not all, of the evidence:

(1) Training. Appellants argued that evidence of their training was relevant because the VSBE is required by statute to train electoral board members and board members are required to take and sign an oath that they "will faithfully and impartially discharge all the duties incumbent upon" them "to the best of" their ability. The Supreme Court agreed, holding that this evidence was relevant to the appellants' defense because it could have shown whether appellants acted reasonably in light of their training.

(2) The JLARC Report. Appellants sought to introduce "any and all policies and procedures developed or implemented" by VSBE following a report by JLARC. That report contained information about the VSBE's training and supervision of local electoral boards, including a noted failure by the VSBE to properly distribute local electoral board job descriptions. The JLARC report outlined circumstances under which the appellants were working, and was therefore relevant to the appellants' defense. The circuit court abused its discretion in excluding this evidence.

(3) The GREB Report. This evidence related to the General Registrar/Electoral Board Workshop ("GREB") and mirrored that of the JLARC report, except that the data on which the GREB was based predated the relevant periods in the case. The circuit court did not abuse its discretion in excluding this evidence.

(4) Political Party Affiliation of Witnesses. Appellants contended that the political affiliation of witnesses was relevant to show prejudice or bias. The Supreme Court held that the circuit court did not abuse its discretion in excluding the evidence because (1) the appellants had not proffered bias at trial and (2) the evidence of political party affiliation was highly prejudicial and was not probative of any claim or defense.

6. EDUCATION

Sosebee v. Franklin County School Board, 299 Va. 17 (2020).

This case involved a dispute between the Franklin County School Board (the "Board") and the Sosebees, who sought to homeschool their children under Code § 22.1-254.1. On July 10, 2017, the Board amended its Home Instruction Policy (the "Policy") to require parents who notify the Board of their intent to homeschool to "provide a certified copy of the students' birth certificate and proof of residency" for students who were not previously enrolled. When the Sosebees submitted their Notice of Intent to Provide Home Instruction for the 2017-2018 school year, the Board requested that proof of residency and a birth certificate be provided as well. The Board also

warned that, without those items, "FCPS does not have enough information to acknowledge the homeschool request and [the Sosebees] will be subject to Compulsory Attendance where Court intervention may be warranted." The Board ultimately determined that the amended Policy would not apply for the 2017-2018 school year because the Sosebees filed their Notice prior to the new policy going into effect on July 10, 2017. The Board stated that the new Policy would apply to the Sosebees for the 2018-2019 school year and future years.

The Sosebees filed a complaint for declaratory judgment and injunctive relief in the circuit court, arguing that the amended Policy was contrary to Code § 22.1-254.1 and *ultra vires*. The Sosebees also sought to enjoin the Board from implementing or enforcing the Policy.

At trial, the circuit court denied the Sosebees' requested relief. It held that the Policy was not contrary to Code § 22.1-254.1, that the Board was given statutory authority to create the policy pursuant to Code § 22.1-78, that the Board's policy was not *ultra vires*, and that it addressed the valid public policy of ensuring that the children monitored by the Board were between the ages of five (5) and eighteen (18) and were residents of Franklin County.

The Sosebees appealed and the Supreme Court reversed. The Court noted that the appeal turned on issues of statutory interpretation, and applied the plain meaning rule to ascertain the General Assembly's intent as expressed by the language it used.

The first sentence of Section 22.1-254.1 makes it clear that this statute sets forth all the requirements parents must meet in order to homeschool their children, and specifies that compliance with those requirements is sufficient to establish "an acceptable alternative form of education" in the Commonwealth. The three requirements in the statute are that the parent: (1) notify the division superintendent of his or her intention to provide home instruction in lieu of school attendance, (2) provide evidence of satisfying one of the criteria for providing home instruction, and (3) submit evidence of the child's educational progress to the division superintendent at the end of the school year.

The Court held that if a parent satisfies these requirements then he or she is statutorily authorized to homeschool his or her child. Since there was no statutory requirement that a parent provide a child's birth certificate or proof of residency, the Court held that the Board's Policy requiring such documentation was inconsistent with Code § 22.1-254.1.

The Court then addressed the trial court's holding that the Board had the authority to establish its Policy pursuant to Code § 22.1-78, which provides that a school board "may adopt bylaws and regulations, not inconsistent with state statutes . . . for the supervision of schools." The Court noted that the authority delegated to school boards under Code § 22.1-78 is limited in nature, and only allows a school board to adopt regulations "not inconsistent with state statutes," and that the Policy was inconsistent with Code § 22.1-254.1. The Court further held that a school board's authority to adopt regulations "for the supervision of schools" means for the supervision of public schools, not homeschools. Accordingly, the Court held that the Board did not have authority to adopt its Policy pursuant to Code § 22.1-78.

The Court reversed the judgment of the circuit court and remanded the case for entry of a judgment declaring that the amended Policy was inconsistent with Code § 22.1-254.1, and for entry of an injunction enjoining the Board from enforcing the amended Policy.

7. EMINENT DOMAIN

Palmyra Associates, LLC v. Commissioner of Highways, 851 S.E.2d 743 (2020).

Following a condemnation proceeding, the circuit court entered a final order confirming an award of $107,131.00 for the taking of unimproved land in Fluvanna County. The landowner, Palmyra Associates, LLC ("Palmyra"), sought a larger award and appealed on three grounds.

First, Palmyra argued the circuit court erroneously excluded site plans showing the development potential of the property. The Supreme Court disagreed. It explained that, although the County approved "the concept" of the ten-year-old plans, formal approval was conditioned on a number of requirements Palmyra had not yet met. Palmyra also needed separate approval to develop the property because it was in a floodplain, as well as additional approval to construct a new entrance to the proposed development. Accordingly, under the circumstances, the Court held that the circuit court did not abuse its discretion by declining to admit the conditional site plans.

Second, Palmyra challenged the circuit court's decision to strike, post-trial, the testimony of David Sutton ("Sutton"), who testified about the damage caused to Palmyra's residual property. The Court rejected this argument, too, because Sutton's testimony was premised on the "contingent and speculative site plans." Because those site plans were inadmissible, the circuit court did not err by striking Sutton's testimony.

Finally, Palmyra argued that, after striking Sutton's testimony, the circuit court erroneously "put[] the parties on terms" by asking them whether they wanted it to confirm the value of the take or order a new trial. The Supreme Court refused to consider this assignment of error because Palmyra never objected to making a choice. Instead, Palmyra agreed that the circuit court should confirm the award rather than grant a new trial. Because Palmyra invited the error, if any, by approbating and reprobating, the Court concluded that it was barred from considering the issue on appeal.

Hooked Group, LLC v. City of Chesapeake, 298 Va. 663 (2020).

A landowner's commercial property had frontage on two roads, a main thoroughfare (Battlefield Boulevard) and a side street (Callison Drive). The side street had been chained off and was rarely used by the landowner for several years. The City of Chesapeake adopted an ordinance that closed Callison Drive to all but emergency traffic for the stated purpose of promoting "the public purposes of protecting the public health, safety and welfare, including without limitation, the restriction of commercial traffic on minor residential streets for public safety purposes . . . ."

The landowner sued, asking the circuit court to declare the road closure a taking and to impanel a jury to determine just compensation. The complaint alleged that the landowner had an easement for direct access "as a property owner abutting Callison Drive," that the entrance "was necessary

to serve as a secondary ingress or egress" to the property, and that the closure of the entrance had a "substantial negative effect on the value" of the property.

The City demurred on the grounds that the landowner had not stated a claim for inverse condemnation. The circuit court sustained the demurrer, concluding that the landowner's right of access had not been taken because the landowner retained access to Battlefield Boulevard, a "major public highway." The landowner appealed, arguing that it was entitled to compensation for the closure under Supreme Court precedent and Article I, § 11 of the Constitution of Virginia.

The Supreme Court affirmed. The circuit court properly sustained the demurrer because the landowner's complaint did not allege, nor could a fact finder reasonably infer, that the City had deprived the landowner of reasonable access to the property. Landowners are not entitled to access their property from a specific location; rather, they are entitled only to reasonable and adequate access. In *State Hwy. & Transp. Comm'r v. Linsley*, 223 Va. 437 (1982), the Supreme Court held that the "extinguishment of easement of abutting landowners upon the conversion of a conventional highway to a limited access highway" was compensable. The Supreme Court has also previously held that the dividing of a four-lane highway with a median so as eliminate access to a property that was also served by another two-lane highway could be a taking if the fact finder determined that the remaining access was unreasonable. The facts plead here would not permit an inference of a loss of reasonable access to the landowner's property because the landowner retained access to a major public highway.

The landowner also contended that the closing of Callison Drive was a taking under the 2012 amendment to the Virginia Constitution and subsequent implementing legislation (Code §§ 25.1-100 and 25.1-230.1). Under the statutes, if a landowner suffers a "material impairment of direct access to property," that loss is compensable, even if the landowner retains reasonable access. The Supreme Court summarized the analysis with the following steps: "(1) does the landowner retain reasonable access to the property following a taking . . . ; and (2) even if the remaining access is reasonable, has the landowner suffered a loss of access that is (a) direct, i.e. indirect loss of access is not compensable, and (b) material, i.e. significant, essential, or of real importance?" Although the landowner's loss of access to Callison Drive was a direct loss of access, it was not a "material impairment" within the meaning of Code § 25.1-100 because the complaint did not allege that the loss of access via Callison "was of real importance or great consequence or that it was significant or essential."

Johnson v. City of Suffolk, 851 S.E.2d 478 (2020).

The plaintiffs leased oyster grounds in the Nansemond River from the Commonwealth for the purpose of raising oysters. The plaintiffs alleged that the City and Sanitation District polluted the waters so much that Virginia Department of Health closed the polluted parts of the river to the harvesting of oysters, thereby preventing plaintiffs from properly managing and using their oyster ground leases, harvesting their oyster property, planting oysters, and otherwise using and enjoying their property.

The plaintiffs brought inverse condemnation claims against the City of Suffolk and the Hampton Roads Sanitation District on the grounds that their discharges of pollutant caused closures to their property and prevented them from using their property. The City and Sanitation District filed

demurrers, which the circuit court granted. The plaintiffs appealed, and the Supreme Court affirmed.

The Supreme Court previously held in *Darling v. City of Newport News*, 123 Va. 14 (1918), *aff'd*, 249 U.S. 540 (1919), that oyster farmers could not recover in eminent domain for damages to their oysters caused by pollution from a governmental entity. In *Darling*, "a claim that is virtually indistinguishable from the plaintiffs' claim here," the Court had held that the only right a leaseholder had was to plant and propagate oysters in that location, to the exclusion of others. In affirming, the US Supreme Court reasoned that there was no taking under the Fifth Amendment because the lease owner leased the oyster grounds subject to "the risk of the pollution of the water."

The Supreme Court declined to revisit this ruling even in light of significant changes to laws designed to protect the environment; although environmental law is more robust now than it was in 1919, the scope of property rights the plaintiffs possessed had not changed since *Darling* was decided.

The plaintiffs had no legally cognizable property interest under the takings clauses of the US and Virginia Constitutions. Property rights come from state law. The Commonwealth owns the bottomland, and a lessee does not own the bottomland or have the right to control the waters that flow over them. The statutory scheme under which plaintiffs hold leases provide only limited rights. First, the plaintiffs' leases confer on them the right to physically occupy state-owned bottomland and to exclude others. Second, the leases confer the right to physical possession and harvesting of the oysters raised on the leased grounds, to the exclusion of others. Third, there is a distinction between the water bottoms and the water itself. The plaintiffs do not own or control the waters that pass over the leased oyster grounds. Fourth, the governing statutes, case law and leases do not confer a right to grow oysters in conditions free of pollution or guarantee a lessee a commercially viable oyster lease. To the contrary, the governing statutes contemplate the condemnation of polluted growing areas and oysters when sanitary conditions render the oysters unhealthy for human consumption.

Accordingly, a lessee who is granted a lease under Code § 28.2-603 assumes the risk that the waters surrounding the leased grounds will be insufficiently pure to permit the direct harvest of shellfish from them. The Court therefore held that the limited rights plaintiffs acquired when leasing state-owned bottomlands doomed their takings claim.

8. EVIDENCE

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

Samantha Shoemaker rear-ended Deborah Graves' vehicle, causing her injury. Shoemaker was insured by State Farm. Graves sued Shoemaker for $150,000.

Shoemaker's attorney engaged Dr. William C. Andrews, an orthopedic surgeon, to review Graves' medical records and prepare a report. He opined that Graves had a minor injury and that much of

her pain was caused by pre-existing conditions. Dr. Andrews charged $3,362 for work that was paid by State Farm.

Graves filed a motion in limine seeking permission to introduce evidence that Dr. Andrews had testified on behalf of defense counsel's clients 30 or 35 times in the past 10-12 years, that on only one of those occasions did he testify on behalf of a plaintiff, and that State Farm had paid him almost $800,000 for testimony he provided for their insureds from 2012 – 2018. The circuit court ruled that the plaintiff could not question Dr. Andrews about his prior work for State Farm because there was no "direct relationship" between Dr. Andrews and the insurance company: State Farm did not hire Dr. Andrews and Dr. Andrews did not know State Farm would pay his bill when he wrote his report. Thus, Graves could only explore the number of times Dr. Andrews had testified for defense counsel's clients.

Shoemaker admitted fault, and the case was tried to a jury on the issue of damages. Dr. Andrews was the sole defense witness at trial. Graves introduced evidence of medical bills in excess of $26,000. The jury returned a verdict for Graves in the amount of $3,000, plus interest. The circuit court denied Graves' motion for a new trial based on the pre-trial ruling.

The Supreme Court vacated the judgment. It found that the circuit court misinterpreted *Lombard v. Rohrbaugh*, 262 Va. 484 (2001), which held that a plaintiff was permitted to cross-examine a defense expert hired directly by the defendant's insurance company about more than $200,000 in payments the expert received from the insurance company for testifying in prior cases. The cross-examination was proper because "there is a substantial relationship between the witness and a particular insurance carrier that has a financial interest in the outcome of the case." *Id.* at 496. In determining whether there is a "substantial relationship" between an insurer and an expert, the focus is on the "potential for bias because of the witness's interest in the case." *Id.*

Here, the circuit court erred in requiring a "direct relationship" between Dr. Andrews and State Farm. It is not necessary that an insurer directly hire an expert to establish a "substantial relationship"; that is just one of many factors that a court may consider. 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" because it creates a potential for bias that outweighs any potential harm from the mention of insurance to a defendant, as it did here. And a court may give a limiting instruction to mitigate any potential prejudice to the defendant.

Although Dr. Andrews testified that he was not aware that State Farm would benefit from his testimony when he authored his report, the jury was entitled to consider the credibility of his assertion. The case was remanded for further proceedings.

9. GARNISHMENT

Jones v. Phillips, 850 S.E.2d 646 (2020).

Terry and Cathy Phillips, a married couple, owned their marital home as tenants by the entirety until 2010 when they retitled the property in the names of separate, revocable trusts as tenants in

common. In 2018, the residence was severely damaged by fire. The residence was covered by a Chubb insurance policy that named Terry as the named insured and policyholder. Cathy was included as an additional insured by virtue of her status as Terry's spouse. The policy provided that, in the case of Terry's death, Chubb would cover his spouse until a legal representative is appointed and qualified.

Andrea Jones sought to collect a civil judgment she obtained against Terry by filing an action to garnish the insurance payments from Chubb. Terry and Cathy moved to quash the garnishment. The circuit granted the motion to quash and dismissed the garnishment proceeding on the grounds that Code §55.1-136(C) protected the insurance payments from garnishment as "proceeds of the sale or disposition" of property owned by the trusts. The court did not address the Phillips' alternative argument that a contractual right to the insurance payments constituted intangible personal property owned by them as tenants by the entirety, and therefore these payments could not be seized by a judgment creditor of only one of them. Jones appealed, and the Supreme Court reversed.

In a question of first impression, the Supreme Court held that the insurer's payments on the insurance policy were not immune from garnishment as "proceeds of the sale or disposition" of property held in trust under Code §55.1-136(C). Absent a common-law or statutory exemption, insurance payments are not exempt from garnishment. Code §55.1-136(C) provides immunity to "any proceeds of the sale or disposition" of tenancy-by-the-entirety property conveyed to trusts, thus granting those proceeds immunity as if they were tenancy-by-the-entirety property.

The parties agreed that the marital home was not "sold." By examining the ordinary legal meaning of the word "disposition," as used in this context, a majority of the Court concluded that the insurance payments were not proceeds of a "disposition" of the residence. A "disposition" in this context means the act of transferring something to another's care or possession or the relinquishing of property. No disposition of the house ever occurred because the fire was not an act of transferring the property to the insurer or to anyone else.

On the second issue, which presented another question of first impression, the Supreme Court held that Terry and Cathy did not own a contractual right to the insurance payments as tenants by the entirety with the common-law right of survivorship. Terry was the sole policyholder on the Chubb policy and the only named insured. Although Cathy was an unnamed insured spouse, thereby giving her a contractual interest in the payments, a tenancy by the entirety cannot exist unless the parties manifest some intent to create it. Because no provision of the Chubb policy used the terms "tenants by the entireties" or "right of survivorship," the policy cannot be construed to say that upon Terry's death the entire insurance payout would go solely to his spouse and not to his estate.

Dissent (Goodwyn, Mims, and Powell): The insurance payments owed to a husband and wife because of the fire loss of property are entitled to immunity under Code § 55.1-136(C) and are exempt from garnishment by a separate creditor of one of the spouses. The majority fails to consider all of the definitions of "disposition," including a "final settlement or determination," and also relies on a Black's Law Dictionary definition that no one in the case cited or relied on. But given the broadly varying definitions of the term "dispositions," its use in Code § 55.1-136(C) is ambiguous.

Given this ambiguity, the dissent examines the historical underpinnings of Code § 55.1-136(C). In the context of this statute, "disposition" includes proceeds of any type of disposition, including payments of insurance claims and damage judgments. The marital home was literally disposed of when it was consumed by fire. Chubb was required to pay both Terry and Cathy for the value of their lost property under the contract, and did in fact make several payments to both of them, wiring the money to an account held by them as tenants by the entireties.

10. GOVERNMENT DATA COLLECTION AND DISSEMINATION PRACTICES ACT

Neal v. Fairfax County Police Department, 299 Va. 253 (2020).

This appeal marked the closing chapter of a litigation saga about the Fairfax County Police Department ("Police Department") and its use of what is known as an Automated License Plate Recognition ("ALPR") system. The case as a whole hinged on one question: Is the ALPR system an "information system" within the meaning of the Government Data Collection and Dissemination Practices Act, Code §§ 2.2-3800 through -3809 ("Data Act")? The plaintiff argued that it is, and filed suit to enjoin the Police Department from using the system to passively collect and store license plate data without suspicion of criminal activity. After five years of litigation, and an intervening appeal, the Supreme Court concluded that the ALPR is not proscribed by the Data Act.

The circuit court initially entered summary judgment in favor of the Police Department after concluding that the data stored within the ALPR system did not constitute "personal information" under the Data Act. The plaintiff appealed and, in the first appeal, prevailed. The Court held that the data qualified as "personal information" because the ALPR system captures and stores images of vehicles, including their license plates and surroundings, as well as the GPS location, time, and date of each image captured. That holding, however, was not dispositive because the Data Act only applies to "information system[s]" that contain *both* "personal information" *and* "the name, personal number, or other identifying particulars of a data subject." The Court consequently remanded the case for a determination of whether "the total components and operations of the ALPR record-keeping process provide a means through which a link between a license plate number and the vehicle's owner may be readily made."

On remand, the circuit court found that the ALPR system does not, alone, include the name or other information about the person associated with the licenses plate stored therein. The Police Department instead has cross-referenced other databases, which it does not maintain, to link each license plate with the vehicle owner. This process requires "no less than two computer programs and three passwords to complete." Nevertheless, the circuit court found that the ALPR system provides a link through which the vehicle owner can be readily identified. The circuit court consequently held that the ALPR system constituted an "information system" under the Data Act, and enjoined the Police Department from further use of the system.

The Police Department appealed and, in the second (and final) appeal, ultimately prevailed. The Court held that the ALPR system is not an "information system" because it does not include *both* "personal information" *and* "the name, personal number, or other identifying particulars of a data subject." This is because the Police Department cannot link the two without accessing separate databases maintained by separate agencies. The Court therefore reversed the circuit court's judgment, dissolved the injunction, and entered final judgment in favor of the Police Department. And it did so with a humble reminder: "In resolving this case, our task is not to reach the right public policy balance by weighing competing demands for efficiency and security against considerations of privacy. Our duty is more modest: we must determine from the text and structure of the Data Act where the legislature has drawn the line."

11. INSURANCE

Erie Insurance Exchange v. Alba, 298 Va. 673 (2020).

At issue in this fire damage case is whether a condominium association's insurer waived subrogation under Code § 38.2-207 against the tenant of an individual condominium unit owner. The circuit court ruled that the insurer waived subrogation against a unit owner's tenant. The Supreme Court reversed.

In February 2015, a fire broke out at property managed by Chimney Hill Condominium Association ("CHCA"). The fire began in a unit owned by John Sailsman and leased from him by Naomi Alba. The allegations are that Alba carelessly discarded smoking materials that caused the fire. CHCA had an insurance policy with Erie (the "Policy"), which covered "damage to the building structures in the event of fire." The Policy lists CHCA as the named insured and "each individual unit owner of the insured condominium" as additional insureds, and waives "any right of recovery [Erie] may have against the additional insured" or CHCA.

CHCA's governing documents require CHCA to obtain exactly this sort of policy, and also advise unit owners that they are free to purchase additional insurance. Copies of the CHCA governing documents, including by-laws and other information regarding care and maintenance of the units, common areas, etc., were provided to Alba when she leased the unit.

As a result of the fire, Erie paid out over $820,000 to CHCA or for CHCA's benefit. Erie then sued Alba to recover these payments. The parties filed cross-motions for summary judgment, but as there was a factual dispute (not discussed in the opinion, but the issue was presumably the cause of the fire), the motions were converted to motions for declaratory judgment to determine the application of the Policy to the parties.

The circuit court granted Alba's motion for declaratory judgment. Relying on CHCA's bylaws and other governing documents, the court found that the intent of the parties was that Alba, as a tenant, was "bound by all the requirements of an owner under the condominium instruments," and was entitled to the same benefits as an owner, including the subrogation waiver.

The Supreme Court disagreed. The "actual terms of the agreed upon coverage—including the rights and obligations of the parties involved—can only be found in the binding agreement between [CHCA] and Erie as contracting parties." Here, the language of the Policy is clear and unambiguous. So, looking outside the Policy as the circuit court did is unnecessary to determine the intent of the parties. The Policy was clear that the waiver applied only to CHCA and its unit owners, not tenants or other third-parties.

Accordingly, the Court reversed and remanded, holding that Alba was not an "implied insured" subject to the waiver, and the clear, unambiguous language of the Policy governed.

Wood v. Martin, 299 Va. 238 (2020).

John Wood ("Wood") and Tracey Martin ("Martin") were divorced in 2010. The property settlement agreement, incorporated into the final divorce decree, contained a provision requiring Wood to maintain a preexisting $1.5 million life insurance policy to which Martin would be a "50% beneficiary in the unencumbered amount of $750,000." Two days before committing suicide in 2017, Wood changed the beneficiaries, removing Martin and allocating the proceeds to his current wife, two brothers, and a friend (together, the "New Beneficiaries").

Martin submitted a claim against the policy. She then filed suit against the New Beneficiaries, the insurance company, a bank, Wood's estate, and various trustees. The insurer interpleaded the $750,000 at issue, and the only issue for the trial court to decide was which party had the superior claim to the interpleaded $750,000 res.

The circuit court determined that Martin's claim to the $750,000 was superior and awarded her the proceeds. The New Beneficiaries appealed and the Supreme Court affirmed.

The New Beneficiaries presented two principal reasons why their claim to the $750,000 was superior: 1) Code § 38.2-3122(B) bars Martin's claims to the insurance proceeds because she is a "creditor" and the statute protects insurance proceeds from creditors, and 2) Martin's claim is precluded because the divorce decree contains language limiting her sole remedy to a breach of contract action against Wood's estate.

On the first point, the Court looked to a subsection of the cited statute containing an exclusion for claims "by a creditor with respect to a life insurance policy . . . that was . . . assigned in writing for the benefit of the creditor." Code § 38.2-3122(C). The Court determined that Martin's claim to the $750,000 is based on an equitable assignment created when the divorce court ratified the property settlement agreement and divorce decree. Accordingly, the divorce decree gives Martin the sort of written assignment contemplated in Code § 38.2-3122(C).

The Court pointed to two maxims of equity. First, "[e]quity regards that as done which ought to be done." The divorce court's order that Wood maintain the life insurance policy with Martin named as a 50% beneficiary is what "ought to be done" and is, therefore, done. Second, "where there are equal equities the first in order of time shall prevail" unless a later claimant is a bona fide holder for value without notice of the prior assignment. Here, the Court found Martin was first in

time and there was no bona fide transfer of the assignment for value that would overcome her first-in-time claim.

On the second issue, a closer reading of the divorce decree demonstrates that the language relied on by the New Beneficiaries to limit Martin's remedies to solely a contract claim against Wood's estate does not so limit Martin. The provision is a common clause in many contracts and provides that, in the event either party to the property settlement agreement dies and has not complied with its insurance provisions, the insurance death benefits "shall become a charge against the decedent's estate in favor of the other party." The Court focused on the boilerplate nature of the clause, the fact that "shall become a charge" was not "shall *only* become a charge," and the fact that the clause did not specifically limit any remedies. In other words, the clause did not clearly demonstrate an intent between the parties that a contract claim against Wood's estate is the *exclusive* remedy. Nothing in the property settlement agreement or divorce decree limited Martin's right to pursue an in rem claim against an interpleaded res.

Accordingly, the Court affirmed the circuit court's ruling awarding Martin her 50% share of the life insurance proceeds.

12. LOCAL GOVERNMENT

***City of Charlottesville v. Payne*,** 2021 Va. LEXIS 25, 2021 WL 1220822 (2021).

In 2017, the Charlottesville City Council approved resolutions to remove the statue of Robert E. Lee from Lee Park, to rename and redesign Lee Park, and to support the renaming, redesign and transformation of Jackson Park where a statue of Stonewall Jackson was erected. Later, the City covered both statues with black tarps, and approved a resolution to remove both statues from their respective parks.

The land for the Lee and Jackson parks was donated to the City in 1918 for the purpose of erecting the Lee and Jackson statues, and the City erected the statues in 1924 and 1921 respectively.

A group of citizens and others filed a complaint against the City of Charlottesville, the City Council, and its elected officials to enjoin the City from removing or covering the Lee and Jackson statues and from redesigning or renaming the parks. They maintained that statues were protected by the Code §15.2-1812, which authorized cities to erect war memorials and monuments and prohibited disturbing them. They also relied on Code §15.2-1812.1, which creates a cause of action for violation of Code §15.2-1812 and the payment of damages, costs and fees, and on Code §18.2-137, which provides for criminal punishment for injuring any monuments or memorials identified in Code §15.2-1812.

The City demurred, arguing that Code §15.2-1812, which was enacted in 1997, was not in existence at the time the statues were erected and did not apply retroactively to statues erected by cities before 1997. However, the circuit court agreed with Plaintiffs and found the statutes applicable to the Lee and Jackson statues. It reasoned that the legislature must have intended that all of the previously-erected statues to the wars enumerated in Code §15.2-1812 be protected under

that statute and that it would be an absurd result to hold otherwise because the previously-erected statues would far outnumber the prospective statues that could be dedicated to wars from long ago.

The Supreme Court reversed. In a question of first impression, the Court held that Code §15.2-1812 does not apply retroactively to statues erected before Code §15.2-1812 was enacted. Virginia law disfavors the retroactive application of statues. Rather, statutes must be construed to operate prospectively unless a contrary intention is manifest and plain. No such intention is evident in Code §15.2-1812. The plain language of the statute, which uses the present tense, indicates that it applies prospectively only. It states that a "locality may" erect war memorials and provides that "if such" are erected, then it shall be unlawful to disturb or interfere with "such" statues, meaning statues erected pursuant to the authority provided in Code §15.2-1812.

Prior to 1997, no war monuments erected by localities, except counties (which were covered by a predecessor to Code §15.2-1812) were subject to a general statute that prohibited such monuments from being moved or covered. It was not absurd for the General Assembly not to provide such protections to those monuments prior to 1997. An absurd result describes an interpretation that results in the statute being internally inconsistent or incapable of operation. Interpreting Code §15.2-1812 to protect statues erected in the future, but not to those erected in the past, would not result in a law that was internally inconsistent or incapable of being applied.

Dumfries-Triangle Rescue Squad, Inc. v. Board of County Supervisors, 299 Va. 226 (2020).

The Supreme Court considered whether the Board of Supervisors of Prince William County (the "Board") had authority to dissolve the corporate status of Dumfries-Triangle Rescue Squad ("DTRS"), a Virginia non-stock corporation organized under Title 13.1 of the Virginia Code. The Court held that the Board was not entitled to dissolve DTRS because the plain language of Code § 32.1-111.4:7(D) only authorized the Board to dissolve "[a]n emergency medical services agency *established pursuant to this section* . . . ." and DTRS was not "established pursuant to" Code § 32.1-111.4:7.

DTRS was established in 1959 to provide emergency medical and first aid instruction services. DTRS also entered into various contracts with the Board to provide emergency medical services for Prince William County, in exchange for public funds. When the Board formally established the Prince William County Fire and Rescue System, the Board discontinued its contracts with DTRS and sought to dissolve DTRS pursuant to Code §§ 27-10 and 32.1-111.4:7(D).

The circuit court held that the Board "ha[d] plenary power to" dissolve the "corporate entity itself" because Code § 32.1-111.4:7(D) gave the Board "the plenary power to dissolve the corporate existence of a volunteer emergency medical services agency or rescue squad, incorporated pursuant to Chapter 10 of Title 13.1 Va. Code, Ann., which operates under the authority of the Board, pursuant to § 32.1-111.4:7." In addition, because DTRS was "[a] non-stock corporation set up to provide rescue services to the public under the laws of Virginia [it] cannot exist without the approval of the Board . . . [and] was, therefore, subject to the corporate dissolution authority of the Board pursuant to § 32.1-111.4:7(D)."

On appeal, the Supreme Court reversed. The Dillon Rule of strict construction controls determination of the powers of local governing bodies. The Code section relied upon by the Board expressly limited the Board's authority to dissolve to "emergency medical services agenc[ies] *established pursuant to this section . . . .*" Thus, the Court concluded that "a local governing body, like the Board, may only dissolve an emergency medical services agency if it was "established pursuant to" that Code section. Here, DTRS was *not* established pursuant to Code § 32.1-111.4:7 but rather, established under Title 13.1. Accordingly, the Board could not rely on § 32.1-111.4:7 to dissolve DTRS's corporate status. In so holding, the Court concluded that the plain language of the statute precludes the Board's claimed authority by necessary implication.

In addition, the Court considered whether DTRS was the type of entity that is subject to dissolution under Code § 32.1-111.4:7. The Court looked to the definition of an "emergency medical services agency" or "EMS agency" under that section. DTRS performed services that exceeded the scope of those encompassed within the definitions. Accordingly, the Court found that the only service entered into "pursuant to" Code § 32.1-111.4:7(D) was its provision of emergency medical services and "that was the only aspect of its operations that the Board could dissolve." Thus, the Board had no express authority to dissolve DTRS's corporate status.

Finally, the Court considered the Board's argument that it had power to dissolve DTRS because DTRS was organized "consistent with" Code § 32.1-111.4:7. The Court concluded that the plain language of Code § 32.1-111.4:7 defeated that proposition.

13. PARTITION

Berry v. Fitzhugh, 299 Va. 111 (2020)**.**

This case involves a sibling property dispute. Five siblings had an equal interest in property they inherited from their mother. One sibling lived in the basement apartment of the house on the property, while two other siblings lived in the main part of the house at different times. Two of the siblings who lived at the property paid to maintain and care for the property.

Marsha Berry, one of the siblings who did not live on the property, brought a partition suit, naming her other siblings as defendants. The circuit court ordered the sale of the property and further ordered that the siblings split the proceeds of the sale equally. Berry and two of her siblings who opposed the suit were represented by counsel, while two other siblings who did not oppose the suit appeared *pro se*.

The issues for appeal arose out of Berry's requests: (1) to split attorney's fees with her unrepresented siblings; (2) to split the costs of her suit equally among the siblings; and (3) to collect fair market rent from the siblings who lived in the house. The circuit court denied these requests, and Berry appealed.

First, with regard to her request to split attorney's fees with the unrepresented siblings, Berry relied on Code § 8.01-29, which states that in a partition suit, "the court shall allow reasonable fees" to the plaintiff's attorney "on account of the services rendered to the parceners unrepresented by counsel." Berry argued that the word "shall" in the statute required the trial court to grant fees. The

Supreme Court disagreed, noting that "shall" is permissive or mandatory depending on "subject matter and context." The Court held that the plain language of the statute only allows fees for "services rendered" to the unrepresented parties, and the circuit court unequivocally found that no services were rendered to the unrepresented parties in the partition suit. Therefore, Berry was not entitled to split the fees with the unrepresented parties.

Second, Berry was not entitled to split the costs of her case with the siblings under Code § 8.01-31, which states: " An accounting in equity may be had against any fiduciary or by one joint tenant, tenant in common, or coparcener for receiving more than comes to his just share or proportion, or against the personal representative of any such party."

Because a court sitting in equity has the discretion to award costs, the standard of review is abuse of discretion. Most of Berry's claims were related to her attempt to collect rent from the siblings who lived at the property, a claim the circuit court denied. As a general rule, a court does not abuse its discretion by refusing to apportion costs to an opposing party for unsuccessful claims.

Finally, the Court affirmed the trial court's decision not to award Berry the fair rental value of the property. The circuit court denied the claim for rent because (1) the evidence was insufficient to show Berry or other siblings were excluded from the property; (2) the siblings never had any formal agreement regarding rent; and (3) two of the siblings who lived in the property testified that they paid for maintenance and care of the Property. Berry appealed only the first basis for the denial. The Court first noted that its review was limited to a determination of whether the first basis "provides a sufficient legal foundation for the ruling." The trial court found that any money spent by the two siblings on maintenance and care offset any rent they may have owed to the other siblings. That finding provided the Court a separate and independent basis to affirm the trial court's ruling, which it did.

14. PRACTICE AND PROCEDURE

A. Discovery

Galloway v. County of Northampton, 2021 Va. LEXIS 26, 2021 WL 1220722 (2021).

Taxpayers brought suit against the County of Northampton and the Town of Cape Charles ("the County") alleging that their real property was overvalued in a recent tax assessment. The circuit court excluded two expert witnesses for the Taxpayers and dismissed the case. Finding that the circuit court abused its discretion in excluding one of the experts, the Supreme Court reversed.

In April 2015, the Taxpayers disclosed in an interrogatory that they would call Jason Restein as an expert witness and disclosed the substance of his opinion in an attached exhibit. In March 2019, shortly before trial, Taxpayers' counsel realized that he had failed to sign the signature blanks on the interrogatory answers, although he had signed the discovery responses once at the end of the

document and again after the certificate of service. Upon discovering the omission, he promptly signed the empty signature blanks and filed the corrected document.

In January 2019, the Taxpayers responded to a supplemental interrogatory concerning their expert witnesses by identifying Steve Noble as an expert witness and stating that they would elaborate their response by January 18, 2019 pursuant to an extension the County had provided. However, they did not supplement the response or provide the substance of Noble's testimony until two months later, well beyond the deadline for such disclosure in the Pretrial Scheduling Order ("PTSO").

The County moved to exclude Restein and Noble and dismiss the case. They argued that Restein's disclosure was insufficient because the interrogatory response was not signed by an attorney before the expert disclosure deadline set forth in the PTSO. As to Noble, the County argued that his disclosure was untimely. The circuit court agreed and dismissed the case (because the Taxpayers agreed that they could not prove their case without expert testimony).

On appeal, the Supreme Court held that the circuit court abused its discretion in excluding Restein. Taxpayers' counsel's signatures at the end of the discovery responses, together with his notarized and sworn signature satisfied the requirement of Rule 4:1(g) ("[e]very request for discovery or response or objection thereto made by a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name, whose address must be stated.")

But the circuit court did not abuse its discretion in excluding Noble. The Taxpayers failed to disclose his opinions until two months after the deadline set forth in the PTSO, which specifically warned that a party that fails to comply would "ordinarily not be permitted" to use the undisclosed opinion at trial. It made no difference that the PTSO was entered the same day as the disclosure deadline or that Taxpayers invited the County to depose Noble.

B. Statute of Limitations

Mackey v. McDannald, 298 Va. 645 (2020).

Nelson Mackey was a partner in the law firm of Dodson, Pence, Viar, Woodrum & Mackey from 1987 to 1995. When Mackey left the firm, the remaining partners changed the name to Dodson, Pence & Viar. At all relevant times, the firm provided health insurance through Trigon Health Care. In 1997, Trigon converted from a mutual to a stock corporation and issued stock to the firm's former name. Trigon did not issue, and the firm never received, the stock certificates or book entry receipt.

By 2001, two of Mackey's former partners had died. In 2002, another former partner, Viar, wrote a bank about the stock. A letter from the bank indicated that 683 shares worth about $64,000 had been issued to the firm in 1997. Viar took no further action before his death in October 2002.

While working to close down the firm, a long-time administrative employee contacted Mackey about the stock. Mackey obtained firm documents, including Viar's correspondence with the bank. Mackey later changed the firm's mailing address to his residential address.

Michael Quinn, a former associate for the firm, assisted Mrs. Viar with her husband's estate. Quinn discovered Viar's letter to the bank, but not the bank's reply, so he did not know the value of the stock. Quinn and Mackey discussed the stock on several occasions, and Mackey told Quinn: "I have looked into it. There is not enough money involved." Quinn had enough information to determine the value of the stock, but he did not do so because he trusted Mackey.

In 2009, Mackey liquidated the stock. He created letterhead in the name of the former firm and with his personal contact information, on which he directed the transfer agent to send the proceeds to that address. Mackey received about $98,000, which he deposited into an account he and his wife controlled. He did not inform Quinn or the widows of his former partners about the stock, although he understood that it was a partnership asset. In November 2015, Quinn found the 2002 letter from the bank to Viar, and eventually learned that Mackey had liquidated the stock in 2009.

In December 2015, the executors of the three estates sued Mackey for conversion. Mackey filed a plea in bar of the statute of limitations; in response, the executors argued that the limitations period was tolled under Code § 8.01-229(D). Following a bench trial, the circuit court found that Mackey converted the stock, and that Code § 8.01-229(D) tolls the limitations period even if no cause of action has accrued at the time of the misrepresentation. It further held that the tolling applied to all of the estates even though Mackey only talked to Quinn, who represented Viar's estate. The court therefore entered judgment for the executors for $259,212 in compensatory damages and $100,000 in punitive damages. Mackey appealed.

The Supreme Court affirmed in part, reversed in part, and remanded.

Conversion claims must be brought within five years after the cause of action accrues. Code § 8.01-243(B). Because Mackey sold the stock in 2009, but suit was not filed until 2015, the suit is time-barred unless the limitations period is tolled. A plaintiff relying on Code § 8.01-229(D)'s tolling provision must establish that the defendant undertook an affirmative act designed or intended, directly or indirectly, to obstruct the plaintiff's right to file the action. An act that relieves the bar of the statute of limitations must be of that character which involves moral turpitude and must actually deter the plaintiff from filing the action.

The focus of Code § 8.01-229(D) is the defendant's intent, and not the timing of the obstructive actions. Therefore, in a question of first impression, the Court held that Code § 8.01-229(D) operates to toll the limitations period whenever 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.

Under this standard, Mackey's misrepresentation to Quinn was sufficient to toll the statute of limitations as to Mrs. Viar until Quinn learned of the stock's value in 2015. Mackey's misrepresentation that the stock was not worth pursuing was an act that involved moral turpitude and caused Quinn not to pursue the stock. However, Mackey only made the misrepresentation to Quinn, and demonstrated no obstructive intent as to the other estates. As mere silence is not sufficient to toll the limitations period, Code § 8.01-229(D) does not toll the limitations period for the other estates.

The circuit court correctly held that Mackey committed conversion. Conversion is any wrongful exercise or assumption of authority over another's goods, depriving him of their possession; and any act of dominion wrongfully exerted over property in denial of the owner's right or inconsistent with it. To show a conversion of intangible property, the plaintiff must have both a property interest in and be entitled to immediate possession of documented intangible property. Mrs. Viar had an immediate right to possess the stock to complete her duties as executor. And Mackey had no right to possess the stock because he had no interest in the dissolved firm which owned the stock.

C. Motions Craving Oyer

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

In one of the year's most-watched cases, the Supreme Court held that a defendant may use a motion craving oyer to make the legislative record of a local government proceeding part of the complaint when that record is essential to the claim.

Byrne had a dispute with the Alexandria Board of Architectural Review ("BAR") concerning renovations to his property (specifically a fence along the front of the property) located in the Historic District of Alexandria. The BAR approved a "Certificate of Appropriateness" regarding the materials and design of the fence, but with conditions regarding the width and location of the gate.

Byrne appealed to City Council which, after a hearing, approved BAR's decision. An appeal then followed to the circuit court. The City filed a demurrer and a motion craving oyer of the legislative record that was before the City Council when it made its decision. The circuit court granted the motion craving oyer, and then granted the demurrer. Byrne appealed.

The Supreme Court affirmed both decisions. Reviewing the history of motions craving oyer, the Court recognized that at early common law, oyer was only available to compel the production of deeds, writs, bonds, letters of probate and administration and other documents under seal. However, the Supreme Court has expanded the remedy to include production of a much wider range of documents (for example, an indictment, an Act of Assembly, an arbitration award, an appellate record, and pleas filed in another criminal case).

A motion craving oyer should be granted only where the missing document is essential to the claim. When a court is asked to make a ruling on any paper or record, it is its duty to require the pleader to produce all material parts. Therefore, the circuit court did not err in granting oyer of the legislative record.

Nor did the circuit court err in sustaining the demurrer. A city's legislative determinations are presumed correct and will be sustained if the issue is "fairly debatable." As reasonable and objective persons might have reached different conclusions with regard to the architectural and

historical appropriateness of the width and placement of Byrne's proposed gate, that issue was fairly debatable.

D. Misnomers

Hampton v. Meyer, 299 Va. 121 (2020).

The question in this case was whether the misidentification of the defendant in a complaint was a misnomer or a misjoinder. The majority held that it was a misnomer; the dissent would have found it to be a misjoinder.

Calvin Hampton was a passenger in a vehicle that was struck when a 1997 GMC Suburban ran a red light on December 24, 2016. On December 11, 2018, Hampton filed a complaint against Michael Meyer, who was identified in the police accident report as the driver of the Suburban. The complaint alleged that Hampton's injuries were caused by the negligent operation of the Suburban. The complaint asserted no claim against the owner of the Suburban, who was listed in the accident report as Patricia Meyer.

On January 18, 2019, Hampton learned from the defendant's insurance carrier that Michael Meyer's son, Noah Meyer, had been driving the Suburban at the time of the collision. Michael was actually the co-owner of the vehicle. One month later, Hampton nonsuited the complaint and filed a new complaint against Noah, explaining that he had relied on the erroneous police report.

Noah filed a plea in bar asserting that the complaint was time-barred. Hampton argued that under *Richmond v. Volk*, 291 Va. 60 (2016), this was a misnomer and that Code §8.01-229(E) tolled the limitations period. The circuit court sustained the plea in bar and dismissed the case.

The Supreme Court reversed. A misnomer occurs where the proper party to the action has been identified, but incorrectly named. Misjoinder, on the other hand, arises when the person or entity identified by the pleading was not the person by or against whom the action could or was intended to be brought. The key distinction is whether the incorrectly named party in the pleading is, in fact, a correct party who has been sufficiently identified in the pleadings, considering them as a whole.

In *Volk*, an automobile negligence case, the plaintiff coupled the driver's first name with the owner's surname. In a 4-3 decision, the Supreme Court held that this was a misnomer because the complaint, read as a whole, contained sufficient allegations to identify the proper party defendant even though the incorrect name had been used. Similarly, Hampton's complaint correctly identified the driver as the person who negligently operated the vehicle and Hampton intended to bring this action against the driver, but just used the wrong name. Further, nothing in the complaint alleges a cause of action against the owner of the vehicle. Nor did Noah allege any prejudice to him from Hampton's good-faith reliance on the police report.

The statute of limitations was tolled when Hampton took a nonsuit to cure a misnomer. The *Volk* Court rejected Noah's argument that Code §8.01-6 is the only procedure to use to correct a

misnomer, and held that Code §8.01-229(E) tolled the limitations period when a nonsuit is taken to cure a misnomer. Under principles of stare decisis, the Court declined to reconsider *Volk*.

Dissent (Justices Kelsey, Lemons and Chafin): A misnomer arises when the right person is incorrectly named in a complaint, not where the wrong person is named. Suing the incorrect person, while correctly stating his name, constitutes a misjoinder. Thus, a misnomer is a mistake in name, but not person.

This is a misjoinder case because Hampton correctly named, but incorrectly sued the wrong person, the vehicle owner. *Volk* did not address the question presented here: whether a plaintiff commits a misnomer when he sues a vehicle owner rather than the driver in a vehicle negligence case. Because the majority's decision goes against the weight of Virginia precedent, stare decisis should not apply.

E. Standing

McClary v. Jenkins, 848 S.E.2d 820 (2020).

The Supreme Court considered whether plaintiffs, resident-taxpayers of Culpeper County, had standing to bring suit against the Sheriff and the Board of Supervisors of Culpeper County (the "Board"), to enjoin, and declare unlawful the alleged use of local tax revenue to enforce an agreement between the Sheriff and U.S. Immigration and Customs Enforcement ("ICE"). The Court held that plaintiffs did not have standing.

The Sheriff and ICE executed an agreement, commonly known as a "287(g) Agreement," which authorizes local law enforcement, in this case the Sheriff and his officers, to enforce federal immigration laws. Plaintiffs filed suit, alleging that any appropriation by the Board, and the Sheriff's use, of Culpeper County funds related to the 287(g) Agreement was "unconstitutional, unlawful, ultra vires, and void ab initio." Importantly, plaintiffs did not identify any specific appropriation related to the 287(g) Agreement.

Granting defendants' demurrer, the circuit court determined that the Sheriff did not act outside the scope of his authority by executing the 287(g) Agreement, that federal law expressly authorizes such agreements, and that any appropriation by the Board to the Sheriff was therefore lawful. However, the sole issue addressed on appeal was whether plaintiffs had standing.

Plaintiffs argued that they had standing because their complaint alleged facts sufficient to establish local taxpayer standing. The Court disagreed. Under *Lafferty v. School Bd.*, 293 Va. 354 (2017), "[w]hen a taxpayer challenges a policy, the complaint must do more than identify a policy that the plaintiff disagrees with." Instead, the complaint must contain allegations of costs or expenditures connected to the polices implemented for there to be local taxpayer standing. Much like the plaintiffs' complaint here, the plaintiffs in *Lafferty* "failed to identify any costs or expenditures related to the policies complained of . . . ."

The complaint was not sufficient because it alleged that the Board appropriated funds to the Sheriff generally, and that some of those funds contributed in some nonspecific and undifferentiated

amount to assist the Sheriff with his execution of the 287(g) Agreement. "Taxpayers have an interest in the application of their *revenue* and have the common law right to challenge *expenditures*." Because plaintiffs merely described the County's costs and expenditures related to the 287(g) Agreement in "broad strokes, without identifying any discrete appropriation or payment by the local government in support of the policy or actions they seek to prohibit[,]" the Court concluded that they lacked standing to initiate the proceeding and affirmed the circuit court's dismissal under the "right-result-different-reason" doctrine.

F. The Voluntary Payment Doctrine

Sheehy v. Williams, 850 S.E.2d 371 (2020).

Kerry Ann Sheehy appealed a judgment against her, and in favor of Rene Williams. While the appeal was pending, Sheehy entered into a contract to sell real property. Following a title search, the title company required the judgment lien to be satisfied. In response to a request from the buyer's attorney, Williams' attorney advised that the balance due on the judgment was $54,673.19. Williams' counsel then received a check in that amount drawn on the escrow account of the buyer's attorney; the memo line on the check read "Judgment Payoff" and an attached letter had handwritten initials next to the circled amount of the judgment. Williams' attorney then filed a satisfaction of judgment.

Relying on the voluntary-payment doctrine, Williams moved to dismiss the appeal. Under this doctrine, a claimant cannot demand that a court return money to him that he has voluntarily paid to another absent a showing of fraud or other misconduct. Thus, the voluntary payment of a civil judgment for a fixed sum, made by or on behalf of a judgment debtor with her knowledge and consent becomes involuntary only when the payment is made after the judgment creditor has initiated execution proceedings. Voluntary payment of the judgment deprives the payor of the right of appeal.

Here, Williams did not attempt to collect or execute on the judgment. At oral argument, Williams' counsel asserted that the payment of the judgment was voluntary, but Sheehy's attorney said that the payment was issued on behalf of the buyers and he did not know if his client authorized the payment. Accordingly, the Court remanded the case to the circuit court pursuant to Rule 1:1B for the purpose of making findings of fact necessary for deciding the motion to dismiss.

Addendum: Following remand, the circuit court certified its findings to the Supreme Court. Without detailing what the circuit court's findings were, the Supreme Court dismissed the appeal by unpublished opinion dated April 8, 2021.

15. REAL PROPERTY

Canova Land and Investment Company v. Lynn, 2021 Va. LEXIS 35, 2021 WL 1424648 (2021).

In 1875, the Lynns executed a deed granting one acre of land to the Woodbine Baptist Church in exchange for five dollars. The deed provided that the property is "for the use and benefit of the Baptist Church . . . and that th[e Trustees] will allow the proper authorities of said Church to use it for the worship of God in accordance with the customs and regulations of said Church . . . for the church known as the 'Woodbine' Baptist Church, said property to revert to the grantors or their heirs if it ceases to be used for the purposes expressed in the deed."

In 2011, Woodbine defaulted on a loan secured by a deed of trust in which Woodbine granted its rights in a five-acre parcel, including the one-acre parcel conveyed in the 1875 deed. Canova Land acquired title to the property through foreclosure, but has not taken possession of the land. Woodbine continues to use the land for worship.

Canova Land brought a quiet title action, claiming that the reverter clause in the 1875 deed should be void as an unreasonable restraint on alienation. The circuit court held that the reverter clause was a reasonable land use restriction imposed on a charitable gift, and that the 1875 deed granted a fee simple determinable subject to a possibility of reverter, and not a fee simple absolute.

The Supreme Court affirmed. The 1875 deed granted Woodbine a fee simple determinable subject to the possibility of reverter. Under Virginia law, reasonable restraints on alienation and restrictions triggering reverters of fee simple determinable estates are generally valid. As the grantor clearly intended to create a limited estate, the court is less inclined to find the condition imposed on the grant to be unreasonable. Further, The Restatement (Third) of Property and Virginia law recognize a preference to uphold charitable gifts such as this. The preference for charitable gifts applies in the context of restrains on alienation.

In determining whether a restraint controls the use of the property or its alienation, courts look to the form of the restraint, the reasons for imposing the restraint, and the practical effect of the restraint. Considering these factors and that the deed references the use of land, the restraint is one focused on the use of the property, not alienation.

Upholding the deed's use restriction is most consistent with the preference for charitable gifts and the overarching policy preference to allow the land to continue to be used according to the grantors' wishes.

16. REMEDIES

James G. Davis Construction Corp. v. FTJ, Inc., f/k/a Ciesco, Inc., 298 Va. 582 (2020).

In a split decision, a majority of the Supreme Court held that a general contractor was unjustly enriched by the supplier of one of its subcontractors on a construction project.

James G. Davis Construction Corporation ("Davis") was the general contractor for a residential condominium project in Arlington. It contracted with H&2 Drywall Contractors to complete the drywall and metal framing for the project. Davis contracted to pay H&2 $1,269,396 in installments. H&2 purchased materials for the project from Ciesco (now FTJ). Davis and H&2 entered into a Joint Check Agreement ("JCA") solely to assist H&2 in making payments to Ciesco. Under the JCA, Ciesco would send its invoices to Davis and H&2, and Davis would pay by joint check made payable to both H&2 and Ciesco and deliver the check to H&2, which in turn would turn it over to Ciesco to pay for materials. The JCA only obligated Davis to pay if Davis actually owed money to H&2, and it created no contractual relationship or equitable obligation between Davis and Ciesco. H&2's owner also executed a personal guaranty to Ciesco.

Davis paid pursuant to the JCA. Later, though, H&2 had payroll problems and stopped paying Ciesco, which in turn stopped shipping additional materials after March 2017. Davis issued H&2 a "notice to cure." In response, H&2 advised that it could not complete the project. When Davis terminated H&2, it had paid H&2 all but about $300,000 of the contracted price. Davis hired a new subcontractor, paying it $260,000 to complete the project.

Davis advised Ciesco it was processing payments to Ciesco in the amount of $160,670.05, but later advised that it had to use that money to complete the project. Ciesco never got paid about $252,000 for materials it shipped to H&2. It sued Davis, H&2 and H&2's owner for breach of contract, unjust enrichment, and enforcement of a mechanic's and materialmen's lien. Ciesco got a default judgment against H&2 and its principal. Following a bench trial, the circuit court entered a judgment against Davis on the unjust enrichment claim, but rejected the breach of contract and mechanic's lien claims. Davis appealed.

The Supreme Court affirmed. Unjust enrichment is a "contract implied in law" requiring one who accepts and receives goods, services, or money from another to make reasonable compensation for those services. A plaintiff must prove that (1) it conferred a benefit on the defendant; (2) the defendant knew of the benefit and should reasonably have expected to repay the plaintiff; and (3) the defendant accepted or retained the benefit without paying for it. There was no dispute that Ciesco established the first and third elements. As to the second element, the Court found that Davis repeatedly responded to Ciesco's inquiries about late invoices and provided assurances that Ciesco would be paid. Davis even internally approved a payment to Ciesco, although it did not actually make the payment.

Davis argued that the JCA barred the unjust enrichment claim. The existence of an express contract covering the same subject matter of the parties' dispute precludes a claim for unjust enrichment. Ciesco, though, was not making a claim against Davis that was governed by the JCA. The sole purpose of the JCA was to assist H&2 and the JCA provided that it did not create a contractual relationship between Davis and Ciesco. Given its limited scope, the JCA did not bar the claim.

Davis argued that it had to pay more than originally projected to complete the project, so it could not be unjustly enrichment. Unjust enrichment may not lie when an owner or general contractor has previously paid for the services in question. But the proper inquiry was the payment for the

specific supplies and not the overall cost of the project. Davis used, and did not pay for, Ciesco's materials. It did not pay for those materials twice.

Dissent (Justices Kelsey, Lemons and Chafin): This is an aberrant use of the doctrine of quasi-contracts that disrupts the predictability of contracts in the construction industry. Unjust enrichment typically arises in a two-party scenario, but should not apply to this multi-party commercial transaction where a plaintiff may render a benefit to a defendant while performing a contractual obligation to a third party. In a third-party context, legitimate concerns about privity of contract must be accommodated by imposing a test of unjust enrichment that is "highly protective" of the defendant.

The fundamental requirement of unjust enrichment is that a defendant must obtain a valuable benefit at the plaintiff's expense without paying anyone for it. Here, Davis lost $2,242.90 on the drywall project after paying H&2 everything that it was owed. In the third-party context, the court cannot award unjust enrichment when the general contractor has paid the contract price to the benefit it received even if the contract price is less than the cost of value of the performance in question. Further, Virginia's mechanic's lien statute provides a remedy to those who enhance the value of a building or structure. Finally, Davis never assured Ciesco of payment for a future delivery of supplies, and Ciesco never asserted a claim for fraud.

17. SEXUALLY VIOLENT PREDATORS

***Ferrara v. Commonwealth*,** 854 S.E.2d 652 (2021).

In 1997, Frank Paul Ferrara was convicted of four counts of forcible sodomy of his daughters. In 2010, Ferrara was evaluated by Dr. Mark Hastings, an expert for the Commonwealth, for civil commitment. Dr. Hastings determined that Ferrara did not qualify as a sexually violent predator. After being released on supervised probation in 2011, Ferrara was convicted of other crimes and was again incarcerated. In 2016, Dr. Hastings evaluated him again before his scheduled release, and again determined that he did not qualify as a sexually violent predator. After his second release, Ferrara attended church meetings where children were present, and his probation was revoked.

In advance of Ferrara's next scheduled release, he was evaluated for civil commitment by Dr. Dennis Carpenter. Ferrara refused to cooperate with Dr. Carpenter even after being informed that his refusal would result in him not being able to put on his own expert at the civil commitment hearing. Dr. Carpenter concluded that Ferrara was a sexually violent predator.

Before his probable cause hearing, the court appointed counsel for Ferrara, but he continued his failure to cooperate with Dr. Carpenter. The court found probable cause existed. Later, relying on Code §37.2-906(D), the circuit court denied Ferrara's request to introduce testimony from Dr. Hastings or his evaluations at the civil commitment trial. However, the court permitted Ferrara to question Dr. Carpenter about his reliance on Dr. Hastings' report and conclusions. The jury found that Ferrara was a sexually violent predator and the court ordered him civilly committed.

Ferrara argued on appeal that the circuit court erred in excluding Dr. Hastings' evidence because Code §37.2-906(D) does not apply to the civil commitment hearing. Applying the rules of statutory interpretation, the Court held that Code §37.2-906(D) applies in probable cause hearings, but not in commitment hearings, which are governed by a different provision, Code §37.2-907(A). However, Code §37.2-907(A) does not apply here because it bars testimony *from an expert appointed to assist the respondent* when the respondent has failed to cooperate with the Commonwealth's expert. Dr. Hastings was not an expert appointed for Ferrara.

Even though the court erred in relying on Code §37.2-906(D), the error was harmless. As part of the court's authority to oversee the judicial process and litigation, the court has the implied power to impose a sanction when a party refuses to abide by an obligation to provide evidence. Code §37.2-904 obligates a respondent in a SVPA commitment proceeding to submit to an examination, and there was no indication that Ferrara failed to comply with that statutory obligation for a valid reason. Moreover, the circuit court did allow Dr. Hastings' reports to be mentioned as impeachment evidence.

Nor did excluding the Dr. Hastings' evidence offend due process. Although a litigant has a right to present evidence in his favor, due process is not offended when the litigant forfeits his right through purposeful non-cooperation with the Commonwealth's witness, as here.

The judgment was affirmed.

18. STATE CORPORATION COMMISSION

Wal-Mart Stores East, LP v. State Corporation Commission, 299 Va. 57 (2020).

Walmart filed two petitions with the State Corporation Commission ("SCC") to combine the electric-energy demand of separate Walmart locations to qualify to buy electricity from sources other than the incumbent public utilities—Virginia Electric and Power Company ("VEPCO") and Appalachian Power Company ("APCO"). The SCC denied both petitions and Walmart appealed.

Before 1999, Virginia's electrical energy regulatory model required customers to purchase electricity from one of the incumbent public-utility companies regulated by the SCC. In 1999, Virginia Electric Utility Restructuring Act, former Code §§ 56-576 *et seq*. was enacted to allow retail consumers to purchase electric power from other suppliers. In 2007, however, the General Assembly enacted legislation which allowed retail choice under limited circumstances.

Code § 56-577(A)(4) enables nonresidential consumers to file a petition to aggregate their electricity load, above five megawatts, and "participate in the wholesale market for electricity." Under this statute, the SCC may approve the petition if it finds that: (1) neither such customers' incumbent electric utility, nor retail customers of such utility that do not choose to obtain energy from alternate suppliers, will be adversely affected in a manner contrary to the public interest by granting such petition. In making such determination, the Commission shall take into consideration, without limitation, the impact and effect of any and all other previously approved petitions of like type with respect to such incumbent electric utility; and (2) approval of such petition is consistent with the public interest.

An evidentiary hearing was held, and the hearing examiner found that if the SCC approved the petitions, the monthly bills of the remaining "non-shopping" consumers would increase—$.13 for VEPCO and $.05 for APCO. The SCC found that even though the monthly increase in cost was de minimis, the yearly increase in cost was significant. Walmart petitioned for reconsideration and asked, for the first time, that the SCC to consider a "scaled down request for aggregation." The SCC denied and Walmart appealed.

On appeal, Walmart argued that the SCC was required to approve the petition unless it would adversely affect the utility or remaining consumers. The Court disagreed. It concluded that because Code § 56- 577(A)(4) uses permissive language (i.e. "may"), the SCC is not required to approve any petition. Moreover, Code § 56-577(A)(4)(a) states that the commission *shall* take into consideration previously approved petitions. The Court noted that "when the General Assembly employs a specific word in one section [may] and chooses a different term [shall] in another section, we must presume the difference in language was intentional." Since the use of the permissive "may" was presumably intentional, the SCC is not required to grant any petition under this code section.

Walmart also argued that the factual record was insufficient to deny the petition. The Court held, however, that "an argument that the evidence was insufficient can only be made against, not by, the party with the burden of proof." Walmart bore the burden of proof because it was requesting the SCC to grant its petition for retail choice. Walmart did not carry its burden and, therefore, the petition was denied.

Finally, Walmart argued that the SCC erred in denying its motion to reconsider. In support, Walmart states that a witness at the evidentiary hearing stated that "Walmart would aggregate a smaller amount of load if necessary." The Court held, however, that this motion to reconsider was not appropriate because it asked, *for the first time*, if the SCC would approve a petition to aggregate a smaller amount of load. The witness's remark was ambiguous and did not relate to the original relief sought in the petition. Therefore, the SCC did not abuse its discretion by refusing reconsideration.

19. STOCK OWNERSHIP

Day v. MCC Acquisition, LC, 299 Va. 199 (2020).

The Treasurer of the Commonwealth of Virginia filed an interpleader action to resolve disputed claims of ownership to the proceeds from the sale of unclaimed corporate stock. Dorothy Day and MCC Acquisition were the claimants. Day was a shareholder of M.C. Construction, a company that had dissolved after selling all of its assets to MCC Acquisition.

Before 1997, M.C. Construction owned a membership interest in Virginia Blue Cross Blue Shield. In 1997, Virginia BCBS converted to a stock company, which converted M.C. Construction's

interest into Class A common stock of the surviving company, Trigon Healthcare. Through later mergers and acquisitions, the Trigon stock became WellPoint stock.

In 1999, MCC Acquisitions purchased all of the assets of M.C. Construction, which meant "both tangible and intangible [assets], of every kind and nature, wheresoever situate and howsoever held." As part of the purchase agreement, M.C. Construction assigned all its rights in the company assets to MCC Acquisition. Neither party was aware of the stock at this time. Further, Trigon did not issue stock certificates and did not deliver any such certificates to M.C. Construction. Therefore, M.C. Construction did not deliver any stock certificates to the buyer. M.C. Construction later liquidated and dissolved.

The stock was transferred to Virginia's Unclaimed Property Division and the Treasurer sold the stock and filed the interpleader action. The circuit court held that MCC Acquisition had obtained "equitable title" to the interpleaded stock proceeds.

The Supreme Court affirmed. Under Virginia law, shares of stock of a corporation are intangible personal property in the nature of a "chose in action," and are considered as a res (a thing separate and apart from its ownership of the possession of the certificate evidencing the ownership thereof). M.C. Construction owned a chose in action in the stock. The 1999 purchase agreement conveyed to MCC Acquisition all of the assets of M.C. Construction including intangible assets and the assignment agreement conveyed all of M.C. Construction's rights and interests in these assets. Thus, the stock fell within both of these agreements, and equitable title to the stock transferred intangibly to MCC Acquisition.

Equitable ownership did not depend on delivery of the stock certificates or recordation of the assignment on the corporate books. The UCC does not determine whether the property transferred equitably or by operation of law. The rule of equitable assignment of corporate stock is not abrogated by the Code. Thus, MCC Acquisition was the equitable owner of the stock even though it was titled in the name of M.C. Construction.

Day's argument that she has a superior claim to the stock because the statute of limitations has expired on a breach of contract action fails. As this is an interpleader action, not a breach of contract action, the statute of limitations for breach of contract is of no moment.

20. TAXATION

International Paper Company v. County of Isle of Wight, 299 Va. 150 (2020).

This case concerns Isle of Wight County's machinery and tools tax (MTT) assessment for various tax years.

International Paper Company previously brought an action against the County for MMT assessments for tax years 2012 -2015. That action resulted in a refund of MMT taxes to International Paper in the amount of $2.4 million. The County paid the judgment to International Paper in 2017.

While this action was pending, the County announced that the valuations for tax years 2013 -2015 would be retroactively reduced due to a valuation error, and issued tax refunds (totaling $5.6 million) to taxpayers in the County. To counteract the negative fiscal impact to the general fund from these refunds, the County took two steps. It (1) substantially increased the MTT rate for tax year 2017 and (2) created a MTT Tax Relief Program to credit the MTT refund amounts on taxpayers' MTT bills. This resulted in only the taxpayers who received refunds having to pay the substantially increased MTT rate, with the increased amount owed by them being limited to the amount of the MTT refund they had received from the County.

International Paper paid the MTT it was assessed for tax year 2017 and filed a second refund action to correct the County's "nonuniform, invalid and illegal" assessment. The case was tried to the bench. At the conclusion of International Paper's evidence, the circuit court sustained the County's motion to strike the evidence and dismissed the entire case. International Paper appealed.

In Count 1 of the complaint, International Paper alleged that the 2017 MTT tax plan violated its vested rights in the judgment it received in the first refund action and impermissibly clawed back the refund paid pursuant to that judgment. The circuit court properly dismissed this count. The 2017 MTT increase did not retroactively alter the tax rates for tax years 2012 – 2014 and did not interfere with the refund International Paper was paid (and had a vested right to receive) in the first refund action.

In Count II, International Paper alleged that the 2017 MTT rate increase was an invasion of judicial authority and violated the separation of powers doctrine. Localities have constitutional and statutory authority to tax tangible personal property and therefore the County had authority to implement the 2017 tax increase. Therefore, the circuit court did not err in dismissing this count of the complaint.

In Count III, International Paper alleged that the 2017 MTT tax plan was ultra vires because it indirectly and retroactively revised International Paper's MTT valuations and rates for 2013 – 2015. As discussed, the County had authority to increase the 2017 rates and execute the relief program, and its actions did not effectively revise previous assessments for tax years 2013 – 2015. Therefore, the circuit court did not err in dismissing this count of the complaint.

But the Supreme Court reversed the dismissal of Counts 4 and 5, where International Paper alleged that the 2017 MTT assessments violated the constitutionally-mandated requirement that such taxes be uniform, as evidenced by the disparate "effective tax rates." Constitutional uniformity is the requirement of equality in property taxation so that those who are similarly situated are treated in a like manner during the taxation process.

Any act that has the effect of allowing one taxpayer to pay less than another taxpayer who is similarly situated offends uniformity, no matter how the different treatment is effected. The evidence supported International Paper's claim that the County intended, structured, funded, administered and calculated the MTT Tax Relief Program payments within the MTT taxation process, and that the MTT rate increase and the Relief Program were interwoven. International Paper introduced evidence to show that the effective tax rates (the net tax rate paid by MTT

taxpayers given the payments made to some MTT taxpayers through the Relief Program) were not uniform. The Relief Program treated the MTT taxpayers differently based upon whether the County had lawfully owed that taxpayer a refund on MTT taxes overpaid in prior years, thereby creating a sub-class of MTT taxpayers. Only the MTT taxpayers who had received a refund were required to pay the 2017 MTT increase.

21. TORTS

A. Medical Malpractice

Green v. Diagnostic Imaging Associates, P.C., 299 Va. 1 (2020).

Green's wife died after receiving medical care in Virginia and in Kentucky. Green filed wrongful death and personal injury actions in Virginia and Kentucky alleging that his wife died as the result of medical professionals in both states failing to identify and treat her mesenteric ischemia when her ischemic bowel was salvageable.

In July 2017, Green settled the Kentucky case against one of the original defendants, and the case was dismissed. The Virginia case was amended to allege solely a wrongful death action under Code §8.01-50. The Virginia defendants moved to dismiss because: (1) the Kentucky and Virginia cases asserted the same injuries and Green had elected his remedy under Code §8.01-56 when he recovered for personal injury to the decedent in Kentucky; (2) Green engaged in claim-splitting; and (3) Green would obtain a double recovery. The circuit court agreed and dismissed the case.

The Supreme Court reversed. Code §8.01-56 is not an election of remedy statute. There is no language in Code §8.01-56 that prohibits the filing of a wrongful death action in Virginia because of the settlement of a personal injury claim in another state. The facts dictate whether a case is brought in Virginia as a survival action or as a wrongful death action. Here, the case could only proceed as a wrongful death action. Thus, the settlement of the Kentucky personal injury action did not operate as an election of remedies by Green in the Kentucky case and did not bar the wrongful death action in Virginia.

Claim-splitting occurs when a plaintiff brings successive suits on the same cause of action where each suit addresses only a part of the claim. The rule against claim-splitting does not apply because Green is not bringing successive suits against the same defendants. The defendants in the Virginia suit are different than those in the Kentucky suit. Moreover, under Code §8.01-443, a judgment against one of several joint tortfeasors "shall not bar the prosecution of an action against any or all the others."

Nor would Green get a double recovery (which is prohibited under Code §8.01-56). To the extent there were a double recovery, the circuit court could reduce any judgment Green receives in Virginia by amounts already compensated in the Kentucky settlement.

Finally, judicial estoppel does not apply because the parties in Virginia and Kentucky are different, and the results would not be inconsistent with each other.

B. Duty

Shoemaker v. Funkhouser, 2021 Va. LEXIS 15, 2021 WL 1133790 (2021).

As this case was decided on a demurrer, the following facts come from the complaint. On November 23, 2014, Shawn Jason Nicely (an adult) visited his grandparents, Richard and Anna Funkhouser, who owned eight-acres of property on Charlotte Lane in Shenandoah County. The Funkhousers gave Nicely permission to shoot targets with a rifle on the Funkhouser property in the direction of another home on Charlotte Lane at a firing position within sight of the Funkhouser home. The Funkhousers knew that the other home, owned by Nesselrodt, was on the other side of tress which were not densely arranged. One of the bullets penetrated Nesselrodt's home, striking and killing Gina Shoemaker, who was visiting inside.

Shoemaker's personal representative brought a wrongful death action against the Funkhousers, alleging that they were negligent in granting Nicely permission to shoot in the direction of Nesselrodt's home. The Funkhousers filed a demurrer contending that they did not owe a duty to Nesselrodt or Shoemaker and that they had immunity under Code §29.1-509. The circuit court sustained the demurrer and dismissed the case.

A majority of the Supreme Court reversed. General negligence principles require a person to exercise due care to avoid injuring others. In determining whether a duty exists, a court must consider the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant. Although an occupier of land must use reasonable care for the safety of those outside of his land to prevent direct harm resulting from his affirmative activities on his land, he does not have a duty to control third parties on his land unless a special relationship exists between the actor and the third person or a between the actor and the other person.

Consistent with §318 of the Second Restatement of Torts, a landowner has a duty in tort to exercise reasonable care to control the conduct of a third party who has been granted permission by the landowner to use the land, to prevent that third party from intentionally harming others or from conducting himself so as to create an unreasonable risk of bodily harm to others. For the duty to apply, the landowner must be present, know or have reason to know that he has the ability to control the third person, and know or should know of the necessity and opportunity for exercising such control.

In a Caveat to the rule, ALI expressed no opinion whether a duty to control a licensee exists when a landowner is "not present" but is "in the vicinity" of the licensee when the tort is committed. A "Reporter's Note" that follows states that the rule could be applied when the landowner is not present, but is in a position to arrive promptly upon the scene, even though no cases have been found supporting this "in the vicinity" interpretation.

Based on the allegations in the complaint, the Funkhousers owed a duty to their neighbors not to grant permission for someone to shoot targets on their property in the direction of a house located within sight of their house when they knew or should know that the bullets are likely to strike that house.

The allegations in the complaint satisfy the element of "presence" required by §318 of the Second Restatement of Torts. "Present" is defined as "being in one place and not elsewhere; being within

reach, sight, or call or within contemplated limits; being in view or at hand; being before, besides, with, or in the same place as someone or something." The Funkhousers were alleged to be physically present on their land when they granted Nicely permission to target-shoot, were at their house when the shooting took place such that they could exercise oversight over the activity and control Nicely, could view the firing position from their house, and knew or should have known of the necessity and opportunity for exercising such control.

Additionally, the Recreational Land Use Act, Code §29.1-509, which provides immunity to landowners in certain circumstances, does not immunize the Funkhousers from liability. As the statute is in derogation of the common law, it must be strictly construed. Code §29.1-509(C), which provides immunity when a landowner grants another person permission to engage in certain enumerated activities, does not mention target shooting, and that unlisted activity cannot be implied. Nor did the Funkhousers grant permission "for the use of an easement or license as set forth in subsection B." A license is a right given by a competent authority to do something that would otherwise be illegal, is a tort or a trespass. Subsection B addresses landowner liability for persons who are on the premises for recreational purposes and it is inapplicable here. Therefore, the statute does not cover a situation where a landowner gives another person permission to shoot targets on his property.

*Dissent (*Kelsey, Lemons, Chafin): The complaint alleges that "one or both" of the grandparents were at the residence within view of the shooting. This is a "drafting blemish" and "undisciplined approach to pleading." The sense of "and/or" is "both or either," providing three possible choices. The use of an "and/or" allegation should be subject to demurrer on this basis alone. Even ignoring this defect, the complaint is missing critical allegations, for example, that the Funkhousers actually saw Nicely shoot or were outside when he was shooting.

The majority improperly adopted the "Reporter's Note" in §318, which is merely the personal opinion of the Reporter and not the "official product" of ALI and is contrary to the common law. Nevertheless, the common-law "if present" requirement means being physically present with the licensee at the time of the tort, not being present somewhere else on the property in the vicinity of the licensee. The complaint does not allege that the Funkhousers were physically present when the shooting took place on their property or that they saw Nicely after he arrived on the property.

Target-shooters are covered by the Recreational Land Use Statute. Strict-construction was not appropriate. The dissent also disputed the majority's interpretation of "license." It means permission that manifests consent by a landowner for another to enter his property. Licenses are given to licensees, which include social guests such as Nicely and the users listed in Subsection B and the catch-all "any other recreational" user in that subsection, which is incorporated by reference into subsection C. Subsections B and C fit together perfectly. The majority's interpretation of the Statute is inconsistent with the General Assembly's intent and the prior amendment expanding the scope of the statute.

C. Negligence

AlBritton v. Commonwealth, 853 S.E.2d 512 (2021).

DeVinche AlBritton was an inmate at Sussex II State Prison. While incarcerated, AlBritton tripped and fell down a set of stairs. AlBritton filed a Complaint alleging the steps were negligently maintained by the Virginia Department of Corrections and attesting that he had "exhausted the administrative remedies of the adult institutional grievance procedure to the extent required and permitted by the Virginia Department of Corrections and its regulations."

The Commonwealth filed a plea in bar and a motion for summary judgment. The plea in bar alleged that the doctrine of sovereign immunity barred AlBritton's claim because he had failed to exhaust his administrative remedies pursuant to Code §§ 8.01-195.3(7) and 8.01-243.2. The Commonwealth's motion for summary judgment asserted that no genuine issue of material fact existed on the question of primary negligence or contributory negligence. The circuit court held that sovereign immunity applied, no reasonable fact finder could conclude the Department of Corrections had been negligent and/or that AlBritton had not been contributorily negligent. Thus, it granted the Commonwealth's plea in bar and motion for summary judgment.

AlBritton appealed on each of the three independent grounds. The Supreme Court reversed.

As it pertains to the issue of sovereign immunity, AlBritton argued that he had exhausted his administrative remedies and, thus, Code § 8.01-195.3(7) provided him with an exception to the Commonwealth's assertion of sovereign immunity. AlBritton argued that placement of a grievance appeal in the prison mail system constituted compliance; the Commonwealth asserted that the appeal must be received within the time set out by the procedure. The Supreme Court held that an inmate's grievance appeal, as well as any initial grievance, is properly submitted "when the inmate timely places them into the prison mailing system" and not the date of receipt by the Virginia Department of Corrections.

The Supreme Court held that summary judgment was not proper on the question of the Commonwealth's negligence or AlBritton's contributory negligence. The Commonwealth had to demonstrate that there were no genuine issues of material fact and that no reasonable factfinder could find the Commonwealth was negligent. It failed to do so.

Factual disputes between the parties, including whether protrusions were present, whether the steps were unreasonably dangerous, or whether there was a rule in place that prevented AlBritton from using the staircase, were genuine. Further, the Court distinguished the facts of AlBritton's case from *Williamsburg Shop, Inc. v. Weeks*, 201 Va. 244 (1959) (holding the absence of anti-slip treads could not deemed a negligently created hazard as a matter of law) and *Medical Newport News v. Anderson*, 216 Va. 791 (1976) (holding that imperfections in sidewalks do not constitute negligence). Further, reasonable minds could differ on AlBritton's negligence. Therefore, summary judgment was not appropriate on the issues of negligence or contributory negligence.

AlBritton's assignment of error was sufficient to permit consideration of the arguments presented. The assignment of error asserted the circuit court "erred and abused its discretion in granting the defendant Commonwealth's Motion for Summary Judgment for [c]ontributory negligence based solely upon the inadmissible [h]earsay [e]vidence submitted by the defense." Although AlBritton failed to note any specific hearsay statements, the fairest reading of the assignment of error was that the circuit court erred in entering summary judgment based solely upon the Commonwealth's

evidence without considering his evidence, and that the use of "inadmissible [h]earsay" was mere surplusage. Applying the phrase "based on" as functioning the same as "because of," the Court held AlBritton intended to use the phrase properly and did not waive his argument.

D. Tortious Interference with Parental Rights

Padula-Wilson v. Landry, 298 Va. 565 (2020).

Plaintiff was the custodial parent of three children, and was involved in a custody dispute with her ex-husband, who had supervised visitation of the children. The custody court appointed a guardian *ad litem* and a psychologist to evaluate the parties; several therapists were also involved.

There were allegations of physical abuse by the father and attempts by Plaintiff to alienate the children from the father. One of the therapists and the guardian *ad litem* testified that Plaintiff was delusional and recommended the children be removed from her custody. The court agreed, and later gave custody to the father and supervised visitation to Plaintiff. After an appeal, the court granted both parents joint custody.

Plaintiff filed a complaint against the guardian *ad litem*, the psychologist, and the therapists. Among other claims, she alleged interference with parental rights against all defendants, and she brought a defamation claim solely against the psychologist. The circuit court sustained the demurrers and dismissed the entire case. The Supreme Court affirmed.

Virginia law recognizes tortious interference with parental rights as a cause of action. A plaintiff must plead and prove four elements: (1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's consent, or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference.

No cause of action for tortious interference with a parental or custodial relationship may be maintained against a guardian *ad litem* or an adverse expert witness based upon his/her expert testimony and/or participation in a child custody and visitation proceeding. Plaintiff was afforded due process in the custody case. The "conspired" and allegedly false opinions that form the basis of Plaintiff's claim were presented in open court, subject to cross-examination, rebuttal, and weighing by the trial judge. To the extent the defendants violated any court order, Plaintiff could have sought contempt or other remedies. Further, none of the defendants physically took any of the children away. The Supreme Court thus declined to expand the scope of the tort of interference with parental rights by opening a new front for disappointed, angry, frustrated, or vindictive parents to renew battle.

On the defamation claim, the circuit court held that the psychologist's statements were privileged. The Court also affirmed the circuit court's dismissal of the defamation claim, but on different grounds. The allegedly defamatory statements were merely opinion: they explained the

psychologist's impressions and concerns about Plaintiff, and instructions about custody and visitation. When a statement is relative in nature and depends largely on a speaker's viewpoint, that statement is an expression of opinion.

E. Damages

Northern Virginia Kitchen, Bath & Basement v. Ellis, 2021 Va. LEXIS 37, 2021 WL 1424646 (2021).

The Supreme Court holds that evidence of emotional distress alone, without any evidence of monetary damages, is sufficient to support compensatory and punitive damages for the statutory intentional torts of racial harassment and stalking.

Northern Virginia Kitchen, Bath & Basement ("NVKBB") and its owner John Powell hired William Ellis, a Black man and assigned him to work on a contracted job with Homeowner. When Powell and Homeowner later canceled the contract, Homeowner asked Ellis to finish the job. Angered, Powell left Ellis two voicemails using the N-word, calling him "boy," and threatening that he "better not see" him at Homeowner's house, had "motorcycle clubs and gangs around," and that Ellis had ruined it for the next Black man he hired. Ellis told Powell to stop calling him, but Powell continued to berate him via text message. Homeowner later posted Powell's messages on social media and business-rating websites.

NVKBB and Powell sued Ellis and Homeowner for defamation and conspiracy to injure his business. Ellis and Homeowner filed a counterclaim for racial harassment in violation of Code §8.01-42.1 and stalking in violation of §8.01-42.3. The circuit court dismissed Plaintiffs' claims. Plaintiffs later stipulated to liability on the counterclaims, and the case went to the jury solely on the issue of damages on the counterclaims.

Ellis testified at trial that Powell's voice messages made him upset and scared, and that for a period of time he altered his schedule to avoid the motorcycle gangs and areas where Powell might be; he also altered his work schedule at Homeowner's house. He felt scared when he saw motorcycles. He also testified that he felt threatened and intimidated by use of the N-word and "boy," and that he was upset that his nephew overheard one of the voicemail messages. Ellis installed security cameras at his home because he was afraid of Powell, but did not contact the police, and did not seek counseling or medical treatment. Ellis had no monetary damages.

At trial, the circuit court denied Plaintiffs' motions to strike the damages evidence as insufficient. The jury returned a verdict for Ellis for $250,000; it awarded a total of $100,000 in compensatory damages on each count against Plaintiffs and $150,000 in punitive damages solely against Powell. The circuit court also denied Plaintiffs' motions to set aside the verdict. On appeal, Plaintiffs argued that Ellis failed to prove damages. The Supreme Court affirmed.

The Supreme Court first examined the statutes, noting that §8.01-42.1 and §8.01-42.3 expressly permit compensatory and punitive damages to be awarded to a prevailing plaintiff, and neither statute requires proof of physical injury. Next, the Court rejected Plaintiffs' argument that proof of monetary damages is a predicate for an award of compensatory damages. To the contrary, the

Court has approved compensatory damages supported by evidence of non-pecuniary or emotional damages alone. In cases involving intentional torts, a plaintiff may recover damages for humiliation, embarrassment, and similar harm to feelings without actual physical injury where a cause of action existed independently of such harm. Therefore, Ellis' testimony that Powell's conduct made him feel intimidated, harassed, threatened, and humiliated was sufficient to support the jury's award.

The Court also rejected Plaintiffs' argument that under *Massie v. Firmstone*, 134 Va. 450 (1922), Ellis could not "rise above" his testimony that his motive in filing the counterclaim was retaliation, thereby requiring that the testimony be stricken. Even if *Massie* applied, which it doesn't, a litigant's motivation for filing suit is wholly unrelated to whether he experienced mental anguish.

22. VIRGINIA CONSUMER PROTECTION ACT

NC Financial Solutions of Utah, LLC v. Commonwealth, 854 S.E.2d 642 (2021).

From 2012 to 2018, NC Financial Solutions of Utah, LLC ("NCFS-Utah") issued over 47,000 loans to consumers in Virginia that included interest rates from 34 to 155 percent. On April 23, 2018, Virginia's Attorney General filed a complaint on behalf of the Commonwealth in the Circuit Court of Fairfax County against NCFS-Utah, alleging that it violated the Virginia Consumer Protection Act ("VCPA").

NCFS-Utah filed a "Motion to Dismiss, or Alternatively, to Compel Arbitration of Individual Damages" based on the arbitration clause found in the loan agreements it had with the Virginia consumers. The arbitration clause in the loan agreements stated that "all claims 'arising from or relating directly or indirectly' to the loan agreements were subject to arbitration, including any claims 'based upon a violation of any state . . . statute or regulation' and any claims 'asserted on [the consumer's] behalf by another person.'" The loan agreements also stated that the arbitration provisions were "governed by the [FAA]." NCFS-Utah argued that the Commonwealth's restitution claim would not only circumvent the arbitration agreement, but was also pre-empted by federal law as such an award would be inconsistent with the Federal Arbitration Act ("FAA").

The circuit court denied NCFS-Utah's motion, holding that the Commonwealth was not bound by the arbitration agreement, has statutory authority to pursue litigation to enforce the VCPA, and is permitted to seek restitution for consumers in VCPA actions. NCFS-Utah filed an interlocutory appeal pursuant to Section 16 of the FAA, 9 U.S.C. § 16, and Code § 8.01-581.016, (a similar provision of the Virginia Uniform Arbitration Act), on the grounds that (1) an award of restitution in this case would conflict with the provisions of the FAA and general principles of contract law and (2) the VCPA does not authorize the Commonwealth to collect restitution for individual consumers.

The Supreme Court affirmed. Applying *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2005) and general contract principles, the Court reasoned that the Commonwealth was not a party to the arbitration agreement and, thus, was not bound to arbitrate its claims against NCFS-Utah. The

Commonwealth sought to enforce the VCPA on behalf of the public, and its restitution claim was akin to the "victim-specific" relief pursued by the EEOC in *Waffle House*. Further, the unambiguous and plain language of the VPCA permits a circuit court to award restitution when it permanently enjoins a practice that violates the VCPA.

23. VIRGINIA FREEDOM OF INFORMATION ACT

Cole v. Smyth Cty. Bd. of Supervisors, 298 Va. 625 (2020).

The Smyth-Bland Regional Library ("Library") was a regional library system of Smyth and Bland counties. The Library was managed by a board of trustees consisting of nine members, seven of whom were appointed by the Board of Supervisors for Smyth County (the "Smyth Board"). On October 27, 2016, the Smyth Board met and voted to remove its seven appointees and replace them with seven new appointees. On November 4, 2016, three of the removed trustees filed suit against the Smyth Board seeking reinstatement (the "Mowbray Case").

On January 26, February 14, February 23, and March 14, 2017, the Smyth Board held public meetings. During each of those public meetings the Smyth Board approved motions to enter into closed sessions "under the Code of Virginia, Section 2.2-3711 -A.7 Legal; discussion with legal counsel and staff pertaining to actual or probable litigation" (the "Motions"). On March 28, 2017, the Smyth Board noticed a special meeting open to the public. At this special meeting, the Smyth Board voted to and did disband the Library. The Smyth Board's justification was that the "administrative costs associated with the operation of a regional library system now exceed the financial benefit of maintaining a regional library system." The Smyth Board did not allow public comment at the special meeting.

On April 5, 2017, Beverly Cole filed a petition for injunction (the "Petition") against the Smyth Board and the Smyth County Administrator. The Petition alleged that the Smyth Board violated the Virginia Freedom of Information Act ("VFOIA") when it issued unreasonable notice for the special meeting, and discussed matters in the four closed sessions that were not exempted from VFOIA's open meeting requirement. Finding that there was active litigation involving the Library pending against the Smyth Board, the circuit court denied the Petition and determined that the closed sessions were properly held and that the discussions therein were exempted.

Cole appealed. The Supreme Court reversed and vacated the judgment, and remanded on the issue of whether Cole was entitled to an award of attorney's fees under Code § 2.2-3713(D).

First, the Motions failed to include the subject matter necessary to enter into closed sessions. The VFOIA statute referenced in the Motions exempts the open meeting requirements for "consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body." Code § 2.2-3711(A)(7). The Motions did not include any additional information to reveal the actual subject matter of the closed sessions. The Motion did not state that the Smyth Board intended to discuss the Mowbray Case, the Library, or

any other case or legal matter in the closed sessions. The Court noted that "[a] public body must identify the subject matter more specifically in a motion for a closed meeting." The mere mention of "actual or probable litigation" was too general to adequately identify the subject matter for the closed session.

The Smyth Board presented legislative history in an effort to show that the General Assembly removed the specificity requirements regarding the subject matter of closed sessions. But, the plain language of the statute "indicates that the General Assembly intended that such motions contain more than a citation to an exemption and a reference to the language of that exemption." When the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted because statutory words are taken as written.

Second, as to whether the Smyth Board's discussions in closed sessions violated VFOIA, Code § 2.2-3711(A)(7) does not categorically exempt any discussion between a public body and staff or legal counsel. Rather, it only exempts consultation or briefing that "'pertain[s] to actual or probable litigation,' and only when the briefing or consultation that pertains to the litigation would 'adversely affect the negotiating or litigating posture of the public body' in such litigation, if the consultation or briefing were to occur in public."

The discussions in closed sessions regarding the economic viability of the Library were not pertinent to the Mowbray Case. Indeed, the Smyth Board's resolution stated that the decision to disband the Library was due to the "administrative costs associated with the operation" of the Library exceeding its financial benefit to the County. Thus, the decision to disband the Library was unrelated to the Mowbray Case. The discussions therefore were not exempt from public access. Further, the discussions concerning the economic viability of the Library would not have adversely affected the Smyth Board's negotiating or litigating position.

Third, as to Cole's claim for attorney's fees, the Court looked to the plain language of the VFOIA, finding that "a VFOIA plaintiff can recover attorney's fees if a court finds (1) the public body committed a single VFOIA violation, and (2) the plaintiff 'substantially prevails on the merits of the case.'" *See* Va. Code § 2.2-3713(D); *Bergano v. City of Virginia Beach*, 296 Va. 403, 411 (2018). The Court remanded the case to the circuit court to determine whether Cole is entitled to an award of attorney's fees and, if so, the amount.

24. WILLS, TRUSTS, AND ESTATES

Larsen v. Stack, 298 Va. 683 (2020).

This appeal involves the interpretation of a will, specifically whether the Testator left his wife a life estate in the family house and farm ("the Farm").

The Testator's will devised the Farm to "my children, namely, Pamela Larsen Stack and Kirk Larsen, subject to my wife, Sandra Flora Larsen, having the right to reside in our home . . . for so long as she is physically and mentally able to do so." The will left Wife the "monthly rental

payments" for a cell tower on the property. The will also addressed additional real estate, "giv[ing] to my wife, Sandra Flora Larsen, a life estate in my property located at 5414 Quail Ridge Court . . . [w]ith the remainder interest to my children, Pamela Larsen Stack and Kirk Larsen."

The Testator's children filed a declaratory judgment action to determine the extent of Wife's interest in the Farm. Finding that the will was ambiguous, the court admitted testimony from the attorney who drafted the will. The attorney testified that the Testator wanted his children to end up with the property and did not give Wife a life estate in the Farm because he was concerned she would have to sell such an interest to obtain Medicaid coverage. He also testified that the Testator's intent was for Wife to have access to the entire property as long as she was physically and mentally able to reside in the house; if she had to go to a nursing home or couldn't live by herself, then her interest in the Farm would terminate.

The circuit court held that Wife did not have a life estate in the Farm. Rather, she had the "right to reside" in the house and use the entire Farm, and that right would terminate when she is no longer physically or mentally able to reside in the home. It further held that the children could not interfere with Wife's ability to live on the property "by herself." Wife appealed, arguing she had a life estate subject to an executory limitation.

The Supreme Court affirmed. A life estate is an estate held only for the duration of a specified person's life, usually the possessor's life. No specific words are required to create a life estate, but the testator's intention to convey a life estate must be plainly manifested in the will. Here, the will did not convey a life estate; it only conveyed a "right to reside" on the property. It was unnecessary to expressly give Wife the right to receive the rent for the cell tower because a life tenant is entitled to the income generated by the property. Further, as the Testator used the term "life estate" when granting the other property, he likely would have done so with the Farm property if he had intended a life estate.

Parol testimony is admissible when a will is ambiguous to enable the court to identify the property intended to be given by the will or to determine the quantum of interest which is to pass by the will. Here, the scope of Wife's rights and the limitation placed on her rights were not clear. Thus, there was no error in considering testimony from the drafting attorney on the ambiguous parts of the will.

The Court also held that the Testator did not give Wife the exclusive right to use the property, and the children, as fee simple owners, had concurrent property rights provided they did not interfere with Wife's rights. Finally, Wife's interest in the property would terminate when she was no longer physically and mentally able to live there.

Plofchan v. Plofchan, 2021 Va. LEXIS 27, 2021 WL 1220752 (2021).

In 1997, Paula Plofchan executed a general durable power of attorney ("POA"). In 2001, after Ms. Plofchan's husband died, her son Thomas became her attorney-in-fact under the POA. In 2006, Ms. Plofchan executed the Paula G. Plofchan Revocable Trust, which named her as trustee of the Trust. In 2014, Ms. Plofchan was diagnosed with Alzheimer's disease. She later resigned as

trustee and named Thomas and Elizabeth, one of her daughters, as co-trustees to succeed her. Two doctors certified that Ms. Plofchan was incapacitated under the terms of the Trust.

In 2018, Ms. Plofchan revoked the POA that appointed Thomas. She then petitioned a New York court to appoint her daughter Jennifer as her guardian under the New York Mental Hygiene Law, and terminate Thomas and Elizabeth's authority as co-trustees. A few months later, Ms. Plofchan's two doctors revoked their certifications, and determined Ms. Plofchan was capable of making financial decisions. Ms. Plofchan then revoked the Trust.

Following evidentiary hearings, the New York court denied Ms. Plofchan's petition. It found that Ms. Plofchan was not an incapacitated person under the state's Hygiene Law, and found no evidence of fiduciary violations by the Co-Trustees.

In 2019, the Co-Trustees filed a complaint against Ms. Plofchan in the Fairfax County circuit court, alleging that Ms. Plofchan is incapacitated and had ineffectively attempted to revoke the POA and the Trust. They sought injunctive relief and attorney's fees and costs expended in defense of the Trust and the POA. Ms. Plofchan filed a plea in bar contending that the Co-Trustees lacked standing and that their claims were barred by collateral estoppel. The circuit court sustained the plea in bar. On appeal, the Supreme Court reversed.

To assert collateral estoppel, a party must establish: (1) the parties to the two proceedings are the same, (2) the issue of fact was actually litigated in the prior proceeding and essential to the prior judgment, and (3) the prior proceeding resulted in a valid, final judgment. The issue of Ms. Plofchan's mental capacity to revoke the POA and Trust in 2018 were not actually litigated in the New York proceeding. First, the New York court evaluated her mental capacity only in terms of whether she needed a guardian applying a different standard than that which would be applicable to the issue in this proceeding (i.e., her testamentary or contract capacity). Second, the issue of whether Ms. Plofchan had the capacity to revoke her Trust and POA was not actually litigated in the New York proceeding. That court made no findings regarding Ms. Plofchan's mental capacity on the dates she revoked the POA and Trust.

Further, the Co-Trustees had standing to bring this action because their complaint alleged that they, in their fiduciary capacities, had a legal interest in protecting the assets and administration of the Trust. Because no evidence was taken on the plea in bar, the court must accept the allegations in the complaint as true. Because the circuit court's ruling denying the request for fees and costs was based on the erroneous decision that the Co-Trustees lacked standing, that decision is also reversed.

25. WORKERS' COMPENSATION

Alexandria City Public Schools v. Handel, 299 Va. 191 (2020).

Keri Handel, a teacher, slipped and fell on a puddle on her classroom floor while working for the school system of the City of Alexandria. The Supreme Court considered whether the Court of

Appeals had correctly defined and applied the legal standard for determining whether the claimant proved an "injury by accident" to her shoulder.

Handel sought compensation for multiple injuries as a result of her fall, although only her shoulder was at issue before the Deputy Commissioner. The Deputy Commissioner found that the claimant suffered an injury by accident to her shoulder because there was a causal connection between the accident and shoulder complaints. On appeal to the full Commission, the school system argued that the evidence was insufficient to establish a structural or mechanical change to the shoulder, which was necessary for there to be an injury by accident. The full Commission affirmed the Deputy Commissioner.

The school system appealed to the Court of Appeals, which found that a sudden mechanical or structural change anywhere in the body suffices to establish that a claimant has suffered an injury by accident, and therefore any injury causally connected to the accident – even if not connected to the sudden or mechanical change – is compensable. It concluded that Handel had proven a single mechanical or structural change in her body and so her shoulder injury was compensable.

The school system appealed to the Supreme Court, asserting that the Court of Appeals erred in finding that a sudden mechanical or structural change is not necessary in connection with each injury asserted and arguing that each alleged injury must be a mechanical or structural change in order to qualify as an injury. The Supreme Court agreed, and found "the 'structural or mechanical' change *is* the injury, when it produces harm or a lessened facility of the natural use of any bodily activity or capability" and so, without such a change, there is no injury. It vacated the judgment of the Court of Appeals and remanded for a determination whether Handel had suffered an injury by accident to her shoulder.

Loudoun County v. Richardson, 298 Va. 528 (2020).

A fire battalion chief, Michael Richardson, suffered an injury to his hip while working for the Loudon County Fire and Rescue Department.

Richardson's injury caused him to undergo hip replacement surgery. Following the surgery the surgeon assigned an 11% loss-of-use rating. The same surgeon indicated in a separate report, completed over a year post-surgery, that Richardson's loss-of-use rating prior to the total hip replacement was 74% and his condition would only have deteriorated without the surgery. The surgeon indicated Richardson's condition was permanent post-surgery and he had reached maximum medical improvement within a few months of surgery.

Richardson initially filed a claim for an 11% loss-of-use of his left leg, after his surgery, but amended his claim a couple months later to reflect a 74% loss-of-use prior to the total hip replacement with a prosthesis. The Deputy Commissioner awarded permanent partial disability benefits using the 74% loss-of-use rating, but reduced it to 49% on ground that certain arthritic conditions should not have factored into the rating.

Loudon County appealed to the full Commission and Richardson filed a cross appeal based on the reduced rating. The Commission found that the loss-of-use rating before prosthesis implantation surgery was the appropriate rating to use and was the standard required by Code § 65.2-503. It affirmed the Deputy Commissioner's decision, but amended the award to reflect a 74% loss-of-use rating. It noted that Richardson had reached maximum medical improvement before the hip replacement.

On appeal, Loudon County assigned error to the holding that the claimant's functional loss-of-use was measured by the extent of his impairment prior to surgery. Code § 65.2-503 does not directly address whether loss of use is measured before or after surgical implantation of a prosthetic joint. However, relying on cases discussing ocular surgery and medical articles discussing the disadvantages and repair of prosthetic joints, the Court found that the loss of use should be measured *prior* to a surgical prosthetic joint replacement. This decision was also based on a consistently-applied interpretation by the Commission and precedent dating back "half a century." The Supreme Court rejected the employer's argument that a claimant was not at maximum medical improvement when surgery was an option, and affirmed the Court of Appeals.

Dissent (Justices Kelsey and Powell): Under the Workers' Compensation Act, if the claimant continues to suffer a permanent loss of use of his leg, and where surgery can restore some of that loss, the percentage of restored loss is not permanent.

26. ZONING, VESTED RIGHTS, and LAND USE

Rowland v. Town Council of Warrenton, 298 Va. 703 (2020).

Developers filed an application with the Warrenton Planning Commission to rezone approximately 31 acres of land from industrial to industrial planned unit development (I-PUD), which is a type of mixed use development allowing for limited residential and commercial properties in the zone along with industrial uses. The Planning Commission denied the so-called Walker Drive Project rezoning, but Town staff worked with Developers to make additional adjustments, which resulted in a final proffer statement that included mixed land use percentages that did not comport with the target of the Town's zoning ordinance percentages. Town Council passed the rezoning on a 6-1 vote.

Residents with property nearby the Project filed a complaint challenging Town Council's approval of the rezoning. Two counts challenged the authority of Town Council to review and vote on the revised rezoning application without further review by the Planning Commission and to accept the conditional proffers which modified the requirements of the I-PUD zone. The circuit court granted oyer of the legislative records and the parties agreed that there were no disputed facts. The court ruled in favor of the Developers and the Town.

The Supreme Court affirmed. It first looked at the language of various statutes, including Code §15.2-2201, -2297, -2298. These statutes evidence the intent of the General Assembly for local governments to have authority to accept proffers that depart from the requirements of the zoning ordinance for a specific property as part of a conditional rezoning process. Because the acceptance

of a proffer has the force of law, the acceptance of a proffer which alters the rezoning requirements of a particular property is the functional equivalent of an amendment to the zoning ordinance.

Legislative decisions in zoning matters are presumed value and will not be altered unless they are unreasonable, arbitrary, or bear no reasonable relation to the public health, safety or general welfare. Town Council accepted a proffer that reduced the minimum industrial use for the property from 50% to about 40%, resulting in a *de minimus* increase in the maximum residential use and a commercial use that was within the allowed range for the I-PUD. Town Council's acceptance of the proffer reducing the maximum industrial use of the rezoned property was fairly debatable in relation to public health, etc., was not unreasonable and was not arbitrary. Therefore, it was a permissible use of conditional zoning.

Further, the WZO did not require the Planning Commission to re-hear the revised application before Town Council voted on it. Such a requirement would mean that the public hearing process may never come to a conclusion.

Stafford County v. D.R. Horton, 2021 Va. LEXIS 28, 2021 WL 1220736 (2021).

In 2005 and 2007, D.R. Horton, Inc. and Metts, L.C. ("Developers") submitted preliminary, non-clustered subdivision plans to the Stafford County Planning Commission, requesting extension of the public sewer to the unserved areas of the property. Finding that the requested extensions complied with the comprehensive plan, the Planning Commission approved the extensions for service outside of the County's "Urban Services" area.

The Developers did not construct the subdivisions, but in 2012, they submitted plans which reconfigured their previously-approved subdivisions into cluster subdivisions. The 2012 plans differed from the 2005 and 2007 plans, with one-third and 50% more lots/homes respectively and different street configurations and sewer layouts. Because the new plans differed from the old plans and the County had updated the comprehensive plan in 2010, the County advised the Developers they would need to undergo another comprehensive plan compliance review in accordance with Code §15.2-2232. The Developers refused to comply, and appealed to the Board of Supervisors, which upheld the Planning Commission's determination.

The Developers filed Writs of Mandamus and sought declaratory relief requiring the County to approve the new plans without another Planning Commission review. Following a trial, the circuit court held that the 2012 cluster development plans did not require Planning Commission review. The Supreme Court reversed.

In a question of first impression, the Court held that Code §15.2-2286.1(B), the cluster development statute, does not apply when a proposed cluster development is not located entirely within an area designated for water and sewer service. The properties here are not "located within an area designated for water and sewer service," as the statute provides, because the properties were only partially located within that area. Therefore, the statute does not even apply.

Nor does Code §15.2-2232(D) provide a safe harbor for a previously approved plans. The relevant part of that statute is permissive, not mandatory. The import of this provision, then, is that the

County has the discretion to deem certain features consistent with the comprehensive plan, but it exercised its discretion here to require review of the new developments.

The circuit court also erred in concluding that the Planning Commission's prior approvals meant that no further approval was needed. Because the Planning Commission's prior approval did not result in the "feature" being "shown on the [comprehensive] plan," Code §15.2-2232(A) required Planning Commission approval of the 2012 plans. Additionally, the 2012 projects were different from the projects that were previously approved.