In The

Supreme Court of Virginia

RECORD NO. 150638

JSR MECHANICAL, INC.,

Appellant,

v.

AIRECO SUPPLY, INC.,

Appellee.

BRIEF OF *AMICUS CURIAE*
VIRGINIA TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF APPELLANT

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SCV: Submitted on 11-02-2015 09:08:07 EST for filing on 11-02-2015

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This brief *amicus curiae* is submitted by the Virginia Trial Lawyers Association (hereinafter, "VTLA") in support of the Appellant, JSR Mechanical, Inc. (hereinafter, "JSR").

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

For the Court's convenience and in the interest of brevity, VTLA incorporates the Appellant's Nature of the Case and Material Proceedings from their Opening Brief (to be filed).

ASSIGNMENT OF ERROR

1. The motion to reinstate is a procedural motion for which the Circuit Court has limited discretion to deny. Once the plaintiff has shown that it complied with the timeliness and notice requirements of § 8.01-335(B) the Circuit Court does not have the discretion to deny the motion based on lack of good cause since this is not a requirement provided in the statute for reinstatement following discontinuance of a case. (App. 24-25)

STATEMENT OF FACTS

VTLA incorporates by reference the facts described in the Petition for Appeal filed by the Appellant JSR Mechanical, Inc., and in the Brief in Opposition by Appellee Aireco Supply, Inc.

The facts and proceedings germane to this brief are as follows:

1. The trial court entered a final order dismissing the plaintiff's action pursuant to Virginia Code § 8.01-335(B) without notice to the parties. Petition for Appeal, at Exhibit 1.

2. The plaintiff timely filed a motion to reinstate within one year of the dismissal order. Petition for Appeal, at Exhibit 2.

3. During the pendency of the action at issue, the plaintiff actively pursued alternate remedies in an alternate jurisdiction. Those remedies were not successful. Petition for Appeal, at Exhibit 2.

4. The trial court found that the plaintiff did not establish "just cause" and denied the motion to reinstate. Petition for Appeal, at Exhibit 3.

ARGUMENT

I. The circuit court erred when it denied the Motion to Reinstate pursuant to Virginia Code § 8.01-335(B) because it imposed a "good cause" standard upon the plaintiff that is not required by statute.

A. Standard of Review

An issue of statutory construction is a question of law that this Court reviews *de novo*. *Conger v. Barrett*, 280 Va. 627, 630 (2010).

B. Discussion

1. The plain language of Virginia Code § 8.01-335(B) does not require plaintiffs to establish good cause.

Courts are bound by the plain meaning of statutory language. *Hicks v. Mellis*, 275 Va. 213, 218 (2008). If statutory language is unambiguous, courts may not interpret the language in a way that effectively holds that the General Assembly did not mean what it actually expressed. *Id.*; *Vaughn, Inc. v. Beck*, 262 Va. 673, 678-79 (2001) (courts are not permitted to "add new language" to a statute because any such changes to a statute "must be a legislative, rather than a judicial, undertaking.")

Virginia Code § 8.01-335(B) provides:

> Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court

> may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

Va. Code § 8.01-335(B) (emphasis added).

By its plain terms, Virginia Code § 8.01-335(B) does not require a plaintiff to demonstrate good cause in order for his action to be reinstated. If the General Assembly had intended for plaintiffs to establish good cause, it would have stated its intention in the statute.

Further, it is well established that "when the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional." *Va. Broad. Corp. v. Commonwealth*, 286 Va. 239, 247 (2013) (citations omitted). Although the General Assembly included the words "good cause" in 31 separate statutes throughout Section 8.01 of the Code

of Virginia, it omitted them from Code § 8.01-335.[1] Virginia law requires us to presume that the General Assembly's choice of language was intentional.

The defendant argues that, pursuant to *Wickham v. Green*, 111 Va. 199 (1910), plaintiffs have a "duty" to show good cause in order for their cases reinstated after dismissal. Appellee's Brief in Opp., at 10. The defendant's reliance upon *Wickham* is misplaced because in that case, the trial court dismissed the plaintiff's suit for cause; specifically, because the plaintiff failed to file required pleadings. *Id.* at 200, 203 (cited by *Duty v. Chesapeake & O. Ry*., 70 W. Va. 14, 19, 73 S.E. 331, 334 (W. Va. 1911) (explaining that the suit in *Wickham* was dismissed by the clerk for want of pleadings)).

In *Wickham*, this Court explained:

> It is always to be regretted when a case has to be disposed of on other grounds than those that go to the very right and merits of the cause. Courts cannot, however, permit considerations of hardship in particular cases to cause them to disregard and set at naught the plain provisions of a positive

[1] These statutes are Va. Code § 8.01-18; § 8.01-20.1; § 8.01-41; § 8.01-50.1; § 8.01-216; § 8.01-216.16; § 8.01-217; § 8.01-251; § 8.01-264; § 8.01-265; § 8.01-286.1; § 8.01-380; § 8.01-396; § 8.01-417; § 8.01-420.4; § 8.01-420.6; § 8.01-466; § 8.01-500; § 8.01-506; § 8.01-581.04; § 8.01-581.3:1; § 8.01-581.17; § 8.01-581.20(C); § 8.01-587; § 8.01-600; § 8.01-606; § 8.01-607(B)(2); § 8.01-615; § 8.01-675.1; § 8.01-675.2; § 8.01-676.1.

> statute. To do so would be to usurp legislative functions, and would operate a judicial repeal of the statute.

Wickham, at 203-204.

The case on appeal here is significantly different from *Wickham* because the plaintiff in this case filed and served pleadings before the statute of limitations expired, and his suit was not dismissed for cause. Instead, the instant case suffered an involuntarily dismissal that was entered without prior notice to the parties for the convenience of the court's docket. On these facts, the plaintiff here is not – and should not – be required to establish good cause in order to have his case reinstated.

2. The General Assembly specifically deleted the "for cause" requirement from Virginia Code § 8.01-335(B).

When interpreting a statute, courts must "ascertain and give effect to the intention of the legislature, which is usually self-evident from the statutory language." *Rutter v. Oakwood Living Ctrs. of Va., Inc.*, 282 Va. 4, 9-10 (2011). The legislative history of Virginia Code § 8.01-335(B) makes clear that a plaintiff who files a motion to reinstate is <u>not required to establish good cause</u>, and that a motion to reinstate should be liberally granted if it is filed within one year of the dismissal order.

Virginia Code § 8.01-335(B) is derived from former Virginia Code § 8-154. *See* Va. Code Ann. § 8.01-335 (2015). In 1970, Virginia Code § 8-154 provided:

> Any case dismissed under the provision of this section may be reinstated, on motion, and after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after.

Id. (cited by *Bosserman v. Newlin*, 10 Va. Cir. 477, 478 (Frederick 1970)). At that time, the statute did <u>not require a plaintiff seeking reinstatement to show good cause</u>.

Virginia Code § 8-154 was recodified as Virginia Code § 8.01-335 in 1977. *See* House Doc. No. 14, Virginia Code Commission, *Report on Revision of Title 8 of the Code of Virginia* at 34, 219 (1977) (cited by *Bosserman*, at 478). The statute was amended again in 1990, 1992, 1997, 1999 and 2007. Va. Code Ann. § 8.01-335 (2015).

In 1997, the General Assembly inserted the words "for cause" into subsection B of the statute, as follows:

> Any case discontinued under the provisions of this subsection may be reinstated, on motion and <u>for cause</u> … within one year from the date of such order.

Va. Code Ann. § 8.01-335 (1997) (emphasis added). The effect of the amendment was that, from that point forward, discontinued actions could only be reinstated "for cause."

The General Assembly deleted the words "for cause" from the statute just two years later – in 1999. Va. Code Ann. § 8.01-335 (1999). The legislature has never reinserted the words "for cause" into subsection B even though it has continued to amend the statute. *See* Va. Code Ann. § 8.01-335 (2007).

The fact that the General Assembly inserted the words "for cause" into the statute, but then deleted them two years later, clearly shows that plaintiffs are <u>not</u> required to establish good cause in order to have their cases reinstated pursuant to Virginia Code § 8.01-335(B). Therefore, although subsection B gives courts *some* discretion when ruling on motions to reinstate, the trial court erred when it imposed a "for cause" standard upon the plaintiff.

3. The purpose of Virginia Code § 8.01-335(B) is to enable trial courts to eliminate cases that have been abandoned from their dockets.

The purpose of Virginia Code § 8.01-335(B) is to enable trial courts to eliminate from their dockets cases for which there is "<u>no reasonable prospect of trial.</u>" *Nash v. Jewell*, 227 Va. 230, 234 (1984) (emphasis

added). This Court has explained that in summarily dismissing such cases, "trial courts may thus promote efficiency in the administration of justice by saving the time of court personnel which would otherwise be required to preserve on the courts' dockets actions long forgotten or abandoned by litigants and lawyers." *Id.* (emphasis added) (cited with approval by *Rutter*, at 10).

Although Virginia Code § 8.01-335 permits a trial court to clear dormant cases from its docket, it is not intended to deprive a litigant of his right and ability to seek justice if the litigant has a legally viable claim, has not forgotten or abandoned his claim, has a reasonable prospect of trial, and has complied with the statutory requirements. In *Nash v. Jewell*, this Court held that the trial court abused its discretion by dismissing an action under Virginia Code § 8.01-335 because the plaintiff had exhibited a desire to proceed with her case. This Court explained:

> As a general rule, if a plaintiff who is ready and willing to go to trial is brought before the court under the provisions of Code § 8.01-335, and **demonstrates an intent to proceed with his case**, the court should not discontinue his action.

Nash, at 235-236 (1984) (emphasis added).

Notably, although subsection A of the statute was at issue in *Nash v. Jewell*, the Court did not limit its holding to subsection A. Instead, the

Court referred to the entire statute – Virginia Code § 8.01-335 – as evidenced by the quote above.

4. Liberally granting motions to reinstate comports with due process concerns.

The holding in *Nash* is consistent with two well established legal principles. First, this Court disfavors the dismissal of viable claims on technical grounds. *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 139 (2013) (dismissals on technical grounds are disfavored); *see also Collins v. Shepherd*, 274 Va. 390, 400-401 (2007) (interpreting Va. Code § 8.01-335). Dismissals pursuant to Virginia Code §§ 8.01-335(A) and (B) are not dismissals on the merits, and it is well established that it is better for filed cases to be resolved "on their merits at trial or by the agreement of the parties themselves, rather than by operation of a statute." *Gittens v. Va. Empl. Comm'n*, 80 Va. Cir. 106, 109 (Chesapeake 2010); *see also Conger*, at 632 (dismissal under Code § 8.01-335 is not a dismissal on the merits).

Second, liberally granting motions to reinstate comports with due process concerns because Code § 8.01-335 authorizes courts to dismiss viable actions <u>without notice to the parties.</u> *Collins*, at 401(noting that the statute does not require prior notice). Many courts have recognized the "severity" of involuntary dismissals pursuant to Code § 8.01-335, but have found that due process was satisfied <u>because the plaintiff could move to</u>

reinstate his or her case within one year of the dismissal order. *See* *Milot v. Milot*, 62 Va. App. 415, 423-424 (Va. Ct. App. 2013); *Bosserman*, at 480; *see also* *Smith v. Smith*, 4 Va. App. 148, 152-153 (Va. Ct. App. 1987) (noting due process concerns); *Cook v. Wayland*, 64 Va. Cir. 386, 387-388 (Waynesboro 2004) (stating that the General Assembly included a "one year grace period" to provide parties the opportunity to reinstitute their claims). In *Bosserman v. Newlin*, the trial court observed that the reinstatement provision "is clearly for the purpose of softening the harshness of any results effected by the preceding portions of the statute." *Id.* at 480.

Without question, clearing long forgotten and abandoned cases from a court's docket is laudable because it can "expedite the administration of justice and reduce the size of dockets needlessly burdened with inactive cases." *Bosserman*, at 479. However, efforts to reduce the size of a trial court's docket should not take precedence over due process concerns or access to justice. This is particularly true where, as here: (1) the case has not been forgotten or abandoned; (2) the case was not dismissed on its merits; (3) the case was involuntarily dismissed without prior notice to the parties; and, (4) the plaintiff complied with the statutory requirements by filing a motion to reinstate within one year of the dismissal order. Under

circumstances such as these, VTLA respectfully submits that motions to reconsider should be liberally granted.

5. Liberally granting motions to reinstate cases will not prejudice defendants who desire an end to the litigation.

Liberally granting motions to reinstate cases will not prejudice defendants who desire an end to litigation because defendants have the ability to expedite and bring an end to litigation by serving discovery requests and requests for admission, moving for entry of a scheduling order, filing dispositive motions, and setting their case for trial on the merits. In its opposition brief, the defendant argues: (1) that the action is "without merit"; (2) that the plaintiff "began repeatedly missing deadlines for discovery and stopped prosecuting its case";[2] and, (3) that it would be "contrary to the administration of justice and court efficiency to allow this matter to be dragged out further" because the plaintiff "willfully allowed the case to languish and be long forgotten and abandoned." *Id.* at 1, 3, 12, 13. Even if true, the defendant has had ample opportunity to bring this case to a conclusion on its merits, and should not be permitted to evade liability (should liability be appropriate) on a technicality.

[2] Notably, the defendant has not cited any evidence to support these assertions.

II. The circuit court erred in denying the Motion to Reinstate because the plaintiff established "good cause."

A. Standard of Review

The determination of the existence of "good cause" presents a mixed question of fact and law. *See*, *e.g.*, *Hampton v. Va. Empl. Comm'n*, 2014 Va. App. LEXIS 59 (Va. Ct. App. 2014) (unpub.); *Louis Latour, Inc. v. Va. Alcoholic Bev. Control Bd.*, 49 Va. App. 758, 774 (Va. Ct. App. 2007). This Court reviews mixed questions of law and fact, utilizing a *de novo* standard of review. *Muhammad v. Commonwealth*, 269 Va. 451, 479 (2005).

B. Discussion

The factual record in this case is not well developed, and a transcript of the proceedings is not available. Nevertheless, when he filed his Motion to Reinstate, the plaintiff offered plausible explanations as to why the case has been dormant and why he wishes to reactivate the litigation.

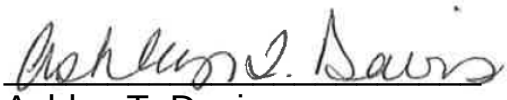
It is not uncommon for plaintiffs to file an action in order to preserve the statute of limitations, and then pursue relief in an alternate forum. In the divorce context, the Virginia Court of Appeals has observed that actions are routinely dismissed under Code § 8.01-335(B) where another action has been filed simultaneously with the pending action "<u>and the relief has been granted in the other action.</u>" *Smith*, at 151 (emphasis added). However, if relief is <u>not</u> granted in the alternate forum (as here), the plaintiff

should be permitted to pursue his original action and obtain a judgment on the merits, if a judgment is warranted under the facts and law of the case. The plaintiff in this case established good cause to have this case reinstated, and the trial court erred when it ruled otherwise.

CONCLUSION

This Court should reverse the trial court's decision to deny the plaintiff's motion to reinstate pursuant to Virginia Code § 8.01-335(B) because the trial abused its discretion when it imposed a good cause standard upon the plaintiff that is not required by the statute. Even if the trial court did not abuse its discretion when it imposed a good cause standard upon the plaintiff, the trial court erred when it found that the plaintiff did not establish good cause under the facts of this case.

Respectfully submitted by *The Virginia Trial Lawyers Association*,

By: 
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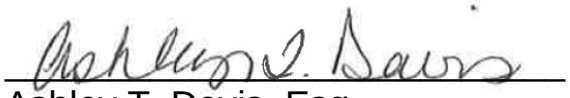
CERTIFICATE OF SERVICE

This is to certify that undersigned counsel has complied with the requirements of Rule 5:30 and that on November 2, 2015 an electronic copy of the Brief of *Amicus Curiae* was filed, via VACES, and ten paper copies of the same were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Brief of *Amicus Curiae* was served, via email, to counsel for all parties, specifically to Patrick G. Merkle, Esq., Law Offices of Patrick G. Merkle, PLLC, 2120 L Street, NW, Suite 700, Washington, D.C. 20037, PGMerkle@aol.com, Counsel for Appellant JSR Mechanical, Inc.; and Brett L. Antonides, Esq. and Ashley A. Jackson, Esq., 4400 Fair Lakes Court, Fairfax, VA 22033, bantonides@blapc-law.com, ajackson@blapc-law.com Counsel for Appellee Aireco Supply, Inc.



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Assurance Data, Inc. v. Malyevac

Supreme Court of Virginia

September 12, 2013, Decided

Record No. 121989

Reporter

286 Va. 137; 747 S.E.2d 804; 2013 Va. LEXIS 103; 36 I.E.R. Cas. (BNA) 1155; 2013 WL 4853305

ASSURANCE DATA, INC. v. JOHN MALYEVAC

Prior History: **[***1]** FROM THE CIRCUIT COURT OF FAIRFAX COUNTY. Robert J. Smith, Judge.

Assurance Data, Inc. v. Malyevac, 2013 Va. LEXIS 41 (Va., Feb. 27, 2013)

Disposition: Reversed and remanded.

Case Summary

Overview

ISSUE: Whether a trial court erred by using a demurrer to decide, on the merits, the enforceability of an employment contract's non-compete and non-solicitation provisions. HOLDINGS: [1]-The trial court committed error because a demurrer's one purpose was to find if a complaint stated a cause of action upon which requested relief could be granted, and, in ruling on the demurrer, the court ruled on the merits of whether the provisions were enforceable without letting appellant employer present evidence to show the restraints were no greater than necessary to protect its legitimate business interests, were not unduly harsh or oppressive in curtailing appellee employee's ability to earn a livelihood, and were reasonable in light of sound public policy.

Outcome

Judgment reversed.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN1 A demurrer cannot be used to decide on the merits whether a restraint on competition in an employment contract is enforceable.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

HN2 The purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted. A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof. Thus, unlike a motion for summary judgment, a demurrer does not allow a court to evaluate and decide the merits of a claim.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN3 On review of a judgment sustaining a demurrer, like a trial court, the reviewing court considers as true all the material facts alleged in the complaint, all facts impliedly alleged, and all reasonable inferences that may be drawn from such facts. When a complaint contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer. Even though a complaint may be imperfect, when it is drafted so that the defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer. Because the decision whether to grant a demurrer involves issues of law, the trial court's judgment is reviewed de novo.

Evidence > Burdens of Proof > Allocation

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN4 An employment agreement that restrains competition must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved. Each case involving the enforceability of a restraint on competition must be determined on its own facts. An employer bears the burden to show that the restraint is no greater than necessary to protect a legitimate business interest, is not unduly harsh or oppressive in curtailing an employee's ability to earn a livelihood, and is reasonable in light of sound public policy. In determining whether an employer has carried that burden, a court considers the function, geographic scope, and duration elements of the restriction.

It assesses these elements together rather than as distinct inquiries, and, to be enforceable, the agreement must be found reasonable as a whole.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN5 Restraints on competition in employment contracts are neither enforceable nor unenforceable in a factual vacuum. Based on evidence presented, a trial court must ascertain whether a restraint is narrowly drawn to protect an employer's legitimate business interest, is not unduly burdensome on an employee's ability to earn a living, and is not against public policy. An employer may prove a seemingly overbroad restraint to be reasonable under the particular circumstances of the case.

Counsel: For Appellant: C. Dean Latsios (Matthews, Snider & Fitzner).

For Appellee: Christopher T. Craig and Lee Warren (Cook, Craig & Francuzenko, PLLC).

Judges: OPINION BY CHIEF JUSTICE CYNTHIA D. KINSER. JUSTICE McCLANAHAN, concurring.

Opinion by: CYNTHIA D. KINSER

Opinion

[*139] **[**805]** PRESENT: All the Justices

OPINION BY CHIEF JUSTICE CYNTHIA D. KINSER

This appeal concerns an employer's action to enforce certain provisions of an employment agreement that, among other things, restrain competition. In sustaining a demurrer, the circuit court resolved the employee's challenge to the enforceability of the restraints on competition. Because ***HN1*** a demurrer cannot be used to decide on the merits whether a restraint on competition is enforceable, we will reverse the circuit court's judgment. This case is an example in which the trial court "'incorrectly . . . short-circuited litigation pretrial and . . . decided the dispute without permitting the parties to reach a trial on the merits.'" CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24, 431 S.E.2d 277, 279, 9 Va. Law Rep. 1421 (1993) (quoting Renner v. Stafford, 245 Va. 351, 352, 429 S.E.2d 218, 219, 9 Va. Law Rep. 1174 (1993)); see also Breeding v. Hensley, 258 Va. 207, 214, 519 S.E.2d 369, 372 (1999).

[*140] **[**806]** I. RELEVANT FACTS AND PROCEEDINGS

John Malyevac and Assurance Data, Inc. (ADI) entered **[***2]** into an agreement (the Agreement), pursuant to which Malyevac sold ADI's computer products and services to its customers. As relevant to the issues on appeal, the Agreement contained non-compete, non-solicitation, non-disclosure, and return of confidential information provisions. Specifically, paragraph 5 required that Malyevac

> shall not, during the term of this Agreement and for 6 months after the termination hereof (within a fifty (50) mile radius of [ADI's] Virginia office(s)), solicit, provide, promote or sell, directly or indirectly, except through and for the direct benefit of [ADI]:
>
> (a) computer, software or hardware products in competition with the products which are available through [ADI]; (b) services for customers or prospective customers that are competitive with services provided by or available through [ADI]; or
>
> (c) training, managed services, installation, implementation or related professional services for software and/or hardware which are provided by [ADI], except as pre-approved in writing by [ADI].

Under paragraph 10, Malyevac agreed that he would not

> at any time during or after the term of this Agreement use . . . or disclose any Confidential Information to any person **[***3]** whatsoever (except for the sole purpose of selling [ADI's] services and products for [ADI] in a good faith and professional manner as provided herein), or permit any person whatsoever to examine and/or make copies of any reports or any information or documents prepared by him/her or that come into his/her possession or under his control by reason of his/her consulting services, and that upon termination of this Agreement he/she will turn over to [ADI] all Confidential Information, including, without limitation, all copies thereof, in any format whatsoever, and any documents, papers and other items in his/her possession or under his/her control that relate to [ADI].

Next, in paragraph 12, Malyevac agreed that

> **[*141]** [e]xcept for the sole benefit of [ADI] and consistent with the terms hereof, during the term hereof, and for a period of twelve (12) after the date of termination hereof, [he] will not, directly or indirectly, seek, engage in or solicit, from any "Company Customer" (as hereafter defined) any business which is competitive with [ADI's] offering of services or products or in any way discourage client or customer usage of [ADI's] services or products. A "Company Customer" shall mean **[***4]** any past, present or prospective customers of [ADI] or its subsidiaries, with whom [Malyevac] has been in contact or obtained contact/user information in connection with his/her consulting activities for [ADI] or its vendors.

Finally, in paragraph 17(b), Malyevac agreed that upon termination of the Agreement, he would

> [d]eliver to [ADI] all [ADI] or [ADI's] customer or vendor keys, passwords, property, equipment, vendor marketing info and materials, data, reports, summaries, test results, computer software, and such other items and materials and/or Confidential Information (and copies thereof) as may have been prepared for and/or accumulated by [Malyevac] in performing this Agreement or services for [ADI], whether completed or in process (including all copies thereof in whatever format).

A few months after entering into the Agreement, Malyevac resigned. Subsequently, ADI filed a complaint in the circuit court alleging that Malyevac was violating paragraphs 5, 10, 12, and 17(b) of the Agreement by performing work and services and selling products in direct competition with ADI, by engaging in other prohibited activities, and by failing to return confidential information. ADI requested **[***5]** injunctive relief, the return of all confidential information, and compensatory damages.

In response, Malyevac filed a demurrer, asserting that ADI's allegations set forth in the complaint fail to state a claim upon which relief may be granted. Malyevac specifically asserted that the Agreement's non-compete **[**807]** and non-solicitation provisions are overbroad and thus unenforceable. At a hearing on the demurrer, Malyevac pointed out, as an example, that the non-solicitation

requirements in paragraph 12 are in force for a period of "twelve (12)" but that language indicating whether the duration is days, weeks, months or **[*142]** years is omitted. Due to the over-breadth, Malyevac argued that a demurrer can be used to challenge the provisions' enforceability.

ADI responded that a demurrer only tests whether a cause of action has been pled and that it cannot be used to decide the merits of a claim. Acknowledging its burden to demonstrate the reasonableness of the provisions restraining competition, ADI argued that it was entitled to present evidence to meet that burden. Thus, according to ADI, a demurrer cannot be used to determine whether the restraints are enforceable.

The court sustained the demurrer **[***6]** without granting ADI leave to amend its complaint. Explaining its decision, the circuit court stated:

> So then the question becomes why can't we do it with a demur[rer] if the court finds as a matter of law that a contract, a part of a contract is unenforceable then to state, to bring a lawsuit based on that unenforceable contract . . . fails to state a cause of action.

Applying that rationale, the court concluded "as a matter of law the provision is unenforceable." The court entered a final order dismissing the action with prejudice.

We awarded ADI this appeal. The dispositive question is whether the circuit court erred by using a demurrer to decide, on the merits, the

enforceability of the Agreement's non-compete and non-solicitation provisions.[1]

[*143] II. ANALYSIS

HN2 The purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted. Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 557, 708 S.E.2d 867, 869 (2011). "A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." Id. (internal quotation marks omitted). Thus, unlike a motion for summary judgment, a demurrer "does not allow the court to evaluate and decide the merits of a claim." Fun v. Virginia Military Inst., 245 Va. 249, 252, 427 S.E.2d 181, 183, 9 Va. Law Rep. 971 (1993); see also Concerned Taxpayers v. County of Brunswick, 249 Va. 320, 327-28, 455 S.E.2d 712, 716 (1995).

HN3 Like the circuit court, "we consider as true all the material facts alleged in the . . . complaint, all facts impliedly alleged, and all reasonable inferences that may be drawn from such facts." Concerned Taxpayers, 249 Va. at 323, 455 S.E.2d at 713. When a complaint "contains sufficient allegations **[***9]** of material facts to inform a defendant of the nature and character of the claim, it is unnecessary **[**808]** for the pleader to descend into statements giving details of proof in order to withstand demurrer." CaterCorp, 246 Va. at 24, 431 S.E.2d at 279. "[E]ven though a . . . complaint may be imperfect, when it is drafted so that defendant cannot mistake the true nature of the claim, the trial

[1] At the hearing on the demurrer, the parties' arguments focused primarily on the enforceability of the Agreement's non-compete and non-solicitation provisions and whether that issue could be decided on demurrer. Malyevac, however, also argued at that hearing and in a memorandum in support of the demurrer that the allegations concerning Malyevac's violation of paragraphs 10 and 17(b) requiring non-disclosure and return of confidential information, **[***7]** respectively, are conclusory and therefore insufficient to state a claim, and that the complaint fails to identify actual damages suffered by ADI as a result of Malyevac's alleged actions. The circuit court did not address these arguments but sustained the demurrer as to the entire complaint, including the allegations regarding paragraphs 10 and 17(b), for the stated reason that "as a matter of law the provision is unenforceable."

In a motion to reconsider, ADI pointed out that Malyevac challenged only the enforceability of the non-compete and non-solicitation provisions and that he asserted other reasons in the demurrer and supporting memorandum as to why the allegations asserting violations of paragraphs 10 and 17(b) fail to state a claim. ADI argued that the circuit court's order sustaining the demurrer and dismissing the entire complaint did not accurately reflect its ruling that pertained only to the non-compete and non-solicitation provisions. The circuit court denied the motion to reconsider, stating that its prior order was an accurate statement of the court's ruling on the demurrer. Thus, the circuit court sustained the demurrer and dismissed the complaint with prejudice and **[***8]** without leave to amend because "as a matter of law the provision is unenforceable." When the circuit court used the term "the provision," it did not specify to which provision it was referring. We will address them collectively.

court should overrule the demurrer." Id. "'Because the decision whether to grant a demurrer involves issues of law, we review the circuit court's judgment de novo.'" Dunn, McCormack & MacPherson, 281 Va. at 557, 708 S.E.2d at 869 (quoting Abi-Najm v. Concord Condo., LLC, 280 Va. 350, 357, 699 S.E.2d 483, 487 (2010)).

Citing the decisions in Modern Environments, Inc. v. Stinnet, 263 Va. 491, 561 S.E.2d 694 (2002), and Home Paramount Pest Control Cos. v. Shaffer, 282 Va. 412, 718 S.E.2d 762 (2011), Malyevac argues that the circuit court did not err in sustaining the demurrer because the Agreement's non-compete and non-solicitation provisions are overbroad on their face and therefore unenforceable. According to Malyevac, when analyzing overly broad restraints on **[*144]** competition, a court could determine that no **[***10]** amount of evidence would render the restraints reasonable and enforceable. As it did before the circuit court, ADI argues that in the context of ruling on a demurrer, the court could not decide the merits of Malyevac's challenge to the enforceability of these provisions. To do so, according to ADI, denies it the opportunity to present evidence that the restraints are reasonable and no greater than necessary to protect its legitimate business interests.

HN4 An agreement that restrains competition "must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved." Omniplex World Servs. Corp. v. US Investigations Servs., Inc., 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005). Each case involving the enforceability of a restraint on competition "must be determined on its own facts." Modern Env'ts, 263 Va. at 493, 561 S.E.2d at 695. The employer bears the "burden to show that the restraint is no greater than necessary to protect a legitimate business interest, is not unduly harsh or oppressive in curtailing an employee's ability to earn a livelihood, and is reasonable in light of sound public policy." Id. In determining **[***11]** whether an employer has carried that burden, "we consider the 'function, geographic scope, and duration' elements of the restriction." Home Paramount, 282 Va. at 415, 718 S.E.2d at 764 (quoting Simmons v. Miller, 261 Va. 561, 581, 544 S.E.2d 666, 678 (2001)). "We assess these elements together rather than as distinct inquiries," and to be enforceable the agreement must be found

reasonable as a whole. Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 284 Va. 382, 393, 732 S.E.2d 676, 681 (2012) (citing Home Paramount, 282 Va. at 415-16, 718 S.E.2d at 764).

The premise running through Simmons, Modern Environments, Home Paramount, and our other decisions is that ***HN5*** restraints on competition are neither enforceable nor unenforceable in a factual vacuum. Based on evidence presented, a trial court must ascertain whether a restraint "'is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy.'" Home Paramount, 282 Va. at 415, 718 S.E.2d at 763-64 (quoting Omniplex World Servs., 270 Va. at 249, 618 S.E.2d at 342); Modern Env'ts, 263 Va. at 493, 561 S.E.2d at 695. An employer **[***12]** may prove a seemingly overbroad restraint to be reasonable under the particular **[*145]** circumstances of the case. Simmons, 261 Va. at 581, 544 S.E.2d at 678 (citing cases).[2]

As explained earlier, a demurrer has one purpose - to determine whether a complaint states a cause of action upon which the **[**809]** requested relief may be granted. Dunn, McCormack & MacPherson, 281 Va. at 557, 708 S.E.2d at 869. In ruling on the demurrer, the circuit court, however, examined the Agreement's non-compete and non-solicitation provisions and determined that the provisions are overbroad and thus unenforceable **[***13]** as a "matter of law." The court ruled on the merits of whether the Agreement is enforceable without permitting ADI to present evidence to demonstrate that the restraints are no greater than necessary to protect its legitimate business interests, are not unduly harsh or oppressive in curtailing Malyevac's ability to earn a livelihood, and are reasonable in light of sound public policy.[3] See Modern Env'ts, 263 Va. at 493, 561 S.E.2d at 695.

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[2] Contrary to Malyevac's argument, our decision in Modern Environments does not support his assertion that a restraint on competition can be found unenforceable as a matter of law without the presentation of evidence. There, the employer failed to offer argument or evidence to prove its legitimate business interests were served by the particular restraint at issue. 263 Va. at 495-96, 561 S.E.2d at 696. In contrast, ADI opposed the demurrer precisely on the ground that it sought to present evidence to prove that the restraint is reasonable and no greater than necessary to protect its legitimate business interests.

[3] Because a demurrer cannot be used to decide the merits of a claim alleged in a complaint, we disagree with Malyevac's assertion that this Court cannot review the circuit court's decision because ADI failed to proffer the evidence that it would have introduced to support the enforceability of the provisions restraining competition.

III. CONCLUSION

Because "[a] demurrer does not permit the trial court to evaluate and decide the merits of the claim set forth in a . . . complaint," Concerned Taxpayers, 249 Va. at 327, 455 S.E.2d at 716, the circuit court erred when it sustained Malyevac's demurrer on the ground that "the provision is unenforceable" as a matter of law and dismissed the entire complaint for that reason. Therefore, we will reverse the circuit **[***14]** court's judgment sustaining the demurrer and remand the case for further proceedings.[4]

Reversed and remanded.

Concur by: McCLANAHAN

Concur

[*146] JUSTICE McCLANAHAN, concurring.

Because an employer is entitled to present evidence to prove its restraints on competition are reasonable under the particular circumstances, I agree the circuit court erred in sustaining the demurrer. I would end my analysis there.

[4] In light of our decision, it is not necessary to address ADI's other assignments of error.

Bosserman v. Newlin

Circuit Court of Frederick County, Virginia

April 22, 1970

No Number in Original

Reporter

10 Va. Cir. 477; 1970 Va. Cir. LEXIS 18

Richard Allen Bosserman v. Mitchell Lee Newlin

Case Summary

Procedural Posture

Plaintiff injured passenger filed an action against defendant automobile driver for damages allegedly suffered by reason of the automobile driver's negligent operation of a motor vehicle. Following dismissal of his action, the injured passenger filed a motion to reinstate his cause of action, which was the subject of the matter before the court.

Overview

The injured passenger's lawsuit was dismissed by the court, pursuant to Va. Code § 8-154 (1950), lack of progress for more than two years following commencement of the lawsuit. The injured passenger then filed a motion to reinstate his cause of action within one year of the dismissal and the order for reinstatement was entered more than one year following the dismissal of the action. The automobile driver argued that, under § 8-154, reinstatement was precluded because the reinstatement order was not entered within the one-year period following entry of the dismissal order. The court rejected the automobile driver's argument. The court noted that entry of a dismissal order was discretionary with the trial court. The court reviewed the language of the statute and interpreted it to only require that a motion to reinstate be made within the one-year period. It further determined that the law did not mandate that a reinstatement order be obtained or entered within the one-year period required by the statute. The court pointed out that a discontinuance order was not the same as a final judgment because it did not dispose of all the rights of the parties to the lawsuit.

Outcome

The court granted the injured passenger's motion for reinstatement.

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Pretrial Matters > Continuances

HN1 Under the provisions of Va. Code § 8-154 (1950) it is discretionary with a trial court in which a case has been pending for more than two years without any order or proceeding therein excepting continuances to order it stricken from the docket, and it shall thereby be discontinued. This statute provides for notice to the parties before entry of such an order so that they may be heard on the matter.

Governments > Legislation > Interpretation

HN2 Though resort to considerations of grammar and logical composition in the placement of words and phrases within a sentence is not always a true touchstone in divining legislative intent, use of this method is a frequent and at times an indispensable means of casting light to disperse shadows of doubt and ambiguity. It is even a more potent aid when the grammatical construction reached reveals an intent which accords with the general purpose and object of a statute.

Headnotes/Syllabus

Headnotes

[1]** After a discontinuance for the failure to act in a case for two years, the court may reinstate the case if a motion to do so is made within one year. Section 8.01-335(A).

Judges: JUDGE ROBERT K. WOLTZ

Opinion by: WOLTZ

Opinion

[*477] On October 16, 1963, the plaintiff, an infant suing by his next friend, filed his Motion for Judgment against the defendant, also an infant, for damages alleged to have resulted from the defendant's negligent operation of a motor vehicle in which the plaintiff was a passenger. The action was filed by a non-resident attorney who associated a local counsel. Within several days, service of process was had upon a member of the defendant's family at his usual place of abode, he then being in another jurisdiction as a member of the Armed Forces. No further action took place until April 7, 1965, when grounds of

defense tendered by the defendant were ordered filed and were filed forthwith. As the result of notices of a motion for leave to withdraw as counsel, plaintiff's resident counsel was granted such leave pursuant to Rule 1:13 of the Rules of Court by order entered July 18, 1966.

After proper notice by the Clerk to the plaintiff's remaining (nonresident) counsel and **[**2]** counsel for the defendant, the action was dismissed by general order of September 16, 1968, under the "two-year rule" of § 8-154, Code, 1950, without appearance or objection on the part of either party.

On September 8, 1969, there was filed in the Clerk's Office the draft of an order reciting that upon plaintiff's motion for reinstatement pursuant to such § 8-154 it was ordered that the matter be placed upon the docket to be **[*478]** heard on such motion on November 4, 1969 (the November Motions Day of this Court), and such order was entered October 10, 1969. On that Motions Day the plaintiff appeared in person and by his new counsel, as did counsel for the defendant, to argue the matter. The defendant argued that under § 8-154 the actual order of reinstatement must have been entered no later than September 16, 1969, that is within one year from the September 16, 1968, order of dismissal, and that the mere filing of a motion for reinstatement within one year, in this case by a margin of eight days, was not compliance with the statute and as a consequence no reinstatement should be allowed. The defendant further argued that if there was to be a reinstatement good cause therefor must be shown.

[3]** In response to the second contention of the defendant, the plaintiff testified that he was nineteen at the time of the accident, twenty at the time action was instituted, entered the Armed Forces in May of 1965 (which was approximately one month after the grounds of defense were filed) in the course of which he spent eighteen months in Germany being discharged in May of 1967, when he returned to Virginia briefly and then moved to the District of Columbia where he was married in December of 1967, after which for a time he was busily engaged in setting up housekeeping and the like.

HN1 Under the provisions of § 8-154 it is discretionary with a trial court in which a case has been pending for more than two years

without any order or proceeding therein excepting continuances to order it stricken from the docket, "and it shall thereby be discontinued." This statute provides for notice to the parties before entry of such an order so that they may be heard on the matter. The portion of the statute principally involved in this case is as follows: "Any case dismissed under the provision of this section may be reinstated, on motion, and after notice to the parties in interest if known or their **[**4]** counsel of record, within one year from the date of such order but not after." Both Snead v. Atkinson, 121 Va. 182, 92 S.E. 835 (1917), and Echols' v. Brennan, 99 Va. 150, 37 S.E. 786 (1901), are authority that a decree striking a cause from the docket is a final adjudication that everything has been done in the case that the court expects to do, the first named case holding this to be true even though the decree removing from the **[*479]** docket may have been erroneous, the error making the decree no less final. In both of those cases efforts to reinstate were initiated a matter of some years after the expiration of the one-year limitation on reinstatement. In Miller v. Armentrout, 196 Va. 32, 82 S.E.2d 491 (1954), the case had been dismissed October 22, 1951, and motion for reinstatement was made November 24, 1952, the trial court allowing the reinstatement over the defendant's objection that "motion for reinstatement was not made within the time prescribed by statute." The Supreme Court of Appeals decided the case on other grounds and specifically declined to rule on this particular point. No case in this jurisdiction has come to my attention where application for reinstatement was made within the prescribed limit of one year from **[**5]** the time of dismissal, but the order of reinstatement based on such application fell beyond the one-year limitation.

The provisions § 8-154 for striking somnolent cases from the docket is a salutary one for stirring parties to action in progressing the case, or in default of that clearing dead wood from the docket, and in practice is frequently resorted to by trial courts in this jurisdiction to expedite the administration of justice and reduce the size of dockets needlessly burdened with inactive cases. Though salutary, the rule is attendant with some severity and in mitigation of this the legislature in its wisdom has seen fit to provide a grace period in which the involuntary discontinuance resulting from the operation of the statute may be terminated

by reinstatement of the case. The result of a reinstatement would seem to be a setting aside of the judgment of the court in dismissing the case previously. Where there has been an involuntary dismissal, the general rule is that the judgment of dismissal may be set aside on timely application, and in many jurisdictions only on a showing of good cause, 24 Am. Jur. 2d, Dismissal, Discontinuance, Non-suit, § 88. If under our statute **[**6]** only the application for reinstatement need be made within the one-year period, then admittedly it was timely made.

Examining the precise words of the statute the phrase "within one year from the date of the order" can be construed to modify either "may be reinstated" or to modify the phrase "on motion." The phrase "and after notice to **[*480]** the parties in interest if known or their counsel of record" intervening between the phrase "on motion" and the phrase "within one year of the date of such order" is merely descriptive of a preliminary procedural step which must be taken prior to the motion and is not otherwise germane to the question of the time limit. Omitting this phrase, which is unrelated to the time limit, from this sentence it would then read "Any case dismissed under the provisions of this section may be reinstated, on motion within one year from the date of such order but not after." The year limitation then modifies the time of motion rather than the reinstatement. Furthermore and as a corollary to the foregoing dissection of sentence structure, if a one-year time limitation refers to the reinstatement, then the phrase containing such provision would properly follow immediately **[**7]** the introductory clause on reinstatement and the provisions concerning motion and notice could either conclude or introduce the sentence and in either event would be unrelated directly to the time limitation.

HN2 Though resort to considerations of grammar and logical composition in the placement of words and phrases within a sentence is not always a true touchstone in divining legislative intent, use of this method is a frequent and at times an indispensable means of casting light to disperse shadows of doubt and ambiguity. It is even a more potent aid when the grammatical construction reached reveals an intent which accords, as I think it does, with the general purpose and object of a statute.

As noted above, the statute is salutary to the administration of justice. In attaining its object

there is some severity in its discontinuance provisions, and the subsequent provision on reinstatement is clearly for the purpose of softening the harshness of any results effected by the preceding portions of the statute. In affording this palliative to a party in a case so stricken it is not consonant with that purpose to say the party must be held strictissimi, after necessary prerequisites of **[**8]** both motion and notice, to having actual entry of an order of reinstatement within the one-year limit, but at the same time leave him subject to the vagaries of court calendars, availability of judges, local and varying rules and practices or customs of court and other such **[*481]** matters which may be beyond his control. As the statute does hold a party seeking reinstatement very strictly, and it should of right, to the performance of an act within the required time, then more consistent to its latter palliative purpose is that the act which he must perform be one the performance of which is largely under his control in relation to the time allotted for it. The filing and giving notice of motion for reinstatement within the time limit fits this consistency far more readily than does obtaining within that time entry of an order which can come only after such filing and notice.

I am not unmindful that Rule 3:21 of the Rules of Court, stating that all final judgments remain under the control of the trial court and subject to be modified or vacated for twenty-one days after date of entry and no longer, has been interpreted to imply strict compliance and that the mere filing of a motion or other **[**9]** paper in the Clerk's Office is not compliance but that there must be the entry of an order modifying or vacating entered within such time limit. Harvey v. Chesapeake & Potomac Tel. Co., 198 Va. 213, 93 S.E.2d 309 (1956). The intent and purpose of that rule is "the expeditious final determination of all litigation," and so generally is the statute at hand. The so-called final judgment under § 8-154 remains inchoate in that it may be superceded by a later order of reinstatement, and though the judgment under the Rule likewise may be considered inchoate for twenty-one days, there is a definite distinction between the judgments otherwise. The type of judgment contemplated by the Rule is one which has disposed of the case on all issues of procedure or fact raised by the pleadings and is fully dispositive of the rights of the parties absent an appeal. The prevailing

party should not have the fruits of such a judgment postponed or denied him save by a modifying or vacating order entered in strict compliance with the purposely short time limit set by the Rule, or by procedurally correct steps for appeal with the protection and safeguards specifically provided by law for the prospective appellee during the **[**10]** interim before which it is determined whether the final trial judgment is correct. But the order striking from the docket and effecting a discontinuance under the statute is simply a discontinuance which term of necessity implies that the rights of the parties, or at least not **[*482]** all of them, have not been disposed of. What is postponed or denied to the litigant is not his right as judicially determined and embodied in a judgment, using that term in its precise and technical sense, but his procedural right to have determined judicially his rights raised under the pleadings and presented by the evidence. This postponement or denial under the statute may of course become permanent in the absence of timely action for reinstatement of the matter. It is also significant that the statute uses the term "order" throughout rather than the word "judgment."

It is well known that in most cases defendants are not averse to such discontinuances becoming permanent, being with ample justification more willing to sacrifice their right to an expeditious judicial determination of a case than to insist on the right to have such issues resolved. Argument is made that the entry of an order after expiration **[**11]** of the one-year period on the basis of a motion made prior to that expiration can result in further delay in getting at the merits of the case should the plaintiff not diligently prosecute his motion for reinstatement. The answer is that the defendant under well recognized procedures can easily force the plaintiff to bring the matter of reinstatement to a head or suffer the consequences, just as the defendant during the nearly five years in which the case was previously on the docket could likewise have forced the plaintiff to proceed to trial and final judgment. This the defendant was unwilling to do and would likely be so again, for good and practical reasons, but he had the right to do so and the fact that it would perhaps have been unwise to insist on the right is simply one of the consequences implicit in being a defendant.

It should be noted that the sentence under consideration as it existed in the predecessor

to § 8-154 when Snead v. Atkinson, supra, was decided (§ 3312, Code of 1904) by its structure lends some support to the position taken by the defendant. Nevertheless, the problem here is the accommodation of two principles of jurisprudence seemingly opposed at times **[**12]** to one another: First, that the disputes of litigants be decided on actual hearing and judicial determination of the issues, and second, that litigation be terminated and laid to rest without **[*483]** excessive delay. Section 8-154 is equivocal in the sense that these principles may be in conflict and that its purpose is to accomplish both of them. What the fore part of the statute does to advance the second principle is made subject to cancellation by the succeeding portion which reopens the possibility for advancement of the first principle. The statute could very well have advanced the second principle only but instead made it subservient to the possible effectuation of the first mentioned principle. The legislature having done this, for the purpose of this statute an intent is discernible to favor full resolution of disputes on the issues presented over the policy of bringing litigation to a conclusion. In view of the statute, for one year after the order removing a case from the docket thereby effecting a discontinuance, the case is not dead but in a state of suspended animation. In my opinion the statute does not require that the case within the year must be restored to the docket and **[**13]** full-blown life by entry of an order, but only that it be stirred perceptibly toward renewed activity by application within the year requesting its full restoration which may be accomplished by order entered after the expiration of the year. As mentioned above, the general rule is that timely application is required to set aside an involuntary dismissal, and not necessarily the timely entry of an order setting aside the dismissal.

The defendant also argues that no reinstatement can be had without good cause shown. A sketch of the evidence heard on this point appears above. However, I find nothing in the statute which supports this contention. Good cause for reinstatement or good cause against reinstatement does not seem to have been in the mind of the legislature, but in my view the only prerequisites for an order of reinstatement are a timely application and due notice thereof.

For the foregoing reasons the motion of the plaintiff for reinstatement is sustained.

Collins v. Shepherd

Supreme Court of Virginia

September 14, 2007, Decided

Record No. 061728

Reporter

274 Va. 390; 649 S.E.2d 672; 2007 Va. LEXIS 116

LARRY R. COLLINS v. FAYE M. SHEPHERD

Prior History: **[***1]** FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK. John C. Morrison, Jr., Judge.

Disposition: Reversed and remanded.

Case Summary

Procedural Posture

The Circuit Court of the City of Norfolk (Virginia) dismissed plaintiff's personal injury action pursuant to a local rule providing for dismissal of cases not served on a defendant within one year of filing. A motion to vacate the order was granted, the case was reinstated, and a nonsuit was entered. But, upon defendant's motion, such was vacated, and dismissal was upheld. After the denial of his motion to reconsider, plaintiff appealed.

Overview

At issue was: (1) whether Norfolk, Va., Cir. Ct. R. 2(F)(3) was valid, therefore, granting the circuit court the authority to dismiss the case, and (2) the effect, if any, of the failure to challenge that dismissal order until after the expiration of the twenty-one day limitation period in Norfolk, Va., Cir. Ct. R. 1:1. After a review of the evidence, the instant court agreed with plaintiff that: (a) the circuit court lacked the authority to adopt a local rule that essentially translated Va. Sup. Ct. R. 3:5(e) into a mode of procedure for the court dismissing unserved cases, sua sponte, as the local rule violated Va. Code Ann. § 8.01-4; and (b) the local rule was invalid because it abridged his substantive right to proceed with his lawsuit. Hence, even after failing to serve defendant within one year of filing suit, he retained the right to take a nonsuit under Va. Code Ann. § 8.01-380 and recommence the action. Second, the circuit court entered the dismissal order pursuant to a mode of

procedure it could not lawfully adopt, making the dismissal order void ab initio and, thus, not subject to the limitation period of Va. Sup. Ct. R. 1:1, but subject to challenge at any time.

Outcome

The judgment was reversed, and the case was remanded.

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

Governments > Courts > Clerks of Court

HN1 The Civil Case Management Administrative Plan has as its purpose the laudable goal of concluding all civil cases, except by leave of court and in suits for divorce, within twelve months of filing. In an apparent effort to achieve that goal, Norfolk, Va., Cir. Ct. R. 2(F)(3) provides that if any civil action is not served within the time provided by Va. Sup. Ct. R. 3:5(e), the Clerk shall prepare a notice of dismissal and send such notice to counsel for the plaintiff.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2 When the assignments of error and cross-error on appeal raise solely questions of law, the Supreme Court of Virginia applies a de novo standard of review.

Civil Procedure > ... > Service of Process > Time Limitations > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN3 Va. Sup. Ct. R. 3:5(e) provides that no order, judgment or decree shall be entered against a defendant who was served with process more than one year after the institution of the action against that defendant unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on that defendant. However, Rule 3:5(e) does not expressly contemplate dismissal of cases not served within a year, although such cases are potentially subject to dismissal under Rule 3:5(e) upon motion by the defendant.

Governments > Courts > Authority to Adjudicate

HN4 See Va. Code Ann. § 8.01-4.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Governments > Courts > Authority to Adjudicate

HN5 See Va. Code Ann. § 8.01-335.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN6 In comparison to Va. Code Ann. § 8.01-335, Norfolk, Va., Cir. Ct. R. 2(F)(3) would drastically expand the circuit court's authority to dismiss an inactive case by permitting dismissal, sua sponte, after one year rather than after two or three years. Furthermore, unlike Va. Code Ann. § 8.01-335, Norfolk, Va., Cir. Ct. R. 2(F)(3) does not provide an opportunity for revival of a discontinued case, thus the local rule totally ignores the statutory distinction between a discontinuance and a dismissal with prejudice.

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN7 See Va. Sup. Ct. R. 1:1.

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN8 An order is void ab initio, rather than merely voidable, if the character of the judgment was not such as the court had the power to render, or because the mode of procedure employed by the court was such as it might not lawfully adopt. An order that is void ab initio is a complete nullity that may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.

Counsel: John Norris (James P. St. Clair; Kent K. Stanley; Norris & St. Clair, on brief), for appellant.

Allen W. Beasley (Darlene P. Bradberry; Breeden, Salb, Beasley & DuVall, on brief), for appellee.

Judges: Present: Hassell, C.J., Keenan, Koontz, Kinser, Lemons, and Agee, JJ., and Lacy, S.J. [1] OPINION BY JUSTICE LAWRENCE L. KOONTZ, JR. JUSTICE KINSER, with whom JUSTICE AGEE and SENIOR JUSTICE LACY join, concurring in part and dissenting in part.

Opinion by: LAWRENCE L. KOONTZ, JR.

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[1] Justice Lacy participated in the hearing and decision of this case prior to the effective date of her retirement on August 16, 2007.

Opinion

[*393] **[**673]** OPINION BY JUSTICE LAWRENCE L. KOONTZ, JR.

This appeal principally concerns an order entered sua sponte by the circuit court dismissing with prejudice a civil action for personal injuries pursuant to a local rule adopted by that court that provides for the dismissal of cases not served on the defendant within one year of filing. We consider two issues: (1) whether the local rule is valid and, therefore, the circuit court was within its authority to dismiss the case pursuant to that rule, and (2) what is the **[***2]** effect, if any, of the failure to challenge that dismissal order until after the expiration of the twenty-one day limitation period in Rule 1:1.

[*394] BACKGROUND

The parties do not dispute that the local rule at issue is Local Rule 2(F)(3) which is contained in the Civil Case Management Administrative Plan originally adopted by the Circuit Court of the City of Norfolk on October 8, 1998. ***HN1*** The plan has as its purpose the laudable goal of "concluding all civil cases, except by leave of court and in suits for divorce, within twelve months of filing." In an apparent effort to achieve that goal, Local Rule 2(F)(3) provides that "[i]f any civil action is not served within the time provided by Supreme Court Rule [3:5(e)], the Clerk shall prepare a notice of dismissal and send such notice to counsel for the plaintiff." [2]

The application of Local Rule 2(F)(3) became implicated in the following procedural context. On September 7, 2004, Larry R. Collins filed a motion for judgment in the Circuit Court of the City of Norfolk against Faye M. Shepherd for personal injuries allegedly resulting from the negligent operation of her motor vehicle. Collins did not serve Shepherd with process. On September 15, 2005, the circuit court, in accord with its local rule, mailed to Collins' attorney a "Notice of Dismissal" stating that the circuit court "on Friday, October 7, 2005 at 9:00 a.m. . . . pursuant to Supreme Court Rule [3:5(e)] and *Nelson v. Vaughan,* 210 Va. 1 [, 168 S.E.2d 126] (1969), will dismiss this case because [Shepherd] has not been served with

[2] During the proceedings in the circuit court, the local rule referenced former Rule 3:3(c). Effective January 1, 2006, our Rules of Court were reorganized and Rule 3:3(c) became Rule 3:5(e). The provisions of former Rule 3:3(c) are nearly identical to the provisions of Rule 3:5(e) and the circuit court's Local Rule 2(F)(3) has been revised to reference Rule 3:5(e). Accordingly, we **[***3]** will refer to the current rule in this opinion.

process within one year after the filing of the . . . Motion for Judgment . . . unless the [c]ourt finds that [Collins] has exercised due diligence to have timely service on [Shepherd]."

Collins did not appear on or before the October 7, 2005 date designated in the notice of dismissal. On October 20, 2005, the circuit court entered an order dismissing Collins' action against Shepherd with prejudice. The dismissal **[***4]** order provided that Collins, "having failed to show that due diligence was exercised to have timely service upon [Shepherd], . . . this case [is] dismissed with prejudice in accordance with Supreme Court Rule [3:5(e)] and *Nelson v. Vaughan,* 210 Va. 1 [, 168 S.E.2d 126] (1969)." The dismissal order also provided **[*395]** that endorsement by counsel was waived pursuant to Rule 1:13.

Collins subsequently filed a motion on March 9, 2006 requesting that the circuit court vacate the dismissal order and restore his case to the court's docket. Collins did not give Shepherd notice regarding this motion. By an order dated March 16, 2006, the circuit court vacated its prior dismissal order and reinstated Collins' case on the court's docket. [3] On the same day, the circuit court **[**674]** by separate order granted Collins' motion to nonsuit the case.

The record does not demonstrate how Shepherd became aware of the March 16, 2006 order. [4] However, Shepherd filed a motion on March 27, 2006 requesting that the circuit court reconsider its decision to enter the March 16, 2006 dismissal order. Shepherd asserted that Collins' motion to vacate the October 20, 2005 dismissal order was barred under Rule 1:1 for failure to challenge that order within twenty-one days of its entry and, therefore, that the circuit court was without authority to enter the March 16, 2006 order. Accordingly, Shepherd requested that the circuit court vacate the March 16, 2006 order.

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[3] The March 16, 2006 order provided that the circuit court was reinstating the case "in the interest of justice, in that it appears that a clerical error and/or a fraud on the court occurred." This ruling was apparently in response to assertions made by Collins' counsel that a disloyal employee of his office had deliberately withheld or destroyed the notice of dismissal **[***5]** and the dismissal order that were mailed by the circuit court. Collins' counsel relied, in part, upon the provisions set forth in Code § 8.01-428. However, it is clear that Collins' argument under Code § 8.01-428 did not form the basis of the circuit court's ultimate ruling in this case that gave rise to this appeal. Therefore, we will not address the applicability, if any, of Code § 8.01-428 in this case.

[4] On brief, Shepherd states that Collins filed a "second but identical complaint" and "immediately served the new complaint upon [Shepherd]" following the entry of the March 16, 2006 **[***6]** order granting Collins a nonsuit of the original action. For purposes of our resolution of this appeal, we will accept that assertion as accurate.

The circuit court held a hearing on April 3, 2006 on Shepherd's motion for reconsideration. At the hearing, Collins contended that, under the procedural posture of the case at the time, the circuit court did not have the authority to enter the October 20, 2005 dismissal order and, therefore, the order was void ab initio. The circuit court took the matter under advisement.

In a letter brief to the circuit court, Shepherd contended that even if entry of the October 20, 2005 dismissal order was error, such error rendered that order voidable rather than void ab initio. Accordingly, **[*396]** Shepherd maintained that the dismissal order was subject to Rule 1:1 and Collins was barred from challenging the order more than 21 days after its entry. Furthermore, Shepherd contended that the circuit court should have the authority to dismiss cases that have not been served within a year of filing so that dockets will not "become unduly burdened with pending cases which have not been served but which the [c]ourt may not manage in any manner."

Responding by letter **[***7]** brief, Collins contended that the sua sponte dismissal order was void ab initio because "the character of the order is such that the court had no power to render it" and "the mode of procedure used by the court was one that the court could not lawfully adopt." Therefore, Collins asserted that his challenge to the order was not subject to the 21 day time limitation of Rule 1:1. Collins also contended that the authority the circuit court cited in the dismissal order, Rule 3:5(e) and *Nelson,* authorize dismissal of a suit only after process has been served on the defendant more than one year after filing and only after the defendant files a motion to dismiss, neither of which occurred in this case. Collins further contended that circuit courts are authorized by statute to clear inactive cases from their dockets through the mechanism prescribed in Code § 8.01-335. Finally, Collins contended that the circuit court's Local Rule 2(F)(3) was invalid under Code § 8.01-4 because it abridged Collins' substantive right to nonsuit the action prior to service of process on Shepherd.

In order to consider the issues presented, the circuit court entered an order on April 6, 2006 vacating its prior order **[***8]** granting Collins a nonsuit. Subsequently, the circuit court issued a letter opinion in which it rejected Collins' assertions that the October 20, 2005 dismissal

order was void ab initio. The circuit court stated that the procedure used to dismiss Collins' case was a "docket control procedure" created to deal with "moribund" cases where no service has been made within a year and the plaintiff has failed to exercise due diligence to effectuate service. The circuit court concluded that its docket control procedure was not inconsistent with the provisions of Code § 8.01-4 authorizing circuit courts to adopt such docket control procedures **[**675]** so long as they do not "abridge the substantive rights of the parties." Addressing Collins' contention that his case remained viable after one year because he still had a right to nonsuit and refile, the circuit court noted that Collins had the opportunity to exercise his right to nonsuit up until the return date on the notice of dismissal. **[*397]** The circuit court acknowledged that Code § 8.01-335 provided a mechanism for clearing its docket of inactive cases, but found that mechanism inadequate to prevent the "indefinite tolling of the statute of limitations **[***9]** and harassment of the defendant," which was an abuse that Rule 3:5(e) was designed to prevent. The circuit court explained that the local rule was intended to prevent such abuse while at the same time giving the plaintiff the "opportunity to protect his substantive rights."

Accordingly, the circuit court ruled that the October 20, 2005 dismissal order was valid. Collins filed a motion for reconsideration. By order entered May 26, 2006, the circuit court ruled that the dismissal order was not void ab initio, denied Collins' motions to vacate the dismissal order and for reconsideration, and dismissed Collins' September 7, 2004 suit. This appeal followed.

DISCUSSION

In three assignments of error, Collins principally asserts that the circuit court's October 20, 2005 dismissal order was void ab initio because it was entered pursuant to an invalid local rule. According to Collins, the local rule is invalid because it abridges his substantive right to take a nonsuit and refile his case, conflicts with the procedures for discontinuance set forth in Code § 8.01-335, and permits dismissal of a case that was never served on the defendant in contravention of Rule 3:5(e), which he asserts applies **[***10]** only where the defendant is served with process outside of the one-year period. Shepherd assigns cross-error on two grounds:

(1) that the dismissal order was a final order and all orders entered subsequent to it were void, and (2) this Court is without jurisdiction over this appeal because Collins did not appeal the dismissal order, which was entered on October 20, 2005, until June 16, 2006. ***HN2*** Because the assignments of error and cross-error raise solely questions of law, we will apply a de novo standard of review. *Janvier v. Arminio,* 272 Va. 353, 363, 634 S.E.2d 754, 759 (2006).

Similar to Rule 3:5(e)Rule 3:5(e), the local rule at issue targets cases not served within a year of filing. ***HN3*** Rule 3:5(e) provides that "[n]o order, judgment or decree shall be entered against a defendant who was served with process more than one year after the institution of the action against that defendant unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on that defendant." However, unlike the local rule, Rule 3:5(e) does not expressly **[*398]** contemplate dismissal of cases not served within a year, although such cases are potentially subject to dismissal under Rule 3:5(e) upon **[***11]** motion by the defendant. *See Gilbreath v. Brewster,* 250 Va. 436, 440, 463 S.E.2d 836, 837 (1995).

Despite the local rule's reference to Rule 3:5(e), the critical question raised in this appeal is whether the circuit court had the authority to adopt a local rule that essentially translates Rule 3:5(e) into a mode of procedure for the court dismissing unserved cases sua sponte. [5] Collins asserts that the circuit **[**676]** court did not have such authority because the local rule violates the provisions of Code § 8.01-4. Code § 8.01-4 provides that:

> ***HN4*** The district courts and circuit courts may, from time to time, prescribe rules for

[5] The linchpin of the analysis in the dissenting opinion in this case upon which rests the ultimate conclusion that the circuit court's erroneous October 20, 2005 dismissal order was merely voidable and not void ab initio is the initial conclusion that the circuit court did not enter that order pursuant to its Local Rule 2(F)(3) but, rather, pursuant to our Rule 3:5(e). It reaches that conclusion by applying the settled principle that a court speaks only through its written orders.

In this case, however, the parties do not dispute that the authority upon which the circuit court dismissed Collins' action was the circuit court's Local Rule 2(F)(3). This is supported by the record before us in this appeal. Indeed, the circuit court in its opinion letter of April 19, 2006, which it subsequently incorporated into its May 26, 2006 order holding that the October 20, 2005 dismissal order was not void, leaves **[***13]** no room for dispute that the circuit court entered the dismissal order in reliance upon the "docket control procedure this court has adopted." The docket control procedure adopted by the circuit court is Local Rule 2(F)(3) and obviously not our Rule 3:5(e). Additionally, if there could be any remaining doubt, the circuit court explained in some detail in its opinion letter its concern with our decision in *Gilpin v. Joyce,* 257 Va. 579, 515 S.E.2d 124 (1999), which addressed the application of Rule 3:3(c), now Rule 3:5(e), and, thus, why it was relying upon its docket control procedure instead.

> their respective districts and circuits. Such rules shall be limited to those rules necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices. No rule of any such court shall be prescribed or enforced which is inconsistent with this statute or any other statutory provision, or the Rules of Supreme Court or contrary to the decided cases, or which has the effect of abridging substantive rights of persons before such court. Any rule of court which violates the provisions of this section shall be invalid.
>
> The courts **[***12]** may prescribe certain docket control procedures which shall not abridge the substantive rights of the parties nor **[*399]** deprive any party the opportunity to present its position as to the merits of a case solely due to the unfamiliarity of counsel of record with any such docket control procedures.

Collins contends that the local rule is invalid because it abridged his substantive right to proceed with his lawsuit, noting that even after failing to serve Shepherd with process within one year of filing his civil action, he retained the right to take a nonsuit under Code § 8.01-380 and subsequently recommence the action against Shepherd. Collins also asserts that the local rule is invalid because it conflicts with the provisions governing the discontinuance of cases set forth in Code § 8.01-335. We agree with Collins. [6]

Code § 8.01-4 delegates to circuit courts the authority to establish rules regarding the management of their courts and the cases handled therein. Clearly, however, Code § 8.01-4 denotes that such authority must be carefully exercised so that local rules do not encroach upon statutes, Rules of Court, or case law. To this end, Code § 8.01-4 expressly states that local rules must not "abridge the substantive rights of the parties" or deprive any party from having a case heard on the merits, reflecting the General Assembly's intention that local rules govern the administration, but not become the determining factor in the ultimate outcome, of cases.

Here, by operation of a procedure effectuated solely by its local rule, the circuit court

[6] Collins' assignments of error also raise the issue of whether Rule 3:5(e)Rule 3:5(e) **[***14]** only applies when the defendant is served with process more than one year after filing, and here Shepherd was never served. Our decision in *Gilpin* resolves this issue. 257 Va. at 582, 515 S.E.2d at 126 ("[T]his rule applies only where there has been service of process.").

dismissed Collins' case with prejudice without the case being heard on the merits. In the absence of this local rule, Collins would have retained the right to take a nonsuit and refile **[***15]** his civil action beyond the one-year limitation period established by the local rule. *See* Code § 8.01-380; *Berry v. F&S Fin. Mktg.,* 271 Va. 329, 332-33, 626 S.E.2d 821, 823 (2006) (citing *Waterman v. Halverson,* 261 Va. 203, 208, 540 S.E.2d 867, 869 (2001); *McManama v. Plunk,* 250 Va. 27, 32, 458 S.E.2d 759, 762 (1995)). The dismissal under a local rule of a case that the plaintiff would otherwise be able to pursue under the Code, case law, and Rules of Court exceeds the authority delegated to circuit courts under Code § 8.01-4.

[*400] The tension between this particular local rule and the Code is further demonstrated by a comparison of this rule to Code § 8.01-335, which governs circuit courts' authority to discontinue inactive cases. Code § 8.01-335 provides, in relevant part, that:

> ***HN5*** A. [A]ny court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. However, no case shall be discontinued if either party requests that it be continued. **[**677]** The court shall thereafter enter a pretrial order pursuant to Rule 4:13 controlling **[***16]** the subsequent course of the case to ensure a timely resolution of that case. If the court thereafter finds that the case has not been timely prosecuted pursuant to its pretrial order, it may strike the case from its docket. The clerk of the court shall notify the parties in interest if known, or their counsel of record at his last known address, at least fifteen days before the entry of such order of discontinuance so that all parties may have an opportunity to be heard on it. Any case discontinued under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after.
>
> B. Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action

> shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions **[***17]** of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

Under Code § 8.01-335(A), the earliest point at which the circuit court may discontinue a pending case is after two years of inactivity, **[*401]** and even then discontinuance may be ordered only if neither party requests a continuance or the parties fail to abide by a schedule set by the court following a continuance. [7] A case must be inactive for three years before a circuit court may dismiss a case sua sponte under Code § 8.01-335(B). Additionally, Code § 8.01-335 provides the parties to a discontinued case the opportunity to reinstate the case within one year of the discontinuance.

HN6 In comparison to Code § 8.01-335, Local Rule 2(F)(3) would drastically expand the circuit **[***19]** court's authority to dismiss an inactive case by permitting dismissal, sua sponte, after one year rather than after two or three years. Furthermore, unlike Code § 8.01-335 the local rule does not provide an opportunity for revival of a discontinued case, thus the local rule totally ignores the statutory distinction between a discontinuance and a

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[7] After the trial court's disposition in this case, and after the briefing in this appeal was completed, the General Assembly has added a new subsection (D) to Code § 8.01-335, effective July 1, 2007, which provides:

> Any court in which is pending a case wherein process has not been served within one year of the commencement of the case may, in its discretion, order it to be struck from the docket, and the action shall thereby be discontinued. **[***18]** The clerk of the court shall notify the plaintiff or his counsel of record at his last known address at least 30 days before the entry of an order of discontinuance so that the plaintiff may have an opportunity to show that service has been timely effected on the defendant or that due diligence has been exercised to have service timely effected on the defendant. Upon finding that service has been timely effected or that due diligence has been exercised to have service timely effected, the court shall maintain the action on the docket and, if service has not been timely effected but due diligence to effect service has been exercised, shall require the plaintiff to attempt service in any manner permitted under Chapter 8 (§ 8.01-285 et seq.) of this title. Nothing herein shall prevent the plaintiff from filing a nonsuit under § 8.01-380 before the entry of a discontinuance order pursuant to the provisions of this subsection. Nothing in this subsection shall apply to asbestos litigation.

We express no opinion about the validity of the subject local rule of court in light of this amendment to the statute.

dismissal with prejudice. As Code § 8.01-4 expressly provides, "[n]o rule . . . shall be prescribed or enforced which is inconsistent with . . . any . . . statutory provision." Here, the inconsistency between Local Rule 2(F)(3) and Code § 8.01-335 is palpable and beyond debate.

For these reasons, the circuit court did not have the authority under Code § 8.01-4 to adopt a local rule permitting the sua sponte dismissal with prejudice of cases not served **[**678]** within a year of the filing date. Accordingly, we hold that Local Rule 2(F)(3), which purports **[*402]** to authorize the circuit to do so, is invalid. Thus, the circuit court's entry of the October 20, 2005 dismissal order based on that local rule was in error.

We turn now to address the effect, if any, of Collins' failure to challenge the October 20, 2005 dismissal order until after the twenty-one day period **[***20]** set forth in Rule 1:1. Under Rule 1:1, ***HN7*** "final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Collins took no action regarding the October 20, 2005 order until March 10, 2006, well beyond the twenty-one day period.

Collins contends that the circuit court entered the dismissal order pursuant to a "mode of procedure the court could not lawfully adopt," making the dismissal order void ab initio and, thus, not subject to the limitation period of Rule 1:1. Shepherd responds that even if the circuit court's entry of the dismissal order was in error, such error merely rendered the order voidable, not void ab initio. Therefore, Shepherd argues that the dismissal order was subject to Rule 1:1. Again, we agree with Collins.

HN8 An order is void ab initio, rather than merely voidable, if "the character of the judgment was not such as the court had the power to render, or because the mode of procedure employed by the court was such as it might not lawfully adopt." *See Evans v. Smyth-Wythe Airport Comm'n,* 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998); **[***21]** *Lapidus v. Lapidus,* 226 Va. 575, 579, 311 S.E.2d 786, 788 (1984); *Watkins v. Watkins,* 220 Va. 1051, 1054, 265 S.E.2d 750, 753 (1980); *Barnes v. American Fertilizer Co.,* 144 Va. 692, 706, 130 S.E. 902, 906 (1925); *Anthony v. Kasey,* 83 Va. 338, 340, 5 S.E. 176, 177 (1887). An order

that is void ab initio is a "complete nullity" that may be "impeached directly or collaterally by all persons, anywhere, at any time, or in any manner." *Singh v. Mooney,* 261 Va. 48, 52, 541 S.E.2d 549, 551 (2001).

In this case, the procedure utilized by the circuit court to enter the dismissal order was done pursuant to a local rule that, under Code § 8.01-4, the circuit court was not authorized to adopt. As such, the "mode of procedure" utilized by the circuit court was one that it **[*403]** could "not lawfully adopt." Accordingly, the dismissal order was void ab initio and subject to challenge at any time. [8]

CONCLUSION

For the foregoing reasons, we hold that the circuit court erred in entering the October 20, 2005 order dismissing Collins' lawsuit against Shepherd, and that the dismissal **[***22]** order was void ab initio. We further hold that Collins was entitled to the nonsuit granted by the circuit court's March 16, 2006 order and, accordingly, the April 6, 2006 order vacating that order was entered in error and upon remand Collins' subsequent action against Shepherd is to be restored if necessary to the circuit court's active docket. We will reverse the judgment of the circuit court and remand the case for further proceedings in accordance with the principles stated herein.

Reversed and remanded.

Concur by: KINSER (In Part)

Dissent by: KINSER (In Part)

Dissent

JUSTICE KINSER, with whom JUSTICE AGEE and SENIOR JUSTICE LACY join, concurring in part and dissenting in part.

I concur in the portion of the majority opinion holding that the circuit court's entry of the October 20, 2005 dismissal order was in error. However, the majority also concludes that the dismissal order was void ab initio. I respectfully disagree. The dismissal order was not void ab initio because it involved an action by the circuit court that was in error rather than an action concerning **[**679]** the underlying authority of the circuit court to act on a matter. *See Singh v. Mooney,* 261 Va. 48, 51, 541 S.E.2d 549, 551 (2001).

[8] In light of our resolution of these issues, we need not address any remaining issues raised in Shepherd's assignments of cross-error.

The majority focuses on **[***23]** the Circuit Court of the City of Norfolk Local Rule 2(F)(3) and states that the "critical question raised in this appeal is whether the circuit court had the authority to adopt a local rule that essentially translates Rule 3:5(e) into a mode of procedure for the court dismissing unserved cases sua sponte." By its terms, that local rule only authorizes the clerk of the circuit court to send a notice of dismissal to a plaintiff's counsel advising that, because the plaintiff's civil action has not been served within one year after commencement of the action, it will be dismissed unless the plaintiff has exercised due diligence to serve process.

[*404] While the local rule at issue was the impetus for the notice of dismissal being sent to counsel for the plaintiff, Larry R. Collins, [9] it was not the authority upon which the circuit court relied to enter the October 20, 2005 order dismissing the action filed by Collins against Faye M. Shepherd. Instead, the court stated in the dismissal order that "[Collins] having failed to show that due diligence was exercised to have timely service upon [Shepherd], and it seeming proper to the [c]ourt to do so, it is ORDERED that this case be dismissed with **[***24]** prejudice in accordance with *Supreme Court Rule [3:5(e)]* and *Nelson v. Vaughan,* 210 Va. 1[, 168 S.E.2d 126] (1969)." [10] (Emphasis added.) Thus, contrary to the majority's conclusion, the circuit court did not dismiss Collins' action "by operation of a procedure effectuated solely by its local rule." Speaking through the plain terms of its written order, the circuit court, instead, applied this Court's Rule 3:5(e) and our decision in *Nelson* to dismiss the action. [11] *See Conyers v. Martial Arts World,* 273 Va. 96, 103, 273 Va. 96, 639 S.E.2d 174, 177 (2007) ("[A] court speaks only

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[9] The notice of dismissal sent to Collins' counsel stated that, pursuant to the predecessor of current Rule 3:5(e) and *Nelson v. Vaughan,* 210 Va. 1, 168 S.E.2d 126 (1969), the circuit court would dismiss the action because Shepherd had not been served with process within one year unless the court found that Collins had exercised due diligence to serve process.

[10] In *Nelson,* the trial court dismissed an action because of a "long **[***25]** delay" in serving process on the defendant. 210 Va. at 1-2, 168 S.E.2d at 127. We reversed the trial court's judgment because process had been served within one year after the filing of the motion for judgment. *Id.*

[11] In a letter opinion incorporated by reference in its May 26, 2006 order denying Collins' motion to vacate the dismissal order, the circuit court referenced a "docket control procedure" that, in its view, was designed to allow a defendant "to have a stale claim against him dismissed." The docket control procedure reflected in Local Rule 2(F)(3) provided the circuit court with a method to identify what it regarded as stale claims, but it was not the basis of the circuit court's dismissal order. *See Berean Law Group, P.C. v. Cox,* 259 Va. 622, 627, 528 S.E.2d 108, 111 (2000) (holding that an oral ruling of a court cannot nullify its written order); *Wagner v. Shird,* 257 Va. 584, 588, 514 S.E.2d 613, 615 (1999) (holding that an agreement of parties extending stay cannot change terms of court's written order).

through its written orders."); *Rose v. Jaques,* 268 Va. 137, 147, 597 S.E.2d 64, 70 (2004) (same); *Upper Occoquan Sewage Auth. v. Blake Constr. Co.,* 266 Va. 582, 588, 587 S.E.2d 721, 724 (2003) (same).

There is no question that the circuit court erred in dismissing Collins' action because the court misconstrued the provisions of Rule 3:5(e). **[*405]** As we explained in *Gilpin v. Joyce,* 257 Va. 579, 515 S.E.2d 124 (1999), only a defendant who has been served with process more than one year after commencement of an action can invoke the provisions of Rule 3:5(e) in order to obtain a dismissal of the action with prejudice. *Id.* at 583, 515 S.E.2d at 126; *see also Gilbreath v. Brewster,* 250 Va. 436, 442, 463 S.E.2d 836, 838 (1995) ("[A] dismissal under Rule [3:5 (e)] is a dismissal with prejudice."). When the circuit court dismissed the action, Collins had not served Shepherd with process, nor had Shepherd filed any pleading invoking the provisions of Rule 3:5(e).

Collins' argument that the circuit court's dismissal order was void ab initio is similar to the argument we rejected in *Singh.* There, the trial court entered an order that did not **[**680]** comply with the provisions of Rule 1:13. 261 Va. at 51, 541 S.E.2d at 551. The issue before us was whether the order **[***27]** was "void *ab initio* or merely voidable." *Id.* at 50, 541 S.E.2d at 550. We held that "a claim that an order does not comply with Rule 1:13 is a claim that the trial court abused its discretion in dispensing with the requirements of the Rule when it entered the order." Id. at 52, 541 S.E.2d at 552. Such a claim "involves a question of court error; it is not a question of the jurisdiction or authority of the court to enter the order." *Id.* at 52, 541 S.E.2d at 552.

Likewise, in the case before us, the circuit court's failure to adhere to the provisions of Rule 3:5(e) when it dismissed Collins' action raises a question of error by the court. *See Parrish v. Jessee,* 250 Va. 514, 521, 464 S.E.2d 141, 145 (1995) ("The validity of a judgment based upon a challenge to the application of a statute raises a question of trial error, and not a question of jurisdiction."). "[I]f the inferior court has jurisdiction of the subject matter of the controversy, and the

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I also disagree with the majority's assertion that the local rule abrogated Collins' right to take a nonsuit. After the circuit court issued the notice of dismissal, nothing **[***26]** precluded Collins' from taking a nonsuit pursuant to Code § 8.01-380. Indeed, the circuit court acknowledged this fact in its letter opinion.

parties are before it, . . . a mistaken exercise of that jurisdiction does not render its judgment void." *County School Bd. v. Snead,* 198 Va. 100, 107, 92 S.E.2d 497, 503 (1956). An order containing reversible error, such as the dismissal **[***28]** order at issue, "is merely voidable [and] may be set aside by motion filed in compliance with Rule 1:1 or provisions relating to the review of final orders" such as Code § 8.01-428. *Singh,* 261 Va. at 52, 541 S.E.2d at 551.

A trial court has the power to dismiss an action pending before it. That it does so for the wrong reason does not render its dismissal order void ab initio. An order is void ab initio only "if entered by a **[*406]** court in the absence of jurisdiction of the subject matter or over the parties, if the character of the order is such that the court had no power to render it, . . . if the mode of procedure used by the court was one that the court could 'not lawfully adopt,' " *id.* at 51-52, 541 S.E.2d at 551 (quoting *Evans v. Smyth-Wythe Airport Comm'n,* 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998)), or if the order was obtained by extrinsic or collateral fraud. *Rook v. Rook,* 233 Va. 92, 95, 353 S.E.2d 756, 758, 3 Va. Law Rep. 1944 (1987).

Nevertheless, the majority concludes that the circuit court employed a "mode of procedure" that it could "not lawfully adopt" and that the dismissal order was therefore void ab initio. That "mode of procedure," according to the majority, was "the procedure utilized by **[***29]** the circuit court to enter the dismissal order . . . pursuant to a local rule that, under Code § 8.01-4, the circuit court was not authorized to adopt." As I previously explained, the local rule authorized only the issuance of a notice of dismissal. And, the circuit court relied on Rule 3:5(e), not the local rule, as the authority for its dismissal order. Moreover, the few cases cited by the majority in which this Court has addressed whether an order was void ab initio because the "character of the judgment was not such as the court had the power to render, or because the mode of procedure employed by the court was such as it might not lawfully adopt" are inapposite. *Evans,* 255 Va. at 73, 495 S.E.2d at 828.

Three of those cases involved issues that arose in the context of divorce proceedings and addressed the validity of orders awarding certain types of relief that were not authorized by statute. In *Barnes v. The American Fertilizer Co.,* 144 Va. 692, 130 S.E. 902 (1925), we

stated that, without specific statutory authority, a circuit court "has no power to transfer to the wife any specific portion of her husband's real estate as alimony," and that the character of such an order doing **[***30]** so would not be such as the court had the power to render. *Id.* at 709, 130 S.E. at 907. We concluded, however, that the order at issue there was "within the limits of the court's jurisdiction, and did not constitute an attempt on the part of the court to transfer to [the wife] title to her husband's real estate as *alimony*." *Id.* at 714, 130 S.E. at 908. Similarly, in *Watkins v. Watkins,* 220 Va. 1051, 265 S.E.2d 750 (1980), the issue before us was whether "the trial court, as a part of the maintenance and support provisions of the final decree, [had] jurisdiction to enjoin the husband from disposing of his shares of stock in two family-owned corporations." *Id.* at 1051-52, 265 S.E.2d **[*407]** at 751. We concluded that "the court lacked the statutory power to lawfully adopt the remedy in question." *Id.* **[**681]** at 1055, 265 S.E.2d at 753. Finally, in *Lapidus v. Lapidus,* 226 Va. 575, 311 S.E.2d 786 (1984), the trial court directed the husband in a divorce proceeding "to contract for life insurance as a part of spousal support for his wife." *Id.* at 577, 311 S.E.2d at 787. Again, we found that "[n]othing in the divorce statutes empowered the court to take the action it took." *Id.* at 579, 311 S.E.2d at 788.

In **[***31]** *Anthony v. Kasey,* 83 Va. 338, 5 S.E. 176 (1887), a surety attacked the validity of a personal judgment previously entered against him on the basis that the trial court lacked jurisdiction to render the decree. *Id.* at 339-40, 5 S.E. at 177. We affirmed the trial court's judgment that the decree was null and void because the surety was not a party to the original suit and "the procedure by rule to bring [him] in and subject [him] for liability as suret[y] on the bond of the receiver . . . was against every sound principle of jurisprudence and without any recognized precedent." *Id.* at 341, 5 S.E. at 178.

The remaining case cited by the majority, *Evans v. Smyth-Wythe Airport Commission,* involved an order that restricted an airport commission's power of eminent domain. 255 Va. at 70, 495 S.E.2d at 826. We held that the order was "void *ab initio* because the circuit court did not have the power to render a judgment which permitted a governmental entity to relinquish the power or right of eminent domain." *Id.* at 74, 495 S.E.2d at 828. Neither

this case nor the other cases discussed support the majority's position that the local rule, which the majority declares invalid, [12] is tantamount to **[***32]** a "mode of procedure" that the circuit court could not lawfully adopt, thereby rendering its dismissal order void ab initio.

The circumstances in which a court employs a "mode of procedure" that it could not lawfully adopt or renders a judgment the character of which was beyond its power to render is perhaps best illustrated by this passage from *Windsor v. McVeigh,* 93 U.S. 274, 23 L. Ed. 914 (1876):

> All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a **[*408]** special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act **[***33]** judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.

Id. at 282 (citation omitted). Surely, it cannot be said that a trial court "transcends the limits of its authority" when it dismisses an action properly before it, even when it does so

[12] In my view, it is not necessary to decide whether Local Rule 2(F)(3) is invalid because the circuit court based its dismissal order on Rule 3:5(e), not the local rule.

erroneously, or when, according to the majority, it does so based on an invalid local rule.

Today's decision will allow litigants to mount collateral attacks on final judgments whenever a local rule, or even a Rule of this Court, is subsequently invalidated. **[***34]** In other words, litigants will be able to circumvent the mandate of Rule 1:1 that "final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, *and no longer."* (Emphasis added.) For these reasons, I respectfully **[**682]** concur in part and dissent in part, and would affirm the judgment of the circuit court.

Conger v. Barrett

Supreme Court of Virginia

November 4, 2010, Decided

Record No. 091492

Reporter

280 Va. 627; 702 S.E.2d 117; 2010 Va. LEXIS 261

SHIRLEY CONGER, ADMINISTRATOR OF THE ESTATE OF PAUL RAE CONGER v. EUGENE J. BARRETT, M.D., ET AL.

Prior History: **[***1]** FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY. Cheryl V. Higgins, Judge.

Conger v. Barrett, 2010 Va. LEXIS 163 (Va., Jan. 4, 2010)

Disposition: Reversed and remanded.

Case Summary

Procedural Posture

The personal representative sued two doctors under Va. Code Ann. § 8.01-50 in the Circuit Court of Albemarle County (Virginia), for wrongful death. The court dismissed the case under Va. Code Ann. § 8.01-335(B). The court granted the representative's motion to reinstate the case. The doctors pleaded the statute of limitations under Va. Code Ann. § 8.01-244(B). The court sustained the pleas and dismissed the case. The representative appealed.

Overview

The doctors argued that the trial court's dismissal under Va. Code Ann. § 8.01-335(B) dismissed the case without determining the merits of the action within the meaning of Va. Code Ann. § 8.01-244(B). They further asserted that the two-year limitation period had run. The representative argued that Va. Code Ann. § 8.01-335(B) permitted her to reinstate her case within one year after the dismissal of her case. She further contended that Va. Code Ann. § 8.01-244(B) did not apply. On appeal, the court found that Va. Code Ann. § 8.01-244(B) barred only the filing of another action if the two-year limitation period had expired. The representative's motion to reinstate her earlier case did not create another action and therefore was not subject to the limitation period in Va. Code Ann. §

8.01-244(B). Thus, the original action was effectively reinstated and the original commencement date of that action was controlling for the purposes of the statute of limitations. Consequently, the circuit court erred in sustaining the doctors' pleas and dismissing the case as barred by Va. Code Ann. § 8.01-244(B).

Outcome

The judgment of the circuit court was reversed. The case was remanded for further proceedings.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN1 A purely legal question of statutory construction is reviewed de novo. The primary objective of statutory construction is to ascertain and give effect to legislative intent. When a given controversy involves a number of related statutes, they should be read and construed together to give full meaning, force, and effect to each. Therefore an appellate court will accord each statute, insofar as possible, a meaning that does not conflict with any other statute. When two statutes seemingly conflict, they should be harmonized, if at all possible, to give effect to both. However, when two statutes do conflict, and one statute speaks to a subject generally and another deals with an element of that subject specifically, the more specific statute is controlling.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

Torts > ... > Statute of Limitations > Tolling > General Overview

Torts > Wrongful Death & Survival Actions > Defenses > Statute of Limitations

HN2 Va. Code Ann. § 8.01-244(B) provides that if any wrongful death action is brought within a period of two years after such person's death and for any cause abates or is dismissed without determining the merits of such action, the time such action is pending shall not be counted as any part of such period of two years and another action may be brought within the remaining period of such two years as if such former action had not been instituted.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

Torts > ... > Statute of Limitations > Tolling > General Overview

Torts > Wrongful Death & Survival Actions > Defenses > Statute of Limitations

HN3 Va. Code Ann. § 8.01-244(B) tolls the two-year limitation period while a wrongful death lawsuit is pending. In the event such a pending suit is ended, however, whether by abatement or dismissal without determining the merits, the time available within the limitation period begins to run again and the plaintiff may commence a new action only if he does so before any remaining time expires. Thus, if a plaintiff commences his wrongful death action one year after the death of the decedent and that action abates or is dismissed without determining the merits, then one year remains to commence a new action beginning on the date the original action abated or was dismissed. The remaining time is calculated without regard to how long the original action was pending. But after the remaining time elapses, Va. Code Ann. § 8.01-244(B) bars the commencement of a new action.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN4 See Va. Code Ann. § 8.01-335(B).

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN5 The plain meaning of Va. Code Ann. § 8.01-335(B) is that any action in which there is no activity by the parties for three or more years may be removed from a court's docket, either by dismissal or discontinuance. Thereafter a court may reinstate the case on motion but only within one year of the dismissal or discontinuance. Thus, the statute creates a rare exception to the rule that a circuit court loses jurisdiction over a case 21 days after entering a final order.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Governments > Courts > Authority to Adjudicate

HN6 See Va. Sup. Ct. R. 1:1.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

Torts > ... > Statute of Limitations > Tolling > General Overview

Torts > Wrongful Death & Survival Actions > Defenses > Statute of Limitations

HN7 The dismissal of an action under Va. Code Ann. § 8.01-335(B) is a dismissal without determining the merits for the purposes of Va. Code Ann. § 8.01-244(B), and such a dismissal resumes the two-year limitation period established for a wrongful death action. But statutes of limitation operate to bar the commencement of actions and generally have no effect on an action already pending before a court. Thus, by its plain terms, Va. Code Ann. § 8.01-244(B) bars only the filing of another action if the two-year limitation period has expired.

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

Torts > Wrongful Death & Survival Actions > Defenses > Statute of Limitations

HN10 Statutes of limitation may bar the addition of new claims, parties, or demands to a commenced action.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

Torts > Wrongful Death & Survival Actions > Defenses > Statute of Limitations

HN8 See Va. Code Ann. § 8.01-228.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Pleadings & Proof

HN9 See Va. Code Ann. § 8.01-235.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

Torts > Wrongful Death & Survival Actions > Defenses > Statute of Limitations

HN13 The Va. Code Ann. § 8.01-244(B) limitation period would apply if a new action were filed for any reason, unless the new action were filed following a voluntary nonsuit. Va. Code Ann. § 8.01-244(B). Such reasons could include that a plaintiff sought to amend the complaint to add claims, parties, or demands; or that a new complaint was required to cure some defect, such as misjoinder.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

Torts > ... > Statute of Limitations > Tolling > General Overview

Torts > Wrongful Death & Survival Actions > Defenses > Statute of Limitations

HN14 See Va. Code Ann. § 8.01-244(B).

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN11 See Va. Sup. Ct. R. 3:2(a).

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

Torts > Wrongful Death & Survival Actions > Defenses > Statute of Limitations

HN12 Va. Code Ann. § 8.01-335(B) establishes a one-year limitation period for reinstatement from the date a case is dismissed or discontinued.

Counsel: Sidney H. Kirstein for appellant.

Bevin R. Alexander; Randall T. Perdue (Braden J. Curtis; C.J. Steuart Thomas III; Freeman, Dunn, Alexander & Tiller; Timberlake, Smith, Thomas & Moses, on briefs), for appellees.

Judges: OPINION BY JUSTICE WILLIAM C. MIMS.

Opinion by: WILLIAM C. MIMS

Opinion

[117]** PRESENT: All the Justices

[*629] OPINION BY JUSTICE WILLIAM C. MIMS.

In this appeal, we consider whether the statute of limitations for wrongful death actions established by Code § 8.01-244(B) bars the reinstatement of an action dismissed under Code § 8.01-335(B).

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

Paul Rae Conger died on March 7, 2001. His widow, Shirley Conger ("Conger"), qualified as his personal representative. On May 21, 2002, Conger filed a complaint under Code § 8.01-50 against Eugene J. Barrett, M.D. and James C. VandeWater, M.D. (collectively "the Doctors") alleging they wrongfully **[**118]** caused Paul's death. The Doctors filed timely responsive pleadings. The record reflects no other papers filed, no proceedings conducted, and no orders entered after June 10, 2003.

[*630] On March 29, 2007, Barrett sought entry of an order dismissing the case under Code § 8.01-335(B). The circuit court entered the order on May 3, 2007. On April 29, 2008, Conger filed a motion pursuant to that statute to reinstate the case. The court entered an order granting Conger's **[***2]** motion on May 1, 2008.

The Doctors subsequently filed pleas of the statute of limitations in which they argued that the court's earlier dismissal under Code § 8.01-335(B) dismissed the case "without determining the merits of [the] action" within the meaning of Code § 8.01-244(B). They asserted that the two-year limitation period had run because 440 days had elapsed between Paul's death and the filing of the complaint and 362 more days had elapsed between the dismissal and the filing of the motion to reinstate.

Conger argued that Code § 8.01-335(B) permits a plaintiff whose case is dismissed under that statute to reinstate it within one year. Conger contended Code § 8.01-244(B) did not apply because a motion to reinstate revives the original action and thus there was not "another action" as contemplated by that statute.

Relying on this Court's decision in *Nash v. Jewell*, 227 Va. 230, 315 S.E.2d 825 (1984), in which we considered the difference between

"discontinuance" and "dismissal" for the purposes of Code § 8.01-335, the circuit court held that its earlier dismissal restarted the limitation period established in Code § 8.01-244(B) and found that the limitation period had expired before **[***3]** the case was reinstated. In addition, the court determined that to the extent Code §§ 8.01-244(B) and 8.01-335(B) were in conflict, the former was more specific and therefore controlled. The court then sustained the Doctors' pleas and dismissed the case. We awarded Conger this appeal. [1]

II. ANALYSIS

There are no facts in dispute, so the applicability of the statute of limitations is ***HN1*** a purely legal question of statutory construction which we review de novo. *Willard v. Moneta Bldg. Supply*, 262 Va. 473, 477, 551 S.E.2d 596, 597 (2001). "[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent." *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). "[W]hen a given controversy involves a number of **[*631]** related statutes, they should be read and construed together in order to give full meaning, force, and effect to each." *Ainslie v. Inman*, 265 Va. 347, 353, 577 S.E.2d 246, 249 (2003). Therefore "[w]e accord each statute, insofar as possible, a meaning that does **[***4]** not conflict with any other statute." *Ragan v. Woodcroft Village Apts*., 255 Va. 322, 325, 497 S.E.2d 740, 742 (1998). "When two statutes seemingly conflict, they should be harmonized, if at all possible, to give effect to both. However, when two statutes do conflict, and one statute speaks to a subject generally and another deals with an element of that subject specifically, the more specific statute is controlling." *Viking Enter. v. County of Chesterfield*, 277 Va. 104, 110, 670 S.E.2d 741, 744 (2009) (internal citations, quotation marks, and alterations omitted).

In this case, Code §§ 8.01-244(B) and 8.01-335(B) are both implicated but they are not in conflict. ***HN2*** Code § 8.01-244(B) provides, in relevant part, that if any wrongful death action

> is brought within [a] period of two years after such person's death and for any cause abates or is dismissed without determining the merits of such action, the time such

[1] We also granted the Doctors' assignment of cross-error that the circuit court erred in granting Conger's motion to reinstate after the two-year limitation period had expired.

> action is pending shall not be counted as any part of such period of two years and another action may be brought within the remaining period of such two years as if such former action had not been instituted.

By its plain terms, ***HN3*** this language tolls the two-year limitation period while **[***5]** a wrongful death lawsuit is pending. In the event such a pending suit is ended, however, whether by abatement or dismissal without determining **[**119]** the merits, the time available within the limitation period begins to run again and the plaintiff may commence a new action only if he does so before any remaining time expires. Thus, if a plaintiff commences his wrongful death action one year after the death of the decedent and that action abates or is dismissed without determining the merits, then one year remains to commence a new action beginning on the date the original action abated or was dismissed. The remaining time is calculated without regard to how long the original action was pending. But after the remaining time elapses, Code § 8.01-244(B) bars the commencement of a new action.

By contrast, Code § 8.01-335(B) provides that

> **[*632]** [a]ny ***HN4*** court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties **[***6]** with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

HN5 The plain meaning of this statute is that any action in which there is no activity by the parties for three or more years may be removed from the court's docket, either by

dismissal or discontinuance. [2] Thereafter the court may reinstate the case on motion but only within one year of the dismissal or discontinuance. Thus, the statute creates a rare exception to the rule that a circuit court loses jurisdiction over a case 21 days after entering a final order. [3] *See* Rule 1:1 (***HN6*** "All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer.").

HN7 The **[***8]** dismissal of an action under Code § 8.01-335(B) is a dismissal without determining the merits for the purposes of Code § 8.01-244(B), **[*633]** and such a dismissal resumes the two-year limitation period established for a wrongful death action. But statutes of limitation operate to bar the commencement of actions and generally have no effect on an action already pending before the court. [4] *See* Code § 8.01-228 (***HN8*** "Every action for which a limitation period is prescribed by law must be commenced within the period prescribed . . . ."); Code § 8.01-235 (***HN9*** A plea of the statute of limitations is a plea "that an action [was] not commenced within the limitation period prescribed by law."). Thus, by its plain terms, Code § 8.01-244(B) bars only the filing of "another action" if the two-year limitation period has expired.

[120]** Conger's motion to reinstate her earlier case did not create "another action" and therefore is not subject to the limitation period

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[2] As originally enacted in 1977, Code § 8.01-335 distinguished between discontinuances in subsection A and dismissals in subsection B. 1977 Acts. ch. 617. The legislative report **[***7]** explaining the re-codification of Title 8.01 makes clear that this distinction was deliberate. House Doc. No. 14, Virginia Code Commission, *Report on Revision of Title 8 of the Code of Virginia* at 219 (1977) ("The present language [of former Code § 8-154] has been altered to better distinguish between a dismissal and a discontinuance, when each is available, and the effect of each."). The statute retained this distinction in 1984 when we decided *Nash*. However, the General Assembly subsequently replaced references to dismissal with references to discontinuances in Code § 8.01-335(B). 1997 Acts ch. 680. The legislature then re-introduced references to dismissal and made some, but not all, of the references to dismissal and discontinuances disjunctive, thereby creating the appearance that discontinuance and dismissal were identical for some purposes but not others. 1999 Acts ch. 652.

In the case before us, the circuit court's May 3, 2007, order clearly dismissed Conger's action. Consequently, *in this case*, the distinction between dismissal and discontinuance is not relevant to our inquiry.

[3] Code § 8.01-428 is a similar exception. *McEwen Lumber Co. v. Lipscomb Bros. Lumber Co.*, 234 Va. 243, 247, 360 S.E.2d 845, 848, 4 Va. Law Rep. 850 (1987).

[4] Of course, ***HN10*** statutes of limitation may bar the addition of new claims, parties, or demands to a commenced action. *Ahari v. Morrison*, 275 Va. 92, 96-97, 654 S.E.2d 891, 893-94 (2008); *Neff v. Garrard*, 216 Va. 496, 498, 219 S.E.2d 878, 879 (1975).

in Code § 8.01-244(B). **[***9]** [5] *See* Rule 3:2(a) (***HN11*** "A civil action shall be commenced by filing a complaint in the clerk's office."). Rather, Conger's motion to reinstate merely invited the circuit court to invoke the statutory expansion of its jurisdiction provided by Code § 8.01-335(B) to reopen the existing action and thereby resume proceedings in the existing action despite the entry of an otherwise final order. ***HN12*** The statute establishes a one-year limitation period for reinstatement from the date the case was dismissed or discontinued; that period had not expired when the court entered the order. [6] Thus, in this case, the original action was effectively reinstated and the original commencement date of that action is controlling for the purposes of the statute of limitations.

Consequently, the circuit court erred in sustaining the Doctors' pleas and dismissing the case as barred by Code § 8.01-244(B). Accordingly, we will reverse the judgment of the circuit court and remand for further proceedings.

Reversed and remanded.

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[5] ***HN13*** The Code § 8.01-244(B) limitation period would apply if a new action were filed for any reason, unless the new action were filed following a voluntary nonsuit. Code § 8.01-244(B) (***HN14*** "[I]f a plaintiff suffers a voluntary nonsuit pursuant to § 8.01-380, the nonsuit shall not be deemed an abatement nor a dismissal pursuant to this subsection, and the provisions of subdivision E 3 of § 8.01-229 shall apply to such a nonsuited action."). Such reasons **[***10]** could include that a plaintiff sought to amend the complaint to add claims, parties, or demands; or that a new complaint was required to cure some defect, such as misjoinder. *See James v. Peyton*, 277 Va. 443, 456, 674 S.E.2d 864, 870 (2009) (requiring the filing of a new action to cure misjoinder).

[6] This holding disposes of the Doctors' assignment of cross-error because the circuit court did not err in granting Conger's motion to reinstate the case within the one-year limitation period established by Code § 8.01-335(B).

Cook v. Wayland

Circuit Court of the City of Waynesboro, Virginia

April 26, 2004, Decided

No Number in Original

Reporter

64 Va. Cir. 386; 2004 Va. Cir. LEXIS 60

Charles C. Cook v. Donna M. Wayland

Disposition: **[**1]** Plaintiff's motion to reinstate granted.

Case Summary

Procedural Posture

Plaintiff filed a motion to reinstate his personal injury suit against defendant nearly eight months after the issuance of an order dismissing the case, but within the statutory period for reinstating a formerly dismissed case under Va. Code Ann. § 8.01-335(A) (2004). The case had been dismissed on defendant's motion, which alleged that it had been dormant in excess of two years as a consequence of plaintiff's own inaction.

Overview

At issue was whether the court retained its jurisdiction to reinstate the proceeding despite its order dismissing the case with prejudice, which became final 21 days thereafter and thus precluded further modification thereof, pursuant to Va. Sup. Ct. R. 1:1, codified at Va. Code Ann. § 8.01-428. The court held that whereas a case extinguished by a judgment and effectuated by Va. Sup. Ct. R. 1:1's 21-day rule was fully dispositive of all disputed issues and facts pertaining thereto, a case dismissed pursuant to Va. Code Ann. § 8.01-335 was not dead but in a state of suspended animation. The statute's two-year dormancy period afforded those parties to dismissed proceedings the opportunity to be heard and have their disputes resolved by the legal system if requested within the statutorily mandated period of time in order to promote the principles of justice without clogging the dockets of the state's courts. By virtue of plaintiff's compliance with the provision contained in § 8.01-335(A), permitting discontinued cases to be reinstituted on motion within one year from the date of a dismissal

order, his motion could be granted without offending the strict final judgment rule.

Outcome

The court granted the motion to reinstate.

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pretrial Judgments > Nonsuits > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Lower Court Jurisdiction

HN1 Va. Code Ann. § 8.01-335 (2004) explicitly grants a judge the discretion to order a pending proceeding struck from the docket if the judge finds that it has been dormant for more than two years. A trial court may discontinue the case if it feels the plaintiff does not intend to proceed with it. If, within one year from the date of the order dismissing the case, a party to the dormant proceeding files a motion to reinstate the case with the dismissing court, then such relief may be granted. § 8.01-335(A). The statute serves to discontinue the proceeding which acts like a nonsuit in that it closes the action but does not prohibit subsequent litigation for the same cause.

Governments > Courts > Rule Application & Interpretation

Governments > Legislation > Interpretation

HN2 When faced with a rule and statute that appear to conflict, a court should reconcile the discord between the two.

Governments > Courts > Judicial Precedent

Governments > Courts > Rule Application & Interpretation

Governments > Legislation > Interpretation

HN3 The Virginia Supreme Court has not applied a precedent favoring its rules to those of the Virginia General Assembly, or vice versa. Therefore, Virginia statutes and court rules must be applied harmoniously.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Lower Court Jurisdiction

HN4 Va. Sup. Ct. R. 1:1, codified at Va. Code Ann. § 8.01-428, entrusts a trial court with control over all judgments, rulings or orders of the court for 21 days from the dates of entry, but no longer. Upon the passage of the statutorily prescribed period without further action by the court or parties to proceedings, the judgments, rulings or orders become final and the trial court is divested of jurisdiction to alter or vacate them thereafter. Va. Sup. Ct. R. 1:1. Although the strict time limitation established in Rule 1:1 may appear to be incongruous with the latitude provided dormant cases in Va. Code Ann. § 8.01-335 (2004), in fact, the two statutes are compatible by virtue of their shared purpose: to expedite litigation.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Governments > Courts > General Overview

Governments > Courts > Authority to Adjudicate

HN5 The final judgment rule applies to judgments that have fully disposed of all issues of procedure or fact raised by the parties in their pleadings and is fully dispositive of the rights of the parties absent an appeal. Conversely, Va. Code Ann. § 8.01-335 (2004) applies to inactive, unresolved cases and serves to remove such burdensome litigation from the already inundated dockets of the Commonwealth's trial courts. An order entered by a circuit court pursuant to the authority granted in § 8.01-335 does not address the validity of the pending litigation, nor does it resolve outstanding issues of law or fact. Rather, § 8.01-335 provides a judge the authority to remove outstanding litigation from his or her docket if it is determined that the plaintiff lacks the intent or desire to pursue his or her claim.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Lower Court Jurisdiction

HN6 The general assembly has included a one-year grace period in its dormant dismissal statute to provide parties to dismissed proceedings the opportunity to reinstitute their claims. Whereas a case extinguished by a judgment and effectuated by the 21-day rule of Va. Sup. Ct. R. 1:1, codified at Va. Code Ann. § 8.01-428, is fully dispositive of all disputed issues and facts pertaining thereto, a case

dismissed pursuant to Va. Code Ann. § 8.01-335 (2004) is not dead but in a state of suspended animation. Consequently, the two-year statute affords those parties to dismissed proceedings the opportunity to be heard and have their disputes resolved by the legal system if requested within the statutorily mandated period of time in order to promote the principles of justice without clogging the dockets of Virginia's courts.

Headnotes/Syllabus

Headnotes

A lawsuit that has been discontinued under Va. Code § 8.01-335(A) can be reinstated even twenty-one days after entry of the final judgment.

Counsel: Thomas R. Knoll, Jr., Esquire, Waynesboro, VA.

Henry S. Carter, Esquire, James R. Jebo, Esquire, Richmond, VA.

Judges: Humes J. Franklin, Jr.

Opinion by: Humes J. Franklin, Jr.

Opinion

[*386] Pursuant to the jurisdiction and discretion of this Court, as well as the inherent principle favoring the full resolution of legal disputes rather than the termination of dormant litigation in Virginia, Charles Cook's (hereinafter "Plaintiff") Motion to Reinstate his personal injury action against Donna Wayland (hereinafter "Defendant") is granted. Thus, the case of *Cook v. Wayland,* is hereby restored to the docket of this Court and may proceed hereafter.

The facts of this case are straightforward. On June 9, 2003, Defendant filed a Motion to Dismiss the personal injury suit initiated by Plaintiff in April 2001. According to Defendant's motion, the case had been dormant in excess of two years as a consequence of Plaintiff's own inaction. Thus, pursuant to Virginia Code § 8.01-335(A), Defendant requested the case be stricken from the docket. Finding evidence in support of Defendant's claims, this Court granted Defendant's motion on June 17, 2003. No **[**2]** further action was taken by either party. Hence, on July 8, 2003 (twenty-one days after June 17, 2003) this Court's order became final. Va. S. Ct. R. 1:1. Then, on February 5, 2004, nearly eight months after

the issuance of the order dismissing his case, but within the statutory period for reinstating a formerly dismissed case under Va. Code Ann. § 8.01-335(A), Plaintiff filed his Motion to Reinstate his case against Defendant.

In opposition to Plaintiff's Motion to Reinstate, Defendant argues Rule 1:1 of the Virginia Supreme Court effectively terminated the jurisdiction of this Court twenty-one days after entry of its Dismissal Order. As a result, this Court does not have the authority to grant Plaintiff's request. However, Plaintiff argues the dormant dismissal statute trumps the twenty-one day rule and therefore the case may be reinstated.

[*387] The issue presented by Plaintiff's Motion to Reinstate is whether this Court retained its jurisdiction to reinstate the proceeding despite its June 17, 2003, order dismissing the case with prejudice which became final twenty-one days thereafter and thus precludes further modification thereof, pursuant to Rule 1:1 **[**3]** of the Virginia Supreme Court. Consequently, this Court must resolve the apparent conflict between the Commonwealth's statute and the Supreme Court's stringent rules guiding civil procedures in its courts.

Virginia Code § 8.01-335 ***HN1*** explicitly grants a judge the discretion to order a pending proceeding struck from the docket if the judge finds that it has been dormant for more than two years. A trial court *may* discontinue the case if it feels the plaintiff does not intend to proceed with it. *Nash v. Jewell,* 227 Va. 230, 234, 315 S.E.2d 825, 827 (1984). If, within one year from the date of the order dismissing the case, a party to the dormant proceeding files a motion to reinstate the case with the dismissing court then such relief may be granted. Va. Code Ann. § 8.01-335(A) (2004). The statute serves to discontinue the proceeding which acts like a nonsuit in that it closes the action but does not prohibit subsequent litigation for the same cause. *Payne v. Buena Vista Extract Co.,* 124 Va. 296, 98 S.E. 34 (1919).

HN2 When faced with a rule and statute that appear to conflict, a court should reconcile **[**4]** the discord between the two. ***HN3*** The Virginia Supreme Court has not applied a precedent favoring its rules to those of the General Assembly, or vice versa. Therefore, Virginia statutes and Court rules must be applied harmoniously. *Cilman v. Virginia State Bar,* 266 Va. 66, 72, 580 S.E.2d 830 (2003) *quoting Clark v. Butler Aviation,* 238 Va. 506,

512, 385 S.E.2d 847, 850, 6 Va. Law Rep. 718 (1989).

The provisions of Va. Code Ann. § 8.01-335 seem to contradict the Commonwealth's twenty-one day rule. Rule 1:1 of the Virginia Supreme Court (codified at Va. Code Ann. § 8.01-428) ***HN4*** entrusts a trial court with control over all judgments, rulings or orders of the court for twenty-one days from the dates of entry but no longer. Upon the passage of the statutorily prescribed period without further action by the court or parties to proceedings, the judgments, rulings or orders become final and the trial court is divested of jurisdiction to alter or vacate them thereafter. Va. S. Ct. R. 1:1. Although the strict time limitation established in Rule 1:1 of the Supreme Court Rules appear to be incongruous with the latitude provided dormant **[**5]** cases in Va. Code Ann. § 8.01-335, in fact, the two statutes are compatible by virtue of their shared purpose: to expedite litigation.

Judge Woltz tackled the reconciliation of Rule 1:1 and Va. Code Ann. § 8.01-335 in *Bosserman v. Newlin,* 10 Va. Cir. 477 (Frederick County, **[*388]** 1970). In that case, Circuit Court Judge Robert K. Woltz noted ***HN5*** the final judgment rule applies to judgments that have fully disposed of all issues of procedure or fact raised by the parties in their pleadings and "is fully dispositive of the rights of the parties absent an appeal." *Bosserman,* 10 Va. Cir. at 481. Conversely, § 8.01-335 of the Virginia Code applies to inactive, unresolved cases and serves to remove such burdensome litigation from the already inundated dockets of Commonwealth's trial courts. An order entered by a circuit court pursuant to the authority granted in Va. Code Ann. § 8.01-335 does not address the validity of the pending litigation, nor does it resolve outstanding issues of law or fact. Rather, Va. Code Ann. § 8.01-335 **[**6]** provides a judge the authority to remove outstanding litigation from his or her docket if it is determined that the plaintiff lacks the intent or desire to pursue his or her claim.

However, the Commonwealth's General Assembly recognizes that the interests of its citizens are best served by the full yet expeditious resolution of outstanding litigation. Thus, ***HN6*** the General Assembly included a one year grace period in its dormant dismissal statute to provide parties to dismissed proceedings the opportunity to reinstitute their claims. Whereas a case extinguished by a

judgment and effectuated by the twenty-one day rule is fully dispositive of all disputed issues and facts pertaining thereto, a case dismissed pursuant to Va. Code Ann. § 8.01-335 is "not dead but in a state of suspended animation." *Bosserman,* 10 Vir Cir. at 483. Consequently, the two year statute affords those parties to dismissed proceedings the opportunity to be heard and have their disputes resolved by the legal system if requested within the statutorily mandated period of time in order to promote the principles of justice without clogging the already inundated dockets of Virginia's courts.

[7]** In light of the aforementioned accommodation of the final judgment and dormant dismissal statutes, Plaintiff's motion to reinstate should be granted. This Court used its discretion to grant Defendant's Motion to Dismiss in June 2003, following two years of inactivity in the case and a reasonable determination that Plaintiff did not intend to pursue his action against Defendant. That dismissal order became final in July 2003. However, by virtue of Plaintiff's compliance with the provision contained in Code Ann. § 8.01-335(A), permitting discontinued cases to be reinstituted on motion within one year from the date of a dismissal order, Plaintiff's Motion to Reinstate his claim against Defendant may be granted without offending the strict final judgment rule. In light of this ruling, Plaintiff and Defendant should be mindful of all future dates pertaining this case and work diligently to meet all deadlines in a timely and expeditious manner.

Humes J. Franklin, Jr.

Duty v. Chesapeake & O. Ry.

Supreme Court of Appeals of West Virginia, Charleston

January 17, 1911, Submitted ; November 28, 1911, Decided

No Number in Original

Reporter

70 W. Va. 14; 73 S.E. 331; 1911 W. Va. LEXIS 183

DUTY v. CHESAPEAKE & OHIO RAILWAY COMPANY.

Prior History: **[***1]** Error to Circuit Court, Cabell County.

Action by Amanda S. Duty against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error.

Affirmed.

Disposition: Affirmed.

Case Summary

Procedural Posture

Defendant railway company challenged a judgment of the Circuit Court, Cabell County, West Virginia, which was entered in favor of plaintiff injured passenger. The circuit court failed to set aside the verdict based on insufficient evidence as requested by the company.

Overview

The court on appeal examined the overruling of a demurrer to the amended declaration. The company argued that one count omitted the duty and the breach thereof by the company to stop its train at its the station. The court on appeal found that the first count stated with reasonable certainty that the main or primary acts of omission and commission that did the damage. This was namely the duty of the company, while the passenger was in the act of boarding its train, to not wantonly, recklessly and carelessly and negligently move its train so as to injure her. Whether or not the company did so offend could depend on whether a stop of sufficient length was made, and whether the company's servants saw or reasonably ought to have seen the passenger in her place of danger when giving the signal to go ahead, but the want of averment of that fact did not render the count bad on demurrer. Also the second count was exceptionally good, and the

company was not prejudiced by the action of the circuit court on the first count. A new cause of action was not begun by the amendment and non-suit suffered and set aside. There was also no substantial error in admission of certain testimony.

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN1 If a good count and the evidence thereunder is sufficient to sustain a verdict and judgment, the error, if any, in not, on demurrer, suppressing the bad count, will be disregarded by an appellate court, if it clearly appears that the action of the court on the bad count and the evidence, if any, admitted thereunder, has not resulted in an excessive verdict, or that the defendant has not been otherwise prejudiced thereby, this upon the same principle that where there is but one count, which contains good and bad matter, and a general demurrer thereto is properly overruled, the bad will not after verdict vitiate the good, unless prejudice due to the bad matter and evidence thereunder has resulted to the defendant.

Civil Procedure > Dismissal > Voluntary Dismissals > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

HN2 Section 12, chapter 127, Code 1906 (West Virginia), originating with chapter 132, Acts 1868, unlike any statute of Virginia, specifically provides, that all causes in which orders of dismissal or orders of non-suit have been set aside, and the same re-instated, shall remain upon the docket, and be proceeded with in the same manner as if the order had never been made. True this statute says "in the same manner;" but rightly interpreted it clearly means with all the rights preserved the same as if a non-suit had never been suffered. The statute is remedial, and is entitled, under well known canons, to liberal construction, and read in the light of § 19, chapter 104, Code 1906 (West Virginia), another remedial statute, it should be given the construction indicated.

Torts > ... > Motor Vehicles > Particular Actors, Circumstances, & Liabilities > Motor Carriers

Torts > Transportation Torts > Rail Transportation > General Overview

Transportation Law > Rail Transportation > Personnel > Conductors

HN3 It is universally held to be negligence for the conductor or other servant of a railroad company to start a train while passengers are obviously in the act of getting on the train or alighting therefrom.

Torts > ... > Motor Vehicles > Particular Actors, Circumstances, & Liabilities > Motor Carriers

Torts > Transportation Torts > Rail Transportation > General Overview

HN4 It is negligence to start a railroad train from a station, while a passenger is actually getting on board, regardless of the length of the stop.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > ... > Motor Vehicles > Particular Actors, Circumstances, & Liabilities > Motor Carriers

Torts > Transportation Torts > Rail Transportation > General Overview

HN5 Where evidence is conflicting, the question of the reasonableness of a stop; or whether a train is in motion when the plaintiff stepped upon the lowest step; and whether the circumstances were such as called for the exercise of reasonable diligence upon the part of defendant's servants, to see that the plaintiff had reached a place of safety, are all questions of fact to be determined by the jury, and that a motion for an involuntary non-suit was properly refused.

Syllabus

1. APPEAL AND ERROR--*Review--Harmless Error--Ruling on Pleading*.

If the good count or counts of a declaration, and the evidence thereunder be sufficient to support the verdict, the judgment thereon will not be vitiated by the error of the trial court, if any, in overruling the demurrer to a bad count, when it clearly appears that the defendant has not been prejudiced thereby. (p. 16).

2. CARRIERS--*Injuries to Passengers--Pleading*.

The first count of the declaration in this case, though omitting to allege, as did the second, that defendant failed to stop its train at the station where plaintiff offered herself as a passenger, and was injured, for a sufficient

length of time to enable her to get aboard, and to a place of safety, held good on demurrer. (p. 16).

3. PARTIES--*Amendment--Statutory Provision*.

Where there are two corporations of the same name, one created under the laws of one state, the other of another, but the corporation intended to be sued, has in fact been sued, and duly served with process, but on the trial plaintiff discovers that in one count of his declaration he has erroneously alleged the wrong state under the laws of which defendant was incorporated, it is not error for the trial court, after non-suit suffered, and set aside, on his motion, to permit plaintiff to amend his declaration by striking out the erroneous allegation. Such an amendment is authorized by section 14, chapter 125, Code 1906. (p. 18).

4. PLEADING--*Amendment--New Cause of Action*.

Such an amendment is not the introduction of new cause of action against the defendant actually sued. (p. 19).

5. LIMITATION OF ACTIONS--*Computation of Limitations--Commencement of Action--Amendment of Pleading*.

Nor will a non-suit thus suffered and set aside, amount to a voluntary abandonment or discontinuance of the old suit, and the beginning of a new action, so as to entitle defendant to have its plea of the statute of limitations applied to the date of the amendment, and not to the date of the writ commencing the suit. Section 12, chapter 127, and section 19, chapter 104, Code 1906, are decisive kof this point. (p. 19).

6. TRIAL--*Opinion Evidence--Effect*.

The verdict for the plaintiff is not contrary to the overwhelming weight and preponderance of the evidence. (p. 21).

7. CARRIERS--*Injuries to Passengers--Questions for Jury*.

The questions of the manner in which plaintiff sustained her injuries; the reasonableness of the stop made at defendant's railway station; whether plaintiff was attempting to board a moving train at the time of her injuries, and whether defendant was guilty of negligence in not seeing her and seeing that she got on the

train, and to a place of safety, before giving the signals to go ahead, all depended on conflicting evidence and attendant circumstances, and were properly submitted to the jury. (pp. 21-2).

8. CARRIERS--*Injuries to Passengers--Taking Up Passengers*.

It is actionable negligence for a conductor or other servant of a railroad company to start a train while passengers are obviously in the act of getting on it, or alighting therefrom. (p. 24).

9. TRIAL--*Instructions--Requests--Instructions Already Given*.

It is not error to reject instructions the subject of which has been substantially covered by other instructions given. (p. 25).

10. NEW TRIAL--*Appeal and Error--Newly Discovered Evidence--Discretion of Trial Court*.

If the affidavits on which a motion for a new trial for after discovered evidence is based, are rebutted by counter affidavits, it is for the court below exercising a sound judicial discretion to say whether a new trial should be granted, and its judgment should not be disturbed, except for plain abuse of that discretion. (p. 25).

Counsel: Simms, Enslow, Fitzpatrick & Baker for plaintiff in error.

Marcum & Marcum, for defendant in error.

Judges: MILLER, JUDGE.

Opinion by: MILLER

Opinion

[*16] **[**332]** MILLER, JUDGE:

Defendant by writ of error seeks reversal of the judgment below against it for five thousand dollars, damages for injuries alleged to have been sustained by plaintiff while a passenger, at West Hamlin, in Lincoln county, on the night of September 24, 1907.

The first point of error is the overruling of the demurrer to the amended declaration and to each count thereof. This declaration contains two counts. The second count, among other things, avers the duty and the breach thereof by defendant to stop its train at its said station, on the night in question, a reasonable length of time to enable plaintiff to get aboard and to reach a place of safety. This count is concededly good, but it is insisted that the first

count, which omits this averment, but which avers other duties of defendant to plaintiff, and the willful, **[***2]** wanton, reckless, and negligent disregard thereof, resulting in the injuries complained of, is nevertheless fatally bad, demanding reversal of the judgment and that a new trial should be awarded.

The law on this subject, however, is that ***HN1*** if the good count and the evidence thereunder, be sufficient to sustain the verdict and judgment, the error, if any, in not, on demurrer, suppressing the bad count, will be disregarded by an appellate court, if it clearly **[**333]** appears that the action of the court on the bad count and the evidence, if any, admitted thereunder, has not resulted in an excessive verdict, or that the defendant has not been otherwise prejudiced thereby, this upon the same principle that where there is but one count, which contains good and bad matter, and a general demurrer thereto is properly overruled, the bad will not after verdict vitiate the good, unless prejudice due to the bad matter and evidence thereunder has resulted to the defendant. *Robrecht* v. *Marling*, 29 W. Va. 765, 773, 2 S.E. 827, and cases cited; 6 Ency. Pl. & Prac. 367, citing, at page 368, numerous Alabama and Indiana decisions, sustaining the proposition.

But is the first **[***3]** count bad for omitting the alleged primary and paramount averment? It avers facts sufficient to establish the relationship of passenger and carrier; the duty of defendant thereafter to use all due and proper care, caution, skill and diligence in and about the operation and movement of its locomotives, engines, cars, coaches and trains and so forth, so as to **[*17]** prevent and avoid all hurts, injuries, accidents, and dangers to plaintiff, and to carry her safely and securely to destination; the disregard of those duties, in that while at the instance and request of defendant, she was attempting to board the defendant's regular passenger train and the car or coach thereof at said station, to be carried safely to destination, and while said train was standing motionless, and while she in the exercise of all due and proper care and diligence for her own safety and security, the defendant, its officers, agents and servants, without ring of bell, blow of whistle, or giving the usual and customary warnings and signals, or warning or signal of any kind, whatsoever, wantonly, recklessly, carelessly, and negligently caused said train and the car or

coach whereon plaintiff was then and there **[***4]** in the act of boarding, to be suddenly and quickly and without warning started and jerked forward and whereby she was then and there hurled and thrown with great force and violence from the plat-form and from the step of the car or coach which she was then and there in the act of boarding, as aforesaid, resulting in the injuries of which she complains. Does this state a good cause of action? It is insisted that it does not, for the reason noted.

To sustain this proposition *Snyder* v. *Wheeling Electrical Co.*, 43 W. Va. 661, 28 S.E. 733 is mainly relied on. We do not think this case supports the contention of counsel; quite the contrary. If in disregard of its alleged duties defendant, as this count avers, while plaintiff was in the act of boarding the train, without notice as alleged, wantonly, recklessly, carelessly and negligently caused its train and coach in which, in the exercise of due and proper care and diligence, she was so attempting to enter, to be suddenly started and jerked forward, causing her injuries, it was guilty of actionable negligence. The count states with reasonable certainty the main or primary acts of omission and commission doing the damage, **[***5]** within the rule of the case cited, namely the duty of defendant, while plaintiff was so in the act of boarding its train not to so wantonly, recklessly and carelessly and negligently move its train so as to injure her. Whether or not defendant did so offend might, on the trial, depend on whether a stop of sufficient length was made, and whether defendant's servants saw or reasonably ought to have seen plaintiff in her place of danger when giving the signal to go ahead, but the want **[*18]** of averment of that fact did not in our judgment render the count bad on demurrer.

But even if the count be bad, we can plainly see, the second count being concededly good, that defendant was not prejudiced by the action of the court on the first count, and that the judgment ought not to be reversed for any error therein. No evidence was admitted under the first count, not admissible under the second, and nothing could have been added by way of damages under the first count not provable under the second count, wherefore defendant could not have been prejudiced.

The next point is that the court erroneously permitted plaintiff to withdraw a juror, and on a non-suit suffered, but set aside the **[***6]** same day on her motion, to amend her declaration

by striking out of the first count the words, "State of West Virginia," descriptive of the corporation sued, leaving the corporate name as described in the writ executed upon the defendant company, and as described in the second count, Chesapeake and Ohio Railway Company, a corporation. It is insisted that although the Chesapeake & Ohio Railway Company, a corporation under the laws of the State of Virginia, was in fact the corporation sued, and intended to be sued, and the one served with process, the error of description in the first count, committed plaintiff to the West Virginia corporation, and that she could not of right amend her declaration, as she was permitted to do, without suffering the consequences of a new suit brought as of the date of the filing of the amended declaration, and to which the statute of limitations interposed by the defendant, the Virginia corporation, could be properly pleaded; also that the amendment permitted was equivalent to stating a new cause of action to which the statute of limitation might also be properly applied. The evidence relied on by defendant in the court below in support of its motion to **[***7]** strike out the amended declaration, shows, we think, that neither the words "State of West Virginia," stricken out, nor the words "State of Virginia" constitute any part or parts of the corporate names of either of these corporations. Each corporation has the same corporate name, the one sued being organized **[**334]** under the laws of Virginia, the other under the laws of West Virginia, the latter not being the owner or operator of the railroad at the time plaintiff is alleged to have sustained her injuries. If we should treat the words "State of West Virginia" as part of the **[*19]** corporate name, and a misnomer, the right corporation having been sued and served with process, the variance would not be fatal; nor, by section 14, chapter 125, Code 1906, the proper subject of a plea in abatement. Under that section the declaration would be amendable on mere motion of either party. *Bank* v. *Distilling Co.*, 41 W. Va. 530, 23 S.E. 792; *Grocery Co.* v. *Brewing Co.*, 60 W. Va. 281, 54 S.E. 349; *Stout* v. *B. & O. R. R. Co.*, 64 W. Va. 502, 63 S.E. 317.

The other argument based on the theory of a new cause of action introduced **[***8]** by the amendment is, in our opinion, wholly untenable. The cause of action is the same in both pleadings. Defendant knew it was the corporation sued, intended to be sued, and described in the writ, and that it was properly

served with this writ. It is true perhaps, as a general rule, as decided in the cases cited, that the introduction by way of amendment of a new and distinct cause of action, will not prevent the running of the statute of limitations, except from the date of such amendment; but we have no such case here. This is not a case where by amendment a different party has been substituted for the defendant actually sued; but one in which the name of the party actually sued and served with process has been corrected. Such a case is clearly within our statute, and the decisions cited, and within the rule of *Mill Co.* v. *Hobdy*, (Ala) 51 So. 871, one of the cases relied on by defendant.

But was a new cause of action begun by the amendment and non-suit suffered and set aside, to which the statute of limitations could properly be applied? In affirmance of this proposition, counsel rely on the Virginia cases of *Manuel* v. *N. & W. Ry. Co.*, (Va.) 37 S.E. 957, **[***9]** and *Wickham* v. *Green*, (Va.) 68 S.E. 259, construing the statute of that state, the first, a new suit, brought after a non-suit voluntarily suffered, but not set aside; the second a suit dismissed by the clerk at rules for want of pleadings, and reinstated on motion at the subsequent term of the court. In both cases the actions were held to be barred. These decisions were rested on the statute of Virginia, corresponding to section 19, chapter 104, Code 1906, of this state. In *Tompkins*, v. *Ins. Co.*, 53 W. Va. 479, 484, 44 S.E. 439, the difference between our broader and more comprehensive statute, and the statute of Virginia, and the statutes of some other states, is distinctly noted, and the Virginia decisions cited are regarded as uncontrolling. *Lawrence* v. *Coal Co.*, 48 W. Va. 139, 35 S.E. 925, distinguished in *Tompkins* v. **[*20]** *Ins. Co., supra*, involved a voluntary abandonment of the first suit, after dismissal at rules, and new suit subsequently brought. In the recent case of *Ryan* v. *Piney Coal & Coke Co.*, 69 W. Va. 692, 73 S.E. 330, we had occasion, in construing our statute, to review **[***10]** our former decisions on the subject. We held the statute broad enough in its application to cover the case of a new suit brought after a former one dismissed for variance between the writ and declaration, and refusal of the court to allow an amendment.

But why need we further pursue this question? Our statute, ***HN2*** section 12, chapter 127, Code 1906, originating with chapter 132, Acts 1868, unlike any statute of Virginia, specifically

provides, that all causes in which orders of dismissal or orders of non-suit have been set aside, and the same re-instated, "shall remain upon the docket, and be proceeded with in the same manner as if the order had never been made." True this statute says "in the same manner;" but rightly interpreted it clearly means with all the rights preserved the same as if a non-suit had never been suffered. The statute is remedial, and is entitled, under well known canons, to liberal construction, and read in the light of section 19, chapter 104, Code 1906, another remedial statute, it should be given the construction indicated.

The next point is that over the defendant's objection, the court below admitted improper evidence. This point is made with respect to the **[***11]** whole of the evidence of Doctors Solter and Turner, motion to exclude which it is claimed was overruled. If such motion was ever made we have been unable to find it in the record. Attention is not directed to any particular portion or portions of this evidence which in the judgment of counsel ought to have been excluded. The generality of the objection does not require us to give it consideration. But counsel say that the motion to exclude, which we fail to find in the record, should have been sustained on the rules and principles of *C. & O. Ry Co.* v. *Wiley*, 121 S.W. 402; *McKormick* v. *West Bay City*, 110 Mich. 265, 68 N.W. 148, and *Comstock* v. *Township of Georgetown*, 137 Mich. 541, 100 N.W. 788. The particular rules of these cases supposed to have been violated by the alleged action of the court, are not pointed out. We are left in the dark, as the court below evidently was, if such motion was made, justifying it in denying the motion. We have read the evidence of these witnesses with reference to the authorities **[*21]** cited, and we can see no substantial infraction of the rules of evidence enunciated in those cases. **[***12]** The evidence relates mainly to the treatment of the plaintiff by these witnesses, from the time of her supposed injuries, the history, symptoms, **[**335]** and progress of her disease and their opinions based thereon, as to its cause. One rule of *McKormick* v. *West Bay City*, which may possibly have been in the mind of counsel, is that where a physician is called to examine a plaintiff in an action for personal injuries, for the express purpose of giving testimony, his voluntary exclamations of pain and the like are incompetent evidence; but no such case is presented by the evidence of these witnesses.

Much of the evidence went in without objection by defendant's counsel. We perceive no substantial error in its admission.

Next, it is said that the evidence of the plaintiff is overborne and buried under the preponderating evidence of the defendant, and that on this ground, notwithstanding the conflict, the court below, as proposed by defendant's instruction number 1, should have directed a verdict for it, and after verdict should have set the same aside on its motion to award a new trial. This point is directed to two distinct portions of the evidence: First, it is claimed that **[***13]** the evidence of plaintiff's witnesses, doctors Turner and Solter, relating to the nature of plaintiff's injuries, the causes, and results, and particularly their opinion, at the time of the trial, that she was suffering from *locomotor ataxia*, was completely demolished and overridden by the evidence of some six other physicians, most, if not all, of them employees of the defendant, and who had never treated plaintiff, or made any physical examination of her or her injuries, but gave it as their opinion, based on the evidence of the plaintiff's witnesses, and what they had seen of plaintiff at the trial, that she was not then suffering from *locomotor ataxia*. We are unable to agree with counsel. True there is conflict, but it was for the jury, and not for the court to judge of its weight and credibility; the number of witnesses is not controling. Defendant's witnesses, as they admit, had never had the opportunity to examine or treat plaintiff, as plaintiff's witnesses had done, and they did not attempt to speak with the same personal knowledge or accuracy as doctors Turner and Solter.

The other class of evidence to which counsel would apply their **[*22]** theory of overwhelming **[***14]** preponderance is: (a), that relating to the manner in which plaintiff's alleged injuries were received; (b), that relating to the reasonableness of stop made at West Hamlin on the night in question, and (c) that relating to defendant's claim that plaintiff attempted to get aboard the train while it was in motion, and thereby contributed to her injuries, depriving her of right of recovery. It is conceded that the (a) class of evidence is conflicting. It might reasonably be said to be one sided, for defendant's witnesses profess not to have seen plaintiff as she was attempting to board the train. Plaintiff, her husband and another witness all agree, that these injuries were sustained substantially as alleged in the

declaration. We need not further consider this point.

Next, as to the evidence relating to the reasonableness of the stop, and that relating to contributory negligence. It is insisted that this case is clearly controlled by *Hoylman* v. *Kanawha & Michigan Ry. Co.*, 65 W. Va. 264, 64 S.E. 536, and the rules and principles of *Louisville, H. & St. L. Ry. Co.* v. *Coons*, 25 Ky. L. Rep. 509, 76 S.W. 45; *C. B. & Q. R. R. Co.* v. *Landauer*, 36 Neb. 642, 54 N.W. 976; **[***15]** *C. B. & Q. R. Co.* v. *Lampman*, 104 P. 533; *Hurt* v. *St. L., I. M. & S. Ry. Co.*, 94 Mo. 255; *Raben* v. *Central Iowa Ry. Co.*, 73 Iowa 579, 35 N.W. 645; *Pa. R. R. Co.* v. *Kilgore*, 32 Pa. 292, and *Shealey* v. S.C. *& G. Ry. Co.*, 67 S.C. 61. We do not think the *Hoylman Case* controls this one. In that case there was no conflict in the evidence as to the reasonableness of the stop, or as to the negligence of Porter who was killed. In this case there is conflicting evidence; the witnesses for the defendant do not agree as to the exact length of the stop, except in saying that it was longer than usual. But the train was about two hours late at West Hamlin; it was of unusual length, being composed of some eight coaches, including the baggage coach, and heavily loaded with passengers returning from a circus at Huntington that day, and an unusual number got off at West Hamlin. Plaintiff and her husband with six small children were destined for Big Creek, a station east of West Hamlin. Both testify, and they are not contradicted, that they had been waiting for a long time for the belated train, **[***16]** and that as soon as the train whistled for the station, they went out promptly, and on its arrival at the station presented themselves at the place between the smoking car and the coach immediately in the rear of it, where passengers for that station were alighting, **[*23]** near the lower end of the platform, each carrying one of the smaller children, and directing the others; that as soon as the passengers for that station had alighted, they proceeded at once to get aboard, the husband with one child in his arms, and one or two of the other children going in first, and who succeeded in getting up on the platform and into the coach, the wife and plaintiff with the child in her arms, and the other children following closely behind. Plaintiff testifies and she is corroborated by her husband and her witness Wilkinson, present, that while she was in the act of getting on the train with her right foot on the lower step, and holding on to the hand rail with her released

hand, the train and the car on which she was then standing, without warning or signal, gave a lurch forward, jerking her loose and backwards against the car, throwing her to **[**336]** the ground. These witnesses distinctly **[***17]** say that the train was not in motion when Mrs. Duty thus attempted to get on the train, and that she and her husband started right on the train, as soon as the passengers for West Hamlin got off. The evidence of defendant relied on is that of the two conductors and the brakeman in charge of the train. Conductor Cowherd in charge of the three front coaches, was standing up on the front platform of the smoking car, between it and the baggage car, and concededly was not in a position to see plaintiff with her husband and children attempting to board the train. The brakeman claims to have been standing on the station platform, about opposite Conductor Cowherd, or about midway of the smoking car, as to which the evidence is not very clear; but he does not appear to have been giving attention to the passengers getting off and on the train where plaintiff was attempting to get on. Armstrong the conductor in charge of the rear coaches testifies that after he got the passengers off his coaches, which stood far back from the station, opposite freight cars on another track, he walked forward; that he could see Walker, the brakeman, but did not see plaintiff and her children attempting to get **[***18]** aboard the train; and Walker the brakeman professes to have seen Armstrong, and both profess to have had a full view along the entire length of the train; yet both say they did not see plaintiff and her husband with their large family in the act of getting aboard when giving the signals to go ahead. It was dark and the trainmen had their lanterns; but if Armstrong and Walker could see each other **[*24]** it seems almost incredible that they did not see or could not while looking along the train, as they profess to have been, have plainly seen this family in the act of getting on the train. Whether they could or did, and whether a sufficient stop was made, and whether plaintiff attempted to get on the train after it started, were, we think, under all the evidence in the case, peculiarly questions of fact for jury decision.

Most, if not all, the cases cited and relied on by counsel for defendant, were actions for damages sustained by passengers while alighting from trains in motion, after reasonable stops made, where, as in our case of *Hoylman* v. *Railway Co., supra*, the rule is, that the

carrier will not be liable unless the circumstances indicate or cause the trainmen to **[***19]** suspect, in the exercise of reasonable diligence, that a passenger has not reached a place of safety, so as to be in danger if the train is started. The rule perhaps would not be different, as indicated in the *Hoylman Case*, in actions for damages for injuries sustained while attempting to get on moving trains. The rule is clearly stated in 5 Am. & Eng. Ency. Law, 578, one of the authorities cited and relied upon by defendant's counsel, as follows: ***HN3*** "It is universally held to be negligence for the conductor or other servant of a railroad company to start a train while passengers are obviously in the act of getting on the train or alighting therefrom." The numerous decisions cited in the footnotes fully support the text. One of them, *Texas & P. Ry. Co.* v. *Gardner*, 114 F. 186, holds, that ***HN4*** it is negligence to start a railroad train from a station, while a passenger is actually getting on board, regardless of the length of the stop. And in *Kulman* v. *Erie R. Co.*, (N.J.) 47 A. 497, it is held, that ***HN5*** where the evidence, as in the case at bar, is conflicting, the question of the reasonableness of the stop; or whether the train was in motion when the **[***20]** plaintiff stepped upon the lowest step; and whether the circumstances were such as called for the exercise of reasonable diligence upon the part of defendant's servants, to see that the plaintiff had reached a place of safety, are all questions of fact to be determined by the jury, and that a motion for an involuntary non-suit was properly refused. Our own case of *Normile* v. *Wheeling Traction Co.*, 57 W. Va. 132, 49 S.E. 1030, is also authority in support of this proposition. Our conclusion is that the court below **[*25]** did not err in refusing to set aside the verdict for want of sufficient evidence to support it.

Another point is that the court improperly rejected defendant's instructions numbers 5 and 8. These instructions are based upon the theory that the plaintiff attempted to board the train while it was in motion. There is little evidence to support this theory. The evidence clearly shows that the entire family of the plaintiff was in the act of boarding the train at one and the same time, the husband preceding the wife, she following him in close succession. But conceding that defendant was entitled to instructions upon this theory, the law applicable **[***21]** to the facts in the case was fully

covered by other instructions given on its behalf and there is no error.

Lastly, it is claimed that the court erred in refusing to set aside the verdict on the ground of newly discovered evidence. The motion of the defendant to set aside the verdict on this ground, was supported by the affidavits of two women to the effect, that in December, 1907, following the accident, plaintiff had admitted to them, that she had not been seriously injured, but that upon the advice of counsel she had concluded to simulate injuries, for the purposes of this suit. These witnesses are directly contradicted by affidavits of the plaintiff and her husband, corroborated by the affidavit of her counsel. The court below overruled the motion. We are only called upon here to say whether the court below abused its discretion. We cannot say so; and not being able to see that there was it is our duty to overrule the point. 29 Cyc. 904; *Trimble* v. *Tantlinger*, 104 Iowa 665, 69 N.W. 1045; *Thompson* v. *Thompson*, 88 Cal. 110, 25 P. 962; *Goodell* **[**337]** v. *Hall*, 112 Ga. 435; *Grace* v. *McKinney, Id.* 425.

Finding **[***22]** no substantial error the judgment must be affirmed.

Affirmed.

Gittens v. Va. Empl. Comm'n

Circuit Court of the City of Chesapeake, Virginia

January 25, 2010, Decided

Case No. (Civil) CL09-2599, (consolidated with CH04-513)

Reporter

80 Va. Cir. 106; 2010 Va. Cir. LEXIS 150

Celeste Gittens v. Virginia Employment Commission, Matsushita Corporation, and Americaid, Inc.

Case Summary

Procedural Posture

Plaintiff filed a Va. Code Ann. § 8.01-335(B) motion for reinstatement of her action against defendant Virginia Employment Commission (VEC); the plaintiff, through counsel, explained that since she was previously acting pro se, she was unaware of the court procedure requiring her to schedule a date for trial, and therefore the case "sat on the docket" without activity.

Overview

The plaintiff claimed that as long as notice was given and the motion for reinstatement was filed within one year of the date the dismissal order was entered, the aim of § 8.01-335(B) had been met. VEC claimed that allowing reinstatement without an order thwarted the purpose of § 8.01-335(B) to move cases along on the court's docket. The court found, inter alia, that it was reasonable for the pro se plaintiff to await notice from the court as to the next steps in the case when she previously received similar instructions from VEC in the underlying matter. Accordingly, the case could be reinstated even though the order therefor was after the deadline.

Outcome

The motion was granted.

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN1 See Va. Code Ann. § 8.01-335(B).

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN2 The meaning of Va. Code Ann. § 8.01-335(B) is to allow courts to eliminate cases from their dockets for which there is no reasonable prospect of trial.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN3 To require entry of an order within the one year time period in Va. Code Ann. § 8.01-335(B) allowing reinstatement leaves the moving party subject to the vagaries of court calendars, availability of judges, local and other such matters that may be beyond his or her control.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN4 Va. Code Ann. § 8.01-335(B) does not actually dismiss a case, but rather puts it in a state of "suspended animation," allowing it to be stirred perceptibly toward reviewed activity by application within a year.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN5 The language of Va. Code Ann. § 8.01-335(B) allows "reinstatement on motion," and such reinstatement is valid even if the order is entered after the expiration of the one year period.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN6 The use of the word "discontinued" in Va. Code Ann. § 8.01-335(B) provides for a case's resumption on the docket upon motion.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN7 Va. Code Ann. § 8.01-335(B) does not provide for a hearing or a showing upon "good cause" for reinstatement, but merely "on motion."

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN8 As a general rule, if a plaintiff who is ready and willing to go to trial is brought before a court under the provisions of Va. Code Ann. § 8.01-335 and demonstrates an intent to proceed with his case, the court should not discontinue his action.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN9 Va. Code Ann. § 8.01-335(A) affords those parties to dismissed proceedings an opportunity to be heard and have their disputes resolved by the legal system if requested within the statutorily mandated period of time in order to promote the principles of justice without clogging the already inundated dockets of Virginia's courts.

Headnotes/Syllabus

Headnotes

A discontinued case can be reinstated if the motion therefor is timely, though the order therefor is after the deadline.

Judges: [1]** JOHN W. BROWN, JUDGE.

Opinion by: JOHN W. BROWN

Opinion

[*106] By Judge John W. Brown

On January 6, 2010, came the plaintiff by counsel and the Virginia Employment Commission by counsel and presented argument regarding the issue before the Court: does Virginia Code § 8.01-335(B) allow reinstatement of a case dismissed under that code section to be reinstated based solely upon the filing of a motion within the one year limitation period, or does a court order of reinstatement have to be entered within that time frame?

The position of the plaintiff is that, as long as notice is given and the motion for reinstatement is filed within one year of the date the dismissal order was entered, then the aim of the statute has been met.

The defendant, Virginia Employment Commission ("VEC"), urges that the purpose

of the statute is to move cases along on the Court's docket and allowing reinstatement without an order thwarts that objective.

[*107] *Procedural History*

The Court, in this instance, signed an Order discontinuing the case of *Gittens v. V.E.C. et al.,* CH04-0513, on November 5, 2008, pursuant to Virginia Code § 8.01-335(B). The plaintiff filed a Motion for Reinstatement on November 3, 2009, setting forth the reason that the action **[**2]** languished on the court's docket for four years and notifying all parties with a copy of the Motion. The Order for Reinstatement was not received from the plaintiff until November 10, 2009, under separate cover.

The Court entered the Order for Reinstatement on November 19, 2009. The Court received the response of the VEC to the Motion for Reinstatement on November 24, 2009. After a phone conference on December 10, 2009, with counsel, the Court vacated the Reinstatement Order of November 19, 2009, to give the parties time to appear and argue the validity of the motion for reinstatement without having the 21 day period of Rule 1:1 expire before an agreeable date could be set. The plaintiff relies on *Bosserman v. Newlin,* 10 Va. Cir. 477 (1970), and the reasoning therein, while the defendant submits the answer lies in *Wingo v. Goldnetz,* 71 Va. Cir. 11 (2006), and *Siford v. Cooley,* 17 Va. Cir. 73 (1989).

Analysis

The Court begins its review by looking at the code section in question:

> ***HN1*** Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action *shall* **[**3]** *thereby be discontinued.* The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under provisions of this subsection *may be reinstated, on motion,* after notice to the parties in interest, if know, or their counsel of record within one year from the date of such order but not after.

Va. Code § 8.01-335(B) (emphasis added).

[*108] ***HN2*** The meaning of the statute as stated in *Nash v. Jewell,* 227 Va. 230, 315 S.E.2d 825 (1984), is to allow courts to eliminate cases from their dockets for which there is no reasonable prospect of trial.

In reading the cases submitted by the defendant, the Court found the analysis to be brief and succinct. In *Wingo,* the court focused on the permissive wording of the statute, specifically the legislature's use of the word "may" versus "shall," as well as the phrase "but not after." 71 Va. Cir. at 11. In *Siford,* the court focused on the absence of the word "commenced" (within one year) and found that the word "reinstated" was a specific word chosen by the legislature to convey the requirement that the action **[**4]** must be reinstated within the one year period, presumably by order of the court. 17 Va. Cir. at 74.

In *Bosserman,* however, the court dealt with what is now known as subsection A of 8.01-335, rather than Section B. 10 Va. Cir. at 477. It is a distinction without a difference because both sections today state that "[a]ny case discontinued under the provision of this subsection may be *reinstated on motion* after notice to the parties in interest, if known, or their counsel of record, *within one year* from the date of such order, but not after." *See* Va. Code § 8.01-335.

The court, in *Bosserman,* considered the few Virginia Supreme Court cases that have tangentially dealt with the issue at hand, but, in the end, felt that the above quoted language of the statute merely requires the motion to be filed (after notice) within one year of the dismissal (or discontinuance) order. 10 Va. Cir. at 483.

The court in *Bosserman,* like this court, found that ***HN3*** to require entry of an order within the one year time period allowing reinstatement leaves the moving party "subject to the vagaries of court calendars, availability of judges, local and other such matters which may be beyond his [or her] control." *Id.* at 480-81.

Judge **[**5]** Woltz explained that ***HN4*** the statute does not actually dismiss the case but rather puts it in a state of "suspended animation," allowing it to be "stirred perceptibly toward reviewed activity by application within the year." *Id.* at 483.

Likewise, this Court finds that ***HN5*** the language of the statute allows "reinstatement

on motion" and such reinstatement is valid even if the order is entered after the expiration of the one year period.

The language quoted above aside, this Court finds that ***HN6*** the use of the word "discontinued" provides for a case's resumption on the docket upon motion. ***HN7*** The statute does not provide for a hearing or a showing upon "good cause" for reinstatement, but merely "on motion." This absence **[*109]** may be the result of the legislature's decision that it behooves society to have existing and filed claims resolved on the merits at trial or by agreement of the parties themselves, rather than by operation of a statute.

Indeed in *Nash v. Jewell,* the Court restated the following: ***HN8*** "As a general rule, if a plaintiff who is ready and willing to go to trial is brought before the Court under the provisions of § 8.01-335 and demonstrates an intent to proceed with his case, the Court should not **[**6]** discontinue his action." 227 Va. at 235-36, 315 S.E.2d at 828.

In *Cook v. Wayland,* 64 Va. Cir. 386 (2004), the court, in granting reinstatement of the case pursuant to Virginia Code § 8.01-335(A), stated as follows:

> Consequently, ***HN9*** the two year statute affords those parties to dismissed proceedings the opportunity to be heard and have their disputes resolved by the legal system *if requested* within the statutorily mandated period of time in order to promote the principles of justice without clogging the already inundated dockets of Virginia's courts.

Id. at 388 (emphasis added).

While *Nash* involved the two year rule of subsection A, this Court finds in this case that a good faith reason existed for the delay and that the plaintiff now intends to promptly pursue this matter.

In the present case, the Court sees that a precise, typed Petition for Review was timely filed by Ms. Gittens, acting *pro se,* on **[**7]** May 21, 2004. The Answer and Record of the Proceedings were promptly filed by the VEC, but thereafter no actions were taken by either party with regard to the appeal. No separate responses or even acknowledgments were made by Matsushita Corporation or Americaid, Inc., co-defendants in this action.

In the Motion for Reinstatement filed, the plaintiff, through counsel, explained that since

she was previously acting *pro se,* she was unaware of the circuit court procedure requiring her to schedule a date for trial and therefore the case "sat on the docket" without activity. The Court finds it is reasonable for a non-attorney to await notice from the Court as to the next steps in a case when she previously received similar instructions from the VEC in the underlying matter.

In light of the above, the Court grants the Motion for Reinstatement.

Hampton v. Va. Empl. Comm'n

Court of Appeals of Virginia

February 25, 2014, Decided

Record No. 1163-13-4

Reporter

2014 Va. App. LEXIS 59; 2014 WL 720903

KATHLEEN C. HAMPTON v. VIRGINIA EMPLOYMENT COMMISSION AND PUBLIC UTILITIES REPORTS, INC.

Notice: PURSUANT TO THE APPLICABLE VIRGINIA CODE SECTION THIS OPINION IS NOT DESIGNATED FOR PUBLICATION.

Prior History: **[*1]** FROM THE CIRCUIT COURT OF FAIRFAX COUNTY. Randy I. Bellows, Judge.

Hampton v. Va. Empl. Comm'n, 2013 Va. Cir. LEXIS 37, 87 Va. Cir. 7 (Va. Cir. Ct., May 21, 2013)

Disposition: Affirmed.

Case Summary

Overview

ISSUE: Whether a claimant was ineligible to receive unemployment compensation benefits, under Va. Code Ann. § 60.2-618(1), because she left work voluntarily without good cause. HOLDINGS: [1]-The Virginia Employment Commission did not err by finding the claimant ineligible for unemployment compensation benefits because the claimant, of her own accord, acted in a manner inconsistent with maintaining a working relationship with employer. Furthermore, the claimant's dispute with her supervisor over the employer's leave policy did not constitute good cause for leaving work under Va. Code Ann. § 60.2-618(1), and the claimant's failure to elevate her dispute with her supervisor to the company president was not reasonable; [2]-The Commission did not err under 16 Va. Admin. Code § 5-80-10(B) by considering the employer's unsworn statements to the deputy examiner.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Review of Benefit Determinations

HN1 A reviewing court will consider the evidence in the light most favorable to the finding by the Virginia Employment Commission.

Labor & Employment Law > ... > Unemployment Compensation > Eligibility > Good Cause Terminations

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Review of Benefit Determinations

HN2 The determination of whether an employee voluntarily quit work without good cause is a mixed question of law and fact. The Virginia Employment Commission legal determinations are reviewed de novo by a court. However, the Commission's findings of fact, if supported by the evidence and in the absence of fraud, are conclusive. Accordingly, the Commission's findings may be rejected only if, in considering the record as a whole, a reasonable mind would necessarily come to a different conclusion.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Benefit Entitlements

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Burdens of Proof

Business & Corporate Compliance > ... > Disability & Unemployment Insurance > Unemployment Compensation > Scope & Definitions

Labor & Employment Law > ... > Unemployment Compensation > Eligibility > Good Cause Terminations

HN3 Va. Code Ann. § 60.2-618(1) provides that an employee is ineligible to receive unemployment compensation benefits when the Virginia Employment Commission finds that the employee voluntarily quit work without good cause. The employer bears the burden of proving that the claimant left work voluntarily. If the employer satisfies its burden of proof that the claimant left work voluntarily, the burden of proof shifts to the claimant to demonstrate good cause for leaving work. The term "voluntary" connotes unconstrained by

interference; not impelled by another's influence; spontaneous; acting of oneself resulting from free choice. An employee's intention to quit may be discerned from words or conduct inconsistent with the maintenance of an employer/employee relationship.

Labor & Employment Law > ... > Unemployment Compensation > Eligibility > Good Cause Terminations

HN4 To determine whether good cause existed for a claimant to voluntarily leave work, the Virginia Employment Commission and the reviewing courts must first apply an objective standard to the reasonableness of a dispute and then to the reasonableness of the employee's efforts to resolve that dispute before leaving the employment. In making this two-part analysis, the claimant's claim must be viewed from the standpoint of a reasonable employee.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Burdens of Proof

Labor & Employment Law > ... > Unemployment Compensation > Eligibility > Good Cause Terminations

HN5 To constitute "good cause" for quitting work, a claimant must prove that her employer created workplace conditions so intolerable that she had no reasonable alternative except to quit her job.

Labor & Employment Law > ... > Unemployment Compensation > Eligibility > Good Cause Terminations

HN6 "Good cause" under Va. Code Ann. § 60.2-618(1) cannot be established by an employee who quits her job merely because she believes she will eventually be fired.

Labor & Employment Law > ... > Unemployment Compensation > Eligibility > Good Cause Terminations

HN7 To constitute "good cause" for a claimant to voluntarily leave employment, the consistent position of the Virginia Employment Commission, acquiesced in by the Virginia General Assembly, has required an employee to take those steps that could be reasonably expected of a person desirous of retaining his employment before hazarding the risks of unemployment.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Claim Procedures

HN8 See 16 Va. Admin. Code § 5-80-10(B).

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Claim Procedures

HN9 See 16 Va. Admin. Code § 5-80-20(F)(4).

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Claim Procedures

HN10 Where a claimant seeks an initial award of unemployment compensation benefits, she possesses no absolute constitutional right of cross-examination. Moreover, the Virginia Employment Commission does not err by considering an employer's unsworn statement to a deputy examiner where the claimant did not object to entering the employer's statement into the record, and where she did not seek to cross-examine the employer at her hearing with the appeals examiner.

Counsel: Jonathan A. Nelson (Day & Johns, PLLC, on briefs), for appellant.

Joshua E. Laws, Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General, on brief), for appellee Virginia Employment Commission.

No brief or argument for appellee Public Utilities Reports, Inc.

Judges: Present: Chief Judge Felton, Judges Petty and McCullough. MEMORANDUM OPINION BY CHIEF JUDGE WALTER S. FELTON, JR.

Opinion by: WALTER S. FELTON, JR.

Opinion

MEMORANDUM OPINION* BY CHIEF JUDGE WALTER S. FELTON, JR.

Kathleen C. Hampton ("claimant") appeals the judgment of the Fairfax County Circuit Court ("circuit court"), affirming the decision of the Virginia Employment Commission ("the Commission") that claimant was ineligible to receive unemployment compensation benefits because she left work voluntarily without good cause. Claimant asserts that the circuit court erred by affirming the Commission's decision because her employer did not meet its burden

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

to prove that claimant left work voluntarily and that the ruling was unsupported by the evidence in the record. Claimant also contends the **[*2]** circuit court erred by affirming the Commission's decision because the Commission improperly relied on unsworn statements by claimant's former employer in determining that she was ineligible for benefits.

I. BACKGROUND

HN1 We "consider the evidence in the light most favorable to the finding by the Commission." Va. Emp't Comm'n v. Trent, 55 Va. App. 560, 565, 687 S.E.2d 99, 101 (2010) (citation omitted). The evidence showed that, from February 11, 2008 to April 18, 2012, claimant worked as a full-time technical legal editor for Public Utilities Reports, Inc. ("employer"). Phillip Cross ("Cross") was claimant's direct supervisor. Cross worked for employer in his capacity as vice president and human resources officer. Claimant often disagreed with her supervisor regarding employer's overtime and paid leave policies.

On Monday, April 16, 2012, claimant called employer to report that she was sick and that she would be unable to work. She returned to work the following day. On Wednesday, April 18, 2012, her supervisor told claimant that she needed to complete a paid time off ("PTO") form for the day that she had been out of the office. Claimant told her supervisor that she should not have to fill **[*3]** out a PTO form because she planned to work at least forty hours during the remainder of the week. Her supervisor explained to claimant that her position was contrary to employer's policies, and repeated his direction that she complete a PTO form for the day she was out of the office.[1] He told claimant that she was not required to work more than forty hours per week, that he did not want her to work more than forty hours per week, and that she would not be compensated for hours worked above forty hours. He reiterated to claimant that she needed to account for the day she was out of the office by filling out a PTO form.

When claimant continued to argue with her supervisor, he told her that she "[had] other options" if she did not want to complete the PTO form. Claimant asked, "[O]h, like the option to quit[?]" He did not respond to

[1] Because claimant had already allocated her PTO days for the calendar year, her absence on Monday, April 16, would ultimately be deemed unpaid leave.

claimant's inquiry. Claimant then asked her supervisor, "You just don't want me here anymore, do you?" He replied, "No." Claimant then told him that "[she] [would not] stay where [she] [was] not wanted," and began **[*4]** to pack her belongings. When a coworker "begged" her to stay, claimant repeated that she would not stay where she was not wanted and that she would not "put up with [such] bullying." Claimant left the office and did not return.

The Commission found

> that the proximate cause of the claimant's separation from employment flowed from her action in challenging the supervisor's instructions over putting in a leave form for her April 16th unscheduled absence from work or his refusal to permit her to make up her time for that week. This was followed by the claimant's raising the subject of her quitting her job, followed by her initiating questioning of the supervisor as to whether he still wanted her there or not.
>
> * * * *
>
> In the Commission's opinion, while the employer does assume the burden of non-persuasion as to a voluntary leaving, the claimant's own evidence clearly demonstrates that she voluntarily walked off the job that day, rather than being discharged from employment. . . . The Commission flatly rejects the contention that the claimant's supervisor "provoked" her **[*5]** into quitting that day, or her arguments to the effect that the record fails to evidence a voluntary separation from employment.

The circuit court affirmed the Commission's decision denying unemployment compensation benefits to claimant. It found that claimant's dispute with her supervisor over employer's leave policy "was not an objectively reasonable employment dispute." The circuit court

> agree[d] with the Commission that "while the supervisor may have acted unprofessionally in acknowledging that he did not want her there," he did not fire her that day, and the dispute centered on a common employment policy: "most employers require employees to obtain approval or authorization for overtime before it is worked."

II. ANALYSIS

A.

HN2 The determination of whether an employee voluntarily quit work without good cause is a mixed question of law and fact. Snyder v. Va. Empl. Comm'n, 23 Va. App. 484, 491, 477 S.E.2d 785, 788 (1996). The Commission's legal determinations are reviewed *de novo* by this Court. Smith v. Va. Emp't Comm'n & Swift Transp. Co., 59 Va. App. 516, 519, 721 S.E.2d 18, 20 (2012). However, "the Commission's findings of fact, if supported by the evidence and in the absence of fraud, **[*6]** are conclusive." Lee v. Va. Emp't Comm'n, 1 Va. App. 82, 85, 335 S.E.2d 104, 106 (1985). Accordingly, "the [Commission's] findings may be rejected only if, in considering the record as a whole, a reasonable mind would *necessarily* come to a different conclusion." Craft v. Va. Emp't Comm'n, 8 Va. App. 607, 609, 383 S.E.2d 271, 273, 6 Va. Law Rep. 177 (1989).

HN3 Code § 60.2-618(1) provides, in pertinent part, that an employee is ineligible to receive unemployment compensation benefits when the Commission finds that the employee voluntarily quit work without good cause. The employer bears the burden of proving that the claimant left work voluntarily. Shuler v. Va. Emp't Comm'n, 9 Va. App. 147, 150, 384 S.E.2d 122, 124, 6 Va. Law Rep. 656 (1989). If the employer satisfies its burden of proof that the claimant left work voluntarily, the burden of proof shifts to the claimant to demonstrate good cause for leaving work. Actuarial Benefits & Design Corp. v. Va. Emp't Comm'n, 23 Va. App. 640, 645, 478 S.E.2d 735, 738 (1996).

> The term "voluntary" connotes "'[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself . . . [r]esulting from free choice.'" Barnes v. Singer Co., 324 N.C. 213, 376 S.E.2d 756, 758 (N.C. 1989) **[*7]** (quoting Black's Law Dictionary 1413 (5th ed. 1979)). An employee's intention to quit may be discerned from words or conduct inconsistent with the maintenance of an employer/employee relationship. See Tate v. Briggs & Stratton Corp., 23 Wis. 2d 1, 126 N.W.2d 513, 515 (Wis. 1964).

Shuler, 9 Va. App. at 150-51, 384 S.E.2d at 124.

(i)

Here, the record on appeal amply supports the Commission's finding that claimant voluntarily left work. On April 18, 2012, claimant argued with her supervisor over employer's leave policy, notwithstanding that her supervisor had previously explained the policy to her. Rather than adhere to employer's policy that she complete a "paid time off" form to account for the day she had been absent from the office, claimant suggested that she had the option to quit work. Spurned by what she perceived as a negative comment from her supervisor, claimant stated she would not work where she was not wanted, collected her personal belongings from her cubicle, and left the office. She did not contact employer again until May 7, 2012, to inquire about unemployment and other benefits. Employer testified that continuing work remained available for claimant after she left the workplace, and **[*8]** the Commission explicitly rejected claimant's contention that employer "provoked" her to quit. The evidence in the record established that claimant, of her own accord, acted in a manner inconsistent with maintaining a working relationship with employer. Accordingly, the circuit court did not err by affirming the Commission's finding that employer met its burden to prove that claimant left work voluntarily.

(ii)

HN4 To determine whether good cause existed for claimant to voluntarily leave work,

> the commission and the reviewing courts must first apply an objective standard to the reasonableness of the dispute and then to the reasonableness of the employee's efforts to resolve that dispute before leaving the employment. In making this two-part analysis, the claimant's claim must be viewed from the standpoint of a reasonable employee.

Umbarger v. Va. Emp't Comm'n, 12 Va. App. 431, 435-36, 404 S.E.2d 380, 383, 7 Va. Law Rep. 2481 (1991).

HN5 To constitute "good cause" for quitting work, a claimant must prove that her employer created workplace conditions so intolerable that she "had no reasonable alternative except to quit her job." Id. at 436, 404 S.E.2d at 383. Here, the Commission found that claimant's dispute with her **[*9]** supervisor over employer's leave policy did not constitute "good cause" for leaving work under Code §

60.2-618(1). The Commission found that employer reasonably required its employees to obtain preauthorization for overtime work or for taking time off. In addition, applying its longstanding precedent, the Commission determined that ***HN6*** "good cause" under Code § 60.2-618(1) cannot be established by an employee who quits her job merely because she believes she will eventually be fired. We agree. Claimant's dispute with employer arose solely out of her refusal to comply with employer's uniformly enforced absence policy. Claimant possessed numerous alternatives to quitting, including that she complete the PTO form as required by her employer. The Commission correctly concluded that claimant's dispute with employer was not so compelling, necessitous, or substantial that it left her with no reasonable alternative other than to quit work. Phillips v. Dan River Mills, Inc., Commission Decision 2002-C (June 15, 1955).

In addition, the Commission correctly concluded that claimant's failure to elevate her dispute with her supervisor to the company president was not reasonable. ***HN7*** To constitute "good **[*10]** cause" for a claimant to voluntarily leave employment, the consistent position of the Commission, "acquiesced in by the General Assembly," has required an employee to "take those steps that could be reasonably expected of a person desirous of retaining his employment before hazarding the risks of unemployment." Lee, 1 Va. App. at 85, 335 S.E.2d at 106. Here, claimant failed to notify the company president of her dispute with her supervisor. The Commission found incredible claimant's assertion that she believed the president of the company had no authority over her supervisor, the vice president. Because claimant did not elevate her complaint to the company president, she failed to take all reasonably expected steps to resolve her dispute with her supervisor.

Accordingly, we affirm the decision of the circuit court upholding the Commission's decision that claimant left work voluntarily and without good cause, and was therefore ineligible for unemployment compensation benefits.

B.

Claimant also asserts that the circuit court erred by finding that the Commission properly considered, as part of the record of the case, employer's unsworn statements to the deputy examiner.

16 Va. Admin. Code § 5-80-10(B) **[*11]** provides that:

> ***HN8*** This informal interview [with the deputy examiner] shall not be recorded in any way, although notes can be taken by the deputy. *Statements made by parties or witnesses shall not be taken under oath* and formal examination or cross-examination shall not be permitted. The deputy shall direct questions to the parties and witnesses. The parties may also ask questions of each other and the witnesses. Rebuttal to statements made by opposing parties or witnesses shall be permitted. . . . *The record of facts of the proceeding shall become a part of the commission's records*.

(Emphasis added.) See also 16 Va. Admin. Code § 5-80-20(F)(4) (***HN9*** "On motion of the appeals examiner, or any party, documents already in a claimant's file or obtained during the course of a hearing may be admitted into the record as exhibits provided they are relevant to the issues in dispute.").

During claimant's telephonic hearing with the appeals examiner, the appeals examiner explained to claimant that his proposed Exhibit 6 contained the record of facts obtained by the deputy examiner, including employer's statement regarding claimant's departure from the office. The appeals examiner explicitly stated that **[*12]** Exhibit 6 contained "the notes that the deputy [examiner] took when he had the fact finding interview with both you and the employer." When the appeals examiner asked claimant if she had any objection to the exhibits being entered into the record, claimant replied, "[n]o, none at all."

In Baker v. Babcock & Wilcox Co., 11 Va. App. 419, 399 S.E.2d 630, 7 Va. Law Rep. 1159 (1990), this Court held that, ***HN10*** where a claimant seeks an initial award of unemployment compensation benefits, she "possesse[s] no absolute constitutional right of cross-examination." Id. at 427, 399 S.E.2d at 635 (footnote omitted). Moreover, the Commission does not err by considering employer's unsworn statement to the deputy examiner where, as here, claimant did not object to entering employer's statement into the record, and where she did not seek to cross-examine employer at her hearing with the appeals examiner. "If claimant did not enjoy the right of confrontation and cross-examination or any of the other rights

available to [her] under the laws and regulations, it was not because they were denied [her]; it was, insofar as the record discloses, only because [s]he did not pursue them." Klimko v. Va. Emp't Comm'n, 216 Va. 750, 762-63, 222 S.E.2d 559, 569-70 (1976). **[*13]** Accordingly, the circuit court did not err by finding that the Commission properly considered, as part of the agency record, employer's unsworn statements to the deputy examiner.

III. CONCLUSION

For the foregoing reasons, and for the reasons articulated by the circuit court in its letter opinion, we hold: (i) that the Commission did not err by considering employer's unsworn statements to the deputy examiner as part of the agency record, and (ii) that the Commission did not err by finding claimant ineligible for unemployment compensation benefits.

Affirmed.

Hicks v. Mellis

Supreme Court of Virginia

February 29, 2008, Decided

Record No. 070344

Reporter

275 Va. 213; 657 S.E.2d 142; 2008 Va. LEXIS 36

MICHAEL HICKS, A MINOR, WHO SUES BY HIS MOTHER AND NEXT FRIEND, DARLENE A. HICKS v. PETER MELLIS, M.D.

Prior History: **[***1]** FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND. Melvin R. Hughes, Jr., Judge.

Disposition: Reversed and remanded.

Case Summary

Procedural Posture

The City of Richmond Circuit Court (Virginia) entered a judgment that dismissed plaintiff mother's third motion for judgment in a medical malpractice case that the mother brought on behalf of her three-year-old son against defendant doctor. The mother appealed.

Overview

The mother filed a medical malpractice lawsuit against the health care providers regarding treatment her three-year-old son received. She later filed in the trial court a second motion for judgment alleging the same claims and including the doctor as a defendant. The doctor was not served with the second motion for judgment or other process. After more than three years with no further activity in the case, the trial court entered an order under Va. Code Ann. § 8.01-335(B) striking the case from the docket. The trial court then allowed the mother's timely motion to reinstate pursuant to Va. Code Ann. § 8.01-335(B) and her motion for nonsuit. The mother then filed a third motion for judgment and for the first time notified the doctor of the claim against him. The trial court dismissed the action on the doctor's special plea of the statute of limitations. The state supreme court found that since the trial court had jurisdiction over the action because it was properly reinstated, but misapplied the notice provision of Va. Code Ann. § 8.01-335(B) by not notifying the doctor of the reinstatement,

the reinstatement order was voidable, not void, and could not be collaterally attacked.

Outcome

The state supreme court reversed the trial court's judgment and remanded the case to the trial court for further proceedings.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1 Courts are bound by the plain meaning of statutory language. Therefore, if the language of a statute is unambiguous, courts may not interpret the language in a way that effectively holds that the General Assembly did not mean what it actually expressed.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN2 See Va. Code Ann. § 8.01-335(B).

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN3 An order is void ab initio if the court did not have the jurisdiction to render the order, or if the court employed an unlawful mode of procedure in entering the order. Because an order that is void ab initio is a complete nullity, the order may be challenged directly or collaterally by all persons, anywhere, at any time, or in any manner.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

Civil Procedure > Appeals > General Overview

HN4 An order is voidable if its issuance was reversible error but was within the court's jurisdiction to enter. A court has jurisdiction to err, as well as to correctly decide the issues presented in a case, and the remedy to correct an error by a trial court is to appeal the court's decision upon entry of a final order, not to collaterally attack the erroneous decision in a separate action.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN5 A challenge to an order based on a trial court's misapplication of a statute generally raises a question of court error, not a question of the court's jurisdiction.

Civil Procedure > Parties > Real Party in Interest > General Overview

Civil Procedure > Attorneys > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN6 Va. Code Ann. § 8.01-335(B) provides that a trial court may reinstate a discontinued action after notice to the parties in interest, if known, or their counsel of record.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Governments > Courts > Authority to Adjudicate

HN7 A collateral challenge to an order must be resolved based on a determination whether an issuing court had jurisdiction to enter the order in question, not whether the court erred or abused its discretion in entering the order.

Counsel: Gerald R. Walsh for appellant.

Elizabeth Griffin Robertson (Katheleen M. McCauley: Goodman, Allen & Filetti, on brief), for appellee.

Judges: OPINION BY JUSTICE BARBARA MILANO KEENAN.

Opinion by: BARBARA MILANO KEENAN

Opinion

[143] [*216]** PRESENT: All the Justices

OPINION BY JUSTICE BARBARA MILANO KEENAN.

In this appeal, we consider the effect of an order reinstating a medical malpractice action under Code § 8.01- 335(B) that was entered without notice to the defendant. The issue arose when the plaintiff obtained a nonsuit of the reinstated action and filed a new motion for judgment, which was the first pleading in either of these actions that was served on the defendant. The judgment order on appeal before us is the circuit court's final order dismissing the new motion for judgment on the ground that the action was barred by the statute of limitations because the reinstatement order in the prior action "was improvidently allowed."

The nature of this case requires a description of the dates of the parties' relevant filings. In April 1993, Darlene A. Hicks (Hicks) filed a motion for judgment in the Circuit Court of the City of Richmond on behalf of her three year-old son Michael D. Hicks (Michael), who was born on October 21, 1989. In her motion, Hicks asserted claims **[***2]** of medical malpractice against the Medical College of Virginia Hospitals, the Commonwealth of Virginia, and "unnamed health care providers" for treatment her son had received on December 11, 1990. In July 1995, Hicks sought a nonsuit of the case, which the circuit court granted.

In October 1999, Hicks filed in the circuit court a second motion for judgment, alleging the same claims of medical malpractice and naming as defendants the Medical College of Virginia Hospitals, the Commonwealth of Virginia, Peter Mellis, M.D. (Dr. Mellis), Gayle S. Smith, M.D., and other hospital employees. None of these defendants was served with the second motion for judgment or other process in the case. After more than three years with no further filings or proceedings in the case, in January 2003, the circuit court entered an order under Code § 8.01-335(B) **[**144]** discontinuing and striking the case from the docket.

In November 2003, Hicks filed a timely motion to reinstate the case pursuant to Code § 8.01-335(B). The circuit court, after observing that none of the defendants had been served with process, entered an order of reinstatement returning the case to the court's docket. In January 2004, Hicks filed a **[***3]** motion for nonsuit, which the circuit court granted by order dated May 25, 2004.

On the same day, Hicks filed a third motion for judgment naming Dr. Mellis as the sole defendant. In this pleading, Hicks alleged that Dr. Mellis had provided Michael with negligent medical treatment in **[*217]** December 1990, and had caused Michael to suffer severe injuries. Hicks served Dr. Mellis with a copy of this third motion for judgment on May 23, 2005, which was the first notice Dr. Mellis had received regarding Hicks' claim.

Dr. Mellis filed grounds of defense and a special plea of the statute of limitations. On November 21, 2006, the circuit court sustained Dr. Mellis' special plea of the statute of limitations and dismissed the case with prejudice.

In its letter opinion, the circuit court concluded that "reinstatement [of the case] was improvidently allowed" because Code § 8.01-335(B) required that the parties in interest be notified prior to reinstating a case that had been stricken from the docket, and Dr. Mellis had not received such notice. Thus, the circuit court concluded that the case remained stricken from the docket, that the second nonsuit was of "no effect," and that the third motion for judgment **[***4]** was barred by the statute of limitations under Code § 8.01-243.1. Hicks appeals.

Hicks argues that the circuit court erred in sustaining Dr. Mellis' plea of the statute of limitations, because the notice provision of Code § 8.01-335(B) is not a mandatory requirement for entry of a reinstatement order. Hicks asserts that although the circuit court may have erred in its application of the statute by entering the order in the absence of notice to Dr. Mellis, the order was merely voidable, rather than void ab initio, and could not be challenged more than 21 days after the nonsuit was granted in the reinstated case. Thus, Hicks contends that because the final order of nonsuit entered on May 25, 2004 was not appealed or timely challenged within 21 days of its entry, as required by Rule 1:1, the reinstatement order remained in effect and the present motion for judgment was timely filed.

In response, Dr. Mellis observes that the order discontinuing the malpractice action was a final order striking the case from the court's docket and that, in the absence of a valid reinstatement order, the case remained stricken. Dr. Mellis cites our decision in *Janvier v. Arminio,* 272 Va. 353, 634 S.E.2d 754 (2006), **[***5]** and argues that the circuit court lacked jurisdiction to enter the nonsuit order "by virtue of a procedurally defective reinstatement." As a consequence, Dr. Mellis maintains, the circuit court correctly held that the statute of limitations applicable to Hicks' injuries had expired, barring the present malpractice action. We disagree with the conclusion advanced by Dr. Mellis.

[*218] Although the procedural history of this case is somewhat complex, the appeal involves a pure question of law, which requires us to employ an analysis involving both statutory interpretation and our prior decisions. We begin by considering the language of Code § 8.01-335(B) under an established principle of statutory construction.

HN1 Courts are bound by the plain meaning of statutory language. *Young v. Commonwealth,* 273 Va. 528, 533, 643 S.E.2d 491, 493 (2007); *Alliance to Save the Mattaponi v. Commonwealth,* 270 Va. 423, 439, 621 S.E.2d 78, 86-87 (2005); *Horner v. Department of Mental Health,* 268 Va. 187, 192, 597 S.E.2d 202, 204 (2004). Therefore, if the language of a statute is unambiguous, courts may not interpret the language in a way that effectively holds that the General Assembly did not mean what it actually **[***6]** expressed. *Young,* 273 Va. at 533, 643 S.E.2d at 493; *Alcoy v. Valley Nursing Homes, Inc.,* 272 Va. 37, 41, 630 S.E.2d 301, 303 (2006); *Alliance to Save the Mattaponi,* 270 Va. at 439, 621 S.E.2d at 87.

[145]** The language of Code § 8.01-335(B) is plain. This provision states that:

> ***HN2*** Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall be thereby discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

Code § 8.01-335(B).

Under this statutory language, a circuit court may enter an order reinstating a discontinued case only after notice is given to known parties in interest. The parties do not dispute that Dr. Mellis was a known party in interest to the discontinued **[***7]** action. Therefore, the circuit court entered the reinstatement order contrary to the notice provision set forth in Code § 8.01-335(B).

[*219] Because the reinstatement order was entered improperly, we now must consider the effect of that order on the present litigation. We focus on the question whether the absence of notice to Dr. Mellis rendered the court's reinstatement order void ab initio and subject to collateral attack in the present malpractice action.

We begin by reviewing the familiar distinction between orders that are void ab initio and

those that are merely voidable. ***HN3*** An order is void ab initio if the court did not have the jurisdiction to render the order, or if the court employed an unlawful mode of procedure in entering the order. *Collins v. Shepherd,* 274 Va. 390, 402, 649 S.E.2d 672, 678 (2007); *Singh v. Mooney,* 261 Va. 48, 51-52, 541 S.E.2d 549, 551 (2001); *Evans v. Smyth-Wythe Airport Comm'n,* 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998); *Lapidus v. Lapidus,* 226 Va. 575, 579, 311 S.E.2d 786, 788 (1984). Because an order that is void ab initio is a complete nullity, the order may be challenged directly or collaterally "by all persons, anywhere, at any time, or in any manner." *Collins,* 274 Va. at 402, 649 S.E.2d at 678 **[***8]** (quoting *Singh,* 261 Va. at 52, 541 S.E.2d at 551); *accord Nelson v. Warden,* 262 Va. 276, 281, 552 S.E.2d 73, 75 (2001); *Parrish v. Jessee,* 250 Va. 514, 521, 464 S.E.2d 141, 145 (1995).

In contrast, ***HN4*** an order is voidable if its issuance was reversible error but was within the court's jurisdiction to enter. *Singh,* 261 Va. at 51-52, 541 S.E.2d at 551; *see Parrish,* 250 Va. at 521, 464 S.E.2d at 145. A court has jurisdiction to err, as well as to correctly decide the issues presented in a case, and the remedy to correct an error by a trial court is to appeal the court's decision upon entry of a final order, not to collaterally attack the erroneous decision in a separate action. *See Singh,* 261 Va. at 52-53, 541 S.E.2d at 551-52; *Parrish,* 250 Va. at 521-22, 464 S.E.2d at 145-46; *Farant Inv. Corp. v. Francis,* 138 Va. 417, 436, 122 S.E. 141, 147 (1924).

HN5 A challenge to an order based on a trial court's misapplication of a statute generally raises a question of court error, not a question of the court's jurisdiction. *Parrish,* 250 Va. at 521, 464 S.E.2d at 145. Our review of Code § 8.01-335(B) in the present case demonstrates that the circuit court had jurisdiction to enter the reinstatement order **[***9]** but misapplied the statute.

We first observe that the statute permits a circuit court to enter a reinstatement order without prior notice to anyone when the circuit court has determined that there are no known interested parties or counsel of record. *See* Code § 8.01-335(B). Thus, prior notice **[*220]** is not a jurisdictional requirement for entry of a reinstatement order under the statute.

Instead, ***HN6*** Code § 8.01-335(B) provides that a circuit court may reinstate a discontinued

action after notice to "the parties in interest, if known, or their counsel of record." *Id.* Significantly, the statute does not direct that notice be given only to named defendants or their counsel of record, but leaves for the circuit court's determination the issue whether **[**146]** there are known parties who have an interest in the litigation.

This determination required by the statute will rest on the facts and circumstances of a particular case. The potentially broad scope of the inquiry may require that the circuit court decide both issues of fact and of law in reaching a conclusion. Such determinations are core functions of our courts in the exercise of their jurisdiction.

The fact that Dr. Mellis easily could be identified as **[***10]** a person of interest in this case did not change the nature of the legal determination that the circuit court was required to make under the statute. Thus, the circuit court's failure to apply the statute properly did not affect the court's jurisdiction to enter the reinstatement order.

Likewise, the circuit court's reinstatement order was not void ab initio on the ground that the court employed an unlawful mode of procedure. *See Collins,* 274 Va. at 402-03, 649 S.E.2d at 678; *Evans,* 255 Va. at 73, 495 S.E.2d at 828. Code § 8.01-335(B) required that the circuit court decide whether there were known interested parties entitled to notice before reinstating the case and, thus, the circuit court lawfully could have made this determination and still have reached the wrong result. Because the misapplication of the statute in the present case occurred in the circuit court's lawful exercise of its jurisdiction, the reinstatement order was merely voidable, rather than void ab initio and, thus, was not subject to collateral attack in the present action. *See Singh,* 261 Va. at 51-52, 541 S.E.2d at 551; *Parrish,* 250 Va. at 521, 464 S.E.2d at 145.

Our conclusion is not affected by our holding in *Janvier v. Arminio,* 272 Va. 353, 634 S.E.2d 754. **[***11]** There, we held that an order granting a second nonsuit, in the absence of notice to the defendant, was not void ab initio because entry of the order was within the court's discretion under former Code §

8.01-380(B). [1] 272 Va. at 367, **[*221]** 634 S.E.2d at 761-62. Unlike the proceedings in *Janvier,* the present case involves a legal determination that the circuit court was required to make in deciding what parties were entitled to notice before entry of an order of reinstatement. Thus, the holding in *Janvier* is inapposite, because that holding was based on a circuit court's lawful exercise of its discretion in the absence of a statutory notice requirement. Nevertheless, as our holding in *Janvier* illustrates, ***HN7*** a collateral challenge to an order must be resolved based on a determination whether the issuing court had jurisdiction to enter the order in question, not whether the court erred or abused its discretion in entering the order. *See id.* at 367, 634 S.E.2d at 761; *see also Parrish,* 250 Va. at 521, 464 S.E.2d at 146.

Finally, we are aware that because Dr. Mellis was not served in the nonsuited action, and had no other notice of those proceedings, he did not know that the May 25, 2004 order of nonsuit had been entered and could have been appealed. This problem, however, cannot be considered in this collateral action but may raise a question for the General Assembly's consideration in future revisions to Code § 8.01-335(B). Accordingly, we hold that the circuit court erred in sustaining Dr. Mellis' plea of the statute of limitations and in dismissing Hicks' motion for judgment on that basis. [2]

For these reasons, we will reverse the circuit court's judgment and **[***13]** remand the case for further proceedings consistent with the principles expressed in this opinion.

Reversed and remanded.

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[1] Code § 8.01-380(B) was amended in 2007 to require that a defendant be given notice of a plaintiff's request for a second or subsequent nonsuit. That subsection presently provides **[***12]** in relevant part: "Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits upon reasonable notice to counsel of record for all defendants and upon a reasonable attempt to notify any party not represented by counsel, or counsel may stipulate to additional nonsuits." Code § 8.01-380(B).

[2] We do not consider Dr. Mellis' procedural due process argument because he has not raised this issue on cross-error before this Court. *See* Rule 5:18(b).

Louis Latour, Inc. v. Va. Alcoholic Bev. Control Bd.

Court of Appeals of Virginia

May 29, 2007, Decided

Record No. 1836-06-2

Reporter

49 Va. App. 758; 645 S.E.2d 318; 2007 Va. App. LEXIS 218

LOUIS LATOUR, INC. v. VIRGINIA ALCOHOLIC BEVERAGE CONTROL BOARD AND THE COUNTRY VINTNER, INC.

Prior History: **[***1]** FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND. Theodore J. Markow, Judge.

Disposition: Affirmed.

Case Summary

Procedural Posture

Appellant winery appealed a decision of the Circuit Court of the City of Richmond (Virginia) affirming a decision of the Virginia Alcoholic Beverage Control Board which found that the winery violated the Virginia Wine Franchise Act's dual distributorship provisions, unilaterally amended appellee distributor's agreement without good cause, discrimination among wholesalers, and acted in bad faith in dealing with the distributor.

Overview

The winery contended, inter alia, that the trial court erred in finding that the winery unilaterally amended its agreement with the distributor without good cause, discriminated among its wholesalers in violation of the Act, and acted in bad faith in its dealing with the distributor. The appellate court disagreed, finding, among other things, that the text of the winery's requirements announcement stated that it was a unilateral amendment to the commercial relationship between the parties. In addition, "good cause" was not shown, as there was no evidence of any material deficiency for which the distributor was responsible or any other example of "good cause" as enumerated in Va. Code Ann. § 4.1-406. The appellate court also found that the winery discriminated against the distributor by offering new distributors incentives that were not available to the distributor and by delaying or not filling purchase orders from the distributor. The

winery further acted in bad faith by frustrating the distributor's ability to sell wine to anywhere to anyone. As the winery failed to show good cause to amend the parties' agreement, the remedy awarded under Va. Code Ann. § 4.1-409, was appropriate.

Outcome

The judgment of the trial court was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

HN1 An appellate court will review the evidence, and all reasonable inferences deducible therefrom, in the light most favorable to the party prevailing below.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN2 In reviewing the decisions of a regulatory agency, the agency's findings of fact are conclusive if supported by the evidence. Accordingly, a reviewing court may reject the agency's findings of fact only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN3 Although decisions by administrative agencies regarding matters within their specialized competence are entitled to special weight in the courts, decisions which involve issues of statutory interpretation require little deference because the issue falls outside the agency's specialized competence. Said differently, pure statutory interpretation is the prerogative of the judiciary. Thus, an appellate court reviews an issue of statutory construction de novo.

Administrative Law > Judicial Review > Standards of Review > General Overview

Evidence > Inferences & Presumptions > Presumptions

HN4 Absent clear evidence to the contrary in the record, the judgment of a trial court comes to a reviewing court on appeal with a presumption that the law was correctly applied to the facts.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

HN5 In the absence of an agreed upon change (i.e., a bilateral amendment), the Virginia Wine Franchise Act provides a framework for unilaterally amending an existing agreement. Va. Code Ann. §§ 4.1-406 and 4.1-407. According to that framework, a winery may not unilaterally amend a contract without good cause.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Business & Corporate Law > Distributorships & Franchises > Termination > Notice Requirements

HN6 See Va. Code Ann. § 4.1-407(A).

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

HN7 Under the Virginia Wine Franchise Act, a winery is permitted to impose requirements on a wholesaler by unilateral amendment, so long as the winery complies with the requirements set forth in the Act. Va. Code Ann. §§ 4.1-406, 4.1-407. Specifically, Va. Code Ann. § 4.1-406, requires that the winery first comply with Va. Code Ann. § 4.1-407, and good cause must exist for amendment, termination, cancellation, nonrenewal, noncontinuance or causing a resignation.

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

HN8 See Va. Code Ann. § 4.1-406.

Administrative Law > Judicial Review > Standards of Review > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

HN9 Upon review, the issue of whether a winery had "good cause" to unilaterally amend a franchise agreement with a wholesaler is a mixed question of fact and law.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

HN10 Va. Code Ann. § 4.1-404 states that each winery which enters into an agreement

with a wine wholesaler shall designate a sales territory as the primary area of responsibility of that wholesaler which is applicable to the agreement. However, § 4.1-404 also states that the term "primary area of responsibility" shall not be construed as restricting sales or sales efforts by a wine wholesaler exclusively to retailers located within the designated sales territory, and any agreement to the contrary shall be void.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

HN11 Va. Code Ann. § 4.1-415 provides that no winery shall discriminate among its wholesalers in any business dealings including, but not limited to, the price of wine sold to the wholesaler, unless the classification among its wholesalers is based upon reasonable grounds. In general, discrimination is defined as differential treatment; especially a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored. Thus, according to § 4.1-415, no winery may treat its wholesalers differently unless the winery has reasonable grounds to do so.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Business & Corporate Law > ... > Causes of Action > Fiduciary Duties > Good Faith & Fair Dealing

HN12 "Good faith" is a legal term of art, and thus on appeal whether a party acted in good faith is a mixed question of law and fact. An appellate court gives deference to the factual findings of an agency, but reviews the application of those facts to the law de novo.

Business & Corporate Law > ... > Causes of Action > Fiduciary Duties > Good Faith & Fair Dealing

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

HN13 The Virginia Wine Franchise Act requires that every agreement entered into under this chapter shall impose on the parties the obligation to act in good faith. Va. Code Ann. § 4.1-418. Although good faith is not defined under the Act, it is generally defined as a state of mind consisting in (1) honesty and

belief in purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

Business & Corporate Law > ... > Remedies > Damages > Compensatory Damages

HN14 See Va. Code Ann. § 4.1-409.

Business & Corporate Law > ... > Remedies > Damages > Costs & Attorney Fees

HN15 See Va. Code Ann. § 4.1-410.

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Amicus Curiae: Virginia Wine Wholesalers Association, Inc. (Thomas A. Lisk; Jacqueline S. McClenney; LeClair Ryan, on brief), for appellant.

Judges: Present: Judges Humphreys, Beales and Senior Judge Coleman. OPINION BY JUDGE RANDOLPH A. BEALES. Humphreys, J., concurring, in part, and dissenting, in part.

Opinion by: RANDOLPH A. BEALES

Opinion

[*761] **[**320]** OPINION BYJUDGE RANDOLPH A. BEALES

Louis Latour, Inc. ("Latour") appeals a decision of the Circuit Court of the City of Richmond, which affirmed a decision of the Virginia Alcoholic Beverage Control Board ("Board"). Specifically, Latour contends that the **[***2]** circuit court erred in failing to apply a *de novo* standard of review, and in finding that Latour (1) unilaterally amended its agreement with The Country Vintner, Inc. ("Vintner" or "TCV") without good cause; (2) discriminated among its wholesalers in violation **[*762]** of the Virginia Wine Franchise Act ("VWFA"); and (3) acted in bad faith in its dealings with Vintner.

For the following reasons, we affirm the judgment of the circuit court.

I.

STANDARD OF REVIEW

" On appeal, ***HN1*** we will review the evidence, and all reasonable inferences deducible therefrom, in the light most favorable to [Vintner], the party prevailing below." The Country Vintner, Inc. v. Rosemount Estates, Inc., 35 Va. App. 56, 60, 542 S.E.2d 797, 799 (2001).

II.

BACKGROUND

A. Factual History

On December 10, 1990, Latour entered into a wine distribution agreement with The Country Vintner, Inc. According to the agreement, Vintner would sell Latour's wine throughout the Commonwealth with a primary area of responsibility in Surry and Gloucester Counties. [1] It was understood that Vintner was selling, and intended to continue selling, Latour wine in Northern, Central, and Eastern Virginia. [2] Between **[***3]** December 1990 and April 2003, Latour permitted Vintner to order as much wine as it could sell throughout the Commonwealth. And, from November 5, 1999 to April 3, 2003, Vintner **[*763]** was the only wholesale distributor of Latour wines in the Commonwealth.

In 2002, Latour sought to change its marketing strategy, and with the help of Charles Ducker ("Ducker"), Latour's **[***4]** new Southeast Manager of Sales, attempted to create a network of regionally based distributors. Specifically, Latour decided to appoint new distributors with primary areas of responsibility outside of Surry and Gloucester Counties. Latour planned to mail distribution agreements to three new distributors, [3] receive them back, and file the new territory appointments with the Board. Latour made these plans without alerting Vintner.

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[1] The original agreement was never distilled to writing. However, forms filed with the Board in 1990 and 1997 indicate that Vintner's territory designation was Surry and Gloucester Counties.

[2] In 1990, two other distributors had written agreements to distribute Latour wines in Virginia. Specifically, King & Roberts was authorized to distribute Latour wine in Charlottesville, and Virginia Imports had an agreement to distribute Latour wine in Northern Virginia. In 1996, Virginia Imports and Vintner entered into a brand swap, and thus, Vintner acquired the Northern Virginia Territory. Subsequently, King & Roberts sold its business to Broudy-Kantor.

[3] The new distributors included Select Wines and Virginia Distributing.

Latour entered into written distribution agreements with three new wholesalers, and on April 3, 2003, filed the appropriate forms with the Board. On April 18, 2003, Latour sent Vintner a new proposed distribution agreement. The proposed agreement designated **[**321]** Vintner's primary area of responsibility as Surry and Gloucester Counties and required certain performance measures. For example, it required Vintner to maintain, and file with Latour, detailed stock depletion reports. [4] In essence, Latour intended for this **[***5]** written agreement to replace the existing franchise agreement which existed "by virtue of prior designations, actions, understandings, and course of dealings" between Vintner and Latour. [5] Vintner refused to sign the agreement.

In response, Latour sent Vintner a Requirements Announcement ("announcement"), stating that it was "prepared **[*764]** as a unilateral amendment to the **[***6]** commercial relationship." The announcement incorporated all aspects of the proposed agreement and declared that it would become effective ninety-one days after its receipt by Vintner. The announcement defined Vintner's sales territory as Surry and Gloucester Counties, and stated that Latour had no obligation to "support in any way" sales activities of Vintner related to retailers located outside of the defined territory. It further provided that Latour could "in its sole discretion allocate the Latour wines among distributors in any manner" that it deemed in the best interests of Latour. Vintner objected to all aspects of this announcement and, subsequently, filed a complaint with the Board.

After Vintner refused to sign the agreement, Latour began offering price discounts and marketing incentives to the new distributors, Select Wines and Virginia Distributing, and ceased offering any such opportunities to Vintner. [6] Latour gave the new distributors access to Vintner's confidential business records in order to facilitate the new

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[4] The depletion reports were to contain "the names and addresses of the retail licensees to which [Vintner] ha[d] sold the Latour wines during said month and the volume of sales of the Latour wines for that month."

[5] By acquiring agreements with the new distributors, Latour hoped to pressure Vintner into signing the new franchise agreement. The new distributors were subject to a written agreement, which included, among other things, the requirement for filing depletion reports. As such, Latour hoped to push Vintner into signing the agreement by indicating that the other wholesalers in the Commonwealth were subject to the same terms.

[6] We note that the record is unclear as to whether Latour failed to offer these price discounts and marketing incentives to Vintner in general, or just in relation to its sales outside of its primary area of responsibility. When questioned at oral argument,

distributors' marketing efforts. Latour also deliberately delayed the processing of Vintner's purchase orders, while almost immediately filling those from **[***7]** the new distributors, and, moreover, never filled two purchase orders submitted by Vintner.

B. Procedural History

On August 6, 2003, Vintner filed an original complaint with the Board **[***8]** against Latour. The complaint alleged that Latour violated the VWFA by creating dual distributorships and by **[*765]** attempting to impose specific performance requirements on Vintner without good cause. On February 11, 2004, Vintner filed an amended complaint with the Board alleging that Latour acted in bad faith and unilaterally amended its franchise agreement without good cause. A Hearing Panel ("Panel") heard the case over a seven-day period, and on March 21, 2005, issued an opinion finding that Latour: (1) violated the VWFA's dual distributorship provisions;

(2) unilaterally amended Vintner's agreement with Latour without good cause because the "modification [of the agreement was] in direct contravention of the Act"; (3) discriminated among its wholesalers, in violation of the VWFA; and (4) acted in bad faith in its dealings with Vintner.

Latour appealed, and on November 29, 2005, the Board affirmed all but one portion of the Panel's decision. Specifically, "The Board concur[red] with the analysis and findings of the hearing panel on the issue of Latour's unilateral amendment of its agreement **[**322]** with TCV. It likewise concur[red] with the hearing panel on the issues involving unlawful **[***9]** discrimination between wholesalers and bad faith on the part of Latour." However, the Board reversed the Panel's decision with regard to Latour's alleged creation of a dual distributorship. The Board found that Vintner's "primary area of responsibility [was] Surry and Gloucester Counties, and therefore, Latour [had] not entered into a dual distributorship situation in [Vintner's] territory."

Latour appealed the Board's decision to the Circuit Court for the City of Richmond. On June 28, 2006, the circuit court affirmed the

Latour's counsel could only indicate that Latour offered wine tasting events to the new wholesalers within their primary area of responsibility and that Latour did not offer Vintner the same events outside of its primary area of responsibility. However, the record does not contain any indication that Latour offered these services to Vintner within its primary area of responsibility. Based upon our standard of review, we will view this in the light most favorable to Vintner, the prevailing party below. See Rosemount, 35 Va. App. at 60, 542 S.E.2d at 799.

Board's final order, stating that it was "without error." Latour timely appealed to this Court.

III.

ANALYSIS

HN2 In reviewing the decisions of a regulatory agency, the agency's findings of fact are conclusive if supported by the evidence. Rosemount, 35 Va. App. at 62-63, 542 S.E.2d at 799; see also Code § 4.1-410 ("All proceedings under this chapter **[*766]** and any judicial review thereof shall be held in accordance with the Virginia Administrative Process Act (§ 2.2-4000 et seq.)."). Accordingly, "[t]he reviewing court may reject the agency's findings of fact only if, considering the record as a whole, a reasonable **[***10]** mind would necessarily come to a different conclusion." Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 242, 369 S.E.2d 1, 7, 4 Va. Law Rep. 2665 (1988).

However, ***HN3*** "[a]lthough decisions by administrative agencies regarding matters within their specialized competence are 'entitled to special weight in the courts,'" id. at 244, 369 S.E.2d at 8, decisions which involve issues of statutory interpretation require "little deference" because the issue falls outside the agency's specialized competence, Sims Wholesale Co. v. Brown-Forman Corp., 251 Va. 398, 404, 468 S.E.2d 905, 908 (1996); see also Va. Imports, Ltd. v. Kirin Brew. of Am., LLC, 41 Va. App. 806, 821, 589 S.E.2d 470, 477 (2003). Said differently, "pure statutory interpretation is the prerogative of the judiciary." Id. Thus, we review an issue of statutory construction *de novo*. See Mattaponi Indian Tribe v. Dep't of Envtl. Quality ex rel. State Water Control Bd., 43 Va. App. 690, 707, 601 S.E.2d 667, 675 (2004).

A. The Circuit Court and the Standard of Review

Latour argues that the circuit court erred in failing to apply the *de novo* standard of **[***11]** review in reviewing the Board's final order. Specifically, Latour argues that issues of statutory construction and the meaning of terms found in the VWFA are questions "which [fall] squarely [within] the province of the courts." We agree with the proposition that these issues are subject to *de novo* review by the courts, but we find that the record does not support Latour's contention that the circuit court failed to apply this standard of review.

We have long held that, ***HN4*** "[a]bsent clear evidence to the contrary in the record, the judgment of a trial court comes to us on appeal with a presumption that the law was correctly applied to the facts." Yarborough v. Commonwealth, 217 Va. 971, 978, 234 S.E.2d 286, 291 (1977); Shenk v. Shenk, **[*767]** 39 Va. App. 161, 169, 571 S.E.2d 896, 900 (2002) ("A trial court is presumed to apply the law correctly."); Oliver v. Commonwealth, 35 Va. App. 286, 297, 544 S.E.2d 870, 875 (2001) ("The trial court's judgment is presumed to be correct."). [7]

[*12]** Here, the circuit court held, "Having reviewed and considered the record before the Board, this court is of the opinion that the decision of the Virginia Alcoholic Beverage Control Board is without error." Even though the circuit court did not explicitly set forth the standard of review in its holding, on appeal, we presume that in reviewing and considering the record, the circuit court used the appropriate standard of review. Moreover, during discussion with trial counsel, the circuit court acknowledged that it was **[**323]** "bound" by the facts as found by the Board. However, the circuit court also noted that such a deferential standard of review is "not true with regard to questions of law." Therefore, because the record does not contain "clear evidence to the contrary," we cannot say that the circuit court applied an incorrect standard of review.

B. Dual Distributorships

Neither party appeals the Board's finding that Vintner's "primary area of responsibility [was] Surry and Gloucester Counties, and therefore, Latour [had] not entered into a dual distributorship situation in [Vintner's] territory." Instead, the parties disagree regarding the impact of this finding. Specifically, **[***13]** Latour argues that the Board's determination that "Latour lawfully appointed new wholesalers . . . is legally irreconcilable with the Board's adoption of the Hearing Panel's holdings that Latour nevertheless violated the WFA by engaging in unilateral amendment, bad faith, and discrimination." In contrast, Vintner and the Commonwealth argue that the Board recognized "that the other findings do not depend upon the primary area of responsibility" and that those findings are

[7] Although in cases such as this, the circuit court functions as an appellate court rather than a trial court, the principle remains applicable.

"legally unassailable" in light of the Board's holding.

[*768] Because neither party presents the issue of Vintner's "primary area of responsibility" on appeal, we will not address it. Accordingly, we are bound by the Board's decision that Latour had not created a dual distributorship, in violation of the VWFA, and that, according to the parties' agreement, Vintner's primary area of responsibility was Surry and Gloucester Counties. Therefore, we will approach the other issues on appeal in light of these uncontested facts.

C. Unilateral Amendment and Good Cause

Latour contends that the circuit court erred in finding that it unilaterally amended its franchise agreement with Vintner without good cause, thereby violating **[***14]** Code § 4.1-406. Vintner responds that the evidence supports the finding that Latour unilaterally amended the franchise agreement without good cause, and the fact that Code § 4.1-404's prohibition of the establishment of dual distributorships was not violated does not contradict that finding. For the reasons that follow, we affirm the circuit court on this issue.

1. Unilateral Amendment

Initially, we note that the VWFA does not preclude a winery from proposing changes to the contractual relationship with its distributors, and we would certainly not uphold the imposition of any sanctions on a winery for solely proposing changes to its contractual relationship with its distributor. To do so would be contrary to the VWFA. ***HN5*** In the absence of an agreed upon change (i.e., a bilateral amendment), however, the VWFA also provides a framework for unilaterally amending an existing agreement. See Code §§ 4.1-406 and 4.1-407. According to that framework, a winery may not unilaterally amend a contract without good cause. Id.

In this case, the Panel explicitly concluded that Latour's **[***15]** actions "constitute[d] a unilateral change or modification of an agreement without good cause." [8] In reaching this conclusion, **[*769]** the Panel noted that Vintner "objected to all aspects of the

[8] While the dissent questions our examining Latour's actions subsequent to Vintner's receipt of the requirements announcement (i.e., the unilateral amendment), we nonetheless find it necessary to address those actions given the Board's factual findings, which Latour challenges on appeal. With that in mind, we feel we must address Latour's question presented of whether or not Latour unilaterally amended, without good cause, its existing agreement with Vintner by imposing the requirements announcement.

Requirements Announcement. Consequently, it was not implemented by Louis Latour as to TCV." Latour contends this sentence constitutes a finding that the amendment was not actually implemented and that, therefore, "the issue of the propriety" of the announcement "has been rendered moot." This claim, however, completely overlooks the Panel's other numerous findings and explanations that Latour had indeed unilaterally amended the franchise agreement, emphasizing one phrase over the vast majority of the Panel's opinion.

[*16]** **[**324]** The Panel, after noting that Latour did not implement the proposal "as to" Vintner, immediately then, however, found:

> However, Louis Latour *delayed orders placed by [Vintner]* and assisted the other distributors by granting them price breaks and other incentives not offered to [Vintner] in order to enable them to compete against [Vintner] . . . .
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> * * * *
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> [The new distributors] had already been told by Mr. Ducker [Latour's Southeast Manager of Sales] that Louis Latour *intended to limit [Vintner's] supply of wine in order to restrict [Vintner's] distribution of Latour wine to Surry and Gloucester Counties.* Mr. Retornaz also testified that this was Louis Latour's *intention* . This is directly contrary to the provisions of Section 404 of the Act in that such a scheme restricted the sales of Latour wine by [Vintner] to retailers located within Surry and Gloucester Counties.
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> * * * *
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> In the case herein, Louis Latour's primary objective, in attempting to force [Vintner's] signing of the Distribution Agreement and complying with the Requirements Announcement, was *to limit [Vintner] from selling Latour* **[*770]** *wines outside of what* **[***17]** *Louis Latour considered [Vintner's] primary area of responsibility* . This is in direct contravention of Section 404 of the Act and makes this case easily distinguishable from Schieffelin . If anything, Schieffelin supports [Vintner's] contentions in this case. [Vintner] had been the sole distributor for Latour wines in Virginia from 1999 to April 2003. The plan or scheme conceived by Louis Latour was to enable other distributors to distribute

> Latour wines in areas of Virginia formerly serviced by [Vintner] pursuant to a longstanding agreement and *to limit [Vintner's] distribution to Surry and Gloucester Counties . This, in the Hearing Panel's view, constitutes a unilateral change or modification of an agreement without good cause.* Good cause cannot exist when the unilateral change or modification is in direct contravention of the Act.

(Emphasis added.)

Latour clearly could not implement *all* of the provisions of the requirements announcement because it was impossible for them to implement the provisions that required Vintner to act. Latour could not unilaterally have Vintner furnish the depletion reports -- only Vintner could perform that provision. **[***18]** Moreover, the requirements announcement, i.e., the unilateral amendment, contained more provisions than just the requirement for depletion reports. Paragraph 1 of the requirements announcement stated, in part:

> Retail licensees located in such Primary Area of responsibility shall be considered by Supplier and Distributor as the target market to which Distributor's obligation under this contract shall be focused; moreover, Supplier shall have no obligation to facilitate or support in any way . . . any activities in which Distributor chooses to engage relating to retail licensees located outside the Territory.

Latour implemented as much of this provision as it possibly could unilaterally. For example, Latour limited Vintner's ability to sell outside of Surry and Gloucester Counties -- in parts of Virginia that were not part of the other distributors' primary areas of responsibility where Vintner had previously **[*771]** been distributing wine -- by refusing to follow previous shipping arrangements that were part of the existing franchise agreement between Latour and Vintner. This is exactly the type of behavior that Code § 4.1-406 was enacted to prevent. **[***19]** See Code § 4.1-400(3), (4). [9]

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[9] We expressly do not hold, as the dissent seems to state (and as we discuss *infra*), that the statute requires a winery, such as Latour, to assist a wholesaler in its efforts to distribute the winery's product in another wholesaler's primary area of responsibility. Such a requirement would create dual distributorships and would violate the statute's express prohibition against creating dual distributorships. The statute also does not require a winery to assist a wholesaler outside the wholesaler's own primary area of responsibility. However, as noted, the statute expressly allows a wholesaler to sell the winery's product outside

[*20]** **[**325]** To find that Latour proposed, but did not implement the amendment would provide suppliers with an easy loophole to Code § 4.1-406. A supplier could propose an amendment that includes a part that can only be implemented by the distributor, such as depletion reporting, and then implement whatever other provisions it sees fit without violating the statute, since the entire proposal has not been implemented. We find such an interpretation contrary to the purpose of Code § 4.1-406. Therefore, while the Panel's *preliminary finding* that Latour did not implement the proposed amendment to the agreement "as to" Vintner is accurate (if inartfully worded), so also is the Panel's *conclusion* that Latour actually unilaterally implemented the portions of the announcement that it could -- on its own -- unilaterally implement.

Finally, the text of the announcement itself states that Latour's requirements announcement was, in fact, a unilateral amendment to the existing agreement. The announcement reads,

> **[*772]** The enclosed "Requirements Announcement" has been prepared as a *unilateral amendment* to the commercial relationship between **[***21]** Louis Latour Inc. and The Country Vintner Inc. It essentially incorporates all of the performance aspects of the proposed contract, those relating to the distributor's performance and those relating to Louis Latour Inc.'s performance.

(Emphasis added.) The announcement also states, "The effective date of the amendments contained in the Requirements Announcement is the 91st day following the date of receipt by The Country Vintner, Inc." [10] Consequently, Latour makes clear that it is unilaterally amending the existing franchise agreement via the requirements announcement, which notes that the unilateral amendment takes effect on "the 91st day following the date of receipt by The Country Vintner, Inc." Therefore, we affirm the finding that Latour unilaterally

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of the wholesaler's primary area of responsibility (and prevents a winery from restricting the wholesaler to its primary area of responsibility). Furthermore, in this case, the existing franchise agreement required Latour to assist Vintner in selling outside of Vintner's primary area of responsibility. It is Latour's unilateral implementation of that proposed change to the existing franchise agreement with Vintner that violates the statute.

[10] Code § 4.1-407(A) states, in pertinent part, ***HN6*** "a winery shall provide a wholesaler at least ninety days' prior written notice of any intention to amend, terminate, cancel or not renew any agreement."

amended the parties' contract, and, in accordance with Code § 4.1-406, Latour must demonstrate that good cause existed for such a unilateral amendment.

[*22]** 2. Good Cause

We now turn to whether the record supports the finding that Latour unilaterally amended the parties' agreement without good cause, in violation of Code § 4.1-406.

HN7 Under the VWFA, a winery is permitted to impose requirements on a wholesaler by unilateral amendment, so long as the winery complies with the requirements set forth in the VWFA. Code § 4.1-406; Code § 4.1-407. Specifically, Code § 4.1-406 requires that "the winery first compl[y] with § 4.1-407 *and* good cause [must] exist[] for amendment, termination, cancellation, nonrenewal, noncontinuance or causing a resignation." (Emphasis added.) Code § 4.1-406 delineates the parameters of "good cause" as follows:

> **[*773]** ***HN8*** Good cause shall not include the sale or purchase of a winery. Good cause shall include, but is not limited to the following:
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> 1. Revocation of the wholesaler's license to do business in the Commonwealth;
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> 2. Bankruptcy or receivership of the wholesaler;
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> 3. Assignment for the benefit of creditors or similar disposition of the assets of the wholesaler, other **[***23]** than the creation of a security interest in the assets of a wholesaler for the purpose of securing financing in the ordinary course of business; or
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> 4. Failure by the wholesaler to substantially comply, without reasonable cause or justification, with any reasonable and material requirement imposed upon him in writing by the winery including, but not limited to, a substantial failure by a wine wholesaler to (i) maintain a sales volume or **[**326]** trend of his winery's brand or brands comparable to that of other distributors of that brand in the Commonwealth similarly situated or (ii) render services comparable in quality, quantity or volume to the services rendered by other wholesalers of the same brand or brands within the Commonwealth similarly situated. In any determination as to whether a wholesaler has failed to

substantially comply, without reasonable excuse or justification, with any reasonable and material requirement imposed upon him by the winery, consideration shall be given to the relative size, population, geographical location, number of retail outlets and demand for the products applicable to the territory of the wholesaler in question and to comparable territories.

Nothing **[***24]** in this section shall be construed to prohibit a winery from proposing or effecting an amendment to a contract with a wine wholesaler in the Commonwealth provided that such amendment is not inconsistent with this chapter.

Good cause shall not be construed to exist without a finding of a material deficiency for which the wholesaler is responsible in any case in which good cause is alleged to exist based **[*774]** on circumstances not specifically set forth in subdivisions 1 through 4 of this section.

HN9 Upon review, "the issue of whether a winery had 'good cause' to [unilaterally amend] a franchise agreement with a wholesaler is a mixed question of fact and law." Rosemount, 35 Va. App. at 63, 542 S.E.2d at 799.

Latour argues that the unilateral amendment avoided dual distributorships, which are prohibited by Code § 4.1-404, and that, therefore, "Latour's amendment was in 'good faith' as a matter of law." [11] As previously stated, we review issues of statutory construction *de novo*. See Mattaponi, 43 Va. App. at 707, 601 S.E.2d at 675. ***HN10*** Code § 4.1-404 states that "[e]ach winery which enters **[***25]** into an agreement with a wine wholesaler shall designate a sales territory as the primary area of responsibility of that wholesaler which is applicable to the agreement." [12] However, Code § 4.1-404 also states that "the term 'primary area of

[11] Code § 4.1-406 delineates the parameters of "good cause" to cancel or amend an existing agreement. Appellant, however, uses the term "good faith" in its argument on this issue. The Virginia Supreme Court has explicitly noted the difference in the two terms as contemplated by that section. See Sims Wholesale Co., 251 Va. at 405, 468 S.E.2d at 909. Therefore, we will address the concept of "good cause" in this section and discuss the VWFA's provision that requires good faith in all dealings *infra*.

[12] Here, Latour designated Surry and Gloucester Counties as the primary area of responsibility for Vintner, certain cities and counties in Northern Virginia as the primary area of responsibility for Select Wines, and certain cities and counties in the Roanoke area, Central Virginia, and Eastern Virginia as the primary area of responsibility for Virginia Distributing Company. No other areas of Virginia were designated as any wholesaler's primary area of responsibility.

responsibility' shall not be construed as restricting sales or sales efforts by a wine wholesaler exclusively to retailers located within the designated sales territory, and any agreement to the contrary shall be void."

[*26]** The plain language of the statute commands that the winery "shall" designate a "primary area of responsibility" for the wholesaler. Furthermore, the statute contemplates that, pursuant to the franchise agreement, the winery may not *restrict* **[*775]** the wholesaler's sales to that "area of responsibility." Code § 4.1-404. In other words, the winery may not limit the wholesaler to selling solely within its primary area of responsibility, nor may the winery qualify the wholesaler's sales territory as solely limited to that primary area of responsibility. See Black's Law Dictionary 1317 (7th ed. 1999) (defining restriction as "a limitation or a qualification").

Of course, the statute does not require that the winery assist a wholesaler in its effort to distribute outside of the wholesaler's "primary area of responsibility." However, in this case, the parties' franchise agreement did require Latour to assist Vintner outside of Surry and Gloucester Counties, and such assistance had taken place throughout the parties' course of dealing. In other words, while Code § 4.1-404 does not require that Latour assist Vintner with sales outside **[***27]** of its primary area of responsibility, the parties' existing contract did. Code § 4.1-404, rather **[**327]** than precluding such a contract provision, provides for such assistance by including the provision, "The term 'primary area of responsibility' shall not be construed as restricting sales or sales efforts by a wine wholesaler exclusively to retailers located within the designated sales territory, and any agreement to the contrary shall be void."

Here, Latour admitted before the Panel that it intended to limit Vintner to Surry and Gloucester Counties. Assisting new distributors, with whom they had recently signed contracts, in the areas outside each of the distributors' primary areas of responsibility (i.e., in areas of Virginia not assigned to any distributor and which were formerly serviced by Vintner), while disregarding Vintner's orders for sales in these same areas outside of any distributors' primary area of responsibility, were all attempts to limit Vintner's sales to only Surry and Gloucester Counties. While Latour is not *required* by statute to assist Vintner outside its primary area of responsibility and,

in fact, cannot assist Vintner within another **[***28]** distributor's primary area of responsibility, Latour cannot *impede* Vintner's efforts and ability to sell outside its primary area of **[*776]** responsibility (while assisting other distributors in this "unclaimed territory"), which Latour clearly did. [13]

Latour's unilateral amendment was, therefore, intended to limit Vintner to its primary area of responsibility, in violation of Code § 4.1-404 **[***29]** . Specifically, Latour intended to use the depletion reports from Vintner to limit its supply of wine and, therefore, its distribution territory. In addition, as the Panel noted:

> Latour delayed orders placed by [Vintner] and assisted the other distributors by granting them price breaks and other incentives not offered to [Vintner] in order to enable them to compete against [Vintner]. Louis Latour also gave the new distributors a letter of authorization to take to the retailers, in areas formerly serviced by [Vintner], announcing a change in the distribution network . . . .

In short, not only did Latour act without good cause, it also acted in bad faith as discussed *infra*.

Latour's actions towards Vintner both before and after Vintner's rejection of the proposed written amendment to their contract further establishes that Latour attempted to unilaterally amend the agreement with Vintner without good cause. Although Latour argues that the VWFA "anticipates and permits wineries to impose sales volume requirements and to make comparisons of product demand among sales territories" and "only by requiring depletion reports of their wholesalers can wineries make **[***30]** such comparisons," Latour does not offer evidence of any "material deficiency for which the wholesaler is responsible" nor does Latour argue that any of the examples of good cause enumerated in Code § 4.1-406 applies **[*777]** in this case. We thus affirm the finding of the Panel, the Board, and the circuit court on this issue.

D. Discrimination

Latour contends that because the issue of discrimination is "hopelessly intertwined with

[13] The Board's finding that Latour did not violate the prohibition on dual distributorships contained in Code § 4.1-404, see *supra*, does not contradict this finding. Code § 4.1-404 contains more than one provision. It both precludes wineries from assigning the same primary area of responsibility to two distributors *and* prevents wineries from limiting those distributors to their primary areas of responsibility. While Latour did not violate the first provision, it violated the second provision by its unilateral amendments to the contract with Vintner.

the Hearing Panel's decision regarding the scope of Vintner's territory," the circuit court erred in finding that Latour discriminated against Vintner, in violation of Code § 4.1-415. For the following reasons, we disagree.

HN11 Code § 4.1-415 provides that "[n]o winery shall discriminate among its wholesalers in any business dealings including, but not limited to, the price of wine sold to the wholesaler, unless the classification among its wholesalers is based upon reasonable grounds." In general, discrimination is defined as "differential treatment; esp. a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored. **[***31]** " Black's Law Dictionary, supra at 479. Thus, according to Code § 4.1-415, no winery may treat its wholesalers **[**328]** differently unless the winery has reasonable grounds to do so.

In this case, the record reflects that Latour offered direct import pricing, depletion allowances, and marketing activities to Select Wines and Virginia Distributing. However, the record gives no indication that the same direct import pricing, depletion allowances, or marketing activities were offered to Vintner. In essence, Latour allowed the new distributors to purchase the same wine at lesser prices, *compensated the new distributors following the sale of the wine*, and offered free wine to the new distributors. After April 2003, none of these incentives were offered to Vintner. Moreover, Latour made a conscious decision to immediately process the purchase orders from Select Wines and Virginia Distributing, while delaying or simply not fulfilling the purchase orders from Vintner, in order to allow the new distributors to sell more wine. Thus, the record provides ample support for the Board's finding that Latour discriminated against Vintner in favor of other distributors. **[***32]** Accordingly, we affirm the circuit court on this issue.

[*778] E. Good Faith

Latour argues that the circuit court erred in affirming the Board's finding that Latour failed to act in good faith, in violation of the VWFA. For the following reasons, we disagree with this argument as well.

HN12 "Good faith" is a legal term of art, and thus on appeal whether a party acted in good faith is a mixed question of law and fact. Again, we give deference to the factual findings of the

Board and the Panel, but review the application of those facts to the law *de novo* . See generally Rosemount, 35 Va. App. at 63, 542 S.E.2d at 799.

HN13 The VWFA requires that, "[e]very agreement entered into under this chapter shall impose on the parties the obligation to act in good faith." Code § 4.1-418. Although good faith is not defined under the VWFA, it is generally defined as "[a] state of mind consisting in (1) honesty and belief in purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." Black's **[***33]** Law Dictionary, supra at 701. [14]

In this case, Latour discriminated against Vintner, in favor of other distributors, in violation of the VWFA. Moreover, Latour provided confidential business information to the new wholesalers so that they could compete more effectively with Vintner in territories outside of Vintner's and their own primary areas of responsibility. Latour acknowledged that disclosing the information was wrong and that it did not condone such business practices. Regardless, Latour argues that because under Code § 4.1-404 a winery is not obligated to facilitate the wholesaler's activities outside of the primary area of responsibility, Latour's actions cannot, as a matter of law, **[***34]** constitute bad faith. This argument, however, ignores **[*779]** the fact that Latour's actions -- delaying and not filling purchase orders, offering incentives to all wholesalers except Vintner, and disclosing confidential business documents -- went far beyond simply not facilitating sales outside Vintner's primary area of responsibility. These actions applied to Vintner's entire business and affected its entire operation. Stated another way, Latour frustrated Vintner's ability to sell wine *anywhere* to *anyone* so that Latour's new distributors could gain a competitive advantage and, consequently, increase their market share.

Because Code § 4.1-418 requires that "[e]very agreement entered into under this chapter . . . imposes on the parties the obligation to act in good faith" and Latour clearly violated this

[14] The Panel relied upon the Uniform Commercial Code, which defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Code § 8.3A-103; see Johnston v. First Union Nat'l Bank, 271 Va. 239, 244, 624 S.E.2d 10, 12 (2006).

obligation, we affirm the circuit court on this issue.

F. Remedies

1. Compensation under Code § 4.1-409

Latour argues that the circuit court erred in granting Vintner compensation in the form **[**329]** of the value of the agreement, pursuant to Code § 4.1-409, because "Latour had every right under the **[***35]** WFA to propose amendments without incurring liability," i.e., Latour had good cause to amend the parties' distribution agreement. We disagree.

Code § 4.1-409 provides that,

> ***HN14*** in any case in which a winery is found to have attempted or accomplished an amendment, termination, cancellation, or refusal to continue or renew an agreement *without good cause* as defined in § 4.1-406, the Board shall, upon the request of the wholesaler involved, enter an order requiring that (i) the agreement remain in effect or be reinstated or (ii) the winery pay the wholesaler reasonable compensation for the value of this agreement as determined pursuant to subsection B.

(Emphasis added.) As we have held *supra*, Latour did not demonstrate good cause to amend the parties' agreement. Consequently, the remedy awarded pursuant to Code § 4.1-409 **[*780]** was appropriate, and we affirm the circuit court on that issue.

2. Attorney's fees

Latour contends that because the circuit court erred in finding that Latour acted in bad faith, the circuit court also erred in awarding Vintner attorneys' fees, pursuant to Code § 4.1-410 **[***36]** . According to Code § 4.1-410, ***HN15*** "[t]he Board may, if it finds that the winery or wine wholesaler has acted in bad faith *in violating any provision of this chapter* or in seeking relief pursuant to this chapter, award reasonable costs and attorneys' fees to the prevailing party." (Emphasis added.) Because we find that Latour acted in bad faith in violation of Code § 4.1-418, [15] and because Code § 4.1-410 allows for attorneys' fees when a party acts in bad faith in violation of *any* provision of this chapter, we affirm the circuit court's decision to award attorneys' fees.

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[15] The Panel awarded attorneys' fees stating, "having concluded that Louis Latour acted in bad faith in its dealings with [Vintner], [Vintner] is entitled to its reasonable costs and attorneys' fees under Section 410 of the Act." The circuit court held that Latour was obligated to pay Vintner "reasonable costs and attorneys' fees."

IV.

CONCLUSION

[*37]** For the foregoing reasons, we hold that the circuit court did not err in applying the appropriate standard of review, in finding that Latour unilaterally amended the parties' agreement without good cause, in finding that Latour discriminated against Vintner, in finding that Latour acted in bad faith, in fashioning an appropriate remedy under Code § 4.1-409, and in awarding attorney's fees. Accordingly, we affirm the judgment of the circuit court.

Affirmed.

Concur by: Humphreys (In Part)

Dissent by: Humphreys (In Part)

Dissent

[*781] Humphreys, J., concurring, in part, and dissenting, in part.

I concur with the analysis and holding with respect to subsections A, B, D and F(2) of section III of the majority opinion that Latour acted in bad faith and discriminated against Vintner under the terms of their existing oral agreement. However, for the reasons that follow, I respectfully dissent from the analysis and holding of subsection C with regard to whether Latour attempted a unilateral amendment to the franchise agreement without good cause, in violation of Code § 4.1-404. Furthermore, because I would reverse the circuit court and the Board **[***38]** on that issue, I also partially dissent from the analysis and holding in subsection F(1) of section III of the majority opinion, and would remand to the circuit court with direction to remand to the Board to reconsider the issue of the appropriate sanction limited to the remaining issues.

I. Unilateral Amendment

The primary point of my disagreement with the majority is with respect to the issue of whether Latour violated Code § 4.1-406 by attempting to amend its agreement with Vintner through the Requirements Announcement without good cause. The hearing panel found that,

> Latour's primary objective, in attempting to force [Vintner's] signing of the Distribution **[**330]** Agreement and complying with the Requirements Announcement, was to limit [Vintner] from selling Latour wines outside of what Louis Latour considered [Vintner's] primary area of responsibility. This is in

> direct contravention of Section 404 of the Act . . . . The plan or scheme conceived by Louis Latour was to enable other distributors to distribute Latour wines in areas of Virginia formerly serviced by [Vintner] pursuant to a longstanding agreement and to limit [Vintner's] distribution **[***39]** to Surry and Gloucester Counties. This in the Hearing Panel's view, constitutes a unilateral change or modification of an agreement without good cause. Good cause cannot exist **[*782]** when the unilateral change or modification is in direct contravention of the Act.

The majority affirms this decision holding that because Latour implemented as much of the requirements announcement that it could on its own -- for example, refusing to follow "previous shipping arrangements"-- Latour unilaterally amended the parties' agreement for which Latour must demonstrate good cause. And because Latour's professed intention behind the requirements announcement was to limit Vintner to its primary area of responsibility, the attempted unilateral amendment to the agreement was done without good cause. I disagree with the majority and would reverse the Board on this issue.

Initially, I note that the majority has conflated the issue of Latour acting in bad faith with respect to its obligations under the *existing* agreement with the issue at hand. While acknowledging the Board's factual finding that "Latour did not implement the proposal 'as to' Vintner," the majority then promptly ignores that explicit **[***40]** finding, and holds that "It is Latour's unilateral implementation of the proposed change to the existing franchise agreement with Vintner that violates the statute." See Footnote 9. Moreover, contrary to the apparent view of the majority, the question before us is not whether the Board erred in holding that Latour's *actions subsequent* to Vintner's refusal to accept the requirements announcement constituted a unilateral amendment to the existing agreement without good cause. Instead, the question presented is whether the Board erred in holding that the *proposed requirements announcement* constituted a unilateral

amendment to the existing agreement without good cause. [16] In my view, it did not.

[*41]** **[*783]** Latour's announcement stated that, (1) "[r]etail licensees located in such Primary Area of responsibility shall be considered by Supplier and Distributor as the target market to which Distributor's obligation under this contract shall be focused;" (2) "Supplier shall have no obligation to facilitate or support in any way . . . any activities in which Distributor chooses to engage relating to retail licensees located outside the Territory"; and (3) "Distributor shall furnish monthly **[**331]** depletion and inventory reports for the Latour Wines to Supplier." The requirements announcement also contained a provision stating, "Supplier shall supply the Latour Wines to Distributor in sufficient quantities to meet the demand for Latour Wines in the Territory. If however, supply of any Latour Wines in [sic] limited, Supplier may, in its sole discretion, allocate the Latour Wines . . . in any manner that it determines to be in the best interest of Latour Wines."

Vintner argues, and the Board found, that these terms, when considered *in light of the course of dealings* between Vintner and Latour, amount to restricting Vintner to selling solely to retailers within the primary area of responsibility, **[***42]** in **[*784]** violation of Code § 4.1-404. And because in the Board's view, the requirements announcement illegally restricted Vintner to its primary area of responsibility, the Board held that, "Good cause cannot exist when the unilateral change or modification is in direct contravention of the Act."

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[16] The majority characterizes the hearing panel's factual finding that Latour did not implement the proposed amendment to the agreement "as to" Vintner as nothing more than a " *preliminary finding*." The majority then asserts that the panel's "final conclusion" was that "Latour actually unilaterally implemented the portions of the announcement that it could-on its own-unilaterally implement." Characterizing an explicit finding of fact as "preliminary," and then substituting its own factual conclusion, is utterly revisionist on the part of the majority. In point of fact, the plain language used by the hearing panel, and later adopted by the Board and the circuit court, was that "Latour's primary objective, in attempting to force [Vintner's] signing of the Distribution Agreement and complying with the Requirements Announcement, was to limit [Vintner] from selling Latour wines outside of what Louis Latour considered [Vintner's] primary area of responsibility . . . . *This in the Hearing Panel's view, constitutes a unilateral change or modification of an agreement without good cause* ." (Emphasis added.) In other words, and contrary to the characterization of the majority, the hearing panel found that Latour, *through the provisions in the announcement*, was attempting to limit Vintner to its primary area of responsibility, in direct contravention of the Code. And although the panel acknowledged that Latour had delayed price orders and given the other distributors price incentives, *the panel never tied these facts to its finding regarding the unilateral amendment without good cause*. And although I agree with the majority that we must "address those actions," in my view, they are more properly addressed in the context of discrimination and good faith with regard to compliance with the existing agreement. They are not, however, properly addressed when determining whether the requirements announcement, *in and of itself*, constituted a unilateral amendment to the agreement without good cause.

However, in affirming the circuit court and the Board on this point, the majority reaches a different issue from the one presented to us. As the majority acknowledges, the Virginia Wine Franchise Act ("VWFA") clearly does not forbid a winery from merely proposing changes to the contractual relationship with its distributors, as long as such changes are not unilaterally implemented except in compliance with the VWFA. Indeed, the VWFA specifically provides for such amendments, and the Board found-as a fact binding on this Court-that no unilateral implementation of the proposed amendments had occurred. See Code §§ 4.1-406 and 4.1-407.

In any event, Latour's announcement to Vintner proposing amendments to the existing agreement does not forbid Vintner from selling Latour products outside of Surry and Gloucester Counties, **[***43]** and in fact, would have been void had it done so. Rather, it simply relieves Latour from any responsibility to actively participate in or promote Vintner's efforts to sell outside of Vintner's primary area of responsibility. Moreover, it allows the winery to allocate its resources among distributors when quantities of a particular product may be low. Thus, in answer to the issue actually presented to us, I would hold that the proposed announcement, standing alone, did not violate Code § 4.1-404.

It seems to me that the chilling effect of the majority's approval of the Board's imposition of sanctions for merely proposing changes in a contractual relationship between a winery and its distributors, as distinguished from the sanctions that were appropriately imposed for the actions of Latour with respect to its existing agreement, frustrates rather than furthers the legislative intent of the statute. Specifically, Code § 4.1-400 clearly indicates that the legislative intent behind the VWFA was, in part, "To provide for a **[*785]** system of designation and registration of franchise agreements between wineries and wholesalers with the Board as **[***44]** an aid to Board regulation of the distribution of wine by wholesalers." By requiring a winery to facilitate a wholesaler outside of its designated primary area of responsibility, even pursuant to an existing franchise agreement, the majority runs afoul of the clear legislative intent to create a territorial system through which the Board can more easily regulate the distribution of wine throughout the Commonwealth. Moreover, by doing so, the majority has in effect encouraged

the *de facto* creation of a dual distributorship, in direct contravention of the VWFA. See Code § 4.1-404 ("No winery shall enter into any agreement with more than one wholesaler for the purpose of establishing more than one agreement for its brands of wine in any territory.").

II. Good Cause

In light of the fact that I believe that the announcement did not violate Code § 4.1-404, I now turn to whether the remaining facts support the conclusion that Latour's attempted unilateral amendment to the agreement was without good cause, in violation of Code § 4.1-406. [17]

[*45] [**332] [*786]** Under the VWFA, a winery is permitted to impose requirements on a wholesaler by unilateral amendment, so long as it complies with the procedural requirements set forth in the VWFA. Code § 4.1-406; see

[17] Code § 4.1-406 delineates the parameters of "good cause" as follows: Good cause shall not include the sale or purchase of a winery. Good cause shall include, but is not limited to the following:

1. Revocation of the wholesaler's license to do business in the Commonwealth;

2. Bankruptcy or receivership of the wholesaler;

3. Assignment for the benefit of creditors or similar disposition of the assets of the wholesaler, other than the creation of a security interest in the assets of a wholesaler for the purpose of securing financing in the ordinary course of business; or

4. Failure by the wholesaler to substantially comply, without reasonable cause or justification, with any reasonable and material requirement imposed upon him in writing by the winery including, but not limited to, a substantial failure by a wine wholesaler to (i) maintain a sales volume or trend of his winery's brand or brands comparable to that of other distributors of that brand in the Commonwealth similarly situated or (ii) render services comparable in quality, quantity or volume to the services rendered by other wholesalers of the same brand or brands within the Commonwealth similarly situated. In any determination as to whether a wholesaler has failed to substantially comply, without reasonable excuse or justification, with any reasonable and material requirement imposed upon him by the winery, consideration shall be given to the relative size, population, geographical location, number of retail outlets and demand for the products applicable to the territory of the wholesaler in question and to comparable territories.

Nothing in this section shall be construed to prohibit a winery from proposing or effecting an amendment to a contract with a wine wholesaler in the Commonwealth provided that such amendment is not inconsistent with this chapter.

Good cause shall not be construed to exist without a finding of a material deficiency for which the wholesaler is responsible in any case in which good cause is alleged to exist based on circumstances not specifically set forth in subdivisions 1 through 4 of this section.

Code § 4.1-407. [18] Specifically, Code § 4.1-406 requires that in order to impose a unilateral amendment upon the wholesaler, "the winery [must] first compl[y] with § 4.1-407 *and* good cause [must] exist[] for amendment, termination, cancellation, nonrenewal, noncontinuance or causing a resignation." (Emphasis added.)

Here, the Board found that Latour complied with the notice requirements as set forth in Code § 4.1-407. The Board also found that although the proposed **[***46]** agreement was never implemented, the proposed unilateral amendment to the existing agreement was intended to limit Vintner to its primary area, in violation of Code § 4.1-404. Thus, because the provisions violated the VWFA, Latour necessarily could not prove good cause existed to amend the agreement. Because the Board did not make any other factual findings with respect to its determination of good cause, and because I would hold that the proposed unilateral amendments alone did not violate the VWFA, I would reverse on this issue, and remand to the circuit court with instructions to remand to the Board for a **[*787]** review of the remedy consistent with this holding and the results of any further proceedings before the Board.

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[18] Code § 4.1-407(A) states, in pertinent part, "a winery shall provide a wholesaler at least ninety days' prior written notice of any intention to amend, terminate, cancel or not renew any agreement."

Milot v. Milot

Court of Appeals of Virginia

October 15, 2013, Decided

Record No. 0337-13-2

Reporter

62 Va. App. 415; 748 S.E.2d 655; 2013 Va. App. LEXIS 286; 2013 WL 5614089

GLENDA H. MILOT v. DAVID SCOTT MILOT

Prior History: **[***1]** FROM THE CIRCUIT COURT OF HALIFAX COUNTY. David A. Melesco, Judge Designate.

Milot v. Milot, 2013 Va. Cir. LEXIS 60 (Va. Cir. Ct., July 18, 2013)

Disposition: Affirmed.

Case Summary

Overview

HOLDINGS: [1]-The dismissal of a wife's case under Va. Code Ann. § 8.01-335(B), which terminated her spousal and child support under a pendente lite order, did not violate due process because there was an adequate post-deprivation remedy available to her in that the legislature had extended the trial court's jurisdiction to one year after a case was dismissed under § 8.01-335(B); [2]-The wife, who claimed that the trial court clerk had not provided her with a copy of the dismissal order as required by § 8.01-335(B), had not overcome the presumption that the clerk had discharged his duties property; [3]-Even if the clerk did fail to comply with the statute, the dismissal order would not be void; [4]-The trial court did not err in denying the husband attorney's fees and costs, as it properly considered the circumstances of the case and determined that it had to be tried or at least argued.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

HN1 When reviewing a trial court's decision on appeal, the appellate court views the evidence in the light most favorable to the prevailing party, granting it the benefit of any reasonable inferences. That principle requires the

appellate court to discard the evidence of the appellant which conflicts, either directly or inferentially, with the evidence presented by the appellee at trial.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Constitutional Law > ... > Case or Controversy > Constitutional Questions > General Overview

HN2 Constitutional arguments are questions of law that an appellate court reviews de novo.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Governments > Legislation > Interpretation

HN3 Statutory interpretation is a pure question of law which the court reviews de novo.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Family Law > ... > Support Obligations > Types > Temporary Support

Family Law > ... > Spousal Support > Obligations > Temporary Support

HN4 Virginia courts have no power to enter a decree of pendente lite support except pursuant to statutory authority. Va. Code Ann. § 20-103 grants authority for a court to provide pendente lite support during the pendency of the suit. Accordingly, this grant of authority is limited to the right to make such award only for the period the action is pending. Consequently, when a case is dismissed by operation of law, any pendente lite award ordered in that case is automatically terminated.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN5 See Va. Code Ann. § 8.01-335(B).

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN6 Va. Code Ann. § 8.01-335 enables trial courts to eliminate from their dockets cases for which there is no reasonable prospect of trial.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN7 The deprivation of property by the random and unauthorized acts of state officials or employees in contravention of established procedures does not offend due process

requirements when adequate post-deprivation remedies exist.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN8 Generally, a trial court only retains jurisdiction over a matter for 21 days after a final order in the case has been entered. Va. Sup. Ct. R. 1:1. The General Assembly, however, extended this jurisdiction to one year when a case is dismissed under Va. Code Ann. § 8.01-335(B). This extension of the trial court's jurisdiction serves as an adequate post-deprivation remedy sufficient to satisfy constitutional due process concerns.

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Evidence > Burdens of Proof > Allocation

HN9 There is a presumption that public officials will obey the law. In the absence of clear evidence to the contrary, courts must presume that a public officer has properly discharged his official duties. Furthermore, there is a presumption in favor of the regularity in the proceedings of courts that extends to every step and the burden is on him who alleges irregularity to show affirmatively by the record that the irregularity exists.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN10 The Virginia Supreme Court has held that an order dismissing a case under an earlier, but nearly identical, version of Va. Code Ann. § 8.01-335(B) may be erroneous, but the error does not render it less final.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN11 A trial court, having by its final order put a cause beyond its control, cannot upon a discovery of error recall it in a summary way and resume a jurisdiction which has been exhausted.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN12 An award of attorney's fees is a matter submitted to the sound discretion of the trial court and is reviewable on appeal only for an abuse of discretion. The key to determining a proper award of attorney's fees is reasonableness under all the circumstances.

Counsel: Robert B. Jeffries (Bob Jeffries Law, P.C., on brief), for appellant.

Michael D. Kmetz for appellee.

Judges: Present: Judges Frank, Huff and Senior Judge Coleman. OPINION BY JUDGE GLEN A. HUFF.

Opinion by: GLEN A. HUFF

Opinion

[*419] [657]** OPINION BY JUDGE GLEN A. HUFF.

Glenda H. Milot ("appellant") appeals an order of the Circuit Court of Halifax County ("the trial court") denying appellant's motion to vacate the dismissal of her case and reinstate a *pendente lite* order. On appeal, appellant contends that the trial court erred in 1) dismissing the case without notice under Code § 8.01-335(B) because appellant had a minimum due process right to prior notice and an opportunity to be heard, and 2) denying appellant's motion to vacate the dismissal order because that order was rendered void from the due process violation.

In an assignment of cross-error, David S. Milot ("appellee") contends that the trial court erred in denying appellee's request for attorney's fees and costs in defending against appellant's meritless motion to vacate the dismissal of her case and reinstate a *pendente lite* order.

For the following reasons, this Court affirms the judgment **[***2]** of the trial court.

I. BACKGROUND

HN1 "When reviewing a [trial] court's decision on appeal, we view the evidence in the light most favorable to the prevailing party, granting it the benefit of any reasonable inferences." Congdon v. Congdon, 40 Va. App. 255, 258, 578 S.E.2d 833, 835 (2003). "That principle requires us to 'discard the evidence' of the [appellant] which conflicts, either directly or inferentially, with the evidence presented by

the [appellee] **[*420]** at trial." Id. (quoting Wactor v. Commonwealth, 38 Va. App. 375, 380, 564 S.E.2d 160, 162 (2002)). So viewed, the evidence is as follows.

In February 2002, appellant filed a divorce complaint in the trial court against appellee. In March 2003, the trial court entered a *pendente lite* order requiring appellee to pay spousal and child support. Thereafter, the trial court remanded all child support matters to the Halifax County Juvenile and Domestic Relations District Court.

Between entry of the March 2003 *pendente lite* order and August 2007, no action or proceeding was taken in the case. Consequently, in August 2007, the trial court dismissed appellant's case ("the dismissal order") pursuant to Code § 8.01-335(B).[1] The **[**658]** Code allows a court to **[***3]** dismiss a pending case from its docket without providing prior notice to the parties when there has been no order or proceeding in the case for three years. Appellant and appellee testified that they did not receive notice prior to or after entry of the dismissal order. Appellant's counsel of record testified, "I never saw [a notice of the dismissal order, but] I can't say that a secretary didn't get it and put it in the wrong file, or lose it . . . I just never saw it is all I can say."

In March 2011, more **[***4]** than three years after the dismissal order, appellee filed a divorce complaint against appellant in the Norfolk Circuit Court. The Norfolk Circuit Court granted the parties a divorce on February 24, 2012 while reserving equitable distribution, child support, and spousal support.

[*421] About three weeks prior to the entry of the divorce decree by the Norfolk Circuit Court, however, appellant moved the trial court to vacate the dismissal order and reinstate the *pendente lite* order. At the hearing, appellant argued that the dismissal order violated her due process rights because she did not receive

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[1] Code § 8.01-335(B) provides that

> [a]ny court in which is pending a case wherein for more than three years there has been no order or proceeding . . . may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

notice prior to or after its entry. Appellee responded that appellant's motion was barred under Code § 8.01-335(B) and requested that the trial court award him attorney's fees and costs associated with opposing the motion.

The trial court denied appellant's motion to vacate the dismissal order and reinstate the *pendente lite* order. The trial court also denied appellee's request for attorney's fees. This appeal followed.

II. ANALYSIS

On appeal, appellant argues that the trial court erred in denying her motion to vacate the dismissal order and reinstate the *pendente lite* order for two reasons: 1) the dismissal **[***5]** order violated her due process rights because she did not receive notice prior to the dismissal and was not afforded an opportunity to be heard, and 2) the dismissal was void because the clerk's office failed to provide the parties with a copy of the dismissal order pursuant to Code § 8.01-335(B). In an assignment of cross-error, appellee contends that the trial court erred in denying him attorney's fees and costs associated with opposing appellant's meritless motion.

A. Due Process

Appellant first asserts that the trial court erred in denying her motion to vacate the dismissal order because the dismissal order violated her due process rights. Specifically, appellant argues that her due process rights were violated when she did not receive prior notice that her case was being dismissed, which resulted in the termination of her right to receive monthly spousal and child support payments under the *pendente lite* order.

[*422] ***HN2*** "'[C]onstitutional arguments are questions of law that [this Court reviews] *de novo*.'" Copeland v. Todd, 282 Va. 183, 193, 715 S.E.2d 11, 16 (2011) (alteration in original) (quoting Shivaee v. Commonwealth, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005)). Appellant's assignments **[***6]** of error also present an issue of ***HN3*** "'statutory interpretation,'" which "'is a pure question of law . . . [this Court] reviews *de novo*.'" Laws v. McIlroy, 283 Va. 594, 598, 724 S.E.2d 699, 702 (2012) (quoting Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007)).

HN4 "Virginia courts have no power to enter a decree of [*pendente lite*] support except pursuant to statutory authority." Smith v. Smith,

4 Va. App. 148, 151, 354 S.E.2d 816, 818, 3 Va. Law Rep. 2179 (1987). Code § 20-103 grants authority for a court to provide *pendente lite* support "during the pendency of the suit." Accordingly, "this grant of authority [is] limited to the right to make such award only for the period the action is pending." Smith, 4 Va. App. at 151, 354 S.E.2d at 818. Consequently, when a case is dismissed by operation of law, any *pendente lite* award ordered in that case is automatically terminated. Id. (finding that the dismissal order "by operation of law terminated" the *pendente lite* support); see also Duke v. Duke, 239 Va. 501, 504, 391 S.E.2d 77, 79, 6 Va. Law Rep. 2054 (1990) (noting that dismissal under Code § 8.01-335(B) terminates a *pendente lite* order).

Code § 8.01-335(B) states:

> ***HN5*** Any court in which is pending **[***7]** a case wherein for more than three years there **[**659]** has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

[*423] ***HN6*** This statute "enables trial courts to eliminate from their dockets cases for which there is no reasonable prospect of trial." Nash v. Jewell, 227 Va. 230, 234, 315 S.E.2d 825, 827 (1984).

In the present case, when appellant's case was dismissed under Code § 8.01-335(B), her spousal and child support under the *pendente lite* order were automatically terminated. Appellant therefore argues that the dismissal of her case without prior notice deprived her of a property right under the *pendente lite* order without due process of law.

Appellant's due process rights **[***8]** were not violated, however, because an adequate post-deprivation remedy was available to her. ***HN7*** "The deprivation of property by the random and unauthorized acts of state officials or employees in contravention of established

procedures does not offend due process requirements when adequate post-deprivation remedies exist." Fun v. Va. Military Inst., 245 Va. 249, 253, 427 S.E.2d 181, 183 (1993) (citing Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 330-31, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)).

Code § 8.01-335(B) provides that "any case dismissed under . . . this subsection may be reinstated, on motion . . . within one year from the date of such order." ***HN8*** Generally, a trial court only retains jurisdiction over a matter for 21 days after a final order in the case has been entered. Rule 1:1. The General Assembly, however, extended this jurisdiction to one year when a case is dismissed under Code § 8.01-335(B). This extension of the trial court's jurisdiction serves as an adequate post-deprivation remedy sufficient to satisfy constitutional due process concerns. See Fun, 245 Va. at 253, 427 S.E.2d at 183 (holding that a breach of contract cause of action by an employee **[***9]** who was fired from a state college served as an adequate post-deprivation remedy (citations omitted)).

Therefore, we hold that the dismissal of appellant's case under Code § 8.01-335(B) did not violate due process because **[*424]** there was an adequate post-deprivation remedy available to appellant.[2]

B. **[***10]** Dismissal Order

Appellant next contends that the trial court erred in denying her motion to vacate the dismissal order because the order was void. Specifically, appellant claims it was void because the trial court clerk did not provide her with a copy of the dismissal order as required by Code § 8.01-335(B).

Code § 8.01-335(B) states, in relevant part, that after a case is dismissed, "[t]he clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case."

[2] Our conclusion is further supported by this Court's decision in Smith, 4 Va. App. at 151-53, 354 S.E.2d at 818-19. In Smith, this Court held that a party's "right to [future] pendente lite support" was "terminated" by operation of law when the underlying case was dismissed pursuant to Code § 8.01-335(B). Id. at 151, 354 S.E.2d at 818. This Court considered the due process implications of its decision, noting that it would be a violation of due process to hold that a dismissal under Code § 8.01-335(B) removed a party's rights to *pendente lite* support which had accrued *prior* to the dismissal. Id. at 152, 354 S.E.2d at 819. This Court did not hold, however, that it was a violation of due process to remove a party's rights to *future pendente lite* support. Rather, this Court held that such future rights were, "by operation of law[,] terminated" when the underlying case was dismissed. Id. at 151, 354 S.E.2d at 818.

HN9 "There is a presumption that public officials will obey the law." Hinderliter v. Humphries, 224 Va. 439, 448, 297 S.E.2d 684, 689 (1982); see also Hladys v. Commonwealth, 235 Va. 145, 148, 366 S.E.2d 98, 100, 4 Va. Law Rep. 2083 (1988) (noting that appellate courts presume **[**660]** "that public officials have acted correctly"). "In the absence of clear evidence to the contrary, [courts] must presume that a public officer has properly discharged his official duties." Gilmore v. Landsidle, 252 Va. 388, 396, 478 S.E.2d 307, 312 (1996). Furthermore, there is a presumption "in favor of the regularity [in] the proceedings of courts [that] extends to every step . . . and the burden is on him who alleges irregularity to show affirmatively **[***11]** by the record that the irregularity exists." Dove v. Commonwealth, 82 Va. 301, 305 (1886).

[*425] In the present case, we presume that the trial court clerk properly discharged his official duties by providing a copy of the dismissal order to the parties. Appellant, however, did not present sufficient "clear evidence" to overcome this presumption. There was no testimony or affidavit from the trial court clerk indicating whether he provided the parties with a copy of the dismissal order. Further, appellant's counsel of record testified only that he never saw a copy of the dismissal order and that it was possible a secretary received it and erroneously filed or lost it. Given the absence of clear evidence to the contrary, the presumption of regularity stands, and appellant's argument fails.

Even if the trial court clerk failed to comply with Code § 8.01-335(B)'s requirements, however, the dismissal order would not be void *ab inito* as appellant contends. See Snead v. Atkinson, 121 Va. 182, 186, 92 S.E. 835, 836-37 (1917) (***HN10*** holding an order dismissing a case under an earlier, but nearly identical, version of Code § 8.01-335(B) "may be erroneous, but the error does not render it less final"); cf. **[***12]** Zedan v. Westheim, 60 Va. App. 556, 579-80, 729 S.E.2d 785, 797 (2012) (holding that although Code § 20-99.1:1 requires a trial court to provide a defendant in a divorce case with notice prior to entry of an order, a failure to provide such notice does not render the order void *ab inito*).

Furthermore, ***HN11*** the trial court, "'having by its [final] order put the cause beyond its control, cannot upon a discovery of error recall it in a summary way and resume a jurisdiction which has been exhausted.'" Snead, 121 Va. at 186,

92 S.E. at 836-37 (quoting Echols' Ex'r v. Brennan, 99 Va. 150, 152-53, 37 S.E. 786, 787 (1901)). Here, Code § 8.01-335(B) provided the trial court with jurisdiction to vacate the dismissal order for one year after it was entered, but appellant waited more than three years to move the trial court to do so. Consequently, the trial court would not have had jurisdiction to, upon discovery of the clerk's error, recall the case in a summary way to vacate its order.

[*426] Therefore, this Court holds that the trial court did not err in denying appellant's motion to vacate the dismissal order because appellant did not overcome the presumption that the trial court clerk complied with Code § 8.01-335(B)'s **[***13]** notice requirements. Regardless, a failure by the trial court clerk to comply with these requirements would not have rendered the dismissal order void.

C. Attorney's Fees

In his assignment of cross-error, appellee contends that the trial court erred in failing to award appellee attorney's fees and costs associated with opposing appellant's motion to vacate the dismissal order.

HN12 "An award of attorney's fees is a matter submitted to the sound discretion of the trial court and is reviewable on appeal only for an abuse of discretion." Graves v. Graves, 4 Va. App. 326, 333, 357 S.E.2d 554, 558, 3 Va. Law Rep. 2865 (1987). The key to determining a "proper award of [attorney's] fees is reasonableness under all the circumstances." Joynes v. Payne, 36 Va. App. 401, 429, 551 S.E.2d 10, 24 (2001).

In the present case, the trial court considered the circumstances of the case, including the distance appellee's counsel had to travel to oppose appellant's motion and the case's procedural history. After considering these circumstances, the trial court determined that "this case had to be tried . . . or at least argued." In light of the discretion allotted to the trial court in determining the award of attorney's fees, this **[***14]** Court will not disturb the trial court's finding when it properly considered the circumstances of the case. Accordingly, the Court holds that the trial court did not abuse its discretion in **[**661]** denying appellee attorney's fees and costs because the trial court properly considered all the circumstances.

III. CONCLUSION

For the foregoing reasons, this Court holds that the trial court correctly denied appellant's motion to vacate the dismissal **[*427]** order and reinstate the *pendente lite* order because 1) the dismissal order did not violate appellant's due process rights, and 2) appellant failed to overcome the presumption that the trial court clerk fulfilled Code § 8.01-335(B)'s notice requirements. Additionally, the trial court did not abuse its discretion by denying appellee's request for attorney's fees and costs. Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Muhammad v. Commonwealth

Supreme Court of Virginia

April 22, 2005, Decided

Record Nos. 041050 & 041051

Reporter

269 Va. 451; 619 S.E.2d 16; 2005 Va. LEXIS 85

JOHN ALLEN MUHAMMAD v. COMMONWEALTH OF VIRGINIA

Subsequent History: **[***1]** As Revised July 26, 2005.

US Supreme Court certiorari denied by Muhammad v. Virginia, 126 S. Ct. 2035, 164 L. Ed. 2d 794, 2006 U.S. LEXIS 3832 (U.S., 2006)

Writ of habeas corpus dismissed Muhammad v. Warden of the Sussex I State Prison, 274 Va. 3, 646 S.E.2d 182, 2007 Va. LEXIS 97 (2007)

Related proceeding at Muhammad v. State, 2007 Md. App. LEXIS 142 (Md. Ct. Spec. App., Nov. 5, 2007)

Prior History: FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY. LeRoy F. Millette, Judge.

Muhammad v. Commonwealth, 611 S.E.2d 537, 2005 Va. LEXIS 39 (Va., 2005)

Disposition: Affirmed.

Case Summary

Procedural Posture

Defendant appealed from a judgment of the Circuit Court of Prince William County (Virginia), which convicted him of two charges of capital murder and imposed two death sentences. The trial court also convicted defendant of conspiracy to commit capital murder and the illegal use of a firearm in the commission of murder.

Overview

The prosecution arose from the investigation of a series of 16 shootings over a 47-day period while the victims were engaged in everyday pursuits. The court held that the theory of the Commonwealth concerning multiple immediate perpetrators acting as principals in the first degree accurately encompassed Virginia law. The trial court did not abuse its discretion in refusing defendant's motion for a bill of particulars. Aggravating

factors were not constitutionally required to be recited in a capital murder indictment. Moreover, any error was rendered harmless by the provision of the information defendant sought in the Commonwealth's notice of intent to seek the death penalty. The terrorism statutes, Va. Code Ann. §§ 18.2-31(13) and 18.2-46.4, were not unconstitutionally overbroad and vague. By referencing established criminal offenses as acts of violence subject to the statutory scheme, the legislature included offenses with previously defined elements and mens rea requirements. The trial court did not abuse its discretion by excluding defendant's expert witness testimony concerning mitigation factors at sentencing where defendant knowingly and intelligently refused to cooperate.

Outcome

The court affirmed the judgment.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

HN1 Va. Sup. Ct. R. 5:17(c)(4) and 5:27 require that a brief contain the principles of law, the argument, and the authorities relating to each assignment of error, and further require that with respect to each assignment of error, the principles, the argument, and the authorities shall be stated in one place and not scattered through the petition.

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

HN2 Failure to adequately brief an assignment of error is considered a waiver.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN3 The appellate court reviews questions of law, and mixed questions of law and fact, utilizing a de novo standard of review.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN4 In accordance with established principles of appellate review, the appellate court states the facts in the light most favorable to the prevailing party in the trial court. The appellate court also accords the Commonwealth the benefit of all inferences fairly deducible from the evidence.

Evidence > Admissibility > Circumstantial & Direct Evidence

HN5 There is no distinction in the law between the weight or value to be given to either direct or circumstantial evidence. The finder of fact is entitled to consider all the evidence, without distinction, in reaching its determination. Circumstantial evidence is not viewed in isolation. While no single piece of evidence may be sufficient, the combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion. The appellate court will set aside the judgment only if it is clearly wrong or unsupported by the evidence.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN6 In felony cases, a principal in the first degree is the actual perpetrator of the crime. A principal in the second degree, or an aider or abettor as he is sometimes termed, is one who is present, actually or constructively, assisting the perpetrator in the commission of the crime. In order to make a person a principal in the second degree actual participation in the commission of the crime is not necessary. The test is whether or not he was encouraging, in citing, or in some manner offering aid in the commission of the crime. If he was present lending countenance, or otherwise aiding while another did the act, he is an aider and abettor or principal in the second degree.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN7 A principal in the second degree must share the criminal intent of the actual perpetrator or be guilty of some overt act.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN8 That there may be more than one principal in the first degree for a particular offense is beyond dispute: Where two people engage in criminal conduct together, as where they participate in striking and killing another, each participant is a principal in the first degree in the homicide. Likewise, where part of a crime is committed in one place and another part is committed in a different place, the author of each part is a principal in the first degree.

Criminal Law & Procedure > ... > Murder > Capital Murder > General Overview

Criminal Law & Procedure > Accessories > Accessory Before the Fact

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN9 Generally in Virginia, a principal in the second degree is subject to the same punishment as the principal in the first degree. However, with the exception of capital murder prosecutions for a killing for hire, or a killing pursuant to the direction or order of one who is engaged in a continuing criminal enterprise, or a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism, an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree. Va. Code Ann. § 18.2-18.

Criminal Law & Procedure > ... > Murder > Capital Murder > General Overview

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN10 Where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an "immediate perpetrator" for the purposes of the capital murder statutes.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN11 Conduct of two criminal actors may be such that they jointly complete the criminal act. It is not a matter of encouraging, advising, urging, or facilitating another in the commission of the crime. It is the actual participation together in a unified act that permits two or more persons to be immediate perpetrators.

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

HN12 Va. Code Ann. § 19.2-297.1 includes, among the acts of violence the offenses of first and second degree murder, voluntary manslaughter, malicious wounding, and robbery.

Criminal Law & Procedure > ... > Murder > Capital Murder > General Overview

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN13 Va. Code Ann. § 18.2-18 provides that a person convicted of capital murder under Va. Code Ann. § 18.2-31(13) is not required to be a principal in the first degree to the murder if the killing was pursuant to the direction or

order of the one who is engaged in the commission of an act of terrorism.

Criminal Law & Procedure > ... > Defendant's Rights > Right to Jury Trial > Felonies

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN14 In Virginia, if the defendant elects a jury trial, the existence of one or both aggravating factors of vileness or future dangerousness is submitted to a jury.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > General Overview

HN15 Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN16 Proceeding by indictment is not constitutionally required of the states.

Criminal Law & Procedure > ... > Accusatory Instruments > Bill of Particulars > General Overview

HN17 In Virginia, if the indictment gives a defendant sufficient notice of the nature and character of the offense charged so he can make his defense, no bill of particulars is required.

Criminal Law & Procedure > ... > Accusatory Instruments > Bill of Particulars > General Overview

HN18 A defendant is not entitled to a bill of particulars as a matter of right. Va. Code Ann. § 19.2-230 provides that a trial court may direct the filing of a bill of particulars. The trial court's decision whether to require the Commonwealth to file a bill of particulars is a matter committed to its sound discretion.

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN19 Aggravating factors are not constitutionally required to be recited in a capital murder indictment.

Criminal Law & Procedure > ... > Crimes Against Persons > Terrorism > General Overview

HN20 See Va. Code Ann. § 18.2-46.4.

Criminal Law & Procedure > ... > Impaneling Grand Juries > Selection of Jurors > General Overview

HN21 See Va. Code Ann. § 19.2-194.

Criminal Law & Procedure > ... > Impaneling Grand Juries > Selection of Jurors > General Overview

HN22 See Va. Code Ann. § 19.2-195.

Governments > Legislation > Overbreadth

HN23 In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Governments > Legislation > Overbreadth

HN24 The First Amendment doctrine of overbreadth requires proof that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep.

Governments > Legislation > Overbreadth

HN25 A successful challenge to the facial validity of a criminal statute based upon vagueness requires proof that the statute fails to provide notice sufficient for ordinary people to understand what conduct it prohibits, or proof that the statute may authorize and even encourage arbitrary and discriminatory enforcement. But one to whose conduct a statute clearly applies may not successfully challenge it for vagueness.

Criminal Law & Procedure > ... > Murder > Capital Murder > General Overview

HN26 See Va. Code Ann. § 18.2-31(13).

Criminal Law & Procedure > Accessories > Accessory Before the Fact

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

HN27 The "act of violence" reference to Va. Code Ann. § 19.2-297.1 includes a list of certain specific aggravated felonies including murder, voluntary manslaughter, mob-related felonies, malicious assault or bodily wounding, robbery, carjacking, sexual assault and arson. The combination of these statutes defines criminal conduct that constitutes a willful, deliberate and premeditated killing in the commission, or attempted commission, of one of the designated felonies with the intent to intimidate the civilian population or influence the conduct of government through intimidation. Additionally, under Va. Code Ann. § 18.2-18 the General Assembly extended the reach of criminal conduct subject to the death penalty to include a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism under the provisions of Va. Code Ann. § 18.2-31(13).

Criminal Law & Procedure > ... > Crimes Against Persons > Terrorism > General Overview

HN28 By referencing established criminal offenses as acts of violence subject to the statutory scheme in Va. Code Ann. § 18.2-46.4, the legislature included offenses with previously defined elements and mens rea requirements.

Criminal Law & Procedure > ... > Murder > Capital Murder > General Overview

Criminal Law & Procedure > Accessories > Accessory Before the Fact

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN29 The provisions of Va. Code Ann. § 18.2-18 do not extend to "aiders and abettors"; rather, it extends only to those who "direct" or "order" the killing. The criminal actor who "orders" or "directs" the killing is not unlike the criminal actor who hires another to kill and is potentially subject to the death penalty under Va. Code Ann. § 18.2-31(2). The criminal actor who "orders" or "directs" the killing shares the

intent to kill with the one who carries out the murder.

Governments > Legislation > Overbreadth

HN30 One who engages in conduct that is clearly proscribed and not constitutionally protected may not successfully attack a statute as void for vagueness based upon hypothetical conduct of others.

Criminal Law & Procedure > ... > Murder > Capital Murder > General Overview

HN31 Capital murder is a Class 1 felony punished by life imprisonment or death.

Criminal Law & Procedure > ... > Crimes Against Persons > Terrorism > General Overview

HN32 The terrorism statute provides for a penalty as a Class 2 felony if the base offense of such act of terrorism may be punished by life imprisonment, or a term of imprisonment of not less than 20 years. Va. Code Ann. § 18.2-46.5.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Accusatory Instruments > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN33 So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied. When an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Counsel > Right to Self-Representation

HN34 The right of a criminal defendant to represent himself is found in the Sixth Amendment to the Constitution of the United States. The right is not without limitations and conditions. It is reasonable, and entirely compatible with the defendant's constitution rights, to require that the right of self-representation be asserted at some time before meaningful trial proceedings have commenced, and that thereafter its exercise rests within the sound discretion of the trial court.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Counsel > Right to Self-Representation

HN35 Faretta does not require a trial judge to permit hybrid representation.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

HN36 Objections must be stated with reasonable certainty at the time of the trial court's ruling in order to be preserved for appellate review.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

HN37 Limiting the evidence that a criminal defendant may present in his defense implicates numerous constitutional rights. A defendant may, by his knowing and informed decisions, waive such rights. These rights may be as venerated as the right to a jury, the right to counsel, the right against self-incrimination, and the right to exclusion of evidence seized in an unconstitutional manner. Waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances. The right to present mitigating testimony is within the panoply of constitutional rights that may be waived by the accused.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN38 The detailed and balanced statutory scheme provided by Va. Code Ann. § 19.2-264.3:1 anticipates decisions made by the accused and the Commonwealth regarding expert mental health evaluations and testimony regarding sentencing issues in a capital murder trial. One of those circumstances arises when the defendant gives notice of intent to present certain types of testimony at sentencing. In response, the Commonwealth may request an evaluation of the defendant. The statute explicitly provides that the trial court must advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence. Va. Code Ann. § 19.2-264.3:1(F)(1). The statute explicitly provides the remedy for lack of cooperation:

the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence. Va. Code Ann. § 19.2-264.3:1(F)(2).

Criminal Law & Procedure > ... > Discovery by Defendant > Reports of Examinations & Tests > General Overview

Evidence > Admissibility > Procedural Matters > Curative Admissibility

HN39 The United States Supreme Court has recognized that the prosecution has the right to a fair rebuttal of mental health evidence presented by the defendant. If a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN40 In Brady, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Whether evidence is material and exculpatory and, therefore, subject to disclosure under Brady is a decision left to the prosecution. Inherent in making this decision is the possibility that the prosecution will mischaracterize evidence, albeit in good faith, and withhold material exculpatory evidence which the defendant is entitled to have under the dictates of Brady. If the defendant does not receive such evidence, or if the defendant learns of the evidence at a point in the proceedings when he cannot effectively use it, his due process rights as enunciated in Brady are violated.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN41 Exculpatory evidence is material if there is a reasonable probability that the outcome of the proceeding would have been different had the evidence been disclosed to the defense. A "reasonable probability" is one which is sufficient to undermine confidence in the outcome of the proceeding.

Evidence > Admissibility > Demonstrative Evidence

HN42 The use of demonstrative evidence to illustrate testimony is a matter entrusted to the sound discretion of the trial court.

Evidence > Inferences & Presumptions > Inferences

HN43 It is an axiom of law and human behavior that one may infer that a person intends to produce the consequences reasonably anticipated from his acts.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

HN44 In order to preserve an issue for appeal, an objection must be made with sufficient specificity and must be timely. Va. Sup. Ct. R. 5:25 requires that an objection be made with sufficient specificity to enable the trial judge to rule intelligently and, thus, to avoid unnecessary reversals on appeal. Absent such objection, the issue will not be considered for the first time on appeal.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview

HN45 A jury is presumed to have followed the instructions of the trial court.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

HN46 The appellate court will not notice error which has been invited by the party seeking to take advantage thereof on appeal.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN47 Aggravated battery under Va. Code Ann. § 19.2-264.2 is a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN48 The clear language of Va. Code Ann. § 19.2-264.2 demonstrates that the term "vileness" includes three separate and distinct factors, with proof of any one factor being sufficient to support a finding of vileness and hence a sentence of death. Those factors are

torture, depravity of mind, or aggravated battery to the victim.

Counsel: *Peter Greenspan*; *Jonathan Shapiro* (*Christie A. Leary*; *Greenspun & Mann*, on briefs), for appellant.

Katherine P. Baldwin, *Senior Assistant Attorney General*; *Robert Q. Harris*, *Senior Assistant Attorney General*, (*Jerry W. Kilgore*, *Attorney General*, on brief), for appellee.

Judges: OPINION BY JUSTICE DONALD W. LEMONS. JUSTICE KINSER, concurring. JUSTICE AGREE, with whom JUSTICE LACY and JUSTICE KOONTZ join, dissenting in part and concurring in part.

Opinion by: DONALD W. LEMONS

Opinion

[*467] [24]** Present: All the Justices.

In these appeals, we consider two capital murder convictions and two death sentences imposed upon John Allen Muhammad ("Muhammad"), along with his convictions for conspiracy to commit capital murder and the illegal use of a firearm in the commission of murder. This prosecution arose from the investigation of a series of sixteen shootings, including ten murders that occurred in Alabama, Louisiana, Maryland, Washington, D.C., and Virginia over a 47-day period from September 5 to October 22, 2002. For the reasons discussed herein, the judgment of the trial court and the sentences of death will be affirmed.

I. Facts and Proceedings Below

A. Facts

On the morning of Wednesday, October 9, 2002, Dean H. Meyers ("Meyers") was shot and killed while fueling his car at the Sunoco gas station on Sudley Road in Manassas, Virginia. Meyers was shot **[***2]** in the head by a single bullet. The bullet entered behind his left ear, where it fragmented into multiple small pieces. The bullet fragments shattered the temporal bone and the fragments of bullet **[**25]** and bone then traveled through his brain and caused multiple fractures of his skull. This gunshot wound was consistent with injuries from a bullet fired from a high velocity

rifle, [1] and was the cause of Meyers' death. **[*468]** Evidence at trial established that the bullet came from the .223 caliber Bushmaster rifle Muhammad possessed when he was arrested. An eyewitness testified that she saw Muhammad and Lee Boyd Malvo ("Malvo") in the vicinity of the shooting approximately one hour beforehand. Police interviewed Muhammad immediately after the shooting in a parking lot across the street from where Meyers was shot. In both encounters, Muhammad was driving a Chevrolet Caprice ("Caprice") in which he was later arrested. Muhammad's fingerprints were on a map police found in the parking lot where Muhammad had been interviewed.

[*3]** Meyers was killed during a 47-day period, from September 5 to October 22, 2002, in which nine others were murdered and six more suffered gunshot wounds as a result of the acts of Muhammad and Malvo in concert. The murder of Meyers was the twelfth of these sixteen shootings.

The first shooting occurred in Clinton, Maryland on September 5, 2002. Paul J. LaRuffa ("LaRuffa"), the owner of Margellina's Restaurant, left the restaurant at closing and proceeded to his car with his briefcase and Sony portable computer. Inside the briefcase were bank deposit bags that contained $ 3,500 in cash and credit card receipts from that evening. LaRuffa placed the briefcase and laptop on the backseat of his car, and then sat behind the steering wheel. He testified that, almost immediately after he sat down, he saw a figure to his left and a flash of light. He heard gunshots and the driver's side window shattered. When he stepped out of his car, he realized he had been shot. The trauma surgeon who treated him testified that LaRuffa was shot six times: once in the back left side of his neck, three times in the left side of his chest, and twice in his left arm.

An employee who left the restaurant with **[***4]** LaRuffa, Paul B. Hammer ("Hammer"), witnessed the shooting and called "911." Hammer testified that he saw a "kid" run up to LaRuffa's car, fire shots into it, and then open the rear door and take the briefcase and portable computer. He was unable to provide a detailed description because of lighting

[1] Throughout the trial, various witnesses and counsel made references to a high velocity rifle, high velocity weapon, and high velocity bullet, cartridge, or load. The technical distinctions between these terms are insignificant to the analysis in this opinion.

conditions, but testified that the shooter was a male in his late teens or early twenties. The briefcase and empty bank deposit bags, along with a pair of pants and a shirt, were found six weeks later in a wooded area about a mile from the shooting. Hair on the clothing yielded DNA that was consistent with Malvo's DNA.

Four days later, on September 9, Muhammad purchased a 1990 Caprice automobile from Christopher M. O'Kupski ("O'Kupski") in **[*469]** Trenton, New Jersey. O'Kupski testified that before the purchase, Muhammad got into the trunk and lay down. O'Kupski also testified that, when Muhammad purchased it, the Caprice did not have a hole in the trunk or a passageway from the backseat to the trunk; the trunk was not spray-painted blue; and the windows were not tinted.

The second shooting occurred in Clinton, Maryland on September 15, 2002. Muhammad Rashid ("Rashid") was closing the Three Roads **[***5]** Liquor Store. Rashid testified that he noticed the Caprice outside the store shortly before closing. He testified that he was in the process of locking the front door from the outside when he heard gunshots from behind him. At the same time, a young man with a handgun rushed towards Rashid and shot Rashid in the stomach. At trial, Rashid identified Malvo as the person who shot him. Two bullets were removed from inside the store. The bullets had been shot through the front door and the trajectory of the bullets placed the shooter in a field across the street from the store.

The third and fourth shootings occurred in Montgomery, Alabama on September 21, 2002. Claudine Parker ("Parker") and Kelly Adams ("Adams") closed the Zelda Road ABC Liquor Store and walked out. They **[**26]** were shot immediately. Parker died as a result of a single gunshot wound that entered her back, transected her spinal cord, and passed through her lung. Adams was shot once through her neck, but lived. The bullet exited through her chin, breaking her jaw in half, shattering her face and teeth, paralyzing her left vocal cord, and severing major nerves to her left shoulder. Both gunshot wounds were consistent with injuries **[***6]** caused by a high velocity rifle. Testing revealed that the bullet fragments recovered from the Parker shooting were fired from a Bushmaster rifle possessed by Muhammad when he was arrested.

As the rifle shots were fired, a young man, later identified as Malvo, ran up to Parker and

Adams. A police car happened to pass the scene immediately after the shots were fired. A police officer observed Malvo with a handgun. He was going through the women's purses. The officer and another eyewitness chased Malvo. Although he escaped, Malvo dropped an "ArmorLite" gun catalogue during the chase. At trial, both the officer and the other eyewitness identified Malvo as the young man with the handgun who fled the scene. Additionally, Malvo's fingerprints were on the "ArmorLite" gun catalogue he dropped during the chase. The handgun Malvo carried that evening, a .22 caliber stainless steel revolver, was found in the stairwell of an apartment building that Malvo ran through during the **[*470]** chase. Forensic tests determined that this .22 caliber revolver was the same gun used to shoot both LaRuffa and Rashid.

The fifth shooting occurred in Baton Rouge, Louisiana on September 23. Hong Im Ballenger ("Ballenger"), **[***7]** the manager of the Beauty Depot store, closed the store for the evening. As she was walking to her car, she was shot once in the head with a bullet fired from a high velocity rifle. Ballenger died as the result of the single shot. The bullet entered the back of her head and exited through her jawbone. The wound caused massive bleeding and compromised her airway. Ballistic tests determined that the bullet fragments recovered from Ballenger were fired from the Bushmaster rifle possessed by Muhammad when he was arrested. An eyewitness saw a young man leave the scene with Ballenger's purse. At trial, this young man was identified as Malvo. Another eyewitness saw Malvo flee the scene with Ballenger's purse and get into the Caprice.

The sixth shooting occurred in Silver Spring, Maryland on October 3, 2002. At approximately 8:15 a.m., Premkumar A. Walekar ("Walekar") was fueling his taxicab. He was shot once with a bullet from a high velocity rifle. The bullet passed through his left arm and then entered his chest, where it broke two ribs, shredded portions of his lungs, and damaged his heart. A physician, who was fueling her car next to Walekar, attempted CPR but was unsuccessful. Ballistic **[***8]** tests established that bullet fragments recovered from the Walekar shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The seventh shooting occurred in Silver Spring, Maryland on October 3, 2002. At

approximately 8:30 a.m., Sarah Ramos ("Ramos") was sitting on a bench in front of the Crisp & Juicy Restaurant in the Leisure World Shopping Center. She was shot once with a bullet from a high velocity rifle. The bullet entered the front of her head and exited through her spinal cord at the top of her neck. An eyewitness identified the Caprice at the scene prior to the shooting. Bullet fragments recovered from the Ramos shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The eighth shooting occurred in Kensington, Maryland on October 3, 2002. At approximately 10:00 a.m., Lori Lewis-Rivera ("Lewis-Rivera") was vacuuming her car at the Shell gas station on the corner of Connecticut Avenue and Knowles Avenue. She was shot once in the back by a bullet from a high velocity rifle as she vacuumed her car. An eyewitness testified that he saw the Caprice in **[*471]** the vicinity of the gas station approximately 20 minutes before **[***9]** the shooting. Bullet fragments recovered from the Lewis-Rivera shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

[27]** The ninth shooting occurred in Washington, D.C. on October 3, 2002. At approximately 7:00 p.m., a police officer stopped Muhammad for "running" two stop signs. The police officer testified that the windows of the Caprice were heavily tinted and that he could not see anyone else in the car. The police officer gave Muhammad a verbal warning and let him go.

At approximately 9:15 p.m. on that day, Paschal Charlot ("Charlot") was shot in the chest as he crossed the intersection of Georgia Avenue and Kalmia Road. This intersection was about 30 blocks from where the police officer stopped Muhammad. The bullet entered Charlot's chest and shattered his collarbone and three ribs before lacerating his lungs. Charlot died before emergency personnel arrived. Eyewitnesses testified that they saw the Caprice at the scene at the time of the shooting, and that the driver drove away without its headlights on immediately after the shooting. It had been parked in a space on the street with its trunk positioned toward Georgia Avenue. One eyewitness testified **[***10]** that he saw a flash of light from the Caprice at the time the shot was fired. Ballistics tests determined that the bullet fragments recovered

from the Charlot shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The tenth shooting occurred in Fredericksburg, Virginia on October 4, 2002. Caroline Seawell ("Seawell") had finished shopping at a Michael's Craft Store, and was putting her bags in her minivan, when she was shot once in the back by a bullet from a high velocity rifle. The bullet severely damaged her liver and exited through her right breast. Seawell survived the shooting. An eyewitness testified that he saw the Caprice in the parking lot at the time of the shooting. Ballistics tests determined that the bullet fragments recovered from the Seawell shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The eleventh shooting occurred in Bowie, Maryland on October 6, 2002. Tanya Brown ("Tanya") took Iran Brown ("Brown") to Tasker Middle School. As Brown was walking on the sidewalk to the school, he was shot once in the chest by a bullet from a high velocity rifle. Tanya decided not to wait for emergency **[***11]** personnel and drove Brown to a health care center. Brown's lungs were damaged, there was a large hole in his diaphragm, the left lobe of his liver was damaged, **[*472]** and his stomach, pancreas, and spleen were lacerated by bullet fragments. Surgeons were able to save Brown's life and he spent eight weeks recovering in the hospital.

Two eyewitnesses testified that they saw the Caprice in the vicinity of Tasker Middle School the day before the shooting and the morning of the shooting. One of these eyewitnesses positively identified both Muhammad and Malvo in the Caprice the morning of the shooting. They were seen in the Caprice which was parked at an intersection with a line of sight to the school. Following the shooting, police searched the surrounding area and found a ballpoint pen and a shell casing in the woods next to the school. The pen and shell casing were located in an area that had been patted down like a hunting blind. This blind offered a clear line of sight to the scene of the shooting. Tissue samples from the pen matched Muhammad's DNA. The shell casing had been fired by the Bushmaster rifle possessed by Muhammad when he was arrested, and tests determined that the bullet fragments **[***12]** recovered from Brown were fired from that rifle.

In the woods, police also found the first communication from Muhammad and Malvo. A tarot card, the one for death, was found with handwriting that stated, "Call me God." On the back of the card was handwriting that stated, "For you, Mr. Police. Code: Call me God. Do not release to the Press."

The twelfth shooting, discussed above, was the murder of Dean Meyers in Manassas, Virginia on October 9, 2002.

The thirteenth shooting occurred in Massaponax, Virginia on October 11, 2002. Kenneth Bridges ("Bridges") was at an Exxon gas station on Jefferson Davis Highway. He was shot once in the chest by a bullet from a high velocity rifle. The bullet damaged his lungs and heart, causing fatal internal injuries. Two eyewitnesses testified that they saw the Caprice at or near the Exxon station **[**28]** on the morning of the shooting. Ballistics tests determined that the bullet fragments recovered from the Bridges shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The fourteenth shooting occurred in Falls Church, Virginia on October 14, 2002. Linda Franklin ("Franklin") and her husband were shopping at a Home Depot **[***13]** store. As they loaded their purchases in their car, Franklin was shot and killed by a single bullet from a high velocity rifle. The bullet entered the left side of her head, passed through her brain and skull, and exited from the right side of her head. An off-duty police officer testified that she saw Malvo driving the Caprice in the vicinity of the shooting immediately **[*473]** after it occurred. Tests determined that bullet fragments recovered from the Franklin shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

On October 15, the day after Franklin was murdered, a Rockville, Maryland police dispatcher received a telephone call in which the caller stated:

> Don't say anything, just listen, we're the people who are causing the killings in your area. Look on the tarot card, it says, "call me God, do not release to press." We've called you three times before trying to set up negotiations. We've gotten no response. People have died.

The dispatcher attempted to transfer the call to the Sniper Task Force, but the caller hung

up.

Three days later, on October 18, Officer Derek Baliles ("Officer Baliles"), a Montgomery County, Maryland Police **[***14]** Information Officer, received a telephone call. The caller told Officer Baliles to "shut up" and stated that he knew who was doing the shootings, but wanted the police officer to verify some information before he talked further. The caller told Officer Baliles to verify information concerning a shooting at a liquor store near "Ann Street." The caller gave Officer Baliles the name and telephone number of a police officer in Alabama. Officer Baliles confirmed the shootings of Parker and Adams. The caller called Officer Baliles again. Officer Baliles told him that he had verified the information concerning the shootings of Parker and Adams. The caller then said that he had to find more coins for the call and had to find a telephone without surveillance and then hung up.

On the same day, William Sullivan ("Sullivan"), a priest in Ashland, Virginia, received a telephone call from two people. The first voice, a male, told him someone wanted to speak with him. Sullivan testified that a second male voice, told him that "the lady didn't have to die," and "it was at the Home Depot." The second voice also told him about a shooting at a liquor store in Alabama and then said, "Mr. Policeman, I **[***15]** am God. Do not tell the press." The second voice concluded by telling Sullivan to give this information to the police.

The fifteenth shooting occurred in Ashland, Virginia on October 19, 2002. Jeffrey Hopper ("Hopper") and his wife stopped in Ashland to fuel their car and eat dinner. They left the restaurant and were walking to their car when Hopper was shot in the abdomen. Hopper **[*474]** survived the shooting, but underwent five surgeries to repair his pancreas, stomach, kidneys, liver, diaphragm, and intestines. In the woods near the shooting, police found a hunting-type blind similar to the one found at the Brown shooting. At the blind, police found a shell casing, a plastic sandwich bag attached to a tree with a thumbtack at eye level that was decorated with Halloween characters and self-adhesive stars, and a candy wrapper. Tests determined that the shell casing and bullet fragments recovered from the Hopper shooting came from the Bushmaster rifle possessed by Muhammad when he was arrested. Surveillance videotapes identified Muhammad in a Big Lots Store on October 19,

2002 near the shooting from which the plastic sandwich bag and decorations were likely obtained. The candy wrapper contained **[***16]** both Malvo's and Muhammad's DNA.

Police also found a handwritten message in the plastic sandwich bag that read:

> For you Mr. Police. "Call me God." Do not release to the Press.
>
> We have tried to contact you to start negotiation . . . These people took our call **[**29]** for a Hoax or Joke, so your failure to respond has cost you five lives.
>
> If stopping the killing is more important than catching us now, then you will accept our demand which are non-negotiable.
>
> (i) You will place ten million dollar in Bank of america account . . . We will have unlimited withdrawl at any atm worldwide. You will activate the bank account, credit card, and pin number. We will contact you at Ponderosa Buffet, Ashland, Virginia, tel. # . . . 6:00 am Sunday Morning. You have until 9:00 a.m. Monday morning to complete transaction. "Try to catch us withdrawing at least you will have less body bags."
>
> (ii) If trying to catch us now more important then prepare you body bags.
>
> If we give you our word that is what takes place.
>
> "Word is Bond."
>
> P.S. Your children are not safe anywhere at anytime.

The note was not found until after the deadline had passed. The day after Hopper was shot at the Ponderosa, an **[***17]** FBI agent operating the "Sniper Tip Line" received a call from a young male who said, "Don't talk. Just listen. Call me God. I left a message for you at the **[*475]** Ponderosa. I am trying to reach you at the Ponderosa. Be there to take a call in ten minutes."

On October 21, 2002, an FBI agent received a call to the FBI negotiations team which had been re-routed from the Ponderosa telephone number referenced in the note left after the Hopper shooting. A recorded voice stated:

> Don't say anything. Just listen. Dearest police, Call me God. Do not release to the press. Five red stars. You have our terms. They are non-negotiable. If you choose Option 1, you will hold a press conference stating to the media that you believe you have caught the sniper like a duck in a

noose. Repeat every word exactly as you heard it. If you choose Option 2, be sure to remember we will not deviate. P.S. - Your children are not safe.

The sixteenth shooting occurred in Aspen Hill, Maryland on October 22, 2002. At approximately 6:00 a.m., Conrad Johnson ("Johnson"), a bus driver for the Montgomery County Transit Authority, was shot in the chest at the entrance to his bus. Johnson remained conscious until **[***18]** rescue workers arrived, but died at the hospital. A single high velocity rifle bullet killed Johnson. The bullet entered his right chest, and caused massive damage to his diaphragm, liver, pancreas, kidneys, and intestines. Tests determined that the bullet fragments recovered from the Johnson shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested. A hunting-type blind, similar to those found at the Brown and Hopper shootings, was found in the woods near where Johnson was shot. A black duffle bag and a left-handed glove were found. A hair from the duffle bag yielded DNA that matched Muhammad's DNA. The police also found another plastic sandwich bag which contained a note and self-adhesive stars.

Muhammad and Malvo were captured and arrested on October 24, 2002, by agents of the FBI at a rest area in Frederick County, Maryland. They were asleep in the Caprice at the time of their capture. Inside the Caprice, police found a loaded .223 caliber Bushmaster rifle behind the rear seat. Tests determined that the DNA on the Bushmaster rifle matched the DNA of both Malvo and Muhammad. The only fingerprints found on the Bushmaster rifle were those of Malvo.

[*19]** **[*476]** The Caprice had been modified after Muhammad purchased it from O'Kupski. The windows were heavily tinted. The rear seat was hinged, providing easy access to the trunk from the passenger compartment. The trunk was spray-painted blue. A hole had been cut into the trunk lid, just above the license plate. The hole was blocked by a right-handed brown glove that matched the left-handed glove found in the woods near the Johnson shooting. The trunk also had a rubber seal that crossed over the hole.

Inside the Caprice, police found a global positioning system (GPS) receiver, a magazine about rifles, an AT&T telephone charge card, ear plugs, maps, plastic sandwich bags, a rifle scope, .223 caliber ammunition,

"walkie-talkies," a digital voice recorder, **[**30]** a receipt from a Baton Rouge, Louisiana grocery store dated September 27, 2002, an electronic organizer, a plastic bag from a Big Lots Store, a slip of paper containing the Sniper Task Force phone number, and a list of schools in the Baltimore area.

Police also found LaRuffa's portable computer in the Caprice. Muhammad had loaded software entitled "Microsoft Streets and Trips 2002" onto this computer on September 29, 2002. In this program, **[***20]** there were various maps showing particular routes and places marked with icons, some with a skull and crossbones. Icons had been added to mark the places where Walekar, Lewis-Rivera, Seawell, Brown, Meyers and Franklin were shot. There was also a Microsoft Word file titled "Allah8.rtf" that contained portions of the text communicated to police in the extortion demands.

B. Proceedings Below

Subsequent to his arrest on October 24, 2002, Muhammad was indicted by a grand jury on October 28, 2002, for the capital murder of Meyers in the commission of an act of terrorism, Code §§ 18.2-31(13) and 18.2-46.4; capital murder of Meyers and at least one other person within a three-year period, Code § 18.2-31(8); conspiracy to commit capital murder, Code §§ 18.2-22 and 18.2-32; and illegal use of a firearm in the commission of capital murder, Code § 18.2-53.1.

Muhammad waived his right to a speedy trial on November 13, 2002. Upon motion by Muhammad, and without objection by the Commonwealth, venue was changed from the Circuit Court of Prince William County to the Circuit Court of the City of Virginia Beach.

From October 20 through November 17, 2003, Muhammad was tried before a jury in the **[***21]** Circuit Court of the City of Virginia Beach. **[*477]** The jury convicted Muhammad of all charges in the grand jury indictments. In a separate sentencing proceeding from November 17 through November 24, 2003, the jury sentenced Muhammad to two death sentences for the capital murder convictions, finding both the future dangerousness and vileness aggravating factors. The jury also sentenced Muhammad to 13 years in prison upon the remaining convictions. At the conclusion of the sentencing proceeding, venue was transferred back to the Circuit Court of Prince William County.

On March 9, 2004, the trial court imposed the two death sentences and the sentences of imprisonment as fixed by the jury. A final sentencing order was entered on March 29, 2004.

Muhammad noted appeals of his convictions. On May 7, 2004, this Court certified Muhammad's appeals of his non-capital convictions under Code § 17.1-409 for consolidation with the appeals of his capital murder convictions and the review mandated by Code § 17.1-313.

We will recite additional facts and incidents of trial as necessary in context as specific assignments of error are considered.

II. Preliminary Issues

A. Issues Abandoned or Waived

[*22]** Muhammad advances 102 assignments of error in his appeal. The Commonwealth maintains that Muhammad failed to sufficiently argue in his brief assignments of error 33, 34, 43, 45, 47, 52, 53, 68, 70, 78, 79, 80, 82, 83, 88, and 96. ***HN1*** Rules 5:17(c)(4) and 5:27 require that a brief contain "the principles of law, the argument, and the authorities relating to each assignment of error," and further require that "with respect to each assignment of error, the principles, the argument, and the authorities shall be stated in one place and not scattered through the petition." In his reply brief, Muhammad contests the Commonwealth's assertion only as to assignments of error 43, 52, 78, 79, 80, 81, and 83. [2] Accordingly, assignments of error 33, 34, 45, 47, 53, 68, 70, 82, 88, and 96 are waived. Consequently, we will consider only assignments of error 43, 52, 78, 79, 80 and 83 as being in controversy.

Assignment of error 43 pertains to the admission **[***23]** of crime scene and autopsy photographs. Assignment of error 52 refers to testimony of Officer Cindy Martin concerning **[**31]** her observations of "brain matter" at the scene of the Ramos shooting. With respect to **[*478]** both of these assignments, there is insufficient argument in the brief. Having been directed by Muhammad to particular page citations where he claims to have presented these arguments, we agree with the Commonwealth's observation that Muhammad merely restates his assignment of error and makes reference to pages in the appendix

[2] The Commonwealth did not claim that Muhammad waived assignment of error 81.

where his trial court arguments can be found. We have previously held that such a practice is improper and is insufficient to meet the requirements of our Rules. Schmitt v. Commonwealth, 262 Va. 127, 138, 547 S.E.2d 186, 194 (2001), cert. denied, 534 U.S. 1094, 151 L. Ed. 2d 719, 122 S. Ct. 840 (2002). ***HN2*** Failure to adequately brief an assignment of error is considered a waiver. Powell v. Commonwealth, 267 Va. 107, 135, 590 S.E.2d 537, 554, cert. denied, 160 L. Ed. 2d 157, 543 U.S. 892, 125 S. Ct. 86 (2004). Therefore, assignments 43 and 52 are deemed waived.

The remaining assignments of error claimed **[***24]** by the Commonwealth to be waived by lack of argument pertain to unadjudicated criminal conduct evidence presented at the bifurcated sentencing proceeding. Assignment of error 78 refers to evidence of the killing of Kenya Cook in Tacoma, Washington. Assignment of error 79 refers to a shooting into Temple Beth El Synagogue in Tacoma, Washington. Assignment of error 80 refers to testimony about the presence of a .308 caliber rifle found pointing to a particular apartment in Tacoma, Washington. Assignment of error 83 refers to evidence of a sharpened spoon handle in Muhammad's cell in the Prince William County jail.

For each of these assignments of error related to unadjudicated criminal conduct, Muhammad cites pages in the section of his brief entitled "Statement of Facts" and one page in the "Argument" section of his brief. The references in the "Statement of Facts" are to arguments made in the trial proceeding. Even giving Muhammad the benefit of examining additional pages of his brief not referred to as the location of his argument, Muhammad does not make particularized arguments in his brief concerning each of the categories of evidence he finds objectionable, except for evidence **[***25]** of the alleged escape attempt contained in assignment of error 81, which the Commonwealth agrees was not waived. Assignments of error 80 and 83 raise issues of lack of notice of presentation of unadjudicated criminal conduct; however, there is no argument of the question in the brief itself. Assignments of error 78, 79, 80, and 83 are not sufficiently argued in the brief. We will not consider them. Rule 5:17(c)(4); Rule 5:27; Elliott v. Commonwealth, 267 Va. 396, 422, 593 S.E.2d 270, 286 (2004), cert. denied, 160 L. Ed. 2d 825, 543 U.S. 1081, 125 S. Ct.

[*479] 875 (2005); Williams v. Commonwealth, 248 Va. 528, 537, 450 S.E.2d 365, 372 (1994), cert. denied, 515 U.S. 1161, 132 L. Ed. 2d 858, 115 S. Ct. 2616 (1995).

B. Sufficiency of the Commonwealth's Capital Murder Theories and of the Evidence to Support These Theories

We first address the dominant issue presented in this case, namely the legal viability of the Commonwealth's theories of capital murder and the sufficiency of the evidence to support its theories. Muhammad's assignments of error 63-69, 71-74, 97, and 102, present these issues. ***HN3*** We review questions **[***26]** of law, and mixed questions of law and fact, utilizing a de novo standard of review. Quatannens v. Tyrrell, 268 Va. 360, 365, 601 S.E.2d 616, 618 (2004), McCain v. Commonwealth, 261 Va. 483, 489-90, 545 S.E.2d 541, 545 (2001).

HN4 In accordance with established principles of appellate review, we state the facts in the light most favorable to the Commonwealth, the prevailing party in the trial court. We also accord the Commonwealth the benefit of all inferences fairly deducible from the evidence. Riner v. Commonwealth, 268 Va. 296, 303-04, 601 S.E.2d 555, 558-59 (2004), Armstrong v. Commonwealth, 263 Va. 573, 576, 562 S.E.2d 139, 140 (2002); Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975).

HN5 There is no distinction in the law between the weight or value to be given to either direct or circumstantial evidence. The finder of fact is entitled to consider all the evidence, without distinction, in reaching its **[**32]** determination. Commonwealth v. Hudson, 265 Va. 505, 512-13, 578 S.E.2d 781, 785, cert. denied, 540 U.S. 972, 157 L. Ed. 2d 322, 124 S. Ct. 444 (2003). Circumstantial **[***27]** evidence is not viewed in isolation. While no single piece of evidence may be sufficient, the combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion. Id. at 514, 578 S.E.2d at 786. We will set aside the judgment only if it is clearly wrong or unsupported by the evidence. Powell v. Commonwealth, 268 Va. 233, 236, 602 S.E.2d 119, 120-21 (2004).

The jury found Muhammad guilty of capital murder under two separate provisions of Virginia law: Code § 18.2-31(8) for the "willful, deliberate, and premeditated killing of more

than one person within a three-year period;" and Code § 18.2-31(13) for the "willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism." Among the challenges made, Muhammad argues that the trial court erred in permitting a legally flawed "triggerman" theory to be **[*480]** presented to the jury as a result of various rulings and instructions. Muhammad further argues that, even under the Commonwealth's theory, the evidence was insufficient to prove that he was the so-called "triggerman. **[***28]** " Also, Muhammad challenges the sufficiency of the evidence to support his capital murder conviction based upon acts of terrorism. His constitutional challenges to the capital murder statute based upon terrorism are addressed elsewhere in this opinion.

1. Capital Murder Conviction Based Upon

Murder of More Than One Person in Three Years

(a) Sniper Team Theory

The Commonwealth introduced the testimony of Sergeant Major Mark Spicer ("Spicer") of the British Armed Forces as an expert in sniper methodology. His testimony and the direct and circumstantial evidence presented to the jury are more than sufficient to support, beyond a reasonable doubt, Muhammad's conviction for the capital murder of Dean Meyers and others within three years.

Spicer testified that "sniping is the ability of two men to go out and inflict injuries or kill people and more importantly spread terror across a much larger force." While acknowledging that a sniper can act alone or in a team of three, he stated, "the basic unit for a sniper team . . . is . . . a two-man unit." Spicer testified at length about the distinct responsibilities of each member of a two-man sniper unit. Essentially, one member of the team **[***29]** is the long-range shooter occupying an obscured position with the opportunity to shoot a particular victim. Because of the intensity and discipline required to take advantage of the narrow window of opportunity to take the long-range shot, the other member of the team, the "spotter," informs the long-range shooter by radio that the victim is coming within the zone of potential fire and that other circumstances are ripe for the shot. The "spotter" may ultimately give the order to shoot.

Spicer connected the evidence found by police investigators in this case to the tools and methods ordinarily used by a sniper team. The .223 caliber Bushmaster rifle used in at least ten of the shootings, including Dean Meyers, is equivalent to the M4 rifle used by military snipers. Additionally, sniper teams use tools such as those found in the Caprice: a bipod support system for support of the rifle; holographic and telescopic scopes to aid sighting; GPS equipment to locate and relocate a vantage point for the long-range shot; "walkie-talkie" handheld radio sets for communication; pocket recording **[*481]** equipment for recording data in the dark, bungee cords for easy "break down" of the rifle for transportation; **[***30]** maps; silencers.

Spicer also testified about the methodology of a sniper team which was supported by the evidence in this case. Spicer emphasized the constant training with the rifle to maintain skills, the creation of a camouflaged location for firing, the use of existing traffic to facilitate escape, and the "team" approach with a "spotter" who is armed with a handgun and may additionally participate in the assault by firing from close range.

With regard to the Caprice, Spicer testified about the alterations made to it to facilitate **[**33]** the methodology of the sniper team. The rear firewall had been removed from the Caprice to provide entry into the trunk from the passenger compartment. The trunk compartment had been spray-painted a dark color to minimize contrast and shadow to avoid detection in the event the trunk was opened.

Finally, Spicer gave particular significance to the peculiar hole placed in the back of the trunk lid that enlarged the field of vision while minimizing the ability to see the person in the trunk. He referred to this special process as implementing the "castle principle" making reference to ancient methods of protecting the castle while minimizing danger to **[***31]** the shooter and maximizing the range of fire.

The Commonwealth presented compelling evidence that such a sniper team methodology was used by Muhammad and Malvo in multiple shootings prior to and after the murder of Dean Myers. Perhaps no one or two incidents could reasonably confirm the use of this methodology by the two perpetrators of this unique criminal enterprise. But in its entirety, the weight of the direct and circumstantial evidence in the case is sufficient to prove that

Muhammad and Malvo acted together as a sniper team.

(b) Jury Instructions on Multiple

Homicide Theory of Capital Murder

Muhammad was convicted under Code § 18.2-31(8), of the willful, deliberate, and premeditated killing of Dean Meyers and others within a three-year period. He maintains, "Only the immediate perpetrator of a homicide, the one who fired the fatal shot, and not an accessory before the fact or a principal in the second degree, may be convicted of capital murder." He claims that under the Commonwealth's theory of the case, Muhammad could never be the "triggerman" as defined in our cases.

> **[*482]** It is well-established that ***HN6*** in felony cases:
>
> A principal in the first degree is the actual **[***32]** perpetrator of the crime. A principal in the second degree, or an aider or abettor as he is sometimes termed, is one who is present, actually or constructively, assisting the perpetrator in the commission of the crime. In order to make a person a principal in the second degree actual participation in the commission of the crime is not necessary. The test is whether or not he was encouraging, in citing, or in some manner offering aid in the commission of the crime. If he was present lending countenance, or otherwise aiding while another did the act, he is an aider and abettor or principal in the second degree.

Jones v. Commonwealth, 208 Va. 370, 372-73, 157 S.E.2d 907, 909 (1967). ***HN7*** A principal in the second degree "must share the criminal intent of the actual perpetrator or be guilty of some overt act." Hall v. Commonwealth, 225 Va. 533, 536, 303 S.E.2d 903, 904 (1983). ***HN8*** That there may be more than one principal in the first degree for a particular offense is beyond dispute:

> Where two people engage in criminal conduct together, as where they participate in striking and killing another, each participant is a principal in the first degree **[***33]** in the homicide. Likewise, where part of a crime is committed in one place and another part is committed in a different place, the author of each part is a principal in the first degree.

1 Wharton's Criminal Law § 30 (15th ed. 1993).

HN9 Generally in Virginia, a principal in the second degree is subject to the same punishment as the principal in the first degree. Taylor v. Commonwealth, 260 Va. 683, 687-88, 537 S.E.2d 592, 594 (2000). However, with the exception of capital murder prosecutions for a killing for hire, or a killing pursuant to the direction or order of one who is engaged in a continuing criminal enterprise, or a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism, "an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree." Code § 18.2-18. Accordingly, pursuant to the charge of capital murder based upon killing of two or more persons within a three-year period, the Commonwealth **[**34]** **[*483]** must prove that Muhammad was a principal in the first degree.

[*34]** The euphemism, "triggerman," is inadequate to describe the breadth of criminal responsibility subject to the death penalty in Virginia. Immediately and obviously, capital murder cases are not confined to murders completed by the instrumentality of a firearm. Recognizing this inadequacy, our capital murder cases routinely use the term "immediate perpetrator" as the appropriate descriptive term. The term is not new, having been used as early as 1880 in our case law. Mitchell v. Commonwealth, 74 Va. (33 Gratt.) 845, 868 (1880).

Muhammad argues in assignments of error 66 and 69 that the trial court erred in giving instructions 4 (capital murder finding instruction) and 9 (defining principals in the first and second degree), and further argues in assignments of error 71 and 73 that the trial court erred in refusing to give his proffered instruction J (concerning multiple killings) and L (concerning the definition of a principal in the first and principal in the second degree). Muhammad's quarrel with the instructions is a function of his disagreement over the scope of the concept of "immediate perpetrator" for the purposes of the capital murder statutes. He further argues **[***35]** that the instructions at issue confuse the concept of principal in the first degree with the requirements of principal in the second degree and undermine the concept of "aiding and abetting."

Instruction 4 required Muhammad to be a "principal in the first degree, as defined in

Instruction No. 9" for the jury to convict for capital murder. The pertinent part of Instruction 9 states:

> A principal in the first degree is the immediate perpetrator of the offense. Where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an immediate perpetrator for the purpose of proving capital murder.
>
> The principal in the second degree is a person who is present, aiding and abetting, by helping in some way in the commission of the crime. Presence and consent alone are not sufficient to constitute aiding and abetting. It must be shown the Defendant, John Allen Muhammad, intended his word, gestures, signals or actions to in some way, encourage, advise or urge, or in some way help the person committing the crime commit it . . . .

[*484] In Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227, 7 Va. Law Rep. 2320, cert. denied, 502 U.S. 944, 116 L. Ed. 2d 337, 112 S. Ct. 386 (1991), **[***36]** we reviewed a capital murder conviction wherein the "Commonwealth's theory of the case was that Strickler and Henderson had acted jointly to accomplish the actual killing" of the victim by crushing her skull with a 69-pound rock. Id. at 494, 404 S.E.2d at 235. The evidence was consistent with the Commonwealth's argument that one of the two men held the victim immobile while the other dropped or threw the rock on her head. Citing Coppola v. Commonwealth, 220 Va. 243, 256-57, 257 S.E.2d 797, 806 (1979), cert. denied, 444 U.S. 1103, 62 L. Ed. 2d 788, 100 S. Ct. 1069 (1980), where we held that a defendant who "jointly participated in [a] fatal beating" was subject to conviction and punishment for capital murder, we restated the rule of culpability for capital murder as follows:

> We adhere to the view that ***HN10*** where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an "immediate perpetrator" for the purposes of the capital murder statutes.

Strickler, 241 Va. at 495, 404 S.E.2d at 235. This rule has been reaffirmed in several cases since Strickler. See Lenz v. Warden, 265 Va. 373, 381, 579 S.E.2d 194, 199 (2003); **[***37]** Remington v. Commonwealth, 262 Va. 333, 349-50, 551 S.E.2d 620, 630 (2001), cert. denied, 535 U.S. 1062, 152 L. Ed. 2d 834, 122

S. Ct. 1928 (2002); Williams, 248 Va. at 545, 450 S.E.2d at 376; Hancock v. Commonwealth, 12 Va. App. 774, 779-81, 407 S.E.2d 301, 304-05, 8 Va. Law Rep. 52 (1991).

In Lenz and Remington, two criminal actors were immediate perpetrators because they "jointly participated in the fatal stabbing." Remington, 262 Va. at 350, 551 S.E.2d at 630. Another category of multiple actors who may be immediate perpetrators was established in Strickler. The Court held **[**35]** that the evidence supported the Commonwealth's theory that one actor held the victim while the other actor dropped a large rock on her head. We observed that "it would have been necessary that she be held down by one assailant while the other lifted the rock and dropped it on her head." Strickler, 241 Va. at 494, 404 S.E.2d at 235. As established in Strickler, ***HN11*** conduct of two criminal actors may be such that they jointly complete the criminal act. It is not a matter of encouraging, advising, urging, or facilitating another in the **[***38]** commission of the crime. It is the actual participation together in a unified act that permits two or more persons to be immediate perpetrators. In Strickler, the Commonwealth advanced its **[*485]** theory concerning how the murder was accomplished. Our review on appeal considered whether the evidence supported the theory.

Similarly, we must consider the evidence in support of the Commonwealth's theory of how Muhammad and Malvo acted together in the murder of Dean Meyers. Spicer's expert testimony, the evidence recovered from the Caprice, the evidence from the 16 shootings, and the additional evidence concerning Malvo and Muhammad's relationship and activities support the Commonwealth's theory of the case. Muhammad and Malvo and the Caprice were identified in the immediate vicinity of Dean Meyers' murder approximately one hour before it occurred. Immediately after the murder, Muhammad was identified in the parking lot across the street from where Meyers was shot. Muhammad was driving the Caprice in which he and Malvo were later arrested. Ballistics tests determined that the bullet that killed Meyers was shot from the .223 caliber Bushmaster rifle found in the Caprice with Muhammad and Malvo **[***39]** when they were arrested. The Caprice was located in a position providing a direct line of fire to accomplish the murder. Significantly,

the shot from the parking lot had to cross nine lanes of traffic on a heavily traveled highway at approximately 8:15 p.m. on a weekday evening. With the relatively small portal offered by the hole in the trunk of the Caprice and the obstacle presented by nine traffic lanes, the evidence supports the Commonwealth's theory of a "shooter" and a "spotter" and the direction by the spotter to shoot at the opportune time. As in Strickler, we review the evidence in the light most favorable to the Commonwealth to determine if it is sufficient to support the Commonwealth's theory. 241 Va. at 485, 404 S.E.2d at 230. Upon review of that evidence, we cannot say that the trial court was plainly wrong or without evidence to support its judgment.

The jury instructions given by the trial court accurately conveyed applicable law without confusion to the jury. Furthermore, Instructions J and L offered by Muhammad did not embrace a correct definition of immediate perpetrator and were properly refused by the trial court.

The theory of the Commonwealth **[***40]** concerning multiple immediate perpetrators acting as principals in the first degree accurately encompasses Virginia law. The jury instructions in question properly instructed the jury on the law and the facts of the case.

[*486] 2. Capital Murder in the Commission of an Act of Terrorism

(a) Sufficiency of Evidence

Muhammad was also convicted of capital murder pursuant to Code § 18.2-31(13) for the willful, deliberate, and premeditated killing of Dean Meyers in the commission of an act of terrorism as defined in Code § 18.2-46.4. Code § 18.2-46.4 defines an "act of terrorism" as

> an act of violence as defined in clause (i) of subdivision A of § 19.2-297.1 committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation.

HN12 Code § 19.2-297.1 includes, among the acts of violence the offenses of first and second degree murder, voluntary manslaughter, malicious wounding, and robbery. Additionally, ***HN13*** Code § 18.2-18 provides that a person convicted of capital murder under Code § 18.2-31(13) is not required to be a principal in the first degree **[***41]** to the murder if the

killing was "pursuant to the direction or order of the one who is engaged in the commission of . . . an act of terrorism."

[36]** Significantly, Muhammad does not contest the sufficiency of evidence to support the charge that acts of violence committed by him and Malvo were done with the intent to "intimidate the civilian population at large" or to "influence the conduct or activities of the government of the United States, a state or locality through intimidation." Rather, he challenges his conviction for capital murder based upon the terrorism predicate by attacking the validity of the statute, constitutionally and otherwise, and by challenging the sufficiency of the evidence that he "directed" or "ordered" Malvo with respect to the killing of Dean Meyers. We will consider Muhammad's challenge to the validity of the statute elsewhere in this opinion.

The Commonwealth argues that the evidence is sufficient to support two separate evidentiary theories upon which Muhammad's conviction for capital murder in the commission of an act of terrorism is based. One theory is based upon Muhammad committing the murder of Dean Meyers as a principal in the first degree because he **[***42]** is an immediate perpetrator of the crime. The second evidentiary theory is based upon Muhammad giving a direction or order to Malvo to kill Dean Meyers. Either or both theories are sufficient to sustain the **[*487]** proof necessary to affirm Muhammad's conviction for capital murder in the commission of an act of terrorism.

As stated above, the proof is sufficient to establish beyond a reasonable doubt that Muhammad acted as a principal in the first degree, as an immediate perpetrator, in the death of Dean Meyers. The "sniper theory" advanced by the Commonwealth is supported through Spicer's expert testimony, the ample evidence of such a methodology, and our prior decisions. As an immediate perpetrator of the death of Dean Meyers in a murder that qualifies as an act of violence under Code § 19.2-297.1, Muhammad was a principal in the first degree in the "willful, deliberate, and premeditated killing of [a] person . . . in the commission . . . of an act of terrorism." Code § 18.2-31(13).

Additionally, the combined weight of direct and circumstantial evidence is sufficient to sustain Muhammad's conviction even if he is considered to have been a criminal actor in the second degree who gave **[***43]** an order or direction to Malvo to kill Dean Meyers. Malvo

and Muhammad were seen in the Caprice in the vicinity of Meyers' shooting approximately one hour beforehand. The Caprice was the same vehicle in which Muhammad and Malvo were arrested. It was altered to provide access to the trunk from the inside and a portal for firing a rifle through the trunk lid. Muhammad was interviewed by police immediately after the shooting in a parking lot across the street from where Meyers was shot. Malvo was not seen at the parking lot. There was a direct line of fire between the parking lot and the Sunoco station where Meyers was shot. Between the parking lot and the site where Meyers was shot were nine traffic lanes. The evidence shows that Malvo and Muhammad possessed the .223 caliber Bushmaster rifle, mittens with open fingers, a GPS receiver, earplugs, maps, rifle scopes, "walkie-talkies," a voice recorder, an electronic organizer, and other evidence previously described. The evidence proves that the bullet that killed Dean Meyers came from the .223 caliber Bushmaster rifle in the possession of Muhammad and Malvo when they were arrested. The evidence also contains direct or circumstantial proof **[***44]** of instances where the two men committed similar crimes together.

Muhammad and Malvo were seen nearby in the Caprice immediately before the murder of Dean Meyers. Only Muhammad was seen immediately afterward. The weight of the evidence supports the conclusion that either Muhammad or Malvo fired the fatal shot that killed Dean Meyers. If it was Muhammad, he is a principal in the **[*488]** first degree, with or without the sniper theory advanced by the Commonwealth. The evidence more reasonably proves that Malvo was the shooter and was in the converted trunk when Muhammad was interviewed in the parking lot immediately after the murder.

The circumstances of this murder are consistent with the expert testimony concerning a two-man sniper team. As Spicer testified, the "spotter" sets up the shot at a position **[**37]** safe from view yet within range of the target. In this case, the relatively limited range of the shooter in the trunk of the car requires split-second timing to successfully hit a target that quickly comes into range and just as quickly moves out of range. This abbreviated window of opportunity is made all the more difficult by nine lanes of traffic passing between the shooter and the target. **[***45]** According to Spicer, the job of the spotter is to

communicate with the shooter, give the order or direction, and then to provide an undetected getaway.

Furthermore, the record is replete with evidence that Muhammad directed and ordered Malvo in the entire criminal enterprise. As the Commonwealth argued based upon evidence presented:

> It was Muhammad who brought Malvo to this country from Jamaica. It was Muhammad who had the military background in shooting and snipering skills and who trained Malvo. It was Muhammad who provided the weapons. It was Muhammad who was determined to terrorize his ex-wife's area of the country. It was Muhammad who was the "father" and Malvo who was the "son." All the evidence about their relationship - from the Lighthouse Mission and friends in Washington state to Muhammad's cousin in Baton Rouge and the YMCA personnel in Maryland - consistently showed Muhammad directing and ordering Malvo's conduct. Everyone who saw them together observed that Malvo was extremely obedient to Muhammad, not the other way around.

On this issue, the trial court held that there was "overwhelming circumstantial evidence regarding [Muhammad's] direction and ordering **[***46]** of Mr. Malvo." Upon review of the evidence, we cannot say that the trial court was clearly wrong or without evidence to support this conclusion. Powell, 268 Va. at 236, 602 S.E.2d at 120-21.

We hold that Muhammad was an immediate perpetrator and as such was a principal in the first degree in the commission of capital murder during the commission of an act of terrorism. We further **[*489]** hold that the evidence proves that Muhammad gave a direction or order sufficient to satisfy the requirements of Code § 18.2-18 such that even if he were a criminal actor ordinarily demonstrating culpability as a principal in the second degree, he is nonetheless guilty of capital murder under Code §§ 18.2-31(13) and 18.2-18.

(b) Jury Instructions on the Terrorism Capital Offense

Muhammad maintains that it was error for the trial court to give Instructions 5 and 6 and to refuse his Instructions K and M. (Assignments of Error 67, 68, 72, 74). Assignment of error 68 regarding instruction 6 has been waived for

failure to brief the issue. Upon review of the evidence and the instruction, we hold that the trial court did not err in granting instruction 5. With respect to Muhammad's proffered instructions **[***47]** K and M, he states in his brief only that they properly addressed the terrorism issues. There is no argument concerning why it would be error to refuse them in light of the other instructions given. We will not consider this argument. Rule 5:17(c).

C. Alleged Inconsistent Prosecution Theories

The independently elected Commonwealth's Attorneys of Prince William County and Fairfax County maintained contemporaneous prosecutions of Muhammad and Malvo. In Fairfax County, Malvo was prosecuted for the murder of Linda Franklin wherein Malvo interposed an insanity defense. In Prince William County, Muhammad was prosecuted for the murder of Dean Meyers. Much of the same evidence was utilized in each prosecution. In assignments of error 8, 100, and 101, Muhammad argues that the Commonwealth violated principles of due process "by simultaneously taking materially inconsistent positions in the Muhammad case, where it claimed Muhammad directed and controlled Malvo, and in the Malvo case where it claimed that Malvo was a free agent." Muhammad further argues that the Commonwealth should be judicially estopped from maintaining prosecution theories in two cases based upon the same evidence because **[***48]** the theories of prosecution are "inconsistent" and "irreconcilable." We need not address the legal arguments advanced by Muhammad because we hold that the theories of prosecution **[**38]** by the two independent prosecutors were not inconsistent.

Malvo sought to prove in his case in Fairfax County that he was insane or "brainwashed" by Muhammad. Evidence was successfully offered to rebut such claims. In the Fairfax County prosecution, **[*490]** the Commonwealth offered expert testimony that Malvo was "fully cognizant, conscious, deliberate, [and] purposeful." The Commonwealth argued in Malvo's case that he was a "bright, clever human being" who knew what he was doing when he acted in concert with Muhammad. In the Prince William County case against Muhammad, the Commonwealth presented evidence that Muhammad was the "leader" and "teacher"

who trained and directed Malvo to perfect his sniper skills. A successful rebuttal of Malvo's affirmative defense of insanity is not inconsistent with a theory of prosecution that includes Muhammad engaged in training and directing Malvo in their sniper team activity. It is beyond peradventure that businesses, sports teams, and military operations involve training and **[***49]** direction without insanity of the participants as an issue. The trial court did not err in rejecting Muhammad's claim of inconsistent theories of prosecution.

III. Indictment and Grand Jury Process

Muhammad asserts in multiple assignments of error that often overlap that there were fatal flaws in the indictment process. (Assignments of Error 4, 6, 7, 9, 10, 14, 15, 17, 18, 19, 27). We will consider them topically.

A. Alleged Failure to Accuse

Muhammad as the "Triggerman"

Muhammad argues the Commonwealth failed to allege facts necessary for a death sentence in the indictment because it did not allege that he actually fired the shot that killed Dean Meyers. He further alleges that it was error to deny his motion for a bill of particulars to accomplish this end. Also, he argues that the Commonwealth's notice of intent to seek the death penalty does not cure this alleged legal flaw in the indictment. Finally, he argues that the trial court should have dismissed the indictment for its failure to indict Muhammad for murder in the second degree rather than capital murder because of lack of allegations that he was the "triggerman."

These related allegations simply advance Muhammad's **[***50]** argument that upon the facts of this case, only the person who "pulls the trigger" is eligible for the death sentence under Virginia law. As we have set forth, an immediate perpetrator of the act is eligible for the death sentence. The trial court did not err in recognizing this principle of law in its rulings on these motions.

[*491] B. Failure to State Aggravating

Factors in the Indictment

Muhammad alleges that the capital murder indictments are defective because they failed to recite aggravating factors that would support a death sentence. He argues that pursuant to Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), aggravating factors in support of the death penalty are the

functional equivalent of elements of the offense of capital murder. He further alleges that it was error to refuse his request for a bill of particulars specifying the aggravating factors upon which the Commonwealth would rely. Finally, despite the fact that the Commonwealth filed a notice of intent to seek the death penalty based upon both aggravating factors of vileness and future dangerousness, he argues that the Commonwealth's notice did not cure the defect in the indictments.

Ring **[***51]** involved the statutory sentencing scheme in Arizona where a death sentence may not legally be imposed unless at least one aggravating factor is found to exist beyond a reasonable doubt. Ring, 536 U.S. at 596. Additionally, the Arizona statutes provided that the judge, without a jury, was to make this determination. Id. at 592-93. The issue before the Supreme Court of the United States was stated as follows, "The question presented is whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." Id. at 597. Citing the Court's prior **[**39]** opinion in Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), the precise answer was provided: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S. at 494, n.19, the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609. **[***52]**

The Virginia statutory scheme does not suffer from the infirmities found in Apprendi and Ring. ***HN14*** In Virginia, if the defendant elects a jury trial, the existence of one or both aggravating factors of vileness or future dangerousness is submitted to a jury. Muhammad recognizes that Virginia's statutory scheme provides for jury determination of aggravating factors; however, he argues that the indictments in his case were defective for failure to set out the aggravating factors upon which the Commonwealth would seek the death penalty.

In Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999), the Supreme Court reviewed a conviction under a federal statute prosecuted in **[*492]** federal court. The Court stated, ***HN15*** "under the Due Process Clause of the Fifth Amendment and

the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id. at 243, n.6. The Court in Apprendi quoted this statement and added, "The Fourteenth Amendment commands the same answer in this case involving **[***53]** a state statute." Apprendi, 530 U.S. at 476. However, in a footnote to the opinion, the Court stated,

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. He relies entirely on the fact that the "due process of law" that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury. . . and the right to have every element of the offense proved beyond a reasonable doubt. . . . That Amendment has not, however, been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in Almendarez-Torres v. United States, 523 U.S.224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998). We thus do not address the indictment question separately today.

Apprendi, 530 at 477, n.3. As if to emphasize the point, the Court stated in a footnote to Ring,

> Ring does not contend that his indictment was constitutionally defective. See Apprendi, 530 U.S. at 477, n.3 (Fourteenth Amendment "has not . . . been construed to include the **[***54]** Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

Ring, 536 U.S. at 597, n.4.

Muhammad concedes in his brief, "we have acknowledged that states are currently not bound by the federal constitution to proceed in felony cases by way of indictment." He then makes the argument that is now before this Court: "Nevertheless, having chosen to establish a grand jury system in Virginia, there is a federal due process right that demands the state properly follow that scheme." We disagree with Muhammad. A similar argument was made and rejected in Pennsylvania v.

Finley, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987). In Finley, **[*493]** Pennsylvania provided court appointed counsel for collateral attacks upon conviction, a right not required by the Constitution of the United States. The Court held that Finley could not sustain a federal constitutional claim for deficient performance of counsel in such collateral proceedings where there was no federal constitutional right to counsel in the first place. Id. at 558-59. Similarly, Muhammad has no constitutional claim for failure to include aggravating factors in the two capital murder **[***55]** indictments because ***HN16*** proceeding by indictment is not constitutionally required of the states.

Additionally, ***HN17*** in Virginia, if the indictment gives a defendant sufficient notice of the nature and character of the offense charged so he can make his defense, no bill **[**40]** of particulars is required. Roach v. Commonwealth, 251 Va. 324, 340, 468 S.E.2d 98, 107, cert. denied, 519 U.S. 951, 136 L. Ed. 2d 256, 117 S. Ct. 365 (1996), Wilder v. Commonwealth, 217 Va. 145, 147, 225 S.E.2d 411, 413 (1976). In Goins v. Commonwealth, 251 Va. 442, 454, 470 S.E.2d 114, 123, cert. denied, 519 U.S. 887, 136 L. Ed. 2d 154, 117 S. Ct. 222 (1996), we held that an indictment reciting an offense under Code § 18.2-31 was sufficient to place the defendant on notice of the nature and character of the offense charged. We noted that:

> The capital murder indictment alleged that "on or about October 14, 1994, in the City of Richmond, Christopher Cornelius Goins did feloniously and unlawfully commit capital murder in that he did kill and murder Robert Jones in a willful, deliberate and premeditated killing of more than one person as part of the same act or transaction. **[***56]** "

Id. at 454 n.1, 470 S.E.2d at 123 n.1. We held that the indictment in Goins was sufficient. Muhammad's indictments were sufficient as well.

HN18 A defendant is not entitled to a bill of particulars as a matter of right. Code § 19.2-230 provides that a trial court "may direct the filing of a bill of particulars." The trial court's decision whether to require the Commonwealth to file a bill of particulars is a matter committed to its sound discretion. Quesinberry v. Commonwealth, 241 Va. 364, 372, 402 S.E.2d 218, 223, 7 Va. Law Rep.

1796, cert. denied, 502 U.S. 834, 116 L. Ed. 2d 82, 112 S. Ct. 113 (1991). Here, the trial court denied Muhammad's motion for a bill of particulars identifying the aggravating factors upon which the Commonwealth would rely. After the trial court denied the bill of particulars, the Commonwealth nonetheless filed a notice of intent to seek the death penalty which fully placed Muhammad on notice that the **[*494]** Commonwealth intended to prove both future dangerousness and vileness as aggravating factors.

We hold that ***HN19*** aggravating factors are not constitutionally required to be recited in a capital murder indictment. We hold that the indictments in **[***57]** this case were sufficient under Virginia law. We hold that the purported violation of Virginia's indictment provisions in this case does not rise to the level of a federal constitutional claim. We hold that it was not an abuse of discretion to refuse Muhammad's motion for a bill of particulars. Finally, we hold that any error that could have been committed by the failure to order a bill of particulars was rendered harmless by the provision of the information Muhammad sought in the Commonwealth's notice of intent to seek the death penalty.

C. Alleged Defect in Indictment

Because of Disjunctive Language

In assignment of error 15, Muhammad asserts that the indictment charging capital murder under the terrorism predicate is defective because of the use of disjunctive terms. The indictment in question follows the language of Code § 18.2-46.4 which states in pertinent part:

> ***HN20*** "Act of terrorism" means an act of violence as defined in clause (i) of subdivision A of § 19.2-297.1 committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation. **[***58]**

Code § 18.2-46.4 (emphasis added). Muhammad claims that the indictment is defective because it did not specify which of the two intents Muhammad had at the time of the killing. His argument is not based upon any constitutional claims; rather, his argument is confined to state law issues.

The indictment charges a single offense and not two separate offenses. The single offense

can be satisfied upon proof of either or both of two mens rea conditions. A reasonable construction of the indictment as rendered by the grand jury includes both. Here, the trial court permitted the amendment of the indictment to more particularly express what was already a reasonable construction of the meaning of the indictment as delivered. The indictment was amended from "or" to "and/or."

[*495] Previously, we considered a similar claim of defective indictment based upon the use of the disjunctive, "or." In Buchanan v. Commonwealth, 238 Va. 389, 398, 384 S.E.2d 757, **[**41]** 763, 6 Va. Law Rep. 531 (1989), cert. denied, 493 U.S. 1063, 107 L. Ed. 2d 963, 110 S. Ct. 880 (1990), the defendant was charged with capital murder based upon the killing of more than one person as a part of the same act or transaction. **[***59]**

Buchanan killed four people. We observed that:

> The first indictment charged, in essence, that Buchanan killed Buchanan, Sr. as part of the same act or transaction in which he killed J.J., Donnie, or, Mrs. Buchanan.

238 Va. at 396, 384 S.E.2d at 762. We held that this indictment reasonably placed Buchanan on notice in the following manner:

> Under the first indictment, Buchanan was on notice that he had to defend against a claim that he killed Buchanan, Sr. and *all three* of the other victims as part of the same act or transaction; that he killed Buchanan, Sr. and *any two* of the other victims as part of the same act or transaction; or that he killed Buchanan, Sr. and *any one* of the other victims as part of the same act or transaction.

Id. at 397, 384 S.E.2d at 762.

Muhammad had notice in the indictment, as originally found by the grand jury and as amended, that he was charged with a single offense that could be proved by showing: (1) his intent to intimidate the civilian population at large; or (2) his intent to influence the conduct or activities of the government of the United States, a state or locality through **[***60]** intimidation; or (3) his intent to do both 1 and 2 above. The trial court did not err in refusing to dismiss the terrorism indictment.

D. Alleged Deficiencies in the Composition of the Grand Jury

Muhammad argues that the process utilized in his indictment was fatally flawed because the

grand jury that indicted him was "improperly constituted in violation of Virginia Law and [his] rights to due process and equal protection." Other than this conclusory statement and the further statement that the process is "arbitrary and vague," Muhammad makes no constitutional argument in his brief in support of his contentions. His argument is insufficient. Rule 5:17(c). **[*496]** Furthermore, no constitutional argument was raised in the trial court. Rule 5:25. We will not consider this vague and uncertain constitutional challenge to the composition of the grand jury.

Additionally, his statutory challenge is without merit. Code §§ 19.2-191 through 205 govern the selection of regular grand jurors. The record reveals that the grand jurors who returned indictments against Muhammad were selected pursuant to the following routine process. The clerk of the court creates a list of individuals who have been called **[***61]** to serve as petit jurors at least three times, but not in the immediately preceding three years. From that list, a smaller list of 120 names is created. The list of 120 names is reviewed by all the judges of the circuit. Questionnaires are sent to the persons on the list. At each term of court, seven jurors are randomly selected to serve as regular grand jurors. The chief judge of the circuit reviews the questionnaires prior to the first meeting of the grand jury. During his first meeting with the grand jurors, the chief judge discusses their duties with them and selects one of them to be the foreperson.

The procedure employed in this case complies with the requirements outlined by statute that the grand jury be composed of ***HN21*** "persons 18 years of age or over, of honesty, intelligence and good demeanor and suitable in all respects to serve as grand jurors," Code § 19.2-194, and ***HN22*** "a citizen of this Commonwealth, eighteen years of age or over, and shall have been a resident of this Commonwealth one year and of the county or corporation in which the court is to be held six months, and is in other respects a qualified juror." Code § 19.2-195.

Finally, Muhammad claims that the grand jurors **[***62]** "were not properly rotated as required by Section 19.2-194." There is no evidence to support his claim. The evidence does establish that this grand jury was sworn to sit for a two month term in October and November 2002. We hold that the evidence does not sustain a claim that there were

infirmities in the process, selection, or make-up of the grand jury that indicted Muhammad.

[42]** IV. Constitutional Challenge to the Terrorism Statute

In assignment of error 17, Muhammad maintains that the terrorism statutes, Code §§ 18.2-31(13) and 18.2-46.4 are unconstitutionally overbroad and vague. We disagree.

[*497] As the Supreme Court stated in Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982):

> ***HN23*** In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly **[***63]** vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Id. at 494-95. See Chicago v. Morales, 527 U.S. 41, 52, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999). ***HN24*** The First Amendment doctrine of overbreadth requires proof that a law "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.' " Virginia v. Hicks, 539 U.S. 113, 118, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003) (citing Broadrick v. Oklahoma, 413 U.S. 601, 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)). While Muhammad utilizes the term "overbroad," he offers no evidence or argument in support of the requirements of this doctrine. Instead, Muhammad confines his argument to vagueness.

HN25 A successful challenge to the facial validity of a criminal statute based upon vagueness requires proof that the statute fails to provide notice sufficient for ordinary people to understand what conduct it prohibits, or proof **[***64]** that the statute "may authorize

and even encourage arbitrary and discriminatory enforcement." Morales, 527 U.S. at 56; Kolender v. Lawson, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983). But "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974); Commonwealth v. Hicks, 267 Va. 573, 580-81, 596 S.E.2d 74, 78 (2004); accord Gibson v. Mayor of Wilmington, 355 F.3d 215, 225 (3d Cir. 2004); Fuller v. Decatur Public School Board of Education School District 61, 251 F.3d 662, 667 (7th Cir. 2001); Joel v. City of Orlando, 232 F.3d 1353, 1359-60 (11th Cir. 2000); United States v. Tidwell, 191 F.3d 976, 979 (9th Cir. 1999); United States v. Hill, 167 F.3d 1055, 1063-64 (6th Cir.), cert. denied, 528 U.S. 872, 145 L. Ed. 2d 148, 120 S. Ct. 175 **[*498]** (1999); Woodis v. Westark Community College, 160 F.3d 435, 438-39 (8th Cir. 1998); United States v. Corrow, 119 F.3d 796, 803 (10th Cir. 1997), cert. denied, 522 U.S. 1133, 140 L. Ed. 2d 146, 118 S. Ct. 1089 (1998); **[***65]** Love v. Butler, 952 F.2d 10, 14 (1st Cir. 1991); Hastings v. Judicial Conference of the United States, 264 U.S. App. D.C. 306, 829 F.2d 91, 107 (D.C. Cir. 1987), cert. denied, 485 U.S. 1014, 99 L. Ed. 2d 715, 108 S. Ct. 1487 (1988); Hill v. City of Houston, 789 F.2d 1103, 1127 (5th Cir. 1986), aff'd, 482 U.S. 451, 96 L. Ed. 2d 398, 107 S. Ct. 2502 (1987); Gallaher v. City of Huntington, 759 F.2d 1155, 1160 (4th Cir. 1985).

Capital murder pursuant to Code § 18.2-31(13) is defined as the ***HN26*** "willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in Code § 18.2-46.4."

> "Act of terrorism" means an act of violence as defined in clause (i) of subdivision A of § 19.2-297.1 committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation.

Code § 18.2-46.4. ***HN27*** The "act of violence" reference to Code § 19.2-297.1 includes a list of certain specific aggravated felonies including murder, **[***66]** voluntary manslaughter, mob-related **[**43]** felonies, malicious assault or bodily wounding, robbery, carjacking, sexual assault and arson. The combination of these statutes defines criminal

conduct that constitutes a willful, deliberate and premeditated killing in the commission, or attempted commission, of one of the designated felonies with the intent to intimidate the civilian population or influence the conduct of government through intimidation. Additionally, under Code § 18.2-18 the General Assembly extended the reach of criminal conduct subject to the death penalty to include "a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism under the provisions of subdivision 13 of § 18.2-31."

Muhammad raises questions about the definition of "intimidation," "civilian population at large," and "influence the conduct or activities of government." He suggests that failure to statutorily define these phrases renders the statutes unconstitutional. He further complains that "no distinction can be drawn between the newly defined crime and any 'base offense' which carries with it the same hallmarks of intimidation and **[***67]** influence," and that this allows "unguided and unbridled law enforcement discretion." Muhammad **[*499]** further maintains that extending the scope of the statute to reach those who order or direct a killing in the commission of or attempted commission of an act of terrorism somehow violates what he calls the "triggerman rule." In a particularly exaggerated statement, Muhammad claims that extending the scope of the statute "allows almost any violent criminal act to be classified as terrorism and thereby rendering any individual charged eligible for the death penalty." We disagree with each of Muhammad's contentions.

HN28 By referencing established criminal offenses as acts of violence subject to the statutory scheme, the legislature included offenses with previously defined elements and mens rea requirements. Additionally, the term "intimidate" has been defined by case law. See Sutton v. Commonwealth, 228 Va. 654, 663, 324 S.E.2d 665, 669 (1985) (defining intimidation as unlawful coercion; extortion; duress; putting in fear).

We have no difficulty understanding that "population at large" is a term that is intended to require a more pervasive intimidation of the community rather **[***68]** than a narrowly defined group of people. Examples are illustrative. When used in a descriptive sense referring to a prison, the prison "population at

large" consists of everyone in the prison rather than a small subset of prisoners. Lewis v. Casey, 518 U.S. 343, 358, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996); Cleavinger v. Saxner, 474 U.S. 193, 210, 88 L. Ed. 2d 507, 106 S. Ct. 496 (1985). In a case involving the exclusion of certain people from capital juries, the term "population at large" meant the community from which the jury pool could be chosen. Lockhart v. McCree, 476 U.S. 162, 179, 90 L. Ed. 2d 137, 106 S. Ct. 1758 (1986). It is significant to note that Muhammad offered a similar understanding of the term when he argued below that all potential jurors in his case were victims. We do not believe that a person of ordinary intelligence would fail to understand this phrase.

Similarly, we do not believe that a person of ordinary intelligence needs further definition of the phrase "influence the conduct or activities of government." Muhammad's argument on this point is essentially a strained "legislative history" argument. Quoting former Attorney General Jerry Kilgore's press **[***69]** releases, Muhammad claims that the statutes are designed "to address al-Qaeda type attacks - attacks motivated by a greater political purpose." Even if a press release could qualify as legislative history, it is quite a leap to impute, from the press releases of an Attorney General, the intent of the General Assembly. We find the intent of the General Assembly primarily in the words it employs in enacting legislation. Nothing in **[*500]** the words of these statutes evinces an intent to limit its application to criminal actors with political motives.

Muhammad maintains that there is no distinction between the "base offense" and the capital offense based upon terrorism. What he appears to be arguing is that the terrorism statute is unnecessary on the one hand because a killing in the commission of one of the enumerated violent acts could result in the death penalty anyway, and on the other **[**44]** hand, its reach is extended too far by including those who order or direct such killings. Clearly, the General Assembly has the power to define criminal conduct even if statutes overlap in coverage. Whether a defendant can be simultaneously or successively charged with overlapping offenses implicates other **[***70]** questions not presented here.

Muhammad's quarrel with the expansion of the potential imposition of the death penalty to those who order or direct another in a killing in

the commission of or attempted commission of an act of terrorism is a policy question well within the purview of legislative power so long as it is not otherwise unconstitutional. In that respect, Muhammad argues in assignment of error 18 that the provisions of Code § 18.2-18 allow the death penalty for a defendant with no demonstrated intent to kill the victim. Muhammad incorrectly characterizes the extension of the scope of the statute to reach traditional "aiders and abettors." ***HN29*** The provisions of Code § 18.2-18 do not extend to "aiders and abettors;" rather, it extends only to those who "direct" or "order" the killing. The criminal actor who "orders" or "directs" the killing is not unlike the criminal actor who hires another to kill and is potentially subject to the death penalty under Code § 18.2-31(2). The criminal actor who "orders" or "directs" the killing shares the intent to kill with the one who carries out the murder. The provisions of Code § 18.2-18 do not have the effect imagined by Muhammad.

Muhammad's **[***71]** argument concerning vagueness does not focus on his conduct. Indeed, Muhammad does not claim in his brief that his actions and those of Malvo were not acts of terrorism under the statutory provisions. Rather, Muhammad hypothetically poses questions about the applicability of the statute in other circumstances. As discussed above, the statutes provide notice sufficient for ordinary people to understand what conduct they prohibit, and do not authorize and/or encourage arbitrary and discriminatory enforcement. More importantly, Muhammad cannot and does not maintain that the statutes do not give him notice that his conduct and Malvo's conduct **[*501]** was prohibited. Nor does Muhammad allege that he has been subject to arbitrary or discriminatory enforcement of the statutes. ***HN30*** One who engages in conduct that is clearly proscribed and not constitutionally protected may not successfully attack a statute as void for vagueness based upon hypothetical conduct of others. Hoffman Estates, 455 U.S. at 494-95.

V. Alleged Conflict Between Sentencing Provisions

Muhammad argues in assignment of error 27 that he may not be sentenced to death because of an "absolute and unrectifiable conflict" **[***72]** between the capital murder statute (Code § 18.2-31(13)), and the terrorism

statute (Code § 18.2-46.4, et seq.). ***HN31*** Capital murder is a Class 1 felony punished by life imprisonment or death. ***HN32*** The terrorism statute provides for a penalty as a Class 2 felony "if the base offense of such act of terrorism may be punished by life imprisonment, or a term of imprisonment of not less than twenty years." Code § 18.2-46.5. Muhammad argues that there is "no discernable distinction whatsoever between murder committed under the terrorism provision and murder committed under the capital murder provision." He maintains that he may not be subject to the greater punishment.

The Supreme Court of the United States resolved this same issue in a case involving sentencing provisions under two statutes that encompassed the same criminal act. Holding that the prosecutor had discretion to choose which statute to base the prosecution upon, the Court stated:

> The provisions in issue here, however, unambiguously specify the activity proscribed and the penalties available upon conviction. That this particular conduct may violate both Titles does not detract from the notice afforded by each. Although the **[***73]** statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. ***HN33*** So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the **[**45]** notice requirements of the Due Process Clause are satisfied.
>
> This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute **[*502]** under either so long as it does not discriminate against any class of defendants.

United States v. Batchelder, 442 U.S. 114, 123-24, 60 L. Ed. 2d 755, 99 S. Ct. 2198 (1979). Muhammad makes no constitutional argument in his brief on this issue. He merely recites that there is a conflict. He does not argue that there is ambiguity in either statute nor does he argue that application of the statute discriminates against any class of defendants. The trial court did not err in denying Muhammad's motion to preclude a death sentence on this basis.

VI. Right to Self-Representation

Muhammad alleges in briefing assignment of error 35 that the trial court violated Muhammad's "Sixth Amendment **[***74]** right to self-representation by unduly interfering with his ability to consult with standby counsel."

HN34 The right of a criminal defendant to represent himself is found in the Sixth Amendment to the Constitution of the United States. Faretta v. California, 422 U.S. 806, 807, 836, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). The right is not without limitations and conditions. Only after the jury panel had been sworn, did Muhammad request permission to represent himself. At that time, Muhammad did not have a constitutional right to proceed pro se. As the United States Court of Appeals for the Fourth Circuit has held,

> we think it is reasonable, and entirely compatible with the defendant's constitutional rights, to require that the right of self-representation be asserted at some time "before meaningful trial proceedings have commenced," and that thereafter its exercise rests within the sound discretion of the trial court.

United States v. Lawrence, 605 F.2d 1321, 1325 (4th Cir. 1979), cert. denied, 444 U.S. 1084, 62 L. Ed. 2d 770, 100 S. Ct. 1041 (1980). Nonetheless, after extensive questioning of Muhammad concerning his decision and appropriate admonition **[***75]** concerning the risks involved and the manner in which it would be permitted, the trial court exercised its discretion and allowed Muhammad to represent himself. The trial court directed his lawyers to be "standby counsel." The trial court informed Muhammad that "standby counsel" could sit at counsel table with him, and "you can perhaps upon occasion ask them questions, but I don't expect you to ask them every question that's being formulated. That would, I think, unduly hinder the trial process."

[*503] After two days of self-representation, Muhammad changed his mind and requested that his "standby counsel" resume their previously assigned role. Now Muhammad complains about the limitations and restrictions placed upon him during those two days. The only issue presented in this assignment of error is stated by Muhammad as follows: "whether the court improperly prohibited Muhammad from consulting with his standby counsel."

Soon after Muhammad began representing himself, the Commonwealth objected to the extensive interaction between Muhammad and standby counsel. The Commonwealth complained that standby counsel was actually acting as co-counsel in contravention of the trial court's instructions. **[***76]** An exchange between the trial court and standby counsel appears to confirm the Commonwealth's concern. Standby counsel stated:

> Mr. Muhammad has asked about things such as objections - what is hearsay? What is a leading question? and so on. And so he's inquired about that and the timing of objections and so on, which as the court knows is obviously crucial or else it's waived. That's the context of it. We'd say hearsay, and he knew the argument to make to Your Honor and same thing as far as leading questions.

It is apparent from this exchange that standby counsel was doing far more than responding to inquiries made by Muhammad. Rather, as they admit, they were prompting him to make objections during the course of testimony.

[46]** The trial court indicated that Muhammad would not be permitted to have "hybrid" representation where standby counsel becomes co-counsel by extensive participation and direction of the defense. ***HN35*** "Faretta does not require a trial judge to permit 'hybrid' representation." McKaskle v. Wiggins, 465 U.S. 168, 183, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984). As Muhammad acknowledges in his brief, "the court's solution to the perceived problem was to move standby **[***77]** counsel down the table, away from Mr. Muhammad, something that Mr. Muhammad had suggested." Muhammad does not now complain that he could not have taken an extra step or two to consult with counsel. He cannot be heard to complain of a solution he proposed. There is no specific ruling of the trial court that Muhammad identifies as error. Muhammad points to no objection made by him concerning the trial court's direction or handling of the issue. The record reveals that Muhammad **[*504]** expressly agreed with the trial court's instructions to standby counsel. Upon review of the specific arguments made by Muhammad and the relevant portions of the record he identifies, we hold that the trial court did not abridge his rights under the Sixth Amendment to properly consult with standby counsel.

VII. Refusal to Permit Expert Healthcare Testimony at Sentencing

The trial court granted Muhammad's motion under the provisions of Code § 19.2-264.3:1 for the appointment of mental health experts to assist him in his defense. Thereafter, Muhammad gave notice of his intent to use expert psychiatric testimony at the sentencing phase to prove mitigating factors. In response, the Commonwealth moved the trial court **[***78]** for an order appointing an expert for the Commonwealth pursuant to Code § 19.2-264.3:1(F).

At the hearing on the Commonwealth's motion for the appointment of an expert, the trial court granted Muhammad's request that the Commonwealth's expert be prohibited from inquiring into circumstances of the crimes alleged or Muhammad's relationship with Malvo. This restriction was based upon Muhammad's declaration that he did not intend to present evidence that he acted under extreme mental disturbance or failed to appreciate the criminality of his conduct. At that time, the trial court advised Muhammad that if he refused to cooperate with the Commonwealth's expert, it could result in the exclusion of Muhammad's expert's testimony. Muhammad acknowledged to the trial court that he understood the requirements and the potential consequences for noncompliance.

Nonetheless, on October 8, 2003, Muhammad refused to be interviewed by the Commonwealth's expert without his counsel present. Also, he objected to the expert's use of a video camera during the interview. After a hearing on the matter, the trial court permitted counsel to be present at the interview by the Commonwealth's expert and further **[***79]** ruled that the interview could be recorded by video camera. Nonetheless, the following day, Muhammad refused to meet with the Commonwealth's expert under any circumstances.

In response, the Commonwealth moved the trial court under the provisions of Code § 19.2-264.3:1 to prohibit Muhammad from presenting expert testimony from his court appointed experts at sentencing. At the hearing, the trial court again directly addressed Muhammad concerning the potential effect of his refusal to cooperate with the Commonwealth's expert. Muhammad indicated that he **[*505]** understood and that he had made the choice not to cooperate. The trial court exercised its discretion under the

statute and barred Muhammad from presenting expert testimony from his court appointed experts regarding mitigating factors at the sentencing proceeding.

Despite the trial court's ruling, at the conclusion of the evidence in the guilt phase of the trial, Muhammad moved the trial court to permit him to present expert testimony from one of his court appointed mental health experts, Dr. Cunningham, in the sentencing phase. Muhammad represented that Dr. Cunningham would not testify based upon anything he learned from his examination; **[***80]** rather, he would testify based upon statistical analyses about prison populations. Apparently, this testimony would be offered as relevant to the question of Muhammad's future **[**47]** dangerousness. The Commonwealth objected, but the trial court overruled the Commonwealth's objection at that time and invited Muhammad to present Dr. Cunningham's testimony outside the presence of the jury for a determination of its admissibility. Muhammad did not do so.

After all of the evidence had been presented to the jury in the sentencing phase and after both sides rested their case, Muhammad announced that he would present a proffer from Dr. Cunningham. An affidavit from Dr. Cunningham was thereafter submitted to the trial court.

In assignments of error 29, 75, and 76, Muhammad attacks various rulings of the trial court on this matter. Muhammad argues that it was an abuse of discretion for the trial court to deny him the opportunity to present expert testimony. He further states, in conclusory fashion, that the denial violated his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. He further complains that he was not able to present lay testimony in mitigation. Finally, **[***81]** he argues that, because of the notice of intent to use expert testimony in a limited fashion, the Commonwealth was not entitled to an expert evaluation of Muhammad.

Considering the Commonwealth's right to an evaluation of Muhammad, the trial court found, and Muhammad agreed, that the issue of notice of use of evidence in a limited fashion was not raised before the trial court ruled on the matter. It was raised for the first time in post trial proceedings. The trial court ruled that it was waived. ***HN36*** Objections must be stated with reasonable certainty at the time of the trial court's ruling in order to be preserved for

appellate review. This objection will not be considered on appeal. Rule 5:25.

[*506] Consideration of Muhammad's arguments on these matters requires a clear understanding of what the trial court ruled concerning these issues. The trial court ruled that Muhammad could not present expert testimony on mitigation factors at sentencing because of his refusal to abide by the trial court's order to submit to an evaluation by the Commonwealth. The trial court did not bar the presentation of non-expert testimony on this issue. Thereafter, Muhammad sought the ability to present limited **[***82]** expert testimony purporting not to be based upon expert interviews. The Commonwealth objected. The trial court overruled the Commonwealth's objection and gave Muhammad the opportunity to present evidence out of the presence of the jury that would allow the trial court to rule on its admissibility. Muhammad did not take advantage of this invitation. Only after all the evidence was presented at the sentencing phase and both parties rested their case did Muhammad offer an affidavit as a proffer of Dr. Cunningham's testimony. He may not be heard to complain about the exclusion of Dr. Cunningham's limited testimony when he did not give the trial court the contemporaneous opportunity to evaluate its admissibility. Rule 5:25.

Nothing in the trial court's ruling prohibited non-expert testimony on mitigating factors in the sentencing proceeding. Muhammad cites Lovitt v. Warden, 266 Va. 216, 257, 585 S.E.2d 801, 825-26 (2003), cert. denied, 541 U.S. 1006, 158 L. Ed. 2d 523, 124 S. Ct. 2018 (2004), and suggests that somehow that case further prohibits such testimony in the absence of expert testimony. Nothing in Lovitt suggests such a bar.

Considering the main thrust of Muhammad's argument, **[***83]** we turn our attention to the claim that the trial court abused its discretion, and that its decision barring expert testimony on mitigation factors and the statutes that permit such a decision are unconstitutional. Muhammad makes no argument on brief that the statutes are overbroad or vague. His only argument is that their application to him under these circumstances violated various constitutional rights.

The trial court provided Muhammad with the experts he requested at state expense. The

trial court granted Muhammad's request that his counsel be present during any evaluation by the Commonwealth. The trial court engaged Muhammad directly in court on multiple occasions concerning the potential consequences of his failure to cooperate with the evaluation. On these occasions, Muhammad affirmatively expressed his understanding and further acknowledged that he freely **[**48]** decided not to cooperate. After the trial court made its ruling, it even considered permitting expert mitigation testimony **[*507]** not based upon his own expert's interview with him. Muhammad did not avail himself of the opportunity.

Muhammad is correct that ***HN37*** limiting the evidence that a criminal defendant may present in his defense **[***84]** implicates numerous constitutional rights. What Muhammad fails to appreciate is that he may, by his knowing and informed decisions, waive such rights. These rights may be as venerated as the right to a jury, the right to counsel, the right against self-incrimination, and the right to exclusion of evidence seized in an unconstitutional manner. As the Supreme Court recently noted, "Waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a 'knowing, intelligent act done with sufficient awareness of the relevant circumstances.' " Iowa v. Tovar, 541 U.S. 77, 80, 158 L. Ed. 2d 209, 124 S. Ct. 1379 (2004) (quoting Brady v. United States, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970)). We have no difficulty including the right to present mitigating testimony within the panoply of constitutional rights that may be waived by the accused.

Upon review of the record, we agree with the trial court that Muhammad's decision not to cooperate was knowingly and intelligently made. The real issue presented is whether the trial court's exercise of discretion was reasonable under the circumstances.

HN38 The detailed and balanced statutory scheme **[***85]** provided by Code § 19.2-264.3:1 anticipates decisions made by the accused and the Commonwealth regarding expert mental health evaluations and testimony regarding sentencing issues in a capital murder trial. One of those circumstances arises when the defendant gives notice of intent to present certain types of testimony at sentencing. In response, the Commonwealth may request an evaluation of the defendant. The statute explicitly provides

that the trial court must "advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence." Code § 19.2-264.3:1(F)(1). The statute explicitly provides the remedy for lack of cooperation: "the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence." Code § 19.2-264.3:1(F)(2).

HN39 The Supreme Court has recognized that the prosecution has the right to a fair rebuttal of mental health evidence presented by the defendant. In Buchanan v. Kentucky, 483 U.S. 402, 97 L. Ed. 2d 336, 107 S. Ct. 2906 (1987), the defendant challenged the introduction of evidence from a psychiatric report **[***86]** prepared upon joint motion of the defendant and the prosecution. The Court stated, "if a defendant requests such an evaluation or **[*508]** presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested." Id. at 422-23.

We agree with the Commonwealth's characterization of the circumstances presented on this question. "By his own deliberate conduct, the defendant sought to gain an unfair benefit by obtaining an evaluation that the Commonwealth would be powerless to contest at trial either by meaningful cross-examination or by presenting its own expert testimony. The trial court's remedy thus was protective of the interests of all parties in a fair trial and was not punitive." The trial court's ruling was not unreasonable, especially considering that it was willing to consider expert testimony from Dr. Cunningham not based upon interviews with Muhammad, but Muhammad did not avail himself of the opportunity. We hold that the trial court did not abuse its discretion by excluding Muhammad's expert witness testimony concerning mitigation factors at sentencing.

VIII. **[***87]** Discovery Issues

In assignments of error 1, 2, 3, 22, 98, and 99, Muhammad attacks the constitutionality of criminal discovery rules in Virginia, specific rulings of the trial court regarding discovery, the refusal of the trial court to permit ex parte application for expert witness assistance, and the refusal to grant a new trial upon "after-discovered" evidence of an alleged

exculpatory nature. There is no merit to any of Muhammad's contentions.

[49]** Muhammad's claim that criminal discovery rules in Virginia are unconstitutional because they provide for limited discovery has been previously decided. Bailey v. Commonwealth, 259 Va. 723, 736, 529 S.E.2d 570, 577, cert. denied, 531 U.S. 995, 148 L. Ed. 2d 460, 121 S. Ct. 488 (2000); Walker v. Commonwealth, 258 Va. 54, 63, 515 S.E.2d 565, 570-71 (1999), cert. denied, 528 U.S. 1125, 145 L. Ed. 2d 829, 120 S. Ct. 955 (2000). We see no reason to revisit this issue.

Additionally, the trial court did not err in denying certain specific requests for discovery:

a. The trial court was correct in denying Muhammad's request 1(b) seeking "the specific questions, comments or statements of any person involved **[***88]** in the conversation with, or interrogation of, John Allen Muhammad, which brought about any response." Rule 3A:11 requires production of the substance of the defendant's statements but does not require production of the statements sought by Muhammad in this **[*509]** request. Nonetheless, the trial court did order that if a video, audio, or otherwise transcribed interrogation existed, the entirety of such material would be provided to the defendant.

b. The trial court was correct in denying Muhammad's request for "any contemporaneously made notes of statements attributed to the defendant." Except for specifically designated items, subsection (b) of the Rule 3(A):11 excludes the production of such notes.

c. The trial court did not err in denying Muhammad's discovery request seeking "charged offenses, investigation or [items] which allege unadjudicated conduct." Such items are not discoverable under Rule 3A:11; rather such information and items may be provided by motion under Code § 19.2-264.3:2. Similarly, Muhammad's request for evidence of unadjudicated criminal conduct in request 8 was properly denied under Rule 3A:11.

Muhammad alleges that it was error for the trial court **[***89]** to refuse to permit him to make ex parte application to the court "in order to seek funds and authorization to retain expert evaluations." We have previously rejected this

argument and find no reason to revisit the issue. Weeks v. Commonwealth, 248 Va. 460, 473, 450 S.E.2d 379, 388 (1994), cert. denied, 516 U.S. 829, 133 L. Ed. 2d 55, 116 S. Ct. 100 (1995); Ramdass v. Commonwealth, 246 Va. 413, 422, 437 S.E.2d 566, 571, 10 Va. Law Rep. 456 (1993), vacated on other grounds, 512 U.S. 1217, 129 L. Ed. 2d 830, 114 S. Ct. 2701 (1994).

The final issue related to discovery questions involves Muhammad's assertion that the trial court erred in failing to grant him a new trial because the Commonwealth allegedly failed to provide exculpatory evidence to him pursuant to Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Malvo wrote certain letters from jail addressed to "Pacman," a person who remains unidentified. Counsel for Muhammad state that they first became aware of the existence of these letters when they were the subject of testimony in Malvo's trial. The Commonwealth represented to the trial court that prosecutors in Muhammad's case were unaware of the letters before **[***90]** the post-trial motion for a new trial was filed.

Muhammad claims that the so-called "Pacman letters" are exculpatory in nature because of the issue raised by Code § 18.2-18, previously discussed herein, extending the potential applicability of the death sentence in a capital murder prosecution under the terrorism **[*510]** statute where there is proof that the accused "directed" or "ordered" the killing.

Muhammad maintains that the letters show the independence of Malvo from him and demonstrate that Malvo could not have acted under Muhammad's "direction" or "order."

We have previously stated:

> ***HN40*** In Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith **[**50]** or bad faith of the prosecution." Id. at 87. Whether evidence is material and exculpatory and, therefore, subject to disclosure under Brady is a decision left to the prosecution. Pennsylvania v. Ritchie, 480 U.S. 39, 59, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1987). **[***91]** Inherent in making this decision is the possibility that the

prosecution will mischaracterize evidence, albeit in good faith, and withhold material exculpatory evidence which the defendant is entitled to have under the dictates of Brady. If the defendant does not receive such evidence, or if the defendant learns of the evidence at a point in the proceedings when he cannot effectively use it, his due process rights as enunciated in Brady are violated. United States v. Russell, 971 F.2d 1098 (4th Cir.1992); United States v. Shifflett, 798 F. Supp. 354 (1992); Read v. Virginia State Bar, 233 Va. 560, 564-65, 357 S.E.2d 544, 546-47, 3 Va. Law Rep. 2839 (1987).

. . . .

HN41 Exculpatory evidence is material if there is a reasonable probability that the outcome of the proceeding would have been different had the evidence been disclosed to the defense. "A reasonable probability" is one which is sufficient to undermine confidence in the outcome of the proceeding. United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985); Robinson v. Commonwealth, 231 Va. 142, 151, 341 S.E.2d 159, 164 (1986). Bowman v. Commonwealth, 248 Va. 130, 133, 445 S.E.2d 110, 111-12, 10 Va. Law Rep. 1499 (1994).

[*92]** We need not resolve questions related to when the Commonwealth knew of the letters or whether the knowledge of Fairfax prosecutors should be imputed to Prince William prosecutors because, upon review of the record, we hold that the letters were not exculpatory in nature, were not likely to be admissible in Muhammad's case, **[*511]** were cumulative of other testimony, and the admission of such letters would not result in a "reasonable probability that the outcome of the proceeding would have been different had the evidence been disclosed to the defense."

The letters do not significantly address the relationship between Malvo and Muhammad. They do suggest the ability of Malvo to think and act independently, a subject squarely at issue in Malvo's case because Malvo maintained that he was "brainwashed" by Muhammad. As previously discussed herein, Malvo's claim of insanity was demonstrably different than the issue of his action under "direction" or "order" of Muhammad.

Also, the ability of Malvo to think and act independently was amply revealed in other discovery given to Muhammad, such as transcripts of Malvo's confessions to police and drawings and writings Malvo made while in custody. In this **[***93]** respect the "Pacman letters" are merely cumulative in nature.

Muhammad argues that the result of the trial would have been different had the jury received the letters in evidence. The admissibility of the letters in Muhammad's case is far from established. Muhammad only states that they were admissible in Malvo's case, so they must be admissible in Muhammad's. However, in Malvo's case the letters may have satisfied an exception to the hearsay rule as statements of the defendant. Muhammad offers no theory of admissibility of this evidence in his trial that would overcome a hearsay objection.

In ruling on the motion for a new trial, the trial court stated:

> And I do not believe that the Pacman letters are such as to require the granting of a new trial.
>
> I believe that they are cumulative, corroborative and collateral . . . they are not material, such that they would not produce an opposite result on the merits at another trial, or, in the other analysis, that they are not favorable evidence that could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Upon review of the record, we agree with the trial court. The **[***94]** trial court did not err in denying Muhammad's motion for a new trial based upon the "Pacman letters."

[*512] IX. Jury Selection Issues

In assignments of error 16, 20, 30, and 31, Muhammad complains of error in the jury selection process. As a preliminary **[**51]** matter, he asserts that he cannot be tried by any jury in the United States for capital murder under the terrorism statute. He asserts that this unique charge alleging "intent to . . . intimidate the civilian population at large" results in the "legal impossibility to impanel an impartial jury." His logic is simply stated: because victims of the crime charged cannot be jurors in the case, no one from the "civilian population at large" can serve on his jury. Taking this tautology to its extreme application, Muhammad concludes, "The entire civilian population of Prince William County, and

indeed, of the entire state and the United States, was alleged to be the victim."

We need not address Muhammad's extensive citation of cases concerning prohibition of victims of a particular crime serving on the jury trying the crime at issue. The entirety of his argument is premised upon the status of jurors in this case as victims. They are not victims. **[***95]** The victim in the capital murder charge based upon terrorism is Dean Meyers. Arguably, Muhammad's victims under the facts of the case and the evidence presented also included Keenya Cook, Muhammad Rashid, Paul LaRuffa, Claudine Parker, Keely Adams, Hong Im Ballenger, Premkumar Walekar, Sara Ramos, Lori Lewis-Rivera, Paschal Charlot, Caroline Seawell, Iran Brown, Kenneth Bridges, Linda Franklin, Jeffrey Hopper, and Conrad Johnson.

The trial court's task was to empanel an impartial jury. This task was accomplished by the application of the requirements of carefully drafted statutes in Virginia and the use of voir dire in the selection of the panel. The trial court did not err in denying Muhammad's motion to dismiss the indictment because of a "legal impossibility" of empanelling a jury on the capital murder charge based upon terrorism.

With regard to the voir dire process itself, Muhammad maintains that the trial Court erred in precluding counsel from propounding certain questions and "limiting voir dire . . . regarding capital punishment attitudes, pre-trial publicity and other issues." Additionally, Muhammad makes general arguments attacking the process of "death qualification" of **[***96]** jurors.

In his brief, Muhammad does not argue that the trial court abused its discretion in refusing any question he proposed. In fact, Muhammad does not identify any voir dire question he was not permitted to ask. In this respect, his assignments of error on these **[*513]** issues are inadequately supported by argument on brief and are waived. Rule 5:17(c); Powell, 267 Va. at 135, 590 S.E.2d at 554. Muhammad does specifically complain in assignment of error 32 that the court erred in permitting the Commonwealth to question jurors during voir dire concerning the "concept of direction or order of a 42 year old over a 17 year old regarding the terrorism theory." His argument consists of one sentence: "the Commonwealth should not have been able to telegraph its theory of direction or order." This single sentence does not constitute sufficient

argument. The remainder of the specific complaints in assignment of error 32 are not mentioned at all in the argument. Consequently, they are deemed waived. Rule 5:17(c); Powell, 267 Va. at 135, 590 S.E.2d at 554.

Finally, with regard to the qualification of the jury, Muhammad argues that the "death qualification" process **[***97]** itself is unconstitutional. There is no assignment of error concerning this issue; consequently, it is not properly before us. Rule 5:17(c); Powell, 267 Va. at 135, 590 S.E.2d at 554.

X. Evidentiary Issues

A. Sergeant Major Mark Spicer

In assignments of error 36, 37, and 62, Muhammad alleges that it was error for the trial court to permit the testimony of Sergeant Major Mark Spicer concerning the Commonwealth's sniper theory. Spicer's testimony came at a time in the trial proceedings when Muhammad was representing himself with the aid of standby counsel.

Muhammad maintains that the Commonwealth did not identify Spicer as an expert witness pursuant to the requirements of a pretrial order. He further argues that the "slides" used as demonstrative aids in his presentation constituted "reports" subject to disclosure under the pretrial order. The **[**52]** pertinent part of the pretrial order required the Commonwealth's production of "written reports of autopsies, ballistic tests, fingerprint analysis, handwriting analysis, blood, urine and breath tests and other written scientific reports and . . . oral scientific reports that the Commonwealth intends to offer in its case in **[***98]** chief or that are exculpatory." In consideration of Muhammad's motion for a new trial, the trial court held that the pretrial order did not require disclosure of all experts. It only required the disclosure of scientific tests and results. Spicer's slides were not in the nature of scientific tests and results.

[*514] Next, Muhammad asserts that Spicer's testimony was irrelevant and that he should not have been permitted to testify about "Mr. Muhammad's background, military career, and other factors not in evidence." Upon review of the record, we hold that Muhammad did not make contemporaneous objections concerning these matters; consequently, they are not preserved for appeal and may not be

considered. Rule 5:25. The trial court did not err in refusing to exclude Spicer from testifying or in refusing to grant Muhammad's motion for a new trial on these grounds.

B. Jeffrey Miller

Muhammad alleges in assignment of error 44 that the trial court erred in permitting Fairfax Police Officer Jeffrey Miller to "testify as to his opinion." In argument, Muhammad maintains that Miller's testimony was expert opinion testimony and that it was based upon conjecture and surmise and facts not in evidence. **[***99]** Muhammad appears to complain in his brief, although not in the assignment of error, that he was not given notice of Miller's testimony in violation of the pretrial discovery order.

Muhammad did not object at trial on the basis that he had no notice of Miller's testimony. He did not object at trial that Miller's testimony was based upon conjecture or surmise or not supported by facts in evidence. He did not object at trial that Miller's testimony was expert in nature. We will not consider these arguments for the first time on appeal. Rule 5:25.

C. Edward Bender

In assignment of error 54, Muhammad argues that the trial court erred in admitting certain laboratory reports of the Virginia Department of Forensic Science through Edward Bender, a chemist at the Federal Bureau of Alcohol, Tobacco and Firearms. His assignment of error asserts that admission of the report constituted a "violation of a right to confront the person who undertook that analysis pursuant to Crawford v. Washington," 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004).

Crawford had not been decided at the time of Muhammad's trial. No objection was made at trial based upon Sixth Amendment rights. Muhammad's objections were based **[***100]** upon compliance with Code § 19.2-187 not constitutional concerns. The objections on appeal based upon the Sixth Amendment and Crawford were not preserved at trial. We will not consider them. Rule 5:25.

[*515] D. Professor Steven Fuller

George Mason University Professor Steven Fuller testified over the defendant's objection about the economic impact of the 47 days of turmoil caused by the criminal conduct of Muhammad and Malvo. Assignment of error 60 complains that his testimony was permitted

without notice required by the pretrial discovery order, "and further was without proper foundation or a basis in the record for such expert testimony to be admitted."

The trial court found that Fuller did not generate any reports which were required to be produced by the pretrial discovery order. Although Muhammad claims in his brief that "the testimony was wholly irrelevant," he also answers his own objection by stating, "this witness was crucial to the Commonwealth theory that the October, [2002] shooting influenced the government." Other than relevance, an issue he concedes, Muhammad does not offer any specific basis upon which this testimony was admitted without proper foundation. Upon **[***101]** review of the record, we cannot say that the trial court abused its discretion in permitting Fuller to testify.

[53]** E. Alleged Victim Impact Evidence Admitted During Guilt Phase

In assignments of error 38, 39, 40, 41, and 42, Muhammad makes various objections to the introduction of biographical information and backgrounds of various victims. Specifically, Muhammad objects to the trial court's admission of "so-called 'photographs in life' " of various shooting victims and the admission of certain "911" calls, particularly that of Ted Franklin, husband of Linda Franklin.

At trial, Muhammad did not object to the admission of the "photographs in life" of various victims. He did raise an objection to the Commonwealth's use of the photographs during opening statement, but did not object to the photographs when admitted. Also Muhammad did not object to the admission of the first three "911" tapes received in evidence regarding the shooting of Meyers and LaRuffa. These objections are not preserved. Rule 5:25.

Three other "911" tapes were admitted into evidence. Muhammad objected to the tape related to Rashid's shooting as "irrelevant." With regard to the tapes involving the shootings of Brown **[***102]** and Franklin, Muhammad objected that the tapes were irrelevant and cumulative. The trial court ruled that the tapes were "very relevant . . . and material evidence." Muhammad objected to the "911" tape **[*516]** of Franklin's husband as prejudicial. Upon consideration of the objection, the trial court ruled that the prejudicial impact was outweighed by its probative value. The trial court specifically

noted that the tape was relevant to the issue of terror in the community.

Muhammad objected to a question asked of Meyers' brother regarding Meyers' military service. The trial court sustained the objection. Every objection made by Muhammad to the testimony of Parker's sister was sustained. Muhammad did not make a contemporaneous objection to the testimony of Ballenger's sister; rather, he waited until her testimony was concluded. Any objection not raised contemporaneously is waived. Rule 5:25. To the extent that a continuing or renewed objection was made to the introduction of a photograph of Ballenger, the trial court did not err in admitting Exhibit 137A. Similarly, Muhammad's objection to the testimony of Ballenger's widower was not timely. An objection during the testimony of Walekar's daughter **[***103]** resulted in a direction from the trial court to limit the testimony to biographical information. The objection made by Muhammad to the testimony of Ramos' widower was sustained. Before Lewis-Rivera's widower testified, Muhammad objected to what he expected to be "victim-impact" testimony. The court instructed the Commonwealth concerning proper limitations upon the testimony and, when it was offered, there was no objection. Every objection to the testimony of Charlot's daughter, Franklin's daughter, and Johnson's widow was sustained.

The record reveals that the trial court carefully limited the Commonwealth in the guilt phase to short biographical information about the victim and the manner in which the particular family member found out about the shooting. The testimony was not "victim-impact" testimony allowed in the penalty phase. It did not consist of evidence of economic or psychological loss, or grief. The trial court did not abuse its discretion in the admission of such evidence.

F. The Rashid Shooting

Muhammad alleges in assignment of error 46 that evidence of the robbery and shooting of Muhammad Rashid was immaterial and irrelevant to the Commonwealth's theories of the case. **[***104]** He also argues that the probative value of the evidence was outweighed by the prejudicial impact upon the jury.

At trial the Commonwealth explained the relevance of the evidence. Rashid was shot

and wounded at the Three Roads Liquor Store. Rashid saw the Caprice outside the store before the shooting. **[*517]** He identified Malvo as the person who shot him with a handgun. At the same time that Malvo shot him, he was shot at with a rifle from a distance. The rifle shot missed its target. The handgun was the same weapon used to shoot and wound LaRuffa and the same weapon found at the scene in Montgomery, Alabama where Malvo dropped it after Parker **[**54]** and Adams had been shot with a high-powered rifle. The rifle used to wound and kill Parker and Adams at the same time that Malvo held the handgun during their robberies was the .223 caliber Bushmaster rifle recovered from the Caprice with Muhammad and Malvo.

The trial court did not abuse its discretion in the admission of this evidence because it demonstrated a "singular strong resemblance to the pattern of the offense charged," Johnson v. Commonwealth, 259 Va. 654, 677, 529 S.E.2d 769, 782, cert. denied, 531 U.S. 981, 148 L. Ed. 2d 439, 121 S. Ct. 432 (2000), **[***105]** and it provided significant links connecting Muhammad and Malvo to each other, to the weapons used, and supported the theories of the Commonwealth concerning the methodology of their cooperative criminal efforts.

G. Documents Related to the Caprice

During the testimony of Christopher O'Kupski, a used car salesman from New Jersey, the trial court admitted certain "paperwork" related to the ownership and transfer of title for the Caprice. In assignment of error 48, Muhammad argues that the trial court erred in admitting these documents because they were "not properly authenticated" and "were hearsay." Exhibit 65 consisted of four documents: the temporary car tag, a registration application, a reassignment form, and the original title to the Caprice. Upon questioning by the trial court, the witness stated that he had "filled out" the documents, with the exception of the registration application which is a form regularly used by the New Jersey Division of Motor Vehicles. Assuming, without deciding that the admission of any or all of these documents was improper, the error would be harmless. The evidence was offered to show Muhammad's purchase of and connection to the Caprice. Considering **[***106]** O'Kupski's testimony apart from the documents themselves, and the extensive evidence of Muhammad's connection to the

Caprice, if the trial court erred, such error was most certainly harmless error.

[*518] H. Charlene Anderson

Charlene Anderson, Muhammad's cousin, testified about her encounters with Muhammad and Malvo in Baton Rouge, Louisiana in August 2002. In assignments of error 49, 50, 51, and 62, Muhammad asserts that her testimony was irrelevant, that "the prejudicial value outweighed any probative assistance to the fact finder," and that the Commonwealth was permitted to question Anderson on redirect beyond the scope of cross-examination.

Anderson testified that Muhammad told her that he and Malvo were on a mission for the military to recover explosives. Anderson was a law enforcement officer. Muhammad asked her to provide him with bullets. Anderson testified that Muhammad told her that Malvo was "highly trained."

Muhammad objected to this testimony on the grounds that it was hearsay and irrelevant. The trial court overruled the objection on the grounds that it was not offered for the truth of its content, namely that Muhammad and Malvo were actually on a mission for the military **[***107]** and that Malvo actually was "highly trained." The purpose for the testimony was to show Muhammad's attempt to obtain ammunition for his rifle shortly before the string of shootings began and also to show the nature of the relationship between Malvo and Muhammad.

During cross-examination of Anderson, Muhammad elicited testimony suggesting that Muhammad and Malvo did not interact or talk to each other. On redirect, the trial court permitted the Commonwealth to ask Anderson about a conversation she overheard between Muhammad and Malvo.

Lastly, with respect to Anderson's testimony, Muhammad asserts that it was error to permit Anderson to describe the rifle Muhammad showed her. Muhammad made no such objection at trial. He may not advance this claim of error for the first time on appeal. Rule 5:25.

Upon review of the record and upon the issues preserved for appeal, we hold that the trial court did not err in admitting Anderson's testimony. It was relevant and its probative value outweighed any claim of prejudicial effect upon the jury.

[55]** I. Demonstrative Evidence - Model of the Caprice Trunk and Video

At trial the Commonwealth offered demonstrative evidence utilizing a model of the trunk **[***108]** of the Caprice and a video demonstrating how a shooting could take place from the trunk. ***HN42*** The use of **[*519]** demonstrative evidence to illustrate testimony is a matter entrusted to the sound discretion of the trial court. Mackall v. Commonwealth, 236 Va. 240, 254, 372 S.E.2d 759, 768, 5 Va. Law Rep. 670 (1988), cert. denied, 492 U.S. 925, 106 L. Ed. 2d 607, 109 S. Ct. 3261 (1989).

Muhammad claims in assignments of error 55, 56, 57, and 58 that the trial court erred in admitting this evidence because "the reconstruction was not complete," it "was out of context," and "did not include the materials in the trunk from the time of Mr. Muhammad's arrest or any specific incident." Muhammad further argues that it was error to allow the jury to inspect the Caprice after viewing the demonstrative replica and the video. He further complains about the use of "police officer stand-ins" in the video and that the evidence presented invited the jury to speculate about what occurred in the shootings, particularly the shooting of Dean Meyers.

The evidence presented was not expert reconstructive opinion testimony. Rather it was demonstrative evidence, illustrative in nature of other evidence presented. Muhammad **[***109]** claims that the demonstration was not supportive of the Commonwealth's theory of the case nor based upon other evidence presented. We disagree with Muhammad.

Scientific evidence of the presence of nitroglycerine and gunshot residue in the trunk of the Caprice proved that gunshots were fired from the trunk. A witness testified that he saw a flash come from the car when Charlot was murdered. Muhammad and Malvo were seen in the Caprice immediately before the murder of Dean Meyers. Immediately after the murder of Dean Meyers, Muhammad was interviewed in the parking lot across the street and in the presence of the Caprice. Malvo was not seen at the parking lot, leaving the reasonable inference that Malvo was in the trunk. Demonstrative evidence concerning how a person could get from the passenger compartment to the trunk from the inside and how a person could shoot a rifle from within the trunk was relevant and helpful to the jury.

The trial court carefully considered the relevance of the demonstrative evidence and

the foundation for its admissibility. The trial court did not abuse its discretion in permitting this demonstrative evidence followed by an actual inspection of the trunk of **[***110]** the Caprice.

J. Testimony Regarding Terror in the Community

Robert Saady, a convenience store operator in Ashland, Virginia testified at trial about the impact of the sniper shootings on his business, his employees, and other businesses in the Ashland **[*520]** area. Montgomery County Police Sergeant Robert Thompson testified at trial concerning the shootings in the Washington D.C. area. Muhammad argues in assignments of error 59 and 61 that Saady's testimony was "irrelevant, speculative, and immaterial," and that Thompson's testimony was "cumulative, irrelevant and immaterial." He argues that proof of actual fear in the community is not probative of Muhammad's intent.

School officials in three different school systems also testified about the impact of the sniper shooting upon personnel, students and parents, and the operation of the schools. However, the only assignments of error before this Court involve the testimony of Saady and Thompson.

With regard to Thompson, Muhammad objected only to specific questions not the overall nature of the testimony. None of those specific objections are made the subject of argument in his brief. With regard to Saady, Muhammad did object to the relevance **[***111]** of his testimony in its entirety. Section 18.2-46.4 required proof that Muhammad intended to "intimidate the civilian population at large or . . . influence the conduct or activities of the government . . . through intimidation." ***HN43*** It is an axiom of law and human behavior that one may infer that a person intends to produce the consequences reasonably anticipated from his acts. Wilson v. Commonwealth, 249 Va. 95, 101, **[**56]** 452 S.E.2d 669, 673, cert. denied, 516 U.S. 841, 133 L. Ed. 2d 76, 116 S. Ct. 127 (1995); see also Mickens v. Commonwealth, 247 Va. 395, 408, 442 S.E.2d 678, 687, 10 Va. Law Rep. 1201, rev'd on other grounds, 513 U.S. 922, 130 L. Ed. 2d 271, 115 S. Ct. 307 (1994); Green v. Commonwealth, 223 Va. 706, 711, 292 S.E.2d 605, 608 (1982); Barrett v. Commonwealth, 210 Va. 153, 156, 169 S.E.2d 449, 451 (1969). As such, testimony about

what was actually and reasonably produced by Muhammad's conduct was relevant to prove his intent. The trial court did not err in permitting such testimony.

K. Motion to Quash Eyewitness Identifications

In assignment of error 25, Muhammad alleges that "the court erred in denying the motion to quash and **[***112]** suppress as unreliable various eyewitness identifications." In his one paragraph argument in his brief, Muhammad offers insufficient argument in support of his assignment of error. It is waived. Rule 5:17(c); Powell, 267 Va. at 135, 590 S.E.2d at 554.

[*521] XI. Sentencing

A. Torture, Aggravated Battery, or Depravity of Mind

In assignment of error 12, Muhammad asserts that:

> It was error to deny the motion to preclude sentence of death based on vileness factor and allow the Commonwealth to base its request forthe death sentence on the "vileness" factor, since there was no evidence of torture, aggravated battery, or depravity of mind.

Muhammad raised this issue in a pre-trial motion which the trial court took under advisement until the evidence had been presented. At the conclusion of the presentation of the evidence, Muhammad expressly stated that he objected to the case being presented to the jury based upon torture or aggravated battery. Muhammad's assignment of error is in the disjunctive. He claims that there was no evidence of torture, aggravated battery, or depravity of mind. He did not object to "depravity of mind" as a predicate finding for vileness. **[***113]** The trial court ruled that it would not include "torture" in the instructions. Muhammad's objections in the trial court do not preserve assignment of error 12. Rule 5:25; Rule 5:17.

B. Victim Impact Testimony

Muhammad argues in assignment of error 11 that it was error under the due process clause to permit victim impact testimony during the penalty phase of his trial. He argues that prior to 1998, the Virginia capital sentencing scheme "only contemplated the presentation of victim impact testimony to the judge prior to the imposition of sentence." To the extent that this statement provides a separate grounds

for his assignment of error, it is barred from review because the issue was not raised in the trial court. Rule 5:25. With respect to Muhammad's complaint about victim impact evidence presented to a jury, we have previously considered such claims and have rejected them. Beck v. Commonwealth, 253 Va. 373, 385, 484 S.E.2d 898, 906, cert. denied, 522 U.S. 1018, 139 L. Ed. 2d 495, 118 S. Ct. 608 (1997); Weeks, 248 Va. at 476, 450 S.E. 2d at 389. We see no reason to revisit our previous decisions.

C. Unadjudicated Criminal Conduct

Muhammad alleges **[***114]** in assignments of error 77, 78, 79, 80, 81, 82, and 83 that the trial court erred in admitting multiple instances of unadjudicated criminal conduct. As previously discussed, **[*522]** he has waived assignments of error 78, 79, 80, 82, and 83 for failure to adequately brief the issues. Rule 5:17(c). We will turn our attention to assignments of error 77 and 81. Assignment of error 77 states:

> The court erred by allowing unadjudicated acts to be received into evidence by the jury without any standard of proof or particularized burden on the Commonwealth to prove such acts to a specific standard of proof in violation of Mr. Muhammad's right to due process under the Virginia and United States Constitutions.

As stated, assignment of error 77 is unspecific. We must look to other assignments of **[**57]** error to place his complaint in a particular context. The only specific issue involving unadjudicated criminal conduct properly before us on appeal is the subject of assignment of error 81 concerning testimony about an alleged escape attempt from the Prince William County Adult Detention Center.

Muhammad filed a motion in limine seeking to exclude evidence of an alleged escape. At a hearing on **[***115]** the motion, Muhammad argued that the Commonwealth "ought to be able to make a proffer to the court about what they have, and [the trial court] could rule on that and whether or not that is even sufficient enough to go to this jury." The trial court denied the motion in limine and directed Muhammad to "raise whatever objection you feel is appropriate when they put their evidence on."

Immediately before the Commonwealth offered its proof of the alleged escape attempt, Muhammad made an oral motion in limine to

exclude the evidence once again. Muhammad objected to the lack of notice of a particular witness testifying on the subject. The motion was denied and is not the subject of an assignment of error on appeal. Then Muhammad raised once again the issue of sufficiency of evidence of an escape attempt. Further, Muhammad argued that there was no "standard" for the admissibility of unadjudicated acts. Muhammad offered no standard in his argument. The trial court overruled the motion.

During the Commonwealth's presentation of evidence on the subject by two witnesses, Muhammad made three objections based upon hearsay. None were based upon the question of a threshold standard of admissibility. **[***116]** At the conclusion of the all the evidence from the prosecution and defense at the sentencing phase and after both parties had rested, Muhammad moved to strike the evidence of the attempted escape. However, Muhammad did not argue that there was **[*523]** no threshold standard for admissibility and offered no standard to be used. Rather, Muhammad argued, "there's just no evidence of an escape." In denying the motion, the trial court responded:

> Well, the facts are what they are; and I think that the Commonwealth can argue what inference they believe reasonably flows from that; and Muhammad can argue what inference you believe reasonably flows. The weight of that, I think, is up to the jury. I'm going to overrule your - deny your motion to strike the evidence.

HN44 In order to preserve an issue for appeal, an objection must be made with sufficient specificity and must be timely. Rule 5:25 "requires that an objection be made with sufficient specificity to enable the trial judge to rule intelligently and, thus, to avoid unnecessary reversals on appeal. Absent such objection, the issue will not be considered for the first time on appeal." Commonwealth v. Washington, 263 Va. 298, 309, 559 S.E.2d 636, 642 (2002) **[***117]** (citing Fisher v. Commonwealth, 236 Va. 403, 414, 374 S.E.2d 46, 52, 5 Va. Law Rep. 1019 (1988), cert. denied, 490 U.S. 1028, 104 L. Ed. 2d 201, 109 S. Ct. 1766 (1989)).

During the argument on the written motion, the trial court addressed Muhammad's counsel and inquired, " . . . why do you think this is not going to be relevant?" Counsel's response made no reference to any particular standard

of proof and addressed the relevance issue. Of course, unadjudicated criminal conduct is made relevant in the sentencing proceeding by statute. Code § 19.2-264.3:2. See generally Watkins v. Commonwealth, 229 Va. 469, 488, 331 S.E.2d 422, 436 (1985). Nowhere in the record does Muhammad argue that the trial court should permit introduction of such evidence only upon proof of the unadjudicated criminal conduct beyond a reasonable doubt or by clear and convincing evidence or by preponderance of the evidence. Muhammad's objections to the evidence of an attempted escape therefore were not "made with sufficient specificity to enable the trial judge to rule intelligently," and consequently, his objections were not sufficient to preserve the issue for appellate purposes. They will not be **[***118]** considered. Rule 5:25; Washington, 263 Va. at 309, 559 S.E.2d at 642; Riner v. Commonwealth, 268 Va. 296, 325, 601 S.E.2d 555, 571-72 (2004).

D. Testimony of Mildred Muhammad

In assignments of error 84 and 85, Muhammad asserts that the trial court erred in **[**58]** allowing Mildred Muhammad, ("Mildred"), the defendant's former wife, to testify about statements made to her **[*524]** by her lawyer in Tacoma, Washington and a statement made by their child, Taalibah.

Mildred testified that the lawyer representing her in a custody proceeding told her to leave town quickly because of fear that Muhammad would find her and kill her. Muhammad objected to this statement on the grounds of hearsay. The trial court overruled the objection because it was not offered for the truth of the matter asserted; rather, it was offered to show why Mildred left Washington State and moved to the suburbs of Washington, D.C. The trial court gave the jury a limiting instruction directing it that the evidence was to be considered only to prove that she moved because of the statement made by her lawyer. After further discussion with counsel, the court gave an additional limiting instruction drafted **[***119]** by Muhammad. Also, Mildred testified that her daughter, Taalibah, said to her that if Muhammad "gets out," she was concerned that he would kill her mother. Muhammad objected on the grounds of hearsay.

Muhammad maintains on appeal that allowing such statements violated his Sixth Amendment right to confront witnesses against him and violated the rule established in Crawford. Crawford had not been decided at the time of

Muhammad's trial. He made no objection based upon the Sixth Amendment to the testimony of his former wife. These issues will not be considered for the first time on appeal. Rule 5:25.

The trial court did not err in admitting Mildred's testimony regarding her lawyer's statement to her. It was not hearsay because it was not offered for the truth of the matter asserted. Chandler v. Graffeo, 268 Va. 673, 682, 604 S.E.2d 1, 5 (2004). A proper limiting instruction was given, not once, but twice. One of the instructions was drafted by Muhammad. ***HN45*** A jury is presumed to have followed the instructions of the trial court. Green v. Young, 264 Va. 604, 611, 571 S.E.2d 135, 139 (2002) (citing Zafiro v. United States, 506 U.S. 534, 540, 122 L. Ed. 2d 317, 113 S. Ct. 933 (1993)). **[***120]**

With regard to Mildred's testimony about her daughter's statement to her, the record reveals a more complicated context. Muhammad objected on the grounds of hearsay and relevancy, not on Sixth Amendment grounds. It is significant that the Commonwealth did not seek to introduce Mildred's testimony about her daughter's statement until after the trial court, over the Commonwealth's objection, ruled that it would allow Muhammad to present to the jury several letters written to him from his children, including Taalibah, which gave the impression that the children had no fear of him. After considerable argument from counsel, the trial court ruled **[*525]** that all the letters Muhammad sought to introduce would be allowed and a single statement from Taalibah to her mother would also be allowed. The trial court ruled that all of this evidence was admissible pursuant to the state-of-mind exception to the hearsay rule. The Commonwealth also argued that Taalibah's statement should be independently admissible as rebuttal to Muhammad's introduction of the letters.

The nature of the evidence offered by Muhammad was to show his relationship with his children. He offered out of court statements in the form **[***121]** of letters from his children for this purpose. Similarly, the Commonwealth offered an out of court oral statement from Taalibah for the same purpose. Upon review of the record, we hold that, if the admission of Taalibah's statement was error, it was invited error. ***HN46*** We will not "notice error which has been invited by the party seeking to take advantage thereof on appeal." Saunders v.

Commonwealth, 211 Va. 399, 400, 177 S.E.2d 637, 638 (1970); Clark v. Commonwealth, 202 Va. 787, 791, 120 S.E.2d 270, 273 (1961). Muhammad's introduction of evidence showing the state of mind of his children toward him -- arguing that such proof was both relevant and not objectionable hearsay -- surely invited evidence of a similar nature from the Commonwealth. Whether as evidence in its case in chief or as rebuttal evidence, the trial court did not err in permitting Mildred to testify about Taalibah's statement.

[59]** XII. Jury Instructions

In assignments of error 86, 87, 89, 90, 91, 92, 93, 94, and 95, Muhammad alleges defects in the instruction of the jury.

A. Aggravated Battery

Muhammad objected to the trial court's instruction to the jury that it could find the aggravating **[***122]** factor of vileness under Code § 19.2-264.2 from proof of aggravated battery in the death of Dean Meyers. Muhammad asserts that a single shot has never qualified as an aggravated battery. We have defined ***HN47*** aggravated battery as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 967, 60 L. Ed. 2d 1074, 99 S. Ct. 2419 (1979). Muhammad asserts that, in a shooting case, this Court has always required more than one gunshot to satisfy the requirements of aggravated battery.

In Hedrick v. Commonwealth, 257 Va. 328, 513 S.E.2d 634, cert. denied, 528 U.S. 952, 145 L. Ed. 2d 294, 120 S. Ct. 376 (1999), we noted that ***HN48*** the clear language of Code § 19.2-264.2 demonstrates that "the term 'vileness' includes **[*526]** three separate and distinct factors, with proof of any one factor being sufficient to support a finding of vileness and hence a sentence of death." Id. at 341-42, 513 S.E.2d at 640. Those factors are torture, depravity of mind, or aggravated battery to the victim.

The significance and effect **[***123]** of Muhammad's argument attacking the aggravated battery instruction must be assessed in the context of the other jury instructions and the jury's actual findings. Jury instruction 14 dealt with the offense of "the killing of Dean Meyers as part of the killing of

more than one person in a three-year period." Jury instruction 14A dealt with the offense of "the killing of Dean Meyers in the commission or attempted commission of an act of terrorism." Each of the instructions included direction to the jury that the penalty of death could not be imposed for either of the offenses unless the Commonwealth proved beyond a reasonable doubt at least one of the following aggravating circumstances:

> 1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> 2. That his conduct in committing the offense was outrageously or want only vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

For each of the offenses, the jury's verdict forms **[***124]** expressly found that Muhammad "would commit criminal acts of violence that would constitute a continuing serious threat to society," and that "the offense was outrageously or wantonly vile, horrible, or inhuman." Additionally, each of the verdict forms expressed findings of both "depravity of mind" and "aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." Based upon these multiple findings, the jury unanimously fixed Muhammad's punishment at death for each of the offenses.

Even if the trial court erred in granting an instruction based upon aggravated battery, the error would be harmless beyond a reasonable doubt. The jury's verdict of death for each of the offenses was predicated upon additional and independent findings of future dangerousness and vileness based upon depravity of mind.

[*527] B. Future Dangerousness Instruction

Muhammad argues in his brief that the future dangerousness instruction given is unconstitutionally vague. The Court can find no assignment of error that attacks this instruction on that basis. Furthermore, his one sentence conclusory argument is inadequate. We will not consider the argument. Rule 5:17(c).

C. Finding Instruction

[*125]** In assignment of error 91, Muhammad alleges that the trial court erred in failing to instruct the jury "that the verdict be unanimous as to any aggravating factors." Muhammad's argument on this point is a one-sentence repetition of his assignment of **[**60]** error. It is inadequate argument and will not be considered. Rule 5:17(c).

D. Life Without Parole

In assignments of error 87 and 90, Muhammad maintains that the trial court erred in granting the Commonwealth's proposed instructions "without including the 'life without the possibility of parole' language." He further argues that the trial court should have granted his proposed instruction with such language. Once again, Muhammad, in one sentence conclusory arguments, simply repeats the language of the assignment of error and offers no argument. The assignments of error are deemed waived. Rule 5:17(c).

E. Remaining Issues Relating to Instructions

Numerous other issues are waived by Muhammad for failure to make sufficient argument in his brief. He makes insufficient argument that:

1. The trial court should have granted his instruction K defining mitigation. Additionally, here the trial court did define mitigation, it simply refused **[***126]** to highlight any particular evidence as Muhammad wanted;

2. The trial court should have instructed the jury that it could consider life without parole in determining aggravating factors and as a mitigating factor;

3. The trial court should have given his instruction L because the jury was "left directionless" as to how to "weigh" mitigation evidence;

4. The trial court should have instructed the jury that the vileness factor applied only to Meyers' killing. Additionally, here the instruction offered was incorrect because the vileness **[*528]** factor could be found based upon depravity of mind as well;

5. The trial court should have granted his instruction T regarding mitigating evidence to be considered in weighing culpability and future violence. The entirety of his argument consists of the following: "The jury was entitled to this guidance."

6. The trial court did not make it clear in instructions that the jury could impose life

in prison even if it found aggravating factors. The record demonstrates that the jury was properly instructed on this matter.

For each of these matters (1 - 6), Muhammad fails to make sufficient argument in his brief. The matters are **[***127]** waived. Rule 5:17(c).

XIII. Pretrial Publicity and the Right to a Fair Trial

In assignments of error 5, 23, 24, and 28, Muhammad makes various arguments concerning alleged errors of the trial court concerning its handling of pretrial publicity. Muhammad argues that:

1. The trial court erred by denying his motion to issue a show cause order, quashing subpoenas related to seeking evidence of pretrial leaks of information concerning the investigation of Muhammad and Malvo, and denying a request for appointment of a special prosecutor to investigate pretrial leaks;

2. The trial court erred by denying Muhammad's motion to close a hearing on a motion in limine;

3. The trial court erred in failing to prevent information leaks and to take appropriate corrective action concerning the leaks;

4. The trial court erred in refusing to dismiss the charges against Muhammad based upon leaks of information;

5. The leaks "hindered the defendant's ability to seat a fair jury despite the change of venue."

This case attracted extensive media coverage. Counsel for Muhammad and the Fairfax Commonwealth's Attorney agreed to a consent order in the Fairfax County Circuit **[***128]** Court, where Malvo's prosecution was pending, generally prohibiting law enforcement officials of the Fairfax County Police Department and its civilian employees from disclosing information in violation of the Department's own rules, namely, General Order 401.1. Among other things, **[*529]** General Order **[**61]** 401.1 and the consent order in Fairfax County Circuit Court specifically prohibit disclosure of evidence of statements, criminal records, opinions of guilt or innocence, testing and test results, and statements about expected testimony. Additionally, counsel for Muhammad and the Commonwealth's Attorney for Prince William County agreed that all discovery from the Commonwealth would be sealed to limit

dissemination of information that might have an effect upon jury selection.

Due to continued concerns about allegations of leaks of information related to the investigation and prosecution of Muhammad and Malvo, Muhammad filed a motion for rule to show cause in the Prince William County Circuit Court requesting that the trial court determine the source of information appearing in the media concerning the Malvo and Muhammad cases which had been attributed to law enforcement sources, and take appropriate **[***129]** action. In the alternative, Muhammad requested that the trial court appoint a special prosecutor or investigator. The trial court denied the motion. A similar motion had been presented to the Circuit Court of Fairfax County and was denied.

Thereafter, Muhammad and the Prince William County Commonwealth's Attorney agreed to the entry of an order on August 5, 2003, providing in pertinent part:

> Law enforcement employees, from all agencies working as members of the prosecution Task Force, or working with the Task Force, whether sworn officers/agents or civilian employees shall not disclose any information to the press or public related to the investigation leading to the arrests of John Allen Muhammad and Lee Boyd Malvo, and pending prosecution of John Allen Muhammad and Lee Boyd Malvo in Prince William and Fairfax County Circuit Courts.

Approximately two weeks before the commencement of Muhammad's trial, a book entitled "Sniper: Inside The Hunt For The Killers Who Terrorized The Nation," was released to the public. This 237-page publication contained detailed information concerning the investigation of Muhammad and Malvo. Muhammad filed a motion to dismiss the charges or **[***130]** for other appropriate relief asserting that there had been a flagrant violation of the August 5, 2003 order by numerous and unknown law enforcement agents. In the motion, Muhammad did not fault the prosecutors in the case and did not argue that there had been any discovery violations under Rule 3A:11.

[*530] The trial court expressed its concern about the matter but disagreed regarding Muhammad's proposed remedies. In the absence of any violations of the discovery rules, the trial court declined to prohibit

introduction of specified evidence of the Commonwealth. The trial court declined to order that the Commonwealth could not seek the death penalty. The trial court indicated that it would allow individual voir dire of potential jurors on the issue of pre-trial publicity. The trial court had already granted a motion for change of venue and the trial was scheduled to be held in Virginia Beach, Virginia.

Muhammad asserts that the trial court should have dismissed the charges, precluded the death penalty, or limited the introduction of evidence pursuant to the authority of Code § 19.2-265.4. However, this code section recites potential remedies for failure to provide discovery under **[***131]** Rule 3A:11. Muhammad expressly stated in his motion that no discovery violations under the rule had occurred.

In his motion, Muhammad does not suggest that the Commonwealth's Attorney's office of Prince William County was the source of leaks. Additionally, there is no evidence that the information contained in the book published before trial came from leaks after the August 5, 2003 order. The trial court noted that it was likely that most of the information in the book came from communications prior to the time the trial court was asked to intervene and prohibit disclosure of any information regarding the Muhammad and Malvo investigations.

In his brief on this matter, Muhammad cites one statute, which does not apply, and no cases, in support of his argument that Muhammad was not tried by a fair and impartial jury or that his trial was in any way tainted by pretrial publicity. Upon review of the record, we conclude that the trial court **[**62]** took appropriate action to limit the effect of pretrial publicity in this case. The trial court entered a consent order regarding sealing of discovery responses of the Commonwealth; when asked, the trial court entered the August 5, 2003 order prohibiting **[***132]** law enforcement and civilian employees of law enforcement agencies from disclosing to the media or the public any information concerning the investigation of Muhammad and Malvo; the trial court granted Muhammad's motion for a change of venue to a location away from the immediate zone of pretrial publicity; and, the trial court permitted individualized voir dire of potential jurors concerning pretrial publicity.

Muhammad does not cite any actual tainting of the jury selection process or any way in which his trial was compromised by pretrial

publicity. He does not cite any particular consequences of the trial **[*531]** court's denial of a motion to close a hearing on a motion in limine or the trial court's refusal to issue show cause orders or appoint a special prosecutor to investigate leaks. It is most telling that at trial, of the 125 potential jurors questioned, only 8 were challenged on grounds that exposure to pretrial publicity made them inappropriate jurors. We hold that the trial court did not err with regard to any of the issues raised in Muhammad's assignments of error 5, 23, 24, and 28.

XIV. Miscellaneous Constitutional Challenges to the Death Penalty

In assignments of error 13, **[***133]** 21, and 26, Muhammad raises numerous issues relating to the constitutionality of the death sentence generally and as it is applied in Virginia. Support for many of his arguments is not found in his brief. Rather, Muhammad attempts to incorporate by reference various motions, memoranda, and argument made in the trial court. We have previously held that such a practice is impermissible. Schmitt, 262 Va. at 138, 547 S.E.2d at 194; Burns v. Commonwealth, 261 Va. 307, 319, 541 S.E.2d 872, 881, cert. denied, 534 U.S. 1043, 151 L. Ed. 2d 542, 122 S. Ct. 621 (2001). We will not consider such arguments. They are waived. Rule 5:17(c).

Other matters raised in these assignments of error and argued in Muhammad's brief have been previously decided by this Court:

(1) Virginia statutes fail to provide meaningful guidance to the jury because the aggravating factors are vague, rejected in Jackson, 267 Va. at 205-06, 590 S.E.2d at 535 (dangerousness); Powell, 267 Va. at 136, 590 S.E.2d at 554 (both); Wolfe, 265 Va. 193 at 208, 576 S.E.2d 471 at 480;

(2) The Virginia scheme fails to provide the jury with **[***134]** guidance regarding its consideration of mitigating evidence, rejected in Buchanan v. Angelone, 522 U.S. 269, 275-76, 139 L. Ed. 2d 702, 118 S. Ct. 757 (1998); Jackson, 267 Va. at 206, 590 S.E.2d at 536; Johnson, 267 Va. at 69, 591 S.E.2d at 56; Jackson v. Commonwealth, 266 Va. 423, 429, 587 S.E.2d 532, 538 (2003); Lovitt, 260 Va. at 508, 537 S.E.2d at 874;

(3) The Commonwealth is permitted to prove future dangerousness by evidence

of unadjudicated criminal conduct without any standard of proof, rejected in Jackson, 267 Va. at 206, 590 S.E.2d at 536; Powell, 267 Va. at 136, 590 S.E.2d at 554; Johnson, 267 Va. at 70, 591 S.E.2d at 56; **[*532]** Bell v. Commonwealth, 264 Va. 172, 203, 563 S.E.2d 695, 716 (2002), cert. denied, 537 U.S. 1123, 154 L. Ed. 2d 805, 123 S. Ct. 860 (2003). Additionally, we note that all Muhammad's assignments of error regarding unadjudicated criminal conduct have been rejected either because they were not preserved in the trial court (Rule 5:25) or they have been inadequately briefed (Rule 5:17(c)). Consequently, no issues related **[***135]** to unadjudicated criminal conduct are properly before the Court.

(4) The statute allows, but does not require, that a sentence of death be set aside upon a showing of good cause and permits the court to consider hearsay in a post-sentence report, rejected in Jackson, 267 Va. at 206, 590 S.E.2d at 536; Powell, 267 Va. at 136, 590 S.E.2d at 555; Johnson, 267 Va. at 70, **[**63]** 591 S.E.2d at 56; Jackson, 266 Va. at 430, 587 S.E.2d at 539;

(5) This Court fails to conduct an adequate proportionality review and passion/prejudice review, rejected in Jackson, 267 Va. at 206, 590 S.E.2d at 536; Powell, 267 Va. at 136, 590 S.E.2d at 555; Johnson, 267 Va. at 70, 591 S.E.2d at 56.

XV. Statutory Review

Muhammad does not argue that his sentences of death are excessive, arbitrarily imposed, or disproportionate to other similar cases. Nonetheless, pursuant to Code § 17.1-313(C)(2), we must conduct a review of these issues.

Upon review of the record, we conclude that the trial court conducted the proceedings related to this case with patience and fairness. Muhammad was given **[***136]** access to the trial court to present each and every issue he desired to present and was entitled to present. The jury selection process was untainted by pretrial publicity. The trial court's granting of the motion to change venue provided additional protection to the right of the defendant to a fair trial. The record contains no reversible error. Simply stated, we find not even a hint of arbitrariness or prejudice in the

conduct of the trial or the jury's imposition of the sentences of death.

Our proportionality review is not undertaken to "insure complete symmetry among all death penalty cases." Orbe v. Commonwealth, 258 Va. 390, 405, 519 S.E.2d 808, 817 (1999), cert. denied, 529 U.S. 1113, 146 L. Ed. 2d 800, 120 S. Ct. 1970 (2000). The review we employ is done to "identify and invalidate the aberrant death sentence." Id.

[*533] With regard to the death sentences imposed for the killing of more than one person in three years or in the same act or transaction we have reviewed our cases involving the killing of two or more people. Of the fourteen cases in which the death sentence was given, five involved more than two killings. Buchanan v. Commonwealth, 238 Va. 389, 384 S.E.2d 757, 6 Va. Law Rep. 531 (1989), **[***137]** cert. denied, 493 U.S. 1063, 107 L. Ed. 2d 963, 110 S. Ct. 880 (1990) (four victims); Barnes v. Commonwealth, 234 Va. 130, 360 S.E.2d 196, 4 Va. Law Rep. 522 (1987), cert. denied, 484 U.S. 1036, 98 L. Ed. 2d 779, 108 S. Ct. 763 (1988) (two victims); Davidson v. Commonwealth, 244 Va. 129, 419 S.E.2d 656, 8 Va. Law Rep. 3306, cert. denied, 506 U.S. 959, 121 L. Ed. 2d 345, 113 S. Ct. 423 (1992) (three victims); Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 606, 8 Va. Law Rep. 3158, cert. denied, 506 U.S. 958, 121 L. Ed. 2d 343, 113 S. Ct. 421 (1992) (two victims); Stewart v. Commonwealth, 245 Va. 222, 427 S.E.2d 394, 9 Va. Law Rep. 956, cert. denied, 510 U.S. 848, 126 L. Ed. 2d 105, 114 S. Ct. 143 (1993) (two victims); Burket v. Commonwealth, 248 Va. 596, 450 S.E.2d 124 (1994), cert. denied, 514 U.S. 1053, 131 L. Ed. 2d 314, 115 S. Ct. 1433 (1995) (two victims); Goins v. Commonwealth, 251 Va. 442, 470 S.E.2d 114, cert. denied, 519 U.S. 887, 136 L. Ed. 2d 154, 117 S. Ct. 222 (1996) (five victims plus the death of a fetus); Kasi v. Commonwealth, 256 Va. 407, 508 S.E.2d 57 (1998), cert. denied, 527 U.S. 1038, 144 L. Ed. 2d 798, 119 S. Ct. 2399 (1999) **[***138]** (two victims); Bramblett v. Commonwealth, 257 Va. 263, 513 S.E.2d 400, cert. denied, 528 U.S. 952, 145 L. Ed. 2d 293, 120 S. Ct. 376 (1999) (four victims); Walker v. Commonwealth, 258 Va. 54, 515 S.E.2d 565 (1999), cert. denied, 528 U.S. 1125, 145 L. Ed. 2d 829, 120 S. Ct. 955 (2000) (two victims); Zirkle v. Commonwealth, 262 Va. 631, 553 S.E.2d 520 (2001) (two victims); Hudson v. Commonwealth, 267 Va. 29, 590 S.E.2d 362

(2004) (three victims); Elliott v. Commonwealth, 267 Va. 396, 593 S.E.2d 270 (2004), cert. denied, 160 L. Ed. 2d 825, 543 U.S. 1081, 125 S. Ct. 875 (2005) (two victims); Winston v. Commonwealth, 268 Va. 564, 604 S.E.2d 21 (2004) (two victims).

In the cases in which the death sentence was sought but a life sentence was given, of the fourteen cases only four involved the killing of more than two persons and three of those cases had unusual circumstances. Woodfin v. Commonwealth, 236 Va. 89, 372 S.E.2d 377, 5 Va. Law Rep. 527 (1988), cert. denied, 490 U.S. 1009, 104 L. Ed. 2d 163, 109 S. Ct. 1649 (1989) (two victims); Mundy v. Commonwealth, 11 Va. App. 461, 390 S.E.2d 525, 6 Va. Law Rep. 1890 (1990), **[***139]** cert. denied, 502 U.S. 840, 116 L. Ed. 2d 95, 112 S. Ct. 127 (1991) (two victims); Moran v. Commonwealth, No. 1708-90-3 (Va. Ct. App. Nov. 5, 1991) (two victims); Stephenson v. Commonwealth, No. 2080-91-1 (Va. Ct. App. Jan. 11, **[**64]** 1993) (two victims); Hamlin v. Commonwealth, No. 1279-99-2 (Va. Ct. App. Apr. 25, 2000) (four victims killed by arson); Novak v. Commonwealth, 20 Va. App. 373, 457 S.E.2d 402 (1995), cert. denied, 519 U.S. 1006, 136 L. Ed. 2d 397, 117 S. Ct. 507 (1996) (two victims); Pritchett v. Commonwealth, No. 1968-95-3 (Va. Ct. App. Apr. 1, 1996) (two victims); Owens v. Commonwealth, No. 2259-95-1 (Va. Ct. App. Nov. 19, 1996) (four victims; **[*534]** defendant was 16 years old at time of offense); Williams v. Commonwealth, No. 2423-96-2 (Va. Ct. App. Oct. 28, 1997) (three victims; defendant was alleged to be brain-damaged and border-line mentally retarded); Stoneman v. Commonwealth, No. 3069-96-3 (Va. Ct. App. June 9, 1998) (two victims); Evans v. Commonwealth, No. 2089-99-3 (Va.Ct. App. Feb. 9, 2000) (two victims); Burlile v. Commonwealth, 261 Va. 501, 544 S.E.2d 360 (2001) (two victims); Hairston v. Commonwealth **[***140]** , No. 1722-01-3 (Va. Ct. App. Mar. 28, 2002) (two victims); Cooper v. Commonwealth, 2004 Va. App. LEXIS 403, No. 0819-03-4 (Va. Ct. App. Aug. 24, 2004) (three victims).

Additionally, we reviewed two cases in which the Commonwealth did not seek the death penalty for the killing of two or more persons. In those two cases there were only two murders in each case. Smith v. Commonwealth, No. 0628-93-1 (Va. Ct. App. Feb. 1, 1994) (two victims); Hobbs v.

Commonwealth, No. 1301-99-1 (Va. Ct. App. Mar. 17, 2000) (two victims).

Apart from the Cooper case, except where unusual circumstances existed, all the capital prosecutions in Virginia that we have reviewed wherein more than two people were murdered and the prosecution was based upon Code § 18.2-31(7) or (8) resulted in the death penalty being imposed.

This case represents the first capital murder case with a death sentence under the terrorism statute. We are unaware of any state that has reviewed a death sentence predicated upon a similar provision.

We think the death penalty is not an excessive nor a disproportionate penalty for a case with evidence of ten murders and six malicious woundings. Similarly, the evidence presented on the terrorism count **[***141]** independently supports the imposition of the death penalty.

Muhammad's crimes cannot be compared to any other case in the Commonwealth. The evidence of vileness and future dangerousness in support of the jury's verdict justifies its sanction of death.

Muhammad with his sniper team partner, Malvo, randomly selected innocent victims. With calculation, extensive planning, premeditation, and ruthless disregard for life, Muhammad carried out his cruel scheme of terror. He did so by employing stealth and secrecy using a sniper methodology that put his victims at great risk while reducing his own. He employed a weapon with truly awesome power to inflict massive injury upon his victims. Muhammad recruited a younger boy, Malvo, and carefully trained and guided him in this murderous enterprise.

His victims came from all walks of life who were engaged in everyday pursuits when their lives were tragically ended or altered. **[*535]** Paul LaRuffa, Muhammad Rashid, Hong Im Ballenger, Claudine Parker, and Kelly Adams were closing and leaving their places of business. Sarah Ramos was sitting on a bench in front of a store. Lori Lewis-Rivera was vacuuming her car at a gas station. Paschal Charlot was crossing **[***142]** an intersection as a pedestrian. Caroline Seawell and Linda Franklin were putting packages in their respective automobiles. Iran Brown was walking to school. Dean Meyers, Kenneth Bridges, and Premkumar Walekar were putting fuel in their vehicles at gasoline stations. Jeffrey Hopper was leaving a restaurant after

a meal. Conrad Johnson, a bus driver, was standing in the doorway of his bus. Muhammad inflicted death or massive injury upon these victims as he pursued his mission of terror.

Muhammad's threats to those within the communities he stalked including the warning, "Your children are not safe anywhere at anytime." He communicated his desire to extort money from the government through the demand to deposit ten million dollars in an account connected to a card for accessing the account through automated teller machines. **[**65]** Whatever else may have been his intentions, he certainly intended to intimidate the civilian population and to influence the conduct and activities of government. He did so with breathtaking cruelty. If society's ultimate penalty should be reserved for the most heinous offenses, accompanied by proof of vileness or future dangerousness, then surely, this case qualifies.

[*143]** XVI. Conclusion

Upon review of the record and upon consideration of the arguments presented, we find no reversible error in the judgment of the trial court. Further, we find no reason to commute or set aside the sentences of death. We will affirm the judgment of the trial court.

Affirmed.

JUSTICE KINSER, concurring. JUSTICE AGEE, with whom JUSTICE LACY and JUSTICE KOONTZ join, dissenting in part and concurring in part.

Concur by: KINSER

Concur

JUSTICE KINSER, concurring.

I fully agree with the majority opinion in this case. I write separately to address the dissent's failure to view the evidence in the light most favorable to the Commonwealth, to consider the circumstantial evidence, and to address the Commonwealth's theory of the case. Unlike the dissent, I conclude that the Commonwealth did indeed prove beyond a reasonable doubt that John Allen Muhammad was a principal in the first degree in the murder of Dean Meyers under Code § 18.2-31(8), "the willful, deliberate, and premeditated killing of more than one person within a three-year period."

[*536] Certain basic and well-established principles must guide the appellate review of

this case. When the sufficiency of the evidence is challenged on appeal, this Court must view the evidence and **[***144]** all reasonable inferences flowing therefrom in the light most favorable to the prevailing party at trial, in this case the Commonwealth. Commonwealth v. Norman, 268 Va. 539, 545-46, 604 S.E.2d 82, 85 (2004); Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786, cert. denied, 540 U.S. 972, 157 L. Ed. 2d 322, 124 S. Ct. 444 (2003). It is our duty to affirm the trial court's judgment unless that judgment is plainly wrong or without evidence to support it. Code § 8.01-680; Barrett v. Commonwealth, 268 Va. 170, 179, 597 S.E.2d 104, 108 (2004); Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975).

In viewing the evidence in the light most favorable to the prevailing party at trial, we must consider all the evidence, both direct and circumstantial. "There is no distinction in the law between the weight or value to be given to either direct or circumstantial evidence." Hudson, 265 Va. at 512, 578 S.E.2d at 785. "Indeed, in some cases circumstantial evidence may be the only type of evidence which can possibly be produced." Stamper v. Commonwealth, 220 Va. 260, 272, 257 S.E.2d 808, 817 (1979), **[***145]** cert. denied, 445 U.S. 972, 64 L. Ed. 2d 249, 100 S. Ct. 1666 (1980) (citing Toler v. Commonwealth, 188 Va. 774, 780, 51 S.E.2d 210, 213 (1949)).

Instead of adhering to these principles of appellate review, the dissent presents the evidence in the light most favorable to Muhammad rather than the Commonwealth. The dissent does so by failing to address the compelling circumstantial evidence concerning the other 15 shootings that occurred during a span of 47 days in addition to the Meyers shooting and the similarities among those shootings that demonstrate the method employed by Muhammad and Lee Boyd Malvo in the murder of Meyers. There is no mention of the forensic evidence establishing that the .223 caliber Bushmaster rifle recovered when Muhammad and Malvo were apprehended was used in 13 of the 16 shootings, including the Meyers murder, or the evidence showing that the rifle is equivalent to a type of weapon used by military snipers. Likewise, the dissent takes no notice of the fact that, in 10 of the 16 shootings, the Caprice that Muhammad purchased after the first shooting and in which he and Malvo were sleeping when arrested was seen in the vicinity of those shootings,

[*146]** including the Meyers shooting, either before, at the time of, or soon after they occurred. In the Meyers shooting, the Caprice actually was seen in the area both before and after the shooting.

[66]** **[*537]** The dissent further makes no reference to the alterations to the Caprice enabling the shooter in the two-man sniper team to fire a high-velocity rifle from the trunk while minimizing the shooter's visibility. Finally, there is no mention of the many tools used by sniper teams that were recovered in the Caprice along with the Bushmaster rifle: a bipod system for support of the rifle; holographic and telescopic scopes to aid sighting; global positioning system equipment to locate and relocate a vantage point for the long-range shot; "walkie-talkie" handheld radio sets for communication; bungee cords for easy "break down" of the rifle for transportation purposes; and silencers. The dissent's failure to consider all the evidence, both direct and circumstantial, in the light most favorable to the Commonwealth is contrary to the principles of appellate review.

The dissent also does not address the Commonwealth's theory of the case. The Commonwealth predicated its theory on the methodology employed **[***147]** by a two-man sniper team. The testimony of Sergeant Major Mark Spicer clearly demonstrated that such a team employs one member as the long-range "shooter" and the other member as the "spotter." The spotter's job is to determine when the target is within the zone of fire and a shot can be taken, given the other surrounding circumstances, and to inform the shooter, who is positioned in an obscure place, of these facts and to give the order to shoot at the opportune moment.

It is the order to shoot that differentiates this case from the dissent's analogy to a "lookout" or "wheelman." The typical lookout or wheelman in a robbery does not direct at what moment the robber brandishes a weapon at a bank teller or store clerk and demands money. In the present case, it is that direct and immediate action by the spotter in giving the order to shoot that forms the basis of the Commonwealth's theory that Muhammad acted as a principal in the first degree. Such conduct by the spotter in a two-man sniper team is not "indirect" and is not "the quintessence of a principal in the second degree."

The dissent, however, never explains why such action by the spotter would not make that person a principal **[***148]** in the first degree. Instead, the dissent concludes that Malvo made the final decision about whom to shoot and when to do so. The dissent states, again not in the light most favorable to the Commonwealth, that "Malvo could have picked any target and decided at any time to fire or not," and thereby reduce Muhammad's role to that of merely giving advice about the traffic flow on a multi-lane highway. In other words, the dissent does not deal with the Commonwealth's theory that Muhammad **[*538]** gave the order to shoot and the circumstantial evidence that supports the theory.

Under our case law, "where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an 'immediate perpetrator,' " i.e., a principal in the first degree. Strickler v. Commonwealth, 241 Va. 482, 495, 404 S.E.2d 227, 235, 7 Va. Law Rep. 2320, cert. denied, 502 U.S. 944, 116 L. Ed. 2d 337, 112 S. Ct. 386 (1991); see also Remington v. Commonwealth, 262 Va. 333, 349-50, 551 S.E.2d 620, 630 (2001), cert. denied, 535 U.S. 1062, 152 L. Ed. 2d 834, 122 S. Ct. 1928 (2002); Williams v. Commonwealth, 248 Va. 528, 545, 450 S.E.2d 365, 375 (1994), cert. denied, 515 U.S. 1161, 132 L. Ed. 2d 858, 115 S. Ct. 2616 (1995). **[***149]** In Strickler, the Commonwealth's theory was that Strickler and another individual had jointly participated in the actual killing. Id. at 494, 404 S.E.2d at 235. The Commonwealth argued that, since the victim's death was caused by the crushing of her skull with a 69-pound rock, it would have been necessary for one assailant to hold her down on the ground while the other assailant lifted the rock and dropped it on her head. Id. We agreed and concluded that the weight and size of the rock "made it apparent that a single person could not have lifted it and dropped or thrown it while simultaneously holding the victim down." Id. Even though the evidence did not show which assailant wielded the rock, we held that Strickler took a direct part in inflicting the fatal injuries and was therefore an "immediate perpetrator." Id. at 495, 404 S.E.2d at 235.

Turning to the evidence in this case and viewing it in the light most favorable to the Commonwealth, I conclude that Muhammad, like Strickler, acted as a principal in the first **[**67]** degree. The dissent does not dispute,

nor can it, that Muhammad, Malvo, the Caprice, and the Bushmaster rifle were all present at the scene of the **[***150]** Meyers shooting. In fact, soon after the shooting, Muhammad and the Caprice were seen in a parking lot directly across the street from the gas station where Meyers was shot. A police officer questioned Muhammad about why he was in the parking lot. Muhammad told the officer that the police had directed him into that parking lot. However, the officer explained that, after the shooting, the procedure was to direct traffic away from the area, not into it.

Also, a map containing both Muhammad's and Malvo's fingerprints was found in the parking lot. Forensic evidence established that the bullet recovered during the autopsy of Meyers' body was fired from the Bushmaster rifle. While only Malvo's fingerprints were found on the Bushmaster rifle, DNA matching that of both Muhammad and Malvo was found on the rifle.

[*539] The question is whether the "combined force" of this evidence along with "many [other] concurrent and related circumstances" surrounding not only the Meyers shooting but also the other 15 shootings and the sniper tools found in the Caprice when Muhammad and Malvo were apprehended establishes beyond a reasonable doubt that Muhammad acted as an immediate perpetrator in the Meyers **[***151]** killing. Hudson, 265 Va. at 514, 578 S.E.2d at 786 (citation omitted). Each piece of circumstantial evidence is not to be viewed in isolation. Id.

Soon after the Meyers shooting, the Caprice, with Muhammad in the driver's seat, was in a parking lot directly across a nine-lane highway from the gas station where Meyers was killed. The location of the parking lot provided a direct line of fire to the gas station. Due to the traffic on this multi-lane highway and the small hole in the trunk of the Caprice through which to fire the Bushmaster rifle, the jury could reasonably have inferred that the shooter fired upon order from the spotter because only the spotter could determine the opportune moment to fire a shot that would avoid oncoming vehicular traffic, then strike and kill the victim. See Inge v. Commonwealth, 217 Va. 360, 366, 228 S.E.2d 563, 567-68 (1976) ("it is within the province of the jury to determine what inferences are to be drawn from proved facts, provided the inferences are reasonably related to those facts").

Thus, in this case, Muhammad was either the shooter, making him a principal in the first

degree, or the spotter, also making **[***152]** him a principal in the first degree. The evidence concerning all 16 shootings and the reasonable inferences flowing therefrom viewed in the light most favorable to the Commonwealth demonstrate that, in this two-man sniper team, the spotter took an immediate and direct action in the Meyers murder by giving the order to shoot, an act that, in my view, is equivalent to pulling the trigger or holding the victim down on the ground as in Strickler. Such action by the spotter goes beyond the conduct of a principal in the second degree who merely encourages, incites, or aids in the commission of a crime. See Jones v. Commonwealth, 208 Va. 370, 372-73, 157 S.E.2d 907, 909 (1967).

For these reasons, I respectfully concur and, like the majority, would affirm all the convictions.

Dissent by: AGEE

Dissent

JUSTICE AGEE, with whom JUSTICE LACY and JUSTICE KOONTZ join, dissenting in part and concurring in part.

The common law classification of criminal perpetrators that distinguished between principals in the first and second degree has become of limited significance in modern times. Nearly all jurisdictions **[*540]** have enacted provisions similar to Virginia Code § 18.2-18, **[***153]** which erase the distinction between principals of the first and second degree by treating both categories of criminal actors as principals in the first degree for purposes of indictment, trial, conviction, and punishment.

However, the common law distinction between principals of the first and second degrees remains of significant importance in a case of capital murder in Virginia because the General Assembly has specifically provided in Code § 18.2-18 that a "principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first **[**68]** degree." Thus, unless the Commonwealth proved beyond a reasonable doubt that John Allen Muhammad was a principal in the first degree to the murder of Dean Meyers under Code § 18.2-31(8), the plain language of Code § 18.2-18 bars conviction and punishment of Muhammad for capital murder under Code § 18.2-31(8). Accordingly, the common law distinction between acts sufficient to constitute a principal

in the first degree and those of a principal in the second degree is of vital importance.

> At common law, a principal in the first degree is a person who engages in criminal conduct **[***154]** by his own hand - he fires the gun that kills, he takes and carries away the property of another.
>
> . . . .
>
> At common law, a principal in the second degree is a person who is present at the scene of a crime, but does not engage in the criminal conduct; he merely aids and abets the principal in the first degree in committing the crime. He may be actually present, assisting the principal in the first degree, standing ready to assist if needed, or commanding, counseling, or otherwise encouraging the principal in the first degree to commit the crime; or, although at a distance from the scene of the crime, he may be deemed present when he is acting as a driver of the getaway car or as a lookout with instructions to warn the principal in the first degree if anyone approaches.

1 Charles Torcia, Wharton's Criminal Law §§ 30-31 (15th ed.1993).

Based on the record in this case, the Commonwealth did not prove that Muhammad was a principal in the first degree to the capital murder of Dean Meyers under Code § 18.2-31(8). Under established law, Muhammad may be a principal in the first degree to the Meyers murder in two circumstances: (1) if he actually shot Meyers **[*541]** or (2) if he and **[***155]** Lee Boyd Malvo are found to be joint principals, with each acting as an "immediate perpetrator" in the killing. The record does not establish that the Commonwealth proved either circumstance.

Our decision in Rogers v. Commonwealth, 242 Va. 307, 410 S.E.2d 621, 8 Va. Law Rep. 1229 (1991), precludes finding that Muhammad is a principal in the first degree as the actual shooter of Meyers under the facts of this case. In Rogers, we reversed a defendant's capital murder conviction because the evidence placed the defendant and another man in the victim's house at the time of the murder and the Commonwealth failed to present "any evidence . . . which places the murder weapon in defendant's hands." Id. at 319, 410 S.E.2d at 628. "Stated differently, the Commonwealth . . . failed to exclude [the second man] as the perpetrator." Id.

Following Rogers, Muhammad cannot be a principal in the first degree as the actual shooter of Meyers because the Commonwealth has not excluded Malvo as that person, and it presented no evidence that Muhammad was the actual shooter. "Because the circumstances of defendant's conduct do not exclude the reasonable hypothesis that [the second **[***156]** man (Malvo)] killed the victim, the capital murder prosecution fails." Id. at 320, 410 S.E.2d at 629. Therefore, Muhammad may not be convicted of Meyers' capital murder upon this record if the Commonwealth's position is Muhammad actually shot Meyers.

The Commonwealth primarily relies, however, on an expansive reading of the concept of "immediate perpetrator" based on Sergeant Spicer's theory of how a sniper team should operate. The majority opinion adopts this theory and concludes both Malvo and Muhammad are culpable as principals in the first degree because "actual participation together in a unified act" renders each an immediate perpetrator. In doing so, the Commonwealth and the majority opinion reach beyond any precedent of this court and ignore clear foundations of the criminal law that have long defined the distinction between principals of the first and second degree. Our precedent establishes that co-actors in a capital murder can only be immediate perpetrators when each actor undertook a direct act "in the immediate presence of the victim's body when the fatal blows were struck and, hence, had jointly participated in the killing." Strickler v. Commonwealth, **[**69]** 241 Va. 482, 494, 404 S.E.2d 227, 235, 7 Va. Law Rep. 2320 (1991), **[***157]** cert. denied, 502 U.S. 944, 116 L. Ed. 2d 337, 112 S. Ct. 386 (1991).

In Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1103, 62 L. Ed. 2d 788, 100 S. Ct. 1069 (1980), the victim died from blows to the head. Id. at 246, 257 & n.5, 257 S.E.2d at 800, 807 & **[*542]** n.5. In the course of an armed robbery, the defendant beat the victim's head against the floor and a codefendant struck her in the head with his fist. Id. at 246, 257 S.E.2d at 800. We affirmed the defendant's death sentence finding him to be "an immediate perpetrator" because both he and his codefendant directly assaulted the victim as they "jointly participated in the fatal beating." Id. at 256, 257 S.E.2d at 806. This action

rendered the defendant a principal in the first degree.

In Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227, 7 Va. Law Rep. 2320 (1991), the evidence showed that the victim was killed by a blow to the head from a 69 pound rock. We noted "a single person could not have lifted [the rock] and dropped or thrown it while simultaneously holding the victim down." Id. at 494, 404 S.E.2d at 235. **[***158]** We affirmed the conviction for capital murder holding that because the defendant "[took] a direct part in inflicting [the] fatal injuries" he was an "immediate perpetrator" and thus a principal in the first degree. Id. at 495, 404 S.E.2d at 235.

In Lenz v. Warden, 265 Va. 373, 381, 579 S.E.2d 194, 199 (2003), cert. denied, 542 U.S. 953, 159 L. Ed. 2d 836, 124 S. Ct. 2933 (2004), Lenz and another convict, Remington, inflicted "68 stab wounds and all the wounds contributed to the victim's death." Lenz argued that "he could only be convicted of capital murder in the event the jury found beyond a reasonable doubt that he was the triggerman." Id. (internal quotation marks omitted). We disagreed, holding that "when two or more persons take a direct part in inflicting injuries, each joint participant is an immediate perpetrator for the purposes of the capital murder statutes." Id. (citation and internal quotation marks omitted).

In Remington v. Commonwealth, 262 Va. 333, 551 S.E.2d 620 (2001), cert. denied, 535 U.S. 1062, 152 L. Ed. 2d 834, 122 S. Ct. 1928 (2002), Lenz' co-perpetrator was convicted **[***159]** for the same capital murder. We affirmed the trial court's denial of the defendant's proffered jury instructions that would have instructed the jury that he was a principal in the second degree unless he inflicted the actual fatal blow that caused the victim's death out of the many blows struck. Because the evidence established "that Remington and Lenz jointly participated in [the victim's] death[,]" we found that the trial court did not err in refusing the instruction. Id. at 350, 551 S.E.2d at 630.

Similarly, the Court of Appeals found the defendant in Hancock v. Commonwealth, 12 Va. App. 774, 407 S.E.2d 301, 8 Va. Law Rep. 52 (1991), to be an immediate perpetrator of attempted capital murder by arson when he poured gasoline on a cushion while another person immediately ignited it. The court noted that "both men were principals in the **[*543]**

first degree. Both provided the direct means to ignite the fire. Placing the flammable material in place for another to ignite it makes that person a perpetrator." Id. at 781, 407 S.E.2d at 305-06.

All of these cases involve direct, contemporaneous acts on the part of the co-perpetrators that combined to proximately **[***160]** inflict the injury on the victim. In each case, both perpetrators were physically present and personally participated by a direct act against the victim to accomplish the murder, or to set the fire in Hancock. In the case at bar, however, there is no such evidence of a similar direct act by Muhammad.

Assuming Muhammad acted as hypothesized by the Commonwealth's witness, Mark Spicer, in positioning the Caprice in the Bob Evans parking lot to face the gas station and communicating to Malvo that the coast was clear to fire at Meyers, that is not the act of a principal in the first degree under Virginia law. Such conduct is the quintessence of activity by a principal in the second degree: "encouraging, inciting, or in some manner offering aid in the commission of the crime . . . lending countenance, or otherwise aiding while another did the act." Jones v. Commonwealth, 208 Va. 370, 373, 157 S.E.2d 907, 909 (1967).

[70]** In that regard, Muhammad's actions were of the same character as those of a lookout or wheelman in a robbery. Such a person may provide the means and direction for the commission of the robbery by driving the actual perpetrators to the scene and keeping **[***161]** watch while the others directly commit the crime. Like Muhammad, the wheelman may communicate by walkie-talkie or cell phone to the actual perpetrators instructing them as to when to commit the robbery and then exit the premises in heavy traffic. * Undoubtedly these acts accord the actual perpetrators, who take the immediate and direct action to effectuate the robbery, an easier task with an increased likelihood of escape. Nevertheless, no serious argument can be made such a wheelman is a principal in the first degree under our jurisprudence.

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* Grant v. Commonwealth, 216 Va. 166, 168-69, 217 S.E.2d 806, 808 (1975) (lookout and driver of the getaway car convicted as principal in the second degree); Camphor v. State, 233 Md. 203, 196 A.2d 75, 75 (Md. 1963) (accomplice who distracted the attention of a store clerk while immediate perpetrator stole a sewing machine was a principal in the second degree); Vincent v. State, 220 Md. 232, 151 A.2d 898, 902-03 (Md. 1959) (lookout and driver of getaway car who provided a second set of clothing to the robbers was a principal in the second degree).

[*162]** That is because the wheelman takes an indirect role, not a direct role, in the crime of robbery. He is present, keeping watch and offering his counsel and direction to commit the crime to the actual perpetrators, **[*544]** which is Muhammad's role under the Commonwealth's theory of the case. The wheelman is an actual participant in the unified act of disparate persons culminating in a robbery, just as Muhammad was an actual participant in an act with Malvo that resulted in Meyers' murder. Neither the wheelman, nor Muhammad, in the given circumstances, can be deemed an immediate perpetrator and thus a principal in the first degree under Virginia law.

The crimes in Strickler, Coppola, Lenz, Remington and Hancock could not have occurred without the direct, contemporaneous, physical act of both perpetrators. The fire could not have been set without the direct, physical participation of both defendants in Hancock. Similarly, the murder in Strickler could not have occurred without both perpetrators acting together directly on the victim. The defendants in Coppola, Lenz and Remington each directly participated in the physical beating or stabbing of the victim. These direct **[***163]** acts define an immediate perpetrator, rendering each actor a principal in the first degree, but stand in contrast to Muhammad's indirect acts. The record in this case, viewed in the light most favorable to the Commonwealth, is simply devoid of the direct acts regarding a victim that our precedent requires to find Muhammad an immediate perpetrator acting as a principal in the first degree.

Assuming that the events occurred as the Commonwealth theorizes, it was nonetheless, Malvo, not Muhammad, who finally sighted the rifle to its target and made the ultimate decision to pull the trigger. Malvo could have picked any target and decided at any time to fire or not. While the range of Malvo's vision was more restricted than Muhammad's, the record reflects that Malvo was not "blind" and dependent on Muhammad in order to shoot Meyers. Spicer's own testimony confirms the shooter had "a very large field of view by slightly moving [his] head left or right while still maintaining a very small outward chance of . . . being seen." The prosecutor even argued this point to the jury, noting that the shooter had "a much wider field of vision and a much narrower exposure." Obviously, Muhammad's advice **[***164]** and direction to Malvo of the

traffic flow along the multiple lane highway made Malvo's choice easier and more likely to succeed. But in the end, it was Malvo who had to make the final decision to shoot and performed the direct act of firing the rifle.

Put simply, there is a failure of proof to establish Muhammad as a principal in the first degree so as to sustain his conviction under Code § 18.2-31(8). The evidence in this record, viewed in the light most favorable to the Commonwealth and indulging all the inferences from its theory of the case, establishes Muhammad's actions as **[*545]** those of a principal in the second degree, "actually present, assisting the principal in the first degree [Malvo], standing ready to assist if needed, or commanding, counseling, or otherwise **[**71]** encouraging the principal in the first degree to commit the crime," 1

Wharton's Criminal Law, supra, at § 31. Conversely, this same evidence of Muhammad commanding and directing Malvo's actions effectively proves the requisite conduct for the conviction under Code § 18.2-31(13) for "a killing pursuant to . . . direction and order." Code § 18.2-18.

Virginia law is clear that "a principal in the second degree, **[***165]** may [not] be convicted of capital murder under the provisions of [the] Code," Coppola, 220 Va. at 256, 257 S.E.2d at 806, unless one of the enumerated exceptions such as under

Code § 18.2-31(13) applies. Thus, we have noted that

> only the actual perpetrator of the crime maybe convicted of capital murder . . . Thus, neither an accessory before the fact nor a principal in the second degree may be so convicted. . . . The Commonwealth has the burden of proving beyond a reasonable doubt that one accused of capital murder was the actual perpetrator of the crime. Suspicion of guilt, however strong, or even a probability of guilt is insufficient to support a conviction.

Rogers, 242 Va. at 317, 410 S.E.2d at 627 (citations and internal quotation marks omitted).

The General Assembly has specifically limited a capital murder conviction under Code § 18.2-31(8) by its enactment of Code § 18.2-18. In doing so, the General Assembly has

mandated that a principal in the second degree cannot be convicted of capital murder, but his conviction is limited to murder in the first degree. This statutory mandate is binding on the judiciary until altered **[***166]** by the General Assembly.

For the forgoing reasons, Muhammad's conviction and sentence for the capital murder of Dean Meyers under Code § 18.2-31(8) should be reversed and remanded according to the statutory directive of Code § 18.2-18. Accordingly, I respectfully dissent from section II(B)(1) of the majority opinion regarding the conviction and sentence under Code § 18.2-31(8). To the extent the conviction under Code § 18.2-31(13) is based upon a principal in the first-degree analysis, I respectfully dissent from section II(B)(2), but I concur in the alternative ground in section II(B)(2) and would thus affirm the conviction and sentence of death under Code § 18.2-31(13). Otherwise, I concur in the majority opinion.

Nash v. Jewell

Supreme Court of Virginia

April 27, 1984

Record No. 811247

Reporter

227 Va. 230; 315 S.E.2d 825; 1984 Va. LEXIS 237

Essie Mae Nash v. Leslie Curtis Jewell

Prior History: **[***1]** Appeal from a judgment of the Circuit Court of the City of Portsmouth. Hon. Lester E. Schlitz, judge presiding.

Disposition: *Reversed and remanded*.

Case Summary

Procedural Posture

Plaintiff appealed the judgment of the Circuit Court of the City of Portsmouth (Virginia), which granted defendant's motion to discontinue plaintiff's personal injury action on the ground that plaintiff had "slept" on her rights for too long.

Overview

Plaintiff contended that the trial court's discontinuance of the action constituted an abuse of discretion. The court held that when the trial court had defendant's motion to discontinue before it, plaintiff had filed a praecipe and obtained a trial date. Therefore, the court held that the trial court knew that plaintiff had not abandoned the case, was ready for trial, and had arranged an early trial date. According to the court, the trial court had no reason to put plaintiff on terms to try the case. The court also held that there was nothing in the record to suggest that plaintiff or her counsel attempted to mislead the trial court or evade the trial court's supervisory control of litigation. Finally, the court held that plaintiff properly withdrew were elected nonsuit.

Outcome

The court reversed the judgment of the trial court and remanded.

LexisNexis® Headnotes

Civil Procedure > Dismissal > General Overview

Governments > Courts > Clerks of Court

HN1 Va. Code Ann. § 8.01-335 provides in part that any court in which is pending an

action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be discontinued. The clerk of the court shall notify the parties in interest if known, or their counsel of record at his last known address, at least 15 days before the entry of such order of discontinuance so that all parties may have an opportunity to be heard on it. Any case discontinued under the provisions of this subsection may be reinstated, on motion, and after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after. Any court in which is pending a case wherein for more than five years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be dismissed.

Civil Procedure > Dismissal > General Overview

Civil Procedure > ... > Pretrial Judgments > Nonsuits > Voluntary Nonsuits

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Abandonment

Governments > Courts > Court Personnel

HN2 There are significant differences between Va. Code Ann. §§ 8.01-335(A) and (B) of the statute. Under the five-year provision of § 8.01-335(B), a trial court may, in its discretion, without notice to parties to the litigation or their counsel, order a case struck from the docket. The effect of such an order is to dismiss the action. It is apparent that the purpose of § 8.01-335(B) is to enable trial courts to eliminate from their dockets cases for which there is no reasonable prospect of trial. In summarily dismissing such cases, trial courts may thus promote efficiency in the administration of justice by saving the time of court personnel which would otherwise be required to preserve on the courts' dockets actions long forgotten or abandoned by litigants and lawyers.

Civil Procedure > Dismissal > General Overview

HN3 Va. Code Ann. § 8.01-335(A) provides for less drastic action by trial courts in controlling their dockets and requiring that law actions be moved along with reasonable diligence than § 8.01-335(B). Section 8.01-335(A) gives trial courts discretionary authority to order law actions, dormant for more than two years, struck from the dockets. The effect of such an order, however, is to discontinue, not dismiss,

the action. More importantly, such an order may not be entered until the parties, or their counsel of record, have been given at least 15 days notice and an opportunity to be heard. Moreover, any discontinued case may be reinstated within one year on motion and after notice to interested parties or their counsel of record.

Civil Procedure > Dismissal > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > General Overview

HN4 The purpose of Va. Code Ann. § 8.01-335(A) is to enable trial courts to identify cases which litigants or their counsel are not interested in pursuing to a conclusion. Section 8.01-335(B) permits courts to dismiss inactive cases without notice; by contrast, the purpose of § 8.01-335(A) is to enable courts to ascertain from the plaintiffs whether there is a desire and intent to try cases which have been dormant for two or more but less than five years. Section 8.01-335(A) provides a device designed to benefit the trial courts in setting cases for trial and expediting litigation; it does not provide substantive rights to litigants to have cases dismissed for failure to prosecute within two years.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN5 Dismissal for want of a diligent prosecution should be imposed only where there has been an unreasonable delay, and usually after proper warning.

Civil Procedure > Dismissal > General Overview

HN6 As a general rule, if a plaintiff who is ready and willing to go to trial is brought before the court under the provisions of Va. Code Ann. § 8.01-335, and demonstrates an intent to proceed with his case, the court should not discontinue his action.

Civil Procedure > ... > Pretrial Judgments > Nonsuits > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN7 Motions to set aside a nonsuit, or to reinstate a suit after dismissal, are addressed to the judicial discretion of the court.

Civil Procedure > Dismissal > General Overview

Civil Procedure > ... > Pretrial Judgments > Nonsuits > General Overview

HN8 Under Va. Code Ann. § 8.01-380, a plaintiff has an absolute right to one nonsuit. The election is his and if he insists upon taking the nonsuit within the limitations imposed by the statute, neither the trial court nor opposing counsel can prevent him from doing so. Nevertheless, courts act by orders and decrees. There is no termination of litigation until the court enters an appropriate order. Therefore, before entry of such an order a plaintiff may reconsider his decision to take a nonsuit. He has no right to withdraw the nonsuit, but he has a right to move the trial court to permit withdrawal. The granting or denial of the motion is a matter for the trial court to determine in the exercise of judicial discretion.

Headnotes/Syllabus

Headnotes

(1) Limitations of Actions -- Pleading and Practice -- Dockets -- Discontinuance of Action -- Statutory Construction -- Certain Cases Struck From Dockets After Certain Period, Etc. (Code § 8.01-335) -- Section Applies When no Orders Were Entered or Proceedings Initiated During Two Year Period, Court Then Having Discretionary Authority to Discontinue Action.

(2) Limitations of Actions -- Pleading and Practice -- Dockets -- Discontinuance of Action -- Statutory Construction -- Certain Cases Struck From Dockets After Certain Period, Etc. (Five Years) [Code § 8.01-335(B)] -- Purpose of Subsection -- Stated.

(3) Limitations of Actions -- Pleading and Practice -- Dockets -- Discontinuance of Action -- Statutory Construction -- Certain Cases Struck From Dockets After Certain Period, Etc. (Two Years) [Code § 8.01-335(A)] -- Purpose of Subsection -- Stated.

(4) Limitations of Actions -- Pleading and Practice -- Dockets -- Discontinuance of Action -- Statutory Construction -- Certain Cases Struck From [*2] Dockets After Certain Period, Etc. (Two Years) [Code § 8.01-335(A) -- Discretionary Authority in Trial Court to Discontinue After Notification**

of Parties But No Dismissal Until One Year After Case Discontinued.

(5) Limitations of Actions -- Pleading and Practice -- Dockets -- Discontinuance of Action -- Statutory Construction -- Certain Cases Struck From Dockets After Certain Period, Etc. (Two Years) [Code § 8.01-335(A)] -- General Rule as to Discontinuance -- Stated -- Court Improperly Discontinued Action When it Knew Plaintiff Had Not Abandoned Case.

(6) Pleading and Practice -- Nonsuits -- Withdrawal of Motion for Nonsuit -- Statutory Construction -- Dismissal of Action by Nonsuit (Code § 8.01-380) -- Before Entry of Order Terminating Litigation, Grant of Motion to Withdraw Nonsuit is Within Discretion of Trial Court and Discretion Not Barred by Code § 8.01-380.

(7) Pleading and Practice -- Nonsuits -- Withdrawal of Motion for Nonsuit -- When Grant of Motion to Withdraw Presumptively Denied.

(8) Pleading and Practice -- Nonsuits -- Withdrawal of Motion for Nonsuit -- No Abuse of Discretion in Granting Motion to Withdraw Nonsuit.

[*3]** In 1977 plaintiff filed a motion for judgment against defendant to recover damages for personal injuries arising from a 1975 automobile accident. Defendant's grounds of defense were filed on 11 April 1978. No new orders or proceedings were initiated until 27 May 1980 when plaintiff filed a *praecipe* requesting a trial date. On 8 July 1980 defendant filed a motion to discontinue the action pursuant to Code § 8.01-335(A). At a hearing on the motion, plaintiff's counsel stated he would take a nonsuit but later on the same day he requested that the nonsuit be withdrawn. Following a hearing on 1 September 1980, the Trial Court granted plaintiff's motion to withdraw the nonsuit and continued the hearing on her motion to rehear defendant's motion to discontinue the case. At the 9 April 1981 rehearing, the Trial Court granted defendant's motion to discontinue on the ground that plaintiff had failed timely to pursue her rights. Plaintiff appeals.

1. Code § 8.01-335, granting the Trial Court discretion to discontinue with notice any action pending more than two years before any order or proceeding is taken, applies where no

orders were entered or proceedings initiated during **[***4]** a two-year period, the Trial Court then having discretionary authority to discontinue the action.

2. Code § 8.01-335(B) was enacted to enable the Trial Court to eliminate from its docket any case for which there is no reasonable likelihood of trial as evidenced by a five-year period of inactivity by both parties.

3. Code § 8.01-335(A) was enacted to enable the Trial Court to identify litigants who are not interested in pursuing a case filed more than two but less than five years with the Court.

4. Code § 8.01-335(A) gives the Trial Court discretionary authority to discontinue an action after all parties have been notified, but does not provide for dismissal until one year after the case has been discontinued.

5. Here the Trial Court improperly discontinued plaintiff's case, pending more than two but less than five years, where the Court knew plaintiff had not abandoned the case and was ready for trial. As a general rule, if a plaintiff who is ready and willing to go to trial is brought before the Court under the provisions of Code § 8.01-335, and demonstrates an intent to proceed with his case, the Court should not discontinue his action. *Binkley* v. **[***5]** *Parker*, 190 Va. 380, 57 S.E.2d 106 (1950); *Carter* v. *Cooper*, 111 Va. 602, 69 S.E. 944 (1911), *followed*.

6. While under Code § 8.01-380 one nonsuit is granted as a matter of right, the statute does not bar additional nonsuits. The mandate of the statute as to the conditions under which discretionary nonsuits may be taken does not apply to the withdrawal of nonsuits. Before entry of an order terminating litigation, a plaintiff may reconsider his order to take a nonsuit and may move the Court to permit withdrawal of the motion. The grant or denial of the motion is within the discretion of the Trial Court. *Walker* v. *Boaz*, 41 Va. (2 Rob.) 485 (1843); *Wickham* v. *Green*, 111 Va. 199, 68 S.E. 259 (1910), *discussed*.

7. After plaintiff's counsel has announced his intention to nonsuit the case, if the Jury has been dismissed, witnesses have been excused, or other inconvenience would result from the granting of the motion to withdraw the nonsuit, presumably the Trial Court would deny the motion to withdraw the nonsuit.

8. When, as here, the record indicates that no inconvenience would result from granting the

motion to withdraw the nonsuit, **[***6]** there is no abuse of discretion in the granting of the motion by the Trial Court.

Syllabus

Trial Court erred in granting defendant's motion to discontinue action under Code § 8.01-335(A) pending more than two but less than five years where Court had notice of plaintiff's readiness for trial; Trial Court properly permitted plaintiff to withdraw motion for nonsuit, discretion not being barred by Code § 8.01-380.

Counsel: *Peter W. Smith (Robert C. Stackhouse; Stackhouse, Rowe & Smith*, on briefs), for appellant.

John S. Norris, Jr. (Williams, Worrell, Kelly & Greer, P.C., on brief), for appellee.

Judges: Cochran, J., delivered the opinion of the Court.

Opinion by: COCHRAN

Opinion

[*232] **[**826]** Essie Mae Nash filed a motion for judgment in 1977 against Leslie Curtis Jewell seeking to recover damages for personal injuries allegedly arising from a 1975 automobile accident caused by Jewell's negligence. After service of process was obtained by serving the Commissioner of the Division of Motor Vehicles, Jewell's counsel filed grounds of defense on April 11, 1978. During the next two years no orders were entered or proceedings initiated in the action. On May 27, 1980, Nash **[***7]** filed a praecipe requesting that her case be set for trial; at the docket call on June 5, over Jewell's objection, trial was set for August 21. On July 8, Jewell filed a motion to discontinue the action pursuant to Code § 8.01-335A. Nash's answers to interrogatories which Jewell had delivered or mailed to her on July 7 were filed on or about August 1.

At a hearing on the motion to discontinue, Nash's counsel stated that he would take a nonsuit. Later on the same day, he reconsidered and informed the trial judge that he desired to withdraw **[*233]** the nonsuit. After Jewell's counsel had been notified a hearing was conducted. By order entered September 1, 1980, over Jewell's objection, the trial court granted Nash's motion to withdraw the nonsuit but continued the hearing on her motion for a rehearing of Jewell's motion

to discontinue the action. On April 9, 1981, after a hearing, the trial court granted Jewell's motion to discontinue on the ground that Nash had "slept" on her rights too long. The court then denied Nash's motion to reinstate the case and, after a rehearing, over Nash's objection, again denied her motion.

HN1 Code § 8.01-335 provides in pertinent part as **[***8]** follows:

> **§ 8.01-335. Certain cases struck from dockets after certain period; reinstatement.** -- A. Any court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be discontinued. The clerk of the court shall notify the parties in interest if known, or their counsel of record at his last known address, at least fifteen days before the entry of such order of discontinuance so that all parties may have an opportunity to be heard on it. Any case discontinued under the provisions of this subsection may be reinstated, on motion, and after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after.
>
> B. Any court in which is pending a case wherein for more than five years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be dismissed.

On appeal, Nash argues that Code § 8.01-335 was inapplicable because the filing of a praecipe and the setting of a trial **[***9]** date demonstrated that the action had not been dormant for two years before Jewell filed his motion to discontinue. Nash further contends that the trial court abused its discretion in discontinuing the action and then refusing to reinstate it. Jewell has assigned cross-error to the trial court's order permitting Nash to withdraw her nonsuit.

[1] **[**827]** We do not agree with Nash that Code § 8.01-335 was inapplicable. We will assume, without deciding, that filing the praecipe **[*234]** and setting the case for trial were "proceedings" within the meaning of the statute. The action, however, had been pending for more than two years before these steps were taken. Under the statute, once the

two-year period of inactivity had passed, the trial court had discretionary authority to discontinue the action.

The crucial question is whether the trial court's discontinuance of this action constituted an abuse of discretion. In resolving this question we will review the language of the statute to determine the legislative intent.

[2] ***HN2*** There are significant differences between subsections A and B of the statute. Under the five-year provision of Subsection B, a trial court may, **[***10]** in its discretion, without notice to parties to the litigation or their counsel, order a case struck from the docket. The effect of such an order is to dismiss the action. It is apparent that the purpose of this subsection of the statute is to enable trial courts to eliminate from their dockets cases for which there is no reasonable prospect of trial. In summarily dismissing such cases, trial courts may thus promote efficiency in the administration of justice by saving the time of court personnel which would otherwise be required to preserve on the courts' dockets actions long forgotten or abandoned by litigants and lawyers.

[3-4] ***HN3*** Subsection A provides for less drastic action by trial courts in controlling their dockets and requiring that law actions be moved along with reasonable diligence. This subsection gives trial courts discretionary authority to order law actions, dormant for more than two years, struck from the dockets. The effect of such an order, however, is to discontinue, not dismiss, the action. More importantly, such an order may not be entered until the parties, or their counsel of record, have been given at least fifteen days notice and an opportunity to be **[***11]** heard. Moreover, any discontinued case may be reinstated within one year on motion and after notice to interested parties or their counsel of record.

It thus appears that ***HN4*** the purpose of Subsection A is to enable trial courts to identify cases which litigants or their counsel are not interested in pursuing to a conclusion. Subsection B permits courts to dismiss inactive cases without notice; by contrast, the purpose of Subsection A is to enable courts to ascertain from the plaintiffs whether there is a desire and intent to try cases which have been dormant for two or more but less than five years. Subsection A provides a device

designed to benefit the trial courts in setting cases for trial and expediting litigation; it does not provide **[*235]** substantive rights to litigants to have cases dismissed for failure to prosecute within two years.

[5] When the trial court had before it Jewell's motion to discontinue, Nash had filed a praecipe and obtained a trial date. The purpose of Subsection A, therefore, was served. The trial court knew that Nash had not abandoned the case, was ready for trial, and had arranged for an early trial date. There was no reason, therefore, for **[***12]** the trial court to put Nash on terms to try the case. We have no desire to inhibit the trial courts in their laudable efforts to clear their dockets and move litigation to a conclusion. But, on the record in this case, we are compelled to conclude that the trial court failed to perceive that the proper use of the two-year statute is to expedite rather than to terminate litigation.

The issue of dismissal for want of diligent prosecution has arisen in chancery causes and law actions. In *Binkley* v. *Parker*, 190 Va. 380, 57 S.E.2d 106 (1950), the trial court dismissed plaintiff's bill without giving her the opportunity to take evidence, though she appeared to have been willing to do so. We reversed, noting that ***HN5*** dismissal for want of a diligent prosecution "should be imposed only where there has been an unreasonable delay, and usually after proper warning." *Id.* at 387, 57 S.E.2d at 109.

[828]** In *Carter* v. *Cooper*, 111 Va. 602, 69 S.E. 944 (1911), two actions in ejectment were brought against a number of defendants. Separate trials were required for the defendants, and the cases remained on the docket for seventeen years, the only activity being continuances. **[***13]** The trial court dismissed each case for failure to prosecute with due diligence, although plaintiffs said they were ready for trial. In reversing the trial court, we held that since the plaintiffs were ready to go to trial, they should have been permitted to do so. We also noted that defendants had "chosen to pursue a course of inaction, thereby tacitly consenting to the delay." *Id.* at 605, 69 S.E. at 945.

In the present case, Jewell made no effort to have a trial date set. His counsel stated in oral argument that it would have been foolish to ask for a trial date, as Jewell's whereabouts were unknown to him. Nevertheless, the record indicates that Jewell, for whatever reasons, tacitly consented to the delay until a

few weeks after the expiration of the two-year period specified in the statute. Although *Carter* and *Binkley* were decided before the enactment of Code § 8.01-335, the rationale of those cases remains sound and is applicable in the construction of the statute. ***HN6*** As a general **[*236]** rule, if a plaintiff who is ready and willing to go to trial is brought before the court under the provisions of Code § 8.01-335, and demonstrates an intent to proceed **[***14]** with his case, the court should not discontinue his action. In the present case, Nash had demonstrated that she was ready for trial and had arranged to have a trial date set before Jewell filed his motion for discontinuance. There is nothing in the record to suggest that Nash or her counsel was attempting to mislead the court or evade the court's supervisory control of the litigation. No evidence was taken, but Nash's counsel represented to the trial court that Nash's unresolved medical problems caused her delay, and Jewell's counsel represented that he was prejudiced by the delay because he no longer knew where Jewell, with whom he had once discussed the case, was located. Jewell's counsel conceded, however, in oral argument that he could have set the case for trial on his own initiative. If he had done so, he might have avoided the risk of an unavailable defendant or missing witnesses.

Under the circumstances of this case, we hold that the trial court abused its discretion in granting Jewell's motion to discontinue the action. Therefore, we find it unnecessary to decide whether the court erred in refusing to reinstate the case on Nash's motion after it had been ordered stricken **[***15]** from the docket.

[6] Jewell contends, however, that when Nash elected to take a nonsuit the case was terminated, subject to her right to file a new motion for judgment. Jewell says that once the election was made the nonsuit could not be withdrawn and that the trial court erred in ruling to the contrary. We do not agree.

In *Walkers* v. *Boaz*, 41 Va. (2 Rob.) 485 (1843), plaintiffs took a nonsuit with the understanding that the trial court would reconsider a certain opinion regarding the case. Subsequently, plaintiffs unsuccessfully sought to withdraw their nonsuit. On appeal, we reversed, holding that the trial court "in the exercise of a sound discretion, should . . . have set aside the nonsuit." *Id.* at 491.

In *Wickham* v. *Green*, 111 Va. 199, 68 S.E. 259 (1910), we stated that "the prevailing rule is that ***HN7*** motions to set aside a nonsuit, or to reinstate a suit after dismissal, are addressed to the judicial discretion of the court." *Id.* at 203, 68 S.E. at 261. Nevertheless, under the facts of that case, we reversed the judgment of the trial court permitting the plaintiff to avoid dismissal of his action by filing his declaration late. We held that the **[***16]** plaintiff had **[*237]** the duty of showing good cause for his motion to reinstate his suit, and that he had failed to do so.

Walkers and *Wickham* were decided before the enactment of Code § 8.01-380, the statute dealing with nonsuits. Jewell argues that this statute now controls and that it should be strictly construed. **[**829]** He says that the discretionary rule set forth in *Walkers* and *Wickham* has been superseded by the statute, which gives a plaintiff one nonsuit as a matter of right. Additional nonsuits may be allowed, however, under the statute. But the mandate of the statute as to the conditions under which nonsuits may be taken does not apply to the withdrawal of nonsuits.

It is true, as Jewell argues, that ***HN8*** under Code § 8.01-380, a plaintiff has an absolute right to one nonsuit. The election is his and if he insists upon taking the nonsuit within the limitations imposed by the statute, neither the trial court nor opposing counsel can prevent him from doing so. *See Newton* v. *Veney & Raines*, 220 Va. 947, 265 S.E.2d 707 (1980); *Berryman* v. *Moody*, 205 Va. 516, 137 S.E.2d 900 (1964). Nevertheless, courts act by orders and decrees. **[***17]** *See Walker* v. *Commonwealth*, 225 Va. 5, 301 S.E.2d 28 (1983); *Cunningham* v. *Smith*, 205 Va. 205, 135 S.E.2d 770 (1964). There is no termination of litigation until the court enters an appropriate order. Therefore, before entry of such an order the plaintiff may reconsider his decision to take a nonsuit. He has no right to withdraw the nonsuit, but he has a right to move the trial court to permit withdrawal. The granting or denial of the motion is a matter for the trial court to determine in the exercise of judicial discretion.

[7-8] Presumably, after a plaintiff's counsel has announced his intention to nonsuit the case, if a jury has been dismissed, witnesses have been excused, or other inconvenience would result from the granting of a motion to

withdraw the nonsuit, the trial court will deny the motion. In the present case, however, the record shows no abuse of discretion by the trial court in granting Nash's motion; indeed, Jewell has not argued to the contrary. We hold, therefore, that the trial court did not err in permitting Nash to withdraw the nonsuit.

For the reasons assigned, we will reverse the judgment of the trial court dismissing the action and **[***18]** remand the case for trial.

Reversed and remanded.

Rutter v. Oakwood Living Ctrs. of Va., Inc.

Supreme Court of Virginia

June 9, 2011, Decided

Record No. 100499

Reporter

282 Va. 4; 710 S.E.2d 460; 2011 Va. LEXIS 123

BARBARA A. RUTTER, ADMINISTRATRIX OF THE ESTATE OF VIRGIL W. RUTTER, DECEASED v. OAKWOOD LIVING CENTERS OF VIRGINIA, INC.

Prior History: **[***1]** FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH. Edward W. Hanson, Jr., Judge.

Barbara A. Rutter v. Oakwood Living Ctrs. of Va., Inc., 2010 Va. LEXIS 204 (Va., July 29, 2010)

Disposition: Dismissed without prejudice.

Case Summary

Procedural Posture

An administratrix filed a wrongful death suit against defendants, a physical therapy company, its president, its employee, and a nursing home, alleging the employee's negligence caused the decedent's death and the other defendants were vicariously liable for that negligence. The Circuit Court of the City of Virginia Beach, Virginia, sustained the nursing home's motion to dismiss based on the statute of limitations. The administratrix appealed.

Overview

The company and president's bankruptcy stayed the action against them. In 2000, the trial court removed the action from the docket and ordered that the action would be discontinued under Va. Code Ann. § 8.01-335(B) if after three years there had been no further order or proceeding. In 2009, the trial court held that as the administratrix had not re-filed her action within two years of the date the action was discontinued, the suit was time-barred under Va. Code § 8.01-244, a two-year statute of limitations. The high court held that § 8.01-335(B) did not allow entry of a self-executing, prospective order of discontinuance before the period of inactivity. Thus, the trial court erred by concluding that

the 2000 order discontinued the action three years later and by sustaining the nursing home's plea of the statute of limitations. As the 2000 order merely removed the action from the docket, and a subsequent order was required to dismiss the action, it was not a final, appealable order under Va. Code Ann. § 8.01-670(A)(3). Nor was the 2009 order a final order under § 8.01-670(A)(3), because it adjudicated only the rights of the nursing home, not those of the other defendants.

Outcome

The appeal was dismissed without prejudice.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Governments > Legislation > Interpretation

HN1 Statutory interpretation is a pure question of law reviewed de novo on appeal.

Governments > Legislation > Interpretation

HN2 In interpreting a statute, the court must ascertain and give effect to the intention of the legislature, which is usually self-evident from the statutory language. When a statute's terms are clear and unambiguous, the court applies the statute in accordance with its plain language.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN3 See Va. Code Ann. § 8.01-335(B).

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN4 The plain meaning of Va. Code Ann. § 8.01-335(B) is that any action in which there is no activity by the parties for three or more years may be removed from the court's docket, either by dismissal or discontinuance. That is, a case must be inactive for three years before a circuit court may dismiss a case sua sponte under § 8.01-335(B).

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN5 The provisions of Va. Code Ann. § 8.01-335(B) allow a discontinuance of an action when, for three years or more, there has been no order or proceeding. A trial court's determination that there has been no order or proceeding for at least three years must be made contemporaneously with the entry of the

order discontinuing or dismissing the action. A trial court prospectively entering a self-executing order is unable to determine whether there has in fact been "no order or proceeding" for three or more years, or whether there is a reasonable prospect of trial. Such an order would preclude a trial court from considering factors relevant to the exercise of its discretion to discontinue an action under § 8.01-335(B).

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN6 The trial court's discretion to discontinue or dismiss an action for lack of any order or proceeding for more than three years is governed by Va. Code Ann. § 8.01-335(B), which does not contemplate entry of a self-executing, prospective order of discontinuance prior to the period of inactivity. Section 8.01-335(B) does not allow a trial court to enter a self-executing order prospectively discontinuing or dismissing an action. Instead, if a trial court first determines that there has been no order or proceeding in an action for more than three years, it then may discontinue or dismiss the action pursuant to § 8.01-335(B).

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN7 A court always has jurisdiction to determine its own jurisdiction. This principle applies even when determining jurisdiction first requires analysis of the merits of an issue.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN8 Va. Code Ann. § 8.01-670(A)(3) provides that any person may present a petition for an appeal to the Virginia Supreme Court if that person is aggrieved by a final judgment in any other civil case. A final order is one which disposes of the whole subject, gives all the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the order. In the absence of a statutory provision to the contrary, a judgment is not final for purposes of appeal if it is rendered with regard to some but not all of the parties involved in the case.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN9 Under the "severable interests" exception to the final judgment rule, a final adjudication of a collateral matter that addresses separate and severable interests can be appealed if the appeal cannot affect the determination of the remaining issues in the case, even if the adjudication is reversed. Thus, prior to the determination of the case against all defendants, a party may appeal an adjudication that is final as to a collateral matter, separate and distinct from the general subject of the litigation and affecting only particular parties to the controversy.

Counsel: John B. Gaidies (Joynes & Gaidies, on briefs), for appellant.

Jontille D. Ray (Richard J. Cromwell; Erin Q. Ashcroft; McGuireWoods, on brief), for appellee.

Judges: Present: Kinser, C.J., Lemons, Goodwyn, Millette, and Mims, JJ., and Russell and Koontz, S.JJ. OPINION BY CHIEF JUSTICE CYNTHIA D. KINSER.

Opinion by: CYNTHIA D. KINSER

Opinion

[*7] **[**461]** OPINION BY CHIEF JUSTICE CYNTHIA D. KINSER

In this appeal, we conclude that Code § 8.01-335(B), governing the discontinuance or dismissal of inactive cases, does not permit a trial court to discontinue or dismiss such a case with a self-executing, prospective order. As that conclusion renders the order appealed from not final for purposes of appeal, we will dismiss this appeal without prejudice.

RELEVANT FACTS AND PROCEEDINGS

Barbara A. Rutter (Rutter), in her capacity as administratrix of the estate of her deceased husband Virgil W. Rutter, filed a wrongful death action in July 2000 in the Circuit Court of the City of Virginia Beach. Rutter named as defendants Oakwood Living Centers of Virginia, Inc. (Oakwood), an assisted living facility where Virgil Rutter had lived prior **[***2]** to his death; Prism Rehab Systems, Inc. (Prism Rehab), a company that had contracted with Oakwood to provide physical therapy services to residents of Oakwood; Thomas P. Dixon (Dixon), the president of Prism Rehab;

and Frank Knowlton (Knowlton), an employee of Prism Rehab whose alleged negligence caused the decedent to fall and sustain a hip fracture, allegedly resulting in his death. Rutter claimed that Oakwood, Prism Rehab, and Dixon were vicariously liable for Knowlton's negligence and sought damages against the defendants, jointly and severally.

In September 2000, Dixon and Prism Rehab filed a notice of bankruptcy stay, notifying the circuit court that both Prism Rehab and its parent company had filed bankruptcy proceedings and that Rutter's action against Prism Rehab and Dixon was stayed pursuant **[*8]** to federal bankruptcy law. In response, the circuit court entered an order on October 4, 2000 (the 2000 Order), stating:

> [T]his action is removed from the docket of this [c]ourt with leave to counsel to place this action back on the docket of this **[**462]** [c]ourt upon resolution of the bankruptcy proceeding should such procedure be deemed advisable.
>
> This action shall be ordered to be discontinued **[***3]** if after three years there has been no further order or proceeding under [Code] § 8.01-335(B)[.]

Following entry of this order, Rutter, however, continued discovery against Oakwood and in February 2001 filed a motion to compel Oakwood to answer interrogatories. Oakwood responded by filing a notice of the bankruptcy stay order. Asserting that the 2000 Order was "unclear . . . as to whether the action against Oakwood was also removed" from the docket, Oakwood filed a motion requesting the circuit court to remove Rutter's action against it pending resolution of the bankruptcy proceedings. In March 2001, Knowlton also filed a motion to stay, claiming that the action against him was stayed pending resolution of the bankruptcy proceedings.

The circuit court did not rule on either motion, and the docket reflects no activity in the case until Rutter filed a motion in June 2005 to set a trial date. Rutter stated the bankruptcy stay was lifted in April 2002 and the action against the defendants thus could proceed pursuant to the circuit court's 2000 Order. Again, no orders or proceedings took place until April 2009, when Oakwood filed a plea of the statute of limitations and/or motion to dismiss. **[***4]** According to Oakwood, the 2000 Order served to discontinue Rutter's action on October 4, 2003 pursuant to Code §

8.01-335(B) because, as of that date, the action had been inactive for three years. Oakwood asserted that because the matter "abate[d]" as of October 4, 2003, Rutter then had two months, the balance of the statute of limitations remaining when she originally filed her complaint, in which to refile her action. Alternatively, Oakwood asserted that Rutter could have reinstated the discontinued action, pursuant to Code § 8.01-335(B), within one year of the discontinuance in October 2003. Oakwood argued that because Rutter had failed to employ either remedy, she could no longer pursue the action.

[*9] Rutter responded that the 2000 Order only removed the action from the circuit court's docket and did not actually discontinue it. Rutter maintained that the language of the 2000 Order contemplated a subsequent order being entered after three years of inactivity and noted that no such order had been entered. Rutter also contended that Code § 8.01-335(B) does not permit a prospective dismissal of a case, meaning the 2000 Order was void to the extent that it attempted to do so.

The circuit **[***5]** court sustained Oakwood's motion. In an order entered on December 18, 2009 (the 2009 Order), the court stated that the

> case was removed from the [c]ourt's docket and discontinued as of October 4, 2003. Under the provisions of [Code] § 8.01-244 . . ., a two year statute of limitations applies to wrongful death claims, leaving two months following the discontinuance of the case for [Rutter] to refile her claim.

Because Rutter had not re-filed her action within that time, the circuit court dismissed "the Complaint against Oakwood" with prejudice.

Rutter appeals from the circuit court's judgment. She contends, inter alia, that Code § 8.01-335(B) does not permit a trial court to dismiss an action prospectively, but instead requires entry of an order subsequent to the period of inactivity. Thus, according to Rutter, the circuit court erred in sustaining Oakwood's plea of the statute of limitations and dismissing the action.

ANALYSIS

The primary question on appeal, whether the circuit court erred by treating the 2000 Order

as a self-executing order prospectively discontinuing Rutter's action under Code § 8.01-335(B), requires the Court to interpret the provisions of that statute. ***HN1*** Statutory interpretation **[***6]** is a pure question of law reviewed de novo on appeal. Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007). ***HN2*** In interpreting a statute, we must "'ascertain and give effect to the intention of the legislature,' which is usually self-evident from the statutory language." Virginia Polytechnic Inst. & State Univ. v. Interactive **[**463]** Return Serv., Inc., 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006) (quoting Chase v. DaimlerChrysler **[*10]** Corp., 266 Va. 544, 547, 587 S.E.2d 521, 522 (2003)). When a statute's terms are clear and unambiguous, we apply the statute in accordance with its plain language. HCA Health Servs. of Va., Inc. v. Levin, 260 Va. 215, 220, 530 S.E.2d 417, 419-20 (2000).

The provisions of Code § 8.01-335(B) state:

> ***HN3*** Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case **[***7]** discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

The statute's purpose is

> to enable trial courts to eliminate from their dockets cases for which there is no reasonable prospect of trial. In summarily dismissing such cases, trial courts may thus promote efficiency in the administration of justice by saving the time of court personnel which would otherwise be required to preserve on the courts' dockets actions long forgotten or abandoned by litigants and lawyers.

Nash v. Jewell, 227 Va. 230, 234, 315 S.E.2d 825, 827 (1984). As recently stated, that***HN4*** the "plain meaning of this statute is that any action in which there is no activity by the

parties for three or more years may be removed from the court's docket, either by dismissal or discontinuance." Conger v. Barrett, 280 Va. 627, 632, 702 S.E.2d 117, 119 (2010). That is, "[a] case must be inactive for three years before a circuit court may dismiss a case sua sponte under Code § 8.01-335(B)." Collins v. Shepherd, 274 Va. 390, 401, 649 S.E.2d 672, 677 (2007).

In **[***8]** light of the plain terms of Code § 8.01-335 (B) and its purpose, we conclude that the circuit court erred when it held that the 2000 Order served to discontinue Rutter's action as of October 2003. ***HN5*** The provisions of Code § 8.01-335(B) allow a discontinuance when, **[*11]** for three years or more, "there has been no order or proceeding." (Emphasis added.) A trial court's determination that there has been no order or proceeding for at least three years must be made contemporaneously with the entry of the order discontinuing or dismissing the action. This temporal requirement complies with the purpose of the statute: "to enable trial courts to eliminate from their dockets cases for which there is no reasonable prospect of trial." Nash, 227 Va. at 234, 315 S.E.2d at 827 (emphasis added). A trial court prospectively entering a self-executing order is unable to determine whether there has in fact been "no order or proceeding" for three or more years, or whether there is a reasonable prospect of trial. In short, such an order would preclude a trial court from considering factors relevant to the exercise of its discretion to discontinue an action under Code § 8.01-335(B).

That subsection also requires **[***9]** the clerk of the trial court to provide the parties with a copy of the final order discontinuing or dismissing the action and allows reinstatement of such within one year of the entry of the order. Code § 8.01-335(B). However, in the case of a self-executing, prospective order of discontinuance, the clerk could not provide the parties with "the final order discontinuing or dismissing the case." Instead, the clerk could only provide an order that may be final at some point at least three years into the future. In other words, a party would have to determine on what date the action had been inactive for a period of three years for lack of an order or proceeding. Likewise, a party would not know when the one-year period for reinstatement commenced to run. Such uncertainty and guesswork is incompatible with the language of Code § 8.01-335(B) and would undermine

"efficiency in the administration of justice." See Nash, 227 Va. at 234, 315 S.E.2d at 827.

[464]** Oakwood contends, however, that we have recognized the validity of a prospective, self-executing order and cites our decisions in Norris v. Mitchell, 255 Va. 235, 495 S.E.2d 809 (1998), and Berean Law Grp., P.C. v. Cox, 259 Va. 622, 528 S.E.2d 108 (2000). **[***10]** In both Norris and Berean Law Group, the respective trial courts entered orders sustaining a demurrer and dismissing the action, but granted leave for the plaintiff to file an amended complaint by a specific date. 255 Va. at 238, 495 S.E.2d at 811; 259 Va. at 624, 528 S.E.2d at 110. We held that an order sustaining a demurrer but granting leave to amend "does not become final 'until after the time limited therein for the plaintiff to amend his [pleading] has expired.'" Norris, **[*12]** 255 Va. at 239, 495 S.E.2d at 811 (quoting London-Virginia Mining Co. v. Moore, 98 Va. 256, 257, 35 S.E. 722, 723 (1900)); see Berean Law Grp., 259 Va. at 626, 528 S.E.2d at 111. Applying that rationale to the present case, Oakwood argues the prospective discontinuance of Rutter's action similarly was valid and effective after three years of inactivity.

Unlike the present action, neither Norris nor Berean Law Group involved the application of a statute. Here, ***HN6*** the circuit court's discretion to discontinue or dismiss an action for lack of any order or proceeding for more than three years is governed by Code § 8.01-335(B). And, that statute does not contemplate entry of a self-executing, prospective order of discontinuance **[***11]** prior to the period of inactivity. In addition, the orders at issue in Norris and Berean Law Group, containing a date certain and specifying the plaintiff's required act, did not necessitate the guesswork that would result from a prospective order of discontinuance under Code § 8.01-335(B).

In sum, we conclude that Code § 8.01-335(B) does not allow a trial court to enter a self-executing order prospectively discontinuing or dismissing an action. Instead, if a trial court first determines that there has been no order or proceeding in an action for more than three years, it then may discontinue or dismiss the action pursuant to Code § 8.01-335(B). The circuit court thus erred by concluding that the 2000 Order served to discontinue Rutter's action as of October 2003 and by sustaining Oakwood's plea of the

statute of limitations. The 2000 Order merely removed the action from the docket and, pursuant to Code § 8.01-335(B), a subsequent order was required to discontinue or dismiss the action. Rutter's action thus remained pending in the circuit court, and she was entitled to move to set a trial date because the bankruptcy stay had been lifted in 2002.

This conclusion, however, does not end **[***12]** our analysis. The peculiar circumstances of this appeal require us to address an additional issue sua sponte. In the 2009 Order, the circuit court, in sustaining Oakwood's plea of the statute of the limitations, treated the 2000 Order as prospectively discontinuing the entire action, i.e., as an order that became final on October 4, 2003. Because the 2000 Order did not in fact discontinue the action and Rutter's action remained pending in the circuit court, the 2000 Order never became final. That fact calls into question whether the 2009 Order, which is challenged in this appeal, was a final, appealable order. If it was not, this Court has no jurisdiction to hear this appeal.

[*13] In answering that question, we apply the familiar principle that***HN7*** "[a] court always has jurisdiction to determine its own jurisdiction." Lewis v. C.J. Langenfelder & Son, Jr., Inc., 266 Va. 513, 516, 587 S.E.2d 697, 699 (2003); United States v. United Mine Workers, 330 U.S. 258, 292 n.57, 67 S. Ct. 677, 91 L. Ed. 884 (1947); see, e.g., Jenkins v. Mehra, 281 Va. 37, 51, 704 S.E.2d 577, 585 (2011). This principle applies even when, as here, determining jurisdiction first requires analysis of the merits of an issue. See United States v. Ruiz, 536 U.S. 622, 628, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002) **[***13]** ("In order to make that determination [regarding its own jurisdiction], it was necessary for the [appellate court] to address the merits."); Childers v. Chesapeake & Potomac Telephone Co., 881 F.2d 1259, 1263 (4th Cir. 1989) (federal courts may "address a state claim on its merits in the process of determining its own jurisdiction"). See generally Myers v. Hancock, 185 Va. 454, 460, 39 S.E.2d 246, 249 (1946) (disposition on realty fixture issue resulted in the **[**465]** absence of jurisdiction); Western Union Telegraph Co. v. White, 113 Va. 421, 424-26, 74 S.E. 174, 176 (1912) (analysis of the meaning of a statute on the merits required dismissal for lack of jurisdiction). With these principles in mind, we now turn to the question

whether we have jurisdiction to hear this appeal.

In relevant part, ***HN8*** Code § 8.01-670(A)(3) provides that "any person may present a petition for an appeal" to this Court if that person is aggrieved "[b]y a final judgment in any other civil case." See Comcast of Chesterfield Cnty., Inc. v. Board of Supervisors of Chesterfield Cnty., 277 Va. 293, 306, 672 S.E.2d 870, 876 (2009) (holding that "Code § 8.01-670(A)(1) does not authorize appeals of interlocutory orders in those **[***14]** types of controversies enumerated in that subsection"). A final order "is one which disposes of the whole subject, gives all the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the order." James v. James, 263 Va. 474, 481, 562 S.E.2d 133, 137 (2002) (internal quotation marks omitted). "'[I]n the absence of a statutory provision to the contrary, a judgment is not final for purposes of appeal if it is rendered with regard to some but not all of the parties involved in the case.'" Leggett v. Caudill, 247 Va. 130, 133, 439 S.E.2d 350, 351, 10 Va. Law Rep. 771 (1994) (quoting Wells v. Whitaker, 207 Va. 616, 628, 151 S.E.2d 422, 432 (1966)).

Rutter named four defendants in her complaint: Oakwood, Prism Rehab, Dixon, and Knowlton. Because the 2000 Order merely **[*14]** removed the action from the docket, and no other order was entered discontinuing the action or dismissing any defendant, all parties remained before the circuit court when it entered the 2009 Order. That order, sustaining Oakwood's plea of the statute of limitations, stated that "the **[***15]** Complaint against Oakwood is dismissed." The order adjudicated nothing with regard to defendants Prism Rehab, Dixon, and Knowlton. The 2009 Order, therefore, was only "rendered with regard to some but not all of the parties involved in the case" and was not a final order for purposes of appeal. Leggett, 247 Va. at 133, 439 S.E.2d at 351. [1]

HN9 Under the "severable interests" exception, however, "a final adjudication of a collateral matter that addresses separate and severable interests can be appealed [if] the appeal cannot affect the determination of the

[1] The parties did not utilize the procedure for the appeal of an interlocutory order pursuant to the provisions of Code § 8.01-670.1. Thus, we express no opinion whether that procedure would have been applicable in this instance.

remaining issues in the case, even if the adjudication is reversed." Thompson v. Skate Am., Inc., 261 Va. 121, 127, 540 S.E.2d 123, 126 (2001). Thus, "prior to the determination of the case against all defendants," a party may appeal an adjudication that is final "as to a collateral matter, separate and distinct from the general subject of the litigation and affecting only particular parties to the controversy." **[***16]** Wells, 207 Va. at 628, 151 S.E.2d at 432. See generally Rule 5:8A(a).

[2] In Wells, the Court held that an order was not a final, appealable order because if the plaintiff obtained "a reversal on his theory that [the dismissed defendant] was a joint venturer, then [that defendant] might be charged with liability for the same acts or omissions which are the basis of [the remaining defendant's] liability." Id. at 629, 151 S.E.2d at 433.

The 2009 Order, which was not final as to all the defendants, is thus only appealable if the "severable interests" exception applies. The 2009 Order adjudicated Rutter's ability to proceed with the cause of action only as to Oakwood. But, the interests of all four defendants are joint and not severable. Like the situation in Leggett, Rutter's allegations against Oakwood, Prism Rehab, and Dixon derive from the alleged negligent conduct of Knowlton. See Leggett, 247 Va. at 134-35, 439 S.E.2d at 352. Thus, the circuit court's adjudication as to Oakwood in the 2009 Order did not concern "a collateral **[*15]** matter, separate and distinct from the **[***17]** general subject of the **[**466]** litigation." Wells, 207 Va. at 628, 151 S.E.2d at 432.

CONCLUSION

In exercising jurisdiction to determine our own jurisdiction and thereby analyzing the merits of the issue presented on appeal, we conclude that Code § 8.01-335(B) does not allow the prospective discontinuance or dismissal of an action. The 2000 Order therefore merely removed Rutter's action from the circuit court's docket but did not discontinue or dismiss the action. It was not final in any respect. Further, because the 2009 Order only adjudicated Rutter's claim against Oakwood, whose interests are not severable from those of the other defendants, that order was not final for purposes of appeal. As a result, this Court has no jurisdiction over this appeal and the appeal, therefore, will be dismissed without prejudice.

[2] This rule, addressing appeals from partial final judgments in multi-party cases, took effect after entry of the 2009 Order.

Dismissed without prejudice.

Smith v. Smith

Court of Appeals of Virginia

April 7, 1987, Decided

No. 1285-85

Reporter

4 Va. App. 148; 354 S.E.2d 816; 1987 Va. App. LEXIS 173; 3 Va. Law Rep. 2179

EDNA PERSINGER SMITH v. HOLLIS H. SMITH, SR.

Prior History: **[***1]** Circuit Court of Alleghany County, Duncan M. Byrd, Jr., Judge.

Disposition: *Affirmed*.

Case Summary

Procedural Posture

Appellant wife challenged the judgment from the Circuit Court of Alleghany County (Virginia), which held that her right to receive temporary spousal support pursuant to a pendente lite order terminated upon the dismissal of the divorce suit pursuant to Va. Code Ann. § 8.01-335(B). Appellee husband challenged that portion of the judgment awarding the wife arrearages for unpaid support that had accumulated before the suit was dismissed.

Overview

In a divorce suit, the trial court entered a pendente lite order requiring the husband to pay temporary spousal support to the wife. No action having been taken in the case for more than five years, the trial court dismissed the case without notice. A new divorce suit was filed, and the wife filed a motion to award her arrearages in spousal support and to order the husband to resume payment of the same. The trial court held that the wife's right to receive spousal support pursuant to the pendente lite order terminated upon the dismissal of the first divorce suit, but awarded the wife arrearages for unpaid support that accumulated before the suit was dismissed. Both parties appealed. The court affirmed the judgment. The authority of the trial court to order spousal support pendente lite in a divorce suit was limited to the right to make such an award only for the period the suit was pending. Thus, the order of dismissal by operation of law terminated the wife's right to further pendente lite support.

However, the dismissal of the suit, standing alone, did not retroactively nullify the wife's right to accrued spousal support under the pendente lite order.

Outcome

The court affirmed the judgment holding that wife's right to receive temporary support pursuant to a pendente lite order terminated upon the dismissal of the divorce suit but that she was entitled to arrearages for unpaid support that had accumulated before the suit was dismissed.

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN1 Va. Code Ann. § 8.01-335(B) provides: Any court in which is pending a case wherein for more than five years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be dismissed.

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN2 Va. Code Ann. § 20-121.1 provides: In any suit which has been stricken from the docket, and in which complete relief has not been obtained, upon the motion or application of either party to the original proceedings, the same shall be reinstated upon the docket for such purposes as may be necessary to grant full relief to all parties.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN3 Courts have no power to enter a decree of spousal support except pursuant to statutory authority. Va. Code Ann. § 20-107.1. Va. Code Ann. § 20-103 provides authority for the court to provide for spousal support during the pendency of the suit. This grant of authority is limited to the right to make such award only for the period the action is pending.

Civil Procedure > Dismissal > General Overview

HN4 The least harm would result if, once an action is dismissed, any pendente lite order in the case should also be considered dismissed.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Enforcement > General Overview

Family Law > ... > Spousal Support > Obligations > Temporary Support

Governments > Legislation > Effect & Operation > Retrospective Operation

HN5 The dismissal of an action pursuant to Va. Code Ann. § 8.01-335(B), standing alone, does not retroactively nullify the right to accrued spousal support under a pendente lite order. To so hold would be in derogation of the well established principle that court-ordered support becomes vested when it accrues and the courts are without authority to make any change with regard to arrearages.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Constitutional Law > Substantive Due Process > Scope

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Enforcement > General Overview

HN6 A dismissal under Va. Code Ann. § 8.01-335(B) requires no notice to the parties, and, thus, to hold that the right to the amount of support that had accrued could be taken away by dismissal of the action would be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Headnotes/Syllabus

Headnotes

(1) Domestic Relations -- Spousal Support -- Standard. --Courts have no power to enter a decree of spousal support except pursuant to statutory authority; Code § 20-103 provides authority for the court to provide support during the pendency of the suit.

(2) Domestic Relations -- Spousal Support -- Pendente Lite Support. --A court's authority to award support pendente lite is limited to the power to make such awards only for the period the action is pending; when the divorce proceeding is dismissed, there is no further right to pendente lite support.

(3) Domestic Relations -- Spousal Support -- Pendente Lite Support. --Once the divorce proceeding is dismissed, any pendente lite support orders are also by operation of law dismissed.

(4) Domestic Relations -- Spousal Support -- Arrearages. --Court ordered support becomes vested when it accrues and courts are without authority to make any changes.

Syllabus

Wife appealed the judgment of the circuit court which held that her right to receive spousal support pendente lite terminated upon the dismissal of the pending **[***2]** divorce suit.

The Court of Appeals affirmed, holding that when a divorce action is dismissed, the pending orders entered in the case are also terminated; therefore, the order of the court dismissing the pending divorce action also by operation of law terminated her right to further pendente lite spousal support.

Counsel: J. Gregory Mooney (Michael McHale Collins; Collins, Crackel & Mooney, on brief), for appellant.

Edward K. Stein (Dabney L. Pasco; Alderson & Stein; Kostel, Watson, Snyder & Pasco, on brief), for appellee.

Judges: Moon, J. Koontz, C.J., and Hodges, J., concurred.

Opinion by: MOON

Opinion

[*149] **[**817]** Edna Persinger Smith seeks reversal of a trial court decision which held that her right to receive temporary spousal support pursuant to a pendente lite decree was terminated upon the dismissal of the pending divorce suit pursuant to Code § 8.01-335(B), the "five-year rule." Hollis H. Smith, Sr., in his cross appeal, contends that the trial court erred when it awarded his wife arrearages for the amount of unpaid support that had accumulated before the suit was dismissed. We affirm the judgment.

Appellee, Mr. Smith, filed a divorce action against his wife on November **[***3]** 20, 1974. On December 16, 1974, the trial court entered a pendente lite decree requiring Mr. Smith to pay his wife $ 125 in temporary spousal support every two weeks. He made those payments as ordered until August 30, 1979, the date he retired, when he stopped the payments without first obtaining a modification in the decree. On February 27, 1981, no action having been taken in the case for more than five years, the trial court dismissed the case without notice to the parties pursuant to ***HN1*** Code § 8.01-335(B), which provides:

> Any court in which is pending a case wherein for more than five years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be dismissed.

[*150] On February 24, 1984, Mr. Smith filed a new bill of complaint, seeking a divorce based on a one-year separation between the parties. On April 8, 1985, Mrs. Smith filed a motion asking the court to award her arrearages of $ 18,000 in spousal support accumulated since August 30, 1979, and to order her husband to resume paying her $ 125 every two weeks. On July 3, 1985, the trial court held that when it dismissed **[***4]** the 1974 divorce proceeding on February 27, 1981, the pendente lite support order also terminated. However, the court also held that Mr. Smith was responsible for the spousal support payments that had accrued up until the date it dismissed the case and awarded Mrs. Smith $ 4,875, representing the principal sum due her from August 30, 1979, to February 27, 1981, the date of dismissal.

Later that day, on July 3, 1985, Mrs. Smith moved the court to reinstate the 1974 divorce suit pursuant to Code § 20-121.1 [1] and vacate its decision on arrearages. In a letter opinion of July 17, 1985, the trial court stated:

> [T]he Court is of the opinion that the provisions of . . . [Code § 20-121.1] have no effect on the Court's opinion of July 3, 1985 as it relates to the pendente lite support order.
>
> While it is clear that the substantive issues remaining in this case would make it appropriate to reinstate the case on the docket, to do so would be redundant in this case since a new action has already been filed and in the Court's view, reinstatement *would not* revive the [support award] . . . of the previous pendente lite decree.

(emphasis supplied).

[*5]** We agree with the trial court's holding that it would have been redundant to reopen

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[1] ***HN2*** Code § 20-121.1 provides:

> In any suit which has been stricken from the docket, and in which complete relief has not been obtained, upon the motion or application of either party to the original proceedings, the same shall be reinstated upon the docket for such purposes as may be necessary to grant full relief to all parties.

the dismissed case because another case was pending in which complete relief could be obtained. [2]

[*151] (1-2) **[**818]** Whether pendente lite orders survive a case's dismissal appears to be an issue of first impression in Virginia. There are, however, relevant precedents and statutes which aid us in the resolution of this question. ***HN3*** Courts have no power to enter a decree of spousal support except pursuant to statutory authority. *See Bray* **[***6]** *v. Landergren*, 161 Va. 699, 704, 172 S.E. 252, 254 (1934); Code § 20-107.1. Code § 20-103 provides authority for the court to provide for spousal support "during the pendency of the suit." We interpret this grant of authority to be limited to the right to make such award only for the period the action is pending, notwithstanding the wording of the pendente lite decree in this case which provided that the award should continue until "further order of the court." We hold that the order of dismissal by operation of law terminated Mrs. Smith's right to further pendente lite support. *See Wain v. Barnay*, 219 Ill. App. 401, 405-06 (1920); *Heilbron v. Heilbron*, 158 Pa. 297, 301, 27 A. 967, 968 (1893). *Contra Winkel v. Winkel*, 178 Md. 489, 15 A.2d 914 (1940). *See generally* 24 Am. Jur. 2d *Divorce and Separation* § 584 (1983).

Other jurisdictions that have considered this question have uniformly held that when a divorce action is dismissed, the pending orders entered in the case are also terminated. *Wheelock v. Wheelock*, 3 A.D.2d 25, 27, 157 N.Y.S.2d 752, 754 (1956); *Caldwell v. Caldwell*, 189 N.C. 805, 812, 128 S.E. 329, 334 (1925); *Ash v. Ash*, 50 R.I. **[***7]** 1, 6, 144 A. 437, 438-39 (1929); *Rosser v. Rosser*, 620 S.W.2d 802, 805 (Tex. Civ. App. 1981).

Furthermore, we believe that public policy concerns support this rule. Generally, when a divorce action is dismissed under Code § 8.01-335(B), it is for one of three reasons: (1) the parties have resumed cohabitation; (2) another divorce action has been filed simultaneously with the pending action and the relief has been granted in the other action; or (3) the parties continue to live separate and apart. We do not know the percentage of those

[2] The parties mistakenly briefed and argued this case as a dismissal under the "two-year rule" of Code § 8.01-335. Because we hold that a pendente lite order does not survive dismissal of the action, we do not consider it necessary to the outcome of the case to discuss the difference between a "discontinuance" under the two-year rule of Code § 8.01-335(A) and a "dismissal" under Code § 8.01-335(B), nor do we need to consider how Code § 20-121.1 relates to each subsection.

couples who resume cohabitation or file separate actions, but we assume that the number is not insignificant. If the parties had, in fact, resumed cohabitation, it would be counterproductive to marital harmony for one party in a marriage, supporting the other spouse, to learn that the spouse also was accruing a monthly right to support **[*152]** payments while the parties were living together. Similarly, there would be no social purpose served in allowing a person who had been divorced under another decree or accruing rights in another action to also accrue benefits under an action that had been abandoned, thus obtaining a possible windfall. **[***8]** Furthermore, even if the parties continued to live separate and apart, as soon as a party stopped receiving support payments, the other party could seek support in another action. [3]

(3) For the foregoing reasons, we conclude that ***HN4*** the least harm would result if, once an action is dismissed, any pendente lite order in the case should also be considered dismissed. We hold, therefore, that the trial court correctly ruled that the pendente lite support award terminated when the divorce action was dismissed pursuant to Code **[***9]** § 8.01-335(B).

(4) In his cross-appeal, Mr. Smith contends that the trial court nullified the pendente lite order when it dismissed the action and, therefore, the court erred in awarding arrearages. We find no persuasive authority or reason to hold that ***HN5*** the dismissal of an action pursuant to Code § 8.01-335(B), standing alone, retroactively nullifies the right to accrued spousal support under a pendente lite order. To so hold would be in derogation of the well established principle that court-ordered support becomes vested when it accrues and the courts are without authority to **[**819]** make any change with regard to arrearages. *See Cofer v. Cofer*, 205 Va. 834, 839, 140 S.E.2d 663, 666 (1965). Furthermore, ***HN6*** a dismissal under Code § 8.01-335(B) requires no notice to the parties, *Nash v. Jewell*, 227 Va. 230, 234, 315 S.E.2d 825, 827 (1984), and, thus, for us to hold that the right to the amount of support that had accrued could

[3] The present case falls within this last category. However, Mrs. Smith is in no position to complain. Her husband stopped paying her in 1979, two years before the dismissal, and she waited until 1984 before attempting to enforce the 1974 pendente lite order. This length of time does not affect her right to collect any arrearages she may be entitled to, however, since laches is not a bar in collecting arrearages. *See Johnson v. Johnson*, 1 Va. App. 330, 332, 338 S.E.2d 353, 354 (1986).

be taken away by dismissal of the action would be in violation of the due process clause of the fourteenth amendment to the United States Constitution. *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) (due process, at a minimum, requires notice **[***10]** and the right to be heard). Accordingly, we hold that the trial court correctly awarded arrearages for the amount of spousal support that accrued **[*153]** during the pendency of the first action.

This court will not consider the question concerning the refusal of the court to award interest on the arrearages because the objection was not "stated together with grounds therefor at the time of the ruling." Rule 5A:18.

Therefore, the decision is affirmed.

Affirmed.

Va. Broad. Corp. v. Commonwealth

Supreme Court of Virginia

October 31, 2013, Decided

Record No. 122013

Reporter

286 Va. 239; 749 S.E.2d 313; 2013 Va. LEXIS 133; 41 Media L. Rep. 2813; 2013 WL 5833266

VIRGINIA BROADCASTING CORPORATION v. COMMONWEALTH OF VIRGINIA, ET AL.

Prior History: **[***1]** FROM THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE. Edward L. Hogshire, Judge.

Va. Broad. Corp. v. Commonwealth, 2013 Va. LEXIS 58 (Va., Apr. 12, 2013)

Disposition: Affirmed.

Case Summary

Overview

HOLDINGS: [1]-The case fit squarely within the "capable of repetition, yet evading review" exception to the mootness doctrine; [2]-The trial court did not abuse its discretion under Va. Code Ann. § 19.2-266 in denying the broadcaster's request to have a camera in the courtroom during defendant's sentencing hearing because coverage was not permitted during defendant's trial, the "coverage allowed" guidelines were never implicated, the trial court properly considered the impact media coverage could have on a pending civil suit and the opposition of the Commonwealth and defendant, and the broadcaster conceded that had no right under U.S. Const. amend. I or Va. Const. art. I, § 12 to have cameras in a courtroom.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Governments > Legislation > Interpretation

HN1 The question whether a circuit court's exercise of its discretion under Va. Code Ann. § 19.2-266 is subject to appellate review

involves a matter of statutory interpretation, a pure question of law that is reviewed de novo.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

Criminal Law & Procedure > Trials > Judicial Discretion

HN2 See Va. Code Ann. § 19.2-266.

Governments > Legislation > Interpretation

HN3 When interpreting and applying a statute, courts assume that the General Assembly chose, with care, the words it used in enacting the statute, and the courts are bound by those words.

Evidence > Inferences & Presumptions > Presumptions

Governments > Legislation > Interpretation

HN4 When the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, courts must presume that the difference in the choice of language was intentional.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

Criminal Law & Procedure > Appeals > Reviewability > General Overview

HN5 Va. Code Ann. § 19.2-266 contains no language removing a trial court's decision from judicial review.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

Criminal Law & Procedure > Appeals > Reviewability > General Overview

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > General Overview

HN6 A trial court's decision under Va. Code Ann. § 19.2-266 is subject to judicial review, albeit under a highly deferential abuse of discretion standard.

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

HN7 Generally, a case is moot and must be dismissed when the controversy that existed between litigants has ceased to exist.

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

HN8 Whenever it appears that there is no actual controversy between the litigants, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

HN9 The mootness doctrine may be inapplicable when a proceeding is short-lived by nature.

Civil Procedure > ... > Justiciability > Mootness > Evading Review Exception

Constitutional Law > ... > Case or Controversy > Mootness > Conduct Capable of Repetition

HN10 If an underlying dispute is capable of repetition, yet evading review, it is not moot.

Governments > Legislation > Interpretation

HN11 Courts determine the General Assembly's intent from the words contained in a statute.

Governments > Legislation > Interpretation

HN12 When a statute is unambiguous, courts must apply the plain meaning of that language.

Governments > Legislation > Interpretation

HN13 When the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted because courts take the words as written to determine their meaning.

Governments > Legislation > Interpretation

HN14 A statute is ambiguous when its language is capable of more senses than one, difficult to comprehend or distinguish, of doubtful import, of doubtful or uncertain nature, of doubtful purport, open to various interpretations, or wanting clearness or definiteness, particularly where its words have either no definite sense or else a double one.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

HN15 See Va. Code Ann. § 19.2-266 (1983 Repl. Vol.)

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

Criminal Law & Procedure > Trials > Judicial Discretion

HN16 The 1992 revisions to Va. Code Ann. § 19.2-266 demonstrate that when the General Assembly changed the statute from one that did not permit cameras in the courtroom to one that did, it clearly intended to give trial courts great discretion in making the initial determination whether to permit still photography or cameras in the courtroom. The General Assembly included the phrase "solely in its discretion," a phrase that clearly gives great discretion to a trial court when making its decision. It left the guidelines in the statute so that once a court had made a decision to permit coverage, that court had the guidelines to follow to ensure that such coverage was handled properly.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

Criminal Law & Procedure > Trials > Judicial Discretion

HN17 Va. Code Ann. § 19.2-266 in its current form gives trial courts the sole discretion to determine whether to permit the taking of photographs in the courtroom or the broadcasting of judicial proceedings by radio or television. Logically, the power to permit coverage also includes the power to not permit coverage.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

HN18 It is only after a trial court has made a decision to permit electronic media in the courtroom that the guidelines listed in Va. Code Ann. § 19.2-266 under the heading "Coverage Allowed" are implicated. If coverage is permitted, the statute provides that such coverage must be conducted in accordance with the rules set forth thereunder.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

HN19 A trial judge who has made the initial decision to permit electronic media in the

courtroom must then comply with all the guidelines, including Rule 1 of Va. Code Ann. § 19.2-266, and shall advise the parties of such coverage in advance of the proceeding. In accordance with Rule 1, if a party objects to the coverage, then the party must show good cause why the coverage should be restricted or prohibited. Essentially, the objecting party must demonstrate good cause why the trial judge's initial decision to permit coverage should be reversed, and coverage prohibited or restricted in some manner.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

Criminal Law & Procedure > Trials > Judicial Discretion

HN20 The initial decision whether to permit electronic media coverage in the courtroom is solely within the discretion of the trial court. Va. Code Ann. § 19.2-266.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

HN21 Under Va. Code Ann. § 19.2-266, a hearing is not required prior to a court's initial determination whether to permit coverage. If, however, the trial court makes the decision to permit coverage, it is then required to advise the parties of its decision in advance of the proceedings. If a trial court permits coverage, then a party requesting further restriction or prohibition must demonstrate good cause for such further action.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

HN22 Witness testimony may be chilled if broadcast.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Exclusion of Public From Courtroom

HN23 Cameras in a courtroom can have a chilling effect on witnesses.

Counsel: Gregory S. Duncan for appellant.

E. Duncan Getchell, Jr., Solicitor General (Kenneth T. Cuccinelli, II, Attorney General; Patricia L. West, Chief Deputy Attorney General; Wesley G. Russell, Jr., Deputy Attorney General; Michael H. Brady, Assistant

Solicitor General, on brief), for appellee Commonwealth of Virginia.

Amicus Curiae: Virginia Association of Broadcasters; John E. Falcone (Petty, Livingston, Dawson & Richards, on brief), in support of appellant.

Amici Curiae: WCAV-TV, WHSV-TV, WVAW-TV, WAHU-TV, WAVY-TV, WVBT-TV, and WSLS-TV (Thomas McIntosh; Charles D. Tobin; Drew E. Shenkman; Holland & Knight, on brief), in support of appellant.

No brief filed by appellee George Huguely.

Judges: OPINION BY JUSTICE DONALD W. LEMONS.

Opinion by: DONALD W. LEMONS

Opinion

[*243] **[**315]** PRESENT: All the Justices

OPINION BY JUSTICE DONALD W. LEMONS

In this appeal, we consider whether the Circuit Court of the City of Charlottesville ("trial court") erred in denying Virginia Broadcasting Corporation's ("VBC") request to have a camera in the courtroom to broadcast the sentencing of George W. Huguely, V.

I. Facts and Proceedings

George W. Huguely, V ("Huguely") was tried and convicted in February 2012, of murdering his former girlfriend, Yeardley Love ("Love"). Both Huguely and Love were students at the University of Virginia at the time of Love's death. Huguely's subsequent trial received extensive publicity. On April 16, 2012, VBC, the owner of a television station in Charlottesville, Virginia, filed a "Request for Electronic Media and/or Still Photography Coverage of Judicial Proceedings," in the trial court, requesting permission to broadcast Huguely's sentencing hearing, which was scheduled for August 30, 2012. The trial court had previously denied VBC's request to have a camera in the courtroom during Huguely's trial.

The trial **[***2]** court held a hearing on VBC's request on July 25, 2012. At the hearing, VBC argued that because this was a sentencing hearing, **[*244]** many of the trial court's concerns about the impact of cameras on jurors and witnesses, which had been expressed during the hearing on VBC's request to broadcast the portion of the trial to determine guilt or innocence, would no longer be **[**316]** implicated. VBC argued there was

no "good cause for keeping a camera out of the sentencing" hearing, and that any "prejudice to the defendant in this case is just almost de minimis at this point in the proceedings."

The Commonwealth and Huguely both opposed having cameras in the courtroom for the sentencing hearing. The Commonwealth argued that the cameras would have a detrimental impact on any witnesses testifying at the sentencing hearing. Huguely also argued that having a camera in the courtroom and live coverage of the hearing would have a negative impact on the proceedings, and could influence the testimony of certain witnesses. Huguely asserted that VBC had failed to articulate any substantial change in circumstances that would warrant the trial court's reconsideration of its previous ruling to keep cameras out of the **[***3]** courtroom.

VBC responded that neither the Commonwealth nor Huguely had offered evidence of prejudice or established good cause for excluding cameras from the sentencing hearing. The trial court explained that it was concerned about the effect of cameras on the witnesses at the sentencing hearing and the effect of coverage on potential witnesses and jurors in a pending civil suit that Love's family had filed against Huguely. The trial court denied VBC's request.

VBC filed a motion for reconsideration and maintained that the trial court was treating print media and broadcast media differently. VBC asserted that "[t]he First Amendment to the United States Constitution as well as Article [I], Section 12 of the Constitution of Virginia affords the same protections to all newsgathering activities, regardless whether the media form is print or broadcast," and therefore the trial court was required to grant its request. VBC also argued that no evidence was presented to establish "good cause" for excluding cameras from the courtroom. VBC asserted that the arguments of counsel and the court's speculation about the possible effects of cameras on witnesses or on some future civil action were **[***4]** not evidence and did not constitute "good cause" as required by Code § 19.2-266. The trial court denied the motion for reconsideration without a hearing.

VBC filed a petition for appeal with this Court, and we awarded an appeal on the following assignments of error:

[*245] 1. The trial court erred by failing to apply a "good cause shown" standard, instead believing that it had unfettered discretion pursuant to Section 19.2-266 of the Code of Virginia to prohibit the use of a camera during the sentencing of Mr. George Huguely.

2. The trial court erred in denying Virginia Broadcasting's request to use a camera to cover the sentencing of Mr. George Huguely because there was no "good cause shown" pursuant to Section 19.2-266 of the Code of Virginia since no evidence was presented in the record to support that finding.

3. The trial court erred in relying on its own speculation and the speculations of counsel for Mr. George Huguely and the Charlottesville Commonwealth's Attorney in denying Virginia Broadcasting Corporation's request for electronic media coverage of the sentencing of Mr. George Huguely.

4. The trial court erred in holding that Virginia Broadcasting Corporation's newsgathering and reporting **[***5]** activities via electronic media were entitled to no protection under the First Amendment to the United States Constitution or the Constitution of Virginia, including its denial of Virginia Broadcasting's request to use a camera to acquire the news while allowing the print media to use the primary tools of its trade.

II. Analysis

A. Standard of Review

The Commonwealth asserts in its brief that because Code § 19.2-266 provides that the decision whether to permit cameras in a courtroom is "solely" within the discretion of the trial court, such a decision is not subject to review by this or any other court. ***HN1*** The question whether a circuit court's exercise of its discretion under Code § 19.2-266 is subject to appellate review involves a matter of statutory interpretation, a pure question of law which we review de novo. See **[**317]** Osman v. Osman, 285 Va. 384, 389, 737 S.E.2d 876, 878 (2013).

Code § 19.2-266 governs media coverage of judicial proceedings. It states in relevant part:

> ***HN2*** In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the **[*246]** conduct of a fair trial, provided that

[*6]** the right of the accused to a public trial shall not be violated.

A court may solely in its discretion permit the taking of photographs in the courtroom during the progress of judicial proceedings and the broadcasting of judicial proceedings by radio or television and the use of electronic or photographic means for the perpetuation of the record or parts thereof in criminal and in civil cases, but only in accordance with the rules set forth hereunder. In addition to such rules, the Supreme Court and the Court of Appeals shall have the authority to promulgate any other rules they deem necessary to govern electronic media and still photography coverage in their respective courts. The following rules shall serve as guidelines, and a violation of these rules may be punishable as contempt:

Coverage Allowed.

1. The presiding judge shall at all times have authority to prohibit, interrupt or terminate electronic media and still photography coverage of public judicial proceedings. The presiding judge shall advise the parties of such coverage in advance of the proceedings and allow the parties to object thereto. For good cause shown, the presiding judge may prohibit coverage in any case and may **[***7]** restrict coverage as he deems appropriate to meet the ends of justice.

Code § 19.2-266 (emphasis added).

The General Assembly has used the phrase "sole discretion" in several other instances in the Code. See, e.g., Code § 19.2-163(2) (granting trial judge "sole discretion" to determine amount paid appointed counsel); Code § 22.1-294(D) (granting school board "sole discretion" to reassign and reduce salary of principal, assistant principal or supervisor); Code § 44-93.2 (for member of Virginia National Guard, Virginia Defense Force, or naval militia, choice of leave to take from nongovernmental employment shall be "solely within the discretion of the member"); and Code § 51.1-156(H) (Medical Board's decision to waive ninety-day notification period is "solely in its own discretion").

In three other instances, the Code not only grants sole discretion to a decision maker, but states that such a decision **[**318]** is not subject to judicial review. See, e.g., Code § 2.2-4011(D) (allowing Governor in **[*247]** his

"sole discretion" to approve an extension of emergency regulation and such approval "shall not be subject to judicial review"); Code § 10.1-104.6(E) (allowing Virginia Soil and Water Conservation Board, **[***8]** director, or court sole discretion to agree to supplemental environmental project, a decision which "shall not be subject to appeal"); Code § 2.2-3014(C) (granting State Inspector General "sole discretion" in splitting whistleblower reward and such decision "shall not be appealable").

We have repeatedly said that, ***HN3*** "[w]hen interpreting and applying a statute, we 'assume that the General Assembly chose, with care, the words it used in enacting the statute, and we are bound by those words.'" Kiser v. A.W. Chesterton Co., 285 Va. 12, 19 n.2, 736 S.E.2d 910, 915 n.2 (2013) (quoting Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 100, 546 S.E.2d 696, 702 (2001)); accord Rives v. Commonwealth, 284 Va. 1, 3, 726 S.E.2d 248, 250 (2012). Therefore, ***HN4*** "'when the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional.'" Rives, 284 Va. at 3, 726 S.E.2d at 250,(quoting Zinone v. Lee's Crossing Homeowners Ass'n, 282 Va. 330, 337, 714 S.E.2d 922, 925 (2011)).

The General Assembly has granted "sole discretion" **[***9]** to make certain decisions in several instances in the Code. The General Assembly has also explicitly stated in at least three of those situations that such a decision is not subject to judicial review. ***HN5*** Code § 19.2-266 contains no such language removing the trial court's decision from judicial review. We hold that ***HN6*** the trial court's decision under Code § 19.2-266 is subject to judicial review, albeit under a highly deferential abuse of discretion standard.

B. Mootness

Huguely's sentencing hearing has already taken place. VBC was not permitted to broadcast the hearing. ***HN7*** Generally, a case is moot and must be dismissed when the controversy that existed between litigants has ceased to exist. The Daily Press, Inc. v. Commonwealth, 285 Va. 447, 452, 739 S.E.2d 636, 639 (2013). Neither party asserts that the matter is moot, but their agreement cannot resolve the question for the Court. ***HN8*** "Whenever it appears ... that there is no actual

controversy between the litigants ... it is the duty of every judicial **[*248]** tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case." E.C. v. Va. Dep't of Juvenile Justice, 283 Va. 522, 530, 722 S.E.2d 827, 831 (2012) (quoting **[***10]** Franklin v. Peers, 95 Va. 602, 603, 29 S.E. 321, 321 (1898)).

However, as we recently explained in Daily Press,

> the Supreme Court of the United States has recognized that ***HN9*** the mootness doctrine may be inapplicable when a proceeding is short-lived by nature. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); Gannett Co. v. DePasquale, 443 U.S. 368, 377, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546-47, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). ***HN10*** "If the underlying dispute is capable of repetition, yet evading review, it is not moot." Richmond Newspapers, Inc., 448 U.S. at 563 (internal quotation marks and citation omitted).

285 Va. at 452, 739 S.E.2d at 639. This case fits squarely within this exception to the mootness doctrine.

First, VBC, as the owner of a television station that routinely covers trials in the Central Virginia area, is likely to make future requests to broadcast judicial proceedings. Second, if we decline to address the issues in this case on the grounds of mootness, the dispute will evade review. The trial court entered the order denying VBC's request for electronic media coverage of the sentencing hearing on August 30, 2012, the day of the hearing VBC wished to broadcast. **[***11]** VBC had no opportunity to appeal that order before the sentencing hearing occurred. As we discussed in Daily Press, "[c]riminal trials are typically of short duration," and the trial or other judicial proceedings would likely be concluded before our appellate review is completed. Id. at 453, 739 S.E.2d at 639. Accordingly, we conclude that the controversy before us is not moot, and we now turn to the merits.

C. Code § 19.2-266

VBC argues that the trial court should have applied the good cause shown standard in Rule 1 of the statute when deciding whether to deny VBC's request to broadcast the

sentencing hearing. The Commonwealth argues that the decision whether to permit cameras in the courtroom was solely within the trial court's discretion.

[*249] It is well-settled that ***HN11*** "we determine the General Assembly's intent from the words contained in the statute." Alger v. Commonwealth, 267 Va. 255, 259, 590 S.E.2d 563, 565 (2004) (internal quotation marks omitted). Accordingly, ***HN12*** "[w]hen a statute is unambiguous, we must apply the plain meaning of that language." Appalachian Power Co. v. State Corp. Comm'n, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012). ***HN13*** "[W]hen the language of an enactment is free from **[***12]** ambiguity, resort to legislative history and extrinsic facts is not permitted because we take the words as written to determine their meaning." Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

HN14 A statute is ambiguous when its language is "capable of more senses than one, difficult to comprehend or distinguish, of doubtful import, of doubtful or uncertain nature, of doubtful purport, open to various interpretations, or wanting clearness or definiteness," particularly where its words "have **[**319]** either no definite sense or else a double one." Ayres v. Harleysville Mut. Casualty Co., 172 Va. 383, 393, 2 S.E.2d 303, 307 (1939) (internal quotation marks omitted).

This statute is not a model of clarity. On its face, it contains two different standards that arguably apply when a trial court decides to prohibit cameras in a courtroom. We therefore will consider the meaning of the statute in light of the canons of construction and its legislative history.

D. Legislative History

Prior to 1987, Code § 19.2-266 prohibited cameras in the courtroom. It read, in relevant part, that

> ***HN15*** A court shall not permit the taking of photographs in the courtroom during the progress of judicial proceedings or **[***13]** the broadcasting of judicial proceedings by radio or television, but may authorize the use of electronic or photographic means for the perpetuation of the record or parts thereof.

Former Code § 19.2-266 (1983 Repl. Vol.) (emphasis added). In 1987, the General Assembly created an experimental program,

administered by this Court, to allow electronic media and still photography coverage in a limited number of courts. 1987 Acts ch. 580. Code § 19.2-266 was amended to include language describing the experimental program. The statute was also amended to include **[*250]** guidelines for the six courts that were part of the experimental program. Rule 1 of the guidelines stated:

> The presiding judge shall at all times have authority to prohibit, interrupt or terminate electronic media and still photography coverage of public judicial proceedings. The presiding judge shall advise the parties of such coverage in advance of the proceedings and shall allow the parties to object thereto. For good cause shown, the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice.

Former Code § 19.2-266 (1983 Repl. Vol. & Cum. Supp. 1987).

In 1992, the **[***14]** General Assembly ended the experimental program and revised Code § 19.2-266 to permit the use of cameras in courtrooms. 1992 Acts ch. 557. Specifically, the second and third paragraphs of the statute were revised to appear in their current form, as follows:

> A court <u>may solely in its discretion permit</u> the taking of photographs in the courtroom during the progress of judicial proceedings and the broadcasting of judicial proceedings by radio or television, and the use of electronic or photographic means for the perpetuation of the record or the parts thereof in criminal and in civil cases, but only in accordance with the rules hereunder. In addition to such rules, the Supreme Court and the Court of Appeals shall have the authority to promulgate any other rules they deem necessary to govern electronic media and still photography coverage in their respective courts. The following rules shall serve as guidelines, and a violation of these rules may be punishable as contempt:
>
> Coverage Allowed.
>
> 1. The presiding judge shall at all times have authority to prohibit, interrupt or terminate electronic media and still photography coverage of public judicial proceedings. The presiding judge shall

advise **[***15]** the parties of such coverage in advance of the proceedings and shall allow the parties to object thereto. For good cause shown, the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice.

[*251] Code § 19.2-266 (emphasis added). The phrase "may solely in its discretion" replaced the prior language "shall not." The language that originally stated the guidelines applied only to courts in the experimental program was removed, and the guidelines became part of this statute without any further revisions or modifications.

HN16 The 1992 revisions to Code § 19.2-266 demonstrate that when the General Assembly changed the statute from one which did not permit cameras in the courtroom to one which did, it clearly intended to give the trial court great discretion in making the initial **[**320]** determination whether to permit still photography or cameras in the courtroom. The General Assembly included the phrase "solely in its discretion," a phrase which clearly gives great discretion to a trial court when making its decision.

The guidelines, entitled "Coverage Allowed," were originally drafted only to apply to the six courts where coverage was allowed **[***16]** under the experimental program. Clearly, they were only intended to be implicated once coverage had been permitted through the experimental program. In 1992, when the General Assembly ended the experimental program and gave courts the power to decide whether to permit coverage, it left the guidelines in the statute so that once a court had made a decision to permit coverage, that court had the guidelines to follow to ensure that such coverage was handled properly.

E. Application of Legislative History to Code § 19.2-266

From this legislative history, we conclude that ***HN17*** Code § 19.2-266 in its current form gives trial courts the sole discretion to determine whether to permit the taking of photographs in the courtroom or the broadcasting of judicial proceedings by radio or television. Logically, the power to permit coverage also includes the power to not permit coverage. ***HN18*** It is only after a trial court has made a decision to permit electronic media in the courtroom that the guidelines listed in Code

§ 19.2-266 under the heading "Coverage Allowed" are implicated. If coverage is permitted, the statute provides that such coverage must be conducted "in **[***17]** accordance with the rules set forth hereunder." Code § 19.2-266.

HN19 A trial judge who has made the initial decision to permit electronic media in the courtroom must then comply with all the guidelines, including Rule 1 of the statute, and "shall advise the parties **[*252]** of such coverage" in advance of the proceeding. In accordance with Rule 1, if a party objects to the coverage, then the party must show good cause why the coverage should be restricted or prohibited. Essentially, the objecting party must demonstrate good cause why the trial judge's initial decision to permit coverage should be reversed, and coverage prohibited or restricted in some manner.

VBC cites the decisions of the Court of Appeals in Diehl v. Commonwealth, 9 Va. App. 191, 385 S.E.2d 228, 6 Va. Law Rep. 681 (1989), and Novak v. Commonwealth, 20 Va. App. 373, 457 S.E.2d 402 (1995), as support for its position that the "good cause" standard applies to the trial court's decision to permit or prohibit coverage. However, in both of those cases the trial court had already made an initial determination to permit coverage. The court, the parties, and the media were then required to comply with the guidelines, including Rule 1 as set out in Code § 19.2-266. **[***18]** The defendants, who opposed coverage, accordingly had the burden of demonstrating "good cause" to prohibit or restrict the coverage. The trial court and Court of Appeals found that in both cases the defendants had failed to demonstrate "good cause." Diehl, 9 Va. App. at 197, 385 S.E.2d at 232; Novak, 20 Va. App. at 390-91, 457 S.E.2d at 410. These cases do not support VBC's argument that the trial court had to apply the good cause standard in its initial determination whether to permit cameras in the courtroom. They involve factual scenarios where the trial court had already made an initial decision to permit cameras, and therefore the guidelines, including Rule 1 and its good cause standard, had become applicable.

The trial court in this case made an initial determination not to permit electronic media in the courtroom. ***HN20*** The initial decision whether to permit electronic media coverage in the courtroom is solely within the discretion of the trial court. Code § 19.2-266. Because

coverage was not permitted, the "Coverage Allowed" guidelines, including Rule 1, were never implicated. Accordingly, we hold that that the trial court did not abuse its discretion by failing to apply a good cause **[***19]** shown standard in its initial determination whether to permit coverage of Huguely's sentencing hearing.

We acknowledge that, in practice, a request for media coverage is filed and a hearing is often held before the trial court, "solely in its discretion," makes its initial decision. That hearing may consist only of argument from the parties, or the parties may put on **[**321]** evidence. **[*253]** But ***HN21*** under the statute, a hearing is not required prior to a court's initial determination whether to permit coverage.

If, however, a trial court makes the decision to permit coverage, it is then required to advise the parties of its decision in advance of the proceedings. If a trial court permits coverage, then a party requesting further restriction or prohibition must demonstrate good cause for such further action.

The trial court in this case was not required to apply the good cause standard for its initial determination whether to permit a camera in the courtroom. Such a decision is made in the court's sole discretion. There is no requirement that evidence be presented to the trial court to support the initial decision, and the trial court is not required to explain its reasons for denying a request.

In this case, **[***20]** the trial court did explain its reasons for denying VBC's request at the conclusion of the July 25, 2012 hearing. The trial court articulated its concerns about the effect of cameras in the courtroom and the world-wide coverage of the case on potential witnesses, and how broadcasting the sentencing hearing might impact potential jurors in a pending civil suit against Huguely. The reasons the trial court gave on the record for denying this request do not constitute an abuse of discretion.

The Supreme Court of the United States has long recognized "that ***HN22*** witness testimony may be chilled if broadcast." Hollingsworth v. Perry, 558 U.S. 183, 194, 130 S. Ct. 705, 175 L. Ed. 2d 657, (2010); see also Estes v. Texas, 381 U.S. 532, 547, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). The trial judge in the present case explained that the witnesses in the Huguely case were young, almost all college-aged, that the media coverage of the trial had been

"intense," and that he was very concerned about how the media coverage would impact their willingness to come forward and testify. The Supreme Court of the United States has held that ***HN23*** cameras in a courtroom can have a chilling effect on witnesses. It was not an abuse of discretion for the trial court to consider that factor **[***21]** when deciding whether to permit coverage of the sentencing hearing.

The trial court also expressed its concern that enhanced media coverage would further impact potential jurors in a pending civil suit against Huguely. The trial court was certainly within its discretion to consider the impact media coverage could have on a pending civil suit involving the defendant and the victim's family. The trial court also properly considered the opposition of both the Commonwealth and Huguely to the request.

[*254] F. No Constitutional Right to Broadcast Criminal Proceedings

VBC's last assignment of error contends that "the trial court erred in holding that [VBC's] newsgathering and reporting activities via electronic media were entitled to no protection under the First Amendment to the United States Constitution or the Constitution of Virginia, including its denial of [VBC's] request to use a camera to acquire the news while allowing the print media to use the primary tools of its trade." VBC correctly acknowledges in its opening brief to this Court that neither the Supreme Court of the United States nor this Court have held that a broadcaster has a constitutional right to use cameras in court to gather **[***22]** and report the news. Additionally, VBC conceded at oral argument that there is no constitutional right to have cameras in a courtroom.

III. Conclusion

We hold that the trial court did not abuse its discretion when it denied VBC's request to have a camera in the courtroom during Huguely's sentencing hearing, and we will affirm its judgment.

Affirmed.

Vaughn, Inc. v. Beck

Supreme Court of Virginia

November 2, 2001, Decided

Record No. 003042

Reporter

262 Va. 673; 554 S.E.2d 88; 2001 Va. LEXIS 126

VAUGHN, INC. v. HOWARD J. BECK, JR., ET AL.

Prior History: **[***1]** FROM THE CIRCUIT COURT OF ROANOKE COUNTY J. Howe Brown, Jr., Judge Designate.

Disposition: Affirmed

Case Summary

Procedural Posture

Appellee new home purchasers sued appellant home builder in the Circuit Court of Roanoke County (Virginia), for a defect in construction. The trial court found in favor of the purchasers. The builder appealed the judgment.

Overview

The purchasers entered into a contract with the builder to purchase a new house with a well. Within a year of the date the purchasers obtained title and took possession of the property, the purchasers began to have problems with an inadequate flow of water from the well. The purchasers at first did not think the builder was responsible for the problem and installed a second well. Within two years of the date the purchasers obtained title and took possession of their property the purchasers sued the builder for a defect in the well the builder installed alleging the builder breached the statutory warranty for new dwellings provided by Va. Code Ann. § 55-70.1. The builder asserted the purchasers' claim was barred because they failed to provide the builder with notice of the defect within one year of the date the purchasers obtained title to the property and took possession of the dwelling. On appeal, the supreme court found that the statute did not require the purchasers to give notice of the construction defect to the builder within the one-year statutory warranty period as a prerequisite for bringing a breach of warranty action under the statute.

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1 Under basic rules of statutory construction, a court is required to examine the language of a statute in its entirety and determine the intent of the Virginia General Assembly from the words contained in the statute, unless a literal construction of the statute would yield an absurd result.

Governments > Legislation > Interpretation

HN2 When the language of a statute is plain and unambiguous, a court is bound by the plain meaning of that language. Thus, when the Virginia General Assembly has used words of a plain and definite import, courts cannot place on them a construction that amounts to holding that the Virginia General Assembly meant something other than that which it actually expressed.

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Exclusions & Modifications

Contracts Law > Contract Conditions & Provisions > Implied Warranties > General Overview

Governments > Courts > Common Law

HN3 Va. Code Ann. § 55-70.1 is a statute in derogation of the common law. At common law, a purchaser of a dwelling did not acquire an implied warranty in conjunction with the sale of that dwelling. Because Va. Code Ann. § 55-70.1 changed the common law by creating certain statutory warranties, those warranties are limited to the provisions expressly stated in the statute or necessarily implied by its language.

Contracts Law > Contract Conditions & Provisions > Implied Warranties > General Overview

HN4 See Va. Code Ann. § 55-70.1.

Contracts Law > Contract Conditions & Provisions > Implied Warranties > General Overview

Real Property Law > Purchase & Sale > Remedies > Liability of Developers & Vendors

Real Property Law > Torts > Construction Defects

HN5 The language of Va. Code Ann. § 55-70.1 plainly does not require the purchaser of a new dwelling to give notice of a defect in construction to the builder within the one-year statutory warranty period as a prerequisite for bringing a breach of warranty action under the statute based on that defect.

Governments > Legislation > Interpretation

HN6 In the absence of a specific notice requirement, a court may not construe a statute's plain language in a manner that amounts to holding that the Virginia General Assembly meant to add a requirement to the statute that it did not actually express.

Governments > Legislation > Interpretation

Governments > Legislation > Statute of Limitations > General Overview

HN7 Any change to a statute must be a legislative, rather than a judicial, undertaking.

Counsel: *Edward A. Natt* (*Osterhoudt, Prillaman, Natt, Helscher, Yost, Maxwell & Ferguson*, on brief), for appellant.

Monica Leigh Taylor (*J. Rudy Austin*; *Gentry Locke Rakes & Moore*, on brief), for appellees.

Judges: Present: Lacy, Hassell, Keenan, Koontz, Kinser, and Lemons, JJ., and Stephenson, S.J.

Opinion by: BARBARA MILANO KEENAN

Opinion

[89]** **[*675]** In this appeal, we consider the issue whether under Code § 55-70.1, a purchaser of a new home is required to notify the builder of a defect in construction within the statutory warranty period before bringing an action against the builder for breach of that warranty.

Howard J. Beck, Jr., and his wife, Lauren S. Beck (collectively, the Becks), entered into a contract with Vaughn, Inc. (Vaughn) to purchase certain real estate, including a house and a well, in a residential development in Roanoke County. The Becks obtained title and took possession of the property on December 9, 1996.

Within one year of that date, the Becks began to experience problems with an inadequate flow of water from their well. As a result of the inadequate water flow, the Becks **[***2]** did not have sufficient water to perform routine household functions, such as washing dishes,

washing clothes, and bathing. In addition, the Becks were not able to provide water for their lawn and shrubbery. Because of the inadequate water flow, the Becks were required to dig and install a second well.

The Becks did not notify Vaughn of their difficulties with the original well because they thought that the problem was caused by a faulty water pump, which Vaughn would not have been obligated to correct. At a later date, however, the Becks concluded that Vaughn was responsible for correcting the defect in the well, but they took no action to notify Vaughn of the defect.

On December 7, 1998, within two years of the date that the Becks obtained title and took possession of the property, they filed a motion for judgment in the trial court against Vaughn. The Becks **[*676]** alleged that the defect in the well installed by Vaughn was caused by Vaughn's failure to drill, construct, and prepare the well in a workmanlike manner, free from structural defects. The Becks asserted, among other things, that based on Vaughn's actions and omissions regarding the well, Vaughn breached the statutory warranty **[***3]** for new dwellings provided by Code § 55-70.1.

Vaughn filed an answer in which he admitted that "the warranties given are the statutory warranties" under Code § 55-70.1. However, Vaughn denied any breach of those warranties and asserted as an affirmative defense the Becks' failure to provide Vaughn notice of the defect within the one-year statutory warranty period. In response, the Becks conceded that they had not given Vaughn notice of the defect within one year from the date on which they obtained title to the property and took possession of the dwelling.

In a preliminary ruling, the trial court addressed Vaughn's affirmative defense and held that in accordance with rules of statutory construction, the Court looks to the plain meaning of the language of the statute. The statute does not require notice to the builder or vendor. In other statutes the legislature has required notice. . . . If notice of breach by the buyer is required in every case, there would be no reason for the legislature or the contractor to specify a notice provision in certain cases.

The case proceeded to a jury trial. The jury returned a verdict in favor **[***4]** of the Becks in the amount of $ 20,000, and the trial court entered judgment in accordance with the verdict. Vaughn appeals from this judgment.

Vaughn argues that Code § 55-70.1 required the Becks to give Vaughn notice of the defect in the well within the one-year statutory warranty period as a condition precedent to maintaining an action against Vaughn for breach of the statutory warranty. Vaughn asserts that a notice requirement is implied from the statutory language, and that a contrary result would be unreasonable because it would deprive a builder of the opportunity to determine whether a homeowner's claim for damages has any merit. Vaughn also contends that in *Davis v. Tazewell* **[**90]** *Place Associates*, 254 Va. 257, 492 S.E.2d 162 (1997), this Court recognized a builder's right under Code § 55-70.1 to receive such notice of a defect that forms the basis of an action for **[*677]** breach of the statutory warranty. We disagree with Vaughn's arguments.

HN1 Under basic rules of statutory construction, we examine the language of Code § 55-70.1 in its entirety and determine the intent of the General Assembly **[***5]** from the words contained in the statute, unless a literal construction of the statute would yield an absurd result. *Cummings v. Fulghum*, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001); *Earley v. Landsidle*, 257 Va. 365, 369, 514 S.E.2d 153, 155 (1999). ***HN2*** When the language of a statute is plain and unambiguous, we are bound by the plain meaning of that language. *Cummings*, 261 Va. at 77, 540 S.E.2d at 496; *Earley*, 257 Va. at 370, 514 S.E.2d at 155; *Ragan v. Woodcroft Vill. Apartments*, 255 Va. 322, 326, 497 S.E.2d 740, 742 (1998). Thus, when the General Assembly has used words of a plain and definite import, courts cannot place on them a construction that amounts to holding that the General Assembly meant something other than that which it actually expressed. *See Advanced Marine Enters., Inc. v. PRC Inc.*, 256 Va. 106, 125, 501 S.E.2d 148, 159 (1998); *Abbott v. Willey*, 253 Va. 88, 91, 479 S.E.2d 528, 530 (1997).

We also consider the fact that ***HN3*** Code § 55-70.1 is a statute in derogation of the common law. At common law, a purchaser of a dwelling did not **[***6]** acquire an implied warranty in conjunction with the sale of that dwelling. *Davis.*, 254 Va. at 261, 492 S.E.2d at 164; *see Bruce Farms, Inc. v. Coupe*, 219 Va. 287, 289, 247 S.E.2d 400, 402 (1978). Because Code § 55-70.1 changed the common law by creating certain statutory warranties, those warranties are limited to the

provisions expressly stated in the statute or necessarily implied by its language. *See Mitchem v. Counts*, 259 Va. 179, 186, 523 S.E.2d 246, 250 (2000); *Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988).

Code § 55-70.1 provides, in relevant part:

HN4 B. In addition, in every contract for the sale of a new dwelling, the vendor, if he is in the business of building or selling such dwellings, shall be held to warrant to the vendee that, at the time of transfer of record title or the vendee's taking possession, whichever occurs first, the dwelling together with all its fixtures is sufficiently (i) free from structural defects, so as to pass without objection in the trade, (ii) constructed in a workmanlike manner, so as to pass without **[***7]** objection in the trade, and (iii) fit for habitation.

. . . .

[*678] D. If there is a breach of warranty under this section, the vendee, or his heirs or personal representatives in case of his death, shall have a cause of action against his vendor for damages.

E. The warranty shall extend for a period of one year from the date of transfer of record title or the vendee's taking possession, whichever occurs first, except that the warranty pursuant to subdivision (i) of subsection B for the foundation of new dwellings shall extend for a period of five years from the date of transfer of record title or the vendee's taking possession, whichever occurs first. Any action for its breach shall be brought within two years after the breach thereof. As used in this section, the term "new dwelling" shall mean a dwelling or house which has not previously been occupied for a period of more than sixty days by anyone other than the vendor or the vendee or which has not been occupied by the original vendor or subsequent vendor for a cumulative period of more than twelve months excluding dwellings constructed solely for lease. The term "new dwelling" shall not include a condominium or condominium **[***8]** units created pursuant to Chapter 4.2 (§ 55-79.39 et seq.) of this title.

We conclude that ***HN5*** the language of Code § 55-70.1 plainly does not require the purchaser of a new dwelling to give notice of a defect in construction to the builder within the one-year statutory warranty period as a prerequisite for

bringing a breach of warranty action under the statute based on that **[**91]** defect. Subsection (D) of Code § 55-70.1 provides the purchaser of a new dwelling a cause of action against the builder for a breach of the warranty created by the statute. Subsection (E) of the statute provides that the warranty shall extend for a period of one year from the date that record title is transferred to the purchaser, or the date that the purchaser takes possession of the property, whichever occurs first. Any action for such breach of warranty must be brought within two years after the breach occurs. *Id.* Thus, a breach by the builder, not a tendering of notice, is the only condition that the statute imposes for bringing an action against that builder within two years of the date of the breach.

The contrary statutory interpretation advanced by **[***9]** Vaughn would require us to add new language to the statute. We reject that **[*679]** interpretation because, ***HN6*** in the absence of a specific notice requirement, we may not construe the statute's plain language in a manner that amounts to holding that the General Assembly meant to add a requirement to the statute that it did not actually express. *See Advanced Marine Enters., Inc.*, 256 Va. at 125, 501 S.E.2d at 159; *Haislip v. Southern Heritage Ins. Co.*, 254 Va. 265, 268, 492 S.E.2d 135, 137 (1997).

We also disagree with Vaughn's assertion that our decision in *Davis* implicitly recognized a notice requirement under Code § 55-70.1. The issue presented and decided in *Davis* was whether the defendant builder had met its burden of proving that the plaintiffs' cause of action was barred by the two-year statute of limitations in Code § 55-70.1. 254 Va. at 260-61, 492 S.E.2d at 164. We did not consider the question whether notice by a purchaser is an element of a cause of action under Code § 55-70.1.

The facts in *Davis* involved purchasers who, after buying a new house, **[***10]** observed various defects in the dwelling. Although not required by Code § 55-70.1 to do so, the purchasers provided the builder notice of those defects. *Id.* at 259, 492 S.E.2d at 163. We stated that when a purchaser notifies the builder of any defect covered by the statutory warranty within the one-year warranty period, and the builder does not remedy that defect, the purchaser may file an action against the builder within two years from the date that the

notice was given. *Id.* at 261, 492 S.E.2d at 164.

We held that the defendants failed to prove that the statute of limitations had expired before the plaintiffs filed their action. *Id.* Incorporated in this holding was the fact that the purchasers gave notice to the builder within the statutory warranty period. *See id.* Thus, our decision in *Davis* is limited to this factual context and does not impose a notice requirement under Code § 55-70.1.

Nevertheless, as Vaughn observes, our interpretation of Code § 55-70.1 in *Davis* may have the effect of permitting an extension of the statute of limitations in cases **[***11]** when a purchaser has provided timely notice of a construction defect to the builder. This potential result, however, cannot be remedied through judicial construction by imposing a notice requirement that effectively would add new language to the statute. ***HN7*** Any such change to the statute must be a legislative, rather than a judicial, undertaking. *See Advanced Marine Enters., Inc.*, 256 Va. at 125, 501 S.E.2d at 159; *Abbott*, 253 Va. at 91, 479 S.E.2d at 530. Accordingly, we conclude that the trial court correctly held that Code § 55-70.1 does not impose a notice requirement **[*680]** as a prerequisite for maintaining an action for breach of the statutory warranty.

For these reasons, we will affirm the trial court's judgment.

Affirmed.

Wickham v. Green

Supreme Court of Virginia

June 9, 1910

No Number in Original

Reporter

111 Va. 199; 68 S.E. 259; 1910 Va. LEXIS 25

Wickham and Northrop, Receivers, v. Green

Prior History: **[***1]** Error to a judgment of the Law and Equity Court of the City of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendants assign error.

Disposition: *Reversed*.

Case Summary

Procedural Posture

Defendants appealed an order of the Law and Equity Court of the City of Richmond (Virginia), which entered a judgment for plaintiff in a personal injury action.

Overview

A few weeks before the statute of limitations expired, plaintiff caused a summons to be issued in his personal injury action against defendants. Several terms later, plaintiff filed a motion for leave to file a declaration. The trial court granted the motion over defendants' objection. The trial court entered a judgment for plaintiff. On appeal, the court reversed the judgment and dismissed the action. The court held that the clerk of the trial court had a duty to dismiss the action pursuant to Va. Code § 3241 because the declaration was not filed within the prescribed time. The court determined that Va. Code § 3293 provided that a trial court was authorized to permit a plaintiff to file a declaration at the next term after a dismissal. However, the court ruled that § 3293 required the plaintiff to prove a lack of neglect or good cause for reinstatement of the action. Therefore, the court held that the trial court erroneously permitted plaintiff to file the declaration without any showing regarding the reason for the delay. The court determined that the trial court's order deprived defendants of their right to plead the statute of limitations.

Outcome

The court reversed the trial court's judgment for plaintiff in his personal injury action against defendants. The court dismissed the action.

LexisNexis® Headnotes

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

HN1 The reinstatement of a case at the following term, which has been dismissed at rules for want of declaration, may be regarded as a matter of course, provided the effect of such reinstatement is to place the case in the position it would have occupied but for the irregularity of a clerk's conduct, or for good cause shown where there has been no misprision by the clerk.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

HN2 Where a defendant appears and files his answer or plea, or consents to a decree, he will be taken to have waived the dismissal of the cause, and will not be allowed to insist on it.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

HN3 Motions to set aside a non-suit, or to reinstate a suit after dismissal, are addressed to the judicial discretion of the court. The suit is dismissed under Va. Code § 3241, because of apparent neglect of duty upon the part of the plaintiff, and it should be reinstated only upon explanation, showing that the neglect of duty is only apparent, or if really existing that there is excuse or extenuation for it. It is not to be reinstated merely upon showing that the plaintiff would suffer inconvenience or loss by reason of its dismissal, as that would as effectually repeal the statute as though its enforcement is left entirely to the arbitrary discretion of the court. In brief, the plaintiff, on moving to reinstate his suit, should be required to show good cause for his motion.

Governments > Courts > Rule Application & Interpretation

Governments > Legislation > General Overview

Governments > Legislation > Interpretation

HN4 Courts cannot permit considerations of hardship in particular cases to cause them to disregard and set at naught the plain

provisions of a positive statute. To do so would be to usurp legislative functions, and would operate a judicial repeal of the statute.

Headnotes/Syllabus

Headnotes

1. Non-Suit at Rules -- *Failure to Enter -- Control of Court*. -- The failure of a clerk to dismiss a suit as required by the mandatory provision of section 3241 of the Code where one month elapses after the process is returned executed, without the declaration being filed, does not materially affect the rights of the defendant, as the court is given control over such misprisions at the succeeding term by section 3293.

2. Non-Suit -- *Dismissal at Rules -- Reinstatement Without Cause*. -- The reinstatement, at the following term, of a case dismissed at rules for want of a declaration may be regarded as a matter of course, provided the effect of such reinstatement is to place the case in the position it would have occupied but for the dismissal.

3. Non-Suit -- *Dismissal at Rules -- Reinstatement -- When Cause Must be Shown -- Case at Bar*. -- The dismissal of a case at rules by the clerk for failure of the plaintiff to file his declaration within the time prescribed by law is in **[***2]** the nature of a non-suit, which may be set aside by the court at the next succeeding term for good cause shown, but only for cause where the rights of the defendant would be affected thereby. The case will not be reinstated merely because the plaintiff would otherwise suffer inconvenience or loss, as that would, in effect, repeal the statute directing the dismissal. The discretion vested in the court to reinstate the case is judicial, not arbitrary. In the case at bar, if the dismissal were set aside and the case reinstated the defendants would be deprived of their plea of the statute of limitations which would otherwise be available.

Syllabus

The opinion states the case.

Counsel: *Henry Taylor, Jr.*, for the plaintiff in error.

Edgar B. English, D. C. O'Flaherty and *M. J. Fulton*, for the defendant in error.

Judges: Whittle, J., delivered the opinion of the court. Absent, Harrison, J.

Opinion by: WHITTLE

Opinion

[*200] **[**260]** This is a personal injury action in which there was a verdict and judgment for the defendant in error, who was plaintiff in the trial court.

We are met at the threshold of the case with a question of statutory construction of more than ordinary interest. **[***3]** The summons was issued May 1, 1908 (only seventeen days before the right of action would have been barred by the statute of limitations), and was returnable to second May rules, at which rules the process was returned executed, and the case was continued at that and the succeeding June rules for declaration. When more than one month had elapsed after process returned executed without the declaration having been filed, the clerk called attention of counsel for the plaintiff to that fact and notified them that he would be compelled to dismiss the suit. Thereupon, counsel requested that the order of dismissal be not entered, as they wished to obtain consent of opposing counsel to file the declaration. Having failed to get such consent, the court at the next term, on motion of the plaintiff, granted leave to file the declaration. The defendants, at a later day of the term, submitted a motion to set aside the former order and that the clerk be directed to enter the suit dismissed, on the ground that by allowing the declaration to be filed then and refusing to dismiss the suit the defendants would be denied the right to plead the statute of limitations. But the court adhered to its **[***4]** former ruling and the defendants excepted.

[*201] It was the duty of the clerk, by mandatory requirement of section 3241 of the Code, to have entered the suit dismissed. The rights of the defendants, however, were not materially affected by his failure to discharge that function, since such omission was a misprision over which the court is given control at the succeeding term by section 3293. So that, at last the question to be determined is, whether or not the court could, at the next term, under section 3293, relieve the plaintiff from the consequences of his neglect, without excuse, to file his declaration within the time prescribed by section 3241, by granting leave to file the declaration at that term, when the effect of such ruling is to deprive the defendants of an accrued right to plead the statute of limitations.

It is true that ***HN1*** the reinstatement of a case at the following term, which has been dismissed at rules for want of declaration, may be regarded as a matter of course, provided the effect of such reinstatement is to place the case in the position it would have occupied but for the irregularity of the clerk's conduct, or for good cause shown where there has been **[***5]** no misprision by the clerk. This we think is the rule fairly deducible from the cases of *Southall* v. *Exchange Bank*, 53 Va. 312, 12 Gratt. 312; *Wall* v. *Atwell*, 62 Va. 401, 21 Gratt. 401; *Alvis* v. *Johnson*, 1 Va. Dec. 381; and *So. Express Co.* v. *Jacobs*, 109 Va. 27, 63 S.E. 17.

Thus, in *Southall* v. *Exchange Bank*, Judge Lee said: "There can be done then that the court might properly, as it did, set aside all the proceedings at rules after the cause had been remanded at the previous term, and permit the plaintiff to do then, in court, what he would and should have done at rules, file his declaration and take judgment for the part not answered by the plea. No injustice could be done by this to the defendant, as it only placed the cause exactly where it would have been but for the irregularities which had occurred at the rules."

In *Wall* v. *Atwill, supra*, the court held that the proceedings **[*202]** in the clerk's office had been so irregular that the cause was not properly on the office judgment docket, and should be remanded to rules for proper proceedings.

In *Alvis* v. *Johnson, supra*, the plaintiff was in no default, the clerk kept no rule book, and **[***6]** took no rules. At p. 383, Judge Anderson says: "If it (the amended declaration) was not then filed, it was no fault of the plaintiff."

In *Southern Express Co.* v. *Jacobs*, 109 Va. 27, 63 S.E. 17, this court said, in reference to section 3293: "This statute was ample authority for the court's action in overruling the motion to remand, and directing the clerk to make the proper entries in the rule book. . . . It is not pretended that the defendant was misled by any misprision of the clerk, nor is it suggested that any opportunity to file pleas or make any defense was lost by reason of any action on the part of the clerk. It was the duty of the clerk to enter the rules properly as required by the statute. His failure to do so, however, could not, in this case, be prejudical to the plaintiff, **[**261]** who had done all that was required to entitle him to his office judgment."

So, in *Buchanan* v. *King*, 63 Va. 414, 22 Gratt. 414, it was held, that ***HN2*** where the defendant appears and files his answer or plea, or consents to a decree, he will be taken to have waived the dismissal of the cause, and will not be allowed to insist on it.

The pretension of the defendant in error leads to this, that **[***7]** if in the present case the clerk had complied with the statute and entered the suit dismissed, still the court could have set aside the act of the clerk, though done in strict compliance with the mandate of the statute, without cause, merely to relieve the plaintiff from the consequences of his own default. We have seen no case that sustains the contention, and such a construction of section 3293 would be out of harmony with the whole course of administration of justice under our system of jurisprudence, and would defeat the purpose of the revisors in incorporating section 6, Ch. 171, (the corresponding **[*203]** section to section 3241 of the Code of 1904) in the Code of 1849. See Report of Revisors, p. 844.

The case of *Lipscomb's Admr.* v. *Winston's Admr.*, 1 H. & M. 453, is cited for the proposition, that a cause dismissed at rules for want of a declaration may be reinstated at the next court as a matter of course; but the grounds for the reinstatement in that case do not appear.

These dismissals by the clerk partake of the nature of non-suits, and the prevailing rule is that ***HN3*** motions to set aside a non-suit, or to reinstate a suit after dismissal, are addressed to the **[***8]** judicial discretion of the court. The suit is dismissed under section 3241, because of apparent neglect of duty upon the part of the plaintiff, and it should be reinstated only upon explanation, showing that the neglect of duty was only apparent, or if really existing that there was excuse or extenuation for it. It is not to be reinstated merely upon showing that the plaintiff would suffer inconvenience or loss by reason of its dismissal, as that would as effectually repeal the statute as though its enforcement were left entirely to the arbitrary discretion of the court. In brief, the plaintiff, on moving to reinstate his suit, should be required to show good cause for his motion. Many of the causes which would justify a court in setting aside a non-suit or in reinstating a dismissed cause are mentioned in 14 Cyc. 423.

The following cases further illustrate the general principle that courts will not relieve against mere neglect of parties in such case.

Clark v. *Stevens*, 55 Iowa 361, 7 N.W. 591; *English* v. *Wilkins*, 163 Ill. 542, 45 N.E. 287; *People* v. *Justices*, 1 Bar (N.Y.) 478; *Morrow* v. *Malone*, 37 Tenn. 642, 5 Sneed 642.

It is always to be regretted **[***9]** when a case has to be disposed of on other grounds than those that go to the very right and merits of the cause. ***HN4*** Courts cannot, however, permit considerations of hardship in particular cases to cause them to disregard and set at naught the plain provisions of a positive **[*204]** statute. To do so would be to usurp legislative functions, and would operate a judicial repeal of the statute.

The view that we have taken of the question raised by the first assignment renders the consideration of the remaining assignments of error unnecessary.

The judgment must be reversed, and this court will make such order as the trial court ought to have made, dismissing the case with costs.

Reversed.

§ 8.01-18. When suit discontinued unless revived

If the committee, personal representative, heir, or devisee of the plaintiff or appellant who was a party, or of the decedent whose personal representative was plaintiff or appellant, shall not make a motion for substitution of parties under the applicable Rules of Court within a reasonable time after there may have been a suggestion on the record of the fact making such motion proper, the suit of such plaintiff or appellant shall be discontinued, unless good cause be shown to the contrary.

Code 1950, § 8-153; 1954, c. 333; 1977, c. 617.

§ 8.01-20.1. Certification of expert witness opinion at time of service of process

Every motion for judgment, counter claim, or third party claim in a medical malpractice action, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

The certifying expert shall not be required to be an expert witness expected to testify at trial nor shall any defendant be entitled to discover the identity or qualifications of the certifying expert or the nature of the certifying expert's opinions. Should the certifying expert be identified as an expert expected to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the defendant with a certification form that affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert witness opinion. The court, upon good cause shown, may conduct an in camera review of the certifying expert opinion obtained by the plaintiff as the court may deem appropriate. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant as required under this section, the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice.

2005, cc. 649, 692;2007, c. 489;2013, cc. 65, 610.

§ 8.01-41. Wrongful distraint, attachment

If property be distrained for any rent not due, or attached for any rent not accruing, or taken under any attachment sued out without good cause, the owner of such property may, in an action against the party suing out the warrant of distress or attachment, recover damages for the wrongful distraint, seizure, or sale.

Code 1950, § 8-651; 1977, c. 617.

§ 8.01-50.1. Certification of expert witness opinion at time of service of process

Every motion for judgment, counter claim, or third party claim in any action pursuant to § 8.01-50 for wrongful death against a health care provider, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges in his wrongful death action a medical malpractice theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

The certifying expert shall not be required to be an expert expected to testify at trial nor shall any defendant be entitled to discover the identity or qualifications of the certifying expert or the nature of the certifying expert's opinions. Should the certifying expert be identified as an expert expected to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the defendant with a certification form which affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert opinion. The court, upon good cause shown, may conduct an in camera review of the certifying expert opinion obtained by the plaintiff as the court may deem appropriate. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant, the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice.

2005, cc. 649, 692;2007, c. 489;2013, cc. 65, 610.

§ 8.01-216. Comptroller's power to adjust old claims

The Comptroller, with the advice of the Attorney General, may adjust and settle upon equitable principles, without regard to strict legal rules, any doubtful or disputed account or claim in favor of the Commonwealth which may have been standing on the books of his office not less than two years, and may, with the like advice, dismiss any proceedings instituted by him; but before such adjustment or settlement can in any wise affect the rights of the Commonwealth it shall be approved and endorsed by the Attorney General and shall then be submitted to the supervision of the judge of the Circuit Court of the City of Richmond, accompanied by a written statement signed by the Comptroller of the facts and reasons which, in his opinion, render such adjustment or settlement just and proper. When such judge endorses the same with his written approval, signed in his official character, it shall be considered and treated as valid and binding.

Code 1950, § 8-779; 1977, c. 617.

§ 8.01-216.16. Civil investigative demands; oral examinations

A. The examination of any person pursuant to a civil investigative demand for oral testimony served under this article shall be taken before an officer authorized to administer oaths under the laws of this Commonwealth or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the Attorney General. This section shall not preclude the taking of testimony by any means authorized by and in a manner consistent with the Rules of the Supreme Court of Virginia.

B. The investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Commonwealth, any person who may be agreed upon by the attorney for the Commonwealth and the person giving the testimony, the officer before whom the testimony is to be taken, and any court reporter taking such testimony.

C. The oral testimony of any person taken pursuant to a civil investigative demand served under this article shall be taken in the county or city within which such person resides, is found, or transacts business or in such other place as may be agreed upon by the investigator conducting the examination and such person.

D. When the testimony is fully transcribed, the investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance that the witness desires to make shall be entered and identified upon the transcript by the officer or the investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days after being afforded a reasonable opportunity to examine it, the officer or the investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

E. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the Attorney General.

F. Upon payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

G. Any person compelled to appear for oral testimony under a civil investigative demand may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the circuit court for an order compelling such person to answer such question. If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with applicable law.

H. Any person appearing for oral testimony under a civil investigative demand issued under this article shall be entitled to the same fees and allowances paid to witnesses in the circuit court.

2002, c. 842.

§ 8.01-217. How name of person may be changed

A. Any person desiring to change his own name, or that of his child or ward, may apply therefor to the circuit court of the county or city in which the person whose name is to be changed resides, or if no place of abode exists, such person may apply to any circuit court which shall consider such application if it finds that good cause exists therefor under the circumstances alleged. An incarcerated person may apply to the circuit court of the county or city in which such person is incarcerated. In case of a minor who has no living parent or guardian, the application may be made by his next friend. In case of a minor who has both parents living, the parent who does not join in the application shall be served with reasonable notice of the application pursuant to § 8.01-296 and, should such parent object to the change of name, a hearing shall be held to determine whether the change of name is in the best interest of the minor. It shall not be necessary to effect service upon any parent who files an answer to the application. If, after application is made on behalf of a minor and an ex parte hearing is held thereon, the court finds by clear and convincing evidence that such notice would present a serious threat to the health and safety of the applicant, the court may waive such notice.

B. Every application shall be under oath and shall include the place of residence of the applicant, the names of both parents, including the maiden name of his mother, the date and place of birth of the applicant, the applicant's felony conviction record, if any, whether the applicant is a person for whom registration with the Sex Offender and Crimes Against Minors Registry is required pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, whether the applicant is presently incarcerated or a probationer with any court, and if the applicant has previously changed his name, his former name or names.

C. On any such application and hearing, if such be demanded, the court, shall, unless the evidence shows that the change of name is sought for a fraudulent purpose or would otherwise infringe upon the rights of others or, in a case involving a minor, that the change of name is not in the best interest of the minor, order a change of name.

D. No application shall be accepted by a court for a change of name of a probationer, person for whom registration with the Sex Offender and Crimes Against Minors Registry is required pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, or incarcerated person unless the court finds that good cause exists for consideration of such application under the reasons alleged in the application for the requested change of name. If the court accepts the application, the court shall mail or deliver a copy of the application to the attorney for the Commonwealth for the jurisdiction where the application was filed and the attorney for the Commonwealth for any jurisdiction in the Commonwealth where a conviction occurred that resulted in the applicant's probation, registration with the Sex Offender and Crimes Against Minors Registry pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, or incarceration. The attorney for the Commonwealth where the application was filed shall be entitled to respond and represent the interests of the Commonwealth by filing a response within 30 days after the mailing or delivery of a copy of the application. The court shall conduct a hearing on the application and may order a change of name if, after receiving and considering evidence concerning the circumstances regarding the requested change of name, the court determines that the change of name (i) would not frustrate a

legitimate law-enforcement purpose, (ii) is not sought for a fraudulent purpose, and (iii) would not otherwise infringe upon the rights of others. Such order shall contain written findings stating the court's basis for granting the order.

E. The provisions of subsection D are jurisdictional and any order granting a change of name pursuant to subsection D that fails to comply with any provision of subsection D is void ab initio. The attorney for the Commonwealth for the jurisdiction where such an application was filed has the authority to bring an independent action at any time to have such order declared void. If the attorney for the Commonwealth brings an independent action to have the order declared void, notice of the action shall be served upon the person who was granted a change of name who shall have 30 days after service to respond. If the person whose name was changed files a response objecting to having the order declared void, the court shall hold a hearing. If an order granting a change of name is declared void pursuant to this subsection, or if a person is convicted of perjury pursuant to § 18.2-434 for unlawfully changing his name pursuant to § 18.2-504.1 based on conduct that violates this section, the clerk of the court entering the order or the order of conviction shall transmit a certified copy of the order to (i) the State Registrar of Vital Records, (ii) the Department of Motor Vehicles, (iii) the State Board of Elections, (iv) the Central Criminal Records Exchange, and (v) any agency or department of the Commonwealth that has issued a license to the person where such license utilizes the person's changed name, if known to the court and identified in the court order.

F. The order shall contain no identifying information other than the applicant's former name or names, new name, and current address. The clerk of the court shall spread the order upon the current deed book in his office, index it in both the old and new names, and transmit a certified copy of the order and the application to the State Registrar of Vital Records and the Central Criminal Records Exchange. Transmittal of a copy of the order and the application to the State Registrar of Vital Records and the Central Criminal Records Exchange shall not be required of a person who changed his or her former name by reason of marriage and who makes application to resume a former name pursuant to § 20-121.4.

G. If the applicant shall show cause to believe that in the event his change of name should become a public record, a serious threat to the health or safety of the applicant or his immediate family would exist, the chief judge of the circuit court may waive the requirement that the application be under oath or the court may order the record sealed and direct the clerk not to spread and index any orders entered in the cause, and a certified copy shall not be transmitted to the State Registrar of Vital Records or the Central Criminal Records Exchange. At such time as a name change order is received by the State Registrar of Vital Records, for a person born in the Commonwealth, together with a proper request and payment of required fees, the Registrar shall issue certifications of the amended birth record which do not reveal the former name or names of the applicant unless so ordered by a court of competent jurisdiction. Such certifications shall not be marked "amended" and show the effective date as provided in § 32.1-272. Such order shall set forth the date and place of birth of the person whose name is changed, the full names of his parents, including the maiden name of the mother and, if such person has previously changed his name, his former name or names.

Code 1950, § 8-577.1; 1956, c. 402; 1973, c. 401; 1976, c. 115; 1977, cc. 457, 617; 1979, cc. 599, 603, 612; 1980, cc. 448, 455; 1981, c. 297; 1983, c. 335; 1985, c. 483; 1991, c. 144; 2003, c. 258; 2005, c. 579;2014, c. 232;2015, c. 631.

§ 8.01-251. Limitations on enforcement of judgments

A. No execution shall be issued and no action brought on a judgment, including a judgment in favor of the Commonwealth and a judgment rendered in another state or country, after 20 years from the date of such judgment or domestication of such judgment, unless the period is extended as provided in this section.

B. The limitation prescribed in subsection A may be extended on motion of the judgment creditor or his assignee with notice to the judgment debtor, and an order of the circuit court of the jurisdiction in which the judgment was entered to show cause why the period for issuance of execution or bringing of an action should not be extended. Any such motion shall be filed within the 20-year period from the date of the original judgment or from the date of the latest extension thereof. If upon the hearing of the motion the court decides that there is no good cause shown for not extending the period of limitation, the order shall so state and the period of limitation mentioned in subsection A shall be extended for an additional 20 years from the date of filing of the motion to extend. Additional extensions may be granted upon the same procedure, subject in each case to the recording provisions prescribed in § 8.01-458. This extension procedure is subject to the exception that if the action is against a personal representative of a decedent, the motion shall be within two years from the date of his qualification, the extension may be for only two years from the time of the filing of the motion, and there may be only one such extension.

C. No suit shall be brought to enforce the lien of any judgment, including judgments in favor of the Commonwealth, upon which the right to issue an execution or bring an action is barred by other subsections of this section, nor shall any suit be brought to enforce the lien of any judgment against the lands which have been conveyed by the judgment debtor to a grantee for value, unless the same be brought within 10 years from the due recordation of the deed from such judgment debtor to such grantee and unless a notice of lis pendens shall have been recorded in the manner provided by § 8.01-268 before the expiration of such 10-year period.

D. In computing the time, any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted. Sections 8.01-230 et seq., 8.01-247 and 8.01-256 shall apply to the right to bring such action in like manner as to any right.

E. The provisions of this section apply to judgments obtained after June 29, 1948, and to judgments obtained prior to such date which are not then barred by the statute of limitations, but nothing herein shall have the effect of reducing the time for enforcement of any judgment the limitation upon which has been extended prior to such date by compliance with the provisions of law theretofore in effect.

F. This section shall not be construed to impair the right of subrogation to which any person may become entitled while the lien is in force, provided he institutes proceedings to enforce such right within five years after the same accrued, nor shall the lien of a judgment be impaired by the recovery of another judgment thereon, or by a forthcoming bond taken on an execution thereon, such bond having the force of a judgment.

G. Limitations on enforcement of judgments entered in the general district courts shall be

governed by § 16.1-94.1, unless an abstract of such judgment is docketed in the judgment book of a circuit court. Upon the docketing of such judgment, the limitation for the enforcement of a district court judgment is the same as for a judgment of the circuit court.

Code 1950, §§ 8-393, 8-394, 8-396, 8-397; 1956, c. 512; 1958, c. 221; 1960, c. 274; 1977, c. 617; 1983, c. 499; 2002, c. 394;2005, cc. 139, 203.

§ 8.01-264. Venue improperly laid; objection

A. Venue laid in forums other than those designated by this chapter shall be subject to objection, but no action shall be dismissed solely on the basis of venue if there be a forum in the Commonwealth where venue is proper. In actions where venue is subject to objection, the action may nevertheless be tried where it is commenced, and the venue irregularity shall be deemed to have been waived unless the defendant objects to venue by motion filed, as to actions in circuit courts, within twenty-one days after service of process commencing the action, or within the period of any extension of time for filing responsive pleadings fixed by order of the court. As to actions in general district courts, a motion objecting to venue, which may be in the form of a letter or other written communication, shall be filed with or received by the court on or before the day of trial. Waiver by any defendant shall not constitute waiver for any other defendant entitled to object to venue. Such motion shall set forth where the defendant believes venue to be proper, may be in writing, and shall be promptly heard by the court upon reasonable notice by any party. The court shall hear the motion only on the basis of the action as commenced against the original defendant and not on the basis of subsequent joinder or intervention of any other party. If such motion is sustained, the court shall order the venue transferred to a proper forum under the appropriate provisions of §§ 8.01-195.4, 8.01-260, 8.01-261 and 8.01-262 and shall so notify each party.

B. In the event a party defendant whose presence created venue is dismissed after the parties are at issue, then the remaining parties defendant may object to venue within ten days after such dismissal if the remaining defendants can demonstrate that the dismissed defendant was not properly joined or was added as a party defendant for the purpose of creating venue. However, nothing in this section shall impair the right of the court under § 8.01-265 to retain the action for trial on motion of a plaintiff and for good cause shown.

C. The initial pleading, in any action brought in a general district court, shall inform the defendant of his right to object to venue if the action is brought in any forum other than that specified in §§ 8.01-261, 8.01-262, or § 8.01-263. The information to the defendant shall be stated in clear, nontechnical language reasonably calculated to accomplish the purpose of this subsection.

D. Where a suit described in subdivision 19 of § 8.01-261 is filed in a venue that is not described therein, the court, on its own motion and upon notice to all parties, may transfer the suit to a venue described in such subdivision provided the transfer is implemented within sixty days after service of process upon all parties.

1977, c. 617; 1982, c. 601; 1985, cc. 433, 492; 1986, cc. 396, 403; 1987, c. 709; 1991, c. 692 .

§ 8.01-265. Change of venue by court

In addition to the provisions of § 8.01-264 and notwithstanding the provisions of §§ 8.01-195.4, 8.01-260, 8.01-261 and 8.01-262, the court wherein an action is commenced may, upon motion by any party and for good cause shown, (i) dismiss an action brought by a person who is not a resident of the Commonwealth without prejudice under such conditions as the court deems appropriate if the cause of action arose outside of the Commonwealth and if the court determines that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth or (ii) transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth. Such conditions as the court deems appropriate shall include, but not be limited to, a requirement that the defendant agree not to assert the statute of limitations as a defense if the action is brought in a more convenient forum within a time specified by the court. The court, on motion of any party and for good cause shown, may retain the action for trial. Except by agreement of all parties, no action enumerated in Category A, § 8.01-261, shall be transferred to or retained by a forum not enumerated in such category. Good cause shall be deemed to include, but not to be limited to, the agreement of the parties or the avoidance of substantial inconvenience to the parties or the witnesses, or complying with the law of any other state or the United States.

The provisions of (i) of this section shall not apply to causes of action which accrue under § 8.01-249(4) .

Code 1950, §§ 8-38, 8-157, 8-158; 1950, p. 78; 1954, c. 660; 1956, c. 432; 1956, Ex. Sess., c. 11; 1960, c. 569; 1964, c. 502; 1968, c. 386; 1977, c. 617; 1979, c. 662; 1982, c. 601; 1991, c. 530; 2007, c. 105.

§ 8.01-286.1. Service of process; waiver, duty to save costs, request to waive, how served

A. In an action pending in general district court or circuit court, the plaintiff may notify a defendant of the commencement of the action and request that the defendant waive service of process as provided in subsection B. Any person subject to service as set forth in § 8.01-296, 8.01-299, §§ 8.01-301 through 8.01-306 or § 8.01-320, with the exception of the Secretary of the Commonwealth and the Clerk of the State Corporation Commission, who receives actual notice of an action in the manner provided in this section, has a duty to avoid any unnecessary costs of serving process.

B. The notice and request shall incorporate the request for waiver and shall:

1. Be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer, director or registered agent authorized by appointment or law to receive service of process of a defendant subject to service under § 8.01-299, §§ 8.01-301 through 8.01-306 or § 8.01-320;

2. Be dispatched through first-class mail or other reliable means;

3. Be accompanied by a copy of the motion for judgment, bill of complaint or other such initial pleading and identify the court in which it has been filed;

4. Inform the defendant, by means of a form provided by Executive Secretary of the Supreme Court, of the consequences of compliance and failure to comply with the request;

5. Set forth the date on which the request is sent;

6. Allow the defendant a reasonable time to return the waiver, which shall be no more than 30 days from the date on which the request is sent, or 60 days from that date if the defendant's address is outside the Commonwealth; and

7. Provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant fails to comply with a request for waiver made by a plaintiff, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure is shown.

C. A defendant that, before being served with process, timely returns a waiver so requested is not required to serve a grounds of defense or other responsive pleading to the motion for judgment or other initial pleading until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant's address was outside the Commonwealth.

D. When the plaintiff files a waiver of service with the court, the action shall proceed as if a notice and motion for judgment or other initial pleading had been served at the time of filing the waiver, and no proof of service shall be required.

E. The costs to be imposed on a defendant for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under § 8.01-299, §§ 8.01-301 through 8.01-306 or § 8.01-320, together with the costs, including reasonable attorneys' fees, of any motion required to collect the costs of service. This provision does not apply to the Commissioner of the Department of Motor Vehicles, the Secretary of the Commonwealth or the Clerk of the State Corporation Commission.

F. A defendant who waives service of process pursuant to this section does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of that defendant, or to any other defense or objection other than objections based on inadequacy of process or service of process.

2005, c. 866;2011, c. 766.

§ 8.01-335. Certain cases struck from dockets after certain period; reinstatement

A. Except as provided in subsection C, any court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. However, no case shall be discontinued if either party requests that it be continued. The court shall thereafter enter a pretrial order pursuant to Rule 4:13 controlling the subsequent course of the case to ensure a timely resolution of that case. If the court thereafter finds that the case has not been timely prosecuted pursuant to its pretrial order, it may strike the case from its docket. The clerk of the court shall notify the parties in interest if known, or their counsel of record at his last known address, at least fifteen days before the entry of such order of discontinuance so that all parties may have an opportunity to be heard on it. Any case discontinued under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after.

B. Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

C. If a civil action is pending in a circuit court on appeal from a general district court and (i) an appeal bond has been furnished by or on behalf of any party against whom judgment has been rendered for money or property and (ii) for more than one year there has been no order or proceeding, except to continue the matter, the action may, upon notice to the parties in accordance with subsection A, be dismissed and struck from the docket of the court. Upon dismissal pursuant to this subsection, the judgment of the general district court shall stand and the appeal bond shall be forfeited after application of any funds needed to satisfy the judgment.

D. Any court in which is pending a case wherein process has not been served within one year of the commencement of the case may, in its discretion, order it to be struck from the docket, and the action shall thereby be discontinued. The clerk of the court shall notify the plaintiff or his counsel of record at his last known address at least 30 days before the entry of an order of discontinuance so that the plaintiff may have an opportunity to show that service has been timely effected on the defendant or that due diligence has been exercised to have service timely effected on the defendant. Upon finding that service has been timely effected or that due diligence has been exercised to have service timely effected, the court shall maintain the action on the docket and, if service has not been timely effected but due diligence to effect service has been exercised, shall require the plaintiff to attempt service in any manner permitted under Chapter 8 (§ 8.01-285 et seq.) of this title. Nothing herein shall prevent the plaintiff from filing a nonsuit under § 8.01-380 before the entry of a discontinuance order pursuant to the provisions of

this subsection. Nothing in this subsection shall apply to asbestos litigation.

Code 1950, § 8-154; 1954, c. 621; 1977, c. 617; 1990, c. 730; 1992, cc. 532, 792, 803, 835; 1994, c. 517;1997, c. 680;1999, c. 652;2007, c. 498.

VIRGINIA ACTS OF ASSEMBLY -- 1997 SESSION

CHAPTER 680

An Act to amend and reenact § 8.01-335 of the Code of Virginia, relating to striking cases from court dockets.

[H 2708]

Approved March 21, 1997

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-335 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-335. Certain cases struck from dockets after certain period; reinstatement.

A. Except as provided in subsection C, any court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. However, no case shall be discontinued if either party requests that it be continued. The court shall thereafter enter a pretrial order pursuant to Rule 4:13 controlling the subsequent course of the case to ensure a timely resolution of that case. If the court thereafter finds that the case has not been timely prosecuted pursuant to its pretrial order, it may strike the case from its docket. The clerk of the court shall notify the parties in interest if known, or their counsel of record at his last known address, at least fifteen days before the entry of such order of discontinuance so that all parties may have an opportunity to be heard on it. Any case discontinued under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after.

B. Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be ~~dismissed~~ *discontinued*~~,~~ ~~and such dismissal may occur in the discretion of the court upon notice to all parties at their addresses as shown on the pleadings~~. *Any case discontinued under the provisions of this subsection may be reinstated, on motion and for cause, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.*

C. If a civil action is pending in a circuit court on appeal from a general district court and (i) an appeal bond has been furnished by or on behalf of any party against whom judgment has been rendered for money or property and (ii) for more than one year there has been no order or proceeding, except to continue the matter, the action may, upon notice to the parties in accordance with subsection A, be dismissed and struck from the docket of the court. Upon dismissal pursuant to this subsection, the judgment of the general district court shall stand and the appeal bond shall be forfeited after application of any funds needed to satisfy the judgment.

VIRGINIA ACTS OF ASSEMBLY -- 1999 SESSION

CHAPTER 652

An Act to amend and reenact § 8.01-335 of the Code of Virginia, relating to cases struck from dockets after certain period.

[H 1565]

Approved March 28, 1999

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-335 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-335. Certain cases struck from dockets after certain period; reinstatement.

A. Except as provided in subsection C, any court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. However, no case shall be discontinued if either party requests that it be continued. The court shall thereafter enter a pretrial order pursuant to Rule 4:13 controlling the subsequent course of the case to ensure a timely resolution of that case. If the court thereafter finds that the case has not been timely prosecuted pursuant to its pretrial order, it may strike the case from its docket. The clerk of the court shall notify the parties in interest if known, or their counsel of record at his last known address, at least fifteen days before the entry of such order of discontinuance so that all parties may have an opportunity to be heard on it. Any case discontinued under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after.

B. Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. *The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case.* Any case discontinued *or dismissed* under the provisions of this subsection may be reinstated, on motion ~~and for cause~~, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

C. If a civil action is pending in a circuit court on appeal from a general district court and (i) an appeal bond has been furnished by or on behalf of any party against whom judgment has been rendered for money or property and (ii) for more than one year there has been no order or proceeding, except to continue the matter, the action may, upon notice to the parties in accordance with subsection A, be dismissed and struck from the docket of the court. Upon dismissal pursuant to this subsection, the judgment of the general district court shall stand and the appeal bond shall be forfeited after application of any funds needed to satisfy the judgment.

VIRGINIA ACTS OF ASSEMBLY -- 2007 SESSION

CHAPTER 498

An Act to amend and reenact § 8.01-335 of the Code of Virginia, relating to dismissal of actions for the failure to effect service of process within one year.

[H 2521]

Approved March 19, 2007

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-335 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-335. Certain cases struck from dockets after certain period; reinstatement.

A. Except as provided in subsection C, any court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. However, no case shall be discontinued if either party requests that it be continued. The court shall thereafter enter a pretrial order pursuant to Rule 4:13 controlling the subsequent course of the case to ensure a timely resolution of that case. If the court thereafter finds that the case has not been timely prosecuted pursuant to its pretrial order, it may strike the case from its docket. The clerk of the court shall notify the parties in interest if known, or their counsel of record at his last known address, at least fifteen days before the entry of such order of discontinuance so that all parties may have an opportunity to be heard on it. Any case discontinued under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after.

B. Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

C. If a civil action is pending in a circuit court on appeal from a general district court and (i) an appeal bond has been furnished by or on behalf of any party against whom judgment has been rendered for money or property and (ii) for more than one year there has been no order or proceeding, except to continue the matter, the action may, upon notice to the parties in accordance with subsection A, be dismissed and struck from the docket of the court. Upon dismissal pursuant to this subsection, the judgment of the general district court shall stand and the appeal bond shall be forfeited after application of any funds needed to satisfy the judgment.

D. Any court in which is pending a case wherein process has not been served within one year of the commencement of the case may, in its discretion, order it to be struck from the docket, and the action shall thereby be discontinued. The clerk of the court shall notify the plaintiff or his counsel of record at his last known address at least 30 days before the entry of an order of discontinuance so that the plaintiff may have an opportunity to show that service has been timely effected on the defendant or that due diligence has been exercised to have service timely effected on the defendant. Upon finding that service has been timely effected or that due diligence has been exercised to have service timely effected, the court shall maintain the action on the docket and, if service has not been timely effected but due diligence to effect service has been exercised, shall require the plaintiff to attempt service in any manner permitted under Chapter 8 (§ 8.01-285 et seq.) of this title. Nothing herein shall prevent the plaintiff from filing a nonsuit under § 8.01-380 before the entry of a discontinuance order pursuant to the provisions of this subsection. Nothing in this subsection shall apply to asbestos litigation.

§ 8.01-380. Dismissal of action by nonsuit; fees and costs

A. A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision. After a nonsuit no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause is shown for proceeding in another court, or when such new proceeding is instituted in a federal court. If after a nonsuit an improper venue is chosen, the court shall not dismiss the matter but shall transfer it to the proper venue upon motion of any party.

B. Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits upon reasonable notice to counsel of record for all defendants and upon a reasonable attempt to notify any party not represented by counsel, or counsel may stipulate to additional nonsuits. The court, in the event additional nonsuits are allowed, may assess costs and reasonable attorney fees against the nonsuiting party. When suffering a nonsuit, a party shall inform the court if the cause of action has been previously nonsuited. Any order effecting a subsequent nonsuit shall reflect all prior nonsuits and shall include language that reflects the date of any previous nonsuit together with the court in which any previous nonsuit was taken.

C. If notice to take a nonsuit of right is given to the opposing party within seven days of trial or during trial, the court in its discretion may assess against the nonsuiting party reasonable witness fees and travel costs of expert witnesses scheduled to appear at trial, which are actually incurred by the opposing party, solely by reason of the failure to give notice at least seven days prior to trial. The court shall have the authority to determine the reasonableness of expert witness fees and travel costs. Invoices, receipts, or confirmation of payment shall be admissible to prove reasonableness without the need to offer testimony to support the authenticity or reasonableness of such documents, and may, in the court's discretion, satisfy the reasonableness requirement under this subsection. Nothing herein shall preclude any party from offering additional evidence or testimony to support or rebut the reasonableness requirement.

D. A party shall not be allowed to nonsuit a cause of action, without the consent of the adverse party who has filed a counterclaim, cross claim or third-party claim which arises out of the same transaction or occurrence as the claim of the party desiring to nonsuit unless the counterclaim, cross claim or third-party claim can remain pending for independent adjudication by the court.

E. A voluntary nonsuit taken pursuant to this section is subject to the tolling provisions of subdivision E 3 of § 8.01-229.

Code 1950, §§ 8-220, 8-244; 1954, cc. 333, 611; 1977, c. 617; 1983, c. 404; 1991, c. 19; 2001, c. 825 ;2004, c. 362;2007, cc. 179, 367;2013, cc. 274, 366;2014, c. 86.

§ 8.01-396. No person incompetent to testify by reason of interest, or because a party

No person shall be incompetent to testify because of interest, or because of his being a party to any civil action; but he shall, if otherwise competent to testify, and subject to the rules of evidence and practice applicable to other witnesses, be competent to give evidence in his own behalf and be competent and compellable to attend and give evidence on behalf of any other party to such action; but, in any case, the court, for good cause shown, may require any such person to attend and testify ore tenus and, upon his failure to so attend and testify, may exclude his deposition.

Code 1950, § 8-285; 1977, c. 617.

§ 8.01-417. Copies of written statements or transcriptions of verbal statements by injured person to be delivered to him; copies of subpoenaed documents to be provided to other party; disclosure of insurance policy limits

A. Any person who takes from a person who has sustained a personal injury a signed written statement or voice recording of any statement relative to such injury shall deliver to such injured person a copy of such written statement forthwith or a verified typed transcription of such recording within 30 days from the date such statement was given or recording made, when and if the statement or recording is transcribed or in all cases when requested by the injured person or his attorney.

B. Unless otherwise ordered for good cause shown, when one party to a civil proceeding subpoenas documents, the subpoenaing party, upon receipt of the subpoenaed documents, shall, if requested in writing, provide true and full copies of the same to any other party or to the attorney for any other party, provided the other party or attorney for the other party pays the reasonable cost of copying or reproducing the subpoenaed documents. This provision does not apply where the subpoenaed documents are returnable to and maintained by the clerk of court in which the action is pending.

C. After he gives written notice that he represents an injured person, an attorney, or an individual injured in a motor vehicle accident if he is not represented by counsel, may, prior to the filing of a civil action for personal injuries sustained as a result of a motor vehicle accident, request in writing that the insurer disclose (i) the limits of liability of any motor vehicle liability or any personal injury liability insurance policy that may be applicable to the claim and (ii) the address of the alleged tortfeasor who is insured by the insurer, if not previously reported to the requesting party. The requesting party shall provide the insurer with the date of the motor vehicle accident, the name and last known address of the alleged tortfeasor if it has been reported to the requesting party, a copy of the accident report, if any, and the claim number, if available. The requesting party shall also submit to the insurer the injured person's medical records, medical bills, and wage-loss documentation, if applicable, pertaining to the claimed injury. If the total of the medical bills and wage losses submitted equals or exceeds $12,500, the insurer shall respond in writing within 30 days of receipt of the request and shall disclose the limits of liability at the time of the accident of all such policies, regardless of whether the insurer contests the applicability of the policy to the injured person's claim, and the insured's address. Disclosure of the policy limits under this section shall not constitute an admission that the alleged injury or damage is subject to the policy. Information concerning the insurance policy is not by reason of disclosure pursuant to this subsection admissible as evidence at trial.

D. After he gives written notice that he represents the personal representative of the estate of a decedent who died as a result of a motor vehicle accident, an attorney, or the personal representative of the estate of the decedent who died as a result of a motor vehicle accident if he is not represented by counsel, may, prior to the filing of a civil action for wrongful death as a result of a motor vehicle accident, request in writing that the insurer disclose (i) the limits of liability of any motor vehicle liability insurance policy or any personal injury liability insurance

policy that may be applicable to the claim and (ii) the address of the alleged tortfeasor who is insured by the insurer, if not previously reported to the requesting party. The requesting party shall provide the insurer with the date of the motor vehicle accident, the name and last known address of the alleged tortfeasor if it has been reported to the requesting party, a copy of the accident report, if any, and the claim number, if available. The requesting party shall submit to the insurer the death certificate of the decedent; the certificate of qualification of the personal representative of the decedent's estate; the names and relationships of the statutory beneficiaries of the decedent; medical bills, if any, supporting a claim for damages under subdivision 3 of § 8.01-52;and, if at the time the request is made a claim for damages under clause (i) of subdivision 2 of § 8.01-52 is anticipated, a description of the source, amount, and payment history of the claimed income loss for each beneficiary. The insurer shall respond in writing within 30 days of receipt of the request and shall disclose the limits of liability at the time of the accident of all such policies, regardless of whether the insurer contests the applicability of the policy to the personal representative's claim, and the insured's address. Disclosure of the policy limits under this section shall not constitute an admission that the alleged death or other damage is subject to the policy. Information concerning the insurance policy is not by reason of disclosure pursuant to this subsection admissible as evidence at trial.

E. For purposes of subsections C and D, if the alleged tortfeasor has insurance coverage from a self-insured locality for a motor vehicle accident, as described in this section, and the locality is authorized by the alleged tortfeasor to accept service of process on behalf of the alleged tortfeasor and agrees to do so, the locality, in its discretion and instead of disclosing the alleged tortfeasor's home address, may disclose the insured's work address and the name and address of the person who shall accept service of process on behalf of the alleged tortfeasor. If the locality makes such a disclosure, the locality shall not be required to disclose the alleged tortfeasor's home address.

F. As used in subsections C and D, "insurer" does not include the insurance agency or the insurance agent representing the alleged tortfeasor as the authorized representative or agent with respect to the alleged tortfeasor's motor vehicle insurance policy.

Code 1950, § 8-628.2; 1954, c. 390; 1977, c. 617; 2004, c. 345;2005, c. 211;2008, c. 819;2010, cc. 354, 435;2015, c. 711.

§ 8.01-420.4. Taking of depositions

A. Party Depositions. -- A deposition of a party, or any witness designated under Rule 4:5(b)(6) to testify on behalf of a party, shall be taken in the county or city in which suit is pending, in an adjacent county or city, at a place upon which the parties agree, or at a place that the court may, for good cause, designate. Good cause may include the expense or inconvenience of a non-resident party defendant appearing in one of the locations specified in this subsection. The restrictions as to parties set forth in this subsection shall not apply where no responsive pleading has been filed or an appearance otherwise made.

B. Non-party Witness Depositions. -- Unless otherwise provided by the law of the jurisdiction where a non-party witness resides, a deposition of a non-party witness shall be taken in the county or city where the non-party witness resides, is employed, or has his principal place of business; at a place upon which the witness and the parties to the litigation agree; or at a place that the court may, for good cause, designate.

1989, c. 209; 1991, c. 81; 1993, cc. 428, 940; 2005, c. 597.

§ 8.01-420.6. Number of witnesses whose depositions may be taken

Notwithstanding any other provision of law or rule of court, there shall be no limit on the number of witnesses whose depositions may be taken by a party except by order of the court for good cause shown.

2001, c. 595.

§ 8.01-466. Clerk to issue fieri facias on judgment for money

On a judgment for money, it shall be the duty of the clerk of the court in which such judgment was rendered, upon request of the judgment creditor, his assignee or his attorney, to issue a writ of fieri facias at the expiration of twenty-one days from the date of the entry of the judgment and place the same in the hands of a proper person to be executed and take his receipt therefor. The writ shall be issued together with the form for requesting a hearing on a claim of exemption from levy as provided in § 8.01-546.1. For good cause the court may order an execution to issue on judgments and decrees at an earlier period.

Code 1950, § 8-399; 1954, c. 620; 1976, c. 354; 1977, c. 617; 1986, c. 341; 1996, cc. 501, 608.

§ 8.01-500. Officer receiving money to notify person entitled to receive it

Every officer collecting or receiving money to be applied on any execution or other legal process, or on any claim, whether judgment has been rendered thereon or not, shall notify in writing by mail or otherwise, within thirty days after such money is received, the person entitled to receive such money, if known. Any officer failing without good cause to comply with this section within the time prescribed shall be fined not less than twenty dollars nor more than fifty dollars for each offense.

Code 1950, § 8-430; 1977, c. 617.

§ 8.01-506. Proceedings by interrogatories to ascertain estate of debtor; summons; proviso; objections by judgment debtor

A. To ascertain the personal estate of a judgment debtor, and to ascertain any real estate, in or out of this Commonwealth, to which the debtor named in a judgment and fieri facias is entitled, upon the application of the execution creditor, the clerk of the court from which such fieri facias issued shall issue a summons against (i) the execution debtor, (ii) any officer of the corporation if such execution debtor is a corporation having an office in this Commonwealth, (iii) any employee of a corporation if such execution debtor is a corporation having an office but no officers in the Commonwealth provided that a copy of the summons shall also be served upon the registered agent of the corporation, or (iv) any debtor to, or bailee of, the execution debtor.

B. The summons shall require him to appear before the court from which the fieri facias issued or a commissioner of the county or city in which such court is located, or a like court or a commissioner of a county or city contiguous thereto, or upon request of the execution creditor, before a like court or a commissioner of the county or city in which the execution debtor resides, or of a county or city contiguous thereto, to answer such interrogatories as may be propounded to him by the execution creditor or his attorney, or the court, or the commissioner, as the case may be. If the execution creditor requests that the summons require the execution debtor to appear before a like court of the county or city in which the execution debtor resides, or of a county or city contiguous thereto, the case may be filed or docketed in accordance with the requirements of § 8.01-506.2 prior to issuance of the summons.

C. Provided, however, that as a condition precedent to proceeding under this section, the execution creditor has furnished to the court a certificate setting forth that he has not proceeded against the execution debtor under this section within the six months last preceding the date of such certificate. Except that for good cause shown, the court may, on motion of the execution creditor, issue an order allowing further proceedings before a commissioner by interrogatories during the six-month period. Any judgment creditor who knowingly gives false information upon any such certificate made under this article shall be guilty of a Class 1 misdemeanor. The issuance of a summons that is not served shall not constitute the act of proceeding against an execution debtor for purposes of making the certificate required by this subsection.

D. The debtor or other person served with such summons shall appear at the time and place mentioned and make answer to such interrogatories. The commissioner shall, at the request of either of the parties, enter in his proceedings and report to the court mentioned in § 8.01-507.1, any and all objections taken by such debtor against answering such interrogatories, or any or either of them, and if the court afterwards sustains any one or more of such objections, the answers given to such interrogatories as to which objections are sustained shall be held for naught in that or any other case.

E. Notwithstanding the foregoing provisions of this section, the court from which a writ of fieri facias issued, upon motion by the execution debtor and for good cause shown, shall transfer debtor interrogatory proceedings to a forum more convenient to the execution debtor.

Code 1950, § 8-435; 1952, c. 699; 1968, c. 599; 1977, c. 617; 1978, c. 66; 1979, c. 225; 1985, c. 433;

1987, c. 182; 1991, c. 463; 2005, c. 726;2009, c. 622.

§ 8.01-581.04. Hearing

Unless otherwise provided by the agreement:

1. The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

2. The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

3. The hearing shall be conducted by all the arbitrators, but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

1986, c. 614.

§ 8.01-581.3:1. Completion of discovery; hearing date; notification to parties and panel members; oath of panel members

At the time that the panel is designated, the Supreme Court shall advise the clerk of the circuit court in which the matter was filed of the names of the panel members.

Except for good cause shown, the date for completion of discovery shall not be set beyond 120 days from the date on which the panel was requested. Within the period set for the taking of discovery and upon consultation with the panel members, the judge shall notify the parties of the date set for a hearing by the review panel, if any, or the date on which the panel will convene. Such date shall not be set sooner than ten days after the date for completion of discovery. Upon completion of discovery, the clerk of the circuit court shall notify the parties of the name, address and professional practice of each panel member and shall also notify the panel members, in writing, of their appointment.

The written notification to the panel members shall include the definitions of "impartial attorney" and "impartial health care provider" as contained in § 8.01-581.1 and a copy of the oath to which the panel members will be required to subscribe when the panel convenes. The oath shall be as follows:

"I do solemnly swear (or affirm) that I have no past or present relationship with the parties nor am I aware of anything that would prevent me from being impartial in my deliberations. I further swear (or affirm) that I will render an opinion faithfully and fairly on the basis of the evidence presented, applying any professional expertise I may have, giving due regard to the nature of the claim and the nature of the practice of the health care provider." A panel member who, for any reason, could not take the oath of impartiality shall promptly notify the judge presiding over the panel, in writing, of such inability. The judge shall notify the Supreme Court, which shall then select and notify another panel member in place of and practicing the same profession as the disqualified member.

1986, c. 227; 1993, c. 928 .

§ 8.01-581.17. Privileged communications of certain committees and entities

A. For the purposes of this section:

"Centralized credentialing service" means (i) gathering information relating to applications for professional staff privileges at any public or licensed private hospital or for participation as a provider in any health maintenance organization, preferred provider organization or any similar organization and (ii) providing such information to those hospitals and organizations that utilize the service.

"Patient safety data" means reports made to patient safety organizations together with all health care data, interviews, memoranda, analyses, root cause analyses, products of quality assurance or quality improvement processes, corrective action plans or information collected or created by a health care provider as a result of an occurrence related to the provision of health care services.

"Patient safety organization" means any organization, group, or other entity that collects and analyzes patient safety data for the purpose of improving patient safety and health care outcomes and that is independent and not under the control of the entity that reports patient safety data.

B. The proceedings, minutes, records, and reports of any (i) medical staff committee, utilization review committee, or other committee, board, group, commission or other entity as specified in § 8.01-581.16;(ii) nonprofit entity that provides a centralized credentialing service; or (iii) quality assurance, quality of care, or peer review committee established pursuant to guidelines approved or adopted by (a) a national or state physician peer review entity, (b) a national or state physician accreditation entity, (c) a national professional association of health care providers or Virginia chapter of a national professional association of health care providers, (d) a licensee of a managed care health insurance plan (MCHIP) as defined in § 38.2-5800, (e) the Office of Emergency Medical Services or any regional emergency medical services council, or (f) a statewide or local association representing health care providers licensed in the Commonwealth, together with all communications, both oral and written, originating in or provided to such committees or entities, are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless a circuit court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports, or communications. Additionally, for the purposes of this section, accreditation and peer review records of the American College of Radiology and the Medical Society of Virginia are considered privileged communications. Oral communications regarding a specific medical incident involving patient care, made to a quality assurance, quality of care, or peer review committee established pursuant to clause (iii), shall be privileged only to the extent made more than 24 hours after the occurrence of the medical incident. Nothing in this section shall be construed as providing any privilege to any health care provider, emergency medical services agency, community services board, or behavioral health authority with respect to any factual information regarding specific patient health care or treatment, including patient health care incidents, whether oral, electronic, or written. However, the analysis, findings, conclusions,

recommendations, and the deliberative process of any medical staff committee, utilization review committee, or other committee, board, group, commission, or other entity specified in § 8.01-581.16, as well as the proceedings, minutes, records, and reports, including the opinions and reports of experts, of such entities shall be privileged in their entirety under this section. Information known by a witness with knowledge of the facts or treating health care provider is not privileged or protected from discovery merely because it is provided to a committee, board, group, commission, or other entity specified in § 8.01-581.16, and may be discovered by deposition or otherwise in the course of discovery. A person involved in the work of the entities referenced in this subsection shall not be made a witness with knowledge of the facts by virtue of his involvement in the quality assurance, peer review, or credentialing process.

C. Nothing in this section shall be construed as providing any privilege to health care provider, emergency medical services agency, community services board, or behavioral health authority medical records kept with respect to a patient, whose treatment is at issue, in the ordinary course of business of operating a hospital, emergency medical services agency, community services board, or behavioral health authority nor to any facts or information contained in medical records, nor shall this section preclude or affect discovery of or production of evidence relating to hospitalization or treatment of such patient in the ordinary course of the patient's hospitalization or treatment. However, the proceedings, minutes, records, reports, analysis, findings, conclusions, recommendations, and the deliberative process, including opinions and reports of experts, of any medical staff committee, utilization review committee, or other committee, board, group, commission, or other entity specified in § 8.01-581.16 shall not constitute medical records, are privileged in their entirety, and are not discoverable.

D. Notwithstanding any other provision of this section, reports or patient safety data in possession of a patient safety organization, together with the identity of the reporter and all related correspondence, documentation, analysis, results or recommendations, shall be privileged and confidential and shall not be subject to a civil, criminal, or administrative subpoena or admitted as evidence in any civil, criminal, or administrative proceeding. Nothing in this subsection shall affect the discoverability or admissibility of facts, information or records referenced in subsection C as related to patient care from a source other than a patient safety organization.

E. Any patient safety organization shall promptly remove all patient-identifying information after receipt of a complete patient safety data report unless such organization is otherwise permitted by state or federal law to maintain such information. Patient safety organizations shall maintain the confidentiality of all patient-identifying information and shall not disseminate such information except as permitted by state or federal law.

F. Exchange of (i) patient safety data among health care providers or patient safety organizations that does not identify any patient or (ii) information privileged pursuant to subsection B between committees, boards, groups, commissions, or other entities specified in § 8.01-581.16 shall not constitute a waiver of any privilege established in this section.

G. Reports of patient safety data to patient safety organizations shall not abrogate obligations to make reports to health regulatory boards or other agencies as required by state or federal law.

H. No employer shall take retaliatory action against an employee who in good faith makes a report of patient safety data to a patient safety organization.

I. Reports produced solely for purposes of self-assessment of compliance with requirements or standards of a national accrediting organization granted authority by the Centers for Medicare and Medicaid Services to ensure compliance with Medicare conditions of participation pursuant to § 1865 of Title XVIII of the Social Security Act (42 U.S.C. § 1395bb) shall be privileged and confidential and shall not be subject to subpoena or admitted as evidence in a civil or administrative proceeding. Nothing in this subsection shall affect the discoverability or admissibility of facts, information, or records referenced in subsection C as related to patient care from a source other than such accreditation body. A health care provider's release of such reports to such accreditation body shall not constitute a waiver of any privilege provided under this section.

Code 1950, § 8-654.10; 1976, c. 611; 1977, c. 617; 1995, c. 500;1997, c. 292;2001, c. 381;2002, c. 675;2004, c. 250;2006, cc. 412, 678;2007, c. 530;2010, c. 196;2011, cc. 15, 753;2014, c. 320.

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; expert testimony; determination of standard in action for damages

A. In any proceeding before a medical malpractice review panel or in any action against a physician, clinical psychologist, podiatrist, dentist, nurse, hospital or other health care provider to recover damages alleged to have been caused by medical malpractice where the acts or omissions so complained of are alleged to have occurred in this Commonwealth, the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted; provided, however, that the standard of care in the locality or in similar localities in which the alleged act or omission occurred shall be applied if any party shall prove by a preponderance of the evidence that the health care services and health care facilities available in the locality and the customary practices in such locality or similar localities give rise to a standard of care which is more appropriate than a statewide standard. Any health care provider who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of practice in which he is qualified and certified. This presumption shall also apply to any person who, but for the lack of a Virginia license, would be defined as a health care provider under this chapter, provided that such person is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth. A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

The provisions of this section shall apply to expert witnesses testifying on the standard of care as it relates to professional services in nursing homes.

B. In any action for damages resulting from medical malpractice, any issue as to the standard of care to be applied shall be determined by the jury, or the court trying the case without a jury.

C. In any action described in this section, each party may designate, identify or call to testify at trial no more than two expert witnesses per medical discipline on any issue presented. The court may permit a party, for good cause shown, to designate, identify, or call to testify at trial additional expert witnesses. The number of treating health care providers who may serve as expert witnesses pursuant to § 8.01-399 shall not be limited pursuant to this subsection, except for good cause shown. If the court permits a party to designate, identify, or call additional experts, the court may order that party to pay all costs incurred in the discovery of such additional experts. For good cause shown, pursuant to the Rules of Supreme Court of Virginia, the court may limit the number of expert witnesses other than those identified in this subsection whom a party may designate, identify, or call to testify at trial.

1979, c. 325; 1980, c. 164; 1989, cc. 146, 729; 1992, c. 240; 2003, c. 251;2008, cc. 125, 169, 205; 2015, cc. 310, 361.

§ 8.01-587. Liability of general receivers

Except as otherwise ordered by the court, for good cause shown, a general receiver shall be liable for any loss of income which results from his (i) failure to invest any money held by him pursuant to §§ 8.01-582 through 8.01-586 within sixty days of his receipt of the funds or (ii) failure to pay out any money so ordered by the court within sixty days of the court order. He shall be charged with interest from the date of the court order until such investment or payment is made.

Code 1950, § 8-730; 1977, c. 617; 1988, c. 841.

§ 8.01-600. How money under control of court deposited; record kept; liability of clerk

A. This section pertains only to money held by the clerk of the circuit court, when the court orders moneys to be held by the clerk pursuant to this section. Where judgment is taken in the circuit court, upon motion of a party for good cause shown, the court may enter an order directing the clerk to hold moneys pursuant to this section. The clerk shall have the duty, unless it is otherwise specially ordered, to receive, take charge of, hold or invest in such manner as the court orders and also to pay out or dispose of these moneys as the court orders or decrees. To this end, the clerk is authorized to verify, receive, and give acquittances for all such moneys as the court may direct.

B. Orders creating funds pursuant to this section or § 8.01-582 shall include information necessary to make prudent investment and disbursement decisions. The orders shall include, except when it is unreasonable, the proposed dates of periodic and final disbursements. Prior to the entry of the order, the beneficiary or his representative shall file an affidavit with the court providing the beneficiary's name, date of birth, address and social security number. The affidavit shall be maintained under seal by the clerk unless otherwise ordered by the court, and the information therein shall be used solely for the purposes of financial management and reporting.

Unless otherwise ordered by the court, the provisions of this section shall not apply to:

1. Cash or other money received in lieu of surety on any bond posted in any civil or criminal case, including but not limited to bail bonds, appeal bonds in appeals from a district court or circuit court, bonds posted in connection with the filing of an attachment, detinue seizure or distress, suspending bonds, and performance bonds;

2. Cash or other money paid or deposited in the clerk's office prior to final disposition of the case, including but not limited to interpleaders or eminent domain; or

3. Cash or other money deposited in lieu of surety on any bond posted in the clerk's office which is not posted in connection with any civil or criminal case, including bonds posted by executors or administrators.

C. All deposits under this section shall be secured in accordance with the Virginia Security for Public Deposits Act (§ 2.2-4400 et seq.).

D. Moneys held pursuant to this section shall be invested in certificates of deposit and time deposits, and in accordance with the provisions of Chapter 45 (§ 2.2-4500 et seq.) of Title 2.2 as ordered by the court.

E. Any interest which accrues on the funds, minus allowable fees and bond costs, shall be credited and payable to the person or persons entitled to receive such funds. The court may order the clerk to consolidate for investment purposes money received under this section, with income received hereunder to be apportioned among the several accounts.

F. Except as otherwise ordered by the court, for good cause shown, the clerk shall be liable for

any loss of income which results from his (i) failure to invest the money within sixty days of the court order creating the fund or (ii) failure to pay out any money so ordered by the court within sixty days of the court order. He shall be charged with interest from the date of the court order until such investment or payment is made.

G. The clerk shall keep an accurate and particular account of all moneys received, invested, and paid out by him, showing the respective amounts to the credit of each case in the court and designating in the items the judgments, orders or decrees of court under which the respective sums have been received, invested or paid out. At least annually and no later than October 1 of each year, the clerk shall make a report to the court showing the balance to the credit of each case in the court in which money has been received by him, the manner in which money has been received by him, the manner in which it is invested, the amounts received, invested or paid out during the year ending June 30 of the current year, the approximate date on which the moneys held for the beneficiaries will become payable, and the whole amount then invested and subject to the future order of the court. A copy of this report shall be recorded in the trust fund order book. The clerk shall, at any time when required by the court or the Auditor of Public Accounts to do so, furnish a statement of the amount subject to the order of the court in any case pending therein and any other information required by the court or the Auditor of Public Accounts as to any money or other property under his control before the court. When the clerk receives funds under this section, he shall be entitled to receive fees in accordance with § 17.1-287 in the amounts as specified for general receivers in § 8.01-589.

H. All moneys received under this section are subject to audit by the Auditor of Public Accounts.

Code 1950, § 8-744; 1977, c. 617; 1986, c. 644; 1988, c. 841; 1990, cc. 3, 414; 1991, c. 635; 2002, c. 832;2015, c. 633.

§ 8.01-606. Payment of small amounts to certain persons through court without intervention of fiduciary; authority of commissioners of accounts; certain fiduciaries exempt from accountings

A. Whenever there is due to any person, any sum of money from any source, not exceeding $25,000, the fund may be paid into the circuit court of the county or city in which the fund became due or such person resides. The court may, by an order entered of record, (i) pay the fund to the person to whom it is due, if the person is considered by the court competent to expend and use the same in his behalf, or (ii) pay the fund to some other person who is considered competent to administer it, for the benefit of the person entitled to the fund, without the intervention of a fiduciary, whether the other person resides within or without this Commonwealth. The clerk of the court shall take a receipt from the person to whom the money is paid, which shall show the source from which it was derived, the amount, to whom it belongs, and when and to whom it was paid. The receipt shall be signed and acknowledged by the person receiving the money, and entered of record in the book in the clerk's office in which the current fiduciary accounts are entered and indexed. Upon the payment into court the person owing the money shall be discharged of such obligation. No bond shall be required of the party to whom the money is paid by the court.

B. Whenever (i) it appears to the court having control of a fund, tangible personal property or intangible personal property or supervision of its administration, whether a suit is pending therefor or not, that a person under a disability who has no fiduciary, is entitled to a fund arising from the sale of lands for a division or otherwise, or a fund, tangible personal property or intangible personal property as distributee of any estate, or from any other source, (ii) a judgment, decree, or order for the payment of a sum of money or for delivery of tangible personal property or intangible personal property to a person under a disability who has no fiduciary is rendered by any court, and the amount to which such person is entitled or the value of the tangible personal property or intangible personal property is not more than $25,000, or (iii) a person under a disability is entitled to receive payments of income, tangible personal property or intangible personal property and the amount of the income payments is not more than $25,000 in any one year, or the value of the tangible personal property is not more than $25,000, or the current market value of the intangible personal property is not more than $25,000, the court may, without the intervention of a fiduciary, cause such fund, property or income to be paid or delivered to any person deemed by the court capable of properly handling it, to be used solely for the education, maintenance and support of the person under a disability. In any case in which an infant is entitled to such fund, property or income, the court may, upon its being made to appear that the infant is of sufficient age and discretion to use the fund, property or income judiciously, cause the fund to be paid or delivered directly to the infant.

C. Where judgment is taken in the general district court, upon motion of a party for good cause shown, the general district court judge may enter an order directing the clerk of the general district court to hold such funds in escrow for a period not to exceed 180 days to enable such party to file a petition pursuant to § 8.01-600 requesting that such funds be received and held by

the clerk of the circuit court upon payment of fees in accordance with § 17.1-275. The party petitioning the circuit court shall provide the clerk of the general district court a certified copy of any order entered by the circuit court directing that such funds held by the clerk of the general district court be transferred to the clerk of the circuit court. If no such order is received by the clerk of the general district court within the 180-day period, the clerk of the general district court shall give notice to the parties that such funds shall be disbursed to the plaintiff for which judgment was entered in the general district court within 30 days after such notice.

D. Whenever a person is entitled to a fund or such property distributable by a fiduciary settling his accounts before the commissioner of accounts of the court in which the fiduciary qualified, and the amount or value of the fund or property, or the value of any combination thereof, is not more than $25,000, the commissioner of accounts may approve distribution thereof in the same manner and to the extent of the authority herein conferred upon a court including exemption from filing further accounts where the value of the fund being administered is less than $25,000.

E. Whenever an incapacitated person or infant is entitled to a fund or such property distributable by a fiduciary settling accounts before the commissioner of accounts of the court in which the fiduciary qualified and the will or trust instrument under which the fiduciary serves, authorizes the fiduciary to distribute the property or fund to the incapacitated person or infant without the intervention of a guardian, conservator or committee, and the amount or value of such fund or property, or the value of any combination thereof, is not more than $25,000, the commissioner of accounts may approve distribution thereof in the same manner and to the extent of the authority hereinabove conferred upon a court or judge thereof.

F. Whenever a fiduciary is administering funds not exceeding $25,000, the circuit court of the county or city in which the fund is being administered by order entered of record may authorize the fiduciary, when considered competent to administer the funds, to continue to administer the funds for the benefit of the person entitled to the fund without the necessity of filing any further accounts, whether such person resides within or without this Commonwealth. The clerk of the court shall take a receipt from the fiduciary, which shall show the amount of the fund remaining, to whom it belongs, and the date the court entered the order exempting the filing of further accounts. The receipt shall be signed and acknowledged by the fiduciary, and entered of record in the book in the clerk's office in which the current fiduciary accounts are entered and indexed. No surety shall be required on the bond of a fiduciary granted an exemption from filing any further accounts.

G. Whenever a fiduciary qualifies pursuant to § 64.2-454 for the sole purpose of prosecuting or defending an action, the court in which the fiduciary qualifies or the commissioner of accounts for such court may exempt the fiduciary from filing further accounts where the fiduciary is not administering any funds and has no power of sale over any real estate the decedent owned.

Code 1950, §§ 8-750, 8-751; 1952, c. 103; 1954, cc. 238, 526; 1962, c. 465; 1966, cc. 332, 339; 1970, c. 566; 1977, cc. 462, 617; 1978, c. 525; 1980, c. 544; 1985, c. 216; 1987, c. 378; 1995, c. 405; 1997, c. 801;2003, c. 195;2012, c. 43;2015, cc. 129, 130, 633.

§ 8.01-607. Appointment and removal

A. Each circuit court may, from time to time, appoint such commissioners in chancery as may be deemed necessary for the convenient dispatch of the business of such court. Such commissioners shall be removable at pleasure.

B. Commissioners in chancery may be appointed in cases in circuit court, including uncontested divorce cases, only when:

1. There is agreement by the parties with the concurrence of the court; or

2. Upon (i) motion of a party, or (ii) upon motion of the court, sua sponte. The court shall make a finding of good cause shown in each individual case.

Code 1950, § 8-248; 1977, c. 617; 2005, c. 885.

§ 8.01-615. When cause heard on report; time for filing exceptions

A cause may be heard by the court upon a commissioner's report. Subject to the Rules of Court regarding dispensing with notice of taking proofs and other proceedings, reasonable notice of such hearing shall be given to counsel of record and to parties not represented by counsel. Exceptions to the commissioner's report shall be filed within ten days after the report has been filed with the court, or for good cause shown, at a later time specified by the court.

This section shall not apply to the report of a commissioner appointed to sell property; in such cases the report of such commissioner, when filed in the clerk's office, shall be either confirmed, modified, or rejected forthwith.

Code 1950, § 8-257; 1958, c. 67; 1977, c. 617; 1978, c. 237; 1981, c. 500; 1982, c. 339.

§ 8.01-675.1. When dismissal final; when reinstated

After the dismissal of an appeal by the Supreme Court, no other appeal shall be allowed to or from the same judgment. When an appeal is dismissed by reason of the nonpayment of the writ tax within the time required by law, the Court at its first session after such dismissal may on motion of any party for good cause shown and upon payment of such tax set aside the dismissal; and thereupon the appeal may be perfected as though no such dismissal had taken place. A motion under this section shall be made only after reasonable notice to the adverse party or his counsel.

1984, c. 703.

§ 8.01-675.2. Rehearing

The Supreme Court, on the petition of a party, shall rehear and review any case decided by such court if one of the justices who decides the case adversely to the petitioner certifies that in his opinion there is good cause for such rehearing. However, a notice of a petition for rehearing shall be filed as provided by the Rules of Court and the petition for rehearing shall be filed within thirty days after the entry of the judgment with the clerk, who shall note the date of such filing on the order book. The judgment resulting from any such rehearing shall be entered forthwith by the clerk who shall transmit a certified copy thereof to the clerk of the court below, to be entered by him as provided by § 8.01-685.

1984, c. 703.

§ 8.01-676.1. Security for appeal

A. Security for costs of appeal of right to Court of Appeals.-- A party filing a notice of an appeal of right to the Court of Appeals shall simultaneously file an appeal bond or irrevocable letter of credit in the penalty of $500, or such sum as the trial court may require, subject to subsection E, conditioned upon paying all costs and fees incurred in the Court of Appeals and the Supreme Court if it takes cognizance of the claim. If the appellant wishes suspension of execution, the security shall also be conditioned and shall be in such sum as the trial court may require as provided in subsection C.

B. Security for costs on petition for appeal to Court of Appeals or Supreme Court. -- An appellant whose petition for appeal is granted by the Court of Appeals or the Supreme Court shall (if he has not done so) within 15 days from the date of the Certificate of Appeal file an appeal bond or irrevocable letter of credit in the same penalty as provided in subsection A, conditioned on the payment of all damages, costs, and fees incurred in the Court of Appeals and in the Supreme Court.

C. Security for suspension of execution. -- An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall, subject to the provisions of subsection J, file an appeal bond or irrevocable letter of credit conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension, and except as provided in subsection D, execution shall be suspended upon the filing of such security and the timely prosecution of such appeal. Such security shall be continuing and additional security shall not be necessary except as to any additional amount which may be added or to any additional requirement which may be imposed by the courts.

D. Suspension of execution in decrees for support and custody; injunctions. -- The court from which an appeal is sought may refuse to suspend the execution of decrees for support and custody, and may also refuse suspension when a judgment refuses, grants, modifies, or dissolves an injunction.

E. Increase or decrease in penalty or other modification of security. -- The Court of Appeals or the Supreme Court, when it considers a petition for appeal, may order that the penalty or any other terms or requirements of the security for the appeal or of the security for the suspension of execution of a judgment be modified for good cause shown if such request is made in the brief of any party filed in the Court of Appeals, or in the Petition for Appeal or the appellee's Brief in Opposition filed in the Supreme Court or the Court of Appeals. Affidavits and counter-affidavits may be filed by the parties containing facts pertinent to such request. Any increase or decrease in the amount of or other modification of the security so ordered shall be effected in the clerk's office of the trial court within 15 days of the order of the Court of Appeals or the Supreme Court. If an increase so ordered is not effected within 15 days, the appeal shall be dismissed, in the case of the security required under subsection A, or the suspension of execution of a judgment shall be discontinued, in the case of the security required under subsection C. Such increase or decrease in the penalty of or other modification of the security may also be considered and

ordered by the trial court for good cause shown, on motion of either party, at any time until the Court of Appeals or the Supreme Court acts upon any similar motion, and failure to increase such penalty as hereinabove provided shall also cause the appeal to be dismissed, in the case of the security required under subsection A, or the suspension of execution of a judgment to be discontinued, in the case of the security required under subsection C.

F. By whom executed. -- Each bond filed shall be executed by a party or another on his behalf, and by surety approved by the clerk of the court from which appeal is sought, or by the clerk of the Supreme Court or the clerk of the Court of Appeals if the bond is ordered by such Court. Any letter of credit posted as security for an appeal shall be in a form acceptable to the clerk of the court from which appeal is sought, or by the clerk of the Supreme Court or the Court of Appeals if the security is ordered by such court. The letter of credit shall be from a bank incorporated or authorized to conduct banking business under the laws of this Commonwealth or authorized to do business in this Commonwealth under the banking laws of the United States, or a federally insured savings institution located in this Commonwealth.

G. Appeal from State Corporation Commission; security for costs. -- When an appeal of right is entered from the State Corporation Commission to the Supreme Court, and no suspension of the order, judgment, or decree appealed from is requested, such appeal bond or letter of credit shall be filed when and in the amount required by the clerk of the Supreme Court, whose action shall be subject to review by the Supreme Court.

H. Appeal from State Corporation Commission; suspension. -- Any judgment, order, or decree of the State Corporation Commission subject to appeal to the Supreme Court may be suspended by the Commission or by the Supreme Court pending decision of the appeal if the Commission or the Supreme Court deems such suspension necessary for the proper administration of justice but only upon the written application of an appellant after reasonable notice to all other parties in interest and the filing of a suspending bond or irrevocable letter of credit with such conditions, in such penalty, and with such surety thereon as the Commission or the Supreme Court may deem sufficient. But no surety shall be required if the appellant is any county, city or town of this Commonwealth, or the Commonwealth.

I. Forms of bonds; letters of credit; where filed. -- The Clerk of the Supreme Court shall prescribe separate forms for appeal bonds, one for costs alone, one for suspension of execution, and one for both and a form for irrevocable letters of credit, to which the bond or bonds or irrevocable letters of credit given shall substantially conform. The forms for each bond and the letter of credit shall be published in the Rules of Court. It shall be sufficient if the bond or letter of credit, when executed as required, is filed with the trial court, clerk of the Virginia Workers' Compensation Commission, or the clerk of the State Corporation Commission, whichever is applicable, and no personal appearance in the trial court, Virginia Workers' Compensation Commission, or State Corporation Commission by the principal, the surety on the bond or the bank issuing the letter of credit shall be required as a condition precedent to its filing.

J. In any civil litigation under any legal theory, the amount of the appeal bond or irrevocable letter of credit to be furnished during the pendency of all appeals or discretionary reviews of any judgment granting legal, equitable, or any other form of relief in order to stay the execution thereon during the entire course of appellate review by any courts shall be set in accordance with applicable laws or court rules, except that the total appeal bond or irrevocable letter of credit that is required of an appellant and all of its affiliates shall not exceed $25 million, regardless of the value of the judgment.

J1. Any objection to or motion for modification of the form, amount, or issuer of any letter of credit or bond may be made to, and decided by, the Court of Appeals or the Supreme Court. Any objection to or motion for modification of the form, amount, or issuer of any letter of credit or bond may also be made to, and decided by, the court or commission whose decision is being appealed at any time until the Court of Appeals or the Supreme Court acts upon any similar motion.

K. Dissipation of assets. -- If the appellee proves by a preponderance of the evidence that a party bringing an appeal, for whom the appeal bond or irrevocable letter of credit requirement has been limited or waived pursuant to subsection J, is purposefully dissipating its assets or diverting assets outside the jurisdiction of the United States courts for the purpose of evading the judgment, the limitation or waiver granted pursuant to subsection J shall be rescinded and a court may require the appellant to post a bond or irrevocable letter of credit in an amount up to the full amount of the judgment. Dissipation of assets shall not include those ongoing expenditures made from assets of the kind that the appellant made in the regular course of business prior to the judgment being appealed, such as the payment of stock dividends and other financial incentives to the shareholders of publicly owned companies, continued participation in charitable and civic activities, and other expenditures consistent with the exercise of good business judgment.

L. For good cause shown, a court may otherwise waive the filing of an appeal bond or irrevocable letter of credit as to the damages in excess of, or other than, the compensatory damages.

M. Exemption. -- When an appeal is proper to protect the estate of a decedent or person under disability, or to protect the interest of the Commonwealth or any county, city, or town of this Commonwealth, no security for appeal shall be required.

N. Indigents. -- No person who is an indigent shall be required to post security for an appeal bond.

O. Virginia Workers' Compensation Commission. -- No claimant who files an appeal from a final decision of the Virginia Workers' Compensation Commission with the Court of Appeals shall be required to post security for costs as provided in subsection A or B if such claimant has not returned to his employment or by reason of his disability is unemployed. Such claimant shall file an affidavit describing his disability and employment status with the Court of Appeals together with a motion to waive the filing of the security under subsection A or B.

P. Time for filing security for appeal. -- The appeal bond or letter of credit prescribed in subsections A and B is not jurisdictional and the time for filing such security in cases before the Court of Appeals or the Supreme Court may be extended by a judge or justice of the court before which the case is pending on motion for good cause shown and to attain the ends of justice.

Q. Consideration of appeal bond or letter of credit by Court of Appeals or Supreme Court. -- A determination on an issue affecting an appeal bond or letter of credit in a case before the Court of Appeals or the Supreme Court may be considered by an individual judge of such court rather than by a panel of judges.

R. This section applies to injunction bonds required pursuant to § 8.01-631.

1984, c. 703; 1986, c. 89; 1987, cc. 460, 684; 1988, c. 883; 1996, c. 77;2000, c. 100;2004, cc. 328, 356;2010, c. 494;2012, cc. 8, 77.

REVISION OF TITLE 8 OF THE CODE OF VIRGINIA

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REPORT OF THE
VIRGINIA CODE COMMISSION
To
THE GOVERNOR
And
THE GENERAL ASSEMBLY OF VIRGINIA

House Document No. 14

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1977

TABLE OF COMPARATIVE SECTIONS

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8-66.1	8.01-306	8-89	Deleted
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8-67.1	8.01-307	8-91	Deleted
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8-105	Deleted	8-140	8.01-276
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8-124	Repealed	8-160	8.01-331
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8-127	Repealed	8-163	Deleted
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8-135.1	8.01-278	8-172	Deleted
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8-189	Repealed	8-208.18	8.01-356
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8-202	Repealed	8-208.30	Repealed
8-203	Repealed	8-208.31	Repealed
8-204	Repealed	8-208.32	Transferred
8-205	Repealed		to Title
8-206	Repealed		14.1
8-207	Repealed	8-208.33	Transferred
8-208	Repealed		to Title
8-208.1	Repealed		14.1
8-208.2	8.01-337	8-208.34	Transferred
8-208.3	8.01-338		to Title
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8-214	8.01-336	8-246	8.01-423
8-215	8.01-358	8-247	Deleted
8-216	8.01-376	8-248	8.01-607
8-217	8.01-377	8-249	8.01-608
8-218	8.01-378		8.01-609
8-219	8.01-379	8-250	8.01-610
8-220	8.01-380	8-251	8.01-611
8-221	8.01-381	8-252	8.01-612
8-222	Repealed	8-253	8.01-613
8-223	8.01-382	8-254	8.01-614
8-224	8.01-383	8-255	8.01-614
8-225	8.01-384	8-256	Deleted
8-225.1	8.01-384	8-257	8.01-615
8-226	8.01-364	8-258	8.01-616
8-227	8.01-365	8-259	8.01-617
8-228	8.01-366	8-260	8.01-618
8-229	8.01-367	8-261	8.01-619
8-230	8.01-368	8-262	Transferred to Title 14.1
8-231	8.01-369		
8-232	8.01-370		
8-233	8.01-371	8-263	Deleted
8-234	8.01-372	8-263.1	8.01-419
8-235	8.01-373	8-264	8.01-386
8-236	8.01-421	8-265	8.01-390

TITLE 8	THIS REPORT	TITLE 8	THIS REPORT
8-266	8.01-389	8-297	8.01-407
8-267	8.01-391	8-298	8.01-408
8-267.1	8.01-418	8-299	8.01-409
8-268	8.01-391	8-300	Transferred
8-269	8.01-390		to Title
8-270	8.01-386		19.2
8-271	8.01-389	8-300.1	8.01-410
8-272	8.01-388	8-301	Deleted
8-273	8.01-386	8-302	Deleted
8-274	8.01-387	8-303	Deleted
8-275	8.01-389	8-304	Deleted
8-276	8.01-389	8-305	Deleted
8-276.1	8.01-389	8-306	Deleted
8-277	8.01-389	8-307	Deleted
8-277.1	8.01-413	8-309	Deleted
8-278	8.01-391	8-310	Repealed
8-279	8.01-391	8-311	Deleted
8-279.1	8.01-391	8-312	Deleted
8-279.2	8.01-391	8-313	Deleted
8-280	8.01-392	8-314	Deleted
8-281	8.01-393	8-315	Deleted
8-282	8.01-394	8-315.1	8.01-420
8-283	8.01-394	8-316	Deleted
8-284	8.01-395	8-316.1	8.01-411
8-285	8.01-396	8-316.2	8.01-412
8-286	8.01-397	8-316.3	8.01-412.1
8-287	8.01-398	8-317	Deleted
8-288	Transferred	8-318	Deleted
	to Title	8-319	Deleted
	19.2	8-320	Deleted
8-289	8.01-398	8-321	Deleted
8-289.1	8.01-399	8-322	Deleted
8-289.2	8.01-400	8-323	Deleted
8-290	8.01-401	8-324	Deleted
8-291	8.01-401	8-324.1	Deleted
8-292	8.01-403	8-325	Deleted
8-293	8.01-404	8-326	Deleted
8-294	8.01-405	8-327	Deleted
8-295	8.01-406	8-327.1	Deleted
8-296	8.01-407	8-327.2	Deleted
8-296.1	8.01-402	8-328	8.01-414

provide notice of a hearing or of calling the docket if such is to take place on a date other than the first day of the term.

Present § 8-163, which permits a court located in a city of more than 100,000 people to call the docket "at such intervals as may be directed by an order of court", is to be deleted. Proposed § 8.01-332 makes this section unnecessary because it gives all courts this discretion.

Proposed § 8.01-333 is present § 8-167 without change.

Proposed § 8.01-334 combines present §§ 8-164 and 8-168. Although minor language changes have made to these sections, no change in the substance is intended.

The subject matter of present § 8-154 relates to dockets; therefore, it has been removed from present Chapter 7 and located here as proposed § 8.01-335. The present language has been altered to better distinguish between a dismissal and a discontinuance, when each is available, and the effect of each.

Present § 8-161 (Separate volumes for unmatured law cases) and present § 8-166 (Separate volumes for unmatured chancery cases). To be deleted.

Reviser's Note:

It is believed that the maintenance of these separate volumes is unnecessary.

Chapter 11.

Juries.

Note: Present § 19.2-260 of the Criminal Procedure Title effective October 1, 1975 provides that trial by jury in criminal cases shall be regulated by the provisions of Title 8 unless specifically provided otherwise within Article 4 of Title 19.2. Thus, the reference to criminal cases in many provisions of this chapter. (See §§ 19.2-260 to 19.2-264.)

Article I.

When Jury Trial May Be Had.

§ 8.01-336. Jury trial of right; waiver of jury trial; court ordered jury trial; trial by jury of plea in equity; issue out of chancery.—A. The right of trial by jury as declared in § 11, Article I, of the Constitution of this Commonwealth and by statutes thereof shall be preserved inviolate to the parties.

B. Waiver of jury trial.—In any action at law in which the recovery sought is greater than one hundred dollars, exclusive of interest, unless one of the parties demand that the