Old Dominion Bar Association
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Supreme Court of Virginia
Civil Case Law Update
January 2015 – November 2015

Prepared and Presented by the Honorable Wilford Taylor

Administration of Government

FOIA

Department of Corrections v. Surovell

290 Va. 255 (2015)

Under the Virginia Freedom of Information Act, Code § 2.2-3705.2(6) provides that certain records related to public safety are excluded from disclosure to the extent their production would jeopardize security of a governmental facility or the safety of persons using the facility. In a mandamus proceeding to review the refusal of the Virginia Department of Corrections to produce certain documents pertaining to various aspects of executions conducted in Virginia, the circuit court was required to give substantial weight to the agency's evidence of security concerns, and this standard should have been applied with respect to several contested documents. Two "execution manuals" sought contain security protocols exempt from disclosure under the Code § 2.2-3705.2(6). This statute does not refer to production of "portions" of records, and therefore an agency is not required to redact an exempt document in that category that may also contain non-exempt material. The judgment of the circuit court is reversed and, with respect to several documents, the matter is remanded to the circuit court for further proceedings in accord with this opinion.

Attorney

Legal Malpractice

Shevlin Smith v. McLaughlin

289 Va. 241 (2015)

This appeal arises from a legal malpractice claim. Bruce McLaughlin was initially convicted of multiple counts of sexual abuse. McLaughlin hired William J. Schewe and Harvey J. Volzer to represent him at this trial. McLaughlin's convictions were later vacated following a habeas proceedings and a jury acquitted him during a second trial. McLaughlin then sought to bring a legal malpractice claim against Schewe and Volzer alleging they negligently failed to obtain the taped interviews of the alleged victims and compare those to the inaccurate written transcripts used in the first trial. McLaughlin hired the firm Shevlin Smith to pursue the malpractice claim

against Schewe and Volzer. Shevlin Smith negotiated a settlement with Schewe in order to settle the malpractice claim against them ("the Release Agreement"). The Release Agreement expressly did not release the claim against Volzer. Approximately four months after the Release Agreement was executed, the Virginia Supreme Court released its decision in Cox v. Geary, 271 Va. 141 (2006). Based on the holding in Cox, Volzer filed a plea at bar seeking a dismissal of the complaint that was granted by the circuit court and affirmed by the Supreme Court by an unpublished order. McLaughlin then filed a legal malpractice claim against Shevlin Smith for failing to see how the Court's ruling in Cox would influence the Release Agreement. A jury later found Shevlin Smith liable to McLaughlin and awarded a judgment of $5.75 million.

The Supreme Court reversed the circuit court's denial of Shevlin Smith's second plea at bar, reversed the order affirming the jury verdict, vacated the jury award and remanded the case. The major holding in this case is that Shevlin Smith is not liable to McLaughlin solely on the basis that they failed to predict the Court's ruling in Cox. Allowing an attorney to be liable for malpractice for simply failing to predict the outcome of an issue is unduly burdensome on the profession. The Court did not establish blanket immunity when an attorney fails to predict the outcome of an unsettled legal issue. An attorney has to exercise a "reasonable degree of care, skill, and dispatch" when working in an area of law that remains unsettled. The Court held that as a matter of law Shevlin Smith did not breach its duty to McLaughlin. Shevlin Smith relied on two areas of settled law. The common law principle that when there is one indivisible injury a release of one co-defendant is a release of all co-defendants was modified by the General Assembly with respect to tortfeasors so that settlement with one did not release the other co-defendants. The Court in Cox ruled that legal malpractice is a cause of action for breach of contract, therefore, placing legal malpractice claims outside of the General Assembly's modification. However, legal malpractice claims, up until this ruling typically were referred to as tort cases. At the time Shevlin Smith these two lines of decisions afforded them a basis to execute the Release Agreement without breaching their duty. Therefore, the Supreme Court reversed the decision of the circuit court and vacated the jury award.

Sanctions

EE Mart v. Delyon

289 Va. 282 (2015)

This appeal concerns an award of attorney's fees granted against EE Mart. EE Mart initially brought an action against Delyon who was the former chief financial officer of EE Mart. The action against Delyon was for a wrongful conversion of insurance proceeds that were paid to Delyon, but on the eve of trial EE Mart nonsuited the case. EE Mart then brought an action against Traveler's Insurance in Maryland for the same payments. Traveler's removed to federal court where EE Mart amended its complaint to include Delyon as a defendant. The claims brought against Delyon in federal court were the same except EE Mart added a civil RICO claim. The federal court dismissed the RICO claim and the case was transferred back to Maryland because of a lack of diversity. Delyon then filed an action in Fairfax County, Virginia, seeking to enjoin the Maryland action and seeking declaratory judgment that the Maryland action was without merit. EE Mart did not participate in the hearing before the Virginia circuit court beyond filing a counterclaim. The trial court ruled in favor of Delyon and dismissed the counterclaim with prejudice. The trial court then granted an award of attorney's fees of $25,500 for fees associated not only with the Virginia action but also with the initial claims and the Marylnad claims.

The Supreme Court of Virginia reversed and remanded the case for reconsideration as to the amount of attorney's fees awarded. It did not consider whether attorney's fees should be awarded because this was never disputed by EE Mart on appeal. The Court determined that Code §8.01- 271.1 limited an award of attorney's fees to only those fees associated to the present action pending before the court. To hold otherwise would undermine the finality of a judgment under Rule 1:1 and would subject every litigant to Code §8.01-271.1 because it would allow a party to file for sanctions in Virginia court regardless of where the case was initially filed. It is for these reasons the Court reversed the amount of attorney's fees and remanded for a different calculation of the attorney's fees.

Contracts

Express and Implied Agreements

Spectra-4, LLP. v. Uniwest Commercial Realty

290 Va. 36 (2015)

In litigation between two limited partnerships that own and lease adjacent commercial buildings and a company that provided management services for both buildings for 12 years after expiration of prior written contracts with a different management company, two separate implied-in-fact contracts existed which encompassed specific portions of previously expired express contracts executed by a different set of parties. However, these implied-in-fact contracts did not include terms and conditions permitting the management company to withdraw premature termination fees or copying charges from the operating accounts. The judgment below is reversed and the litigation is remanded to the circuit court for further proceedings consistent with this opinion.

Fraud in the Inducement

Donald Devine v. Buki

289 Va. 162 (2015)

This appeal arises out of the sale of Rock Hall, a 200 year old wood frame house. Donald Devine and his wife, Nancy Devine, owned Rock Hall. Donald had hired contractors to perform work on Rock Hall, but it was never completed. He also did some minor work on Rock Hall himself. In 2006, Donald decided to sell Rock Hall and with the help of a local realtor created promotional literature advertising that Rock Hall had been "completely restored". Eventually Buki and Marsho decided to purchase Rock Hall for $590,000. The real estate contract contained a "Disclaimer Statement" stating that Buki and Marsho were purchasing Rock Hall as is with all defects that may exist except those specifically contained in the real estate contract. Buki and Marsho then had the property inspected a number of times where a stain and mold from water leakage was discovered. Donald stated that this was a result of a window being left open during Hurricane Ernesto. When Buki and Marsho went to have the windows of Rock Hall replaced the contractor discovered more water damage and significant damage to the foundation from termites and rot. It was at this time Buki and Marsho moved to have the real estate contract rescinded on the basis that

Donald Devine had made material misrepresentations that amounted to fraud. The trial court supported the findings of the Commissioner and granted rescission of the real estate contract, and awarded consequential damages for everything except the replacement of the windows. The trial court did not grant any damages for the Virginia Consumer Protection Act ("VCPA") claims.

The Virginia Supreme Court reversed in part, affirmed in part, and remanded the trial court's decision. The Court affirmed the decision to rescind the contract based on fraudulent inducement. The Court rejected the argument that the fraud did not induce Buki and Marsho to enter into the contract, but only induced them to go to closing. The Supreme Court found that this was in reality a fraudulent inducement to perform and as such rescission of the contract was an appropriate remedy. The Court reversed the trial court's decision to award prejudgment interest and consequential damages. Awarding consequential damages was incorrect because these damages were a reimbursement to Buki and Marsho for expenses they paid to third parties and not benefits Devine received directly. The only benefit he received was the sale price of Rock Hall. The Court reversed the award of prejudgment interest because the complaint did not request an award for prejudgment interest and therefore it could not be awarded.

Liability and Remedies

Devine v. Buki

289 Va. 184 (2015)

This appeal arises out of the sale of Rock Hall, a wood frame house that is more than 200 years old. Especially relevant to this appeal was the trial court's determination that Nancy Devine was not aware of any of her husband, Donald Devine's, fraudulent acts and her involvement in the sale was limited to signing the contract allowing the house to be sold. The trial court granted a rescission of the real estate contract against both Nancy and Donald. It also required Nancy to be joint and severally liable with her husband for repayment of the purchase price for Rock Hall.

The Supreme Court of Virginia reversed and remanded the decision of the trial court. The main basis for the reversal was that the trial court had made a specific finding that Nancy was not at fault. The court's power at equity only extends if there has been a finding of liability. Therefore, as there was no such finding, it was not possible for Nancy to be held joint and severally liable.

Corporations

Appraisal Rights

Fisher v. Tails, Inc.

289 Va. 69 (2015)

This appeal concerns whether a minority shareholder is entitled to appraisal rights when a Virginia corporation changes its state of incorporation. Tails, Inc. ("Tails") was a Virginia corporation organized as a regional franchise of RE/MAX, LLC, which is a Delaware corporation. In August, 2013, Tails signed an agreement with Buena Suerta Holdings, Inc. ("Buena Suerta") where Tails would be sold to Buena Suerta in four steps. In September, 2013, Tails held a special shareholder meeting where the four steps were approved by majority vote over the minority shareholders vote. In October, 2013, Tails undertook all four of the steps to accomplish the sale of all of its business assets to Buena Suerta. The circuit court granted Tails, Inc.'s demurrer to the minority shareholders complaint seeking declaratory judgment that they were entitled to appraisal rights and seeking monetary damages if they received a favorable ruling on the question of appraisal rights.

The Supreme Court of Virginia affirmed the circuit court granting the demurrer. Virginia Code § 13.1-730 provides a list of situations in which a minority shareholder is entitled to appraisal rights and it tracks closely with the Model Business Corporation Act (MBCA). One key difference between the two is that the Virginia legislature did not incorporate the provision allowing for appraisal rights upon a consummation of domestication. Therefore, under current Virginia statutory law the minority shareholders were not entitled to appraisal rights. The next issue considered by the court is one of first impression and that is whether the "step transaction" doctrine found in Delaware law is applicable to the situation here. The "step transaction" doctrine is one where a court will treat each step in a series of distinct transactions involving the transfer of property as a single transaction if all of the transactions are substantially linked. The Court rejected application of this doctrine. The Court found that there was no authority supporting the position that a statutorily-sanctioned domestication may be considered a step under the doctrine because domestication only determines what law is applicable to a transaction. It was a matter of statute that dictated that Delaware law controlled and under Delaware law the minority shareholders were not entitled to appraisal rights, therefore, the Court affirmed the decision of the circuit court.

Domestic Relations

Qualified Domestic Relations Order

Cowser-Griffin v. Griffin

289 Va. 189 (2015)

Order does not provide a reason for its holding beyond referencing the decision in Griffin v. Griffin, 62 Va. App. 736.

Employment Law

Grievance Procedures

Alexandria Redev. & Housing Auth. v. Walker

290 Va. 150 (2015)

In ruling on a complaint alleging that plaintiff had been improperly discharged by a housing authority, the circuit court erred in applying Code § 15.2-1507 and in concluding that plaintiff was entitled to have her claims arbitrated under the authority's grievance procedure. The judgment is reversed and final judgment is entered for the authority.

Special Relationship

Brown v. Jacobs

289 Va. 209 (2015)

This appeal concerns whether a special relationship exists between an independent contractor and an employer in the context of a wrongful death action. Mrs. Brown filed a complaint for wrongful death as the executor of her husband's estate following his death after being shot by Mr. Abid whom Mr. Brown was attempting to serve process on. Mrs. Brown's complaint alleged that Mr. Jacobs, an attorney who hired Mr. Brown to file service of process on Mr. Abid, was negligent in failing to warn Mr. Brown about the danger of serving Mr. Abid. Following an amended complaint the circuit court sustained Mr. Jacob's demurrer to the complaint and denied Mrs. Brown's motions to reconsider and for leave to file a second amended complaint.

The Supreme Court of Virginia affirmed the decision of the trial court in this case. The Court determined that the existence of a special relationship between the decedent and Mr. Jacobs was not established under Virginia law. The Court limited the holding of a prior case recognizing a special relationship between an employer and an independent contractor on the basis that the prior case involved a youth who was sexually assaulted while working a paper route. This case differed significantly because the independent contractor at issue in this case was a full grown adult who was capable of serving process on Mr. Abid at whatever time he saw fit and in whatever manner he saw fit. As such it was the facts of the prior case which gave rise to the holding that there is a special relationship between an employer and an independent contractor and the Court declined to make this a categorical special relationship under Virginia law.

Evidence

Expert Opinion

Hyundai Motor Company, Ltd. v. Duncan

289 Va. 147 (2015)

This appeal arises out of a products liability claim against Hyundai Motor Company ("Hyundai"). The claim arose out of a crash that left Zachary Gage Duncan ("Gage") with a closed-head injury after the Hyundai Tiburon he was driving did not deploy its side airbag even though it was equipped with one. The Duncan's brought suit alleging that Hyundai had breached the implied warranty of merchantability. The specific contention was that if the side sensor had been placed in a different location then the side airbags would have deployed. To support this claim the Duncan's designated Geoffrey Mahon ("Mahon"), a mechanical engineer, to testify as an expert that the Tiburon was defectively designed. Mahon offered the opinion that if Hyundai would have placed the sensor on the B-pillar of the vehicle approximately 4 to 6 inches from the floor then the side airbag would have deployed. Hyundai moved to exclude Mahon's testimony, prior to trial, claiming that it did not have a sufficient foundation because he did not conduct any tests or analysis to determine whether the sensor if located where he stated would have actually deployed the side airbag. The circuit court denied Hyundai's motion in limine and allowed Mahon to express his opinion at trial.

The Supreme Court reversed and rendered final judgment for Hyundai. The Court held that in order for an expert opinion to be admissible it needs to have a sufficient factual basis and take into account all relevant

variables. In this case Mahon based his opinion on a test Hyundai did in 1999, but admitted that during that test Hyundai never placed the sensor in the location Mahon claimed would have allowed for deployment of the airbags. The assumption for his opinion did not have a sufficient factual basis because it relied on the unproven assumption that the airbag would have deployed had the sensor been located where he suggested. Because Mahon's inadmissible opinion testimony was the sole basis for the Duncans' claim the Court rendered final judgment for Hyundai.

Insurance

Homeowner's Coverage

Allstate v. Ploutis

290 Va. 226 (2015)

The circuit court erred in applying limitations "tolling" based upon a prior nonsuit of an action against an insurer for breach of contract under a homeowner's insurance policy. The policy's two year contractual period in which suit may be brought is not a "statute of limitations" subject to tolling under the nonsuit statute provisions of Code § 8.01-229(E)(3), and the action filed after a prior nonsuit was not commenced within two years from the date of the loss. Hence, a demurrer should have been granted. The judgment is reversed and final judgment entered in favor of the insurer.

Interpretation of Policy Provisions

Bratton v. Selective Insurance Co.

290 Va. 314 (2015)

In declaratory judgment actions contesting the scope of automobile liability coverages under various policies for a decedent who worked as a paving company employee driving a dump truck to a highway site at night, who got out of his truck and moved nine feet to the rear of his truck in a 30-second period before being struck and killed as a result of two drunk drivers crashing into a highway work site, the decedent was (1) "getting out of" the dump truck he was operating and (2) "using" a nearby company pickup truck as a safety vehicle, as those terms are used in a motor vehicle insurance policy to establish insurance coverage. He was therefore "occupying" both of

these "covered auto[s]" at the time of the accident and, thus, under the independent coverages set up under the policy, plaintiff is entitled to proceeds for both the dump truck and the company pickup truck. Plaintiff is also entitled to $100,000 in proceeds under the decedent's personal motor vehicle insurance policy with another carrier. The judgment is reversed and the case is remanded to the circuit court for further proceedings consistent with this opinion.

Title Insurance Coverage

REVI, LLC v. Chicago Title Insurance Co.

290 Va. 203 (2015)

In an action alleging that a title insurer breached its obligations under a title insurance policy, and acted in bad faith, in which the plaintiff sought damages and an award of attorney's fees and costs pursuant to Code § 38.2-209, the circuit court did not err in vacating a jury award of fees and costs, engaging in de novo review of the evidence, and deciding the entitlement to such recovery as a matter for the court. The word "court," as used in Code § 38.2-209(A), means "judge." A trial judge, not a jury, must determine whether an insurer has either denied coverage or failed or refused to make payment to the insured under the policy in bad faith, warranting an award of attorney's fees to the insured, and this statute does not implicate a right to a jury trial under Article I, Section 11 of the Constitution of Virginia. The judgment of the circuit court is affirmed.

Local Government and Administrative Law

Employee Designation

Roop v. Whitt

289 Va. 274 (2015)

This appeal considers whether a sheriff's deputy is a local employee for purposes of Code § 15.2-1512.4. Brad Roop ("Roop") was a Captain of Criminal Investigations for the Montgomery County Sheriff's Office ("MCSO"). In 2012, an employee of the Virginia Department of Forensic Science ("DFS") approached Roop and informed him that on a number of occasions the laboratory had failed to find controlled substances in evidence

submitted by the MCSO's Street Crime Unit. Roop met with Sheriff J.T. Whitt ("Whitt") because he believed this information could suggest corruption. Whitt ordered Roop to investigate and Roop subsequently made a report to Whitt. Whitt met with the captain supervising the Street Crime Unit and informed Roop that the discrepancies noted in his report had been explained. Roop disagreed and was later discharged by Whitt after Whitt said he believed Roop had initiated the investigation for personal reasons. Roop then filed a complaint alleging that his termination was retaliation, in violation of Code § 15.2-1512.4. The circuit court granted Whitt's demurrer on the grounds that § 15.2-1512.4 did not create a cause of action and that Roop was not a local employee for purposes of this section of the Code.

The Supreme Court affirmed the decision of the circuit court. The Court held that because a local employee was not defined in the Code, the ordinary meaning of the words controlled. A sheriff's deputy is appointed solely by the sheriff, who may remove the deputy at will except for a few statutory limitations. Deputies are also paid by the Commonwealth and not the locality. A sheriff is also a creation of the Constitution of Virginia and their power exists independent of the local government. A constitutional officer is elected by the people for a prescribed period and neither hired or fired by the locality so they are not local employees. The Court therefore affirmed the decision of the circuit court.

Enforcement of Special Taxes and Assessments

CVAS 2, LLC v. City of Fredericksburg

289 Va. 100 (2015)

This appeal concerns the forced sale of property owned by CVAS 2 ("CVAS") for delinquent special assessments and special taxes. The City of Fredericksburg has levied real estate owned by CVAS with taxes and the local ordinance Board has levied the same property with special assessments. CVAS has special taxes arising back to the 2012 fiscal year and has outstanding special assessments arising from the 2009 fiscal year. On June 13, 2013 the City filed a complaint seeking to have the real estate sold in order to cover the costs of the outstanding special taxes and assessments. The trial court ordered a sale of the real estate.

The Supreme Court of Virginia reversed, vacated and dismissed the City's complaint against CVAS and the trial courts forced sale of the real estate. The Court held two different statutory provisions governed the enforcement of special taxes and special assessments by cities and localities. Code § 58.1-3965(A) governs the methods a locality can use to recover delinquent special taxes. Under the statute the locality can only seek a sale of

the real estate if the taxes have been delinquent for at least two years prior to the initiation of the suit seeking to sell the property unless the locality has passed a local ordinance shortening this to one year. In this particular case, the Court ruled that CVAS's outstanding special taxes have not been delinquent for two years prior to the complaint seeking to force the sale of the property. The locality only has the right to collect the delinquent taxes if it complies with the statute and because it failed to do so the Court dismissed the complaint against CVAS. Even if the Court made a determination that the amounts in question were special assessments, the Court still could not force the sale of the real estate. Code §15.2-5158(A)(5) does not give the City the ability to force a sale of the property, but instead requires that delinquent special assessments be collected in the form of a lien. Therefore, the decision of the trial court was reversed, vacated, and the complaint was dismissed by the Supreme Court.

Zoning Appeals

Frace v. Johnson

289 Va. 198 (2015)

This appeal concerns an appeal of a decision of the Board of Zoning Appeals of Fairfax County. Sheila E. Frace ("Frace") was issued a Notice of Violation that was upheld by the Board of Zoning Appeals. Frace then sought judicial review of the Board's decision pursuant to Code § 15.2-2314, but styled her petition in accordance with the first paragraph of §15.2-2314. She did not name any other party nor did she serve a copy on the Chairman of the Board of Zoning Appeals. The circuit court subsequently granted the Board of Zoning Appeal's motion to dismiss because she did not serve a necessary party and did not do so within the 30 day statutory time limit.

The Supreme Court affirmed the decision of the circuit court holding that even though Frace complied with the first paragraph of § 15.2-2314 it was not sufficient to institute proceedings because the General Assembly had directly specified who had an interest and must receive notice. The 30-day time period could be waived; but, because there was no waiver in this case, the Court could not sustain the petition on this basis. Finally, ruling that compliance with the first paragraph of the statute alone is sufficient would nullify the other paragraphs of § 15.2-2314, therefore, the Supreme Court affirmed the decision of the circuit court.

Name Change

Standards for Granting

In re: Brown

289 Va. 343 (2015)

The Virginia Supreme Court reversed the trial court's denial of a transgender inmate's application for a change of name. The court addressed the retroactive application of 2014 amendments to Virginia Code § 8.01-217 and what constitutes good cause for an application for a name change.

Virginia Code § 8.01-217 requires a finding of good cause to support the application for a change of name when it is filed by an incarcerated person. Prior to the 2014 amendments, § 8.01-217 required entry of the name change order after the finding of good cause unless the evidence showed that the change of name was sought for a fraudulent purpose or would otherwise infringe upon the rights of others. The 2014 amendments added a requirement that the applicant demonstrate that the change of name would not frustrate a legitimate law-enforcement purpose. The Virginia Supreme Court held that requiring an applicant to prove a new element is a substantive change to the statute and that retroactive application of the statue is not permitted

With regard to the issue of good cause, the court held that "the fact that an applicant is transgender and is changing their name to reflect a change in their gender identity cannot be the sole basis for a finding by a trial court that such an application is frivolous and lacks good cause."

Personal Injury

Insurance Coverage

Bartolomucci v. Federal Ins. Co.
Vo v. Federal Ins. Co.

289 Va. 361 (2015)

These consolidated appeals address the scope and application of a law firm insurance policy that provided coverage for a lawyer's vehicle only when the vehicle is used in the law firm's business or personal affairs. These cases arose out of an automobile accident involving a law firm partner on his commute to work from home.

The lawyer argued that his home operated as a work location for his law firm. He did not have set hours and was encouraged to work from home. Therefore, he argued his commute from home to work was travel between work locations. He also argued that he had a firm-issued Blackberry device in the car that was turned on and within his reach and that he habitually thought about work during his commute.

The question was submitted to the jury as to whether the lawyer was using his vehicle in the firm's business or personal affairs at the time of the accident. The jury answered "yes." The trial judge granted the defendant's motion to strike, set aside the jury's finding as not supported by the evidence and held that the law firm's insurance policy did not cover the lawyer's use of the vehicle at the time of the accident.

The Virginia Supreme Court held that the facts of the case did not establish that the lawyer's use of his vehicle to commute from home to work was a use within the law firm's business or personal affairs. The court cited the facts that the lawyer had not read or responded to any work related emails before or during his commute and that he had not billed his time for any work related activity completed at home prior to his commute or during the commute. The court held that merely having access to a Blackberry and thinking about work does not transform an employee's private activity into company business. The court noted that the trial court should have granted the defendant's motion to strike, however, it was proper to set aside the jury's verdict as contrary to the evidence and enter judgment in favor of the defendant.

Practice and Procedure

Demurrer

Ramos, et al. v. Wells Fargo Bank, NA.

289 Va. 321 (2015)

By order, the Court affirms the judgment of the circuit court sustaining Wells Fargo's demurrer to the second amended complaint of appellants and dismissing it with prejudice. In a suit by homeowners alleging that the defendant lender wrongfully initiated foreclosure on their residence, violating Department of Housing and Urban Development regulations including 24 C.F.R § 203.604 by failing to conduct a face-to-face meeting with them before initiating foreclosure, plaintiffs failed to set forth a single factual allegation to show any injury or damage caused by the lender's purported breach of its obligations, thus failing to establish an essential element of a

breach of contract claim. In addition, whether a closing had been held does not affect the completion of the transaction for rescission purposes. Upon foreclosure under a Virginia deed of trust, the contract of sale is consummated when the auctioneer cries the property out to the person making the highest and last bid.

Judicial Estoppel

Wooten v. Bank of America

290 Va. 306 (2015)

In a lender's suit for a declaration that it holds a trust lien against the entire fee simple interest of a divorced couple in certain real property, the circuit court erred in entering summary judgment against the former wife based on the doctrine of judicial estoppel. Because the former wife made no affirmative, inconsistent representation to the divorce court, judicial estoppel is inapplicable as a matter of law in this case. The judgment declaring that the lender holds a valid first deed of trust lien against the entire fee simple interest of both former spouses is reversed, and the case is remanded to the circuit court for further proceedings.

Jurisdiction

Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.

289 Va. 426 (2015)

Hadeed filed a defamation action in circuit court against three John Doe defendants alleging they falsely represented themselves as Hadeed customers and posted negative reviews on Yelp. Hadeed issued a subpoena duces tecum to Yelp, seeking documents and information related to the identity of the posters. Yelp resisted on First Amendment grounds and the circuit court ultimately found Yelp in contempt. At issue in this case is whether the Virginia statutes provide for service of subpoenas against non-party foreign citizens. The majority opinion concludes that the circuit court did not have jurisdiction over Yelp because the Uniform Interstate Depositions and Discovery Act (UIDDA) provides the exclusive statutory mechanism for obtaining discovery from a non-party foreign citizen. That Act would require Hadeed to seek a discovery order from a court in Yelp's home state, California.

The dissent argues that the majority reached the right result for the wrong reason. The dissent believes there is statutory authority outside of UIDDA to issue a subpoena duces tecum to a non-party foreign corporation;

nevertheless, a state court's coercive judicial power is limited by the Due Process Clause of the Fourteenth amendment in accordance with the Supreme Court of the United States' opinion in J. McIntyre Mach., Ltd. V. Nicastro, 564 U.S. __, __, 131 S.Ct. 2780, 2786-87 (2011). According to the dissent, nothing in the record established that Yelp had sufficient contacts with the Commonwealth or that it purposely directed activities here such that a Virginia court could exercise specific jurisdiction over it.

Jury Instructions

Cain v. Lee

290 Va. 129 (2015)

In a personal injury action arising from a rear-end vehicular collision in which the defendant admitted liability, the circuit did not err in excluding evidence of the defendant's post-accident conduct, but the court erred in giving an instruction about the disfavored status of punitive damage claims that was crafted based upon statements in published Virginia case law. The judgment is reversed and remanded for further proceedings consistent with this opinion.

Motion to Set Aside Default Judgment

Sauder v. Ferguson.

289 Va. 449 (2015)

Plaintiff moved to set aside a default judgment obtained in an automobile accident suit on the grounds that defendant may not have been properly served. The Court affirms the judgment of the circuit court denying plaintiff's motion to set aside. The majority opinion notes that the circuit court has discretion to set aside a default judgment under Virginia Code § 8.01-428(A), which provides: "the court **may** set aside a judgment by default" upon any one of several enumerated grounds. The majority opinion then explains the abuse of discretion standard.

A brief concurrence articulates another route to the same conclusion via judicial estoppel. As applied here, plaintiff who both earlier in her motion for default judgment and later in the motion to set aside attested to the legal sufficiency of service is prohibited from taking within the same action the inconsistent position that service may not have been good.

Nonsuit

Anheuser-Busch Co. v. Cantrell

289 Va. 318 (2015)

In an asbestos litigation case, the trial court erred in granting the plaintiff's motion for a nonsuit filed after the parties had completed their briefing and argument on the defendant's demurrers and the court notified the parties that its decision would be forthcoming. The court held that an action has been "submitted to the court for decision" within the meaning of Virginia Code § 8.01-380(A) when the parties have completed their briefing and argument on a dispositive motion and do not anticipate any further proceedings.

Res Judicata

Lee v. Spoden

290 Va. 235 (2015)

In litigation between former spouses, the ex-wife's prior contempt proceeding barred most of the claims in the present contract action under the doctrine of res judicata and the circuit court erred in ruling otherwise. It also erred in excluding evidence of prior rulings in the contempt proceeding relevant to the issue of bad faith in the present contract action. Because leave to amend the plaintiff's ad damnum clause was granted at trial, that ruling not appealed, and the jury's award did not exceed the amount stated in the amended ad damnum, there was no error in the trial court's refusal to set the verdict aside on the grounds that it exceeded the amount sought in the complaint.

Real Estate

Easements

Marble Technologies, Inc. v. Mallon

290 Va. 27 (2015)

In a suit by landowners concerning the continued existence of an express easement granted along waterfront properties in 1936 by deed and an accompanying map showing metes and bounds of land that is now

submerged under the Chesapeake Bay, the circuit court did not err in proceeding with the parties before it, since the necessary party doctrine does not implicate subject matter jurisdiction and there were numerous and varied parties added to the action, multiple opportunities for the litigants to add parties, and no claim that any of the allegedly missing parties were indispensable. The deed in this case was unambiguous and the annexed map designated the easement location with numerical point references, a drawing of its entire length and width, and the express legend that the easement road ran "along present mean high water." Because the deed and map are unambiguous, there was no need for the circuit court to review evidence beyond the documents themselves to interpret them, and it erred in considering parol evidence. The easement never moved from the mean high water mark as it existed in 1936. The beach has eroded in the meantime, and the land where the easement was once located is now under the Chesapeake Bay and cannot serve as a road. Thus, the express easement created by the 1936 deed has been extinguished. The judgment of the circuit court finding that the plaintiff landowners have a variable express easement that moves with the mean high water line is reversed, and final judgment is entered on this appeal in favor of the defendants.

Real Property

Adverse Possession

Howard v. Ball

289 Va. 470 (2015)

In an action seeking to establish the boundary line between two adjacent pieces of property, the defendant introduced testimony at trial demonstrating that he and his predecessors in interest had adversely possessed the disputed piece of property. The plaintiff objected to the evidence of adverse possession, arguing that the defendant could not rely on the defense because it was not raised in the pleadings. The defendant cited Bradshaw v. Booth, 129 Va. 19 (1921) in support of his argument that he was not required to raise the defense of adverse possession in advance of trial and the trial court ruled in his favor. Bradshaw had held that a defendant who raises a general defense to an ejectment action does not need to raise adverse possession as an affirmative defense.

On appeal, the Virginia Supreme Court overruled Bradshaw, holding that a party may not rely on adverse possession as an affirmative defense without affirmatively asserting the defense in a pleading. In support of its holding, the court cited Virginia Supreme Court Rule 3:8(a) which provides that a general denial of the entire complaint is not permitted. The court identified exceptions to the rule requiring that a party must plead affirmative defenses. The exceptions cited were where the issue was not disclosed in a plaintiff's pleadings and only became apparent as the evidence was being received at trial, where the affirmative defense is addressed by statute either expressly requiring that a particular defense be pled or obviating the need to do so, or where the affirmative defense does not constitute an absolute bar to the plaintiff's claim. The court held that none of the exceptions applied in the present case and reversed the trial court's ruling.

Condemnation

Ramsey v. Commissioner of Highways.

289 Va. 490 (2015)

The trial court erred in finding that an appraisal, which was obtained by the Commissioner of Highways *before* initiating negotiations with the landowners for real property pursuant to Code § 25.1-204 (E) (1), was inadmissible at trial as an offer to settle. The initial valuation of the property was nearly double the amount of a subsequent appraisal offered by the Commissioner at trial. The eminent domain statutes do not forbid admission of otherwise admissible evidence of value like the pre-settlement statement proffered by the landowners. The Court did not address whether the appraisal was admissible under the Virginia Rules of Evidence, but the trial court should on remand.

Deeds

Deutsche Bank v. Arrington

290 Va. 109 (2015)

Code § 55-52, which codifies the doctrine of after-acquired title, only applies between the parties to a deed and does not affect the rights of third parties or influence the relative priority of their interests. Code § 55-96(A) governs questions of priority between deeds, and an individual who obtains a deed of trust pursuant to a court order to secure the payment of court-ordered obligations is a lien creditor for purposes of Code § 55-96(A). It is also held that a deed of trust recorded outside a lien creditor's chain of title is not "duly

admitted to record," and therefore is void as to such lien creditor. The judgment of the circuit court is affirmed.

Mining and Mineral Rights

Bailey v. Spangler.

289 Va. 353 (2015)

This case answers a question certified from the United State District Court for the Eastern District of Virginia concerning the effect of a 1981 statute relating to ownership rights in depleted mines. In 1887 the then-owner of a parcel of land in Dickenson County severed the mineral estate underlying the property and conveyed all the coal, iron, petroleum, etc. to the Virginia Coal and Coke Company. The deed did not specify who would own the mine void, the space that remains after all the minerals have been extracted. A 1920 Supreme Court of Virginia decision held that unless the severance deed specified otherwise, the surface owner owns the mine void, and the mining company can't continue to use it after mining operations have ceased. In 1981, the General Assembly passed a statute (Va. Code § 55-154.1) effectively reversing this presumption as to mine void ownership. That statute contained the following limitation: "The provisions of this section shall not affect contractual obligations and agreements entered into prior to July one, nineteen hundred eighty-one." In 1983, Bailey purchased the parcel of land in Dickenson County.

The certified question is whether the presumption of mine void ownership created by Code § 55-154.2 applies to deeds executed prior to July 1, 1981. Spangler, the Director of the Department of Mines, Minerals and Energy, argued that deeds are different from the "contractual obligations and agreements" referred to in Code § 55-154.2, noting that almost all severance deeds in Virginia predate 1981and therefore ruling in favor of Bailey would effectively gut the statute. The Court ruled that it is irrelevant whether a deed is a "contractual obligation" or "agreement" within the terms of the statute because the answer to the certified question is the same either way. If it is, then it is explicitly excluded from the statute. But even if it is not, the Court may not infer retroactive application of Code § 55-154.2 to deeds executed before the statute became effective unless the statute expressly provides for retroactive application. The Court holds that the presumption of mine void ownership created by Code § 55-154.2 does not apply to deeds executed before July 1, 1981.

Tenancy by the Entirety

Evans v. Evans

290 Va. 176 (2015)

A husband's unilateral execution of a deed purporting to convey to his wife all of his interest in certain real property held by them as tenants by the entirety was sufficient to establish his intent to divest himself of his tenancy by the entirety ownership in that property in favor of a fee simple ownership thereof in the wife. The wife's later execution of a deed, trust, and will addressing her ownership of that real property as her separate property was clear evidence of her affirmative intent to accept the prior deed from her husband and, thereby, her consent to the dissolution of the tenancy by the entirety to create her fee simple ownership of that property. In a declaratory judgment proceeding, the circuit court erred in finding that the deed executed by the husband was not valid to vest fee simple title in his wife. It follows that the later deed by the wife was a valid transfer of her fee simple interest in the real property to her trust. The judgment of the circuit court is reversed and final judgment is entered confirming that the property is the property of the trust.

Torts

Collett v. Cordovana

290 Va. 139 (2015)

In a plaintiff landowner's action alleging that the defendant neighboring property owners were liable in trespass, nuisance, negligence per se and ordinary negligence for directing large quantities of water and pollutants onto plaintiff's property, the circuit court did not err in sustaining the defendants' demurrers. Under Virginia's modified common law rule, surface water is treated as a common enemy, and each landowner may fight it off as best he can, provided a landowner does so reasonably and in good faith and not wantonly, unnecessarily, or carelessly. Plaintiff failed to plead viable claims under this standard for trespass, nuisance, and negligence. Nor do the ordinances plaintiff relies upon contain a provision for a private right of action. She is not a member of the class of person these ordinances were designed to protect, and none of her assertions plead a public nuisance. Thus,

the complaint also failed to state a valid cause of action for negligence per se. The judgment is sustained.

State Corporation Commission

Utility Lines

BASF Corp. v. SCC.

289 Va. 375 (2015)

In consolidated appeals of right, James City County and environmental groups (Save the James Alliance Trust and James River Association) (collectively "JCC") and the BASF Corporation ("BASF"), which owns affected land, challenge orders of the State Corporation Commission ("Commission") issuing certificates of public convenience and necessity and related orders to an electric utility, Dominion Virginia Power ("Dominion"), for construction of electric transmission facilities, including a new overhead transmission line across the James River and on BASF's property, and a new associated switching station to be located in the county. Dominion sought through this project to increase electric transmission capacity, in order "to assure continued reliable electric service to its customers in the North Hampton Roads Area" and to comply with reliability standards of the North American Electric Reliability Corporation. The JCC objected to the project to the extent that "any overhead transmission lines would disrupt scenic vistas and historic landmarks" in the affected area. According to BASF, the project would interfere with its active remediation of a manufacturing site, which is subject to corrective action by the Environmental Protection Agency and Department of Environmental Quality; and proposed transmission lines bisecting BASF's property would impair future land development.

Addressing the applicable standards of review, the Court recognized that "'the Commission's decision is entitled to the respect due judgments of a tribunal informed by experience, and we will not disturb the Commission's analysis when it is based upon the application of correct principles of law.'" Applying a "highly deferential standard" to the evidentiary findings of the Commission and reviewing the matters of law de novo, the Court found no error in the Commission's interpretations of Code § 56-46.1(A) and (B). Subsection B provides: "As a condition to approval [of a no electrical transmission line of 138 kilovolts or more] the Commission shall determine that the line is needed and that the corridor or route the line is to follow will reasonably minimize adverse impact on the scenic assets, historic districts and environment of the area concerned." The Commission's determination of

"reasonableness" involves weighing a multitude of factors. Considering the record, it cannot be said that the Commission erred in concluding that the proposed route across the James River reasonably minimizes the adverse impacts of the transmission line on the affected area.

Commission approval of Dominion's project included construction of a switching station. Code § 15.2-2232 expressly provides that an approved "transmission line" is exempt from local zoning ordinances. However, under the plain language of Code § 56-46.1(F), a switching station is not a "transmission line." A manifest intention on the part of the General Assembly is required to exempt certain structures from local zoning ordinances. The Commission erred in ruling that the proposed switching station is exempt. The objecting corporation's appeal is affirmed, while the county and environmental group appellant's appeals are affirmed in part, reversed in part, and the case is remanded. The dissent agreed with the Commission's practical construction of the term "transmission line" as inclusive of facilities the proposed switching station, which is integral to the transmission of electricity, and would affirm the Commission's interpretation and application of Code § 56-46.1(F) exempting construction of the switching station from local zoning ordinances.

Tax Law

Permissible Deduction

Nielsen v. Board of Arlington County

289 Va. 79 (2015)

This appeal determines whether a payroll percentage calculation is a permissible methodology when determining the amount of certain receipts that may be deducted from taxable gross receipts under Code §58.1-3732(B)(2). During the 2007 tax year Nielsen's Arlington County office engaged in client relationship and customer support, statistical and data collection, data development, product fulfillment, and the solicitation of sales. Nielsen acquired a business license from Arlington County to engage in these practices. In 2010 the Commissioner of Revenue for Arlington County audited Nielsen and issued an additional tax assessment for the 2007 tax year. Nielsen took exception to this and first appealed the decision to the Commissioner of Revenue for Arlington County pursuant to §58.1-3703.1 (A)(5)(b). When the Commissioner rebuffed their appeal, Nielsen filed an appeal with the Virginia Tax Commissioner. The Virginia Tax Commissioner ruled that the Commissioner of Revenue for Arlington County used an improper methodology and instead permitted a payroll percentage

methodology to be used to calculate the deduction. Arlington County and the Commissioner of Revenue appealed the Virginia Tax Commissioner's opinion to the circuit court in order correct the Tax Commissioner's allegedly erroneous ruling. The circuit court rejected the Tax Commissioner's ruling as erroneous, contrary to law and precedent, and arbitrary and capricious in application.

The Supreme Court reversed and remanded the decision of the trial court. The Court first determined that in a matter of statutory interpretation a court does not defer to administrative agencies because interpreting a statute is always within the expertise of the courts. The Court then went on to draw a distinction between the terms "defer" and "weight" because in cases where the statute is ambiguous then a court may give greater weight to the agencies decision then would typically be granted. Weight is the degree of consideration a court will give to an agency's position in a court's independent assessment of an issue. Deference is the court's acquiescence to an agency's interpretation without an independent evaluation of the issue. The Court then went on to hold that the Code §58.1-3732 (B) is unambiguous so the agency's decision is not afforded great weight. The Court in interpreting the statute first established that the General Assembly created a general rule stating that the pool of taxable gross receipts originates from two sources. First, from all gross receipts that accrue at the licensed business within the licensing jurisdiction. Second, from the gross receipts that accrue outside of the jurisdiction when it can be attributed to activities that are initiated, directed, or controlled by the licensed definite place of business. The General Assembly also created an alternative when there is more then one definite place of business or it is impractical to determine which location is the definite place of business. Under this alternative the business's total gross receipts among all definite places of business must be apportioned according to each definite place of business's percentage of the company's total payroll. The main issue in this appeal is how to prove that certain gross receipts fall under the section providing for the deduction. The Court then reversed the decision of the trial court because the Tax Commissioner's ruling was not contrary to law because the statute did not call for a particular method of accounting for the deductions and it was not arbitrary and capricious because the payroll methodology was only employed when it was impossible to determine what business was done by which location. Finally, the Court held that the circuit court could not under current law remand the case to the Tax Commissioner, but must instead grant the relief it saw fit. The circuit court is entitled to determine what evidence it needs to make this ruling.

Torts

Defamation

Abilene Motor Express Co. v. Butler (combined with Egan below)

290 Va. 62 (2015)

In a suit by a former employee on claims for malicious prosecution and defamation, the circuit court erred in excluding evidence probative of plaintiff's future lost income, and that error may have affected the jury's determination of the compensatory damages claim against the individual supervisor defendant and the employer defendant. The judgment is reversed and the case is remanded for a new trial on compensatory damages against both defendants. The circuit court also erred in denying the employer's motion to strike the punitive damages claim against it. That portion of the circuit court's judgment is reversed and final judgment is entered in its favor pertaining to punitive damages claims against the employer. These holdings do not disturb the circuit court's affirmance of the jury's finding of the defendants' liability, or its entry of the punitive damages awards against the individual defendant; those issues are not subject to retrial on remand. The judgment is reversed and remanded in part, and final judgment is entered in part.

Egan v. Butler and Abilene

290 Va. 62 (2015)

In a suit by a former employee on claims for malicious prosecution and defamation, the circuit court erred in excluding evidence probative of plaintiff's future lost income, and that error may have affected the jury's determination of the compensatory damages claim against the individual supervisor defendant and the employer defendant. The judgment is reversed and the case is remanded for a new trial on compensatory damages against both defendants. The circuit court also erred in denying the employer's motion to strike the punitive damages claim against it. That portion of the circuit court's judgment is reversed and final judgment is entered in its favor pertaining to punitive damages claims against the employer. These holdings do not disturb the circuit court's affirmance of the jury's finding of the defendants' liability, or its entry of the punitive damages awards against the individual defendant; those issues are not subject to retrial on remand. The

judgment is reversed and remanded in part, and final judgment is entered in part.

Pendleton v. Newsome

290 Va. 162 (2015)

In a defamation action, the circuit court erred in sustaining a demurrer and dismissing the complaint without leave to amend. Whether a claim for defamation by inference, implication or insinuation, defamation actions may proceed in Virginia only upon statements which may actually defame a plaintiff, and in this case it is clear that any innuendo proceeding from the defendants' statements about the death of a child was aimed directly at the mother and at no other person. The statements were published, and were capable of conveying the defamatory innuendo that the plaintiff bore responsibility for her child's death. Assuming the truth of all the facts properly pled, and giving her the benefit of all facts implied and fairly and justly inferred from them, in the context set forth in the complaint the words ascribed to the defendants, given their plain meaning, are reasonably capable of conveying the defamatory innuendo of which the plaintiff complains. Because the circuit court erred in sustaining the demurrer, the judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

Schaecher v. Bouffault

290 Va. 83 (2015)

In a case by a landowner alleging that a neighbor, who also served as a member of the local planning commission, is liable for defamation and tortious interference with contract for sending numerous email communications relating to plaintiff's application for a special use permit to operate a dog kennel on her property, the circuit court did not err in sustaining a demurrer to several claims based on communications that did not contain a defamatory statement, as well as a demurrer regarding a defamation claim by a corporate plaintiff. With regard to an email charging that the individual plaintiff "is lying and manipulating facts," the basis for the writer's rationale was fully disclosed, and the two persons to which it was sent would have perceived the accusation as pure opinion of the writer based upon her subjective understanding of the underlying scenario and not upon an implied factual predicate of which they were unaware. Thus, in the

absence of a claim that the underlying facts stated in that email were themselves false and defamatory, the statement was purely the defendant's subjective analysis. It is protected by the First Amendment and not actionable. Dismissal of the corporate plaintiff's claim for tortious interference with contractual relations is affirmed for lack of any allegation that the contract at issue was terminated, or that it became more expensive or burdensome for that plaintiff. The judgment is affirmed.

Legal Malpractice

Desetti v. Chester

290 Va. 50 (2015)

In a legal malpractice action against criminal defense counsel, the plaintiff has the burden of pleading and proving that the pecuniary injury for which recovery is sought was proximately caused by the attorney's negligence and was not proximately caused by the malpractice plaintiff's own criminal actions, and here the circuit court did not err in sustaining the demurrers of the defendant attorney and law firm. Where it is alleged that an attorney's malpractice resulted in a more severe conviction or longer sentence than necessary, the complaint must allege that the pecuniary injuries alleged would not have been proximately caused by a less severe conviction or lesser sentence. In such cases, the analysis must consider whether the injuries pled were proximately caused by legal malpractice rather than the legal malpractice plaintiff's own criminal actions. In this case, the plaintiff failed to satisfy her burden of pleading that the pecuniary damages she seeks to recover were proximately caused by her attorney's legal malpractice, rather than being proximately caused by her criminal actions. The circuit court's judgment sustaining the defendants' demurrer is affirmed.

Wrongful Death

141706 In re: Woodley (10/29/2015)

October 2015

In a case involving the wrongful death of a child in which the jury made awards to the parents and siblings of the decedent, the circuit court erred in ordering that the awards to the minors be held by the clerk of court until they reach the age of majority, rejecting irrevocable trusts proposed by the parents, to be professionally managed under appointment of a

disinterested and experienced officer of a well-recognized institution to serve as trustee, under trust instruments that expressly preclude any interference by the parents, and providing for a gradual payout of the trust assets throughout the early years of their sons' adult lives. A trial court presiding over a wrongful death award has no authority to disregard the statutory command of Code § 8.01-54(C) directing that the award "shall be paid" to the personal representatives for distribution to the beneficiaries awarded recovery in the verdict. The judgment is reversed and final judgment is entered ordering the payment of the awards to the personal representatives.

Virginia Consumer Protection Act

Burden of Proof

Ballagh v. Fauber Enterprises

290 Va. 120 (2015)

In an action alleging violations of the Virginia Consumer Protection Act, Code §§59.1-196 to -207, the circuit court erred in giving jury instructions requiring that the plaintiff prove the required elements of her claims by clear and convincing evidence. A preponderance of the evidence standard applies to claims brought pursuant to the Act. The judgment is reversed and the case is remanded for further proceedings.

Virginia Freedom of Information Act

Exemptions

Fitzgerald v. Loudoun County Sheriff's Office.

289 Va. 499 (2015)

Fitzgerald petitioned for a mandamus order to compel production of a suicide note contained in a criminal investigative file, which had been opened by the Loudoun County Sheriff's Office investigating the unexpected and unattended death of a senior United States Air Force official. Certain types of criminal records not required to be produced pursuant to Code § 2.2-3706 (A)(1) may, but need not, be disclosed under subsection (A)(2). The fact that the requested document was obtained during a criminal investigation that did not lead to a criminal prosecution did not change the character of the

investigative file from criminal to non-criminal and is inconsequential for purposes of FOIA disclosure principles.

The suicide note similarly is not subject to disclosure pursuant to § 2.2-3706 (B), because it is not a "compilation of noncriminal occurrences" required to be maintained by sheriffs and police chiefs pursuant to Code § 15.2-1722, a non-FOIA records retention statute. Having reviewed de novo the issues of statutory interpretation and given deference to the circuit court's findings of fact, viewing the facts in the light most favorable to the prevailing party, the trial court's order denying a writ of mandamus to compel disclosure of the suicide note was affirmed.

Virginia Indoor Clean Air Act

Exemptions

Va. Dep't of Health v. Kepa, Inc.

289 Va. 131 (2015)

This appeal arises out of the Virginia Indoor Clean Air Act ("VICAA"), Code § 15.2-2820. She-Sha Café and Hookah Lounge ("She-Sha") is licensed as a "Food Establishment" by the Virginia Department of Health. She-Sha also allows its customers to smoke on-site through hookahs as well as selling tobacco and tobacco products and is also registered as a "Other Tobacco Product Retailer." The Virginia Department of Health conducted an investigation and charged She-Sha with two violations of the VICAA. The Court of Appeals construed the VICAA to exempt a retailer of tobacco and tobacco products from regulation even if it serves food.

The Supreme Court reversed the decision of the Court of Appeals and entered final judgment. The appeal considers two contradictory provisions of the VICAA, § 15.2-2821 which is a generally applicable provision stating that the chapter shall not be construed to regulate smoking in retail tobacco stores, tobacco warehouses, or tobacco manufacturing facilities and § 15.2-2825 which prohibits smoking in restaurants. The Court first construed § 15.2-2821 as establishing three tiers, retail stores, warehouses, and manufacturing facilities. Code § 15.2-2825(A)(3) only specifically exempts restaurants that are operating on premises owned by a tobacco manufacturing facility and therefore this signaled a legislative intent to treat these entities different. The Court also considered Code § 15.2-2825(A)(5), which will allow for a business like She-Sha as long as they provided a separate nonsmoking area. Finally, the Court determined that it did not matter what the primary business of She-Sha was in determining whether

they met an exemption from VICAA. It was for these reasons that the Supreme Court reversed the decision of the Court of Appeals and entered final judgment.

Virginia Worker's Compensation Act

Jurisdiction Limits

City of Danville v. Tate

289 Va. 1 (2015)

This appeal involves the City of Danville ("Danville") trying to recover money it paid to an employee, Mr. Tate, for sick leave pay while it was paying him a workers' compensation benefits. Mr. Tate was a firefighter employed by Danville who suffered a disabling heart attack. Following his heart attack, Mr. Tate chose to use his accrued sick leave to receive an extra year of credit towards his retirement. In addition to this benefit and prior to him retiring, Mr. Tate also filed a workers' compensation claim. Danville paid Mr. Tate six months of indemnity benefits in accordance with a Virginia Workers' Compensation Commission ("the Commission") award, but did not request a credit for the sick leave benefits it had paid him as well. Danville then later brought suit seeking to recover the sick leave pay it had paid Mr. Tate for the same period during which he was claiming indemnity benefits as well. The circuit court dismissed Danville's claims holding that the court did not have jurisdiction to hear the claims because the Commission had exclusive jurisdiction over credits.

The Supreme Court of Virginia affirmed the circuit court's ruling under the doctrine of right result for the wrong reason. The Court determined that the circuit court did have jurisdiction to hear the credit claims because the Virginia Workers' Compensation Act, which is the statute giving the Commission jurisdiction, was not triggered because an employer does not have to request a credit for sick leave time awarded to an employee while they are receiving indemnity benefits. As this was the case here the Commission did not have sole jurisdiction and the circuit court could have heard the claim. The Supreme Court affirms because under the relevant provisions a recovery can only be made over the employee's workers' compensation benefits and not their sick leave payments.

Wills, Trust and Estates

Lost Original Wills

Edmonds v. Edmonds

290 Va. 10 (2015)

In a widow's "Complaint to Establish Copies of the Will and Trust Where Originals Cannot Be Located," the trial court did not err when it ordered a photocopy of a will to be probated. The proponent of a missing will is not required to specifically prove what became of the missing will, but is required to prove, by clear and convincing evidence, that the testator did not destroy the will with the intention of revoking it. Here, it is clear from the transcript and the final order that the trial court applied the proper legal standard recognizing that, because the will was traced to decedent's possession but was not located at his death, the presumption of revocation applied, but that the presumption could be overcome by clear and convincing evidence that the will was not revoked by the defendant. The factual record here showed that decedent was unequivocal in all of his statements concerning his intent that his wife and daughter be the objects of his bounty, and that he specifically did not intend to leave anything to his son by a former marriage. There was also no evidence in the record of anything that might have changed the testator's mind. Viewed in the light most favorable to the plaintiff widow, the evidence was sufficient to support the trial court's finding that she had rebutted the presumption of revocation by clear and convincing evidence, and that the original will was not missing because the testator had purposefully destroyed it with the intention of revoking it. The judgment of the trial court admitting the photocopy of the 2002 will to probate is affirmed.

No-Contest Provisions

141533 Rafalko v. Georgiadis 11/05/2015

In a declaratory judgment suit by two sons seeking a determination that their conduct did not trigger a "no contest" clause in their father's trust instrument, alleging that the trustee's contrary decision was without authority, contrary to the purposes of the trust and an abuse of discretion, judicial review of the trustee's decision is allowed pursuant to Virginia jurisprudence and Code § 64.2-703(B)(2). There was sufficient evidence for

the court to find that the trustee's conclusion that the sons violated the no contest provision was not motivated by a desire to carry out the testator's intent, or to protect the beneficiaries, and was therefore done in bad faith. The record also supports a conclusion that letters sent by the sons did not interfere with the trustee's administration of the trust and should not have resulted in their disqualification as beneficiaries. The circuit court's judgment finding them and their descendants rightful beneficiaries of the trust is upheld because there was no challenge to the circuit court's primary holding that the no contest provision applied only to challenges directed against a later-amended document, while the sons' actions were directed only an earlier instrument; therefore there was no interference with or contest to the operative testamentary document. This alternative ground remains an independent ground for the circuit court's judgment. Accordingly, the circuit court's judgment awarding the sons attorneys' fees and costs is also affirmed.

Worker's Compensation

Benefits

140999 McKellar v. Northrop Grumman Shipbuilding (10/29/2015)

The Court of Appeals erred in ruling that retirement precluded an injured worker from receiving an award of temporary total disability benefits under Code § 65.2-500. The statute applies to totally disabled workers who have lost the capacity to earn wages, and an injured worker's status in the labor market is irrelevant where the incapacity is total. Thus, a retired worker whose work-related injury causes total incapacity need not produce evidence of a pre-injury intent to reenter the workforce. In denying an award of temporary total disability benefits in this case, both the Commission and the Court of Appeals failed to apply the plain language of Code § 65.2-500 and further erred by conflating the analyses for total disability and partial incapacity under the Virginia Worker's Compensation Act. When an employee is totally disabled and medically precluded from working, the appropriate test under Code § 65.2-500 focuses on the loss of earning capacity, not economic loss. In this case, the deputy commissioner correctly found that the claimant was totally disabled and that he lacked all earning capacity and, therefore, he is entitled to temporary total disability compensation. The judgment of the Court of Appeals is reversed and the case is remanded with direction that it be remanded to the Worker's

Compensation Commission with instructions to reinstate the award of compensation as determined by the Deputy Commissioner.