ANNUAL CASE LAW UPDATE

OVERVIEW OF VIRGINIA STATE CASES IN 2012 AND 2013

LGA Fall Conference
October 24-26, 2013
Norfolk Waterside Marriott Hotel
235 East Main Street
Norfolk, Virginia 23510

Presented by Stephen C. Piepgrass, Troutman Sanders, LLP*

* Special thanks to Anne Hampton Andrews and Amanda L. Soberick for their assistance with this presentation.

I. Civil Procedure

(1) *Paugh v. Henrico Area Mental Health & Dev. Servs.*, 286 Va. 85, 743 S.E.2d 277 (2013) (Powell, J.).

Summary:

The Henrico County Police Department received a call from Paugh's friend with information supporting her belief that Paugh was suicidal. A temporary detention order was issued by a Henrico County Magistrate on March 19, 2012, and the following day, a special justice entered an order of Involuntary Commitment pursuant to Va. Code § 37.2-817. Paugh appealed the order to the Henrico Circuit Court. Prior to the appeal, Paugh was released. Given his release, the Commonwealth conceded that the evidence at the time of the appeal was insufficient to have him admitted. The appeal to the circuit court was not moot because of the "collateral consequences" of his detention.

On a *de novo* appeal before the circuit court, he argued that the issue was whether he satisfied the statutory conditions for involuntary commitment on the date of his hearing, not the date of his admission. The circuit court held that the determination should be made as of March 19, 2012, the date the temporary detention order was issued, rather than the date of the circuit court hearing. Paugh appealed to the Supreme Court of Virginia, and the Court granted his petition for appeal.

On appeal, the Supreme Court of Virginia recognized that this case presented a matter of first impression. The precise question on appeal was: "[I]n a *de novo* appeal of a general district court or special justice's determination that a person meets the requirements for involuntary commitment, is the circuit court to evaluate the evidence as of (i) the date of admission, (ii) the date of the lower court's hearing, or (iii) the date of the circuit court hearing of the de novo appeal?" The Court concluded that Va. Code § 37.2-821(B) was clear and unambiguous. Va. Code § 37.2-821(B) expressly provides that: (1) appeals shall be heard *de novo*; and (2) an order extending the involuntary admission shall be entered if, at the time the appeal is heard, the criteria for § 37.2-817 are met. The Supreme Court of Virginia held that the circuit court erred in evaluated the evidence as of the date that Paugh was admitted. As a result, the Court reversed the judgment of the circuit court and dismissed the petition for involuntary commitment.

Takeaway:

If a person develops additional information after he has been involuntarily committed, that information must be considered by a reviewing court in determining whether the decision to involuntarily commit the individual should be sustained.

De novo means the Supreme Court was not reviewing the decision of the circuit court. In other words, the Supreme Court decided the case on a clean slate.

That this case made it to the Supreme Court may be symptomatic of an upward trend (at least anecdotally) in the use of mental health laws being used in cases that previously would have

been handled by reference to the criminal laws alone. This avenue has its pitfalls, as it can result in § 1983 litigation being brought against law enforcement and mental health personnel when the person involuntarily detained does not actually have a mental illness.

(2) *County of Albemarle v. Camirand*, 285 Va. 420, 738 S.E.2d 904 (2013) (Millette, J.).

Summary:

Thirteen retired employees of Albemarle County (the "Retirees") sought payment from the Albemarle County Board of Supervisors (the "Board") on a portion of their retirement benefits under the Albemarle County Voluntary Early Retirement Incentive Program ("VERIP"). The Board denied payment because of a miscalculation by a County employee prior to the Retirees retirement. In other words, the Retirees received a windfall due to the miscalculation.

The Retirees appealed the decision of the Board to the Albemarle Circuit Court. The County filed a demurrer, claiming that the Retirees failed to satisfy the requirements of Va. Code § 15.2-1246, which provides, in relevant part, that a notice of disallowance from a governing body "may be appealed by serving written notice on the clerk of the governing body and executing a bond to the county . . . ." The Retirees had not provided written notice of their appeal to the clerk of the Board and only provided the clerk with a single document entitled "Appeal Bond." Interestingly, the bond contained language stating the precise decision denying the Retirees' claim that was being appealed (the "Decision of June 2, 2010"), and stated that the Retirees "intended to appeal" that decision. The circuit court overruled the County's demurrer. A jury found in favor of the Retirees that they were owed certain payments under the VERIP. The circuit court entered judgment in favor of the Retirees, and the County appealed.

On appeal, the Supreme Court of Virginia concluded that the circuit court erred in finding that the Retirees satisfied the requirements of Va. Code § 15.2-1246. The Retirees argued that they substantially complied with the "written notice" requirements of this Code section. The Court held that substantial compliance was not enough; a party suing a sovereign had to strictly comply with all statutory requirements. The Court recognized that the plain language of the statute required "written notice" and not "implied notice," and that the filing of the Appeal Bond only provided the latter type of notice. The Supreme Court also held that the language in the bond was insufficient. The statements in the bond about the appeal were made in the "Whereas" clauses (the preamble) and had no legal effect.

Alternatively, the Retirees argued that Va. Code § 15.2-1246 permits two methods of perfecting an appeal due to the use of the word "*may*" in this section. The Court held that the use of the word "may" in Va. Code § 15.2-1246 was not intended to suggest an alternative method of perfecting an appeal but was used because the statute *allows* an individual who receives a notice of disallowance from a governing body to appeal that decision, but does not *require* the individual to appeal the adverse decision.

Takeaway:

Practitioners should be careful to dot all of their "i's" and cross all of their "t's" when complying with the procedural requirements for appealing decisions by local government bodies to circuit courts.

II. Legislative Immunity

(3) *Board of Supervisors of Fluvanna County v. Davenport & Company* LLC, 285 Va. 580, 742 S.E.2d 59 (2013) (Millette, J.).

Summary:

The Board of Supervisors of Fluvanna County (the "Board") sued Davenport & Company ("Davenport"), a private financial advisor, asserting various claims including breach of fiduciary duty, fraud, gross negligence and breach of contract. The Board alleged that it relied on Davenport's representations to purchase stand alone bonds instead of pool bonds, and in doing so, incurred approximately $18 million in excess interest payments on the stand alone bonds. Davenport filed a demurrer, and the circuit court sustained Davenport's demurrer, concluding that the separation of powers doctrine prevented the court from hearing the case because doing so would require the court to inquiry into the Board's motives.

On appeal, the Supreme Court of Virginia recognized that the issue related to Constitutional and common law legislative immunity raised in the case was a matter of first impression.

The Court first held that the Board members are not covered by either state or federal Constitutional immunity because: (1) Article IV, Section 9 of the Virginia Constitution explicitly applies only to the Virginia General Assembly; and (2) the Speech or Debate Clause of the United States Constitution does not apply to states. The Court next held that local legislators are afforded common-law legislative immunity when acting within the sphere of legitimate legislative activity. The Court said that this sphere "include[s], but is not limited to, delivering an opinion, uttering a speech, or haranguing in debate; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; and holding hearings and introducing material at Committee hearings." (Citation omitted.)

The Court concluded that the Board's motivations and discussions surrounding their decision to select stand alone bonds instead of pool bonds fell within the scope of common-law legislative immunity. Legislative immunity can be waived only by an explicit, unequivocal renunciation of the protection.

The Court then held that the Board had waived its legislative immunity because it: (1) declined to assert legislative immunity; (2) voluntarily filed a complaint in court that involved issues covered by legislative immunity; and (3) made an express waiver of immunity in

its complaint. As a result, the Court concluded that the circuit court erred in sustaining Davenport's demurrer and dismissed the Board's complaint.

Takeaway:

Although actions of local elected officials are not protected by constitutional legislative immunity, their actions are covered by common law legislative immunity if their actions fall within the sphere of legislative activity. The protections of common law legislative immunity can be waived only by explicit, unequivocal renunciation of the protection.

To assert and not waive the legislative privilege, local officials must:

- At the proper time and in an appropriate manner, claim the benefit of the privilege;
- Remain within the functions the privilege is designed to protect (by filing a lawsuit, the privilege may be waived); and
- Refrain from making assertions that necessarily waive the privilege (here, the language of the complaint required inquiry into the motivations of local officials).

III. Zoning and Vested Rights

(4) *Norfolk 102, LCC v. City of Norfolk,* 285 Va. 340, 738 S.E.2d 895 (2013) (Kinser, J.).

Summary:

The City of Norfolk brought an action about Bar Norfolk and Have a Nice Day Cafe (the "Defendants") seeking an injunction to prevent the Defendants from serving alcohol and hosting entertainment in their respective establishments. In a related matter, the Defendants sought review of a decision by the Board of Zoning Appeals ("BZA") ruling that the Defendants did not have a vested right to serve alcohol at their business location.

Operated since 1983, but Defendants opened for business in a new space in March 1999 within the then-existing meaning of "entertainment establishments" and obtained licenses for selling alcohol. In May 1999, the City of Norfolk (the "City") passed a blanket special-use exemption for establishments in the same complex as Defendants to operate as "entertainment establishments." In 2009, the City repealed the ordinance and required each individual ABC-licensed business to obtain a special exemption to operate as an entertainment establishment. Defendants submitted an application and attended the city council meeting whether the application was denied. When the Defendants nevertheless opened for business, the City filed suit.

In the trial court, the Defendants asserted that because they opened for business prior to the enactment of the blanket ordinance, they had vested rights under Va. Code § 15.2-2307. The Defendants also asserted that the City Council violated the Defendants' due process rights by failing to give proper notice prior to revoking the blanket exemption. The circuit court

consolidated the matters and granted the City's request for injunctive relief. The Supreme Court of Virginia granted the Defendants' petition for appeal.

The Supreme Court of Virginia held that the Defendants did not have a vested right to operate as an entertainment establishment or to serve alcohol. Specifically, Va. Code § 15.2-2307 provides for the vesting of a right to a permissible use of property. Selling of alcohol was not a permissible use of property without a special exception at the time the establishment opened. Further, Va. Code § 12.2-3311(c) did not give the Defendants a vested right because no city officer had ever made a determination that the Defendants' business could operate as an entertainment establishment and provide alcoholic beverages contrary to existing ordinances at the time the businesses opened. Thus, the Defendants did not acquire any vested rights for on-premises consumption without a special exemption from the city when the purported "right" was never permitted in the first place.

Further, on the matter related to the due process violation and notice of the revocation, the Court held that the Defendants waived any statutory notice to which they were entitled by their actual notice and active participation in the said City Council meeting.

Take away:

An establishment does not acquire a vested right when, without a special exemption from the locality, the purported "right" would never have been permitted in the first place (even if the "special" exemption in question was really a blanket exemption).

Additionally, when a party receives actual notice and actively participates in a meeting of a local governmental body at which the matter at issue is discussed, it waives its right to statutory notice of such meeting.

III. Standing / Justiciable Controversy

(5) *Friends of the Rappahannock v. Caroline County Board of Supervisors*, 286 Va. 38, 743 S.E.2d 132 (2013) (Millette, J.).

Summary:

The Caroline County Board of Supervisors (the "Board") issued a permit for the development of a sand and gravel mining operation on a plot of land bordering the Rappahannock River. A number of individual plaintiffs who owned land along the river near the operation, together with a non-profit organization called the "Friends of the Rappahannock," sued the Board challenging the issuance of the permit. The Board demurred to the complaint arguing that the plaintiffs lacked standing to bring the lawsuit. The circuit court agreed, dismissing the complaint for lack for standing, and the plaintiffs appealed to the Supreme Court of Virginia.

The Court first clarified that "any distinction between an 'aggrieved party' and 'justiciable interest' is a distinction without difference in declaratory judgment actions challenging land use decisions." This was a point of disagreement for the parties below, who apparently believed that the "aggrieved party" standard, drawn from Code § 15.2-2314 (dealing with appeals of a decision by a board of zoning appeals and applied to other land use decisions by local governing bodies), was more stringent than the "justiciable interest" standard cited in Code § 8.01-184 (dealing with declaratory judgments).

The Court next considered the standing question. The Court held that despite their stated proximity to the operation, the individual plaintiffs had not pled "facts sufficient to claim particularized harms to rights not shared by the general public." Conclusory allegations of potential harms were insufficient to carry their burden of presenting particularized harms.

Takeaway:

As the Court put it:

> Proximity alone is insufficient to plead a justiciable interest in a declaratory judgment action appealing a land use decision. To demonstrate standing a complaint must also allege sufficient facts showing harm to some personal or proprietary right different than that suffered by the public generally.

Incidentally, the Court did not address the question of associational or representational standing. The Court has, however, made it clear in other cases that no such standing is recognized in the Commonwealth unless specifically provided for by statute.

(6) *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supr'vrs*, 285 Va. 87, 737 S.E.2d 1 (2013) (Goodwyn, J.)

Summary:

A number of area fitness clubs brought declaratory judgment actions against the Albemarle County Board of Supervisors and the Charlottesville City Council, alleging that the defendants had entered into an unlawful contract with the local YMCA. The controversy grew out of the City's decision to bid out a lease of municipal property to construct and operate a nonprofit community recreation facility. The YMCA was the only bidder, and ended up leasing the property from the city for a term of 40 years at a rent of $1 per year. Under a use agreement, which was part of the lease, the County was required to contribute about $2 million for construction of the facility and to conduct a capital campaign for contributions from private donors to pay for construction. The plaintiffs sought a declaration that the County Board's and City Council's actions were void, claiming that they were arbitrary and capricious, exceeded the scope of their authority, and violated equal protection and due process. The circuit court granted the defendants' demurrers, and the plaintiffs appealed.

On appeal, the Supreme Court of Virginia held that the plaintiffs' claims did not present a justiciable controversy and, thus, the circuit court did not have authority to exercise jurisdiction

in the matter. The Court held that and the plaintiffs had no remedy independent of the Virginia Public Procurement Act (VPPA) and, assuming the agreement fell under the VPPA as an award of a public contracts, the plaintiffs had failed to allege that the VPPA offered a means of protesting an award of a public contract. Thus, the plaintiffs failed to allege a justiciable controversy. The Court also held that the plaintiffs had failed to make the YMCA a defendant and, when courts lack the power to bind all parties to the controversy, opinions are merely advisory and thus nonjusticiable. The Court also held that the plaintiffs could have submitted a bid as part of the bidding process, but did not do so. Having failed to participate in this process, the plaintiffs could not "use the declaratory judgment statute to create rights they do not otherwise have." Therefore, the court vacated the judgments of the circuit court and dismissed the case.

Mims, J. (dissenting). Justice Mims dissented, noting that the fitness clubs had alleged that the County Board and City Council did not, in fact, conduct a competitive bidding process, because they had determined that the VPPA did not apply. Mims pointed out that under the majority's decision, there may be no remedy for a party to challenge the award of a contract when the public body awarding the contract has determined that the VPPA does not apply.

Take away:

The fitness clubs could have challenged the decision by the County Board and the City Council by participating in the bidding process. Additionally, as Justice Kinser noted in a concurring opinion, the clubs might have been able to assert standing as taxpayers who would be responsible to pay a debt illegally incurred. The fitness clubs did not choose either of these options, so the Court found there was no case or controversy.

V. Virginia Freedom of Information Act

(7) *Harmon v. Ewing*, 285 Va. 335, 745 S.E.2d 415 (2013) (per curiam).

Summary:

The Supreme Court of Virginia addressed the constraints of the Virginia Freedom of Information Act ("FOIA") in *Harmon v. Ewing*. Ewing submitted a request under FOIA to the James City County Police Department (the "Department") for the following information:

> all criminal incident information from 2011 incidents in which Ryan Shelton [Ewing's arresting officer] was the investigating officer or was otherwise involved; the names of individuals, other than juveniles, arrested or charged by Shelton or other officers based on information supplied by Shelton in 2011; and records concerning Shelton kept pursuant to Va. Code § 15.2-1722 including any personnel records or conduct investigation records.

The Department responded by providing only Ewing's criminal incident report. The Department indicated that information about individuals arrested or charged by Shelton or based on information from Shelton did not exist as that this information was not compiled as a record.

Finally, the Department stated that any records kept concerning Shelton were withheld as part of the officer's personnel file.

Ewing petitioned for a writ of mandamus requiring production of all requested material. The circuit court found in favor of Ewing, and the Department appealed. The Supreme Court of Virginia ruled on each item of the request. The Court determined that identities of individuals arrested by the officer must be disclosed, but the individuals for whom Shelton was not the arresting officer but merely involved in the investigation fell into the category of criminal investigative files and are exempt from disclosure. The Court determined that the police officer's personnel files were properly withheld. Va. Code § 2.2-3705.1 (VFOIA provision exempting personnel records) did not conflict with Va. Code § 2.2-3706 (provision dealing with law enforcement records more generally).

Takeaway:

In responding to a FOIA request, police officer personnel records and information contained within are protected from disclosure pursuant to the general personnel records exemption. Police Departments must provide identities of individuals arrested by a specific officer when requested; however, identities of individuals for whom the officer was not designated the arresting or charging officer are protected from disclosure, as are criminal investigative files.

VI. Zoning, Proffers and Building Permit Fees

(8) *D.R. Horton, Inc. v. County of Warren Bd. Of Suprv'rs,* 285 Va. 467, 737 S.E.2d 886 (2013) (McClanahan, J.).

Summary:

D.R. Horton, Inc. ("Horton"), a subdivision developer, brought suit against the Warren County Board of Supervisors (the "Board") for restitution of building permit fees it had paid to the County, which were subsequently deemed unlawful. Following a series of negotiations and decisions about proffers and fees for building permits, the plaintiff paid the County the proffer fee of $12,000 per house in the development ($4,000 of which was a "hook up fee"). Horton challenged the $4,000 "hook up fee" portion of the payment and sent a letter to the Board indicating that he would pay the fee "only under protest and with full reservation of its rights and remedies." Horton then filed a declaratory judgment action asking the circuit court to declare that the County could not lawfully assess the $4,000. Despite deciding in Horton's favor that the fee was unlawful, the circuit court decided that Horton was barred from being reimbursed for the $4,000 fee under the common law "voluntary payment" doctrine.

On appeal, the Supreme Court of Virginia affirmed the circuit court's decision that Horton was barred from recovering the disputed fee by the voluntary payment doctrine. The common law voluntary payment doctrine provides as follows:

> Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, [i] without an immediate and urgent necessity therefor, or [ii] unless to release his person or property from detention, or [iii] to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment, files a written protest, does not make the payment involuntary.

Although Horton argued that he had met each of the exceptions to the doctrine, the Court disagreed and held that the voluntary payment doctrine applied and Horton had not carried the burden of demonstrating that the payment was involuntary. The Court opined that "simply protesting an unlawful demand does not render the payment demand involuntary under the voluntary payment doctrine."

Horton also argued that the County was being unjustly enriched by the payment. The Court held that because the County had a valid defense for retaining payment, in the form of the voluntary payment doctrine, there was no unjust enrichment. Consequently, the Court affirmed the circuit court's judgment in favor of the County.

Take Away:

The voluntary payment doctrine is a valid affirmative defense for a locality to assert in an action for reimbursement when fees have been paid voluntarily to the County, regardless of whether the fees are later deemed unlawful. (It is important to note that one exception to the doctrine is when a statute or ordinance provides a specific method for recovering fees that have been overpaid.) The doctrine also applies as a valid affirmative defense to a claim for unjust enrichment.

LGA members probably could have predicted this result. This same issue was raised in the same court – Warren County Circuit Court – a couple of years ago in the *Cracker Barrel v. Town of Front Royal* case involving utility connection fees. The Court applied the voluntary payment doctrine. The case was never appealed.

VII. Criminal Law

(9) *Amin v. County of Henrico,* 61 Va. App. 67, 733 S.E.2d 661 (2012) (Humphreys, J.)

Summary:

The appellant, Amin, was convicted of carrying a concealed weapon for which he had no permit. Amin was sleeping in his car outside a Wendy's restaurant. Police officers approached a parked car and asked for identification. Amin produced his driver's license and, when officers ran his license, they learned that Amin had a concealed carry permit that had been revoked. The officers then asked Amin if he had any weapons. After he responded affirmatively, the officers searched him and found a gun hidden in his waistband.

Amin appealed the case, raising two issues. First, he claimed that the local ordinance under which he was convicted, which was an omnibus ordinance criminalizing all sorts of conduct that would be criminal under the Code, did not incorporate Virginia Code § 18.2-308, the statute making it a crime to carry a concealed weapon without a permit. The Court did not consider this argument, holding that Amin had not preserved the issue by noting it in his assignments of error.

Second, Amin argued that the trial court should have granted a motion to suppress, because according to Amin, his encounter with police was not consensual and therefore the Fourth Amendment was violated when he was seized without a reasonable articulable suspicion or probable cause. The Court disagreed, holding that even though three police officers had pulled their cruisers into the parking lot behind him and even though, after Amin handed over his license, the officers held it until after the search, the encounter was "entirely consensual." The Court noted that the officers had not activated their emergency lights, had only asked non-accusatory questions, and Amin had enough room to pull out of his parking space if he chose to do so. The Court contrasted the situations to those in which a driver is blocked in completely, is informed that he or she is suspected of a crime and is given no choice to hand over his or her license.

Take Away:

Make sure assignments of error include everything the appellant wants to raise on appeal. If you are approached by police and are carrying contraband, pin them down on the question whether you are free to leave. At least then, you may have an argument to make when you appeal your conviction.

21360564v2