Civil Conspiracy:

An Analysis of Common Law and Statutory Business Conspiracy Claims Under Virginia Law

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Virginia recognizes two tort claims for civil conspiracy — one under the common law and the second under Virginia Code §§ 18.2-499–500. This article discusses these two causes of action which are often the subjects of business litigation.

Background

As early as 1888, in the case of *Crump v. Commonwealth*, the Supreme Court of Virginia recognized the viability of a claim for a conspiracy to injure a person in his trade or occupation.[1] In *Crump*, members of a union attempted to compel a mercantile business to become a union office and employ members of the union. When the mercantile business refused, the union members attempted to destroy its business through boycotts and threatening patrons. In upholding the criminal convictions of the union members, the Court recognized that "a conspiracy or combination to injure a person in his trade or occupation is indictable."[2]

In 1933, the Supreme Court of Virginia in *Werth v. Fire Companies' Adjustment Bureau*[3] acknowledged the ability for a plaintiff to sue at common law for civil conspiracy in noting that:

> A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of any unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or actionable conspiracy, are, in my opinion, the same, though to sustain an action special damages must be proved.

In 1964, the General Assembly enacted Virginia's business conspiracy statute. The statute is similar to an old Wisconsin statute, but its remedies are stricter.[4] Surprisingly, no legislative history exists for the statute.[5] Due to the year of its enactment and its similarity to statutes passed in other states around the same time, many refer to it as the "Anti-Sit-In" Act.[6]

The business conspiracy statute is found in sections 18.2-499 and 18.2-500 of the Virginia Code — the criminal chapter of the Virginia Code.[7] Under section 18.2-500, "[a]ny person who [is] injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499" may seek relief in a civil court. In turn, Virginia Code § 18.499 imposes liability on:

> Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act . . .

The statute specifically allows for the recovery of treble damages and "the costs of suit, including a reasonable fee to plaintiff's counsel."[8] The statute also provides for damages if a plaintiff proves an attempted business conspiracy.[9]

Stating a Claim for Common Law Conspiracy Under Virginia Law

Under Virginia law, the prima facie elements for common law conspiracy are:

1. A combination of two or more persons;
2. To accomplish, by some concerted action;
3. Some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means; and
4. Resultant damage caused by the defendant's acts committed in furtherance of the conspiracy.[10]

As the Supreme Court of Virginia recently commented: "The gist of the civil action of conspiracy is the damage caused by the acts committed in pursuance of the formed conspiracy and not the mere combination of two or more persons to accomplish an unlawful purpose or use an unlawful means."[11] A plaintiff cannot maintain a claim for common law conspiracy when the unlawful act underlying the claim does not allow for an award of damages.[12] Ordinarily, the issue of whether a conspiracy caused the alleged damage is one for the jury's decision.[13]

Stating a Claim for Statutory Business Conspiracy Under Virginia Law

Under Virginia law, a plaintiff must prove three elements to state a prima facie cause of action under Virginia's business conspiracy statute:

1. A combination of two or more persons;
2. For the purpose of willfully or maliciously inuring a plaintiff in reputation, trade, business, or profession; and
3. Resulting in damage to the plaintiff.[14]

To prove attempted business conspiracy, a plaintiff must prove that a person attempted to procure the participation or cooperation of another to enter into a business conspiracy[15] and resulting damage to the plaintiff.[16] Proof of a civil conspiracy must be shown by clear and convincing evidence.[17]

Proving Civil Conspiracy Claims

I. A Combination of Two or More Persons to Accomplish, by Some Concerted Action — Necessary Elements for Common Law and Statutory Business Conspiracy Claims

Both the common law and statute require a combination of two separate actors in a concerted action.[18] "Concerted action" reflects the statutory requirement that a plaintiff ultimately prove that someone "combined, associated, agreed, mutually undertook, or concerted together" with someone else in the conduct at issue.[19] A plaintiff must prove then, to be successful in his or her claim, that the defendants "combined together to effect a preconceived plan and unity of design and purpose."[20] After all, this "common design is the essence of the conspiracy."[21] A common law conspiracy claim only requires proof of a "tacit understanding"— an express agreement is not a necessary component of the claim.[22]

The "two or more persons" requirement, however, is not satisfied by proof that a principal conspired with one of its agents that acted within the scope of his agency.[23] Under such a circumstance, a conspiracy is a legal impossibility because a principal and an agent are not separate persons for purposes of the conspiracy statute. This rule is commonly referred to as the "intracorporate immunity" doctrine.[24] That doctrine holds that where the agents or employees of a corporation are acting within the scope of their employment, "then only one entity exists"— the corporation — and "[b]y definition, a single entity cannot conspire with itself."[25] To the contrary, an agent or employee acting outside the scope of his employment or agency can be liable for a civil conspiracy to injure a person's business.[26]

The question of what is within the scope of employment is not always clear, but "[b]oth the Fourth Circuit and the state courts of Virginia take a 'fairly broad view of the scope of employment.'"[27] "Generally, an act is within the scope of employment if it is 'naturally incident to [the master's] business . . . done while the servant was engaged upon the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.'"[28] An act may be prohibited by the employer, tortious, or even criminal to be done yet fall within the scope of employment. The test "is not whether the tortious act itself is a transaction within the ordinary course of business of the [employer], or within the scope of the [employee's] authority, but whether the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority."[29]

Further, employees are not the only agents who fall under the doctrine as both Virginia federal and state courts have applied the intracorporate immunity doctrine to corporate directors.[30] Federal courts do apply an exception to this rule where an officer or director has a stake or a purpose "independent of his interest in the corporation's success."[31] For instance, in *Greenville Publishing Company v. Daily Reflector, Inc.*,[32] the Fourth Circuit observed that an exception to the intracorporate immunity doctrine "may be justified when the officer has an independent personal stake in achieving the corporation's illegal objective."[33] A Virginia state court has found that this federal personal stake exception is different from the scope of employment test and explained that the personal stake exception "applies primarily in antitrust actions, such as where a corporate director with a personal stake in another business conspires to use the corporation to eliminate competitors for that personal business interest, thus, hijacking the corporation for his own personal, illegal, ends."[34] In fact, courts have held that the exception was meant to apply only to circumstances in which the "conspirator gained a direct personal benefit from the conspiracy, a benefit wholly separable from the more general and indirect corporate benefit always present under the circumstances surrounding virtually any alleged corporate conspiracy."[35] The Supreme Court of Virginia has not adopted the personal stake exception.[36]

In sum, Virginia courts consistently have held that a conspiracy cannot form in the following situations:

- A single entity cannot conspire with itself.[37]
- A corporation cannot conspire with its wholly-owned subsidiary.[38]
- Partners cannot conspire when they are acting within the scope of their partnership.[39]
- If the conspiracy involves the breach of a contract, one of the conspirators must be a third party to that contract.[40]

II. Some Criminal or Unlawful Purpose or Some Lawful Purpose by a Criminal or Unlawful Means — A Necessary Element for Civil Conspiracy Claims

The key and essential element for a common law conspiracy is the criminal or unlawful nature of the underlying conduct.[41] A complaint will be deficient unless sufficient facts alleging an unlawful act or unlawful purpose are present.[42] Typically, courts do not struggle with whether a plaintiff has made sufficient factual allegations of an unlawful act or unlawful purpose as such facts either are present in the complaint or not. **The Supreme Court of Virginia has held that allegations accusing employees of forming a combination to breach their contractual, employment, fiduciary, and other duties to their employer, including the supposed unlawful conversion by them of their employer's confidential and proprietary information, stated sufficient unlawful purposes.**[43] Virginia courts have held that the following instances are not unlawful acts or unlawful purposes for purposes of establishing this element:

- Truthful business competition;[44]
- The enticement of a competitor's employee to leave his employment so long as no means are used and the employee's employment is terminable at will;[45] and
- Mere breach of contract [46]

Where the unlawful act or unlawful purpose is the commission of a tort, the Supreme Court of Virginia recently emphasized that a plaintiff must establish that the underlying tort was committed to recover for a common law claim of civil conspiracy.[47] In other words, "where 'there is no actionable claim for the underlying alleged wrong, there can be no action for civil conspiracy based on that wrong.'"[48]

III. For the Purpose of Willfully or Maliciously Injuring a Plaintiff in Reputation, Trade, Business, or Profession— A Necessary Element for Business Conspiracy Claims

In a series of three cases involving the business conspiracy statute, the Supreme Court of Virginia has altered the malice standard applicable to business conspiracy claims from an actual malice standard to a legal malice standard.[49] Beginning in 1986 with the case of *Greenspan v. Osheroff,*[50] the Court adopted a "primary overriding purpose" standard, holding that:

> [W]hen the fact-finder is satisfied from the evidence that the defendant's primary and overriding purpose is to injure his victim in reputation, trade, business or profession, motivated by hatred, spite, or ill-will, the element of malice required by Code § 18.2-499 is established, notwithstanding any additional motives entertained by the defendant to benefit himself or persons other than the victim.

Six years later, in the case of *Tazewell Oil Co. v. United Virginia Bank*,[51] the Court appeared to move away from the primary and overriding purpose standard set forth in *Osheroff*. In a 4-3 decision, the Court held that sufficient evidence of a conspiracy existed because, among other things, the defendant's action "exhibited a willful disregard for Tazewell's rights."[52] Surprisingly, the majority opinion in *Tazewell* made no mention of the "primary overriding purpose" standard set forth in *Osheroff*.[53] In his dissenting opinion, Judge Whiting chided the majority for ignoring Osheroff, stating that the "primary and overriding purpose" test should have been applied to determine whether the defendants had acted with actual malice.[54]

Three years later, the Court once again addressed whether the conspiracy statute required proof of actual malice in *Commercial Business Systems, Inc. v. BellSouth Services, Inc.*[55] **Definitively rejecting that requirement, the Court concluded that only proof of legal malice was necessary, i.e., that defendant acted intentionally, purposely, and without lawful justification.**[56] Distinguishing *Osheroff*, the Court explained that its statement about a conspirator's "primary and overriding purpose" was made in the context where the conspirator had both legitimate and illegitimate motives for his actions and ruled that:[57]

> In any event, we do not think that, as a general proposition, the conspiracy statutes require proof that a conspirator's primary and overriding purpose is to injury another in his trade or business. The statutes do not so provide, and such a requirement would place an unreasonable burden on a plaintiff.[58]

Courts consistently have followed the legal malice standard set forth in *Commercial Business Systems*.[59] Further, in pleading a claim for business and common law conspiracy, keep in mind that a plaintiff must allege an unlawful act or unlawful purpose because "there can be no conspiracy to do an act the law allows."[60]

An additional requirement for this second element is proving that the injury was to "reputation, trade, business, or profession." The Supreme Court of Virginia has held that §§ 18.2-499 and 500 "apply to business and property interests, not to personal or employment interests."[61] Virginia federal courts have also made this business / personal distinction.[62]

IV. Resulting in Damage to the Plaintiff — A Necessary Element for Common Law and Statutory Business Conspiracy Claims

A. Actual, Treble and Punitive Damages

Plaintiff must prove that they sustained damages from the alleged interference in a conspiracy claim.[63] Business conspiracy claims have been a favorite claim for lawyers because § 18.2-500 allows for the recovery of treble damages. It provides that one who is "injured in his reputation, trade, business or profession by reason of a violation of [section] 18.2-499 may sue therefore and recover three-fold the damages by him sustained . . . and without limiting the generality of the term, 'damages' shall include loss of profits."[64] The Supreme Court of Virginia, in *Advanced Marine Enterprises, Inc. v. PRC, Inc.*,[65] also permitted the recovery of punitive damages and treble damages in the same action because "awards of punitive and treble damages

were based on separate claims involving different legal duties and injuries."[66] Importantly, Virginia courts consistently have held that damage to one's personal employment interest is not actionable under the statute.[67]

B. Injunctive Relief and Attorneys' Fees and Costs

In addition to damages, the business conspiracy statute also allows for permanent injunctive relief and injunctive relief during litigation to restrain one from continuing the conspiratorial acts.[68] Further, the conspiracy statute allows for "reasonable counsel fees to complainants' and defendants' counsel."[69] One court has held that a defendant is entitled to its attorneys' fees even when the case is dismissed pursuant to its demurrer.[70] Of course, a party seeking to recover their attorneys' fees must prove that the fees were reasonable and necessary.[71]

Pleading Civil Conspiracy Claims

Virginia state and federal courts appear to have differing standards for pleading common law and statutory business conspiracy claims. The Supreme Court of Virginia had held that "traditional notice pleading and demurrer standards apply in reviewing conspiracy claims."[72] To survive an attack by a dispositive motion, a plaintiff must allege the existence of the elements of the claim in more than "mere conclusory language."[73] A plaintiff must allege "concerted action, legal malice, and causally related injury . . . set[ting] forth core facts to support the claim."[74] Moreover, for statutory business conspiracy claims, "it is not enough for [a] plaintiff merely to track the language of the conspiracy statute without alleging the fact that the alleged co-conspirators did, in fact, agree to do something the statute forbids."[75] Ordinarily, a complaint should contain factual details of the time and place and the alleged effect of the conspiracy in order to withstand a demurrer or motion to dismiss.[76] From the federal court's perspective, a statutory business conspiracy requires a heightened pleading to prevent "every business dispute over unfair competition [from] becoming a business conspiracy claim.'"[77]

Defenses to a Civil Conspiracy Claim

I. Statute of Limitations

One point is clear: a conspiracy cause of action accrues when damage is first sustained by the plaintiff.[78] The length of the limitations period running from the accrual point is unclear, however, and the Supreme Court of Virginia has held that the "applicable statute of limitations is determined by the type of injury alleged." If the alleged cause of action is for personal injuries, it is subject to a two-year statute of limitations, but if the alleged cause of action is for injury to property, it is subject to a five-year limitations period.[79]

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II. Intracorporate Immunity Doctrine

The intracorporate immunity doctrine states that "there must two persons to comprise a conspiracy, and a corporation, like an individual, cannot conspire with itself."[80] Thus, a plaintiff alleging that a corporation conspired with its agents acting within the scope of their employment, fails to state a proper claim because the alleged conspiracy would involve only one entity.[81] The intracorporate immunity doctrine does not apply when the agent acts outside the scope of his or her agency relationship at the time of the wrongful conduct.[82]

Conclusion

Common law and statutory business conspiracy claims represent an important piece of the landscape of Virginia business litigation. Claims brought under Virginia's business conspiracy statute will remain a favorite among trial lawyers because, if successful, they allow for the recovery of treble damages and attorneys' fees. Nonetheless, attorneys should not blindly allege civil conspiracy claims, whether under the common law or Virginia Code §§ 18.2-499 and -500, for the mere hope of obtaining enhanced remedies. Instead, as with any claim, counsel should ensure that necessary facts exist to allege these claims. **Virginia lawyers, however, can expect to see many more cases brought under Virginia's business conspiracy statute because of the evolution of the malice standard from actual to legal as set forth in the Supreme Court of Virginia's decisions in Greenspan, Tazewell Oil Co. and Commercial Business Systems, Inc.** The ruling that a plaintiff must merely prove legal malice instead of actual has lowered the evidentiary burden of proving a claim under the statute, which together with the broader categories of potentially recoverable damages, likely will generate more civil conspiracy claims. ⚖

Endnotes

1 84 Va. 927, 934, 6 S.E. 620, 624 (1888) (affirming conviction for conspiracy to boycott a business).
2 *Id.*
3 160 Va. 845, 854, 171 S.E. 255, 258-59, cert. denied, 260 U.S. 659 (1933) (citations omitted).
4 Joseph E. Ulrich & Killis T. Howard, *Injuries to Business under the Virginia Conspiracy Statute: A Sleeping Giant*, 38 Wash. & Lee L. Rev. 377 (1981).
5 *Id.*
6 *Id.* at 378.
7 See generally, *Sexton, J. Scott, What's in a Word? The Tortured Life of the Virginia Conspiracy Statute* Va. Code §§ 18.2-499 and -500, VSB Litigation News (Spring 2004) (providing an excellent discussion of statutory business conspiracy claims in Virginia).
8 Va. Code § 18.2-500(A); see also *AV Auto., LLC v. Preske*, No. CL 2018-7749, 2019 Va. Cir. LEXIS 27 (Fairfax Feb. 11, 2019).
9 Va. Code § 18.2-499(B); see also *Waytec Elecs. Corp. v. Rohm & Haas Elec. Materials, LLC*, 459 F. Supp. 2d 480, 492 (W.D. Va. 2006) (concluding that "to prove attempted business conspiracy, a plaintiff must prove that a person attempted to procure participation or cooperation of another to enter into a business conspiracy"); see also *Schur v. Sprenkle,* 84 Va. Cir. 418 (Richmond Cty. 2012).
10 *Commercial Bus. Sys., Inc. v. BellSouth Servs., Inc.*, 249 Va. 39, 48, 453 S.E.2d 261, 267 (1995); *Glass v. Glass*, 228 Va. 39, 47, 321 S.E.2d 69, 74 (1984).
11 *Almy v. Grisham*, 273 Va. 68, 81, 639 S.E.2d 182, 189 (2007); *Commercial Bus. Sys.*, 249 Va. at 48, 453 S.E.2d at 267 (stating that "[t]he foundation of a civil action of conspiracy is the damage caused by the acts in furtherance of the conspiracy") (citations omitted).
12 See *Efessiou v. Efessiou*, 41 Va. Cir. 142, 146 (Fairfax 1996) (sustaining demurrer to conspiracy claim for alleged combination to affect a fraudulent conveyance); see also, *Fid. Nat'l Title Ins. Co. v. Wash. Settlement Grp., LLC*, 87 Va. Cir. 77 (Fairfax 2013) (same).
13 *Commercial Bus. Sys.*, 249 Va. at 48, 453 S.E.2d at 267 (citing *Middlesboro Coca-Cola v. Campbell*, 179 Va. 693, 702, 20 S.E.2d 479, 482 (1942)); see *Ameur v. Gates*, 950 F. Supp. 2d 905, 918 (E.D. Va. 2013) (questions regarding the scope of employment certification that fall under the Westfall Act are decided by the court and not the jury even if relevant state law would provide a jury trial on such issues).
14 *CaterCorp., Inc. v. Catering Concepts, Inc.,* 246 Va. 22, 28, 431 S.E.2d 277 (1993); see also *Allen Realty Corp. v. Holbert*, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984) ("To recover in an action for conspiracy to harm a business, the plaintiff must prove (1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business, and (2) resulting damage to plaintiff."); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 144 F. Supp. 2d 558, 601 (W.D. Va. 2001), aff'd sub nom. *Virginia Vermiculite Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002) ("The elements of a statutory conspiracy claim under the Virginia Conspiracy Act are: (1) concerted action (2) legal malice; and (3) causally-related injury."); accord *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 526 (4th Cir. 1997) ("CQC was liable for statutory conspiracy if clear and convincing evidence showed that: (1) CQC attempted to conspire with one or more of the other defendants to harm Adelphia; (2) CQC acted with legal malice towards Adelphia; and (3) the conspiratorial actions of CQC and one or more of the other defendants caused Adelphia to suffer damages."); see also *T.G. Slater & Son v. Donald P. & Patricia A. Brennan LLC,* 385 F.3d 836, 845 (4th Cir. 2004) ("A claim for statutory civil conspiracy under Virginia law must allege (1) two or more persons combined, associated, agreed, or mutually undertook together to (2) willfully and maliciously injure another in his reputation, trade, business, or profession."); *Virginia Model Jury Instructions – Civil*, No. 40-300 (2008).
15 Va. Code § 18.2-499(B).
16 *Id.* § 18.2-500.
17 *Multi-Channel TV Cable Co.*, 108 F.3d at 526; *Simmons v. Miller,* 261 Va. 561, 578, 544 S.E.2d 666, 677 (2001); see also *Dunlap v. Cottman Transmission Sys., LLC,* 287 Va. 207, 216, 754 S.E.2d 313, 318 (2014).
18 *Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC*, 261 F. Supp. 2d 483, 499 (E.D. Va. 2003) ("the plaintiff must first allege that the defendants combined together to effect a 'preconceived plan and unity of design and purpose, for the common design in the essence of the conspiracy'"); *Hecht v. Am. Bankers Ins. Co.*, No. 3:04cv00098, 2005 U.S. Dist. LEXIS 25883, at *15 (W.D. Va. Oct. 21, 2005) (concluding that "there is no evidence that Griffin suggested ABIC withdraw from the seminar, let alone agreed or concerted in that action. Indeed, it is clear from the facts that any conspiracy claim against Griffin himself would fail. Hence, there is no evidence that a conspiracy existed, and plaintiff's claim necessarily fails on this point").
19 *Schlegel v. Bank of America, N.A.*, 505 F. Supp. 2d 321, 325 (W.D. Va. 2007) (citing Va. Code § 18.2-499); see also *Bumgarner v. Fischer,* No. CL 18-4351, 2019 Va. Cir. LEXIS 3, at *3-4 (Richmond Cty. Jan. 17,

2019)

20 *Bay Tobacco*, 261 F. Supp. 2d at 499 (internal quotation marks omitted).

21 *Id.*

22 *Tysons Toyota v. Globe Life Ins. Co*., No. 93-1359, No. 93-1443, No. 93-1444, 1994 U.S. App. LEXIS 36692, at *15 (4th Cir. Dec. 29, 1994).

23 *Charles E. Brauer Co. v. Nationsbank*, 251 Va. 28, 30, 466 S.E.2d 382, 386-87 (1996) (finding that a bank and its agent were considered one person); *Heard Constr., Inc. v. Waterfront Marine Constr. Co.*, 91 Va. Cir. 4, 10 (Chesapeake Cty. 2015).

24 *Id*; see also *SecureInfo Corp. v. Telos Corp*., 387 F. Supp. 2d 593, 617 (E.D. Va. 2005) (granting defendant's demurrer on business conspiracy count because "an agent may not conspire with its principal under the intracorporate immunity doctrine").

25 E.g., *Fox v. Deese*, 234 Va. 412, 428, 362 S.E.2d 699, 708 (1987); see also *Wonderland I, LLC v. Peck,* 91 Va. Cir. 83, 85 (Norfolk 2015).

26 *Meeko Corp. v. Chesterfield Commerce Ctr.*, 14 Va. Cir. 149, 152-53 (Chesterfield Cnty. 1988); see also *Nathan v. Takeda Pharm. Am., Inc.*, 83 Va. Cir. 216, 224 (Fairfax 2011).

27 *United States v. Domestic Indus., Inc.*, 32 F. Supp. 2d 855, 861 (E.D. Va. 1999) (quoting *Gutierrez de Martinez v. United States Drug Enforcement Admin*., 111 F.3d 1148, 1156 (4th Cir. 1997), cert. denied, 522 U.S. 931 (1997)).

28 *Domestic Indus.,* 32 F. Supp. 2d at 861 (quoting *Jamison v. Wiley*, 14 F.3d 222, 237 (4th Cir. 1994)).

29 *Martin v. Cavalier Hotel Corp.* 48 F.3d 1343, 1351 (4th Cir. 1995) (quoting *Commercial Business Sys. v. Bellsouth Servs.*, 249 Va. 39, 45, 453 S.E.2d 261, 265 (1995)). In *Bellsouth Servs., the Supreme Court of Virginia* held that the evidence presented a jury issue on whether acts were within the scope of employment where the "conduct was outrageous and violative of [the] employer's rules" and the employee's "motive was personal," but the "willful and malicious acts were committed while [the employee] was performing his duties . . . and in the execution of the services for which he was employer." 249 Va. at 46, 453 S.E.2d at 266. See also *Doe v. United States,* 912 F. Supp. 193, 195 (E.D. Va. 1995) (denying summary judgment on the grounds that whether sex abuse by a psychiatrist during therapy sessions was within the scope of his employment was a jury issue); *Tomlin v. IBM, Corp.*, 84 Va. Cir. 280, 285 (*Fairfax* 2012) (whether or not act was in scope of employment is affirmed to be a jury issue).

30 See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769-70 (1984) (holding that, under the Sherman Act, a corporation cannot conspire with a wholly-owned subsidiary or with its officers and directors because they are not separate actors pursuing separate economic interests); *Williams v. 5300 Columbia Pike Corp.*, 891 F. Supp. 1169, 1175 (E.D. Va. 1995) (relying on *Copperweld* and Fourth Circuit cases to hold that a conspiracy could not exist between individual directors and between the directors and their corporation); B*owman v. State Bank of Keysville*, 229 Va. 534, 540-41, 331 S.E.2d 797, 801 (1985) (stating that, with respect to a tort action for conspiracy to induce the breach of a contract, where the defendants were a bank and a group of its directors, "a third party is necessary to create an actionable conspiracy" because "a corporation, like an individual, cannot conspire with itself"); *Softwise, Inc. v. Goodrich*, 63 Va. Cir. fwestfall576, 577-78 (Roanoke Cty. 2004) (stating the rule: "The corporation is an artificial entity that only acts through its agents, directors and employees. If an employee acts in the scope of her employment and, thus, acts as an agent of the corporation, then only a single entity exists: the corporation" and then applying it to sustain a demurrer because there were no allegations that the director had acted outside the scope of her employment).

31 E.g., *Williams*, 891 F. Supp. at 1175; *Foster v. Wintergreen Real Estate Co.,* 81 Va. Cir. 353, 360 (Nelson Cnty. 2010).

32 496 F.2d 391 (4th Cir. 1974).

33 *Id.* at 399.

34 *Softwise, Inc. v. Goodrich*, 63 Va. Cir. 576, 578 (Roanoke 2004).

35 *Selman v. Am. Sports Underwriters, Inc*., 697 F. Supp. 225, 239 (W.D. Va. 1988).

36 *Id.* at 578 & n.13; *Little Professor Book Co. v. Reston N. Point Village Ltd. P'shp*., 41 Va. Cir. 73, 79 (Fairfax Cnty. 1996); see also *Tomlin v. IBM*, Corp., 84 Va. Cir. 280, 289 (Fairfax 2012).

37 *Fox*, 234 Va. at 428, 362 S.E.2d at 708 ("If the defendants were acting within the scope of their employment and, therefore, were agents of the City, then only one entity exists—the City. By definition a single entity cannot conspire with itself."); *Perk v. Vector Res. Group,* 253 Va. 310, 485 S.E.2d 140 (1997) (ruling that demurrer properly sustained since defendants are not separate entities but rather agents of each other); see also see also *Wonderland I, LLC v. Peck*, 91 Va. Cir. 83, 85-86 (Norfolk 2015).

38 *Advanced Health-Care Servs. v. Radford Cmty. Hosp*., 910 F.2d 139, 145-46 (4th Cir. 1990) (Two wholly owned subsidiaries by the same parent corporation are legally incapable of conspiring with one another for purposes of antitrust law.).

39 *Saliba v. Exxon Corp.*, 865 F. Supp. 306, 313 (W.D. Va. 1994) (holding that "where the alleged co-conspirators are the two general partners in a partnership, acting within the scope of partnership affairs, only one entity exists—the Partnership"), aff'd, 52 F.3d 322 (4th Cir. 1995).

40 *Stauffer v. Fredericksburg Ramada, Inc.*, 411 F. Supp. 1136, 1139 (E.D. Va. 1976) (citing and discussing *Worrie v. Boze*, 198 Va. 533, 95 S.E.2d 192 (1956)); *Chaves v. Johnson,* 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985) (recognizing interference with a contract as a basis for civil liability under § 18.2-500); *Gulledge v. Dyncorp. Inc.*, 24 Va. Cir. 538, 540-41 (Fairfax Cnty. 1989) (noting that "[a]lthough a party to a contract may conspire with a third party to interfere with its own contract, a party to a contract acting alone cannot interfere with its own contract").

41 *Hechler Chevrolet v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985); see also *Kirchner v. McAninley,* No. CL-2010-5279, 2011 Va. Cir. LEXIS 27, at *11-12 (Fairfax Mar. 14, 2011).

42 *Id.*

43 *CaterCorp, Inc. v. Catering Concepts, Inc.,* 246 Va. 22, 26, 431 S.E.2d 277, 281 (1993); accord *Int'l Paper Co. v. Gilliam*, 63 Va. Cir. 485, 493 (Roanoke 2003); *Lance v. Wells Fargo Bank,* N.A., 99 Va. Cir. 115, 117 (Chesapeake Cty. 2018) (conversion can serve as the underlying tort for conspiracy in some instances).

44 *Hechler Chevrolet,* 230 Va. at 402, 337 S.E.2d at 748.

45 *Id.*

46 Station # 2, *LLC v. Lynch*, 280 Va. 166, 174 (2010) (mere breach of contract is not enough to constitute an unlawful act for the purposes of the conspiracy statute).

47 *Almy*, 273 Va. at 80-81, 639 S.E.2d at 188 (refusing to recognize a civil conspiracy claim based on an agreement to intentionally inflict emotional distress); *Citizens for Facquier County v. SPR Corp.*, 37 Va. Cir. 44, 51 (Facquier Cnty. 1995) (ruling that a violation of Va. Code § 8.01-271.1 cannot serve as the basis for a common law conspiracy claim).

48 *Firestone v. Wiley*, 485 F. Supp. 2d 694, 703 (E.D. Va. 2007) (quoting *Citizens for Facquier County*, 37 Va. Cir. at 50); *Glass*, 228 Va. at 54, 321 S.E.2d at 78 (holding that defendant's "actions being lawful, whether they acted in a spirit of actual malice, hostility, or ill will towards plaintiff is of no legal consequence").

49 Urbanski, Michael F., *Expanding the Reach of Virginia's Business Conspiracy Act, VSB Litigation News* at ** 4-6 (Winter 1998-99) ["Urbanski"].

50 232 Va. 388, 398-99, 351 S.E.2d 28, 35-36 (1986); see also *Conway v. Peace*, 28 Va. Cir. 226, 227 (Chesterfield Cnty. 1992) (granting motion to strike due, in part, to plaintiff's failure to establish that defendant's primary and overriding purpose was to injure plaintiff); *Gerald A. Schultz & Assoc., P.C. v. LaLonde*, 17 Va. Cir. 387, 389 (Richmond Cty. 1989) (applying the "primary and overriding purpose" standard).

51 243 Va. 94, 413 S.E.2d 611 (1992).

52 *Osheroff,* 243 Va. at 109, 413 S.E.2d at 620.

53 *Urbanski,* at *5.

54 *Osheroff,* 243 Va. at 116, 413 S.E.2d at 623.

55 249 Va. 39, 47, 453 S.E.2d 261, 266-67 (1995).

56 *Id.* at 47, 453 S.E.2d at 267.

57 *Id.*

58 *Id.*

59 See *Simmons v. Miller,* 261 Va. 561, 578, 544 S.E.2d 666, 677 (2001) (holding that the statute does not require the plaintiff to prove that "a conspirator's primary and overriding purpose is to injure another in his trade or business"); *Advanced Marine Enters., Inc. v. PRC, Inc.*, 256 Va. 106, 117, 501 S.E.2d 148, 154-55 (1998) (holding that "Code §§ 18.2-499 and -500 do not require a plaintiff to prove that "a conspirator's primary and overriding purpose is to injure another in his trade or business"); *Galaxy Computer Servs., Inc. v. Baker,* 325 B.R. 544, 555-56 (E.D. Va. 2005) (holding that statutes merely require proof of legal malice); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 526-27 (4th Cir. 1997) (holding that Adelphia cable only need to prove that Charlottesville Quality Cable Operating company acted with legal malice when it interfered with Adelphia's distribution rights); *Williams v. Dominion Tech. Partners,* 265 Va. 280, 292 (2003) (holding that employee did not breach his fiduciary duty of loyalty to his employer when he accepted employment with a competitor; and, thus did not act with legal malice); *Xtreme 4x4 Ctr., Inc .v. Howery*, 65 Va. Cir. 469, 475 (Roanoke Cty. 2004) (holding that alleged defamatory statements were merely matters of opinion, therefore, legal malice standard was not met); *Feddeman & Co. v. Langan Assoc.,* 260 Va. 35, 45 (2000) (where court held that "the failure of legal justification 'may include a breach of [one's] fiduciary duty or assisting someone to breach their fiduciary duty.'"); *Int'l Paper Co. v. Brooks,* 63 Va. Cir. 494, 496-97 (Roanoke Cty. 2003) (holding that 'for IPC's business conspiracy claims to survive, they must provide enough core facts to support the inference that Brooks acted with the requisite legal malice"); *Atlas Partners II v. Brumberg, Mackey & Wall, PLC,* No. 4:05cv0001, 2006 U.S. Dist. LEXIS 983, at *25 (W.D. Va. Jan. 6, 2006) (stating "that damaging plaintiffs may not have been their primary purpose is immaterial under Virginia law.").

60 *R & D 2001, L.L.C. v. Collins*, CL-2005-7021, 2006 Va. Cir. LEXIS 131, at *8-9 (Fairfax Cnty. 2006) (quoting *Hechler Chevrolet v. General Motors Corp*., 230 Va. 396, 402, 337 S.E.2d 744 (1985)); *Commercial Roofing & Sheet Metal Co. v. Gardner Eng's, Inc.,* 60 Va. Cir. 384, 386 (Fairfax Cnty. 2002) (sustaining defendant's demurrer to statutory conspiracy claim because plaintiff failed to allege an unlawful act or an unlawful purpose); Station #2, *LLC v. Lynch,* Case No. CL06-6106, 2008 Va. Cir. LEXIS 41, at *14 (Norfolk Cty. April 30, 2008) (sustaining demurrer to § 18.2-499 count as plaintiff did not make allegations suggesting that defendant used any illegal means); *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 215 (2014).

61 *Andrews v. Ring*, 266 Va. 311, 319, 585 S.E.2d 780, 784 (2003) (a case where a former school board member filed a civil conspiracy charge against the local prosecutor and county building inspector after the latter two sought criminal charges against him). The court did so based on the origin of those sections in the antitrust statutes and based on principles of statutory construction, which it applied to construe "reputation" in light of "trade, business or profession." Id.

62 See *Buschi v. Kirven*, 775 F.2d 1240, 1259 (4th Cir. 1985) (agreeing with the federal district courts, which "have consistently held that a right of action is 'afforded [under these statutes] only when malicious conduct is directed at one's business, not one's person,' and that the statute 'focuses upon conduct directed at property, i.e., one's business' and applies only to 'conspiracies resulting in business-related damages.'"); see also *Inman v. Klockner-Pentaplast of Am., Inc.*, 467 F. Supp. 2d 642, 654 (W.D. Va. 2006) (holding, in a former employee vs. former employer case, that "Plaintiff's professional reputation and stock ownership in his own company, however, are employment interests, not business interests. A plethora of cases reveal that employment interests are not covered by the Virginia civil conspiracy statutes."); *Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp. 2d 246, 267 (W.D. Va. 2001) (also a former employee vs. former employer case, stating that "In order to state a claim under Section 18.2-499, courts have held that the conspiracy must be one to injure the plaintiff 'in his business.'"); P*icture Lake Campground, Inc. v. Holiday Inns, Inc.*, 497 F. Supp. 858, 863-64 (E.D. Va. 1980) (stating that "[t]he purpose of this statutory action is to provide a remedy for wrongful conduct directed towards one's business, including injury to one's property interest.") (emphasis added); *Campbell v. Bd. of Supvrs*., 553 F. Supp. 644, 645 (E.D. Va. 1982) (limiting claims under Va. Code § 18.2-499 to conduct which limits a "business" and not personal employment interests); *Ward v. Connor*, 495 F. Supp. 434, 439 (E.D. Va. 1980) (ruling that a plaintiff cannot recover under a statutory business claim for harm to his personal reputation and not to any business interest), rev'd on other grounds, 657 F.2d 45 (4th Cir. 1981); *Moore v. Allied Chem. Corp.*, 480 F. Supp. 364, 375 (E.D. Va. 1979) (holding that "statutory coverage [under § 18.2-499] is afforded only when malicious conduct is directed at one's Business, not one's Person"); *Loria v. Regelson,* 39 Va. Cir. 536, 541 (Richmond Cty. 1996) (ruling that "[n]o conspiracy exists under § 18.2-499 of the Code when damage to professional reputation of an individual is alleged").

63 *Gallop v. Sharp,* 179 Va. 335, 19 S.E.2d 84 (1942); see also *Saks Fifth Avenue, Inc. v. James, Ltd.,* 272 Va. 177, 189-90, 630 S.E.2d (2006) (concluding that the plaintiff failed to carry its burden of proof that the defendants' wrongful conduct proximately caused plaintiff's alleged damages); see *Dunlap v. Cottman Transmission Sys., LLC,* 287 Va. 207, 215 (2014).

64 Va. Code § 18.2-500(A); L*ynnwood Tech Holdings LLC v. NR INT. LLC*, 2017 Va. Cir. LEXIS 52, *169 (where the court held that expected or projected profits are not a reasonable basis to estimate damages).

65 256 Va. 106, 501 S.E.2d 148 (1998).

66 *Id*. at 124, 501 S.E.2d at 159; see also *Wilkins v. Peninsula Motor Cars*, 266 Va. 558, 561 (2003) (ruling that court did not err in awarding plaintiff treble and punitive damages).

67 *Jordan v. Hudson*, 690 F. Supp. 502, 508 (E.D. Va. 1998), aff'd, 879 F.2d 98 (4th Cir. 1998) (ruling that postmaster's statutory business claim should be dismissed as a matter of law because he alleged his co-workers conspired to injure him in his trade and reputation, which caused him to be demoted. The section does not apply to employment interests); *Inman v. Klockner-Pentaplast of Am., Inc.,* 467 F. Supp. 2d 642, 654 (W.D. Va. 2006) (ruling that the employee failed to state a claim under the statute because his professional reputation and stock ownership in the company, were employment interests and not business interests); *Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp. 2d 246, 267-68 (W.D. Va. 2001) (holding that to the extent a plaintiff attempts to base his claim for conspiracy to his personal reputation or employment, as opposed to business interests, he fails to state a claim); *Orantes v. Pollo Ranchero, Inc.,* 70 Va. Cir. 277, 281 (Fairfax Cnty. 2006) (holding that statute applies only to "conspiracies resulting in business related damages"); *Almy v. Grisham*, 273 Va. 68, 81(2007) (no cause of action for conspiracy to intentionally inflict emotional distress); but see *Fitzgerald v. Farrell*, 63 Va. Cir. 1, 4 (Loudoun Cnty. 2003) (concluding that police officer's business conspiracy claim survives a demurrer where his claim that two homebuyers and homeowner conspired to have him indicted because they were unhappy with the work he did on their houses as a private contractor was an injury to his reputation or profession); *Hunter v. Simpson*, 93 Va. Cir. 366, 369 (Henrico Cnty. 2016)

68 Va. Code § 18.2-500(B).

69 Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure,* § 2.26 (4th ed. 2003).

70 *Dove v. Dayton Town Council*, 39 Va. Cir. 159, 169 (Rockingham Cnty. 1996).

71 *Chawla v. BurgerBusters, Inc.,* 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998).

72 *Virginia Civil Procedure* § 2.26 (4th ed. 2003) (quoting *Luckett v. Jennings*, 246 Va. 303, 307, 435 S.E.2d 400, 402 (stating that "the trial court is required to consider as true all material facts that are properly alleged, facts which are impliedly alleged, facts which may be fairly and justly inferred from the facts alleged").

73 *Gov't Employees Ins. Co. v. Google, Inc.,* 330 F. Supp. 2d 700, 706 (E.D. Va. 2004); see also Casola, Francis H., *Virginia Business Torts, Chapter 8, Conspiracy to Injure a Business* (VaCLE 2006); B*ay Tobacco, LLC v. Bell Quality Tobacco Prods.*, 261 F. Supp. 2d 483, 499 (E.D. Va. 2003) (noting that a claim for conspiracy asserted in mere conclusory language "is based on inferences that are not fairly or justly drawn from the facts alleged"); *Heard Constr., Inc. v. Waterfront Marine Constr. Co.*, 91 Va. Cir. 4, 10 (Chesapeake Cty. 2015).

74 *Kayes v. Keyser,* 72 Va. Cir. 549, 552 (Charlottesville Cty. 2007) (quoting *Atlantic Futon v. Tempur-Pedic, Inc.,* 67 Va. Cir. 269, 271 (Charlottesville Cty. 2005)); see also *M-Cam v. D'Agostino,* No. 3:05cv6, 2005 U.S. Dist. LEXIS 45289, at * 7-8 (W.D. Va. Sept. 1, 2005) (observing that a plaintiff's allegation that the defendants combined together to effect a "preconceived plan and unity of design and purpose, for the common design is the essence of the conspiracy").

75 *Kayes,* 72 Va. Cir. at 552 (quoting Johnson v. Kaugers, 14 Va. Cir. 172, 177 (Richmond Cty. 1988)); see also *Corinthian Mort. Corp. v. Choicepoint Precision Mkt, LLC*, No. 1:07cv832, 2008 U.S. Dist. LEXIS 28129, at * 18-19 (E.D. Va. April 4, 2008) (requiring a plaintiff asserting a statutory business conspiracy claim to allege that defendant intentionally and purposefully injured plaintiff's business).

76 *Kayes*, 72 Va. Cir. at 552; *Firestone v. Wiley,* 485 F. Supp. 2d 694, 703 (E.D. Va. 2007) (stating a claimant must allege "some details of time and place and the alleged effect of the conspiracy"); *Harper Hardware Co. v. Power Fasteners, Inc.*, Civil Action No. 3:05cv799, 2006 U.S. Dist. LEXIS 3821, at *15 (E.D. Va. Jan. 19, 2006) (finding a plaintiff's conclusory allegations that did not detail the facts relating to the "method of the alleged conspiracy or how it was carried out" to be insufficient).

77 *Schlegel*, 505 F. Supp. 2d at 325-26 (quoting *Gov't Employees. Ins. Co.*, 330 F. Supp. 2d at 706 (E.D. Va. 2004)); *First Hand Communications, LLC v. Schwalbach*, Civil Action No. 1:05cv1281, 2006 U.S. Dist. LEXIS 87844, at *15 (E.D. Va. 2006) (an allegation that the parties were "working together in a scheme" is not enough to survive a motion to dismiss); but see *Country Vintner, Inc. v. Louis Latour, Inc.,* 272 Va. 402, 414-15, 634 S.E.2d 745, 752 (2006) (rejecting defendant's argument that plaintiff was merely dressing up a violation of the Wine Franchise Act in reversing trial court's decision that the Act preempted common law or statutory business conspiracy claims).

78 See *Eshbaugh v. Amoco Oil Co.*, 234 Va. 74, 76-77, 360 S.E.2d 350, 351 (1987) (a cause of action for conspiracy under Code § 18.2-500 accrues when one is "injured in his . . . business."); see also *Gallop v. Sharp,* 179 Va. 335, 338, 19 S.E.2d 84, 86 (1942) (cause of action for conspiracy accrues when the acts committed in furtherance of the conspiracy result in damage); *Lance v. Wells Fargo Bank*, N.A., 99 Va. Cir. 115, 117 (Chesapeake Cty. 2018).

79 *Willard v. Moneta Bldg. Supply,* 262 Va. 473, 482, 551 S.E.2d 596, 600 (2001). *Dunlap v. Cottman Transmission Sys., LLC,* 287 Va. 207, 221-222 (2014)

80 *Bowman v. State Bank of Keysville*, 229 Va. 534, 541, 331 S.E.2d 797, 801 (1985); *Foster v. Wintergreen Real Estate Co.*, 81 Va. Cir. 353, 360-61 (Nelson Cnty. 2010).

81 *Simmons v. Miller*, 261 Va. 561, 578-79, 544 S.E.2d 666, 676-77 (2001); *Fortress Holdings II, LLC v. Patty,* 95 Va. Cir. 402, 408-09 (Norfolk 2017).

82 *Grayson Fin. Am., Inc. v. Arch Specialty Ins.* Co., No. 2:05cv461, 2006 U.S. Dist. LEXIS 7302, at *9-10 (E.D. Va. Feb. 6, 2006); *Phoenix Redevelopment Corp. v. Rodriguez*, 403 F. Supp. 2d 510, 517 (E.D. Va. 2005) (finding the intracorporate immunity doctrine inapplicable when the defendant was not an employee and agent at the time of the wrongful conduct).

Virtual Depositions *continued from page 21*

deponent's, but the deponent will never leave your monitor if the deponent is pinned.

The deposing attorney should incorporate the conference technician into the deposition plan. First, instruct the conference technician to pull up the exact part of the document that you would like to discuss. The deponent may look at the documents in hard copy or a separate window, but this method will help everyone locate the language under scrutiny. Second, make sure that the documents are clearly labeled and organized so the conference technician can find them. Finally, if needed, direct the conference technician to point to or highlight specific text or sections of the document. The conference technician can highlight or draw boxes around segments you would like to discuss.

Finally, make sure that the deponent testifies on the record about any individuals that are in the room with the deponent, the nature of any documents referenced, and any communications received during the deposition. In an in-person deposition, the attorneys normally have complete control over who is in the room, what documents are brought into the room, and any communications the deponent receives during the on-the-record portion of the deposition. In contrast, in a virtual deposition, another person might be in the room but out of camera view. Similarly, the deponent could be prompted by email or text message without the deposing attorney's knowledge.

This can be mitigated by requesting the deponent to declare on the record: who is in the room during the deposition; that the deponent did not receive any communications during the deposition; and to identify all documents examined in response to questions.

Conclusion

Virtual depositions can be a useful tool to keep discovery moving forward despite the numerous disruptions caused by COVID-19. Additionally, the techniques developed during COVID-19 social distancing may be useful time and cost-saving measures well after the pandemic subsides. Adapting this guide to your own practice can help mitigate difficulties and maximize the benefits of virtual depositions. ⚖