Business Litigation in Virginia: The Year-in-Review: 2009 (and Early 2010)

Virginia CLE and the Civil Litigation Section of the Virginia Bar Association

Third Advanced Business Litigation Institute

May 20, 2010

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I. ATTORNEY CONDUCT, MISCONDUCT & SANCTIONS

A. Rule 11

Lake Wright Hospitality, LLC v. Holiday Hospitality Franchising, Inc., 2009 U.S. Dist. LEXIS 73903 (E.D. Va. Aug. 20, 2009): In a paragraph-by-paragraph exegesis of the plaintiff's filings in a franchise fraud case, the district court imposed eleven separate instances of sanctions of $750 per paragraph for "misleading and baseless factual allegations." The court acknowledged that that fraud cases often must be predicated on - and pieced together from - limited circumstantial evidentiary bases because of sophisticated perpetrators. However, the court held that the "plaintiff did not merely employ circumstantial evidence to allege facts supported only by inference in its counterstatement. Instead, plaintiff made factual contentions that were not only utterly misleading and unsupported by record evidence but, in some cases, outright misrepresentations."

Columbia Venture LLC v. FEMA (In re Bees), 562 F.3d 284 (4th Cir. 2009): The attorney claimed that the district court erred in sanctioning her on the basis of her briefing and an oral statement made by her on behalf of the agency at a hearing. The appellate court concluded that the agency's declaration supporting its motion to dismiss contained a clerical mistake rather than a deliberate attempt to mislead, and that the agency's error in one portion of its brief in opposition to the landowner's motion to vacate was an inadvertent mistake, not a deliberate attempt to mislead or a failure to conduct a reasonable inquiry. Moreover, the appellate court buttressed its conclusion by stating that Rule 11 "severely limits a court's ability to sanction counsel for oral statements."

B. Attorney Diligence

Robinson v. Wix Filtration Corp. LLC, 2010 U.S. App. LEXIS 6298 (4th Cir. Mar. 26, 2010): A lawyer who represented the plaintiff on a wrongful termination claim in federal court was having computer troubles, and the lawyer did not get notice through the federal court's Case Management/Electronic Case Filing (CM/ECF) system that the defendant employer in the case had moved for summary judgment. The district court granted the unopposed motion, and then denied the lawyer's motion for relief from the summary judgment. The Fourth Circuit affirmed the entry of judgment because the plaintiff's lawyer "made an affirmative decision to remain in the dark" and was "willfully blind" as to whether the employer had filed a dispositive motion. Thus, his client justifiably paid the price.

C. Sanctions & Recusal

Chester v. County of Augusta, 2010 Va. Cir. LEXIS 13 (Augusta County 2010): After being sanctioned by the court, an attorney requested that the judge recuse himself from the case giving no other reason for the request except for the court's opinion imposing sanctions. The judge refused to recuse himself finding that do so would be shirking his judicial duties. The fact that a judge's order imposing sanctions is uncomplimentary to the attorney, which it almost always is, did not itself show a bias of the court.

Hutchinson v. Cornerstone Builder, VLW 009-8-063 (Loudoun County Cir. Ct. 2009): A Loudoun County Circuit Court did not sanction defendant for filing a motion to strike plaintiff's expert witness designation without first complying with Rule 4:15's requirements to confer and certify. Defendant clearly violated the rule before he filed his motion to strike plaintiff's expert witness designation. Attempting to confer after giving notice of a motion did not comply with the Rule's requirements. Nevertheless, the court held that the appropriate remedy was to move the court to deny the motion for failure to follow the Rule or to ask the court not to hear the motion until the Rule's requirements are satisfied.

D. Withdrawal

Reynolds v. Reliable Transmissions, Inc., 2009 U.S. Dist. LEXIS 86426 (E.D. Va. Sept. 21, 2009): Defendant's counsel sought to withdraw from representation because there was no communication from the defendant and because the defendant was not paying the attorney fees. The court denied the motion to withdraw because a corporation may only make appearances by its attorney, the attorney had made multiple appearances and the court could not relieve counsel of it duty to represent the corporation due to issues involving fees.

E. Discovery Sanctions

Montanile v. Botticelli, 2009 U.S. Dist. LEXIS 65140 (E.D. Va. July 28, 2009): The court barred the plaintiff from testifying in support of her lawsuit. The plaintiff gave woefully inadequate and misleading responses to interrogatories, including statements of "I don't recall" concerning specific question about verifiable facts like revenue of the plaintiff's company and prior arrests or prosecutions. The plaintiff then failed to review any pertinent documents prior to her initial deposition, which rendered the deposition almost useless and caused the magistrate to order the plaintiff to sit for another deposition. The court ultimately followed the magistrate's recommendation that the plaintiff be prohibited from testifying in her suit, but did not follow the magistrate's recommendation to strike the plaintiff's complaint. The court stated that preventing the plaintiff from testifying had the practical effect of ending her case on summary judgment, and the court also granted summary judgment to the defendant on his counterclaims.

II. ATTORNEYS' FEES AND COSTS

Perdue v. Kenny A., 2010 U.S. LEXIS 3481 (U.S. Apr. 21, 2010): 42 U.S.C. § 1988 authorizes courts to award a "reasonable" attorney's fee for prevailing parties in civil rights actions. Half of respondents' $14 million fee request was based on their calculation of the "lodestar," *i.e.,* the number of hours the attorneys and their employees worked multiplied by the hourly rates prevailing in the community. The other half represented a fee enhancement for "superior work and results," supported by affidavits claiming that the lodestar would be insufficient to induce lawyers of comparable skill and experience to litigate this case. Awarding fees of about $10.5 million, the district court found that the proposed hourly rates were "fair and reasonable," but that some of the entries on counsel's billing records were vague and that the hours claimed for many categories were excessive. The court therefore cut the lodestar to approximately $6 million, but enhanced that award by 75%, or an additional $ 4.5 million. The Eleventh Circuit affirmed in reliance on its precedent. The Supreme Court held that the calculation of an attorney's fee based on the lodestar may be increased due to superior performance, but only in rare and well-documented circumstances. In light of the inadequate factual record below on this issue, the Court remanded for consideration on this basis.

Martin v. Duncan, 277 Va. 204, 671 S.E.2d 151 (2009): The plaintiff filed a complaint against the defendant seeking recovery of damages that she sustained as a result of the defendant's alleged negligence. When the plaintiff's motion to strike the defendant's evidence on the issue of liability was denied, she took a nonsuit. Thereafter, the trial court assessed the plaintiff the jury costs associated with the case. The Supreme Court found that because jury costs were not costs authorized by Va. Code § 8.01-380(C) to be imposed on the plaintiff after she exercised her absolute right to a first nonsuit, the trial court could not assess such costs. Such a result had the effect of abridging the plaintiff's absolute right to a first nonsuit.

Capital Hospice v. Global One Lending, LLC, 2009 U.S. Dist. LEXIS 56673 (E.D. Va. July 1, 2009): In ruling on the plaintiff's fee request, the district court applied a fee table from a 2008 decision from the United States Court of Appeals for the Fourth Circuit. In so holding, the court set forth a table containing "reasonable" hourly billing rates for partners and associates.

Hinton v. Trans Union LLC, 1:09-cv-170, Dkt. No. 98 (E.D. Va. Sept 2, 2009): After prevailing on its motion to dismiss, the defendant moved for costs pursuant to Fed. R. Civ. P 54(d). The defendant sought costs for: (1) a $50.00 fee for *pro hac vice* admission of co-counsel; (2) costs incurred by the use of a private process server; (3) copying of documents and pleadings delivered to the court and plaintiff; and (4) cost resulting from production of discovery. The court denied the costs as to the *pro hac vice* fee and the cost of the private process server. The court noted that only the costs associated with having the U.S. Marshall complete service could be taxed. The court also granted costs relating to the copying of documents and production of discovery.

Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235 (4th Cir. 2009): Plaintiff filed suit against defendant for violations of the Fair Credit Reporting Act ("FCRA"). A jury found defendant violated the FCRA in numerous respects and awarded plaintiff $200,000 in actual damages. The court entered judgment in that amount and granted plaintiff attorney's fees. On appeal, defendant challenged the award of damages and attorney's fees. The appellate court found there was more than sufficient evidence connecting defendant's errors with plaintiff's damages to support the jury's actual damages award. On numerous occasions, plaintiff attempted to secure a home mortgage, only to be either denied outright or offered a loan on less advantageous terms than she might have received absent defendant's errors. Plaintiff also proffered sufficient evidence that she suffered emotional distress as a result of defendant's errors. However, the district court abused its discretion by awarding the hourly rates requested by plaintiff in the absence of satisfactory specific evidence of the prevailing market rates. Plaintiff did not meet her burden of establishing the prevailing market rates. There was an absence of evidence in the record to support rates of $425 and $305 per hour for charges by plaintiff's attorneys and the rates of nearby DC attorneys were not sufficient evidence of rates in Alexandria. Moreover, the court would not rely on the hourly rates attested to by one of the attorneys because his affidavit, standing alone, was not sufficient evidence of the prevailing market rates.

III. PROCEDURE, DISCOVERY, AND JURISDICTION

A. Class Actions

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 2010 U.S. LEXIS 2929 (U.S. Mar. 31, 2010): The assignee contended that a class of insureds could satisfy the prerequisites for a class action under Fed. R. Civ. P. 23, and that Rule 23 overrode the prohibition of class actions to recover penalties under New York state law in the federal action based on diversity of citizenship. The insurer argued that state law precluded the class action from being pursued, regardless of whether the putative class might otherwise be certifiable under Rule 23. The U.S. Supreme Court held that a class action was available in the federal diversity action to recover the statutory interest from the insured. Rule 23 explicitly provided a categorical rule that a class action could be maintained if the action satisfied the criteria of Rule 23. State law limiting the availability of the class action based on the relief sought did not apply under federal diversity jurisdiction.

Domonoske v. Bank of Am., N.A., 2010 U.S. Dist. LEXIS 7242 (W.D. Va. Jan. 27, 2010): During the class period, the bank processed 2.2 million transactions involving 3.5 million persons; its system was designed to provide notice as soon as reasonably practicable, and on average five days, although one named consumer received his notice a month late. In recommending Rule 23 certification of the class, the magistrate found that it met the numerosity and adequacy of representation requirements. Although there were insufficient facts to properly determine if the bank's notice was not reasonable for all class members, the magistrate found that there were common legal questions and that the named representatives' claims were typical. The court also found that the Rule 23(b)(b) predominance and superiority requirements were met. While the magistrate found that the settlement was fair, reasonable, and adequate under Rule 23(e), in that it was the result of arms-length negotiations and involved an adequate fund, the magistrate

recommended against approval of parts of the settlement. In particular, the magistrate found that injunctive relief was not available to private parties under the FCRA, and the proposed attorneys' fees and named representative fees were excessive under the circumstances.

B. Removal and Remand

Barbour v. Int'l Union, 594 F.3d 315 (4th Cir. 2010): For the first time, the Fourth Circuit explicitly adopted the "last-served defendant rule," and joined the Sixth, Eighth and Eleventh Circuits in holding that in cases involving multiple defendants, each defendant, once served with formal process, has 30 days to file a notice of removal pursuant to 28 U.S.C. § 1446(b) in which earlier-served defendants may join regardless of whether they have previously filed a notice of removal.

Smart v. SunTrust Bank, 2009 U.S. Dist. LEXIS 51688 (W.D. Va. June 18, 2009): Plaintiff who sued a Martinsville branch of SunTrust Bank in state court cannot defeat removal of her suit to federal court, as the branch bank is not a separate legal entity and SunTrust Bank, a Georgia corporation, must be substituted as defendant. Thus, the court granted defendant's motion to substitute defendant and denied plaintiff's motion to remand.

King v. Flinn & Dreffein Eng'g Co., 2009 U.S. Dist. LEXIS 109207 (W.D. Va. Nov. 23, 2009): Dicta by the Fourth Circuit had previously suggested that 28 U.S.C. § 1446(b) may be an "absolute bar to removal of cases in which jurisdiction is premised on 28 U.S.C. § 1332 more than 1 year after commencement of the action." Certain district courts within the Fourth Circuit, however, have rejected the "absolute bar" position. The court held that the one-year time limit for removal does not apply to cases that are initially removable when filed. Rather, it is only when the Plaintiff's case is not removable on the basis of the initial pleading that the one-year limit is imposed. Noting the uncertainty of this position, however, the court certified an interlocutory appeal on this point, which remains pending.

C. Venue and Forum Selection Clauses

W. Ref. Yorktown, Inc. v. BP Corp. N. Am., 618 F. Supp. 2d 513 (E.D. Va. 2009): After defendants and a buyer entered into an agreement for the purchase of the refinery, the buyer assigned its rights to a subsidiary. Defendants argued that a forum selection clause mandated that the courts in Cook County, Illinois were the exclusive jurisdictions for litigating the dispute. Notwithstanding the fact that its interpretation of the clause rendered certain sections of the clause "mere surplusage," the court determined that the contractually-designated jurisdictions were permissive, not exclusive, jurisdictions for actions arising out of the agreement.

Duncan v. Brannock, 2009 Va. Cir. LEXIS 157 (Richmond 2009): A Richmond Circuit Court ordered a suit against a law firm transferred from Richmond to Staunton Circuit Court, as plaintiff failed to demonstrate that defendants "regularly conduct substantial business activity" in Richmond pursuant to Va. Code § 8.01-262(3) by virtue of their law practice. In 2008, the year the action was filed, there were no appearances in Richmond Circuit Court, two in federal court, one in the Supreme Court of Virginia, three before administrative agencies, five depositions, one CLE and four association meetings in Richmond. The court held that the time for assessing venue for purposes of "conducting business" is the date the action is filed. The evidence did not support the contention that the defendants conducted business regularly in Richmond. The firm, and its members, came to Richmond only as needed. In contrast, "regularly" means doing business in a steady, methodical, uniform way.

United States v. Microsemi Corp., 2009 U.S. Dist. LEXIS 18700 (E.D. Va. Mar. 4, 2009): In this antitrust enforcement action brought by the U.S. Department of Justice, the court denied defendant's motion to dismiss for improper venue because prior to the challenged asset sale, defendant corporation had at least $6 million in revenue from sales of the relevant products to Virginia customers, making venue proper in

the Eastern District under Section 12 of the Clayton Act; however, the court granted the motion to transfer venue to the Central District of California, as the majority of customers were in California and the largest cluster of non-party witnesses was in California.

Sandy Spring Bank v. Advanced Sys. Servs., Corp., 2009 U.S. Dist. LEXIS 27288 (E.D. Va. Mar. 30, 2009): The court held that the forum selection clause was permissive because it did not contain any language mandating jurisdiction in Maryland. Mandatory forum selection clauses require that litigation be in a designated forum. In the instant case, the language in the "Consent to Jurisdiction" clause read as follows: "Borrower irrevocably submits to the Jurisdiction of any state or federal court sitting in the State of Maryland." This forum selection clause was not mandatory because it did not contain obligatory language suggesting that non-Maryland courts were divested of jurisdiction. The forum selection clause was rather characterized as a "hybrid" clause, as jurisdiction became mandatory upon the defendants if they were sued in Maryland.

Nahigian v. Juno-Louduon, LLC, 661 F. Supp. 2d 563 (E.D. Va. 2009): The parties entered into a real estate deal which eventually fell apart. First, the court found that complete diversity of the parties existed and that it had subject matter jurisdiction over the case under 28 U.S.C.S. § 1332(a). Next, the buyers argued that the venue selection clause in the agreement identified the circuit court as the sole appropriate venue for disputes arising between the parties to the agreement. The court held that the forum selection clause was not ambiguous and was plainly geographic, designating "Loudoun County, Virginia." However, the agreement identified only a geographical limitation, not a sovereign limitation. Thus, jurisdiction in the federal court embracing Loudoun County was proper.

In Re: Chinese Drywall Cases, 2010 Va. Cir. LEXIS 14 (City of Norfolk 2010): The underlying action involved defective Chinese drywall that was imported and installed by the defendant companies. Upon review, the court noted that there was a multi-district litigation regarding the drywall in which plaintiff's counsel represented the members of the class. While it was true that some of the houses, builders and developers were in the other venues, the court found that the defendant companies maintained offices and conducted substantial business in the City of Norfolk. Therefore, venue for all cases was proper in Norfolk.

ePlus, Inc. v. Lawson Software, Inc., 2010 U.S. Dist. LEXIS 31322 (E.D. Va. Mar. 31, 2010): The court granted a motion to transfer the case from Norfolk to Richmond because of the substantial experience by Judge Spencer with the underlying patents at issue. The court found that significant judicial resources would be conserved by transferring the case and granted the defendants motion to transfer. The court found unconvincing the defendant's concern with inconsistent results by having different courts construe the patents. However, the interest of judicial economy was nonetheless sufficient to warrant the transfer.

Unistaff, Inc. v. Koosharem Corp., 667 F. Supp. 2d 616 (E.D. Va. 2009): The court found that a forum selection clause stating that venue "shall be in the courts of the Commonwealth of Virginia" required the suit to be filed in Virginia state court as a mandatory forum selection. The court found that it was unnecessary to have specific words such as "exclusive" or "only" but the court looked to whether the clause specified a particular or singular forum. The federal district court therefore granted the defendant's motion to dismiss.

D. Default and Default Judgment

Tara Bahadur Malla v. Hayma Rajamani, 2009 U.S. Dist. LEXIS 28082 (E.D. Va. Apr. 1, 2009): Although defendant employer filed its answer to plaintiffs' suit seeking overtime pay under the Fair Labor Standards one day late, the court denied plaintiffs' motion to strike defendant's answer and pay attorney's fees in light of the fact that the tardiness of the answer did not prejudice the plaintiff.

Modular Wood Sys., Inc. v. World Trade Group, L.L.P., 2009 Va. Cir. LEXIS 103 (Henrico County Feb. 23, 2009): The debtor filed papers with the clerk of court. The papers were signed by its chief executive officer. The creditor moved to strike the papers on the ground that the CEO was not a member of the Virginia bar. The circuit court entered a default judgment. The debtor argued that the default judgment was void because it appeared *pro se* within the time allowed for responsive pleading and was not in default. The circuit court held that the papers had no legal effect, and the time had expired for the debtor to file a responsive pleading. The papers were not a responsive pleading because the debtor, a business organization, could not file a pleading *pro se*. The debtor had to be represented by a lawyer authorized to practice law in Virginia pursuant to Va. Sup. Ct. R. 1A:4. It could not be relieved of the default under Va. Code § 8.01-428(D). The defendant knew it had been sued, and it simply did not comply with the law.
Afsahi v. Branch Bank & Trust, 2009 Va. Cir. LEXIS 46 (Fairfax County Aug. 3, 2009): The plaintiff and defendant bank reached a settlement without any admission of liability. The court said that the bank could not be granted a motion for default judgment on the bank's third-party complaint without a finding of liability against the third-party plaintiff. Because the settlement included no admission of liability by the bank, its motion for a default judgment was not granted.

Vick v. Wong, 263 F.R.D. 325 (E.D. Va. 2009): Plaintiff filed a 15-count complaint against an individual and a limited liability company, alleging violations of various federal securities laws, common law fraud, breach of contract, breach of fiduciary duty, conversion, and negligence. The plaintiff then filed a motion for entry of default judgment, and the individual defendant moved to set aside entry of default, and at the same time filed an affidavit disputing several of plaintiff's claims. The individual defendant, in a letter attached to the affidavit, asked that her affidavit be considered an opposition brief to plaintiff's motion and that the entry of default be "vacated." The court treated the affidavit as a motion to set aside default and as an opposition brief to plaintiff's motion for entry of default judgment as to the individual defendant. Pursuant to Fed. R. Civ. P. 55(c), after liberally construing the "good cause" factors in the individual defendant's favor, and resolving all doubts in favor of hearing the case on the merits, the court determined that the entry of default against the individual defendant should be set aside so that the case could be heard on the merits. Three factors weighed slightly in favor of setting aside default: the individual defendant had been somewhat prompt when responding, alternative sanctions were available, though not effective, and plaintiff had not asserted any substantive prejudice. Most importantly, the fourth factor weighed heavily in favor of setting aside default, as the individual had proffered multiple potentially meritorious defenses. The court ruled that the default as to the LLC should remain in place, but plaintiff's motion for entry of default judgment as to the LLC should be stayed pending resolution of the suit against the individual defendant on the merits.

E. Statute of Limitations

Clark v. Britt, 2009 Va. Cir. LEXIS 72 (Fairfax County Apr. 24, 2009): Virginia required that a party file a wrongful death claim and civil conspiracy claim within two years after the cause of action accrued. The court found that: (1) the amended complaint alleged the same set of operative facts, including a claimed struggle, that gave rise to the differing rights of action for wrongful death and civil conspiracy asserted; (2) it was the greater specificity of facts gained from subsequent discovery that allowed the administrator to assert a wrongful death claim based on the alleged assault, and thus, the administrator was reasonably diligent in determining what claims she might have and asserting the additional claim upon the discovery of more information; and (3) the court was not convinced that the timeliness of the amended motion for judgment substantially prejudiced the alleged co-conspirator. Therefore, the administrator satisfied all of the requirements of Va. Code § 8.01-6.1, amending her complaint such that the rights of action filed in 2007 related back to the cause of action she initially asserted in her 2005 motion for judgment.

Ferguson v. Ingoldsby, 2009 U.S. Dist. LEXIS 104221 (E.D. Va. Nov. 5, 2009): In 1999, the plaintiff loaned the defendant $100,000. In 2006, the parties had one of two key written exchanges. First, the plaintiff emailed defendant about a plan for loan repayment, writing: "The plan for the loan sounds

reasonable to us. We look forward to re-visiting this in mid-January 2007." The defendant responded: "Thanks for your email. You will hear from me in early January." In February 2008, after another year with no payment, plaintiff emailed defendant stating: "It is now time to take this loan seriously and make arrangement to re-pay us, with interest, immediately." Defendant responded the next day, and, after a brief exchange, wrote: "We cannot have a repayment plan if we do not talk. Give me a time on Tuesday and we will get a firm repayment plan in place." The court held that this last exchange reset the applicable statute of limitations under Va. Code § 8.01-229 and thereby permitted the plaintiff to proceed with his breach of contract claim.

F. Attorney-Client Privilege and Work Product

Billings v. Stonewall Jackson Hosp., 635 F. Supp. 2d 442 (W.D. Va. 2009): There was no dispute that the communications between the attorney and the human relations consultant were made in confidence and for the purpose of seeking legal advice. Thus, the attorney-client privilege applied. The attorney's letter to the EEOC did not work a waiver of the privilege, as it never mentioned the human relations consultant nor any conversations he had with her prior to the employee's termination (rather, it was a letter written by the lawyer to the EEOC arguing his client's position). Also, the employer's responses to the employee's first set of interrogatories worked no waiver of the privilege, as the responses in no way discussed or identified anything related to the attorney's advice to the human relations consultant or the human relations consultant's communications to the attorney. Further, no exception to the attorney-client privilege applied. Defendant had not asserted advice of counsel as a defense, and there was no basis for the application of the crime-fraud exception.

Schwarz & Schwarz of Va. L.L.C. v. Certain Underwriters, 2009 U.S. Dist. LEXIS 33019 (W.D. Va. Apr. 16, 2009): The substantive dispute between the parties centered on whether the fact that plaintiff's sprinkler system was not operational on the date of the fire invalidated coverage under the insurance policy's "Protective Safeguards Endorsement." For purposes of applying work-product protection, the court found that the date that litigation became "substantial and imminent" was the date that the insurer officially disclaimed coverage. For all documents created prior to this date, work product protection was not a valid ground upon which the insurer could withhold documents.

Sanford v. Virginia, 2009 U.S. Dist. LEXIS 83979 (E.D. Va. Sept. 14, 2009): Decedent was physically and mentally disabled and died while at Medical College of Virginia following surgery. The administrator alleged that various police officers contributed to the decedent's demise by the manner in which they subdued him while he was under medication and several medical care providers allegedly mishandled the decedent's medical care, also contributing to his death. The single issue to be decided with respect to the documents at issue was whether the administrator showed substantial need, and was thus entitled to discover the documents otherwise protected by work product privilege. The court noted that discovery of fact work product is permitted, but a party seeking disclosure must demonstrate that its need is truly substantial, and that there is no reasonable substitute for the documents they seek. The court concluded that for many of the documents the administrator demonstrated that he needed the information that the interviews were likely to contain, and made efforts to obtain the information in other ways, but that no adequate substitute for the documents existed. Specifically identified were several deponents' memory failures and testimonial inconsistencies. Thus, the administrator made an individualized case for substantial need for all but two of the requested documents and the court granted the plaintiff's motion.

Mohawk Indus. v. Carpenter, 130 S. Ct. 599 (2009): Respondent former shift supervisor filed suit alleging that the employer had terminated him in violation of 42 U.S.C. § 1985(2) and various Georgia laws. According to the complaint, his termination came after he informed a member of the employer's human resources department in an e-mail that the company was employing undocumented immigrants. At the time, unbeknownst to the supervisor, the employer stood accused in a pending class-action lawsuit of conspiring to drive down the wages of its legal employees by knowingly hiring undocumented workers. The supervisor refused to recant his statement and was fired. The supervisor filed a motion to compel

the employer to produce information concerning his meeting with retained counsel and the employer's termination decision. The employer maintained that the requested information was protected by the attorney-client privilege, but the district court ordered the information disclosed. Seeking appellate review via the collateral order doctrine, 28 U.S.C. § 1292(b), petitioner sought to prevent the disclosure of the arguably privileged communications. Thus, the question was whether "deferring review until final judgment so imperils the [party's] interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." The Court's majority observed that other "rights central to our adversarial system" cannot be vindicated on appeal until after a final judgment, such as the appeal of an order disqualifying one's counsel in either a civil or a criminal case. However, the disclosure of privileged information, the Court concluded, can be remedied on appeal in the same way that other erroneous evidentiary rulings can be corrected. And, whether an appeal is interlocutory or post-judgment, orders requiring the disclosure of information — whether because a party waived the privilege or the privilege never actually applied — are reviewed with a great deal of deference to the trial court. It is that fact, the Court held, and not the timing of a possible appeal, for which parties must account in their dealings with counsel.

G. Service of Process

Robic v. Nicola of London, Inc., 78 Va. Cir. 123 (Fairfax County 2009): Plaintiff filed suit against defendant and defendant's former employer. At some point after the incident that was the subject of the suit, defendant changed her last name. When plaintiff could not locate defendant's current address, she served defendant via an affidavit for service of process on the Secretary of the Commonwealth. In her motion to quash, defendant argued that plaintiff did not exercise due diligence in attempting to locate her. The court denied the motion, finding that plaintiff exercised due diligence in attempting to locate defendant. The record showed that plaintiff spoke with another employee at defendant's former place of employment but was unable to learn defendant's current address, that she unsuccessfully searched for defendant in New York via the Internet, that she attempted to locate a work license in both Virginia and New York under defendant's former name, and that she consulted an independent investigation company who was unable to locate defendant. Given the information available to plaintiff, she properly provided the Secretary of the Commonwealth with the business address of the former employer, the same address where she had former contact with defendant.

H. Mistrial

Robert M. Seh Co. v. O'Donnell, 277 Va. 599, 675 S.E.2d 202 (2009): The owners had contracted with the company to install a certain brand of swimming pool. The owners brought a lawsuit after the pool was not completed to their satisfaction. The owners claimed that the pool was not installed to industry standards and that the company installed a second brand of liner rather than the first brand of liner as required by the contract and represented by the company. After opening statements, a juror, who had stated during voir dire that he had helped his father-in-law with swimming pool installations, made a statement out of the jury's presence that he had heard his father-in-law mention that the second brand of liner was inferior. Based on the juror's apparent bias, the company made a motion for mistrial, which was denied. On appeal, the court reversed. The Supreme Court held that the circuit court abused its discretion in denying the company's motion for mistrial because the juror stated that he developed a bias. The Supreme Court held that "once a jury has been empanelled and the impartiality of a juror is subsequently brought into question, it is an abuse of discretion to deny a motion for a mistrial if the proponent of the motion establishes the probability of prejudice such that the fairness of the trial is subject to question."

I. Summary Judgment in Virginia State Court

Fultz v. Delhaize Am., Inc., 278 Va. 84, 677 S.E.2d 272 (2009): The customer tripped over a metal bar attached to the floor. She was injured as a result of the fall. In overturning the decision of the circuit court, the Supreme Court held that the trial court "short circuited" the litigation process through the granting of summary judgment. Specifically, the Supreme Court held that the trial court erred in determining that the customer was guilty of contributory negligence as a matter of law because, under the circumstances of the case, reasonable minds could differ as to whether the customer acted as a reasonable person would have acted for her own safety. Assuming that the existence of the metal bars was an open and obvious condition, the evidence showed that, once the customer arrived at the store, she was distracted from the hazard that the metal bars presented by a number of factors. Whether such circumstances excused attentiveness to an open and obvious dangerous condition depended on the circumstances of the particular case and presented a jury question.

Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 670 S.E.2d 746 (2009): The Supreme Court of Virginia reversed summary judgment for a defendant in a defamation action. The plaintiff alleged that she had been defamed by her former employer, Raytheon, in several statements it made about her job performance. The court recited the general principle that factual statements may be defamatory and statements of opinion are not actionable. "In determining whether a statement is one of fact or opinion, a court may not isolate one portion of the statement at issue from another portion of the statement." In granting summary judgment, the trial court "improperly limited its analysis to the separate factual portions of the alleged defamatory statements and excluded the necessary consideration of each statement as a whole, including any implications, inferences, or insinuations that reasonably could be drawn from each statement." The determination of whether an allegedly defamatory statement is false is ordinarily a factual question to be resolved by the jury. "Only if a plaintiff unequivocally has admitted the truth of an allegedly defamatory statement, including the fair inferences, implications, and insinuations that can be drawn from that statement, may the trial judge award summary judgment to the defendant on the basis that the statement is true."

J. Personal, Diversity and Subject Matter Jurisdiction

Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010): The federal diversity jurisdiction statute provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Hertz Corporation was sued in a class-action lawsuit in California state court by employees seeking unpaid overtime and vacation wages. The company, which maintains its headquarters in New Jersey, removed the case to federal court on the basis of diversity of citizenship. In a unanimous decision, the United States Supreme Court held that the phrase "principal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities. In other words, a corporation's "nerve center" will typically be found at a corporation's headquarters.

PCR Tech. Holdings, L.C. v. Bell Ventures, L.L.C., 2009 Va. Cir. LEXIS 219 (Chesterfield County June 2, 2009): The plaintiff's claims arose out of an oral agreement made by the parties in New York to form a joint venture company. The plaintiff alleged that the parties all understood and intended for the joint venture to be a Virginia entity, with the plaintiff as the majority owner. Further, the plaintiff argued that at least one person involved in the formation of the joint venture agreement was present by telephone from Virginia, and that communications that led to the plaintiff's claims occurred by telephone and e-mail between the parties while plaintiff was present in Virginia. Notwithstanding these facts, the court found, *inter alia*, that the companies and their owner never purposely availed themselves of any Virginia institutions, nor could they have reasonably foreseen that they would be haled into Virginia court as a result of their actions. Therefore, personal jurisdiction over them was not proper.

RCI Contrs. & Eng'rs, Inc. v. Joe Rainero Tile Co., 666 F. Supp. 2d 621 (W.D. Va. 2009): The partnership did not have any employees, registered agent, or any other agents in Virginia, nor did it have an office or any other facility here. It did not manufacture, advertise or distribute the product complained of in the case. The contractor argued that jurisdiction over the partnership was proper solely because it was a partner in the grout company that had subjected itself to personal jurisdiction in Virginia. The contractor unsuccessfully argued that since a partner was generally liable for partnership debts, it was likewise subject to personal jurisdiction. The partnership did not act directly in the case in connection with the allegedly defective product, and the law and the facts in the case did not make the grout company the agent of the partnership.

Delta-T Corp. v. Pac. Ethanol, Inc., 2009 U.S. Dist. LEXIS 8151 (E.D. Va. Jan. 7, 2009): In a contract dispute, the court found defendant, a California corporation, had sufficient contacts with Virginia to meet the long-arm statute and fall within the court's jurisdiction through their sustained contract with the Virginia corporation. The court specifically noted that the defendant had initiated the contact with the plaintiff, negotiated with the plaintiff for numerous agreements, had substantial e-mail and telephone correspondence with the plaintiff, visited Virginia for negotiations, and bound itself to deliver certain documents and specification to the Virginia based plaintiff. The court found that these actions constituted purposeful acts of conducting business in Virginia and, therefore, the personal jurisdiction under the long arm statute was satisfied.

1 Foot 2 Foot Ctr. for Foot & Ankle Care, P.C. v. Davlong Bus. Solutions, LLC, 631 F. Supp. 2d 754 (E.D. Va. 2009): In a contract dispute, the federal district court rejected plaintiff's motion to remand the proceeding to state court for defendants' failure to properly allege diversity. Defendant, a Georgia LLC, failed to include the citizenship of each of its members in its initial notice of removal. The plaintiff, a Virginia company, sought to remand to state court. However, the court found that defendant had shown sufficient evidence that the parties were completely diverse. The defendant then sought to amend its removal notice showing the citizenship of its members to be Georgia, Texas and Alabama. The court noted that the plaintiff never challenged complete diversity, but only that the notice of removal was defective. Since complete diversity was alleged and did in fact exist, the court found diversity jurisdiction proper and found the defendant's request to amend moot.

PBM Products v. Mead Johnson Nutrition Co., 2009 U.S. Dist. LEXIS 93312 (E.D. Va. Sept. 28, 2009): The district court granted defendant's motion to dismiss for lack of personal jurisdiction. The court found that plaintiff failed to establish that defendant had sufficient minimum contacts with Virginia necessary to generate personal jurisdiction. The defendant was a Delaware corporation with its principal place of business in Indiana. Further no officers resided in Virginia, and it did not advertize or conduct business in Virginia. The plaintiff argued that its subsidiary's actions in Virginia were enough to confer jurisdiction. However, the court found the subsidiary was not the agent of the defendant and, therefore, the subsidiary's actions should not be imputed to defendant.

Rosario v. Wands, 2009 U.S. Dist. LEXIS 84992 (E.D. Va. Sept. 17, 2009): The court granted the motion to dismiss for lack of personal jurisdiction over the defendant. The defendant psychic was alleged to have fraudulently reported the plaintiff's substance abuse to the police and the Virginia Board of Medicine. The defendant's company was based in New York, and the defendant lived in New York. The relationship between the plaintiff and defendant developed in New York and the court stated that it was merely a fortuitous fact that the plaintiff currently lived in Virginia. The fact that the defendant was alleged to have reported activity to the New York police which was eventually reported to the Virginia Medical Board was not enough to establish personal jurisdiction.

Touchcom, Inc. v. Bereskin & Parr, 574 F.3d 1403 (Fed. Cir. 2009): The plaintiff appealed a final judgment of the U.S. District Court for the Eastern District of Virginia dismissing its malpractice suit against defendants, a Canadian law firm and an attorney, for lack of personal jurisdiction. The plaintiff contended that, contrary to the finding below, defendants' contacts within Virginia were sufficient to satisfy

the Virginia long-arm statute and establish specific jurisdiction. The court noted that it was a question of first impression as to whether the act of filing an application for a U.S. patent at the U.S. Patent and Trademark Office was sufficient to subject the filing attorney to personal jurisdiction in a malpractice claim that was based upon that filing and was brought in federal court. The Federal Circuit concluded that it was sufficient to subject them to personal jurisdiction. The court agreed with the district court's findings that under a traditional Fed. R. Civ. P. 4(k)(1)(A) analysis, the district court lacked personal jurisdiction over defendants. However, the appeals court found that under a Rule 4(k)(2) analysis, exercise of jurisdiction over defendants was permitted. The claim arose under federal law and for purposes of Rule 4(k)(2), plaintiffs made a prima facie showing that defendants were not subject to the jurisdiction of any state's court of general jurisdiction. Further, defendants' contacts with the U.S. were sufficient to meet the minimum contacts standard articulated in *International Shoe*, and that the exercise of personal jurisdiction over defendants in this case would not have offended traditional notions of fair play and substantial justice. The court reversed and remanded the case to the district court.

Delta-T Corp. v. Harris Thermal Transfer Products, 2009 U.S. Dist. LEXIS 80647 (E.D. Va. Sept. 4, 2009): The district court found that it did not have personal jurisdiction over the defendant. The defendant was an Oregon corporation, the plaintiff initiated the contact, the contract was to be preformed outside Virginia, it had a Michigan choice of law provision and arbitration was to be conduction in Michigan. The other business activity of the defendant in Virginia did not rise to the significant or long term level necessary for general personal jurisdiction under the long arm statute. Thus, the district court dismissed the case for lack of personal jurisdiction.

K. Evidentiary Preservation/Motion to Strike

Murillo-Rodriguez v. Commonwealth, 279 Va. 64, 688 S.E.2d 199 (2010): The Supreme Court of Virginia held (for the first time since the 1992 amendment to Va. Code § 8.01-384) that in order to preserve a challenge to the sufficiency of the evidence for appeal, the defendant must move to strike not only at the close of the plaintiff's or prosecution's evidence but also at the close of all of the evidence. The court reasoned that "by not reasserting a sufficiency challenge after he has introduced his own evidence, the defendant has deprived the trial court of the opportunity to consider and rule on the sufficiency of the evidence as a matter of law under the proper standard . . . ." Va. Code § 8.01-384(A) did not apply because "a motion to strike the evidence presented after the plaintiff's case-in-chief is a separate and distinct motion from a motion to strike all the evidence, or a motion to set aside an unfavorable verdict, made after the defendant has elected to introduce evidence on his own behalf."

Howell v. Sobhan, 278 Va. 278, 682 S.E.2d 938 (2009): The patient alleged that the doctor breached the standard of care. During the trial, she presented testimony from two medical experts. The dispositive issue was whether the patient presented sufficient evidence to prove that the doctor's breach of the standard of care was a proximate cause of her injuries. Viewing the evidence in the light most favorable to the patient, she presented sufficient evidence of proximate causation to take her case to the jury. The court admonished that when ruling on a motion to strike, a trial court should not undertake to determine the truth or falsity of evidence or to measure its weight. Those are matters peculiarly within the province of a jury. Thus, the Court held that because reasonable minds could differ about whether the doctor's breach of the standard of care was a proximate cause of her injuries.

L. Injunction

Real Truth About Obama, Inc. v. FEC, 575 F.3d 342 (4th Cir. 2009): In *Winter v. Natural Resources Defense Council. Inc.,* the U.S. Supreme Court articulated what had to be shown to obtain a preliminary injunction. Because of its differences with the *Winter* test, the *Blackwelder* balance-of-hardship test applied by the Fourth Circuit could no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in *Winter* governed the issuance of preliminary injunctions

not only in the Fourth Circuit but in all federal courts. Thus, it is now established that the party seeking the preliminary injunction must make a clear showing: "(1) that he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) an injunction is in the public interest." On April 26, 2010, however, the case was remanded by the Supreme Court of the United States to the United States Court of Appeals for the Fourth Circuit "for further consideration in light *of Citizens United v. Federal Election Comm'n*, 558 U.S. ___, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) and the Solicitor General's suggestion of mootness." The matter remains pending.

FBR Capital Mkts. & Co. v. Short, 2009 U.S. Dist. LEXIS 94558, 13-15 (E.D. Va. Oct. 9, 2009): The Court denied a TRO for a former food-industry stock analyst from working for a competitor. The plaintiff alleged that there was a risk that they might lose customers and income, but there was been no showing that there was even a significant chance that the plaintiff was going to lose either customers or income. Second, even if plaintiff had suffered harm, the court held that it could be adequately compensated through damages. Therefore, the appropriate remedy was to seek damages through a breach of contract claim, and not through the "extraordinary remedy" of a grant of a preliminary injunction.

Deltek, Inc. v. Iuvo Sys., 2009 U.S. Dist. LEXIS 33555 (E.D. Va. Apr. 20, 2009): In the dispute between the plaintiff and three former employees who allegedly formed a competing company, the court issued a preliminary injunction to stop defendants from using the plaintiff's trademarked name in its website promotion. The court noted that the trademark was displayed in a prominent manner and created a likelihood of confusion. The court, however, denied preliminary relief on the claim that the defendants violated their non-compete agreements due to the fact that the plaintiffs made broad statements regarding the "trade secrets" at stake and that there was no "irreparable harm," as monetary damages could fully compensate the plaintiff.

WV Assn. of Club Owners & Fraternal Servs. v. Musgrave, 553 F.3d 292 (4th Cir. 2009): Plaintiff, an association of video lottery retailers, claimed that the advertising restrictions in West Virginia's Limited Video Lottery Act violated its members' First Amendment free-speech rights. The district court had issued a preliminary injunction enjoining the director of the state lottery from enforcing the advertising restrictions. In discussing the standard for granting a preliminary injunction, the court said "in order to receive a preliminary injunction, a plaintiff must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." The appellate court found that even though First Amendment concerns might be at issue, the injunction would "unwind the lottery program which relies on a public/private partnership and interrelated complementary features to achieve the objectives of revenue production, educational and infrastructure improvement, and promotion of the public welfare that lie at the heart of a state's role in our constitutional order." The court stated that the injunction was inconsistent with those aims and, therefore, vacated the order.

M. Nonsuit

Spear v. Metro. Wash. Airports Auth., 2009 Va. Cir. LEXIS 184 (Loudoun County Aug. 12, 2009): Under § 8.01-380(A), the action being nonsuited is the action then pending before the court when the nonsuit order was entered. In Virginia, a plaintiff cannot recover more than the amount requested in the *ad damnum*. Under the plain language of § 8.01-229(E)(3), the action that was nonsuited is the action that must be recommenced within the six-month period for the tolling provision to apply. The court held that an increase in the *ad damnum* dictated that the plaintiff did not recommence the same action when she filed the present case and the tolling provisions of § 8.01-229(E)(3) did not apply. *Spear* is now on appeal to the Supreme Court of Virginia.

O'Hearn v. Mawler, VLW 010-8-009, (Rockingham County 2010): The Circuit Court took the opposite opinion of *Spear* above. The court found that the increase in *ad damnum* for compensatory damages from $250,000 to $300,000 did not require the plaintiff to file a new suit outside the nonsuit statute. The same set of operative facts underlying the "action" allowed the case to fall within the six-month saving provision of § 8.01-229(E)(3). The court said that reading the term "action" so narrowly would undermine and render meaningless the nonsuit statute's authorization for a plaintiff to nonsuit a "cause of action."

Dunston v. Huang, 2010 U.S. Dist. LEXIS 22844 (E.D. Va. Mar. 10, 2010): The court allowed new claims in a refiled medical malpractice suit after a nonsuit, even though the additional claims otherwise would be barred by the statute of limitations. The judge examined whether the added claims arose from the same "action, transaction or occurrence" as the earlier lawsuit. The court focused on the definition of the term "action" and ruled the case turned on a rules amendment by the Supreme Court of Virginia. In 2006, the Supreme Court added Rule 1:6 to address res judicata claim preclusion. The district court found the Supreme Court, in adopting Rule 1:6, had discarded the same-evidence and same-remedy requirements and adopted instead a "same 'conduct, transaction, or occurrence' test." By expanding the bar to relitigated claims, the Court had expanded the definition of claims that might be filed after a nonsuit. The judge also looked at Virginia Code § 8.01-6.1, the statute applicable to amendments to pleadings and "relation back." "[T]he abandonment of the same evidence test in these other contexts weighs strongly against its application here." The decision stands in marked contrast to the above decision in *Spear*, where the judge refused to allow the plaintiff to seek more money in a case refiled after a nonsuit.

City of Suffolk v. Lummis Gin Co., 278 Va. 270, 683 S.E.2d 549 (2009): The city had previously filed a complaint, in 1995, against property owners seeking to sell the land for delinquent taxes and filed a motion for a nonsuit. In 2006, a suit was filed seeking back taxes on the same parcel of land by for different years than the 1995 suit. The property owners sought attorney's fees and costs, arguing that because the first case resulted in a nonsuit, the city's motion was a request for a second nonsuit. The Supreme Court held that the circuit court erred in determining that it had granted the city a second nonsuit, that the circuit court granted a first nonsuit which was a final judgment and, therefore, the circuit court had no jurisdiction to award attorney's fees and costs twenty-one days after entry of that order. Thus, the award was a nullity.

Meador v. Cray, 2009 Va. Cir. LEXIS 85 (Roanoke County Sept. 15, 2009): Plaintiff, before his death, filed a complaint against defendant motorist for personal injury from a motor vehicle accident and then filed a second complaint, correcting the spelling of the defendant motorist's last name. The decedent then died. After descendant's death, a personal representative filed a third complaint, in her own name, and a fourth complaint was filed in the name of the decedent. Though the motorist moved to discontinue the first and second actions under Va. Code § 8.01-18, the court never granted the motion instead entering orders of nonsuit. The third action was recommenced within six months of the order of nonsuit. The court found that once the second action was voluntarily nonsuited under § 8.01-380, the decedent became a person entitled to bring a personal action under Va. Code § 8.01-229(E)(3). Under the time provision of § 8.01-229(B)(1), the personal representative had a right to recommence the nonsuited action within six-months. The court overruled the special plea of the statute of limitations in the third action and denied the motion to dismiss the third action, allowing it to proceed. It dismissed the fourth action as a nullity.

N. Pleading Standards in Federal Court

Nemet Chevrolet, Ltd. v. Consumeraffairs.com, 2009 U.S. App. LEXIS 28539 (4th Cir. Dec. 29, 2009): The lawsuit concerned various posts on this website relating to automobiles sold or serviced by the plaintiff. Viewing certain postings as false and harmful to its reputation, the plaintiff brought suit for defamation and tortious interference with a business expectancy. The defendant moved to dismiss these claims as barred by § 230 of the Communications Decency Act of 1996, which precludes plaintiffs from

holding "interactive computer service providers" liable for the publication of information created by others. In dismissing the complaint, the Fourth Circuit first considered the "plausibility" of a discrete allegation which was asserted with respect to all twenty postings at issue. The court held that this particular allegation failed to state "facts upon which it could be concluded that it was plausible that Consumeraffairs.com was an information content provider." The court then went on to address an additional allegation which was common to only eight of the twenty postings at issue. The court held that this allegation was nothing more than a "bare assertion . . . devoid of further factual enhancement" and was therefore "not entitled to an assumption of truth. Thus, the court employed a methodical application of the *Iqbal* standard and assessed the "plausibility" of individual allegations in reaching its decision.

Harman v. Unisys Corp., 2009 U.S. App. LEXIS 26396 (4th Cir. Dec. 4, 2009): The court considered the plaintiff's claims of disparate treatment based on race. Specifically, the court noted that plaintiff's "disparate treatment allegations tell a story about her repeated challenges to management's actions and business decisions and summarily assume that with each challenge, 'upon information and belief,' [her supervisor] believed that a younger, African American or male employee would not have challenged their actions or would have been more easily influenced to abide by their decisions. Such conclusory allegations are insufficient to defeat a motion to dismiss." Therefore, the court held that when "viewing the complaint in its entirety, . . . [plaintiff's] allegations failed to establish that she suffered an adverse employment action sufficient to state a claim for disparate treatment based on her race, age or gender." Hence, the decision employed a generalized analysis in determining that the plaintiff had failed to satisfy the standards set forth in *Iqbal*.

Francis v. Giacomelli, 2009 U.S. App. LEXIS 26188, (4th Cir. Dec. 2, 2009): The plaintiff stated a number of civil rights claims, and the court remarked that "even though Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." In affirming the district court's dismissal of the complaint, the court individually assessed each of the plaintiff's four counts and determined that none of the allegations stated a claim for relief that was "plausible" on its face.

Feeley v. Total Realty Mgmt., 660 F. Supp. 2d 700 (E.D. Va. 2009): The district court dismissed the co-defendant banks from a consolidated action accusing developers of artificially inflating undeveloped costal land. The court said that the claims against the banks, that issued loans to the plaintiffs to finance the purchases, were not sufficiently plead to meet the *Twombly* and *Iqbal* standards. Specifically, the court noted that the allegations were too general and utterly failed to allege how the banks entering into a scheme to make under-collateralized loans would be in their interests. The court found the allegations against the banks to be implausible and, therefore, granted their motion to dismiss.

O. Discovery

In re Fannie Mae Secs. Litig., 552 F.3d 814 (D.C. Cir. 2009): The appeal concerned a dispute over subpoenas issued by three former senior Fannie Mae executives. On appeal, the Office of Federal Housing Enterprise Oversight ("OFHEO") argued that the stipulated order limited the executives to specifying appropriate search terms and did not unambiguously compel it to process inappropriate terms. In the alternative, it argued that it substantially complied with the stipulated order, rendering a finding of contempt inappropriate, and that in any event the district court abused its discretion by compelling compliance with the subpoenas in the first place. The court held that the stipulated order obligated the OFHEO to process the search terms the executives specified and to meet the corresponding deadlines, and it violated the order by failing to produce privilege logs on time. The court was unwilling to entertain an argument that the pecuniary burden on a non-party was too high to be reasonable once the nonparty had entertained a stipulated discovery order. Moreover, the stipulated order was not ambiguous. The OFHEO's alleged substantial good faith compliance was insufficient to avoid contempt.

P. Antitrust

E.I. du Pont de Nemours & Co. v. Kolon Indus., 2010 U.S. Dist. LEXIS 8981 (E.D. Va. Feb. 3, 2010): The district court dismissed for the second time, with leave to amend, the Second Amended Counterclaim of the defendant. The counterclaim alleged monopolization and attempted monopolization in violation of Sherman Act § 2 and Clayton Act § 16. The Court found deficiencies in the defendant's allegations respecting both the geographic market and the anticompetitive conduct. Rather than amend its counterclaim a third time, the defendant indicated its intent not to re-amend and moved for entry of final judgment of its counterclaim pursuant to Fed. R. Civ. P. 54(b), which provides: "When an action presents more than one claim for relief - whether as a claim, counterclaim, crossclaim, or third-party claim - or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." The court granted the motion for final judgment due to the fact that the counterclaim was completely distinct from the underlying claim and presented an unsettled issue of antitrust law.

Q. Contract

C. Porter Vaughan, Inc. v. DiLorenzo, 2010 Va. LEXIS 33, 689 S.E.2d 656 (2010): The realtor filed an action against the client alleging that the client had employed the realtor, through its agent, to act as a real estate broker in the offering for sale several properties. The realtor asserted that it marketed the property to several potential purchasers and, thus, was entitled to a commission for its services rendered in procuring a purchaser. The client argued that the complaint failed to satisfy the requirements of Va. Code Ann. § 11-2(7) because it failed to allege a writing which complied with the statute of frauds and, as such, any alleged contract was unenforceable. Upon review, the court found that writings signed by the client and his agent were sufficient evidence of a real estate brokerage agreement between the client and the realtor to remove the bar of the statute of frauds. There was a contract for the sale of real property that contained the essential terms of the brokerage agreement. The contract contained references sufficient to remove the oral real estate brokerage agreement from the operation of the statute of frauds.

R. Immunity

Andrews v. LogistiCare Solutions, LLC, 78 Va. Cir. 45 (Fairfax County 2008): The transportation company was in the business of providing nonemergency transportation services to eligible Medicaid recipients within the Commonwealth of Virginia. These services were performed pursuant to a contract between the transportation company and the Commonwealth of Virginia's Department of Medical Assistance Services ("DMAS"). DMAS was a state agency that administered the Medicaid Program. The transportation company entered into a contact with the subcontractor to provide transportation services. The Medicaid recipient made arrangements to receive transportation through the transportation company from her home to a health care facility for dialysis treatment. The Medicaid recipient was injured when an employee of the subcontractor improperly loaded the Medicaid recipient into a van. To determine whether an individual is an independent contractor a court must consider four factors: (1) the selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual. However, the amount of power to control the work of the individual is the determinative factor. Under the test, if a party directs the means and methods by which the other does the work, an employer-employee relationship exists. Furthermore, the inquiry is not resolved by a statement of the legal relationship in the contract. Under these factors, the court found that the transportation company was not an independent contractor, but rather an agent of DMAS who was "controlled" by DMAS. Thus, as an agent for the Commonwealth, and in determining that a high degree of control was exercised by the agent in furtherance of this "important" governmental objective, the court held that the transportation company was entitled to sovereign immunity on the Medicaid recipient's negligence claim.

Jiminez v. Didlake, Inc., 2009 Va. Cir. LEXIS 171 (Prince William County Feb. 26, 2009): The case arose out of a femoral shaft fracture that the plaintiff sustained while in the care of the defendant. The plaintiff was twenty-five years of age and has been diagnosed with cerebral palsy and mental retardation. The defendant is a non-stock corporation, serving to educate and foster the development of programs for mentally retarded, mentally handicapped, and emotionally disturbed persons. The plaintiff attended the defendant's day program activities, and, when placing the plaintiff back in his wheelchair after changing him, two of the defendant's employees heard the plaintiff verbalize a noise of discomfort. The defendant's staff contacted the plaintiff's mother, who took the plaintiff to the Prince William Hospital Emergency Room. In holding that the defendant had charitable immunity, the court noted that the corporation's charter clearly expressed a charitable purpose and the company's officers and directors received no compensation for their service to the company.

S. Amended Pleading

Martin v. Scott & Stringfellow Inc., 2009 U.S. Dist. LEXIS 1103 (E.D. Va. Jan 7, 2009): The employee filed suit claiming the employer committed age discrimination in creating a hostile working environment and constructively discharging him. The employer sought leave to amend its responsive pleading to asset an "after-acquired evidence" defense based on the discovery of an audio recording of certain conversations made by the employee while still working for the defendant employer. The employer averred that the employee's creating of the recordings violated the employee's fiduciary duty to the company and was, therefore, sufficient wrongdoing to warrant his termination. The court granted leave to amend, stating that leave could be granted even if the parties disputed whether the taping actually amounted to a breach of a fiduciary duty.

Galustian v. Peter, 591 F.3d 724 (4th Cir. 2010): The plaintiff alleged defamation by a U.S. Citizen working in Iraq by sending an email to members of a security industry association attaching an allegedly forged arrest warrant for plaintiff issued by an Iraqi judge. The defendant moved to dismiss on forum non conveniens grounds, and the district court dismissed holding that Iraq was an available an adequate forum. The plaintiff moved to amend the complaint to add an additional party, and the district court did not allow the plaintiff to amend. On appeal, the court held the district court abused its discretion in denying plaintiff's motion to amend his complaint to add a new defendant. The appellate court said the motion to dismiss was not a responsive pleading and plaintiff was entitled to amend his complaint as of right under former Fed. R. Civ. P. 15(a). The court joined most other courts in concluding that the plaintiff's right to amend once is absolute. Therefore, the forum non conveniens ruling was premature.

T. Res Judicata

Bethea v. Wells Fargo Home Mortg., Inc., 2009 U.S. Dist. LEXIS 58853 (E.D. Va. July 9, 2009):
A homeowner's suit against a bank that found her in default on her loan was barred because the homeowner has lost on an unlawful detainer claim brought by the bank in state court. The unlawful detainer was prompted when the bank foreclosed on the property and the homeowner refused to vacate. The bank won a judgment in Virginia General District Court and the homeowner, though noting her appeal, never paid the appeal costs nor posted an appeal bond. The court found that the earlier unlawful detainer judgment was a judgment on the merits under the same cause of action with the same parties involved and, thus, granted summary judgment.

U. Virginia Court Rules

Shapiro v. Younkin, 279 Va. 256, 688 S.E.2d 157 (2010): In his appeal to the circuit court, plaintiff failed to comply with a circuit court rule requiring a court reporter present at the trial of all civil cases or obtaining prior approval from the circuit court if the parties wished to waive the court reporter requirement. In refusing to certify plaintiff's statement of facts, the circuit court wrote directly on the proposed statement that she did not agree that it reflected the events, and that no statement of facts was necessary because

the case was dismissed on procedural grounds. In reversing and remanding, the Supreme Court found that the circuit court violated both § 17.1-128 and Rule 5:11. In particular, the circuit court's action directly violated the unambiguous language and mandate of § 17.1-128, which stated that the failure to secure the services of a reporter should not affect a proceeding. The circuit court also violated Rule 5:11, which provided a means to establish a record for appellate review without obtaining a transcript.

V. Jury Demand

Williams v. Food Lion, LLC, 2009 U.S. Dist. LEXIS 53109 (E.D. Va. June 23, 2009): It was uncontested that the plaintiff failed to timely demand a jury trial after being served with a removal notice by the defendant. The first jury demand was at the initial pre-trial conference, almost two months after the deadline for such a demand. The court found that, regardless of unfamiliarity with federal practice by plaintiff's counsel, the plaintiff waived her right to demand a jury trial. The court, however, granted the plaintiff's motion for a jury trial notwithstanding her waiver. The court noted that the plaintiff filed her motion within eight days of realizing that she had waived her right to demand a jury, and that the proceedings were still at such an early stage that granting such a motion would not prejudice the defendant.

W. Amendments to the Federal Rules of Civil Procedure

Amendments to the Federal Rules of Civil Procedure: A variety of technical but significant changes to the Federal Rules of Civil Procedure and the Federal Rules of Civil Procedure went into effect on December 1, 2009. First, under the new rules, intermediate weekend days and holidays count no matter how many days are provided for any given deadline. See Fed. R. Civ. P. 6(a). The second primary change concerns the many fixed time periods provided in the Rules – such as the time to answer or respond to a complaint or the time to answer when a Rule 12 motion is denied. As amended, the Rules change these time periods to multiples of seven. For example, under the revised Rule 12(a)(1), defendants have 21 days to answer or respond to a complaint, rather than 20. Likewise, the time for amending a pleading under Rule 15(a) was extended from 20 days to 21, and the time for responding to an amended pleading (if necessary) was extended from 10 days to 14 days. Under revised Rule 14(a)(1), a defending party will have to obtain leave of court if it wishes to serve a third-party complaint on a nonparty more than 14 days – rather than 10 days – after serving its initial answer. Under revised Rule 59(b), parties will now have 28 days after the entry of judgment – rather than a mere 10 days – to move for a new trial. The amendments also introduce changes to Rule 56. First, as amended, Rule 56 will permit either party to bring a summary judgment motion at any time up to 30 days after the close of all discovery. Second, Rule 56 now requires a response brief to a summary judgment motion within 21 days. It also permits, but does not require, the moving party to file a reply brief within 14 days.

IV. BUSINESS TORTS

A. Conspiracy

All Bus. Solutions, Inc. v. NationsLine, Inc., 629 F. Supp. 2d 553 (W.D. Va. 2009): Telecommunications provider's allegations of a business conspiracy (that defendant and another entity acted together to divert the telecommunications provider's earned commissions and to injure its business, that the conspiratorial conduct was willful and malicious, and that it resulted in substantial money damages to the telecommunications provider) were sufficient to withstand defendant's motion to dismiss. However, the complaint did not contain sufficient allegations to state a claim for misappropriation of trade secrets. The claim was premised on the single, conclusory assertion that defendant sought to appropriate and disclose the names of the telecommunications provider customers, along with other trade secrets and confidential information, but the complaint contained no additional factual allegations that supported that assertion or

otherwise plausibly suggested an entitlement to relief. Finally, defendant had not overcome the "heavily weighted" balance in favor of retaining jurisdiction, and its motion to abstain under *Colorado River* was denied.

Skillstorm, Inc. v. Elec. Data Sys., LLC, 2009 U.S. Dist. LEXIS 95056 (E.D. Va. Oct. 9, 2009): Plaintiff alleged that defendants conspired to remove plaintiff from a government contract while at the same time soliciting plaintiff's personnel. The plaintiff argued that the defendants improperly terminated purchase orders. But, through their plain language, the purchase orders were terminable at will. The plaintiff also argued that the defendants interfered with the plaintiff's contracts with its personnel by encouraging the plaintiff's employees personnel to go to work for the defendant and other subcontractors. However, the purchase orders did not contain provisions prohibiting Defendants from soliciting the plaintiff's employees. Thus, there was no "improper method" on which a claim for tortious interference could be based. The court also found that the common law and statutory conspiracy claims were insufficiently pled because the conduct complained of was allowed under the purchase orders and was therefore not unlawful. The court reasoned that the purchase orders expressly allowed defendants to terminate the purchase orders "for any reason without penalty." Thus, there was no "unlawful act" as the conduct complained of was entirely permissible under the terms of the agreement.

B. Tortious Interference

Signature Flight Support Corp. v. Landow Aviation Ltd. P'ship, 2009 U.S. Dist. LEXIS 2541 (E.D. Va. Jan. 14, 2009): Plaintiff company, a "Fixed Base Operator" of airport concessions and services for noncommercial aviation industries, sued defendant competitor, which operates a corporate hangar facility that allegedly encroached on plaintiff's operations. The court granted summary judgment to defendant on plaintiff's claim for intentional interference with a business expectancy. Plaintiff first alleged defendant committed misconduct by disparaging plaintiff's services to the Metropolitan Washington Airports Authority. Plaintiff also alleged that defendant made false or misleading statements to plaintiff's loyal and repeat transient customers as well as to some unspecified third parties. The court found that neither of these two topics was a proper basis of a claim for intentional interference with a business expectancy. The nature of defendant's business and the services it was authorized to provide were dictated by the contract between the parties. This tort claim could proceed solely on allegations that defendant breached a common law duty to refrain from making false, misleading and deceptive statements regarding plaintiff's business to transient aircraft, the Metropolitan Washington Airports Authority and other third parties. Plaintiff's allegations – that defendant misrepresented the nature of its own business and the services it could provide – fell outside of this description. Any liability arising from such statements stemmed only from the contracts between the parties; plaintiff could only pursue these allegations through its breach of contract claim.

DurretteBradshaw, P.C. v. MRC Consulting, L.C., 277 Va. 140, 670 S.E.2d 704 (2009): The seller entered into a contract to sell computer communication boards to a buyer. It suffered a casualty loss to its inventory. Its insurer did not pay its claim for business interruption and lost profits. The company agreed to fund the redesign and manufacture of new communication boards. The firm represented the insurer in a declaratory judgment action seeking a determination that it was not required to pay the seller's claims. An attorney for the firm allegedly disclosed to the buyer confidential information the firm had obtained about the seller while investigating the claim. The buyer canceled the contract, which eliminated the seller's claim under its insurance policy. The Supreme Court held that the circuit court erred in overruling the firm's demurrer. The company did not sufficiently state a cause of action against the firm for tortious interference with its contract with the seller. The company alleged that the firm, with knowledge of the company's contract with the seller, induced the buyer to break its contract with the seller. It did not allege that the firm intended to affect the company's contract with the seller or acted with the purpose of interfering with that contract.

C. Computer Crimes

State Analysis, Inc. v. Am. Fin. Servs. Assoc., 621 F. Supp. 2d 309 (E.D. Va. 2009): The court found that the firm stated a claim under the federal Computer Fraud and Abuse Act against the competitor because, according to the complaint, the competitor accessed the firm's website using usernames and passwords that did not belong to it, and the competitor acted without authorization. The firm stated a claim under the federal Electronic Communications Privacy Act against the competitor by alleging that the competitor, without any authorization from the firm, accessed the password-protected areas of the firm's site. The Virginia Computer Crimes Act claim was preempted by the Copyright Act. The breach of contract claim, which alleged a breach of the employee's agreement not to work for an entity similar to the firm within the one year following termination, was time-barred. The copyright claims were not time-barred. There also was no viable claim for misappropriation of trade secrets because where a plaintiff had not alleged that its passwords were the product of any special formula or algorithm that it developed, the passwords were not trade secrets.

Van Alstyne v. Elec. Scriptorium, Ltd., 560 F.3d 199 (4th Cir. 2009): On appeal, appellants contended that the district court erred in permitting the jury to award the employee statutory and punitive damages as well as attorney's fees and costs without first requiring her to prove actual damages under the Stored Communications Act ("SCA"). Applying canons of statutory construction, the court agreed with appellants, finding that the employee failed to show that she sustained actual damages, and that the plain language of the SCA unambiguously required proof of actual damages as a prerequisite to recovery of statutory damages. The court rejected the employee's contrary arguments regarding the legislative history of the SCA and related common law claims. However, the court rejected appellants' other claims, finding that proof of actual damages was not required for an award of either punitive damages or attorney's fees under the SCA. Nonetheless, the court vacated these awards and remanded the case so that the district court could reevaluate the punitive damage awards in light of the ruling that the employee was not entitled to statutory damages, and so that the court could reevaluate the award of attorney's fees and costs in light of the employee's lower degree of success in the case.

Global Policy Partners, LLC v. Yessin, 2009 U.S. Dist. LEXIS 112472 (E.D. Va. Nov. 24, 2009): The parties were feuding business partners and marriage partners in the process of dissolving their marriage, as well as their business relationship. The wife alleged the husband accessed and intercepted her business e-mail, without authorization, in order to review messages between the wife and her attorney related to the pending contested divorce proceeding. The husband moved to dismiss. The court granted the dismissal finding the alleged facts not to create a plausible inference that the husband intercepted any communications, nor had they forecasted any factual allegations that would create such a plausible inference. The wife neither alleged nor forecasted facts that would sustain a conclusion that the husband examined certain sensitive information or obtained, embezzled, or converted any property. However the court did not dismiss the claim that the husband lacked authorization to access the wife's e-mail account.

D. Fiduciary Duties

SunTrust Bank v. Farrar, 277 Va. 546, 675 S.E.2d 187 (2009): After the trust terminated, the trustee obtained court permission to sell the trust's coal mine. An engineer appraised the mine at $1.1 million. It was sold 11 years later for $ 350,000. The beneficiaries' expert testified that had the mine been sold for $1.1 million at the time of appraisal, and the proceeds prudently invested, the trust assets would have been $5.47 million at the time of the actual sale. The engineer testified that his appraisal was probably high, and that he was not aware of any buyer willing to pay $1.1 million for the mine as of the date of the appraisal. The trial court held that the trustee breached his fiduciary duty by failing to appropriately market the mine and by failing to diversify the trust assets in a timely manner. The Supreme Court disagreed. The evidence of damages was premised on the assumption the mine could have been sold

for $1.1 million, but there was insufficient evidence to support this assumption. Further, the beneficiaries did not establish that any action or inaction by the trustee resulted in the delay in selling the mine.

E. Trade Secrets

GTSI Corp. v. Wildflower Int'l, Inc., 2009 U.S. Dist. LEXIS 36618 (E.D. Va. Apr. 30, 2009): In a case alleging "corporate espionage," a government contractor adequately stated a claim for misappropriation of trade secrets under Virginia law by alleging that a competitor obtained a copy of plaintiff's confidential "Teaming Agreement" with pricing, strategy and other trade secret information, and used it to launch a bid protest. Plaintiff alleged that defendant improperly came into possession of trade secret information related to plaintiff's pursuit of a contract with the U.S. Department of Homeland Security. The court found the complaint sufficiently alleged a cause of action under the Virginia Uniform Trade Secrets Act. First, plaintiff alleged the Agreement contained pricing, strategy and other trade secret information that it took affirmative steps to protect. Also, plaintiff claimed to have taken appropriate steps to maintain the secrecy of its pricing information. Plaintiff further alleged that defendant either misappropriated the trade secret itself, or obtained a copy of it through improper disclosure by an employee of the plaintiff that the defendant knew, or should have known was not authorized to disclose it. Thus, the court ruled that plaintiff stated a sufficient claim for misappropriation of trade secrets.

E.I. Dupont De Nemours & Co. v. Kolon Industries., 2009 U.S. Dist. LEXIS 76795 (E.D. Va. Aug. 27, 2009): The matter arose over alleged violations of the Virginia Uniform Trade Secrets Act, conspiracy to injure another in trade, business or reputation, and various tort claims. Plaintiff, designer of Kevlar fibers, claimed that defendant had wrongfully obtained its trade secrets and confidential information by enticing plaintiff's employees and consultants to divulge information regarding the manufacturing process and corporate strategy with respect to the fiber. The defendant argued that the preemption provision of the VUTSA barred the plaintiff from pursuing any of its additional claims. The court found that the VUTSA did not preempt the conspiracy and other tort claims because those claims were not predicated entirely and solely upon defendant's alleged misappropriation of trade secrets. The court found that even the transfer of copies of electronic information could constitute conversion. The court also dismissed the defendant's third-party complaint, finding impleader improper because defendant's claims against the third party defendants were distinct from the misappropriation claims brought by plaintiff. Additionally, because each claim against defendant pled an intentional tort, the defendant was not entitled to contribution from third-party defendants.

F. Fraud

Parkman v. Elam, 2009 U.S. Dist. LEXIS 21578 (E.D. Va. Mar. 17, 2009): The court held that constructive fraud claim had to be dismissed because, although plaintiffs alleged that defendant veterinarian represented that he properly froze approximately thirty-one straws of viable canine semen, plaintiffs failed to state the times or the places those alleged misrepresentations took place (the statement "on numerous occasions" did little, if anything, to provide fair notice to defendants of plaintiffs' factual basis for the constructive fraud claim), and plaintiffs could not rely on the fact that they later discovered the samples were not viable to support the contention that the veterinarian's representation was false. The fraud and misrepresentation claims were dismissed for the same reasons; plaintiffs had not pleaded with particularity when or where the veterinarian allegedly made false representations about having properly frozen the samples. Further, plaintiffs offered neither a statutory nor a contractual basis for seeking attorney's fees. Additionally, plaintiffs did not identify exactly what alleged conduct warranted punitive damages, and the conduct in the veterinary malpractice claim did not amount to willful or wanton behavior, supporting such an award.

Pre-Fab Steel Erectors, Inc. v. Stephens, 2009 U.S. Dist. LEXIS 26548 (W.D. Va. Apr. 1, 2009): A steel company that does structural work on construction projects around the country stated a claim for fraud

against defendant sales representative, who persuaded plaintiff's president and sole shareholder to use the sales representative's father as a bookkeeper and insurance agent, with allegations that the sales representative increased his own pay without authorization and the bookkeeper also took unauthorized payments for his services. In rejecting the application of the economic loss rule, the court held that the plaintiff was not asserting a breach of contract claim masked as a conversion claim, but was alleging that defendants wrongfully converted plaintiff's money. Principally, the plaintiff did not rely on any contract language or obligation as the basis for the duty that defendants violated, but rather relied on the common law duty not to convert the property of another for one's own purposes.

United States SEC v. Pirate Investor LLC, 580 F.3d 233 (4th Cir. 2009): The editor issued a promotional e-mail stating that investors could double their money based on a "super insider tip" from a U.S. government agent who had negotiated a prospective sale of Russian uranium. Investors who paid an up-front fee received a report divulging the details of the proposed sale. More than 800,000 persons on subscriber lists of internet investment newsletters received the e-mail, and 1,217 paid the newsletter for the report. The district court found that the e-mail falsely stated that an insider tipped the date of the sale, which misled investors. On appeal, the court agreed that, under 15 U.S.C.S. § 78j(b), the e-mail's statement that the information came from an insider was false, material, made with the intent to mislead, and made in "connection with" a sale of securities, even though the parties did not enjoy a trading relationship. Mass solicitation e-mails from a purveyor of internet investment advice were the types of communications upon which investors would reasonably rely. In addition, the First Amendment did not apply because fraud was unprotected speech.

RMA Lumber, Inc. v. Pioneer Machine, LLC, 2009 U.S. Dist. LEXIS 93472 (W.D. Va. Oct. 1, 2009): The district court granted summary judgment to the defendant distributor of a defective piece of equipment. The plaintiff's amended complaint alleged only constructive fraud. The court found that the damages sought by the plaintiff were in the nature of economic losses, not in the nature of rescission. The court found that economic losses were not recoverable in a tort action for construction loss and granted summary judgment for the defendant.

Solomon Hess LLC v. Beach First Nat'l Bank, 2009 U.S. Dist. LEXIS 57380 (E.D. Va. July 7, 2009): The plaintiff investment fund bought a loan for a restaurant from the defendant bank. The plaintiff alleged fraud by the bank, asserting that the bank knew of the borrower's troubles and the borrower's failure to repay past loans. The court found that Virginia law does not prevent a claim for fraud that is not based on the contractual relationship between the parties. When the plaintiff alleges it entered into the contract based on certain assurances which turned out to be false, the plaintiff has a claim for fraud which is not barred by the contract.

G. Defamation

Wynn v. Wachovia Bank, N.A., 2009 U.S. Dist. LEXIS 38250 (E.D. Va. May 6, 2009): Even though a former bank employee did not have a copy of a supervisor's alleged email telling coworkers that the employee had been terminated for abandoning her position, the employee could try her defamation claim supported by a former coworker's testimony about seeing and discussing the email with coworkers. This circumstantial proof raised the facts in the pleading above a "speculative level." The court also ultimately denied a motion for a new trial when the challenged jury instruction fairly represented Virginia's approach on the amount of evidence necessary to prevail on a definition claim. The challenged instruction stated: "It is not necessary that the publication be absolutely true: substantial truth is all that is required. It is the plaintiff's burden to prove that the publication was false." The stated that this represented a true reflection of Virginia law.

Smith v. Interactive Fin. Mktg. Group, LLC, 2009 Va. Cir. LEXIS 45 (Richmond 2009): The director worked for the employers as an account director in charge of automobile financing. The director argued

that the increase in unfiltered sub-prime credit "leads" provided by the employer resulted in a breach of the employers' obligations to their automotive franchise dealer partners, who did not receive what the employers contracted to provide. In his complaint, the director alleged the employers made defamatory statements including directions to blame the bad leads on the director, and claims that the bad leads resulting from the filter deactivation were the director's fault, among other things. The court agreed with the employers that the first allegedly defamatory statement, "if the dealers asked about the bad leads, blame it on the director - say that lots of things he was asked to do did not get done," was a command, and not a statement. Thus, the first allegedly defamatory statement did not provide either a false factual connotation or state actual facts about the director, and thus, was not actionable. The plaintiff could, however, claim defamation for additional alleged statements criticizing his job performance.

Habeck v. Cosby, 78 Va. Cir. 117 (Chesterfield County 2009): An advocate for a sewer line district in Chesterfield County sued other county residents for defamation. The trial court held that two letters claimed to be defamatory were filled with strong, emotional language, such as "significant emotional and financial ruin" and "squash us like insects." They contained angry sarcasm, which suggested that they were not to be read as objective statements of fact. Moreover, the assertions that the developers had hired the plaintiff to "ram an unwanted and unneeded sewer line down our throats," and that "this plan reek(ed) of extortion" were not verifiable. The claim that "this guy (plaintiff did) not give a rat's tail about any of us" was not verifiable. Furthermore, the court held that, under the common law, "comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made for the sole purpose of causing harm." Thus, the court held that the statements were privileged as they were made by citizens regarding a matter of public concern as to government action. Since the defamation claim failed, the civil conspiracy claim also failed.

Koegler v. Green, 2009 Va. Cir. LEXIS 181 (Va. Cir. Ct. Sept. 1, 2009): Plaintiff employee filed a defamation action against defendants, the lodge that employed him, an auditor, members of the lodge board, and certain lodge employees. Defendants filed demurrers to the complaint. Following an audit, which revealed that money was missing from the lodge treasury, the plaintiff was discharged from his position as a lodge administrator and his membership was suspended. The plaintiff alleged that defamatory statements were made in the audit report, in certain letters, during board meetings, during staff meetings, and in certain e-mail correspondence. The statements in the audit report and the letters, and those made during board meetings and staff meetings were protected by qualified privilege because they were made to fellow board members or employees, who had corresponding interests or duties. Further, there was insufficient evidence of malice. The statements contained therein were either true statements or statements of opinion. In addition, the plaintiff failed to plead facts with the requisite specificity. The court sustained the demurrers and granted the plaintiff leave to amend.

H. Derivative Lawsuits

RBA Capital, LP v. Anonick, 2009 U.S. Dist. LEXIS 29266 (E.D. Va. Apr. 8, 2009): Because injuries allegedly suffered by defendants who signed a surety agreement covering loans made to their corporate entity, were suffered directly by the corporation, and only derivatively, if at all, by defendants, they could not bring counterclaims for damage to an LLC, in their personal capacities or by virtue of their ownership of shares in a related corporate entity. The law in the Fourth Circuit is clear that a shareholder – even the sole shareholder – does not have standing to assert claims alleging wrongs to the corporation. Because the purported injuries were suffered directly by the LLC, and only derivatively, if at all, by defendants, they could not maintain an action seeking recompense for damage to the LLC in their personal capacities or by virtue of their ownership of shares in the LLC. The defendants had no alternate statutory source of standing to bring this action.

Remora Invs., L.L.C. v. Orr, 277 Va. 316, 673 S.E.2d 845 (2009): The issue was whether a member of an LLC could bring a direct action against the LLC's manager for such a breach or if such an action must be brought derivatively on behalf of the LLC. The parties were each members of the LLC, each having a fifty percent ownership interest. A problem arose after appellee refused to disburse certain proceedings from a real estate transaction. The trial court rejected the commissioner's findings and held that a claim for a breach of fiduciary duty could not be brought directly by one member of an LLC against another member or manager and, thus, appellant did not have standing to bring the cause of action against appellee. The court agreed, finding that nothing in the statutory provisions relating to LLCs provided for fiduciary duties between members of an LLC or between a member and a manager of an LLC. Further, the court found that analogous case law relating to corporations did not provide such duties. Likewise, the LLC's operating agreement did not provide such duties.

V. EVIDENCE

A. Best Evidence Rule

Brown v. Commonwealth, 54 Va. App. 107 (2009): The evidence at trial showed that defendant, along with three others, walked into a store, grabbed twelve bags of crab legs, went into a bathroom with them, returned holding nothing in his hands, and exited the store without paying for anything. At trial, the security officer for the store testified as to what he saw on the videotape of the incident captured by the store's video camera. The court held that the trial court did not err by admitting the testimony of the officer on the ground that the testimony violated the best evidence rule. The best evidence rule applied only to writings. Since a videotape was not a writing as understood and common law and as defined by Va. Code § 1-257, the best evidence rule was inapplicable to the videotape evidence in question. The court declined to expand the scope of the best evidence rule.

B. Control Group

Clifton v. United Salt Corp., 2009 U.S. Dist. LEXIS 82685 (W.D. Va. Sept. 9, 2009): The plaintiffs alleged in their complaint that, while employed at United Salt Corporation's facility, they were sexually harassed, discriminated against on the basis of their gender, were retaliated against, were constructively and/or wrongly discharged, and were subjected to assault and battery by the defendant plant manager. The trial court held that the plaintiff's lawyer could have *ex parte* contact with the plaintiffs' "non-supervisory" and "non-managerial" coworkers whose statements could not be used to impute liability to the employer.

C. Daubert and Expert Testimony

Holmes v. Wing Enters., 2009 U.S. Dist. LEXIS 53108 (E.D. Va. June 23, 2009): The plaintiff stated a products liability claim in his pleadings. More specifically, the plaintiff asserted that defendant negligently designed the Little Giant ladder, and that this negligent design caused his accident. In support of this claim, the plaintiff relied almost solely on the technical expert testimony and analysis of his putative expert witness. When it came to the crucial analysis of the feet and slippage, the court held that the expert relied solely on pure speculation. Moreover, the putative expert did not conduct a number of other tests that would have provided a more accurate, objective, and scientific depiction of the plaintiff's accident. Therefore, the testimony was excluded as insufficiently reliable under Fed. R. Civ. P. 702.

Wilson v. Arlington Co., VLW 010-8-014 (Arlington County Dec 14, 2009): The court set aside a jury verdict in favor of the plaintiff's insurance company State Farm. Plaintiff was involved in a vehicle accident with an Arlington Police officer who, along with the county, was subsequently dismissed from the suit on sovereign immunity grounds. While defending the liability issues in the suit, State Farm also was

processing the medical claims in a different division. State Farm's division dealing with the medical claims, on the final day of trial, received a copy of a medial expert's report extremely favorable to the plaintiff, but failed to give that report to the plaintiff until days after the jury rendered its verdict. The court found that State Farm had a duty to provide the medical expert's identity and to produce his report. State Farm's failure to do so resulted in the identity of the expert and the report constituting evidence discovery subsequent to trial, resulting in the court granting the plaintiff's Motion to Set Aside the Verdict and a new trial.

D. Settlement Negotiations

Xcoal Energy & Resources, LP v. Smith, 635 F. Supp. 2d 453 (W.D. Va. 2009): Plaintiff buyer alleged that defendants, principals in a coal mining business, committed fraud by misrepresenting that coal purchased by plaintiff was being held in inventory. Before the court was plaintiff's motion in limine to exclude certain documents pursuant to Fed. R. Evid. 408(a)(2) on the ground that the statements in the documents were made in compromise negotiations. The documents in question were copies of two e-mails between an officer of plaintiff's company and plaintiff's outside attorneys. The documents would have been otherwise privileged, except that it appeared that the attorney-client privilege was waived by plaintiff when the documents were disclosed to an insurance company. Defendants did not contest that the subject of the e-mails was the then-current negotiations between plaintiff and defendants' company over the missing coal. However, defendants contended that because the documents were internal to plaintiff and were not communications to the opposing side, they did not constitute statements made in compromise negotiations. The court held that internal memoranda, even if not communicated to the opposing side, were encompassed within Fed. R. Evid. 408 if they were prepared for the purpose of compromise negotiations. Thus, the documents at issue were inadmissible under Rule 408.

E. Supplementing the Trial Record

Amr v. Virginia State Univ., 2009 U.S. Dist. LEXIS 37563 (E.D. Va. May 4, 2009): The plaintiff employee sued the University claiming employment discrimination. The court granted summary judgment for the University and the plaintiff moved to supplement the record for appeal. The plaintiff sought to supplement the record with a deposition transcript and another document that was in existence by not proffered by the plaintiff before summary judgment was entered. The court stated that the record could be supplemented for an "error or accident," such as an error by the court reporter, but held that a parties failure to proffer documents in existence at the time of the challenge ruling did not constitute such an "error or accident."

VI. DAMAGES

A. Punitive Damages

Worldwide Network Servs., LLC v. DynCorp International, LLC, 2010 U.S. App. LEXIS 2914 (4th Cir. Va. Feb. 12, 2010): The Fourth Circuit set aside a punitive damage award of $10 million in a racial discrimination case. The court stated that § 1981 liability required proof that race actually played a role in the decision making process and had a determinative influence and that punitive liability required malice or reckless indifference as to whether federal law was being violated. Since nothing showed the contract was terminated in the face of a perceived risk that it would violate federal law, and jury instructions did not define malice or reckless indifference, the punitive damages award had to be vacated. The jury found for the plaintiff on two claims but the punitive damages had not been allocated between the two claims, thus a new trial on damages was needed.

B. Remittitur

Cretella v. Kuzminski, 640 F. Supp. 2d 741 (E.D. Va. 2009): A *pro se* defendant author moved to set aside the verdict in favor of plaintiff attorney on his defamation charges. The author argued that relief should be granted either in the form of judgment notwithstanding the verdict or that the respective verdicts should be reduced by the court, presumably by remittitur. The plaintiff alleged, and the court found, that the author defamed him on several occasions in a series of web-postings, with the jury awarding the plaintiff $236,000 in compensatory and punitive damages. Responding to the defendant's motion to set aside the verdict, the plaintiff argued that the verdict was substantiated by the evidence presented. The court found that the award of actual damages rested upon an appropriate evidentiary foundation, but the damages awarded were substantially beyond the harm alleged, and as such, remittitur was appropriate. The court also found that the punitive damages awarded for most of the claims were so excessive as to unjustly punish the author for his actions. The motion for a new trial was denied conditionally upon the attorney's acceptance of a reduced punitive damage award. The court reduced the total award to $53,000.

C. Exclusivity of Remedy

NENR Investments., LLC v. Starbucks Corp., 2009 U.S. Dist. LEXIS 44769 (W.D. Va. May 18, 2009): The magistrate judge recommended partial summary judgment to the plaintiff regarding liability and the types of damages available. Starbucks signed a lease for a store location but never paid rent nor demolished the old structure to replace it with a new structure as the lease required. The plaintiff sought, in addition to unpaid rent, damages resulting from non-performance such as losses in property value. The magistrate found that Virginia law holds a presumption against exclusivity of remedies unless there is an explicit statement in the contract or lease. In this case, there was no such exclusive statement in the lease agreement. Therefore, the court recommended that summary judgment be granted to the plaintiff concerning the types of damages available.

VII. ARBITRATION

Vaden v. Discover Bank, 129 S. Ct. 1262 (2009): The bank's servicing affiliate filed a complaint in Maryland state court to recover past-due charges under state law. The cardholder filed a counterclaim alleging violations of Maryland's credit laws. The bank then invoked the arbitration clause in the cardholder agreement and filed the Federal Arbitration Act § 4 petition in the district court. Because the cardholder conceded that her state-law counterclaims were preempted by federal law, the district court concluded that it had federal question jurisdiction over the bank's § 4 petition pursuant to 28 U.S.C. § 1331. The Fourth Circuit concluded that the complete preemption doctrine overrode the well-pleaded complaint rule. Although the Supreme Court agreed with the Fourth Circuit that a federal court could "look through" a § 4 petition to determine whether it was predicated on a controversy that "arose under" federal law, the Court held that, in keeping with the well-pleaded complaint rule, a federal court could not entertain a § 4 petition based on the contents of a counterclaim when the whole controversy between the parties did not qualify for federal-court adjudication. The Fourth Circuit erred by focusing only on the cardholder's counterclaims.

Am. Int'l Specialty Lines Ins. Co. v. A.T. Massey Coal Co., 628 F. Supp. 2d 674 (E.D. Va. 2009): As an initial finding, the court agreed with the insured that the insurer lacked standing to force the insured to arbitrate its claims with the other named insureds. The court found that there was no privity of contract between the insurers because the arbitration contracts were individually executed between the insured and the various insurers. Thus, the court dismissed the petition to compel arbitration against the other insurers. As to the insurer's petition to compel arbitration against the insured, the court found that the parties presented a justiciable controversy. However, the court agreed with the insured that it did not have authority under § 4 of the Federal Arbitration Act to compel arbitration because the challenged

arbitration agreement provided that the arbitration itself should occur in another district. Nonetheless, pursuant to 28 U.S.C. § 1404(a), the court concluded that since the parties had agreed that New York City was a convenient forum for arbitration, transfer to this agreed-upon forum, rather than dismissal of the matter for improper venue, was the appropriate judicial action.

A & G Coal Corp. v. Integrity Coal Sales, Inc., 600 F. Supp. 2d 709 (W.D. Va. 2009): The seller contended that the arbitration clause was not effective because the contract was subject to two conditions precedent that were never met in that a prior purchase order had to be completed and the seller had to commence delivery of coal before it was bound. The court noted that the arbitration clauses at issue were broad, but that they did not explicitly include the arbitration of arbitrability issues, so the substantive arbitrability issues were to be decided by the court. In ruling in the buyer's favor, the court found that arbitration was required because certain arbitration clauses in other purchase orders between the parties covered the instant dispute. Even if, as the seller contended, commencement of delivery of coal was a condition precedent to acceptance of the purchase order, the seller signed other purchase orders and delivered coal pursuant to their terms, thereby forming binding contracts and binding agreements to arbitrate. Thus, the parties had agreed to arbitrate, and the dispute was within the scope of the arbitration agreements, which were broad and covered every controversy between the parties regarding the purchase order. As all of the issues were arbitrable, dismissal was appropriate under the FAA.

Forrester v. Penn Lyon Homes, Inc., 553 F.3d 340 (4th Cir. 2009): The builder claimed that the district court erred in holding that it had defaulted its right to compel arbitration. The Fourth Circuit held that the district court properly found that the builder had defaulted its right to arbitration and a stay of judicial proceedings, pursuant to 9 U.S.C. § 3, regarding the homeowners' breach of structural warranty claim. The builder was on notice of the homeowners' structural warranty claim for over two years before it moved to compel arbitration, and the builder waited until the eve of trial to file its motion to compel arbitration, by which time over two years of litigation had occurred in which the homeowners had engaged in extensive pretrial preparations including multiple depositions, a motion for summary judgment, motions in limine, and submission of an array of pretrial filings. Further, the court held that use of the litigation process by the builder caused the homeowners actual prejudice, requiring them to expend significant time and money responding to the builder's motions and preparing for trial, permitting the builder to defeat several of the homeowners' claims on summary judgment, and forcing the homeowners to reveal their trial strategy.

Shoosmith Bros., Inc. v. Hopewell Nursing Home, L.L.C., 2009 Va. Cir. LEXIS 170 (Hopewell July 24, 2009): In considering whether to enforce an arbitration agreement, the court held that the defendant had "so substantially utilize[d] the litigation machinery that to subsequently permit arbitration would prejudice" the plaintiff. As of the date of its motion to stay the case and compel arbitration, the parties had spent nearly two and one-half years fully engaged in litigation, with numerous motions decided and over one year of discovery completed. For that reason, the plaintiff had met its burden of showing actual prejudice and proving waiver.

Stevens v. Eller, VLW 009-8-180, (City of Richmond Aug 19, 2009): The plaintiff, the former CFO at Smithfield Foods, brought a suit for defamation and tortuous interference with his employment contract against defendant Ernst & Young ("E&Y"). As CFO, plaintiff had signed the engagement letter, with the arbitration clause, with E&Y on behalf of Smithfield. The court refused to compel arbitration in a suit by plaintiff personally against E&Y. The court noted that Smithfield was not a party to the suit and that the plaintiff had not entered into the arbitration agreement personally or in his individual capacity.

Seguin v. Northrop Grumman Sys. Corp., 277 Va. 244, 672 S.E.2d 877 (2009): An employee sued her employer alleging defamation. The employer filed a motion to compel arbitration and the circuit court entered an order granting the motion to compel arbitration, which was appealed by the employee. The employer argued that Va. Code § 8.01-581.016 did not confer any right to appeal from an order compelling arbitration. The Court said the language of the statute was clear and unambiguous, agreeing

that the code did not grant a right to appeal an order compelling arbitration. The Court also noted that an order compelling arbitration pursuant to the Virginia Uniform Arbitration Act, was not a final judgment order. Jurisdiction remained with the trial court to vacate an arbitration award or to modify or correct an arbitration award. Thus, the appeal was dismissed.