May
2008
Volume 8
Issue 3

BEAN KINNEY & KORMAN PC
ATTORNEYS

Business Law Newsletter

Carol Schrier-Polak Wins Family Law Service Award

Carol J. Schrier-Polak, a family lawyer and partner with Bean, Kinney & Korman, has been named the 2008 recipient of the Family Law Service Award presented by the Virginia State Bar's Family Law Section.

The award recognizes people and organizations that have improved family, domestic relations, or juvenile law in Virginia. It was presented during the section's annual Family Law Seminar on April 25, 2008, in Richmond.

Carol led successful efforts to persuade the Virginia General Assembly to repeal Virginia Code Section 20-124.3:1, which limits the admissibility of testimony by mental health professionals in domestic relations cases.

Carol holds an undergraduate degree from Brandeis University, a master's in social work from the State University of New York at Buffalo, and a law degree from Temple University.

She is a former president of the Fairfax Bar Association and immediate past president of the Virginia chapter of the American Academy of Matrimonial Lawyers. She is a fellow of the American Academy and International Academy of Matrimonial Lawyers. She is a member of the Virginia Bar Association's Joint Coalition on Family Law, the Virginia State Bar's governing council, the Virginia Trial Lawyers Association and the Fairfax Law Foundation. She formerly served on the board of directors of Legal Services of Northern Virginia.

"Carol exemplifies the very best of our profession … the family lawyer whose emphasis is really on 'the family,'" wrote attorney Betty Moore Sandler of Woodbridge in a nomination letter.

Inside This Issue:

GETTING IT DONE®

2300 Wilson Boulevard, 7th Floor, Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

BEAN KINNEY & KORMAN PC
ATTORNEYS

BUSINESS TORTS

By James V. Irving

On September 24, 2007, the Virginia Supreme Court affirmed a Circuit Court of Roanoke jury award of more than 1.5 million dollars against Troy Cook, the Plaintiff's former sales manager and several of Cook's associates who helped him establish a new business venture in competition with the Plaintiff.

Prior to November, 2003, Troy Cook was the sales manager for Mario Industries of Virginia, Inc., ("Mario") a company that manufactures and sells lighting products. In the spring of 2003, Cook, with the assistance of others, used highly confidential Mario information to plan and form Renaissance Contract Lighting & Furnishings, Inc., a company that began competing with Mario while Cook was still Mario's sales manager. Prior to his resignation from Mario in November of 2003, Cook deleted substantial information from his office computer, including some of the plans he'd developed for his competing business. Cook and two of Mario's sales representatives began diverting projects from Mario to Renaissance while they were still employed by Mario.

Neither Cook nor the two Mario sales reps had signed a non-competition agreement, so when Renaissance learned of the plot, they filed suit against Renaissance and its conspiring founders for business torts, including tortious interference with business relationships, conspiracy, conversion, breach of fiduciary duty and misappropriation of trade secrets.

Perhaps because the actions of the Defendants were so egregious, much of the fight both at trial and on appeal dealt with Mario's damages. Mario claimed lost revenues of more than $6 million and lost profits of nearly $3 million, however the evidence for much of the claim was suspect. For example, Renaissance claimed $2 million in lost revenue and $810,868 in lost profits from the Hilton Garden Inn project, however Mario could not present evidence of the amount of the winning bid for that project. Likewise, Mario's president, Louis Scutellaro, testified that Cook had prepared a bid for the Benjamin West project on his last day of work and that Mario had lost this contract because Cook had prepared it improperly. The evidence to support the Benjamin West claim appeared vague and was offered with limited substantiation, but like the evidence on the Hilton bid, it was admitted without objection. Evidence of lost profits from Hilton and West alone exceeded $2 million.

The Supreme Court held that proof of the combined lost profits from the Hilton and West projects, admitted without objection, was sufficient to support the jury's damages award.

Mario v. Cook et al. appears to be a case of an infuriated jury determined to punish intentional wrongdoers. Had proper evidentiary objections been made, the flaws in Plaintiff's proof might have substantially reduced the award; without those objections, the jury was free to reward the plaintiff and penalize the defendant as it saw fit.

LIMITED LIABILITY COMPANIES

By James V. Irving

While Virginia, like most states, allows its limited liability companies broad latitude in crafting operating agreements, it remains true that such agreements, like all contracts, can only bind those that sign them.

In 2004, two Northern Virginia LLCs - Mission Residential LLC and Triple Net Properties, LLC - formed a third company called NNN/Mission Residential Holdings LLC. Triple Net was in the business of syndicating commercial properties for sale to investors, and Mission in locating, purchasing and managing residential properties. Triple and Mission organized NNN for the purpose of handling like-kind exchanges of multi-family properties for their customers and investors. Mission and Triple Net were the sole, equal members of NNN, and each of them signed NNN's operating agreement which specified that the parties would use their best efforts to resolve all NNN disputes in good

faith, and that all disputes that they could not resolve would be submitted to arbitration.

In March of 2006, Triple brought an arbitration action asserting breach of contract against Mission on its own behalf, plus a derivative claim against Mission on behalf of NNN. The arbitrator ruled that Triple lacked standing to assert the direct claim but allowed the derivative action to proceed.

In August of 2006, Mission asked the Fairfax Circuit Court to stay the arbitration of the derivative action and declare that there was no binding agreement to arbitrate. The Circuit Court denied the Motion to Stay and ruled that the derivative claim was arbitrable.

While it may seem logical to conclude, as the Circuit Court did, that the unanimous agreement of the members of the LLC was determinative of the LLC's dispute resolution practices, the Supreme Court did not see it that way and reversed the Circuit Court.

Unlike a breach of contract claim, which belongs to the party claiming breach, a derivative action belongs to the entity itself - in this case NNN - and is brought by a member on behalf of the entity. Since NNN was not a party to the arbitration agreement, and since a limited liability company is a separate and independent legal entity, it cannot be forced to arbitrate its claim unless NNN itself assented to the arbitration agreement.

Virginia policy includes a presumption in favor of arbitration, but only after proof of the existence of an arbitration agreement that binds all the parties. As Mission argued, in the case of a derivative action, the entity itself must be one of those parties

DEFAMATION SUIT OVER BLOG

By: Arianna S. Gleckel

Do you or your children have a blog, website or webpage? If so, you may be exposing yourself to a lawsuit. In May, 2008, a major landowner and developer in Christiansburg, Virginia, filed suit against four women for over $10 million dollars for damages suffered due to several blog posts.

The Plaintiff, Roger Woody, claims the women's blogs and websites were created to maliciously injure him by publishing false and misleading information about Woody and his business, Showcase Home Builders.

Two of the women do not have blogs and are not associated with the blogs referenced in the suit. However Defendants Terry Ellen Carter and Tacy L. Newell-Foutz do have their own blogs and have posted comments about the large piles of topsoil stockpiled on Woody's property. The blogs also questioned the appearance and safety of this topsoil, which has existed on the property for years, and nicknamed the pile "Mt. Woody."

Patrick Altoft, a blogger, comments on Woody's suit and writes, "the moral of this story is that bloggers should be careful what they write. Whether you are in the right or not you can still be sued."

Altoft is all too familiar with the repercussions of posting false information on a blog. In March of 2008, Altoft posted information about a company that had filed a lawsuit against Yahoo. Within 24 hours of the blog post. Altoft was contacted via email and telephone by the company's lawyers and later that day he retracted his comments.

In Woody's case, this may be perceived by some as an attempt by concerned residents to get a developer to clean up the community eyesore. Maybe Woody's suit will create new legal precedent that will begin to hold bloggers legally

Contact Us
2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

Defamation Suit Over Blog
Continued from Page 3

accountable for the information they post. This lawsuit raises many questions about the risks individuals run by putting information on the Internet and what protections the First Amendment affords this type of speech.

Blogs, personal websites and personal webpages differ from traditional communication forums in that anyone with a computer and an internet connection has the ability to essentially publish anything. This information can reach anyone else with internet access—the content has no geographical boundaries. Additionally, there is no oversight or editing and very little regulation of the content on these pages.

However the same laws apply to electronic medium as they do to newspapers, journals, and other written materials. The risks individuals face when posting information about other people or businesses on a blog, website or webpage are possible lawsuits for defamation, libel, slander, and/or tortious interference with business relationships. Therefore, bloggers should take Altoft's advice and be careful what you write.

BEAN KINNEY & KORMAN PC
ATTORNEYS

2300 WILSON BOULEVARD, 7TH FLOOR
ARLINGTON, VA 22201

GETTING IT DONE®