BEAN KINNEY & KORMAN PC

Getting it done.

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BUSINESS LAW NEWSLETTER

ANOTHER LOOK AT ACCORD AND SATISFACTION IN VIRGINIA

By James V. Irving, Esq.

Our January 2002 newsletter reviewed the ruling of a circuit court judge in Spotsylvania County interpreting the accord and satisfaction statute found in Section 8.3A-311 of the Virginia Code. Judge Ledbetter's ruling in *Chittum v. Anthony* was important because it provided rare judicial guidance on the application of a statute adopted in 1992.

Recently, the Virginia Supreme Court spoke for the first time on this statute. On September 13, 2002, the court, in *Gelles & Sons General Contracting, Inc. v. Jeffrey Stack, Inc.*, held that the subcontractor's acceptance of a partial payment by a contractor discharged the balance of the subcontractor's claim.

Gelles arose from a dispute between a contractor ("Gelles") and its bricklayer- subcontractor ("Stack"). Stack had billed Gelles for work performed under a series of oral agreements. Ultimately, Gelles paid Stack $70,486.00 for the work and Stack invoiced Gelles for the remaining balance of $26,175.00. Gelles disputed the amount owed and produced an accounting showing only $13,580.00 due after certain adjustments made for work and materials provided by Gelles.

Stack, not surprisingly, disagreed with the conclusions in the accounting and insisted on full payment. Thereafter, Gelles sent Stack a letter on December 13, 2002, detailing Stack's shortcomings and stating that Gelles "stands by its final amount as stated on the latest correspondence dated December 11, 2002. Enclosed please find a check in the amount of $13,580.00 representing final payment on the contract."

Stack accepted and negotiated the check, then sued Gelles for the balance it felt was due. Judge Langhorne Keith of the Fairfax Circuit Court sustained Gelles' accord and satisfaction defense. The aggrieved subcontractor appealed the case, which became the first opportunity for the Virginia Supreme Court to interpret this new statute.

The Virginia Supreme Court observed that while "under common law, accord and satisfaction requires both that the debtor intend that the proffered amount be given in full satisfaction," and that the claimant receive it as such, under the statute, a discharge is appropriate where a debtor "proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim." Stack's argument - that the "final payment" language in the December 13th letter was neither conspicuous, nor sufficiently clear to inform a reasonable person that cashing the check constituted a settlement of the claim - did not persuade the court.

Stack also asked the Court to provide "clear guidelines" on the issue, but the court declined, noting, "there is no statutory requirement that the term or clause must be displayed in a specific type or in any other distinguishing manner. Since no particular language was contemplated, each case must be considered on its own merits."

Particularly since the Supreme Court's mandate was to determine whether or not the trial court's findings were clearly erroneous, Stack was really an easy case. It stands, however, as a reminder that all creditors must carefully consider the terms proffered by a debtor when accepting a payment on a disputed amount, particularly if a notation on a check or accompanying letter suggests the possibility that the payment is intended as payment in full. ◈

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A TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCIES: THE NOERR-PENNINGTON DOCTRINE

By James V. Irving, Esq.

Named for a pair of U. S. Supreme Court decisions from the early 1960's, the *Noerr-Pennington* doctrine provides certain Constitutional defenses to claims of violation of the Sherman Anti-trust Act. The doctrine establishes that a citizen's rights of free speech and to petition the Government prohibit prosecutions based upon actions taken to influence legislative or executive action, unless those activities were a "mere sham."

On September 13, 2002, the Virginia Supreme Court extended the *Noerr-Pennington* doctrine to permit civil defendants to rely on the defense in tortious interference cases in which the plaintiff alleges that the defendant interfered with a competitor's business through use of the judicial system.

In 1998, Titan America, L.L.C. attempted to acquire land in Warren County, Virginia to use as a warehouse and distribution site for its cement business. Riverton Investment Corporation and its related entities opposed Titan's plans both before the local board of zoning appeals and planning commission, and then through litigation instituted in the local circuit court. Riverton also attempted to block the acquisition by funding litigation undertaken by various County residents against Titan. Riverton and its affiliates operated a cement company, which competed with Titan.

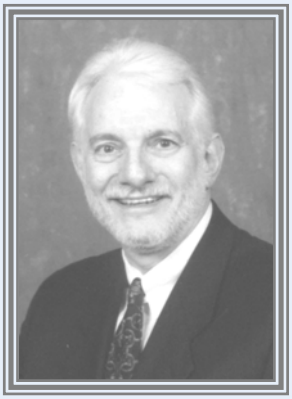
After Titan successfully acquired the land, it filed a Motion for Judgment against Riverton, claiming that Riverton's actions established claims for tortious interference with existing and potential economic relationships, conspiracy, and defamation. Relying on the *Noerr-Pennington* doctrine, Riverton argued that its actions in seeking to block the acquisition through legal process were constitutionally protected and that the allegedly defamatory statements were absolutely privileged since they were made in the course of litigation.

The trial court had little difficulty concluding that Riverton's administrative and litigation efforts were not objectively baseless; that Riverton's actions were protected under the *Noerr-Pennington* doctrine; and, ultimately, that the Riverton-orchestrated litigation brought in the name of Warren County citizens did not constitute fraud upon the tribunal. After considerable procedural wrangling in the trial court, the Supreme Court agreed to hear the appeal.

On appeal, Titan argued that the *Noerr-Pennington* doctrine should not be applied in the context of business tort litigation, and if applied, should be subject to a legal test different than that employed by the trial court.

The trial court had used a two-part test derived from a 1993 United States Supreme Court decision. Under that test, the court first determines whether the challenged litigation was objectively baseless and, if so, inquires into whether litigation was filed for anticompetitive purposes. Since the trial court had found in favor of Riverton on the first prong of this analysis (that is, that the underlying actions were not objectively baseless) it did not consider the subjective question of anticompetitive purposes. The Virginia Supreme Court agreed with the trial court's findings, and also reaffirmed that "a statement made in the course of a judicial proceeding is absolutely privileged if it is material and relevant to the proceedings." Titan argued that the *Noerr-Pennington* doctrine should not be extended to state law civil claims, because the doctrine was not developed for that purpose and because Virginia affords business tort defendants sufficient defenses "without the need to inject an additional defense." Most likely the marshaling of more compelling legal arguments would not have changed the Supreme Court's collective mind; they found in the utilization of government institutions a clear imperative for the invocation of Constitutional protections.

The Virginia Supreme Court's decision in Titan is important not only because it establishes an additional defense against potential tortious interference claims, but also because it establishes the Supreme Court's apparent willingness to extend the *Noerr-Pennington* doctrine generally. Unless claims are brought without basis or claim of right, it would seem that the Supreme Court is ready to consider insulating parties from all claims of liability arising from the exercise of a party's right to sue. ◈



JAMES W. KORMAN ELECTED FELLOW TO VIRGINIA LAW FOUNDATION

CONGRATULATIONS TO James W. Korman, who has been elected as a Fellow to the Virginia Law Foundation.

Limited to no more than 1% of the membership of the Virginia State Bar residing in Virginia, the Foundation "exists to serve Virginians and the legal profession in Virginia through support to programs which promote or provide legal services to the poor, improvements in the administration of justice, education of the public about the law and the legal profession, continuing legal education and public service internships for Virginia law students." Fellows' membership totaled only 272 as this newsletter went to press.

Profiled with numerous accolades in the September 2002 issue of the Bean, Kinney & Korman Business Law Newsletter, Mr. Korman's election acknowledges yet again his extensive service to the public and the legal profession throughout the Commonwealth of Virginia. ◈

SATIRE AND DEFAMATION

By James V. Irving, Esq.

For centuries satire has been one of the most artful and effective ways to criticize government and public figures. Even in a country founded on free speech, there has always been a tension between parody and defamation. In May of 2002, a Texas appellate court highlighted that delicate balance when it held that the publisher of a satirical article could be subject to a defamation claim because the article was not an "obvious satire."

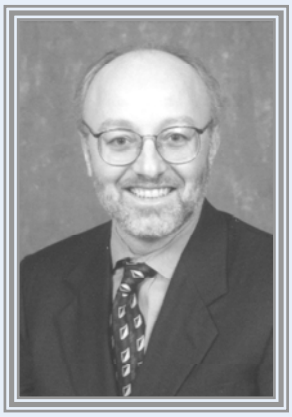
In *New Times, Inc. v. Isaacks*, a newspaper lampooned certain public officials by presenting a satirical version of a recent news story about the arrest of a student for reading a violent Halloween story in school. When the officials sued for defamation, the newspaper predictably moved for summary judgment based upon the First Amendment Right to Free Speech, and argued also that it could not be said that it acted with "actual malice." The trial court denied the motion and the appellate court affirmed.

The appellate court first analyzed whether the allegedly defamatory statement conveyed "a false statement of fact," noting defamation cannot be based upon "mere opinion or rhetorical hyperbole." However, said the court, the opinion-hyperbole protection does not apply when the parody is so misleading as to convey a "substantially false and defamatory impression." In this case, the defendant's article used fictional quotes and attributed them to real individuals who had made similar statements in the underlying news story. The court also noted that the article was placed in a section of the paper normally reserved for investigative reporting and that some readers apparently actually believed the article was true.

The court defined actual malice as "making a statement with knowledge that it is false" and held that the official's burden was to show that the publisher had "serious doubts as to the truth of it's statements." Pointing out that one of the defendant's own employees testified that the article was meant to hold plaintiffs up to public ridicule, and that even "well-read people could have been misled by the story," the court found enough factual support to make the question of actual malice an issue for the jury.

Isaacks is a free speech within a free speech case, since the offense for which the student was prosecuted was the reading of an offensive story. Although free speech is guaranteed by federal law, as well as by the laws of most states, the application of that universal freedom is sometimes a matter of local mores and practices. ◈

MEET OUR LAWYERS …



Leo S. Fisher

An experienced litigator, Leo S. Fisher represents businesses and their owners and senior executives in complex business disputes. These include ownership and control contests, defense of securities fraud claims, and employment terminations involving protection of trade secrets and non-compete agreements. He appears frequently in both state and federal courts, and has handled numerous disputes before the American Arbitration Association. In addition to tenacious representation of clients in litigation matters, Leo helps his clients achieve their objectives through strategies that seek to eliminate the need for litigation or minimize the risk normally associated with trial.

Leo joined Bean, Kinney & Korman in 1990, and has been active in firm management since that time. He has been the managing shareholder of the firm since 2001, and was the first member of Bean, Kinney & Korman to be admitted to practice in all three jurisdictions in the Washington metropolitan area.

Leo grew up in Pittsburgh, Pennsylvania. He and his wife of 27 years, Sue, graduated from Oberlin College, where Leo majored in English and Classic Civilizations and played intercollegiate tennis for four years. While working full time in economic planning positions or as a law clerk, Leo attended the evening division of the George Washington University Law School, where he graduated cum laude in 1980. When not reading fiction and history, Leo continues to play competitive tennis in local leagues. ◈

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About Our Organization . . .

For over four decades, Bean, Kinney & Korman has been a leading Northern Virginia law firm that has continuously grown and diversified to meet the needs of its expanding community of clients and their increasingly complex legal needs. While we have grown in size and greatly expanded the depth and breadth of our capabilities, we have remained committed to those fundamental elements of value that are integral to our practice philosophy: experience, versatility, dedication to service, flexibility and efficiency.

Our responsive and exceptional quality service, coupled with our sensitivity to client needs, has established a professional reputation in which we take great pride. We are dedicated to achieving exceptional results for our clients in every matter we are entrusted to handle, mindful of each client's resources and unique circumstances. Delivering greater value to our clients day in and day out is how we will continue our reputation as one of the most highly regarded law firms in the Washington metropolitan region.

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