University of Richmond Law Review

Volume 24 | Issue 4 Article 9

1990

Annual Survey of Virginia Law: Evidence

Charles E. Friend

EVIDENCE*

*Charles E. Friend***

I. INTRODUCTION

The past year has brought a variety of appellate court decisions (and a few legislative actions) in the evidence area. Some of these are merely affirmations of well-established principles; others answer questions about evidence law which have troubled lawyers and judges in the Commonwealth for some time. And, inevitably, some of them raise questions in areas once thought to be definite and certain.

Many of the decisions were handed down by the Court of Appeals of Virginia. Because these decisions may be reversed or overruled by the Supreme Court of Virginia, they must be cited with caution, and must not be taken by the reader as the final word upon the matters covered. However, some of these cases are cited here because they provide appellate guidance in areas in which such guidance is sorely needed.

II. THE DECISIONS—AND A STATUTE

A. *The Hearsay Rule*

1. The Business Records Rule

One of the most important of all of the hearsay exceptions is the "business records rule." This rule, which is often referred to as the "shopbook rule,"[1] makes admissible many highly relevant documents which would otherwise be excluded by the operation of the hearsay rule. The exception, where it is applicable, therefore greatly enhances the search for the truth in many forms of litigation.

** Adjunct Professor of Law, George Mason University; B.A., 1957, George Washington University; J.D., 1969, Marshall-Wythe School of Law, College of William and Mary.

1. At common law, the shopbook rule was a discrete rule which applied only in limited situations. The modern business records rule includes the matters addressed by the original shopbook rule, but is much broader in its coverage. However, the colloquial use of the term "shopbook rule" to describe the business records rule is common.

In *Ford Motor Co. v. Phelps*,[2] the Supreme Court of Virginia reviewed the rule and applied one of its lesser-known aspects to hold the proffered evidence inadmissible. Under this rule, records (or entries in records) made in the ordinary course of business are admissible as an exception to the hearsay rule. Such entries are admissible only when (a) they are statements of fact, and (b) only when it has been shown that the records were indeed made in the ordinary course of business.[3]

Normally, such entries are admissible only if they are made by persons who have personal knowledge of the facts or events described.[4] However, the Supreme Court of Virginia has recognized that even though the person making the entry (the "entrant") lacks such personal knowledge, the entry is admissible if the entry is based upon an oral or written report made to the entrant by another person (an "informant") who (a) has personal knowledge and (b) is also acting in the ordinary course of business.[5]

This latter provision—that the entry may be based upon the report to the entrant of an informant who has personal knowledge and is also acting in the ordinary course of business—has been troublesome. All too often, those invoking the rule have overlooked the second half of the requirement, offering entries based upon reports from persons who have first-hand knowledge *but who were not acting in the ordinary course of business*. Such entries are not admissible, as *Ford Motor Co. v. Phelps*[6] pointedly reminds us.

In *Ford*, the trial court admitted into evidence reports made by Ford employees based upon complaints received from Ford customers (and their attorneys) reporting unsatisfactory performance of their vehicles. The Supreme Court of Virginia held that these documents did not satisfy the business record rule's requirements, and were therefore inadmissible in evidence, because, although the customers and attorneys making these reports to Ford may have had first-hand knowledge of the problems, *they themselves were not acting in the ordinary course of business*.

> [T]he consumers, who either made the complaints themselves (or

2. 239 Va. 272, 389 S.E.2d 454 (1990).

3. *See, e.g.*, Neeley v. Johnson, 215 Va. 565, 211 S.E.2d 100 (1975) (establishing this exception in Virginia).

4. *Id.*

5. *Ford*, 239 Va. at 276, 389 S.E.2d at 457 (1990).

6. *Id.* at 272, 389 S.E.2d at 454.

> through counsel) or who furnished the information to Ford employees from which the records of the complaints were made, were not acting in the regular course of business. Instead, *they were acting as consumers for personal reasons unrelated to any business.*[7]

Therefore, said the court, the business records rule "does not permit the substance of these exhibits to be considered for the truth of the matters recorded in the documents."[8]

The decision is entirely in accordance with existing law. Further, the principle applies equally to other types of reports made by other types of informants. For example, this same principle would prevent the admission of portions of a police report (if otherwise admissible) which set forth statements made to the reporting officer by eyewitnesses. The officer making the report is acting in the ordinary course of the officer's business, and the eyewitnesses have first hand knowledge, but the eyewitnesses are not acting in the ordinary course of *their* business. Even though the witnesses have a legal duty to provide the information to the police, this does not make the witnesses' statements "in the ordinary course of business" as far as the witnesses are concerned, and such portions of the report should be excluded.

2. Party Admissions

Another 1990 Supreme Court of Virginia decision, *Cofield v. Nuckles*,[9] deserves mention if for no other reason than to prevent possible misinterpretations of what was said by the court in the case. *Cofield* involved an automobile accident. In that case, one of the parties expressed the belief that he was "not supposed to be" driving in the curb lane of the street at the time of the accident. The opinion states: "Cofield's belief that he was 'not supposed to be' driving in the curb lane at the time of the accident does not make such action illegal. A party can concede the facts but cannot concede the law."[10]

This statement is, of course, quite correct in the sense that a party's statements regarding what the law is are not binding upon the court, which must make an independent determination of what

7. *Id.* at 276, 389 S.E.2d at 457 (emphasis added).
8. *Id.*
9. 239 Va. 186, 387 S.E.2d 493 (1990).
10. *Id.* at 194, 387 S.E.2d at 498.

the law is in a given case.

However, this comment should *not* be taken to mean any more than that. A party's own evidential admission to the effect that he or she or it has failed to comply with some legal requirement or standard (i.e., a statute, the standard of care, etc.) *is admissible as evidence against that party under the party admissions exception to the hearsay rule.*[11]

Such party admissions do not (normally) prevent the jury, the trial court, or the appellate court from finding that the party did *not* violate the law, but they are admissible against the party for such consideration as the trier of fact wishes to give them.

The court's comment in *Cofield* should therefore be taken in the context in which it was made, and should not—at least until further notice—be construed to alter the party admissions exception to the hearsay rule.

3. Excited Utterances

In *Harris v. Commonwealth*,[12] the Court of Appeals of Virginia continued its helpful expositions of the "excited utterances" exception to the hearsay rule.[13] Prior to 1988, our appellate courts had not accepted as being within the exception any utterance made more than five minutes after the exciting event had occurred. This was not a requirement of the law, nor was it ever stated to be a rule, but it was most definitely the practice, nevertheless. However, in 1988 in the case of *Clark v. Commonwealth*,[14] our courts for the first time accepted as an excited utterance a statement made more than five minutes (in this case, five to ten minutes) after the event. In *Harris*, the court of appeals, citing *Clark*, held admissible an excited utterance made by a shooting victim "within ten minutes" of the shooting.

The court of appeals noted in *Harris* that there is "no fixed rule

11. Such statements are not rendered inadmissible merely because they address the ultimate issue in the case, nor because they constitute the party's opinion. The opinion rule does not apply to party admissions. *See, e.g.*, Southern Passenger Motor Lines v. Burks, 187 Va. 53, 46 S.E.2d 26 (1948). For additional discussion, see C. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA §§ 229, 253 (3d ed. 1988).

12. 8 Va. App. 424, 382 S.E.2d 292 (1989).

13. This exception is sometimes, unfortunately and confusingly, referred to as "the res gestae exception"—a term which should be barred once and for all from the language of the law.

14. 235 Va. 287, 367 S.E.2d 483 (1988).

by which the question whether the statement is admissible as an excited utterance can be decided. . . . Resolution of the issue depends on the circumstances of each case and 'rests within the sound judicial discretion and judgment of the trial court.' "[15]

The court then held that under the circumstances of the *Harris* case, the statement was admissible.

4. Artist's Sketch Held Not Hearsay

In *Harrison v. Commonwealth*,[16] a composite sketch made by a police artist from information given him by the victim was admitted into evidence. The sketch was admitted after being identified by the victim as the sketch drawn by the artist from her description. The defendant contended that this violated the hearsay rule, and that, in addition, the sketch was merely the artist's opinion, which was admitted without proper foundation.

The court of appeals rejected these contentions. Quoting from a similar decision of the Second Circuit, the court of appeals said:

> The sketch itself . . . need not fit an exception to the rule against hearsay because it is not a "statement" and therefore can no more be "hearsay" than a photograph identified by a witness. . . . The testimony of the artist was no more necessary as a condition of admissibility than a photographer's testimony would have been had the witnesses identified a photograph.[17]"

The court of appeals then held that such sketches are admissible when properly identified by the person who gave the artist the information from which the sketch was created, even though the artist who prepared the sketch does not testify.[18]

---

15. *Harris*, 8 Va. App. at 430, 382 S.E.2d at 295 (quoting *Clark*, 235 Va. at 292, 367 S.E.2d at 486).

16. 9 Va. App. 187, 384 S.E.2d 813 (1989).

17. *Id.* at 189 384 S.E.2d at 814-15 (quoting United States v. Moskowitz, 581 F.2d 14, 21 (2nd Cir.), *cert. denied*, 439 U.S. 871 (1978)). The opinion also cites cases from Massachusetts, Connecticut, New Jersey, Illinois, and Michigan in support of its conclusion.

18. As the Court of Appeals of Virginia noted in its opinion, there are cases which appear to classify such sketches as hearsay. However, even should this result be reached, this would still not preclude the admission of the sketch under any applicable exception to the hearsay rule.

5. "Fresh Complaint"

Few rules of evidence law have been more frequently misunderstood than the so-called "doctrine of fresh complaint." This rule, which permits testimony to the effect that the victim of a rape or attempted rape reported the offense shortly after it was allegedly committed, has often been misapplied, usually with the result that the testimony about the complaint is erroneously excluded from evidence.

Such exclusion is usually based upon the assumption that such testimony is hearsay. However, these statements are *not* admitted to prove the truth of the statement's content, but rather to show that the victim did in fact make an immediate report of the attack—i.e., *to show that the statement was made*, thereby corroborating the victim's testimony by impliedly refuting the possibility that the complaint was a later fabrication of the complaining witness.[19] Since the statement is being offered only to show that it was made, and not to prove the truth of the statement, *it is not hearsay at all*, and may be admitted without reference to the hearsay rule or its exceptions.[20]

There has in the past been some question as to whether "fresh complaint" statements are admissible in trials other than for rape itself. Several cases have held it inapplicable in cases involving molestation of children short of actual rape.[21]

In *Kauffman v. Commonwealth*,[22] the court of appeals held that the rule was not applicable to a case of aggravated sexual battery, and noted, citing prior cases, that it was likewise inapplicable to cases of taking indecent liberties with children. The court stated that application of the rule is limited to cases of rape and attempted rape, thereby presumably eliminating it from employment in the numerous other types of sexual offenses enumerated in title 18.2 of the Code of Virginia (the "Code").

---

19. The rule has frequently been invoked in Virginia, apparently beginning with the case of Haynes v. Commonwealth, 69 Va. (28 Gratt.) 942 (1877).

20. For further discussion and case citations, see C. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 250 (3d ed. 1988).

21. *See, e.g.*, Leybourne v. Commonwealth, 222 Va. 374, 282 S.E.2d 12 (1981), and cases cited therein.

22. 8 Va. App. 400, 382 S.E.2d 279 (1989).

6. State of Mind Exception

In the case cited in the preceding subsection, *Kaufman v. Commonwealth*,[23] the court of appeals also followed prior Virginia cases by holding that a child's complaint that he or she has been sexually abused is not admissible under the state-of-mind exception to the hearsay rule.[24] The court of appeals ruled that the statements made by the child in *Kaufman* were inadmissible under the state-of-mind exception because they recalled past events and described the cause of her state of mind, both being grounds for exclusion under the state-of-mind exception to the hearsay rule.

Again, this case should not be taken to mean more than it says. In this instance the statements were being offered to prove the truth of their content, thereby subjecting them to the hearsay rule. Because they were offered to prove the truth of the matters stated, they were inadmissible unless they fit within some exception to the hearsay rule.

However, prosecutors trying child-abuse cases should keep in mind that *such statements are admissible if offered for some purpose other than to prove the literal truth of their content.*[25] Further, it may be possible to prove child abuse by other statements regarding sex which reveal the child's state of mind toward sex and which, by implication, constitute circumstantial evidence that the child was in fact molested.[26]

B. *DNA Evidence*

1. The *Spencer* Case

In what was perhaps the most significant evidentiary ruling of the past year, the Supreme Court of Virginia in September 1989, became one of the first appellate courts in the country to approve the use of deoxyribonucleic acid (DNA) testing results as evidence in criminal cases. In *Spencer v. Commonwealth*,[27] the defendant was charged with capital murder and rape. Semen stains found at the scene and samples of the defendant's blood were subjected to

---

23. 8 Va. App. 400, 382 S.E.2d 279 (1989).

24. *See* Pepoon v. Commonwealth, 192 Va. 804, 66 S.E.2d 854 (1951).

25. *See, e.g.*, Donahue v. Commonwealth, 225 Va. 145, 300 S.E.2d 768 (1983) (cited by the court of appeals in Harris v. Commonwealth, 8 Va. App. 424, 382 S.E.2d 292 (1989)).

26. *See* Church v. Commonwealth, 230 Va. 208, 335 S.E.2d 823 (1985).

27. 238 Va. 275, 384 S.E.2d 775 (1989).

DNA analysis. The tests determined that the DNA extracted from the semen stains matched the DNA obtained from the defendant's blood. In upholding the admissibility of this type of evidence, the Supreme Court of Virginia said:

> DNA print identification is based upon several well-accepted scientific principles.
>
> . . . .
>
> . . . The configuration of DNA molecules does not vary from cell to cell in the same human body; each DNA molecule carries the same genetic code in exactly the same sequence. However, the configuration of the molecule is different in every individual with the exception of identical twins.[28]

After describing the DNA testing technique, the court continued:

> The parties stipulated that [the defendant] does not have an identical twin and that none of his blood relatives had committed the murder. Therefore, the chance that anyone other than [the defendant] produced the semen stains was one in 135 million.
>
> . . . [W]itnesses testified that "DNA printing" is a reliable scientific technique that will not produce a "false positive" result if a sufficient number of probes are used. They also testified that the testing procedure employed in the present case was conducted in a reliable manner. Moreover, the undisputed evidence established that the technique is generally accepted in the scientific community and is used in "[s]everal thousands of laboratories" around the world. Similarly, the undisputed evidence showed that the probes used in this case are reliable and used in "hundreds of laboratories throughout the world."[29]

The court noted that the defendant had acknowledged that DNA tests were accepted as reliable, and that he was "unable to find or produce one qualified expert to debunk either the theory of DNA printing or the statistics generated therefrom."[30] The court then said that "[b]ecause the undisputed evidence supports the trial court's conclusion that DNA testing is a reliable scientific

28. *Id.* at 286, 384 S.E.2d at 781.
29. *Id.* at 289, 384 S.E.2d at 782 (citation omitted).
30. *Id.* at 289, 384 S.E.2d at 783.

technique and that the tests performed in the present case were properly conducted, we hold that the trial court did not err in admitting this evidence."[31]

2. Virginia Code Section 19.2-270.5

During the 1990 session, the General Assembly gave statutory approval to the use of DNA test results as evidence in criminal cases. The newly-enacted section 19.2-270.5 of the Code states that "[i]n any criminal proceeding, DNA (deoxyribonucleic acid) testing shall be deemed to be a reliable scientific technique and the evidence of a DNA profile comparison may be admitted to prove or disprove the identity of any person. . . ."[32]

The statute provides that the opposing party must be given at least twenty-one days written notice of intent to offer a DNA analysis into evidence. If such notice is not given, the trial court may either grant a continuance or prohibit the use of the evidence.

3. Significance and Prognosis

The significance of these developments can hardly be overestimated. The DNA technique is being hailed as the greatest advance in criminal identification techniques since the establishment of fingerprinting. Because Virginia now has the capability to conduct DNA testing in its own state laboratories, DNA evidence should eventually become readily—indeed, almost routinely—accessible to Virginia prosecutors.

Not surprisingly, the criminal defense bar has viewed the development of the DNA technique with growing alarm. This past spring, a national conference of criminal defense attorneys was held in Washington, D.C. for the express purpose of developing ways to attack and defeat the use of DNA evidence in American courts. We can expect that in the next few years, the criminal defense bar and other groups will lobby intensely throughout the nation for the passage of laws which will prohibit, or at least greatly restrict, the use of DNA evidence.

This "down with DNA" movement has already met with some success. Several court decisions in other states, notably in New

31. *Id.* at 290, 384 S.E.2d at 783.
32. VA. CODE ANN. § 19.2-270.5 (Repl. Vol. 1990).

York, have resulted in the exclusion of DNA evidence in specific trials.

As with most new forms of scientific evidence, the attack upon DNA has been basically two-pronged; the defense seeks to persuade the court (a) that the basic principle is questionable or at least not yet proven; and/or (b) that the testing in the particular case was flawed. Since the DNA principle itself is well-established, it seems probable that it is the second prong of the attack that will be the primary focus of future anti-DNA efforts.

In the coming months and years, Virginia courts and Virginia legislators can expect considerable pressure to be brought to bear upon them to reverse the acceptance of DNA evidence established by the *Spencer* decision and the passage of section 19.2-270.5 of the Code.

C. *Photographs of Victims*

1. Criminal Cases: Admissible, Admissible, and Admissible

Photographic evidence, like other forms of visual evidence, is extremely effective. Not surprisingly therefore, the admission of photographs of the victim of a violent crime is usually opposed with vigor by the defense.

The rules of admissibility of photographs of victims are well established. The Supreme Court of Virginia and the Court of Appeals of Virginia have repeatedly ruled that such photos are admissible if their probative value exceeds their prejudicial effect.[33] The fact that they are gruesome does not prevent their admission;[34] like all relevance-prejudice matters, the admission of such photos is within the discretion of the trial court.[35]

Notwithstanding the repeated expressions of approval by the appellate courts for the use of victim photos, error continues to be assigned on appeal for the admission of such photographs in criminal trials. In not less than three instances during the past year, the Court of Appeals of Virginia was called upon to rule upon the mat-

33. *See, e.g.*, Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983).

34. *See, e.g.*, Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987).

35. *See, e.g.*, Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361 (1987). For a complete discussion of the admissibility of this type of evidence, see C. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 170 (3d ed. 1988).

ter. In *Kelly v. Commonwealth*,[36] *Diehl v. Commonwealth*,[37] and *Edwards v. Commonwealth*[38] victim photographs were admitted into evidence; the court of appeals, reaffirming the principles set forth above, ruled the photos admissible in each case.

2. Civil Cases: "Same Medium" Test Rejected

Perhaps the most interesting case of the past year involving victim photographs was a civil case. Photographs of the plaintiff's injuries are frequently offered in personal injury cases. In one such case, *Lucas v. HCMF Corp.*,[39] the plaintiff was seeking damages for injuries allegedly sustained by the plaintiff's deceased while the deceased was under the care of a nursing home.

At the time that she was transferred from the nursing home to a hospital, the deceased was suffering, among other things, from severe decubitus ulcers, commonly known as bed sores. The plaintiff attempted to introduce photographs of these ulcers as they appeared when she was hospitalized. The trial court ruled that these photographs were not admissible unless accompanied by photographs of the same portions of the deceased's body at the time that she entered the nursing home. According to the court of appeals opinion, the trial court ruled that "in a before and after situation, the medium of demonstration has got to be so similar that there is a comparison. . . . In other words, if you have an illustration of the before, then an illustration of the after is proper."[40] Since no photographs of the ulcers had been taken before the deceased was admitted to the nursing home, "the trial court's statement effectively prevented the introduction of the photographs under any circumstances."[41]

The Supreme Court of Virginia reversed, saying:

> Photographs are admissible when they bear some relevance to a matter in controversy. The party offering the photograph must demonstrate its relevance and lay a foundation for its introduction into evidence. . . . These determinations of relevancy and materiality are within the discretion of the trial judge. . . . The "same me-

36. 8 Va. App. 359, 382 S.E.2d 270 (1989).
37. 9 Va. App. 191, 384 S.E.2d 801 (1989).
38. ___ Va. App. ___, 390 S.E.2d 204 (1990).
39. 238 Va. 446, 384 S.E.2d 92 (1989).
40. *Id.* at 451, 384 S.E.2d at 95.
41. *Id.*

dium" prerequisite espoused by the trial court in this case was unrelated to issues of relevancy, materiality and jury sensitivity. In imposing this prerequisite for the admission of the photographs, the trial court abused its discretion.[42]

D. *Expert Witness: Basis of Opinion*

Parties employing expert witnesses at trials sometimes forget that the mere fact that a person is adjudged to be qualified as an expert in a given field does *not* automatically empower that witness to testify. As the Supreme Court of Virginia has said, "Qualification of an expert witness does not insure admission of his every statement and opinion."[43]

The recurrent problem seems to be that not everyone clearly understands that an expert witness, however well qualified, may not express an opinion from the witness stand *unless that opinion has a proper basis.*

Part of the difficulty seems to lie in the interpretation of the language of section 8.01-401.1 of the Code.[44] The passage of this statute significantly altered the common law rules as to the proper basis of expert opinion. The section permits expert witnesses in civil cases to express opinions based upon sources of information (such as hearsay) which would themselves be inadmissible in evidence. This statute further permits an expert to express an opinion without initially disclosing the basis of that opinion.[45]

This Code section has spawned a number of problems, two of which were addressed by the Supreme Court of Virginia during the past year.

1. Section 8.01-401.1 and the Basis of Expert Opinion

There is apparently some misunderstanding about the effect of this section's provision that the expert need not *state* the basis of his or her opinion prior to giving the opinion. This has been misinterpreted in some quarters to mean that there is no longer any

42. *Id.* (citations omitted).
43. Swiney v. Overby, 237 Va. 231, 377 S.E.2d 372 (1989).
44. VA. CODE ANN. § 8.01-401.1 (Repl. Vol. 1984).
45. *Id.*

need for a proper basis to exist. *Nothing could be further from the truth.*

Section 8.01-401.1 does *not* remove the requirement that there must in fact *be* a proper basis for the expert's opinion, even though the expert need not initially state it. In *Swiney v. Overby*[46] the Supreme Court of Virginia pointedly said:

> Code § 8.01-401.1 allows an expert to express an opinion without initially disclosing the basis for the opinion. . . . *It does not, however, relieve the court from its responsibility, when proper objection is made, to determine whether the factors required to be included in formulating the opinion were actually utilized.* If all the factors are not utilized, the court should exclude the opinion evidence.[47]

The case was reversed because one such factor was not employed by the expert witness in reaching the proffered opinion.

2. Applicability of Section 8.01-401.1 to Criminal Cases

The applicability of section 8.01-401.1 of the Code is expressly limited by the statute's own terms to civil cases. However, there have been repeated efforts since the section's passage to convince the Supreme Court of Virginia to extend the provision's coverage to criminal cases as well. The court has already expressly refused to do this.[48]

Nevertheless, in *Buchanan v. Commonwealth*,[49] the court was again asked to rule that the section's coverage extends to criminal cases. The defendant argued that the trial court had erred when it refused to allow two defense experts to testify about out-of-court interviews and discussions which they had regarding the defendant's state of mind at the time of the murders. The trial court excluded this testimony, applying the well-established rule that in criminal cases in Virginia experts may not testify on the basis of hearsay information. On appeal, the defendant argued that the rule of section 8.01-401.1 should be extended to criminal cases. The Supreme Court of Virginia, following its previous decision in

46. 237 Va. 231, 377 S.E.2d 372 (1989).
47. *Id.* at 233, 377 S.E.2d at 374 (emphasis added) (citation omitted).
48. *See* Simpson v. Commonwealth, 227 Va. 557, 318 S.E.2d 386 (1984).
49. 238 Va. 389, 384 S.E.2d 757 (1989).

Simpson v. Commonwealth,[50] again refused to extend the rule beyond the limits set by the legislature.[51]

E. *Impeachment: Reference to Polygraph Test Permitted*

The courts' deep-rooted suspicion of polygraph evidence has made such evidence generally inadmissible in Virginia courts. In the past, this has prohibited not only testimony about polygraph test results, but also any mention of a party's willingness or unwillingness to take a polygraph test.[52] However, in *Crumpton v. Commonwealth*,[53] the rule forbidding any mention of the polygraph in a Virginia court collided head-on with the common law rule that one who is impeached by a showing of a prior inconsistent statement has a right to explain that inconsistency.[54]

In *Crumpton*, the defendant initially told police that his wife's shooting death was an accident. Following a polygraph test, however, the defendant altered this statement and claimed that his wife had committed suicide. At the trial, when confronted with the inconsistency, the defendant sought to explain his change of story on the basis that it was due to statements made to him by the polygraph examiner during the administration of the polygraph test.

Noting that "the polygraph examination and the alleged statements made by the polygraph examiner were a part of Crumpton's explanation for altering his prior inconsistent statements regarding his wife's death," the Court of Appeals of Virginia sought to reconcile the two apparently conflicting principles. The court concluded that Crumpton should have been permitted to make reference to the polygraph examination in the course of his explanation of the inconsistencies. In the court's view, this could have been accomplished without doing violence to the established rules regarding polygraph evidence, if (1) the *results* of the examination were not mentioned and (2) the trial court had given "an appropriate cautionary instruction . . . that no inference favorable or unfavorable to Crumpton should be drawn from the reference to the polygraph

50. 227 Va. 557, 318 S.E.2d 386 (1984).
51. *Buchanan*, 238 Va. at 416, 384 S.E.2d at 773.
52. *See, e.g.*, Gray v. Graham, 231 Va. 1, 341 S.E.2d 153 (1986).
53. 9 Va. App. 131, 384 S.E.2d 339 (1989).
54. *See, e.g.*, Brown v. Peters, 202 Va. 382, 117 S.E.2d 695 (1961).

examination."[55]

F. *Extrajudicial Statements of Accused's Spouse*

Section 19.2-271.2 of the Code[56] provides that the spouse of the accused may not be called to testify against the accused without the accused's consent. In *Stumpf v. Commonwealth*,[57] the accused's wife was not called as a witness, but evidence of her extrajudicial statements was admitted against him. The accused contended that this violated his statutory right to exclude his wife's testimony.

A prior Virginia case, *McMillan v. Commonwealth*,[58] stated that extrajudicial statements made by the spouse of an accused are within the prohibition of the rule codified in present section 19.2-271.2. However, the Court of Appeals of Virginia noted in *Stumpf* that in another case, *Coppola v. Commonwealth*,[59] the Supreme Court of Virginia held that:

> [W]here declarations of a wife are made at the request of the accused husband, or with his knowledge and consent, they are admissible. In such instances the extrajudicial statements are made by the wife as the husband's agent rather than as his spouse. We approve the rule that where the wife's extra-judicial statements are made with the actual or constructive knowledge and with the express or tacit consent of the husband, they are admissible in evidence against him.[60]

This decision, although it characterizes the spouse's statements as being made by the spouse as the accused's agent, actually appears to be based upon the theory of adoptive admissions, a slightly different rule. The court of appeals in *Stumpf*, discerning this, stated that "[a]dmissions of one spouse that are expressly adopted by the other spouse are, therefore, clearly admissible."[61]

The Court of Appeals of Virginia further analogized the principle to the hearsay rule's "co-conspirator" exception: "The language

55. *Crumpton*, 9 Va. App. at 137, 384 S.E.2d at 343.
56. VA. CODE ANN. § 19.2-271.2 (Repl. Vol. 1990).
57. 8 Va. App. 200, 379 S.E.2d 480 (1989).
58. 188 Va. 429, 50 S.E.2d 428 (1948).
59. 220 Va. 243, 257 S.E.2d 797 (1979).
60. *Id.* at 251, 257 S.E.2d at 802-803.
61. *Stumpf*, 8 Va. App. at 205, 379 S.E.2d at 483.

of *Coppola* mirrors the rationale of the co-conspirator exception to the hearsay rule, and nullifies the application of the spousal privilege to extrajudicial statements made by one spouse when acting in concert with the other spouse."[62]

Regardless of which rationale is applicable, it appears that where the extrajudicial statements of the accused's spouse fit within one of the vicarious admission exceptions to the hearsay rule, neither section 19.2-271.2 nor *McMillan v. Commonwealth* will bar the admission of the spouse's extrajudicial statement in evidence against the accused.

III. Conclusion

The foregoing discussion touches upon a few of the many developments in Virginia evidence law over the past twelve or so months. It is regrettable that space and time do not permit a complete survey of all of them.

In particular, it should be noted that some of the most important Virginia evidentiary cases of the past year occurred in the area of arrest and search and seizure, particularly in the context of motor vehicles stops and searches. Unfortunately, these are beyond the scope of the author's charter for this article. They may be discussed in other sections of this annual review and/or in other publications relating to Virginia evidence law.[63]

62. *Id.* at 205, 379 S.E.2d at 483-84. The court further noted that the fact that the accused is not charged with conspiring with the spouse is of no consequence, provided that the evidence establishes a *prima facie* case of conspiracy. *Id.*

63. *See, e.g., The Virginia Evidence Rep.* (Barrister Press of Williamsburg, Va.) which includes coverage of such cases. *See also The Hampton Roads Legal Bull.* (Hampton Roads Regional Academy of Criminal Justice, Hampton, Va.).