

INSIDE THIS ISSUE:

Emerald Point LLC v. Hawkins: <i>Practical Principles Governing Spoliation</i>	1
<i>President's Corner</i>	2
<i>My Superlative Case</i>	2
<i>Roanoke Law Library News and Information</i>	3
<i>In Memoriam</i>	4
<i>Books & Breakfast</i>	8
<i>Santa in the Square</i>	9
<i>Announcements</i>	10

The views expressed in the *Roanoke Bar Review* do not represent the policy or carry the endorsement of the Association unless specifically noted.

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EMERALD POINT LLC V. HAWKINS: PRACTICAL PRINCIPLES GOVERNING SPOLIATION

BY NATHAN H. SCHNETZLER, ESQ.

In December 2017, in *Emerald Point, LLC v. Hawkins*, the Supreme Court of Virginia adopted a new standard for imposing sanctions for the spoliation of evidence. In the September 2018 edition of the *Roanoke Bar Review*, we featured an article by Charles H. Smith, III, about the effects of the *Emerald Point* decision, from the perspective of the plaintiffs' bar. Here, we feature an article about the decision from the perspective of the defense bar.



I can agree with Mr. Smith on one thing: "there was little need for the Supreme Court [of Virginia] to consider the spoliation issue to reverse" the trial court's decision in *Emerald Point, LLC v. Hawkins*, 294 Va. 544, 808 S.E.2d 384 (2017).¹ But my opinion of the decision diverges sharply from there. Rather, what I find most curious about *Emerald Point* is not its ultimate decision on the spoliation issue but that the *Emerald Point* Court rendered an opinion on spoliation at all, without first determining whether the evidence in question was likely to be material in probable or pending litigation. From the record in *Emerald Point*, it appears there was no evidence to establish that the defendants knew that the furnace was material evidence in the litigation. Maybe it was in the vein of judicial restraint, but *Emerald Point*, in effect, is an opinion on spoliation without an express finding of spoliation.

While the plaintiffs' bar was up in arms after the *Emerald Point* decision,² it is by no means a watershed decision or significant departure from Virginia precedent. *Emerald Point* is sound in its approach to addressing the preservation obligations of parties anticipating or reasonably anticipating litigation and in step with prior precedent from the Supreme Court of Virginia. Moreover, it contemplates real world application by establishing a *scienter* requirement before an adverse inference may be issued.³ This intent element is critical from the standpoint of practical application of spoliation principles and setting a uniform standard applicable to electronic and non-electronic evidence.

- I. An adverse inference instruction must be supported by evidence of an intent to deprive an opposing party's use of material evidence in litigation.

Briefly, the plaintiffs in *Emerald Point*, tenants in an apartment unit, alleged they suffered injuries from carbon monoxide gas exposure resulting from faulty maintenance of (1) the apartment's furnace and (2) the associated vent and flue system.⁴ A maintenance worker had initially checked the apartment's furnace for leaks, discovered a loose vent pipe in the apartment's attic, and used improper screws to secure the vent pipe.⁵ In the following weeks, carbon monoxide continued to leak into the apartment, and the landlord replaced that apartment's furnace.⁶ Carbon monoxide continued to leak into the apartment thereafter. Apparently, the source of the carbon monoxide was not the furnace the landlord replaced, but rather, an improper connection between the flue system and another furnace in an adjoining apartment unit.⁷ After replacing the furnace in the plaintiff's apartment in January 2013, the landlord stored the removed furnace for over a year and disposed of it well before the plaintiffs filed suit.⁸ The case proceeded to trial. The trial court gave an adverse inference instruction at plaintiffs' request but expressly stated that "the landlord 'did nothing in bad faith' in disposing of the furnace."⁹

PRESIDENT'S CORNER

BY J. LEE E. OSBORNE, ESQ.



As I write this report, I look out on a cold November afternoon. It is sunny and beautiful in downtown Roanoke, but I am glad to be indoors. Much of what I will report on here will be history, but some of it is yet to come. So please bear with me as I struggle with this time differential.

First, hot off the press (today), I was just informed by City Councilman Bill Bestpitch that tomorrow (November 30), the City will dedicate a marker for the Oliver White Hill house that is long overdue. At the same time, the City will announce that the Roanoke City Courthouse will be named in honor of the famed Civil Rights attorney who lived in Roanoke as a young man and later started his law practice here. We hope to have the official ceremony for the Courthouse on Law Day, May 1, 2019. I hope everyone in our Association can be involved.

As you read this, we will have just finished pulling off another fantastic Santa in the Square, our service outreach to indigent and homeless children in our community. Sponsored by the Roanoke Law Foundation annually, organized once again by the indefatigable Lori Thompson, and back at Center in the Square for the first time in many years, this event involves a lot of volunteers as well as financial support from the members of our Association. As always, our Executive Director Diane Higgs has provided a number of pictures to share the joy of this event during this Holiday Season!

At this point, we have had three meetings in September, October, and November, with excellent speakers arranged by our Program Committee chair, Patrick Kenney, and you will have just heard about the latest news in Economic Development from Beth Doughty, Executive Director of the Regional Partnership, in December. We can look forward to programs from our still somewhat new City Manager, Bob Cowell, in January, from Dr. Todd Peppers in February, and from Nancy Agee, in March. Bob Ziogas, as chair of the Legislative Committee, is working hard on setting up our legislative presentations on Law Day in May, now that the elections are over.

In addition to our longstanding and successful Barrister Book Buddies reading program, we have fully engaged with the Turn the Page (BBB2.0) program, delivering books and reading with children on alternate Saturdays at Westside and Hurt Park Elementary Schools. If you have not done this yet, please sign up to participate. Several of our members, including Community Service Committee co-chairs Lauren Ellerman and Macel Janoschka, as well as Amy Geddes and Erin Ashwell, are heavily involved in this program and would appreciate our support at the Christmas parties in December and in the Spring.

Under the leadership of Devon Slovensky, we have streamlined the Pro Bono Conflict Referral sign up form on our web page. We invite you to take a few minutes to complete that process. We need more participants in this program to meet our commitment to support the Blue Ridge Legal Services and the Legal Aid Society with this program. I am in the process of appointing an additional four members to the Pro Bono Committee, so if you are interested in serving on this Committee, please let me know.

(Continued on page 3)

MY SUPERLATIVE CASE: WHEN A DISABILITY IS A DEATH SENTENCE

BY CHRISTINE LOCKHART POARCH, ESQ.

This article is the latest installment in a series of musings from RBA members about their superlative cases, legal counseling opportunities, or other law-related endeavors that remind us of why we became lawyers. The RBA invites its members to share stories about their superlative cases.



Leticia was born deaf, a disability that is a death sentence in her home country of Uganda. Deaf people in Uganda are called *kasiru*, which translates to stupid or foolish. Some view deaf children as evil or cursed and as a result, shun them, as if deafness were contagious. Ugandan law does not protect the Deaf, and their educational, occupational, and financial futures are limited. They are frequently subjected to abuse because of their vulnerability and inability to effectively report crime.

Leticia's biological mother witnessed her husband and her other children abusing Leticia. Leticia's biological father, by his own admission, "didn't care" whether Leticia was placed in school because "there was no point spending money on a child who is deaf and dumb." While the family rejected Leticia, her biological mother sent her to reside at the Boanerges Deaf Initiative (BDI), a ministry begun by another Ugandan, Joel, a hearing man who had a Deaf brother who was brutally beaten and burned. Joel and his family had to collect his ashes to bury them at their family burial site. In response to this violence, Joel founded BDI.

Kris Detrow encountered Leticia in the mission field at BDI when Leticia was five years old. Kris immediately bonded with Leticia, and even with two boys of her own, Kris and her husband felt called to adopt Leticia. After obtaining guardianship of Leticia in March 2014 through the Ugandan courts, Kris and her husband, without counsel, began the process of bringing an orphan child to the U.S. At the same time, Congress enhanced the requirements for international adoptions, increasing expense for families like the Detrows by requiring that their adoption be supervised by a licensed agency. The Detrows were denied a visa for Leticia. Then, they were denied again. Each denial was based on the fact that the U.S. refused to classify Leticia as an orphan even though both parents had abandoned Leticia at BDI, refusing to permit her to return even on holiday, and both parents signed relinquishments of Leticia.

In mid-2014, I and others at my firm, Poarch Law, began to advocate on behalf of the Detrows. Ultimately, we were successful in securing a remedy called *humanitarian parole* to permit Leticia to join the Detrows in the U.S. Thereafter, the problem remained of how to best give Leticia permanent legal status in the U.S. Through co-counsel in Maryland, we were able to secure an order from the juvenile courts that permitted Leticia to apply for special immigrant juvenile status. Years passed while that order was adjudicated by USCIS. Leticia, by this point, was excelling in school, integrated into her family, and competitively speed-skating. This year, Leticia acquired lawful permanent residence. She will soon have evidence of her U.S. citizenship as well.

Poarch Law has responded to requests for evidence or notices of intent to deny international adoptions on behalf of more than 50 U.S. families like the Detrows. These challenges to orphan status are part and parcel of U.S. governmental opposition to international adop-

(Continued on page 4)

ROANOKE LAW LIBRARY NEWS AND INFORMATION

BY JOSEPH KLEIN, LAW LIBRARIAN



Season's Greetings!

I would like to extend the warmest Holiday greetings to the entire Roanoke Valley legal community. The year 2018 was a wonderful and productive year at the Roanoke Law Library, and I hope that you had a wonderful year as well. I look forward to the holiday season every year because it provides a chance to spend time with friends and family. My birthday is also during the holiday season, so it is an especially reflective time

for me. Not only does another holiday season pass, but I also get another year older (though seldom any wiser). I hope you all are able to have a joyful holiday season, spending time with friends and family and reflecting on all the blessings 2018 had to offer.

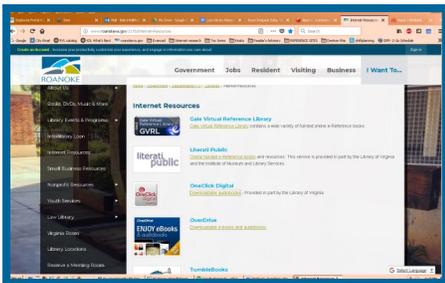
Lexis Advance

As I have mentioned previously, the Roanoke Law Library recently changed our online legal research database subscription from Westlaw to Lexis Advance. We have two terminals with free access to Lexis that are available to anyone whenever the Law Library is open. If you would like a tutorial on the use of Lexis, I will be glad to walk you through all the basics whenever you are in the Law Library. And if you would like more formal training, feel free to give me a call at 540-853-2268 and set up an appointment.

Library Services

We always have the opportunity to start over, to learn something new, to start a diet, to recommit to an intention. As we all know, the New Year is a time when we tend to consider these things more often. In that spirit, I just wanted to remind you all of some Library resources and programs that can help you if you resolve to make a change.

The Roanoke Public Library provides access to Universal Class, a wonderful database that has all levels of classes on a variety of subjects, everything from animal care to cooking to photography to web design. Simply go to the Roanoke Public Libraries web page (roanokeva.gov/library) and go to our Internet Resources page to access Universal Class. The Library also offers free fitness classes throughout the year from Yoga to Ballet to Walk15 (a 45-minute low impact aerobic fitness class). Go to our event calendar on our web page and search for the event type "Get Fit @ the Library."



Holiday Schedule

I would also like to remind you that the Roanoke Law Library and the entire Roanoke City Courthouse (also all City of Roanoke offices including all library branches) will be closed on Monday, December 24, and Tuesday, December 25, for Christmas, as well as Monday, December 31, and Tuesday, January 1, for New Years.

PRESIDENT'S CORNER

(Continued from page 2)

Substantive CLE training for pro bono services has been conducted this Fall and will continue in the Spring. There will be a CLE program on guardianships on January 18, 2019, and an additional CLE program in March on professionalism, moderated by Nancy Reynolds, our CLE chair, and Rhona Levine. Watch for these programs on our web page and in our email blasts, and please sign up to do your part.

Andrew Gerrish, as chair of the Young Lawyers Committee, has organized the Bench Bar Conference for February 22, 2019, and is working hard on the speakers and topics and the sponsorship support needed for that annual program. The Young Lawyers Committee has also agreed to work with the Roanoke Law Foundation (since the retirement of Tom Miller from the board) to continue the You and the Law program in the Spring, geared toward educating the public about the legal system. Anyone interested in helping with either of these programs, please contact Andrew.

We have established a joint committee of members of the Roanoke City Bar and the Salem-Roanoke County Bar to oversee the management of the Rule of Law Project in middle schools of our three jurisdictions, including the recruitment and training of volunteers. The main effort required for this project will be in the Spring, when attorney volunteers meet with civics classes in the middle schools of all three localities to share with students the unique role the Rule of Law plays in protecting our freedoms. A training session will be held at Breckenridge Middle School on March 25, 2019, at 4:00 p.m. I encourage all attorneys, young and old, veteran or new, to attend and become volunteers. There has never been a greater need for an understanding and appreciation of the importance of the Rule of Law in our society than now. Thanks to Macel Janoschka and Past President Brett Marston for agreeing to serve on this committee and to Mike Pace for his continued coordination of this important project.

Christen Church, as chair of the Bylaws Audit Committee, is working with her committee (Melissa Robinson, Justin Simmons, Bob Ziogas and Hugh Wellons) to address changes needed to our bylaws, including potential changes in the current judicial endorsement process. We have reached out to the Salem-Roanoke County Bar to explore the possibility of a joint process to the extent possible. If you are interested in proposed changes to our bylaws, and the judicial endorsement process in particular, please contact Christen for more information or to provide your input. These changes will be brought before the membership in the Spring for education and feedback, and for approval at our annual meeting in June.

Amy Geddes, our Membership Committee Chair, will continue efforts to maintain and grow our membership roster. If you know of any attorneys who currently practice in the City of Roanoke who are not members of the RBA, please do them a favor and invite them to come to a meeting and join. Also, please invite them to check out our website, and if you have not liked us on Facebook, please do so!

Unfortunately, Lori Bentley, as chair of the Memorials and Resolutions Committee, has become very busy with the recent deaths of Joe Logan, Brian Jones, Jack Altizer, and Bob Glenn. In accordance with our standing policy, the board approved at its November meeting contributions of \$100 each to the Roanoke Law Foundation in honor of the three past presidents,

(Continued on page 8)

EMERALD POINT LLC V. HAWKINS: PRACTICAL PRINCIPLES GOVERN- ING SPOILIATION

(Continued from page 1)

Although not referenced in the opinion, the landlord disclosed on brief and at oral argument that the plaintiffs retained an expert to inspect the premises after the removal of the furnace from the apartment and before the furnace's destruction. The plaintiffs' expert completed his inspection on January 16, 2013, approximately two weeks after the landlord removed the furnace from the apartment. The plaintiffs' expert did not ask to inspect the furnace or ask that it be preserved at that time. The plaintiffs sent a letter of representation in April 2013, but did not reference any defect in the furnace, request to inspect it, or ask that it be preserved. The landlord did not discard the furnace until the middle of 2014. At no time from January 16, 2013, to the middle of 2014, did plaintiffs request to inspect the furnace.¹⁰

On appeal, the defendants framed the assignment of error regarding the adverse inference instruction as:

The Trial Court erred in granting an adverse inference jury instruction based on the disposal of the furnace because there was no finding of bad faith, the Defendants had no reason to foresee that the furnace would be material evidence in litigation because all of the evidence indicated the leaks were from the flue pipes, and Plaintiffs failed to present evidence that the furnace was material.¹¹

The *Emerald Point* Court assumed without deciding that the furnace was material evidence by proceeding directly to the question of whether entitlement to an adverse inference instruction requires a finding that the party that lost or disposed of the evidence did so with the intent to prevent its use in litigation.¹² Relying on Federal Rule of Civil Procedure 37(e)(2)(B), the Advisory Committee Notes to the 2015 amendments to that Rule, and decisions from five United States Circuit Courts of Appeals before the 2015 amendments to the Federal Rules, the *Emerald Point* Court adopted the principle that "the evidence must support a finding of intentional loss or destruction of evidence in order to prevent its use in litigation before the court may permit the spoliation inference."¹³

II. The Supreme Court of Virginia had not previously addressed whether an adverse inference jury instruction is proper where lost or destroyed evidence is not accompanied by a finding of deliberate intent to sabotage an opposing party's litigation strategy.

The spoliation issue in *Emerald Point* did present a question of first impression. Specifically, the issue was "whether to warrant remedial action by the trial court, such as the granting of an adverse inference instruction, the destruction of the evidence must be undertaken with the deliberate intent to deprive the other party of its use at trial in a pending or reasonably foreseeable litigation between the parties."¹⁴ Neither *Blue Diamond Coal Co. v. Aistrop*, 183 Va. 23, 31 S.E.2d 297 (1944), nor *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App. 565, 580 S.E.2d 467 (2003), addressed the propriety of an adverse inference jury instruction or other sanction.

Wolfe is also problematic on a number of grounds. First, that opinion pulled the language "[s]poliation 'encompasses conduct that is either intentional or negligent'" not quite out of thin air but from a law review article, not prior Virginia precedent.¹⁵ Second,

MY SUPERLATIVE CASE: WHEN A DISABILITY IS A DEATH SENTENCE

(Continued from page 2)

tion, a trend that has resulted in a 77% decrease in international adoption over the last 14 years (Pew Research). While each of our adoption clients are special to us, there's something about seeing Leticia thrive in the U.S. that makes this case one of our most memorable international adoptions.

Poarch Law is an immigration and adoption practice in Salem, Virginia. Christine Lockhart Poarch and Rachel Thompson have worked with the Detrows since 2014.

Save the Date
Bench Bar Conference
Friday, February 22, 2019

IN MEMORIAM

The following are the Association's losses since September 15, 2018:

Brian R. Jones
(age 64, September 28, 2018)

Jack V. Altizer
(September 3, 1936 – October 11, 2018)

Robert E. Glenn
(December 24, 1929 – October 18, 2018)

In grateful recognition of the contributions of Mr. Jones, Mr. Altizer, and Mr. Glenn to our profession, and their contributions to our Association, the Association laments their passing.

(Continued on page 6)

The McCammon Group

is pleased to announce our newest Neutral



Hon. Malfourd W. "Bo" Trumbo (Ret.)

Retired Judge, 25th Judicial Circuit Court of Virginia

The Honorable Bo Trumbo has joined The McCammon Group after twenty-seven years of distinguished public service. He most recently served for thirteen years as a Judge of the 25th Judicial Circuit Court, including several years as Chief Judge. Prior to his tenure on the bench, Judge Trumbo was elected to serve in the Virginia General Assembly, first as a Member of the House of Delegates and then as a Member of the Senate, throughout which time he also maintained a successful private law practice in western Virginia. Among his many credentials, Judge Trumbo is a former member of the Commission on Courts in the 21st Century, the Advisory Committee on Intergovernmental Relations on the Condition and Future of Virginia Cities, and the Blue Ridge Economic Development Commission. He now brings this distinctive record of service and leadership to The McCammon Group to serve the mediation, arbitration, and judge pro tempore needs of lawyers and litigants throughout the Commonwealth.

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EMERALD POINT LLC v. HAWKINS: PRACTICAL PRINCIPLES GOVERNING SPOILIATION

(Continued from page 4)

the *Wolfe* Court entirely omitted any reference to *Gentry v. Toyota Motor Corp.*, 252 Va. 30, 471 S.E.2d 485 (1996).¹⁶ Third, the primary question in *Wolfe* was whether a delivery room physician was in privity with the Birth-Related Neurological Injury Compensation Program.¹⁷ Concluding the physician and program were in privity, the *Wolfe* Court remanded the case so that factual findings could be made to determine “whether the missing evidence inference should apply.”¹⁸

Lastly, and perhaps most importantly, it is, of course, entirely within the purview of the Supreme Court of Virginia to ignore an opinion from the Virginia Court of Appeals. The *Emerald Point* Court was clearly not persuaded by the plaintiffs’ and *amicus curiae*’s reliance on *Wolfe* as was plainly demonstrated during oral argument. In fact, the Court focused on the spoliation issue throughout the entirety of plaintiffs’ oral argument time, and the justices, Justice Kelsey in particular, were clearly reticent to the notion of adopting a negligence standard for spoliation.¹⁹

In *Gentry*, the Supreme Court of Virginia rejected the negligence standard advocated by the *Emerald Point* plaintiffs. The *Gentry* Court reversed a trial court’s decision to dismiss a case with prejudice after the plaintiffs’ expert destroyed relevant evidence.²⁰ The plaintiffs’ expert in *Gentry* destroyed the evidence “without authorization or permission from anyone.”²¹ Because the expert acted “with neither the consent nor the knowledge of the [plaintiffs] or their attorney,” dismissal of the action was inappropriate, as the punishment would be borne by the innocent plaintiffs, not the culpable offender.²² Moreover, there was no evidence to suggest that the defendant had been prejudiced by the spoliation of evidence.²³ The *Gentry* Court did not address whether a lesser sanction might be appropriate under those circumstances.²⁴

III. Rejection of a negligence standard for spoliation is in accord with federal precedent.

Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995), too, rejects the notion that negligence will suffice to substantiate a spoliation claim. The *Vodusek* Court observed that “[a] party’s failure to produce evidence may, of course, be explained satisfactorily.”²⁵ Expounding on that notion, the *Vodusek* Court noted that

[a]n adverse inference about a party’s consciousness of the weakness of his case . . . cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.²⁶

Thus, *Emerald Point*’s rejection of a negligence standard for adverse inference instructions comports with *Vodusek* and its progeny.²⁷ *Emerald Point* may be more restrictive than the *Vodusek* rule, however, because there was no evidence in *Vodusek* that the plaintiff’s expert acted with the intent to deprive the defendants of the use of the evidence in litigation, and the *Vodusek* Court’s language quoted above gives no indication to the contrary either. But the Virginia rule is not out of step with the majority of courts.²⁸

IV. Virginia follows a pragmatic approach to spoliation that serves the interests of both plaintiffs and defendants.

What should not be lost on the reader is that the *Emerald Point* plaintiffs’ proposed negligence standard would likely be more detrimental to plaintiffs than defendants. After all, plaintiffs are often on notice much sooner as to what information might be relevant to a potential claim. A negligence standard would not have resulted in a different outcome in facts similar to those in *Vodusek*. But a negligence standard may have resulted in a different outcome in facts similar to those in *Gentry* and in the context of a request for an adverse inference instruction.

So why is the intent element so important? Because, as many of us have come to know, many clients—whether plaintiff or defendant—may not operate with the threat of litigation perpetually on their minds or may not be sophisticated enough to appreciate what evidence, electronic or otherwise, might be relevant or material to a potential claim. The *Emerald Point* plaintiffs argued, unconvincingly, that the landlord should have been on notice of a potential claim as soon as it believed replacing the furnace might stop the leaking carbon monoxide. That is, quite simply, an unworkable and unrealistic position. Additionally, a lot can happen in the two years for the statute of limitations on a personal injury claim or five years for a breach of contract claim to run. Because certain evidence that might be deemed material is no longer available does not mean that a party should automatically be penalized if the evidence’s disposal was not the result of an intent to harm an opposing party’s litigation strategy.

Nathan H. Schnetzler is an attorney with Frith Anderson + Peake, PC.

¹ Charles H. Smith, *Spoliation Sanctions Botched by Virginia Supreme Court*, Roanoke Bar Review (Sept. 2018), <http://roanokebar.com/wp-content/uploads/2013/10/September-2018-Final-Draft.pdf>.

² See Peter Vieth, *Spoliation Issue Splits GOP*, Va. Lawyers Weekly (Mar. 7, 2018), <https://valawyersweekly.com/2018/03/07/spoliation-issue-splits-gop/>.

³ Spoliation is “[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usu. a document.” *Black’s Law Dictionary*, 1620 (10th ed. 2014) (emphasis added).

⁴ *Emerald Point*, 294 Va. at 550–51, 808 S.E.2d at 388.

⁵ *Id.* at 550, 808 S.E.2d at 388.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 555, 808 S.E.2d at 391.

⁹ *Id.* at 556, 808 S.E.2d at 391.

¹⁰ See, e.g., *Emerald Point, LLC v. Hawkins*, No. 161339, Appellants’ Opening Br., at *14–16, *35–36 (July 17, 2017).

¹¹ *Emerald Point, LLC v. Hawkins*, No. 161339, 2017 Va. LEXIS 89 (June 6, 2017).

¹² *Emerald Point*, 294 Va. at 557, 808 S.E.2d at 391–92.

¹³ *Id.* at 558–59, 808 S.E.2d at 392 (citations omitted). The *Emerald Point* Court did acknowledge that Rule 37(e)(2)(B)’s specific intent requirement applies to electronically stored information, which is, presumably, why it cited pre-2015 amendment decisions from the various circuit courts of appeals applying specific intent requirements to cases involving spoliation of non-electronic information.

¹⁴ *Id.* at 556, 808 S.E.2d at 391 (emphasis added).

¹⁵ 40 Va. App. at 581, 580 S.E.2d at 475 (quoting Karen Wells Roby & Pamela W. Carter, *Spoliation: The Case of the Missing Evidence*, 47 La. B.J. 222, 222 (1999)).

¹⁶ The *Wolfe* Court seemed to primarily rely on dicta from *Kidder v. Virginia Birth-Related Neurological Injury Compensation Program*, 37 Va. App. 564, 560 S.E.2d 907 (2002). *Kidder* did not present a spoliation question and failed to make any reference to *Gentry* as well.

¹⁷ 40 Va. App. at 583–84, 580 S.E.2d at 475–76.

¹⁸ *Id.* at 585, 580 S.E.2d at 477.

¹⁹ http://www.courts.state.va.us/courts/scv/oral_arguments/2017/oct/161339.MP3.

²⁰ *Gentry*, 252 Va. at 33–34, 471 S.E.2d at 488.

²¹ *Id.* at 32, 471 S.E.2d at 487.

²² *Id.* at 34, 471 S.E.2d at 488.

(Continued on page 8)

MEDIATION**ARBITRATION****JONATHAN M. APGAR**

Having previously served twenty-one years as both a full time and a retired, recalled circuit court judge, Jonathan M. Apgar has successfully mediated scores of cases. He is also certified in civil mediation by the National Judicial College. He offers skilled mediation and arbitration at a modest cost.

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EMERALD POINT LLC V. HAWKINS: PRACTICAL PRINCIPLES GOVERNING SPOILIATION

(Continued from page 6)

²³ *Id.* The Gentry Court’s analysis aligns with the Fourth Circuit’s standard of inquiry in cases involving dismissal of actions based on spoliation. See *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (stating that for a district court to dismiss an action it must “conclude either (1) that the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.”).

²⁴ See *Emerald Point*, 294 Va. at 557, 808 S.E.2d at 392.

²⁵ *Vodusek*, 71 F.3d at 156.

²⁶ *Id.* *Vodusek* contrasts with *Gentry* in that the plaintiff’s expert in *Vodusek* destroyed the evidence during an examination that included the plaintiff’s two sons and took place before the defendants could examine the evidence. *Id.* at 155 (internal quotations omitted).

²⁷ *Emerald Point*, 294 Va. at 558–59, 808 S.E.2d at 392; see also *Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013); *Vulcan Materials Co. v. Massiah*, 645 F.3d 249, 260 (4th Cir. 2011); *Buckley v. Mukasey*, 538 F.3d 306, 322–23 (4th Cir. 2008); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004).

²⁸ See, e.g., *Bracey v. Grondin*, 712 F.3d 1012, 1018 (7th Cir. 2013) (“In this circuit, when a party intentionally destroys evidence in bad faith, the judge may instruct the jury to infer the evidence contained incriminatory content.”); *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 461 (8th Cir. 2013) (“[W]e conclude that a district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction.”); *Bull v. United Parcel Serv. Inc.*, 665 F.3d 68, 79 (3d Cir. 2012); *Dalcour v. City of Lakewood*, 492 F. App’x 924, 937 (10th Cir. 2012) (stating that both permissive and mandatory adverse inference instructions require showing of bad faith).

RBA MEMBERS VOLUNTEER AT BOOKS AND BREAKFAST

RBA members (and their families) were all smiles volunteering at Westside Elementary’s Books and Breakfast (sponsored by Turn the Page and Roanoke City Public Schools). Families received books, a hot breakfast, and gifts while children got to sit on Santa’s lap—all free of charge. The RBA appreciates our members who took time out of their busy weekends to volunteer.



RBA volunteers distribute books



Westside Elementary students and their families gather for Books and Breakfast



Judge Geddes and Amy Geddes.



Jim Guynn and Melissa Robinson.



Judge Urbanski, Lee Osborne and Jim Guynn.



Erin Ashwell, baby Vivian and Bill Hopkins.

PRESIDENT’S CORNER

(Continued from page 3)

Charles Cornelison, Joe Logan, and Bob Glenn, who have passed away recently.

Kevin Holt, as chair of the Roanoke Law Foundation, inducted five new Fellows for the Class of 2018 at a reception on October 23, 2018, at Blue Five. They are Past President Hugh Wellons, Past President Kevin Holt, Victor Cardwell, Tom Winn, and John Jessee. Congratulations to these Fellows, and thanks for your support of the Roanoke Law Foundation! It is that time of year when the Roanoke Law Foundation is seeking applications for academic scholarships from students in the Roanoke City High Schools and statewide law schools. If you know someone who is eligible, please encourage them to apply. And just as a heads up, nominations for the Young Lawyer and Lifetime Achievement Awards on Law Day will open soon as well.

Finally, my thanks to Justin Simmons who continues to do excellent work as Chair of the Communications and Library Committee, publishing the *Roanoke Bar Review* and bringing you all of the news and developments in the Roanoke legal community. And thanks to all of the Board members for the dedication of their time and energy in support of the RBA.

As you can see, there is a lot going on and a lot yet to happen in this Bar year. The RBA provides a number of worthwhile and meaningful opportunities for involvement and service in our community and for our profession. I invite you to get involved!

SANTA RETURNS TO CENTER IN THE SQUARE

The Roanoke Law Foundation’s holiday event for local families in need returned to its roots this Christmas season, as Roanoke’s Center in the Square hosted the annual Santa in the Square festivities on Monday, December 17. The event took place at Center in the Square when the Roanoke Law Foundation started it 13 years ago. For the past few years, the party had moved to the Virginia Transportation Museum, but returned this year to Center in the Square.

More than a foot of snow on Sunday, December 9, caused the Foundation to postpone the event from its originally scheduled date, but Lori Thompson, Santa in the Square’s originator and chief organizer, and a host of other volunteers successfully shifted everything one week later. This year, more than 110 children and family members visited Center in the Square, where they enjoyed what has become the traditional entertainment for the evening. The children visited Santa Claus (and received a family photograph), chose a small gift that they could give to a parent or guardian from Santa’s Sack, made crafts at Santa’s Workshop, and enjoyed food and drinks distributed at the buffet table by a collection of attorneys and judges. Volunteers painted faces, handed out gifts, applied temporary tattoos, and sang Christmas carols.

The child-focused Kids Square was a great venue. In between activities, the children enthusiastically explored and interacted with all the exhibits and educational play areas. Afterwards, children were overheard saying, “This was the best night ever!”

Members of the Association and corporate sponsors who provided generous financial support to the event were: Roy Creasy, Agnis Chakravorty, Julie Dudley, Ray Ferris, Frankl Miller Webb and Moyers, LLP., Melissa Friedman, Stephen Kennedy, Easter Moses, Lee Osborne, Ric Scott and Lori Thompson. Thank you to all of the sponsors and volunteers who provided so much enjoyment for the guests, and helped to put all of the volunteers in the holiday spirit! Last, but not least, a note of appreciation to Lori Thompson.



ANNOUNCEMENTS

NEW MEMBERS	UPCOMING EVENTS	OFFICERS																																		
<p>The Roanoke Bar Association welcomes the following new members: Effective December 9, 2018</p> <p>Active Members</p> <p>John W. Beamer Roanoke Commonwealth Attorneys Office</p> <p>Caley A. DeGroot Gentry Locke</p> <p>Holly C. Farris OPN Law</p> <p>Associate Members</p> <p>Adam L. Miller</p>	<p>Roanoke Bar Association Meetings 2018 - 2019</p> <p>September 11, 2018</p> <p>October 9, 2018</p> <p>November 13, 2018</p> <p>December 11, 2018</p> <p>January 8, 2019</p> <p>February 12, 2019</p> <p>March 12, 2019</p> <p>April 9, 2019</p> <p>May 1, 2019 (Law Day)</p> <p>June 11, 2019 (Annual Meeting)</p> <p>Go to www.roanokebar.com for more information on all upcoming events.</p>	<table> <tbody> <tr> <td>J. Lee E. Osborne President</td> <td>983-7516</td> </tr> <tr> <td>Patrick J. Kenney President-Elect</td> <td>982-7721</td> </tr> <tr> <td>Daniel P. Frankl Secretary-Treasurer</td> <td>527-3515</td> </tr> <tr> <td>Kevin W. Holt Past President</td> <td>983-9377</td> </tr> <tr> <td>Diane Higgs Executive Director</td> <td>342-4905</td> </tr> <tr> <th colspan="2" data-bbox="1049 758 1523 800">BOARD OF DIRECTORS</th> </tr> <tr> <td>Lori Jones Bentley</td> <td>767-2041</td> </tr> <tr> <td>Christen C. Church</td> <td>983-9390</td> </tr> <tr> <td>Lauren M. Ellerman</td> <td>985-0098</td> </tr> <tr> <td>Amy H. Geddes</td> <td>989-0000</td> </tr> <tr> <td>Andrew S. Gerrish</td> <td>725-3770</td> </tr> <tr> <td>Macel H. Janoschka</td> <td>725-3372</td> </tr> <tr> <td>Nancy F. Reynolds</td> <td>510-3037</td> </tr> <tr> <td>Melissa W. Robinson</td> <td>767-2203</td> </tr> <tr> <td>Devon R. Slovensky</td> <td>492-5297</td> </tr> <tr> <td>Justin E. Simmons</td> <td>983-7795</td> </tr> <tr> <td>Robert Ziogas</td> <td>224-8005</td> </tr> </tbody> </table>	J. Lee E. Osborne President	983-7516	Patrick J. Kenney President-Elect	982-7721	Daniel P. Frankl Secretary-Treasurer	527-3515	Kevin W. Holt Past President	983-9377	Diane Higgs Executive Director	342-4905	BOARD OF DIRECTORS		Lori Jones Bentley	767-2041	Christen C. Church	983-9390	Lauren M. Ellerman	985-0098	Amy H. Geddes	989-0000	Andrew S. Gerrish	725-3770	Macel H. Janoschka	725-3372	Nancy F. Reynolds	510-3037	Melissa W. Robinson	767-2203	Devon R. Slovensky	492-5297	Justin E. Simmons	983-7795	Robert Ziogas	224-8005
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