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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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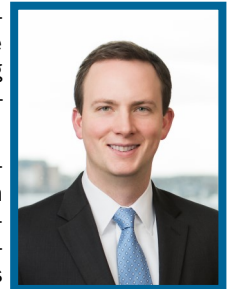
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## ROANOKE'S HOMELESS ORDINANCE

BY THOMAS D. "BO" FRITH, IV, ESQ.

The issue of homelessness is a hot topic both nationwide and locally here in Roanoke. Cities across the U.S. have enacted laws regulating homelessness. There are strong emotions on all sides of the issue as well as extensive, although unclear, case law.

The City of Roanoke passed an ordinance effective January 1, 2021, making it a crime to camp on sidewalks in downtown Roanoke. A violation constitutes a class 4 misdemeanor with a fine of up to \$250.<sup>1</sup> The City hopes the ordinance will reduce the number of homeless encampments downtown. The measure is largely in response to complaints of downtown residents and business owners.<sup>2</sup>



For years, Roanoke residents complained of homelessness in downtown Roanoke. They claim Roanoke's unique position creates the problem. First, because Roanoke is the largest city for a hundred-mile radius, surrounding towns and counties bus their homeless to Roanoke for its public health services. Second, the policy of requiring the homeless to leave Roanoke shelters during the day floods the streets with homeless persons. Third, because the Roanoke Valley has one of only three Veterans Administration Hospitals in Virginia, Roanoke attracts more homeless people due to the fact that statistically veterans (for myriad reasons) are more likely to suffer from homelessness than the general population.<sup>3</sup>

On the other hand, Roanoke residents voiced concerns about attempts to reign in homelessness. These individuals argue criminalizing homelessness will only make matters worse. Levying fines against homeless people, who are already struggling, will make it more difficult for them to get back on their feet. They argue homeless shelters do not work for all individuals. Many shelters are loud, cramped, and do not allow for pets or other allowances. While homeless people may be more visible than ever, in fact homelessness has steadily declined in Roanoke for almost a decade.<sup>4</sup> Lastly, some argue it is cruel because experts state mental illness and addiction cause most homelessness.

Vagrancy laws have a lengthy history in Anglo-American jurisprudence. In colonial times vagrancy laws, patterned after those in England, made acts of "idleness" illegal.<sup>5</sup> These laws did not require any illegal actions to be coupled with homelessness. Rather, the act of homelessness itself was illegal.<sup>6</sup>

In modern times, the typical argument against vagrancy statutes is the laws violate the Eighth Amendment's prohibition on cruel and unusual punishment. The state of being homeless is often out of the individual's control in much the same way as drug addiction or chronic alcoholism. Experts state people rarely choose to be homeless. Rather, homelessness results from various physical, mental, and economic factors beyond individual control. Homelessness both worsens preexisting illness and results from it. Alcoholism, substance abuse, as well as mental and physical disease exist in higher percentages for homeless individuals than the general population. Research suggests homeless persons suffer from these afflictions before they become homeless, which in many cases drive them to being homeless. Compounding the problem, homelessness makes the illnesses worse. The vicious cycle makes it difficult for homeless persons to escape.

In the 1960s, vagrancy laws changed as a result of Supreme Court holdings regarding involuntary status. In the landmark Supreme Court case *Robinson v.*

## PRESIDENT'S CORNER

BY LORI J. BENTLEY, ESQ.



Welcome to the 98th year of the Roanoke Bar Association! It is an honor and a pleasure to serve as President during this exciting time leading up to our 100th anniversary. As I have met and spoken with other Bar Association leaders from around the state over the past year, I am reminded of how lucky we are to live and practice in the Roanoke Valley and to be members of the RBA. We have dedicated members who exemplify both collegiality and commitment to the community that is unparalleled. I am proud to be affiliated with such a wonderful group and hope that you are as well.

I would like to thank our immediate past president, Macel Janoschka, for providing a fine example of leadership and guidance over the past year. We hope to follow her lead by building on the successes of our past initiatives, including the Shine and Dine graduation celebration for the Roanoke City Schools' homeless students. At the same time, we hope to move forward with some new projects that will enhance our community, and the Association, in a positive way. A special thank you goes out to our RBA executive director, Diane Higgs, for her tireless work on behalf of the Association. She keeps things running smoothly and is a remarkable asset to our organization.

We have a wonderful Board this year and they are already hard at work to make this year as successful as possible. Christen Church, President-Elect, has prepared an interesting schedule of speakers for our meetings beginning with Roanoke City Schools Superintendent, Verletta White, this month. Allegra Black continues to lead our Pro-Bono Committee to connect those in need of pro-bono services with our fine volunteers. If you would like to add your name to the volunteer list, please contact her. Molly Elder is leading our Continuing Legal Education Committee, and is planning a number of interesting seminars for our members that will be either low-cost or free. Chris Dadak continues to serve as Co-Chair of the Communications and Library Committee, which publishes the *Roanoke Bar Review*. He is joined this year by Adam McKelvey, and I know they will continue to keep us well-informed of the news and developments in the Roanoke legal community. Bo Frith is the chair of the Membership Committee, so if you know someone that you want to recommend as a new member, please contact him. Jon Puvak is heading up the Audit and Bylaws Committee, so if you have any suggestions in that regard, please let him know. Our Secretary/Treasurer, Amy Geddes, is keeping things running behind the scenes as she looks forward to our centennial year.

Joining the Board for the first time this year is Caley DeGroot, who will be heading up the Young Lawyers Committee. She is working with Judge Carson to plan the Welcome to the Courthouse event for this fall. She is also working with Sarah Jessee, our Service Committee chair, to revitalize the RBA Mentorship program. Sarah will oversee a number of RBA service opportunities and programs and I strongly encourage each of you to get involved because I believe you will find a great deal of personal satisfaction in helping others in our community. Dinny Skaff is also joining the board as the chair of the Legislative Committee. He will be working to plan our annual Law Day celebration, which always provides an interesting dialog with our local legislators. Rounding out our new board mem-

(Continued on page 8)

## MY SUPERLATIVE CASE

BY ALICHA M. GRUBB, 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.*



Last month, Monica Monday and I tried and then settled a pro bono case with a lengthy and odd procedural history compounded by difficult legal issues. The case came to us in 2017, but the relevant facts go back to 2003.

We represented a woman against her ex-husband who was living in her house for free. In 2003, ex-husband's father-in-law was ill and executed a Power of Attorney, making ex-husband his attorney-in-fact. Ex-husband then executed a Deed of Gift as the attorney-in-fact for his father, transferring 65 acres of real property in Bland County to our client. Father-in-law passed away two weeks later.

Our client and her ex moved to the property where they built a house and reared their son. In 2010, the parties separated, and our client left the property. Ex-husband filed for divorce in 2012. Until 2016, the parties agreed that ex-husband would live in the house and pay the mortgage, taxes and insurance. When that agreement ended, he refused to move out but also stopped paying the bills, leaving our client holding the bag.

In 2017, the judge who heard the equitable distribution case entered an order, ruling that the land was our client's separate property but that the improvements were marital property. The judge did not define the interest or distribute the real property.

Ex-husband appealed the equitable distribution order (enter Monica's representation for our client on appeal) as he had made a number of arguments during the proceedings that the property was his or at least all marital property. But then he defaulted on the appeal.

Fast forward a few months, and ex-husband filed a declaratory judgment action to void the Deed of Gift – his basis – that he, as the attorney-in-fact did not have the authority to give gifts under the Power of Attorney. We filed a number of demurrers and pleas in bar, the chief of which was that the statute of limitations had run. We first had to argue that the deed was voidable and not void *ab initio* because an action that is void *ab initio* is not subject to any statute of limitations.

In general, actions that are void *ab initio* are so by statute (i.e. a Court acting without jurisdiction or selling land that belongs to the Commonwealth) or violate public policy (i.e. contracts for murder). Voidable acts are those that are subject to rescission or ratification; acts that are void *ab initio* may not be rescinded or ratified. Actions by an agent that are not authorized by the principal are subject to ratification or rescission, and therefore cannot be void *ab initio*.

We argued that the longest possible statute was 15 years from the date of the father-in-law's death, and ex-husband had filed his action one-day late.

Ex-husband nonsuited his action before a decision could be made.

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## VIEWS FROM THE BENCH: JUDGE MELISSA FRIEDMAN

BY CHRISTOPHER DADAK, ESQ.



We are pleased to continue this series of articles and share our conversation with the Honorable Melissa Friedman. Judge Friedman was appointed to the Juvenile & Domestic Relations Court for a six-year term beginning December 1, 2020.

Judge Friedman was born in Memphis, Tennessee. Because her father was a “wanderer, the family moved around a lot.” While growing up she attended several different elementary schools. Her family then settled down in a “small town in Tennessee, Martin, where the University of Tennessee at Martin is located.” Her father was an English professor there and Judge Friedman ultimately got her B.A. there as well. Judge Friedman shared that she graduated from Westview High School whose “claim to fame was that Chad Clifton went there” and he played for the Green Bay Packers as an offensive lineman with Brett Favre.

After college, Judge Friedman spent a year in France “on a Rotary scholarship which was fabulous.” She lived in Tours and Besancon. She “studied primarily French and some French law” and was fortunate to “do a lot of traveling.” She was “one of those few people who had decided to be a lawyer at a pretty young age” so the French law classes were right in line with her career interests.

She attended Vanderbilt Law School where she met her now-husband, the Honorable Frank Friedman. They got married a few years later and moved to Roanoke where her husband got a job at Woods Rogers. Judge Friedman meanwhile clerked for the late Honorable James C. Turk. “That was the honor of [her] professional life.” It was a “wonderful experience. He was a wonderful man, mentor, and a great judge.”

She had originally hoped to work at a civil rights law firm which “did not exactly pan out except to the extent that I worked as a criminal defense lawyer.” “There’s a lot of constitutional law in criminal defense” so she did manage to “fulfill that dream in a way.”

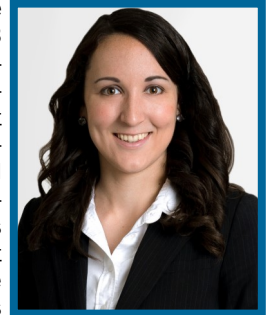
Judge Friedman and her husband had three children together, pretty close in time. So, she switched to part-time work for a few attorneys in the area, but primarily for Tony Anderson. As her children got older, she worked more with Tony Anderson, who “was always flexible” with her schedule. Although her first big case with Tony was a civil fraud cause, she started in and stayed primarily with criminal defense work. Judge Friedman stated that she and Tony worked together for several years, ultimately becoming Anderson and Friedman, until she was appointed to the bench.

Judge Friedman kindly shared her experience on how to succeed as a small firm. She admitted that it “can be difficult.” “You have to have really good staff.” A solo or small firm often has “a lot of volume.” “You really need to have good people to keep you organized.” “We always had that.”

Judge Friedman transitioned to the bench during the pandemic and had to hit the ground running. Because “the juvenile courts never closed” she “had full dockets every day.” “There

## NEW STATE LAW PROHIBITS PAY-IF-PAID CLAUSES

BY ALICHA M. GRUBB, ESQ.



During the 2022 Session, the Virginia General Assembly passed SB 550, which, among other things, prohibits the application of contingent payment or condition precedent payment clauses (known as “pay-if-paid” clauses) under most circumstances. The bill also establishes prompt payment clauses for prime contracts and subcontracts on private projects. Virginia’s Prompt Payment Act was formerly applicable only to public projects. The bill includes a delayed enactment clause so that these statutory changes will not take effect until January 1, 2023. This delay gives owners, developers, design professionals, and contractors the opportunity to work with counsel to modify contracts, subcontracts, and the payment application review and approval processes, to comply with the new statutory language. The bill also allows time for stakeholders to work towards agreement on revisions to the language of the bill addressing its numerous ambiguities.

The bill added language to the Virginia Public Procurement Act (VA Code § 2.2-4354) section establishing clauses that must be included in public construction contracts. Now, contracts for public projects must include a clause “*that obligates a contractor on a construction contract to be liable for the entire amount owed to any subcontractor with which it contracts.*” However, the contractor is not liable to pay the subcontractor “*for amounts otherwise reducible due to the subcontractor’s noncompliance with the terms of the contract.*” And the contractor must provide written notice to the subcontractor “*of his intention to withhold all or a part of the subcontractor’s payment with the reason for nonpayment.*” The bill also establishes that pay-if-paid clauses in contracts for public projects will be unenforceable, without exception.

Language was also added to the Virginia Wage Theft Law (Virginia Code § 11-4.6). These new requirements apply to “Construction Contracts,” defined as “*a contract between a general contractor and a subcontractor relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.*” “General Contractor” and “Subcontractor” are defined using definitions from the Virginia Mechanic’s Lien statutes (Virginia Code § 43-1).

Pursuant to new subsection B, any prime contract on a private construction project must include a provision requiring “*the owner to pay such general contractor within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced.*” It is unclear if this provision will prevent owners and contractors from entering into a contract with milestone payments. It is also unclear how this new prompt payment language will affect the submission of pencil copies of payment applications prior to the submission of final versions for approval and payment. As in the changes to the Prompt Payment Act, subsection B states that the Owner “*shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor’s noncompliance with the terms of the contract.*” If the Owner intends to withhold all or part of the amount invoiced, “*the owner shall notify the general*

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## VIRGINIA STATE BAR UPDATE

BY DANIEL P. FRANKL, ESQ AND  
KEVIN W. HOLT, ESQ.



Bar council met at the VSB annual meeting at Virginia Beach on Thursday, June 16, 2022. At the meeting, bar council approved proposed LEO 1897 addressing whether a lawyer who receives an email from opposing counsel, with the client of opposing party copied in the “to” or “cc” field, violates Rule 4.2 (directly communicating with opposing counsel’s client) if he/she “replies all” to the email. The Virginia State Bar Standing Committee on Legal Ethics concluded that this conduct does not violate Rule 4.2 because the sending lawyer has given implied consent to the direct communication with his/her client by including the client on the email. A lawyer that does not wish to give such consent, should separately communicate with his/her client. This proposed LEO was approved by a vote of 67 yeas to 4 nays.

The council also approved proposed Legal Ethics Opinion 1898 that provides guidance on some of the technical issues surrounding cryptocurrency and what it means to act competently to safeguard the cryptocurrency. This proposed opinion indicates a lawyer may accept client property including cryptocurrency offered as an advance payment for the lawyer’s services, *provided* the lawyer’s fee is reasonable under Rule 1.5. In addition, this business transaction with the client must meet the requirements of Rule 1.8(a), namely, that the transaction is fair and reasonable to the client, the transaction and terms are fully disclosed in writing in a manner the client understands, the client is advised of the opportunity to consult with independent counsel, and the client’s consent is confirmed in writing. The LEO also sets forth where cryptocurrency is being held by the lawyer as an advance fee, the requirements of Rule 1.15 regarding safekeeping client property apply. This Rule provides that the lawyer must take reasonable steps to secure the client’s property against loss, theft, damage or destruction. Proposed LEO 1898 was approved by a vote of 41 yeas to 9 nays.

An emergency meeting of Bar Council was held on September 7, 2022 to address the vacancy of the VSB Executive Director as a result of the retirement of Karen Gould. We are pleased to report Bar Council, after an extensive search, unanimously recommended to send the name of Cameron M. Roundtree to the Supreme Court for approval to fill the position of the VSB Executive Director. Mr. Roundtree is currently serving as VSB deputy executive director and interim executive director since Karen Gould’s retirement. Mr. Roundtree was recommended by a twelve-member VSB Executive Director Search Task Force chaired by past president Phillip V. Anderson.

Bar Council also voted unanimously to Adopt a VSB Policy on Individual Remote Participation in Meeting and All Virtual Meetings pursuant to Virginia Code Section 2.2-3708.3. The policy implementation reflects the Virginia Freedom of Information Act as that act applies to open meetings of public bodies and shall apply strictly and uniformly, without exception, to all members of the committees, subcommittees, or other entities of any public bodies that are part of the VSB.

Please contact Daniel Frankl or Kevin Holt with any questions.

Daniel Frankl is a partner at Frankl Miller Webb & Moyers, LLP and Kevin Holt is a partner at Gentry Locke.

## ROANOKE LAW LIBRARY: NEWS AND INFORMATION

BY JOSEPH KLEIN, LAW LIBRARIAN

School is back in full swing in the Roanoke Valley, and I, for one, am glad of it. My summer was much busier than usual, so I look forward to returning to the structure of the school calendar. My family was able to squeeze in a wonderful week at the beach for some much needed relaxation. I hope you were all able to take some time to relax this summer as well. Two of my children are attending a new school this year. Their natural nervousness reminded me to reach out to all of the new or relatively new members of the Roanoke legal community and offer my support. Please feel free to contact me by phone (540-853-2268) or email ([joseph.klein@roanokeva.gov](mailto:joseph.klein@roanokeva.gov)) with any questions about how the Roanoke Law Library might be able to assist you.

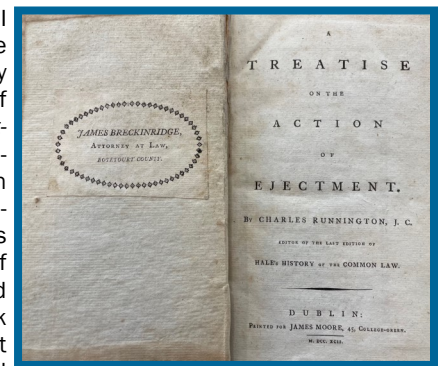


### Historical Virginia Statutes and Legislative Materials

My undergraduate degree was in History, and my love of history is one of the reasons I enjoy working so closely with the Virginia Room of the Roanoke Public Library. I love perusing the Virginia Room’s local history collection and discovering the rich history of our region. Speaking of history, did you know that the Roanoke Law Library has an amazingly thorough collection of historical legislative materials and statutes? We have volumes of the Code of Virginia and the Acts of the General Assembly going back into the early 1800s, and from 1900 forward, we have a fairly exhaustive collection. Using a combination of the Code of Virginia volumes, annual Code of Virginia pocket part supplements (this collection goes back to 1974), and Acts of Assembly volumes, it is possible to determine exactly what the law was in a specific year or to track any changes to laws over a period of time. Most of this collection is not available electronically, and there are very few places that still retain this valuable information. There is nothing I love more than an old book, so I jump at any excuse to use this collection.

### Runnington on Ejectments

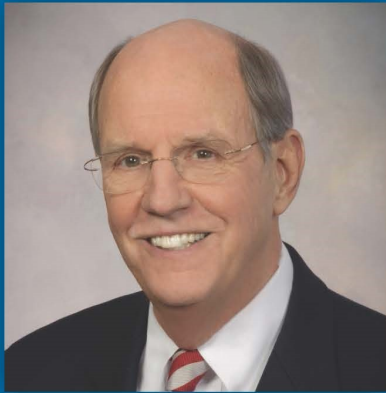
The oldest book I have discovered in the Roanoke Law Library collection is a copy of *Runnington on Ejectments* which was published in 1792. It is in far from perfect condition and probably has little use to most of you. But what I find interesting is the book plate in the front that states that it belonged



to “James Breckinridge, Attorney at Law, Botetourt County.” James Breckinridge (1763-1833) fought in the American Revolutionary War, attended Liberty Hall (Washington and Lee), and completed his education at William and Mary. He studied law under George Wythe and later practiced law in Fincastle. He served in the Virginia legislature and was also a Representative to the Eleventh United States Congress. During the War of 1812, he served as a brigadier general. Later in life, he worked with his friend Thomas Jefferson to establish the University of Virginia and served on its Board of Visitors. For more information on the life of James Breckinridge, see the Encyclopedia Virginia article at URL <https://encyclopediaivirginia.org/entries/breckinridge-james-1763-1833/>.

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## INTRODUCTION TO THE ROANOKE LAW FOUNDATION

BY MACEL H. JANOSCHKA, ESQ.



The Roanoke Law Foundation (formerly known as the Roanoke Bar Association Foundation) was established in 1997 to improve and facilitate the administration of justice, to promote the diffusion of knowledge of the law, and to effect such other educational and charitable purposes as the trustees from time-to-time shall determine. This organization functions as the tax-exempt arm of the Roanoke Bar Association.

The Foundation has a Board of Trustees comprised of three at large trustees and the immediate past president, president, president elect, and secretary-treasurer of the RBA. The RBA's immediate past president serves as RLF Chair. Current trustees are Macel Janoschka, Lori Bentley, Christen Church, Amy Geddes, Elizabeth Perrow, Patrick Kenney, and Lee Osborne.

Current charitable programs operated by the Foundation include the awarding of the Jane Glenn and James N. Kincaid Scholarships and grants to various charitable organizations in line with the RLF mission. During the 2021-2022 bar year, the Foundation awarded \$2,500 in scholarships and \$9,500 in grants. The Foundation awarded \$2,500 to The Rescue Mission of Roanoke, Inc., \$4,500 to the Girl Scouts of Virginia Skyline, and \$2,500 to the Local Office on Aging.

The Foundation also is responsible for the operation of Santa in the Station, You and the Law, and other periodic projects. During the 2021-2022 bar year, the Foundation helped with the distribution of funds for "Welcome Home Baskets" for Roanoke City Public Schools' students and their families who had previously been homeless but have found housing. These baskets provide household essentials to these families. Over \$3,350 was raised to provide these welcome baskets to Roanoke City Public Schools.

A list of the RLF fellows may be found on page 10 of this issue or online at <http://roanokebar.com/wp-content/uploads/2021/11/Fellows-List-2021-Update-Fits-on-Letterhead.pdf>.

Tax deductible donations are always welcome. Those interested in applying for scholarships or grants should visit the website at <http://roanokebar.com/for-the-community/roanoke-law-foundation/> and be sure to submit their applications prior to March 31, 2023 for the upcoming year. Those interested in serving as trustees should email the RBA and attach their resumes for consideration. A new trustee is appointed in June of each year.

*Macel Janoschka is an attorney with First Truth Law PLLC.*



## SPOTLIGHT ON SERVICE

BY DAVID N. COHAN, ESQ.

Over the years I've volunteered for many nonprofit organizations including the Grandin Theatre Foundation (serving on the Board), Roanoke Ski & Adventure Club (President, Trip Director,



Treasurer, and Trip Leader), Roanoke Outside Foundation (helping with the Marathon), Jefferson Center (bartending), Roanoke Symphony Orchestra (greeter), and Roanoke Bar Association (Santa in the Square and grading Virginia Bar exams!). Of course, volunteering is a great way to give back to our community and causes that we are passionate about. However, it is much more than that. It is personally fulfilling and rewarding. I have made lifelong friends through those activities. It's something that my wife and I enjoy doing together, and there are great perks - we've seen dozens of amazing concerts for free after volunteering for a couple of hours with the Jefferson Center and Roanoke Symphony Orchestra. I encourage you to think about your passions (a couple of mine are attending concerts and skiing), and then find organizations related to those passions that you can volunteer for.

*David Cohan is general counsel for Associated Asphalt Partners, LLC.*



**In Keystone, CO, with ski club and industry representatives from around the country**

**Volunteer Trip Leader in Steamboat Colorado**



**Volunteer Trip Leader in Alpe d'Huez in the French Alps**

**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.

**SOUTHWEST VIRGINIA MEDIATIONS****P.O. Box 576, Salem, Virginia 24153****[www.swvmediations.com](http://www.swvmediations.com) 540 556 4296 [jmitcalfe99@aol.com](mailto:jmitcalfe99@aol.com)**

## PRESIDENT'S CORNER

(Continued from page 2)

bers are John McNeil, Lawyer/Client Relations Chair, and Dan Sullivan, Memorials and Resolutions Chair. Let's all hope that neither one of them will have much new business to address in the coming year.

Finally, as our centennial year is quickly approaching, we will be forming a centennial committee to get the planning underway for our year of celebration. If you have thoughts or suggestions for events to consider, or if you would like to serve on the committee, please reach out and let me know.

To quote Idowu Koyenikan, "[t]here is immense power when a group of people with similar interests get together to work towards the same goals." The RBA Board and I look forward to seeing you at our monthly meetings and working with you in the upcoming year to achieve our goals to make our community better.

Lori J. Bentley is a partner at Johnson, Ayers & Matthews, PLC in downtown Roanoke.



Christen Church with speaker Verletta White, Superintendent RCPS.



Verletta White, Superintendent RCPS.



Lori Bentley, president, welcomes everyone to the September luncheon.



## NEW STATE LAW PROHIBITS PAY-IF-PAID CLAUSES

(Continued from page 3)

contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment." Subsection B also imposes interest penalties under Virginia Code § 2.2-4355 on owners who fail to make timely payments. The new language does not prohibit retainage provisions in prime contracts.

Subsection C applies to subcontracts between the General Contractor and Subcontractor. These subcontracts must include a provision "under which any higher-tier contractor is liable to any lower-tier subcontractor with whom the higher-tier contractor contracts for satisfactory performance of the subcontractor's duties under the contract." Subsection C states that the contract "shall require such higher-tier contractor to pay such lower-tier subcontractor within the earlier of (i) 60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general contractor or by the higher-tier contractor to the lower-tier contractor for work performed by a subcontractor pursuant to the terms of the contract. There is a potential gap between the 60-day payment period in subsection C and the 60-day payment period in subsection B so that a General Contractor may be obligated to pay its subcontractors prior to the General Contractor receiving payment from the Owner. It remains unclear if Virginia Courts will apply the requirements in Subsection C to sub-subcontracts, although it appears that the General Assembly intended these provisions to apply to subcontracts and sub-subcontracts, regardless of tier.

Subsection C also states that "such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor." But if the contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor, the contractor must provide written notice to its subcontractor "of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance." General Contractors and Subcontractors will likely err on the side of caution, providing written notice of withholding payment any time there is even the slightest discrepancy, question, or problem with a payment application. It may be difficult for a contractor to meet the requirements of this section, particularly in identifying the "lower-tier subcontractor responsible for the contractual noncompliance."

Subsection C also includes a provision rendering pay-if-paid clauses unenforceable in subcontracts for private projects, but with two exceptions when: "the party contracting with the contractor is insolvent or [is] a debtor in bankruptcy as defined in § 50-73.79." These exceptions protect General Contractors and higher-tier Subcontractors in the event that the party above them in the chain of contract becomes insolvent as defined in the Virginia code, or files for bankruptcy. However, it is unclear if these exceptions apply to downstream subcontractors if the Owner is insolvent or files for bankruptcy, or if this protection is limited to the General Contractor.

Although subcontractors are excited that SB 550 prohibits the enforcement of pay-if-paid clauses in most circumstances, SB 550 will not solve some thorny issues like non-payment for work that is performed subject to a dispute over whether the work is an extra or falls within the original contract scope. Furthermore, on

(Continued on page 11)



**MY SUPERLATIVE CASE**

*(Continued from page 2)*

In early 2019, ex-husband refiled his actions. We filed the same motions and this time filed a Counterclaim for ejectment. We made the same arguments, and the judge agreed with us that the transaction was voidable. The judge also agreed with us on the statute of limitations and dismissed ex-husband’s lawsuit, with prejudice.

COVID caused numerous delays with the trial, which we finally had last month. Ex-husband agreed that we had established all the elements of ejectment with the exception of good title. Their argument – that even though the Court had dismissed their action, our client could not prove good title because of the problem with the Power of Attorney. The first day of trial was a bench trial for the judge to decide the issue of title and possession, and the second day was a jury trial to determine our client’s claim for damages.

In preparing for trial, we relied on a number of key statutes and rules of law – first, a marital interest does not affect title. Second, we did not have to prove title back to a King’s grant because both parties claimed the property from the same source. Third, by statute, the grantor and his/her heirs and assigns are bound to defend title when it is transferred by general warranty deed. We argued that ex-husband was estopped from challenging our client’s title because he was the heir of the grantor on a general warranty deed. We also presented evidence of the deed and argued that the deed on its face was sufficient to show our client’s good title.

Apparently, opposing counsel took the general warranty deed statutes to heart because he did not call his client to testify in the bench trial. The judge ruled in our favor, granting our client title and possession of the property.

On the second day, we sat the jury and called our client to testify about her damages. During a brief recess before our expert witness, ex-husband settled the case. Our client got a great result, and we were pleased for her.

Some key lessons we took away were that the language of orders is extremely important. If the 2017 equitable distribution order in this case had completely dealt with the real property, our client would probably not have been in the position she was. Another key is to look at the statutes – we found help not only in the ejectment statutes but also in the divorce and property statutes. One thing to look for in the future is the matter of void/voidable issues. This subject is ripe for a decision from the Virginia Supreme Court. And while we would have loved to make new law, we are glad our client can move on without more years of appeals.

*Alicha M. Grubb is an associate at Gentry Locke.*

**ROANOKE’S HOMELESS ORDINANCE**

*(Continued from page 1)*

California, the Court held punishing involuntary status violated the prohibition against cruel and unusual punishment under the Eighth Amendment.<sup>7</sup> In *Robinson*, a man was arrested under a California law that made drug addiction illegal. The Court found the involuntary status of addiction similar to that of being mentally or physically ill. The Court noted that a law “which made it a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment.”<sup>8</sup> The key factor was the California law criminalized an involuntary status, addiction, instead of voluntary conduct such as the use or sale of narcotics.

A few years later, the U.S. Supreme Court issued a somewhat contradictory ruling. In *Powell v. State of Texas*, the Court upheld a Texas law prohibiting public intoxication.<sup>9</sup> The Court believed the law was constitutional, even when enforced against a chronic alcoholic, because the law punished conduct, not status.<sup>10</sup> The Court’s decision was heavily fractured.<sup>11</sup> Justice Marshall wrote for the four-justice plurality. Justice White concurred with the judgment, and Justice Fortas wrote for the four dissenting justices. Echoing *Robinson*, the dissent in *Powell* argued the statute violated the Eighth’s Amendment’s prohibition on cruel and unusual punishment because it criminalized conduct (intoxication) for which the individual was powerless to change due to an involuntary status—alcoholism.

In 2019, the Ninth Circuit heard the case of *Martin v. City of Boise*.<sup>12</sup> The court in *Martin* relied heavily on *Powell*. The court underscored Justice White’s concurrence in *Powell* that the Eighth Amendment would prohibit punishment if it were impossible for someone to avoid being in public while he is drunk.<sup>13</sup> As Justice White stated in *Powell*:

For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking . . . For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.”<sup>14</sup>

Based on this reasoning, the court ruled cities cannot enforce homeless camping ordinances if they do not have enough shelter space available for the homeless population.

Roanoke already has a place in the case law of homeless ordinances, specifically the 2019 Fourth Circuit case of *Manning v. Caldwell*.<sup>15</sup> In *Manning*, four homeless individuals suffering from alcoholism brought suit against the City of Roanoke. The individuals alleged the City used a Virginia statutory scheme to repeatedly prosecute them based on their status as alcoholics.<sup>16</sup> The named plaintiff in the case, Bryan Manning, had been arrested and prosecuted more than thirty times for drinking or possessing alcohol.<sup>17</sup> The plaintiffs challenged the constitutionality of a Virginia statute that enabled courts to enter an order prohibiting the sale of alcohol to a person shown to be a “habitual drunkard.”<sup>18</sup>

The Fourth Circuit in *Manning* struck down Virginia’s habitual drunkard statute as unconstitutional. The court, relying on the plurality opinion in *Powell*, ruled the statute violated the cruel and unusual punishment clause of the Eighth Amendment because it penalized a

*(Continued on page 11)*

**The speaker for  
the RBA October 11, 2022, Luncheon  
will be**

**Stephanie E. Grana, Esq.,  
President, Virginia State Bar.**

**Reservations may be made on the RBA website**

## VIEWS FROM THE BENCH: JUDGE MELISSA W. FRIEDMAN

(Continued from page 3)

are federal guidelines for foster care cases and that never slowed” in our local courts. Thanks to “really great people in our DSS and the court staff” the courts were able to meet every statutory deadline. Judge Friedman said that Judge Frank Rogers and the Court Clerk, Michelle Esparagoza, get the credit for that. They “steered the ship well” during that time.

The court continues to use video capabilities when possible. “There are certain hearings when it is more convenient to have it by video.” However, most importantly it is used only when “a criminal defendant’s or juvenile’s rights are not compromised by doing it by video.” Civil litigants can ask to appear by video if they are sick or out of town, and the court liberally grants such requests. “In that sense, the pandemic has changed how we do business around here.”

In her time as a judge, Judge Friedman has been surprised how few civil litigants before her have attorneys. “Almost all of our litigants in custody and visitation cases are pro se.” And that can make it more difficult to try the case. She wishes “there was better access to lawyers by indigent civil litigants.”

She shared what she enjoys most about her job. “A really good day is when a foster child gets to go home to his or her parents or when a foster child is adopted by a good family and is out of foster care.” It’s also a good day when you have had a minor with delinquent or truancy issues and “a year later after review [the minor] is getting proper support, doing well, and attending school regularly.” It’s a great day “when you get good, happy milestones for juveniles.”

Judge Friedman noted that being a judge reminds her of the saying “there’s the case you prepare for, the case you try, and the case you wish you had tried.” As a judge, one makes the ruling and then “there’s the second guessing.” There is an emphasis for judges to enter orders for every stage of the process. “Having to make that call from the bench can be taxing.”

Judge Friedman praised the local Bar for its civility and professionalism and kindly shared some pointers for her courtroom. For new practitioners she emphasized the importance of knowing the rules of evidence. “Hearsay comes up a lot” and knowing the exceptions and intricacies can make the difference as to whether a piece of evidence comes in. In terms of the basics, she emphasized “just being prepared” and to have good communication with your client. Finally, “enough cannot be said about being civil to other lawyers and litigants.”



Chris Dadak is a partner at Guynn, Waddell, Carroll & Lockaby, P.C.



Thank you to the  
Roanoke  
Valley  
Paralegal  
Association  
For help with lunch  
registration

### Roanoke Law Foundation Fellows

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## ROANOKE'S HOMELESS ORDINANCE

(Continued from page 9)

status—alcoholism. The court stated the Eighth Amendment cannot tolerate the “targeted criminalization of otherwise legal behavior that is an involuntary manifestation of an illness.”<sup>19</sup>

Concerning the new Roanoke City ordinance, officials believe the statute will withstand legal scrutiny.<sup>20</sup> While Roanoke's ordinance is likely the first of its kind in Virginia,<sup>21</sup> city officials state the ordinance is similar to other municipal laws upheld by courts.<sup>22</sup> Analogous to the concerns raised in *Martin*, the City maintains there are enough beds to house all of Roanoke's homeless.<sup>23</sup> The statute also includes a specific exemption for those suffering from disability.<sup>24</sup>

City officials state they reached out to community members prior to and after enactment of the ordinance to educate them about the law. A month after enactment of the ordinance, city officials stated no one had been charged with violating the law.<sup>25</sup>

*Bo Frith is an attorney and avid cyclist at Frith & Ellerman in Old Southwest Roanoke.*

<sup>19</sup>Roanoke Code of Ordinances, Chapter 24 – Public Buildings and Property Generally, Article I – In General, § 24-12, Camping on public sidewalks and rights-of-way within the downtown service district, available at [https://library.municode.com/va/roanoke/codes/code\\_of\\_ordinances?nodeId=COCI\\_CH24PUBUPRGE\\_ARTIINGE\\_S24-12CAPUSIRI-WWIDOSEDI](https://library.municode.com/va/roanoke/codes/code_of_ordinances?nodeId=COCI_CH24PUBUPRGE_ARTIINGE_S24-12CAPUSIRI-WWIDOSEDI).

<sup>20</sup>Homelessness is a key issue in local government races across the country, especially in West Coast cities with significant homeless populations such as San Francisco and Seattle. See, e.g., Khazan, Olga, *The Revolt Against Homelessness*, *The Atlantic* (June 2, 2022), available at <https://www.theatlantic.com/politics/archive/2022/06/california-governor-race-shellenberger-homelessness-san-francisco/661164/>.

<sup>21</sup>Final Report, U.S. Dep't of Hous. and Urban Dev., *Veterans Homelessness Prevention Demonstration Evaluation* (Nov. 2015), available at <https://www.huduser.gov/portal/sites/default/files/pdf/veterans-homelessness-prevention-report.pdf>.

<sup>22</sup>*Editorial: No One Size Fits All Solution for Homelessness in Roanoke*, *The Roanoke Times* (Dec. 5, 2021), available at [https://roanoke.com/opinion/editorial/editorial-no-one-size-fits-all-solution-for-homelessness-in-roanoke/article\\_7fdbb0f8-53e6-11ec-8737-570a4c1d54ff.html](https://roanoke.com/opinion/editorial/editorial-no-one-size-fits-all-solution-for-homelessness-in-roanoke/article_7fdbb0f8-53e6-11ec-8737-570a4c1d54ff.html) (citing Sturgeon, Jeff, *Homeless Camps Crop Up in Downtown Roanoke*, *The Roanoke Times* (Oct. 24, 2021), available at [https://roanoke.com/news/local/homeless-camps-crop-up-in-downtown-roanoke/article\\_3fd0988e-31e5-11ec-bbd5-cbe08f70c01a.html](https://roanoke.com/news/local/homeless-camps-crop-up-in-downtown-roanoke/article_3fd0988e-31e5-11ec-bbd5-cbe08f70c01a.html)).

<sup>23</sup>Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 *Colum. J.L. & Soc. Probs.* 293, 302 (1996).

<sup>24</sup>*Id.*

<sup>25</sup>*Robinson v. California*, 82 S. Ct. 660, 666 (1962).

<sup>26</sup>*Id.* at 666.

<sup>27</sup>*Powell v. State of Texas*, 392 U.S. 514, 532 (1968).

<sup>28</sup>*Id.* at 532–33.

<sup>29</sup>Isola, Ryan, *Homelessness: The Status of the Status Doctrine*, *Univ. of Cal. Davis*, Vol. 54:1725 (2021), 1725-1761, at 1728, available at [https://lawreview.law.ucdavis.edu/issues/54/3/notes/files/54-3\\_Isola.pdf](https://lawreview.law.ucdavis.edu/issues/54/3/notes/files/54-3_Isola.pdf).

<sup>30</sup>*Martin v. City of Boise*, 20 F.3d 584 (9th Cir. 2019).

<sup>31</sup>*Id.* at 616 (citing *Powell v. Texas*, 392 U.S. 514, 551 (1968) (White, J., concurring)).

<sup>32</sup>*Id.*

<sup>33</sup>930 F.3d 264 (4th Cir. 2019) (en banc).

<sup>34</sup>*Id.* at 269–70.

<sup>35</sup>See Complaint for Declaratory and Injunctive Relief ¶¶ 51, 54, *Hendrick v. Caldwell*, 232 F. Supp. 3d 868 (W.D. Va. 2017), *aff'd sub nom. Manning v. Caldwell*, 900 F.3d 139 (4th Cir. 2018), *rev'd en banc*, 930 F.3d 264 (4th Cir. 2019).

<sup>36</sup>Va. Code § 4.1-333(A).

<sup>37</sup>*Manning*, 930 F.3d at 285.

<sup>38</sup>*Editorial: No One Size Fits All Solution for Homelessness in Roanoke*, *The Roanoke Times* (Dec. 5, 2021), available at <https://roanoke.com/opinion/editorial/editorial-no-one-size-fits-all-solution-for-homelessness-in-roanoke/>

article\_7fdbb0f8-53e6-11ec-8737-570a4c1d54ff.html (quoting Roanoke City Attorney Tim Spencer “Because it's narrowly tailored and because it's very similar to what some other localities out west have done, we think it's going to be defensible”).

<sup>39</sup>Sturgeon, Jeff, *Roanoke Readies Ordinance to Ban Sidewalk Camping by Homeless Downtown*, *The Roanoke Times* (Nov. 15, 2021), available at [https://roanoke.com/news/local/govt-and-politics/roanoke-readies-ordinance-to-ban-sidewalk-camping-by-homeless-downtown/article\\_7bf35cd2-4669-11ec-b200-9fd662418acf.html](https://roanoke.com/news/local/govt-and-politics/roanoke-readies-ordinance-to-ban-sidewalk-camping-by-homeless-downtown/article_7bf35cd2-4669-11ec-b200-9fd662418acf.html) (quoting Roanoke City Attorney Tim Spencer).

<sup>40</sup>*Id.*

<sup>41</sup>Schroeder, Annie, *Roanoke City Council Passes Ordinance Banning People From Camping on Downtown Sidewalks*, *WLS 10* (Dec. 6, 2021), available at <https://www.wsls.com/news/local/2021/12/06/roanoke-city-council-passes-ordinance-banning-people-from-sleeping-on-sidewalks/>.

<sup>42</sup>Roanoke Code of Ordinances, Chapter 24 – Public Buildings and Property Generally, Article I – In General, § 24-12, Camping on public sidewalks and rights-of-way within the downtown service district, available at [https://library.municode.com/va/roanoke/codes/code\\_of\\_ordinances?nodeId=COCI\\_CH24PUBUPRGE\\_ARTIINGE\\_S24-12CAPUSIRI-WWIDOSEDI](https://library.municode.com/va/roanoke/codes/code_of_ordinances?nodeId=COCI_CH24PUBUPRGE_ARTIINGE_S24-12CAPUSIRI-WWIDOSEDI) (“It is an affirmative defense to prosecution for a violation this section for lying down if a person is lying down and is obstructing the right-of-way, but is lying down as the result of a physical manifestation of a disability, not limited to visual observation”).

<sup>43</sup>Jaxtheimer, Sydney, *Roanoke Sees Compliance One Month Into Camping Ban on Downtown Sidewalks*, *WLS 10* (Feb. 11, 2022), available at <https://www.wsls.com/news/local/2022/02/12/roanoke-sees-compliance-one-month-into-camping-ban-on-downtown-sidewalks/>.

### RBA Announces New Service Project for 2022-2023

The Roanoke Bar Association has been asked to assist with a Site Implementation Project headed by the Roanoke City Juvenile and Domestic Relations District Court. This Project is through the National Council of Juvenile and Family Court Judges. The RBA will participate in the area of improving visitation time for kids in foster care with their biological families. Specifically, the upgrading of the three visitation rooms, waiting area, and the observation rooms at DSS. More details on how to assist with the projects will be announced soon.

## NEW STATE LAW PROHIBITS PAY-IF-PAID CLAUSES

(Continued from page 8)

private projects, lower-tier subcontractors still run the risk of being left holding the bag if the owner goes bankrupt or is insolvent. Discussions are already underway concerning potential modifications and clarifications to be proposed during the 2023 General Assembly session. Now is the time for practitioners to discuss how to modify contract and subcontract forms and procedures for review, approval, and payment of invoices and payment applications to ensure compliance with these new provisions.

*Alicha M. Grubb is an associate at Gentry Locke.*

(Continued above)

# ANNOUNCEMENTS

NEW MEMBERS	UPCOMING EVENTS	OFFICERS																																				
<p>The Roanoke Bar Association welcomes the following new members:</p> <p><b>Active Members</b> Effective July 14, 2022</p> <p>Steve A. Baker, William DeLoatche P.C.</p> <p>Effective September 13, 2022</p> <p>Jason D. Morgan, Commonwealth's Attorney</p> <p>Arthur E. W. Robinson, Leon P. Ferrance P.C.</p> <p>Patrick S. Savage, Frith Anderson &amp; Peake</p>	<p>Roanoke Bar Association Meetings 2022 - 2023</p> <p>September 13, 2022 October 11, 2022 November 8, 2022 December 13, 2022 January 10, 2023 February 14, 2023 March 14, 2023 April 11, 2023 May 1, 2023 (Law Day) June 13, 2023</p> <p>Go to <a href="http://www.roanokebar.com">www.roanokebar.com</a> for more information on all upcoming events.</p>	<table border="1"> <thead> <tr> <th colspan="2" data-bbox="1065 289 1546 300">OFFICERS</th> </tr> </thead> <tbody> <tr> <td data-bbox="1065 300 1425 352">Lori Jones Bentley President</td> <td data-bbox="1425 300 1546 352">767-2041</td> </tr> <tr> <td data-bbox="1065 390 1425 443">Christen C. Church President-Elect</td> <td data-bbox="1425 390 1546 443">983-9390</td> </tr> <tr> <td data-bbox="1065 468 1425 520">Amy H. Geddes Secretary-Treasurer</td> <td data-bbox="1425 468 1546 520">989-0000</td> </tr> <tr> <td data-bbox="1065 552 1425 604">Macel H. Janoschka Past President</td> <td data-bbox="1425 552 1546 604">725-3372</td> </tr> <tr> <td data-bbox="1065 646 1425 699">Diane Higgs Executive Director</td> <td data-bbox="1425 646 1546 699">342-4905</td> </tr> <tr> <th colspan="2" data-bbox="1065 751 1546 793">BOARD OF DIRECTORS</th> </tr> <tr> <td data-bbox="1065 804 1425 835">Allegra M.C. Black</td> <td data-bbox="1425 804 1546 835">857-7111</td> </tr> <tr> <td data-bbox="1065 863 1425 894">Christopher S. Dadak</td> <td data-bbox="1425 863 1546 894">387-2320</td> </tr> <tr> <td data-bbox="1065 921 1425 953">Caley A. DeGroote</td> <td data-bbox="1425 921 1546 953"></td> </tr> <tr> <td data-bbox="1065 980 1425 1012">Martha W. Elder</td> <td data-bbox="1425 980 1546 1012">983-7535</td> </tr> <tr> <td data-bbox="1065 1039 1425 1071">T. Daniel "Bo" Frith, IV</td> <td data-bbox="1425 1039 1546 1071">985-0098</td> </tr> <tr> <td data-bbox="1065 1098 1425 1129">Sarah C. Jessee</td> <td data-bbox="1425 1098 1546 1129">283-0134</td> </tr> <tr> <td data-bbox="1065 1157 1425 1188">D. Adam McKelvey</td> <td data-bbox="1425 1157 1546 1188">342-2000</td> </tr> <tr> <td data-bbox="1065 1215 1425 1247">John M. McNeil, Jr.</td> <td data-bbox="1425 1215 1546 1247">853-2626</td> </tr> <tr> <td data-bbox="1065 1274 1425 1306">Jonathan D. Puvak</td> <td data-bbox="1425 1274 1546 1306">983.9399</td> </tr> <tr> <td data-bbox="1065 1333 1425 1365">Victor S. "Dinny" Skaff, III</td> <td data-bbox="1425 1333 1546 1365">767-2217</td> </tr> <tr> <td data-bbox="1065 1392 1425 1423">Daniel R. Sullivan</td> <td data-bbox="1425 1392 1546 1423">628-7529</td> </tr> </tbody> </table>	OFFICERS		Lori Jones Bentley President	767-2041	Christen C. Church President-Elect	983-9390	Amy H. Geddes Secretary-Treasurer	989-0000	Macel H. Janoschka Past President	725-3372	Diane Higgs Executive Director	342-4905	BOARD OF DIRECTORS		Allegra M.C. Black	857-7111	Christopher S. Dadak	387-2320	Caley A. DeGroote		Martha W. Elder	983-7535	T. Daniel "Bo" Frith, IV	985-0098	Sarah C. Jessee	283-0134	D. Adam McKelvey	342-2000	John M. McNeil, Jr.	853-2626	Jonathan D. Puvak	983.9399	Victor S. "Dinny" Skaff, III	767-2217	Daniel R. Sullivan	628-7529
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