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Recent Va. Court Decision Misses Mark on Oyer, Says LeClairRyan Attorney

Circuit Court's denial in Antigone could lead to bottlenecks,
Nancy Reynolds advises in award-winning article for legal journal

ROANOKE, Va. (10/16/18)— An opinion issued earlier this year by a Fairfax County Circuit Court judge in the *Antigone v. Taustin*, Case (CL-2017-16560, Fairfax County Cir. Ct., March 2, 2018) missed the mark on the Oyer Doctrine and how the Supreme Court of Virginia has addressed it, according to Nancy Reynolds, a Roanoke-based member of national law firm LeClairRyan in a just-published article for the Virginia Association of Defense Attorneys Association's *Journal of Civil Litigation*.

Motions craving oyer "are an interesting nuance of Virginia jurisprudence dating back to ancient times," noted Reynolds in the piece *(Current News on Oyer Motions: A New Wrinkle for an Old Tool)*, which appeared in the publication's Fall 2018 issue and was recognized at an Oct. 11 ceremony as "the best article of the year" by VADA. "The effect is to treat the documents as allegations for all purposes, including demurrer," she wrote. These motions have been used for a wide variety of documents, but "an undercurrent is developing in Virginia circuit courts to limit their application to deeds and letters probate or of administration."

In *Antigone*, plaintiffs sought a Declaratory Judgment and other relief related to the ownership and control of limited liability companies. The defendant filed a motion craving oyer, seeking to add to the Complaint articles of incorporation, operating agreements, and other documents. The Circuit Court denied the motion, noting that the parties to the case "presented no Supreme Court of Virginia opinions, and this court has found none, where a defendant has successfully craved oyer for corporate documents or other contracts over a plaintiff's objection." But Reynolds noted that, to the contrary, the history of Virginia jurisprudence is replete with cases of objections to oyer motions over a vast array of documents. In some cases, she reported, the courts expected oyer to be craved when the documents were necessary for the defendants to answer the Complaint.

In support of its position, the court cited to the *dictum* in *Langhorne v. Richmond Railway Company* limiting oyer to deeds and letters probate or for administration, she wrote. "But in support of this statement, the [*Langhorne*] Court relied neither on case law nor on established precedent." In effect, there was no basis for the limitation placed on motions craving oyer.

The *dictum* in *Langhorne* limiting oyer to deeds and letters probate or for administration "is not supported in Virginia jurisprudence nor should it be supported," Reynolds added in her article. "Such limitations allow selective reliance on documents to assert claims for which there may be no basis were the entire document considered by the court. These limitations deprive defendants of a demurrer opportunity and unnecessarily prolong litigation with the resultant increases in costs to defendants and misuse of court resources."

In the article, Reynolds highlighted Virginia trial court cases, as early as the 1780s, that shaped oyer concepts and recognized their importance. In 1847, she noted, "The Supreme Court of Virginia stated that a defendant must crave oyer of a promissory note if the defendant wanted to demur to the complaint asserting nonpayment. The Court reversed the trial court's decision to sustain the demurrer because the

note was not part of the initial pleading. In essence, the Court articulated an obligation on the part of the defendant to crave oyer of the debt instrument."

In recent history — *Ward's Equipment, Inc. v. New Holland North America, Inc.* — the Supreme Court of Virginia stated that when a party's factual allegations are contradicted by the authentic and unambiguous documents included through an oyer motion, the complaint's factual allegations may be ignored, Reynolds added. Further, in a variety of other cases — as recently as 2017 in *Hale v. Town of Warrenton* — the Virginia Supreme Court did not reject the use of documents included with the complaints, pursuant to oyer motions.

The limitations proposed in the *Antigone* case deprive the courts of an essential function: the ability to dispose of baseless cases early in the litigation, wrote Reynolds. "The circuit court of Virginia should be made aware of these attempts to limit the Oyer Doctrine and should be encouraged to squash them," she asserted.

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