

On Appeal

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Landrum v. Chippenham and the Bounds of Abuse of Discretion Review

By Elizabeth G. Robertson

Justice Potter Stewart famously said on the subject of obscenity, “I know it when I see it.”¹ Such was the standard in Virginia for appellate review of a trial court’s discretionary rulings until the Supreme Court of Virginia embraced new parameters for abuse of discretion in its November 2011 decision in *Landrum v. Chippenham and Johnston-Willis Hospitals, Inc.*²

The Procedural Missteps of Landrum

The facts of *Landrum*, presented with great detail in the majority opinion authored by Justice Donald W. Lemons, Jr., deal with a series of procedural violations by Landrum’s out-of-state counsel and the trial court’s increasing exasperation with the failure of Landrum’s counsel to follow the Rules of the Supreme Court of Virginia (“Rules”) and the trial court’s discovery orders. The bookends of these misadventures were a failure of counsel to file a motion to associate out-of-state counsel *pro hac vice* at the commencement of his involvement³ and, near the end, a ruling by the Supreme Court of Virginia to strike four of Landrum’s five assignments of error for substan-

tive changes to their language in violation of Rule 5:17.⁴

The heart of the abuse-of-discretion analysis in *Landrum* is the trial court’s ruling excluding Landrum’s experts and subsequently dismissing her medical malpractice action for violation by counsel of the trial court’s discovery orders. The trial court entered a scheduling order that required Landrum, the plaintiff, to identify by a certain date her experts and all information discoverable under Rule 4:1(b)(4)(A)(i), including the substance of the facts and opinions on which each expert would testify. Landrum’s counsel sent to defense counsel, on the last possible day, a designation with the names and addresses of plaintiff’s experts, but no details of the substance of their opinions. Defendants filed motions to exclude the experts for insufficient designation. Landrum’s counsel declined to supplement the prior designation as required by Rule 4:1(e), choosing instead to send a letter to defense counsel with a report written by each expert.⁵

At a hearing on defendants’

motions to exclude Landrum’s experts and for summary judgment, the trial court, in its discretion, gave her counsel another chance to file an expert designation in compliance with the Rules and the trial court’s scheduling order. The generosity of the trial court came with a stern warning, however:

I will give you seven days from today . . . you file a copy of it in the clerk’s office and you do it in the proper manner. I’m not going to sit here and lecture how you’re supposed to do it.

...

I will tell you, sir, if you fail to do that, I will dismiss the case after that.⁶

The trial court’s admonition was a harbinger of more procedural mishaps. Landrum’s out-of-state counsel endorsed the new expert designation but local counsel did not, in violation of Rule 1A:4(2). Another round of motions from defendants to exclude plaintiff’s experts and for summary judgment predictably followed. At a hearing on these motions, Landrum’s

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Message from the Chair

I write in celebration of spring, longer days, graduations, and our successful Appellate Summit.

On April 25th, the Virginia Bar Association and the Virginia State Bar combined to hold a summit here in Richmond for the appellate practitioners and trial lawyers of the Commonwealth.

I'm happy to report that the Chief Justice of the Supreme Court of Virginia, the Honorable Cynthia D. Kinser; the Chief Judge of the Court of Appeals of Virginia, the Honorable Walter S. Felton, Jr.; and the Chief Judge of the United States Court of Appeals for the Fourth Circuit, the Honorable William B. Traxler, Jr., joined us and passed on their observations of the state of appellate practice in their courts.

For seven hours, 73 practitioners and judges exchanged their views on the state of appellate practice in Virginia. Our topics ranged from amicus briefs, the view from the court clerk's perspective, and ways to improve our brief writing and oral arguments.

E. Duncan Getchell, Jr., the Solicitor General of Virginia, and Rebecca Glenberg, the Legal Director for the ACLU in Virginia, joined Bill Thro in explaining the benefits and pitfalls that attend the use of

amicus briefs.

Steve Emmert and George Somerville brought us all up to date on the recent developments in appellate practice.

I especially appreciate the attendance of Justice Mims, Judge Huff, and Judge McCullough for their insightful comments as recently appointed members of the bench. Judge Frank shared his views on oral argument, offering a candid assessment of what we do well and where we might improve.

Dave Hargett and Monica Monday showed their skills in oral persuasion, while the Honorable Robert

P. Frank displayed his keen ability to evaluate it.

Jeff Summers and John D. Eure shared their knowledge of interlocutory appeals in the state and federal courts.

The Honorable Patricia L. Harrington and A. John Vollino, Esq.,

spoke to us from their perspectives as the Clerk of the Supreme Court of Virginia and Chief Deputy Clerk of the Court of Appeals of Virginia, respectively.

Jay O'Keefe, George Somerville, and John T. Tucker, III, Chief Staff Attorney of the Court of Appeals of Virginia, passed their tips for improved brief writing.

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The Appeal – The Newsletter of The Virginia Bar Association Appellate Practice Section Editor: Joseph R. Pope—Design by Marilyn Shaw. The Appellate Practice Section welcomes unsolicited articles, news and book reviews. Submissions should be sent by email to jpope@williamsmullen.com. The Appellate Practice Section reserves the right to edit, in collaboration with the author, or to decline to publish any submission.



VBA/MARILYN SHAW

The VBA/VSB Appellate Summit opened with the session "Word from the Chiefs." Sharing a laugh are panelists (from left) William B. Traxler Jr., chief judge of the U.S. Court of Appeals for the Fourth Circuit; Chief Judge Walter S. Felton Jr. of the Court of Appeals of Virginia; and Virginia Supreme Court Chief Justice Cynthia D. Kinser.

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Frank Friedman and John Eure spoke about preserving errors so that we may all have a successful appeal.

The Honorable Robert J. Humphreys of the Court of Appeals of Virginia concluded our day by participating in a wonderful discussion with Steve Emmert about how appellate judges make decisions.

Thank you to Section members Steve Emmert, Monica Monday, John Eure, Frank Friedman, Dave Hargett, Jay O'Keefe, Elizabeth Robertson, Jeff Summers, George Somerville and Bill Thro for their efforts in setting up the conference and preparing the written materials so essential for CLE approval.

I offer my special thanks, and the thanks of the Appellate Practice Section, to George Somerville and Troutman Sanders for providing a superb venue for the summit. It really was first class.

Jeremy Dillon and the staff of the VBA supported us very well, as they always do. Stephanie Blanton and the staff of the VSB also pitched in to produce a fine program.

The Lex Group kindly provided printing support for the conference materials.

Thank you also to the sponsors of the reception after the summit: Gentry Locke Rakes & Moore LLP; Goodman



VBA/JEREMY DILLON

"Friend or Foe of the Court? The Effective Use of Amicus Briefs" featured (from left) moderator William E. Thro, Virginia's Solicitor General E. Duncan Getchell Jr., and Rebecca Glenberg, legal director of the ACLU of Virginia in Richmond.

Allen & Filetti, PLLC; The Law Office of Jeffrey M. Summers, PLLC; Sykes, Bourdon, Ahern & Levy, PC; and Troutman Sanders LLP.

I hope you will join us during the Summer Meeting for another delightful time. I look forward to seeing you all there.

S. Vernon Priddy, III
Appellate Practice Section Chair

McDow v. Dudley and Finding Finality in Bankruptcy

By Joseph R. Pope

Appellate courts may hear appeals only from “final decisions” of lower courts. That is the well known “final judgment” rule found in 28 U.S.C. § 1291; a statute embodying the venerable common law principle that parties should receive a single appeal after entry of a final decision.¹ In the often quoted words of the Supreme Court, a “final decision” is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”²

Unlike other civil cases, appellate jurisdiction over bankruptcy orders is available under both § 1291 and 28 U.S.C. § 158(d)(1), a statute providing that “[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees” of district courts reviewing orders of bankruptcy judges. While § 1291 and § 158 contain the term “final,” the word has a more elastic meaning under § 158(d)(1). As explained by the Seventh Circuit, “[t]he definition of finality in a bankruptcy appeal taken under 28 U.S.C. § 158(d) is considerably more flexible than in an ordinary civil appeal taken under 28 U.S.C. § 1291.”³ A combination of pragmatism and fairness provides the rationale for this more pliant interpretation. First, unlike in most civil cases, a single bankruptcy case commonly encompasses a number of distinct units of litigation. For instance, a single case can simultaneously contain an action brought by a trustee to recover property transferred by a debtor, a debtor’s action objecting to a claim asserted by a creditor, and an adversary proceeding brought by or against the debtor involving a breach of contract. “Parties to these separate proceedings should not

have to wait for the end of the entire bankruptcy proceeding before they can appeal.”⁴ Moreover, this broader approach to finality stems from “the need to tie up the many subsidiary matters that litter the road to the distribution of assets in bankruptcy.”⁵ Courts often cannot wait until the end of the case to allow an appeal, “because final disposition in bankruptcy depends on prior, authoritative disposition of subsidiary disputes.”⁶ “[R]eviewing discrete portions of the action only after a plan of reorganization is approved” would often result in a “waste of time and resources” and cause “extensive delays” in resolving the bankruptcy proceeding and individual creditors’ claims.⁷

So, in interpreting § 158, courts apply a sort of flexible finality when deciding whether a bankruptcy order is appealable. In *McDow v. Dudley*,⁸ the Fourth Circuit applied this pliant standard and found the denial of a trustee’s motion to dismiss the debtors’ bankruptcy case was a reviewable final order. While the Fourth Circuit’s opinion does not provide any bright line rule for deciding the finality issue, the Court’s opinion is an example of a multi-faceted utilitarian approach that looks to the nature and effect of the ruling at issue on the bankruptcy case as a whole and then considers whether allowing an appeal will further pragmatic interests of efficiency through the conservation of institutional and party resources.

A. Background of *McDow*

The case began on August 18, 2008, when David and Anne Dudley filed a petition for bankruptcy protection under Chapter 13 of the Bankruptcy Code. The Chapter 13 trustee later

moved to dismiss the Dudleys’ bankruptcy case or, in the alternative, convert the case to one filed under Chapter 7. In response, the Dudleys moved to voluntarily convert their case to a Chapter 7 case. Thereafter, the U.S. Trustee, W. Clarkson McDow, Jr., filed a motion to dismiss the Dudleys’ Chapter 7 case on grounds that the case was abusive under 11 U.S.C. § 707(b)(1).⁹ In support of the motion, the Trustee claimed the Dudleys failed to satisfy the “means test,” as described in the Bankruptcy Code because, after the deduction of appropriate expenses, the Dudleys would have over \$2,000 a month to pay creditors.

The Dudleys opposed the motion and filed their own motion for summary judgment in which they argued that § 707(b) did not apply to a case such as theirs where the petition was initially filed under Chapter 13 and thereafter converted to a Chapter 7 case. Relying on the plain language of § 707(b), which authorizes the bankruptcy court to dismiss a case only if “filed by an individual debtor *under this chapter*,” the Dudleys argued that “this chapter” referred to Chapter 7, and, since the Dudleys did not file their case under Chapter 7, the court could not dismiss their case under § 707(b).

The Bankruptcy Court agreed with the Dudleys, finding that the plain meaning of “filed under this chapter” only included cases in which the petition was filed originally under Chapter 7 and did not encompass converted cases, such as the Dudleys’. Thus, the bankruptcy court denied the U.S. Trustee’s § 707(b) motion to dismiss and entered summary judgment in favor of the Dudleys.

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The U.S. Trustee appealed, and the district court, acting *sua sponte*, dismissed the appeal for lack of subject matter jurisdiction. The district court concluded that a bankruptcy order denying a motion to dismiss a bankruptcy proceeding under 11 U.S.C. § 707(b) as abusive is not a final order. The court explained that, because the bankruptcy court had not yet decided whether the Dudleys would receive a discharge in bankruptcy, “the decision to be reviewed here is subject to being overtaken or superseded by other proceedings in the Bankruptcy Court and hardly seems ripe for appellate review.” The U.S. Trustee appealed to the Fourth Circuit.

While the appeal was pending, the bankruptcy court did not stay the case and ultimately entered an order discharging the Dudleys’ debts. The U.S. Trustee argued that the discharge was improper because the bankruptcy court lacked jurisdiction while the case was on appeal. The bankruptcy court responded to the U.S. Trustee’s objection by stating that “should the Court of Appeals reverse the District Court and the District Court reverses this Court’s decision to deny the Motion to Dismiss, which would dismiss the Debtor’s [*sic*] case, the discharge granted by this Court could be vacated.”

B. The Statute in Question and the Nature and Effect of the Order

The discrete issue before the court was simply this: “whether a bankruptcy judge’s order denying a § 707(b) motion to dismiss a Chapter 7 bankruptcy case as abusive is a final order within the meaning of 28 U.S.C. § 158(a)(1).”¹⁰ The Court ruled that it was.

Taking into account that “the concept of finality in bankruptcy cases has traditionally been applied in a more pragmatic and less technical way than in other situations,”¹¹ the court found

it must first look to the statute at issue and the precise nature and effect of the bankruptcy court’s order. It noted that the current version of § 707(b), which was adopted as part of the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (“BAPCPA”), 119 Stat. 23, Pub. L. 109-8 (Apr. 20, 2005), added a “means test” under which a Chapter 7 case can be found presumptively abusive. The BAPCPA also added § 707(b)(3), which provides a court broad discretion to dismiss a case as abusive, even where a debtor satisfies the means test, if there is “bad faith” or the “totality of the circumstances . . . demonstrates abuse.”¹²

The BAPCPA made the question of whether a Chapter 7 case is abusive a threshold issue and directed the U.S. Trustee to determine whether a case is presumptively abusive according to the means test and to file a report with the bankruptcy court within ten days of the initial meeting of creditors.¹³ Within thirty days of filing the statement, the Trustee must either file a motion to dismiss the case as presumptively abusive or file a detailed statement explaining why dismissal is not appropriate if the presumption has arisen from application of the means test.¹⁴

This statutory structure, according to the Fourth Circuit, manifests “a congressional policy to police all Chapter 7 cases for abuse at the outset of a Chapter 7 proceeding.” The new provisions also “raise pragmatic considerations that indicate that the denial of a § 707(b) motion to dismiss is different from the denial of other motions to dismiss, such as those filed under Federal Rule of Civil Procedure 12(b).”

While noting that courts of appeal have consistently ruled that the denial of motions to dismiss brought under § 1112(b), which applies in Chapter 11 cases, are not appealable final orders, the Fourth Circuit found the reasoning in those cases inapposite. Relying on precedent from the First

and Seventh Circuits, the court noted that, unlike motions to dismiss under § 1112(b), which can be brought anytime during the course of a bankruptcy proceeding for cause shown, “motions to dismiss for abuse under section 707(b) are subject to statutory deadlines, presumably foreclosing renewed requests for dismissal as the Chapter 7 case proceeds.”¹⁵ As a practical matter, “the discrete dispute over a debtor’s abuse of Chapter 7 will be finally resolved when a court denies a motion to dismiss under section 707(b),” and will therefore render the court’s order appealable.¹⁶

So, in the Fourth Circuit’s view, since § 707(b) “creates a statutory gateway based on whether the case is abusive, and an order denying that motion to dismiss as abusive, in effect, finally and conclusively resolves the issue,” a bankruptcy court’s order denying a § 707(b) motion to dismiss a Chapter 7 case is a final order within the meaning of § 158(a). If the rule were otherwise, and the denial of a § 707(b) motion to dismiss could not be appealed immediately to the district court, “the Chapter 7 proceedings would have to be completed before it could be determined whether the proceedings were abusive in the first place.”¹⁷

C. Finality as a Pragmatic Concept

The Fourth Circuit at bottom attributed to the term “final decision” the meaning that effected the most efficient result. To be sure, the district court’s ruling was consistent with the traditional understanding of finality as expressed in § 1291 and its interest of conserving judicial resources by precluding review of issues that subsequent events in the case might overtake or that factual development might better elucidate. Yet, the issue before the district court in *McDow* was the purely legal threshold question of whether § 707(b) should apply to a case originally filed under Chapter 13. No future

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event would affect whether the debtors had satisfied a threshold condition of converting their case from Chapter 13 to Chapter 7, nor would further factual development shed new light on that issue.

In fact, according to the Fourth Circuit, the district court's ruling caused a great inefficiency, because in remanding to the bankruptcy court with instructions that the case should proceed, it set in motion a series of events that culminated in the debtors' assets being liquidated and the proceeds being distributed to creditors before a final determination of whether the debtors had the right to file their bankruptcy petition in the first place. As the Fourth Circuit explained:

It is readily apparent that pragmatic considerations of preserving resources for creditors in bankruptcy and promoting judicial economy weigh heavily in favor of recognizing the finality of an order denying a § 707(b) motion to dismiss. Delaying appellate consideration of abuse could frustrate both principles of judicial economy and Congress's goal of ensuring that debtors allocate as much of their resources as possible toward repaying their debts. The resources of the debtor could be wasted in completing the bankruptcy proceeding before finally resolving the abuse issue. Requiring trustees to complete Chapter 7 proceedings before appealing denial of their § 707(b) motions wastes debtor resources that should be used to pay creditors, and forces trustees and bankruptcy courts to expend their scarce institutional resources on abusive Chapter 7 petitioners.¹⁸

The Fourth Circuit's ruling also clarifies that the preservation of party resources is an important consideration in determining finality in bankruptcy cases. If the U.S. Trustee can file an immediate appeal after the denial of a § 707(b) motion to dismiss and the appeal succeeds, creditors will have "an opportunity to proceed against the limited assets of the debtor outside of bankruptcy while the debtor still has assets to be attached."¹⁹

On the other hand, if the U.S. Trustee is forced to postpone his appeal until the end of the bankruptcy case, the result will be the liquidation of most, if not all, of the debtor's assets. And if the Trustee prevails, these actions will have to be unwound, if possible.²⁰ Creditors will receive less, if anything, at this stage because the transaction costs associated with pursuing already liquidated assets outside the bankruptcy context will either diminish or consume their total recovery.

Conclusion

What is and is not a final order in a bankruptcy case is sometimes difficult to discern. But the Fourth Circuit in *McDow* provided a useful standard for deciding this oftentimes nettlesome issue. The court expressly instructed that courts must look to the precise nature and overall effect of the order and decide whether allowing an appeal of the ruling will promote an efficient result by preserving precious judicial and party resources. Rulings on threshold issues such as whether a petitioner is eligible to file a bankruptcy petition in the first place would seem always to satisfy this criterion, because a decision dismissing the case will free the court's docket and permit creditors to move against any available assets held by the debtor to satisfy their claims. How the standard will apply to other issues that arise during the course of a bankruptcy case remains to be seen.

NOTES:

1. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted).
2. *Catlin v. United States*, 324 U.S. 229, 233 (1945).
3. *In re Gould*, 977 F.2d 1038, 1040–01 (7th Cir. 1992).
4. *In re James Wilson Assocs.*, 965 F.2d 160, 166 (7th Cir. 1992).
5. *Gould*, 977 F.2d at 1041.
6. *Id.*
7. *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986).
8. 662 F.3d 284 (4th Cir. 2011).
9. The statute provides in relevant part:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter.
10. *McDow*, 662 F.3d at 287.
11. *Id.* (alteration and quotation marks omitted).
12. *Id.* at 288.
13. 11 U.S.C. § 704(b)(1)(A).
14. *Id.* § 704(b)(2).
15. *McDow*, 662 F.3d at 289 (citing *In re Ross-Tousey*, 549 F.3d 1148, 1152–53 (7th Cir. 2008) and *In re Rudler*, 576 F.3d 37, 43–44 (1st Cir. 2009)).
16. *Id.* at 289.
17. *Id.* at 289–90.
18. *Id.* at 290.
19. *Id.*
20. *Id.*

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counsel admitted several violations of Rule 1A:4(2) but asked for one more last chance because counsel's disregard of the Rules and the trial court's orders was not prejudicial to defendants. The trial court, having heard and seen enough, granted the motions to exclude plaintiff's experts, stating:

If it wasn't done properly within the seven-day period, that [] was the last chance, so to speak . . . It's the plaintiff's responsibility to know and stay by the rules. And the court is going to enforce the rule. The designation is filed improperly and is stricken.⁷

Because Landrum could not establish a case of medical malpractice without experts, the trial court granted summary judgment to defendants.

A New Abuse-of-Discretion Standard

Given the egregious and repeated violations of the Rules and the trial court's orders by Landrum's out-of-state counsel, and the unequivocal warning by the trial court of the penalty for continued non-compliance, it would not have been surprising for the Court to affirm the trial court's dismissal of the case under a know-it-when-I-see-it standard for abuse of discretion. Instead, Justice Lemons, writing for a three-justice majority, used this case to redefine the framework for review of a ruling within the discretion of a trial court.⁸

Drawing from a 1984 case from the U.S. Court of Appeals for the Eighth Circuit, *Kern v. TXO Production Corp.*,⁹ and an unpublished opinion of the U.S. Court of Appeals for the Fourth Circuit,¹⁰ the abuse-of-discretion standard embraced by the majority has three elements:

- (1) failing to take into account a significant relevant factor;
- (2) giving significant weight to an irrelevancy; or
- (3) weighing the proper factors but committing a clear error of judgment in doing so.¹¹

The majority analyzed Landrum's claim that the trial court abused its discretion in refusing to consider the lack of prejudice to defendants under this test, holding that prejudice to an opponent was an "irrelevant" factor in determining an appropriate sanction pursuant to Rule 4:12(b)(2) for violation of a trial court's discovery orders.¹² Proper factors considered by the trial court included the multiple warnings given to Landrum's counsel that failure to abide by the trial court's orders would lead to sanctions and counsel's "consistent disregard" of the Rules. Landrum's counsel was "unable to comply with the Rules," including Rule 1A:4(2),

4:1(b)(4)(A)(i), 1A:4(3), 4:1(e)(1)(B) and 4:15, a factor which the trial court appropriately gave significant weight, in the majority's view.¹³

A Fourth Factor?

Justice Millette, joined by Chief Justice Kinser, concurred in affirming the trial court's exclusion of Landrum's experts but emphasized that the majority's three-prong test for abuse of discretion should have included a fourth prong, an error of law.¹⁴ With citation to quite a few opinions from the Supreme Court of the United States, the Supreme Court of Virginia and multiple federal courts of appeal, the concurrence explained that "a trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."¹⁵

Resolving the 3-2 Split

A primary issue for appellate practitioners is how to reconcile the abuse-of-discretion standard of the majority with the view of the concurrence that any inquiry into abuse of discretion must include an analysis of potential errors of law by the trial court. While the abuse-of-discretion standard is likely to evolve in coming months, there are a few alternatives to consider in the interim:

1. The Landrum abuse-of-discretion standard is a four-factor test.

In light of the rarity of a three-justice majority with a two-justice concurrence, counsel may be well-advised to brief and argue the three factors for abuse of discretion embraced by the majority and also to undertake an analysis of whether the trial court's ruling was guided by an error of law. The "perfect example" of this scenario discussed by the concurrence is the Court's 2008 decision in *Porter v. Commonwealth*, in which the trial court misinterpreted the law as giving a judge no authority over security in the courtroom when the law actually did provide the trial court judge such authority.¹⁶

2. The three factors of the Landrum test encompass a mistake of law.

In *Kern v. TXO*, the original source for the majority's three-part standard for abuse of discretion, the U.S. Court of Appeals for the Eighth Circuit prefaced its statement of the test by noting that a discretionary decision of a trial court means "that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by a mistake of law."¹⁷ The *Landrum* majority quotes this language, leading to a logical implication that the three scenarios for abuse of discretion established by the majority do encompass an error of law.

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One possible conclusion is that a misinterpretation of the law is “a clear error of judgment” under the third prong of the test. Another is that the relevant factors to which the trial court should give significant weight and the irrelevant factors to which it should not be based in statutory or case law, or both, necessarily injecting a legal-error analysis into the first two prongs.

For example, in determining whether an expert is qualified to testify in a medical malpractice case, the proper factors to be considered by a trial court are (1) whether the expert has an active clinical practice in the defendant’s specialty or a similar field; and (2) does the expert demonstrate knowledge of the standard of care applicable to the defendant. Both requirements are based in the statutory language of Va. Code § 8.01-581.20. The case law interpreting this statute provides further guidance regarding what aspects of the expert’s training and experience the trial court should consider within these two factors.¹⁸ A trial court that does not undertake inquiry into the expert’s knowledge of the applicable standard of care would violate the first *Landrum* factor and also would commit an error of law.

In *Kern v. TXO*, the district court granted Ms. Kern’s motion for dismissal without prejudice under F.R.C.P. 41(a) but did not award TXO the costs and attorney fees of preparing for trial, stating that the court was “giving Ms. Kern another chance because TXO will survive.”¹⁹ The U.S. Court of Appeals for the Eighth Circuit analyzed the trial court’s ruling under the same three factors embraced by the *Landrum* majority and concluded that the trial court considered an improper factor, the financial health of the defendant.²⁰ In accordance with 28 U.S.C. § 453, the courts are statutorily required to “administer justice without respect

to persons, and do equal right to the poor and to the rich . . .”²¹ The Kern court held that the trial court’s consideration of the financial stability of TXO was an inappropriate factor under the second part of the standard and, therefore, an abuse of discretion, because treating a defendant differently for being financially sound was prohibited by law.²²

3. A pure error of law is reviewed under a *de novo* standard of review, and does not warrant the deference of an abuse-of-discretion standard.

A judge never has the discretion to go beyond the boundaries of the law. For example, in the January 2012 decision in *Northern Va. Real Estate, Inc. v. Martins*, the Court concluded, employing a *de novo* standard of review, that a trial court has the authority to suspend an order of nonsuit without running afoul of Rule 1:1, contrary to the argument made by plaintiff on appeal that Rule 1:1 precluded such action.²³ Issues of statutory construction or interpretation of the Rules of the Supreme Court of Virginia are not reviewed for abuse of discretion; therefore, the majority correctly determined that mistakes of law should not be an element of the *Landrum* standard.²⁴

The respective merits of the options discussed above are for appellate practitioners to ponder. Time will reveal which, if any, of these views of the *Landrum* abuse-of-discretion standard the Court ultimately will adopt.

NOTES:

1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (“I shall not today attempt further to define the kinds of material I understand to be embraced within [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”)

2. 282 Va. 346, 352-53, 717 S.E.2d 134,137 (2011).

3. *Id.* at 349 n. 1, 717 S.E.2d at 135 n. 1.

4. *Id.* at 356 n. 9, 717 S.E.2d at 139 n. 9.

5. *Id.* at 349, 717 S.E.2d at 135. The defendant hospital was represented in the trial court by Todd Anderson and Linda Georgiadis and the defendant physician was represented by Robert Donnelly

and Robyn Ayres-Barber.

6. *Id.* at 350, 717 S.E. at 135-36.

7. *Id.* at 351, 717 S.E.2d at 136. The trial court judge who admonished counsel that he would dismiss the case for further non-compliance with the Rules and the trial court’s orders was The Honorable Buford Parsons, a retired judge from the Circuit Court of Henrico County who served as a substitute judge for the Circuit Court of the City of Richmond for the first hearing. The Honorable Walter W. Stout, III was the judge who dismissed the case and entered the order from which Landrum appealed. The Court’s opinion does not mention that two different judges were involved, but this distinction is not essential to the Court’s analysis.

8. Arguments were heard before only five Justices in June 2011.

9. *Kern v. TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984).

10. *General Trucking Corp. v. Westmoreland Coal Co.*, No. 92-1225, 1992 U.S. App. LEXIS 30853, at *14 (4th Cir. Nov. 23, 1992).

11. 282 Va. at 352-53, 717 S.E.2d at 137.

12. *Id.* at 355, 717 S.E.2d at 138.

13. *Id.* at 355-56, 717 S.E.2d at 138-39.

14. *Id.* at 357, 717 S.E.2d at 139-40.

15. *Id.* quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447 (1990).

16. 276 Va. 203, 257-58, 260, 661 S.E.2d 415, 443, 445 (2008).

17. 738 F.2d 968, 970.

18. See *Jackson v. Qureshi*, 277 Va. 114, 671 S.E.2d 163 (2009); *Lloyd v. Kime*, 275 Va. 98, 654 S.E.2d 563 (2008) *Christian v. Surgical Specialists of Richmond, Ltd.*, 268 Va. 60, 596 S.E.2d 522 (2004); *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004).

19. 738 F.2d 968, 969-70.

20. *Id.* at 972.

21. *Id.*

22. *Id.* The *Landrum* concurrence cites *Lynchburg Div. of Soc. Servs. v. Cook*, 276 Va. 465, 484, 666 S.E.2d 361, 370-71 (2008), in support of the proposition that an appellate court reviewing a discretionary decision of the trial court must also determine that the trial court did not rely on “erroneous legal conclusions.” In *Cook*, the Supreme Court of Virginia held that the Court of Appeals failed to give proper weight to Va. Code § 16.1-278.19 in declining to support an award of costs and attorney fees to grandparents granted custody of their granddaughter but, instead, “enunciated a non-statutory standard, which was that the Grandparents were not entitled to attorney’s fees because the position of LDSS was not unreasonable.” *Id.* at 484, 666 S.E.2d at 371. The legal error in *Cook* was failure to consider a relevant (statutory) factor and consideration of an irrelevant (non-statutory) factor. If analyzed under the *Landrum* standard, the trial court’s ruling would violate both the first and the second prongs.

23. *Northern Virginia Real Estate, Inc. v. Martins*, Rec. No. 101836, slip op. 18-23 (January 13, 2012)

24. See the analysis of L. Steven Emmert posted shortly after *Landrum* was decided for a thorough discussion of this view at http://www.virginia-appeals.com/scv_opinion.aspx?id=403.