

2007 BOYD-GRAVES CONFERENCE

SUBCOMMITTEE REPORT

Availability of Discovery in Pending Immunity Pleas

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2007 BOYD-GRAVES COMMITTEE REPORT

AVAILIBILITY OF DISCOVERY WHEN PLEA OR BAR ASSERTED

Issue Presented To Committee for Study:

Is there a disparity in the availability of discovery to plaintiffs on issues related to immunity pleas asserted by defendants and, if so, is there a statutory or rule change that could address this disparity?

Study Conducted by Committee:

The committee communicated by e-mail and conference call. The VADA and the VTLA were canvassed to solicit reports from their members of discovery issues they had encountered when pleas in bars had been asserted. Judge Gamble spoke with a number of Circuit Court Judges to determine if the Judiciary felt this was an issue that needed to be addressed. The Committee reviewed relevant discovery rules contained in the Rules of the Supreme Court of Virginia.

Scope of Problem:

The committee understood the issue before it to be whether plaintiffs were uniformly being allowed to conduct discovery on issues related to immunity pleas before the plea was submitted to the court for decision. The committee felt that the issue presented to it was applicable to other pleas and defenses in addition to immunity pleas. For example, the issue of availability of discovery could also arise when a defendant challenged venue or jurisdiction or filed a plea of the statute of limitations or asserted a workers' compensation bar. Therefore, the committee did

not limit its inquiry to just those instances when an immunity plea was asserted by a defendant and discovery was sought by a plaintiff.

The committee also determined that an ancillary issue to the one it was asked to address exists which is the availability of full discovery to all parties on the underlying case during the pendency of the plea in bar. In other words, prior to the court ruling on the plea should the parties be allowed to engage in full discovery or should discovery be limited to that solely related to the issues raised in the plea?

None of the members of the committee had any personal experience with discovery not being allowed on pleas in bar where there were factual issues in dispute. All committee members were of the opinion that discovery should be allowed on pleas, since many of these pleas require an evidentiary hearing before a ruling can be made. Members of the committee were aware of instances in which the parties disagreed as to the scope of discovery during the pendency of a plea but understood that in such instances, the matter had been fairly addressed by the court.

The information collected from the defense and plaintiff's bar (VADA and VTLA) indicated that there were isolated instances in which discovery issues had arisen related to venue motions (some Judges allow discovery and some do not) as well as occasions where the parties disagreed as to the scope of discovery to be allowed prior to the court ruling on the plea. However, there did not seem to be a significant number of instances in which the issues were not ultimately resolved either between the parties or with court intervention.

Applicable Rules:

Rule 4:1 of the Rules of the Supreme Court of Virginia provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party

Rule 4:13 of the Rules of the Supreme Court of Virginia provides:

The court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider ...

- (2) a plan and schedule of discovery;
- (3) any limitations on the scope and methods of discovery....

Analysis By Committee:

The committee discussed the many factors that must be considered when determining the plan, schedule, scope and methods of discovery when a defendant has challenged venue or jurisdiction or asserted a plea in bar. These factors would include whether the plea would moot any further action in the case, whether there are other defendants who have not raised any plea, whether an Answer has been filed so that the parties are "at issue" on the underlying case or are only "at issue" as to the plea and other issues related to timing, fairness, or prejudice. For example, if a plaintiff alleges both simple negligence and gross negligence, an immunity plea would only bar the plaintiff's negligence claims but not the gross negligence claims. A court might determine that the parties should engage in full discovery pending the court's ruling on the plea so that discovery does not have to

be duplicated if the plea is dismissed. Another example would be a case in which a defendant challenges venue or jurisdiction or raises a plea but plaintiff needs to conduct discovery to determine the identity of other parties who need to be added as defendants before the running of the statute of limitations. In such cases, a rule or statute that bars discovery except on issues related to venue or jurisdiction or a plea would be prejudicial to the parties. Likewise, a rule or statute that requires discovery on issues related to venue, jurisdiction or pleas, could result in delay and prejudice that could be avoided by the court making case by case determinations as to the plan, schedule, scope and methods of discovery.

Committee Opinion:

It is the unanimous opinion of the committee that insufficient disparity in availability of discovery when pleas are asserted exists to warrant seeking any rule or statute change. Additionally, it is the unanimous opinion of the Committee that the facts and procedural posture of each case in which these issues arise are so diverse that it would be impossible to fashion a rule or statute that would be appropriate in every situation and that it was best left to the court and/or the parties to develop a case specific discovery plan.

Committee:

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Editor's Note:

The Committee's recommendation that no change be made to current law was adopted by consensus.