Definitive Answers

Strange cattle wandering through an open gate/ toward an understanding of Curative Admissibility[1]

by Mark Lindensmith

Things are going along pretty smoothly so far in the case you're trying against the drunk driver who collided with your client. The plaintiff's injuries aren't catastrophic, but they are significant, with almost $15,000 in medical expenses. She will recover from her injuries, and she should be able to recover punitive damages against the defendant. He had a BAC of .23 and an automobile liability policy with $100,000 limits, which the insurance company has already acknowledged will indemnify for the punitive damages if you can get an award for them. There is a pesky contributory negligence and proximate cause issue, but you aren't too worried about it.

Now the defendant is on the witness stand, and defense counsel is asking him questions on direct about how old he is, where he lives, and the like. You are staring off into middle distance, sort of listening, when the usually taciturn defendant suddenly lapses into a fit of logorrhea: "Yeah, I lost my job a while back, so I live with my mother – in a trailer down by the river. We don't have much – Mom's on disability and such, so we do what we can to scrape by. But that's the deal – got no money and no job, and I'm livin' with Mom down at the trailer." As you stand (to object, to approach the bench, to do *something*), you think: What the heck?

The defendant has, in essence, just pleaded poverty to the jury. Normally, his financial condition is not relevant. But you are asking for punitive damages. So, does that mean that the defendant's financial condition has become relevant? You certainly didn't bring it up in your part of the case. Can he talk about how poor he is? You don't want to make a fuss about it in front of the jury, so you ask to approach the judge. And as you stumble toward the bench to argue about what just happened, you have a vague memory – something about strange cattle wandering through a gate. If the farmer opened that gate, can he be heard to complain about the strange cattle that wander through it?

"Your Honor," you say. "The defendant has just presented incompetent, irrelevant evidence to the jury. He's basically presented his financial condition to the jury, and I don't think an instruction to disregard is enough to cure the damage that's been done. I object, and I ask for an instruction. But out of basic fairness, and because the defendant has now opened the door, really swung the gate wide open on evidence about his financial condition, I propose to cross-examine the defendant about the fact that he has liability insurance."

At that point, both the judge and defense counsel turn red and start spitting and sputtering (but in a whisper, eye-balling the jurors the whole time) about how completely improper it is to let in evidence about insurance. Besides, they both say (almost in unison), you're asking for punitive damages, so the defendant's financial condition is in play – isn't it? Aren't there cases on that? It is at that point that you wish you would have thought about and briefed this ahead of time. If you would have, you might have an understanding of curative admissibility and some related issues that arise when the other party "opens the door" or "swings wide the gate" on what would appear to be irrelevant, incompetent or otherwise inadmissible evidence.

Curative Admissibility: Toxic testimony and the search for a cure

Let's assume for the moment that the defendant's testimony about his poverty is improper. Charles Friend's *The Law of Evidence in Virginia* explains the doctrine of curative admissibility as follows: "The doctrine of 'curative admissibility' allows a

party to introduce otherwise inadmissible evidence when necessary to counter the effect of improper evidence previously admitted by the other party without objection. In such cases it is said that the other party has 'opened the door' to the introduction of the impermissible evidence." Charles E. Friend, *The Law of Evidence in Virginia* §8-13 at 314 (6th ed. 2003) (footnotes omitted). *See Luck v. Commonwealth*, 30 Va. App. 36, 46, 515 S.E.2d 325, 329 (1999); *Wright v. Commonwealth*, 23 Va. App. 1, 9, 473 S.E.2d 707, 711 (1996); *see also Graham v. Commonwealth*, 127 Va. 808, 825, 103 S.E. 565, 570 (1920) (citing the "strange cattle" West Virginia case of *Sisler v. Shaffer*, and stating: "In such a case, 'A party who draws from his own witness irrelevant testimony, which is prejudicial to the opposing party, ought not to be heard to object to its contradiction on the ground of its irrelevancy.' 29 Am. & Eng. Ency. Law 793-4. See to the same effect *Sisler v. Shaffer*, 43 W.Va. 769, 770-1, 28 S.E. 721"); *and see generally* E. Cleary, *McCormick on Evidence* §57 at 132 (2d ed. 1972) (most courts generally agree that "one who induces a trial court to let down the bars to a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary is also allowed to avail himself of the opening") (footnotes omitted). Along these same lines, although not using the phrase "curative admissibility," are Virginia cases such as *Pettus v. Gottfried*, 269 Va. 69, 78, 606 S.E.2d 819, 825 (2005), where the Court stated as follows:

> The general rule is that when a party unsuccessfully objects to evidence that he considers improper but introduces on his own behalf evidence of the same character, he waives his objection to the other party's use of that evidence. *Drinkard-Nuckols v. Andrews*, 269 Va. 93, 2005 Va. LEXIS 8, 269 Va. ___, ___, 606 S.E.2d 813, ___ (2004) (decided today); *Combs v. Norfolk & Western Ry. Co.*, 256 Va. 490, 499, 507 S.E.2d 355, 360 (1998); *Hubbard v. Commonwealth*, 243 Va. 1, 9, 413 S.E.2d 875, 879, 8 Va. Law Rep. 1675 (1992). Although the rule is most often applied in cases when the party making the objection later introduces the same evidence, "*it is properly and logically applicable in any case, regardless of the order of introduction, if the party who has brought out the evidence in question, or who has permitted it to be brought out, can be fairly held responsible for its presence in the case*." *Whitten v. McClelland*, 137 Va. 726, 741, 120 S.E. 146, 150 (1923).
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> 606 S.E.2d at 825 (emphasis added).

Friend further explains that the application of curative admissibility normally lies within the discretion of the trial court, but that "a trial court has no discretion to apply the doctrine of curative admissibility *if the party seeking to invoke the doctrine intentionally failed to object to the opponent's initial introduction of the inadmissible evidence* in order to gain admission of other inadmissible evidence." Charles E. Friend at 314 (emphasis added). Therefore, curative admissibility "does not imply that a party may deliberately fail to object as a trial tactic for obtaining the admission of other inadmissible evidence." *Id*. (*citing Wright v. Commonwealth*, 473 S.E.2d at 711, wherein the Court stated that "a trial court has no discretion to apply the doctrine of curative admissibility if the party seeking to invoke it intentionally failed to object to the inadmissible evidence").

So, the bone of contention in some of the Virginia cases where the curative admissibility doctrine has been invoked will be whether the party seeking to admit the curative evidence (in our case, for example, the evidence of insurance to offset the admission of the testimony about the poverty of the defendant) "intentionally failed to object to the inadmissible evidence in order to gain admission of otherwise inadmissible evidence." *Luck v. Commonwealth*, 515 S.E.2d at 329; *Wright v. Commonwealth*, 473 S.E.2d at 711. What factors or evidence might the trial court look at to determine whether the party has "intentionally" failed to object to the use of the offending evidence? In other words, how will the trial court know if your failure to object to the inadmissible evidence is just a trial tactic?

Unfortunately, the Virginia cases do not offer much guidance on what factors might be determinative of whether a party has "intentionally failed to object." There is at least some limited guidance in *Wright v. Commonwealth*, where the criminal defendant in that case sought to introduce hearsay testimony from an informant in response to certain hearsay testimony the prosecution had introduced. The defendant argued that the state had "opened the door" by eliciting the inadmissible hearsay testimony, but the trial court refused to allow defendant's evidence because there hadn't been an objection at the time of the state's evidence. In response to the trial court's inquiry as to why counsel had not objected at the time, the attorney said that such a contemporaneous objection "would have emphasized the objectionable evidence to the jury." 473 S.E.2d at 709.

In concluding that the trial court had not abused its discretion in refusing to allow the use of "curative admissibility" under such circumstances, the Court of Appeals in *Wright* noted the factors in the record which suggested that the defendant had "intentionally failed to object to the inadmissible evidence," stating: "Appellant's counsel acknowledged that he intentionally failed to object to [the] testimony. His stated reason was that he did not want to call the statement to the attention of the jury. However, this explanation appears disingenuous . . . ." 473 S.E.2d at 711, n. 4. The Court went

on to explain that the attorney had brought out the same evidence on direct examination of the defendant, and that he had acknowledged that he chose not to object to the same evidence in the first trial of the matter because he "chose to take the good with the bad," thus, revealing "his intention to allow inadmissible evidence to be received without objection for the express purpose of gaining admission of the description contained in the affidavit." *Id*.

Query, though, how many times will the trial court really have such an open acknowledgement of "intent" to allow in the inadmissible evidence? In our case, for example, where the defendant has pleaded poverty, you've approached the bench and made known your objection almost immediately. You've asked for a curative instruction. But you've also argued that such an instruction will not be sufficient to remove the taint of the objectionable evidence. The cat, so to speak, is out of the bag. The gate has been opened, and strange cattle have started to roam.[2] Let's assume that you do not acknowledge to the trial court that you *intended* to let the critter out just so you could introduce insurance into the case. You objected as soon as the defendant spewed forth about his poverty, but now you argue that "curative admissibility" is the only appropriate cure.

Remember that the use of "curative admissibility," as with most matters of evidence, is discretionary with the trial court. *See Elliot v. Commonwealth*, 267 Va. 396, 417, 593 S.E.2d 270, 284 (2004) (trial court did not abuse its discretion in refusing to allow into evidence the results of a polygraph examination of witness where the defendant argued that the prosecution had "opened the door" on such evidence by another witness making reference to the polygraph exam); and *United States v. Halteh*, 224 Fed. Appx. 210, 215, 2007 U.S. App. LEXIS 6128 (4th Cir. 2007) (arising out of the Eastern District of Virginia) (otherwise inadmissible evidence may be permitted for the limited purpose of removing any unfair prejudice injected by the opposing party's "opening the door" on an issue; such rebuttal evidence must be reasonably tailored to the evidence it seeks to refute, and its admission or exclusion, like all evidentiary rulings, is addressed to the sound discretion of the trial court). Sometimes, the trial court might exercise its discretion by simply giving a *curative instruction* concerning the inadmissible evidence. *See Elliot v. Commonwealth*, 593 S.E.2d at 284. In addressing the trial court's exercise of discretion in *Elliot*, for example, the Supreme Court stated:

> Elliott contends that the trial court erred in not permitting him to introduce the results of Gragg's polygraph examinations to rebut the false impression that Gragg had been truthful in her statements to the police. Elliott contends that the jury would naturally have such an impression from Detective Hoffman's reference to a "polygrapher" having interviewed Gragg. Elliott asserts, as he did at trial, that Hoffman's response "opened the door" to the admission of the results of Gragg's polygraph examinations. We disagree.
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> The term "opening the door" is a catchphrase often used to refer to the doctrine of curative admissibility. *Curative admissibility, in its broadest form, allows a party to introduce otherwise inadmissible evidence when necessary to counter the effect of improper evidence previously admitted by the other party*. *See Clark v. State*, 332 Md. 77, 629 A.2d 1239, 1244-45 (Md. Ct. App. 1993); see also 1 John H. Wigmore, *Wigmore on Evidence*, §15 (Rev. ed. 1983). The specific facts of this case do not implicate the application of this doctrine. *We are of opinion that the trial court properly exercised its discretion to give a curative instruction to the jury under the circumstances rather than to permit Elliott to introduce otherwise inadmissible and unreliable evidence*.
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> 593 S.E.2d at 283-84 (emphasis added).

Thus, in some instances, a curative instruction might suffice to cure the toxic effect of the incompetent evidence, and it is within the discretion of the trial court to decide whether a *curative instruction* or *curative admissibility* is the more appropriate remedy. As noted in *McCormick on Evidence*, "if again the first incompetent evidence is relevant, or though irrelevant is prejudice arousing, but the adversary has failed to object or to move to strike out, where such an objection might apparently have avoided the harm, then the allowance of answering evidence should rest in the judge's discretion." *McCormick on Evidence* §57 at 133 (footnotes omitted). On the other hand, the commentators in *McCormick* go on to state that "if the incompetent evidence, or even the inquiry eliciting it, *is so prejudice-arousing that an objection or motion to strike can not have erased the harm*, then it seems that the adversary should be entitled to answer it as of right." *Id*. at 133 (footnotes omitted; emphasis added). So, how toxic is the testimony about the defendant's poverty in the instant situation?

Ordinarily, of course, the defendant's financial condition would not be relevant at all. Where the plaintiff is asking for punitive damages, though, there is authority suggesting that "[e]vidence of the financial condition of a defendant is relevant on the issue of punitive damages and properly may be considered by the jury." *Hamilton Development Co. v. Broad Rock Club, Inc.*, 248 Va. 40, 44, 445 S.E.2d 140, 143 (1994) (*citing Weatherford v. Birchett*, 158 Va. 741, 747, 164 S.E. 535, 537 (1932)) (See further discussion on this specific issue below, Part C). Therefore, it is quite possible that the trial court

will not see the poverty testimony as being toxic at all. The court might consider it perfectly relevant and appropriate (and not unfairly prejudicial) where you are asking for punitive damages. And an admonition from the court that the jury should disregard the "plea of poverty" evidence, while also giving a punitive damages instruction in the case, will just be confusing. Under such circumstances, it would be appropriate to draw the court's attention to the doctrines of "curative admissibility" and "opening the door," as they are discussed in cases such as *Clark v. State*, 332 Md. 77, 629 A.2d 1239, 1244-45 (Md. Ct. App. 1993), the Maryland case cited and relied on by the Virginia Supreme Court in *Elliot v. Commonwealth*, discussed above.[3]

Strange cattle wandering in other jurisdictions

In the Maryland case of *Clark v. State*, cited and applied in *Elliot* and in the Virginia Court of Appeals case of *Wright v. Commonwealth*, 473 S.E.2d at 710, Maryland's highest court concluded that the defendant in a rape case should have been allowed to present otherwise inadmissible DNA evidence in rebuttal to unexpected and inadmissible testimony by a police officer in the case which implicated the defendant as a suspect in a completely separate rape investigation. In explaining the distinction between "opening the door" to certain evidence based on the fact that the other party has now *made the evidence relevant*, and the doctrine of "curative admissibility," the Maryland court noted that the "opening the door" doctrine "*is really a rule of expanded relevancy* and authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection. Generally, 'opening the door' is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue." 332 Md. at 84 (emphasis added).

In explaining the distinction between "opening the door" and "curative admissibility," the *Clark* court stated:

> A distinction between "opening the door" and "curative admissibility" is that generally the latter doctrine is more limited and applies *where a party wishes to offer incompetent evidence in response to incompetent evidence offered by the opponent which was admitted without objection*; had there been an objection which was overruled, the trial court has effectively made the identical evidence admissible and the only issue is relevancy, thus the "opening the door" rule of expanded relevancy, discussed above, would control.
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> That the curative admissibility doctrine is not frequently invoked is evidenced by the fact that the much more familiar way to "cure" inadmissible evidence admitted without timely objection is to appeal to the court's discretion to grant a belated motion to strike the evidence and to deliver a curative instruction to the jury to disregard the inadmissible testimony. However, where merely striking out the irrelevant evidence is not sufficient to erase the prejudice it caused, and the "damage in the form of prejudice to the defendant transcend[s] the curative effect of the instruction," *Kosmas v. State*, 316 Md. 587, 594, 560 A.2d 1137, 1141 (1989), the damaged party may seek to counter the prejudice with otherwise irrelevant and incompetent evidence. In that case, the "open door" doctrine of expanded relevancy offers the damaged party no recourse. But, *in limited circumstances, when inadmissible and highly prejudicial evidence has been admitted without objection and the opposing party wishes to offer inadmissible evidence that would go no further than neutralize the previously introduced inadmissible evidence, the trial judge has discretion to permit "curative admissibility*."
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> 332 Md. at 88-89 (emphasis added).

As the Maryland court went on to note, "these rules can be distilled into a rather simple maxim which can be characterized by McCormick's cliché 'fighting fire with fire.' John W. Strong, *McCormick on Evidence* §57, at 229 (4th ed. 1992). Litigants have a limited right to contain trial fires which they had no part in starting." 332 Md. at 91.

Thus, in your case involving the unexpected, weird, and highly prejudicial outburst by the defendant about how poor he and his mother are, you can argue that you should be allowed to fight fire with fire. If the defendant's financial situation is in play now, because of the issue of punitive damages and because of the defendant's testimony about his poverty, then you should be allowed to fight that fire with evidence about his liability insurance. For further discussion about how other jurisdictions treat the problem of "curative admissibility" and how far a party might be allowed to go in fighting fire with fire in the application of the doctrine, *see, e.g., Goines v. United States*, 905 A.2d 795, 800-01 (D.C. Ct. App. 2006); *Navarro v. Louder*, 2009 N.J. Super. LEXIS 2425 (App. Div. 2009); and *see generally* F. Gilligan and E. Imwinkelried, *Bringing the "Opening the Door" Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 Santa Clara L. Rev. 807 (2001); and D. Estabrook, *Opening the Door: New Hampshire's Treatment of Trial Court Rebuttal Evidence*, 46 N.H. Bar Jour. 30 (Fall, 2005); and E. Cleary, *McCormick on Evidence* (2d ed.) §§55-57.

Evidence of insurance: Wandering cattle and Mrs. O'Leary's cow

So, you've considered strange cattle wandering through a gap, cats getting let out of a bag, and fighting fire with fire. You've considered generally the doctrine of curative admissibility and the concept of opening the door to otherwise irrelevant or inadmissible evidence. Now, what about any specific authority on whether the door has been opened far enough here to allow in evidence of insurance? Once Mrs. O'Leary's errant cow has started the fire, should she be heard to complain about the methods you use to fight the flames?

As you've already seen, there is Virginia authority stating that "[e]vidence of the financial condition of a defendant is relevant on the issue of punitive damages and properly may be considered by the jury." *Hamilton Development Co. v. Broad Rock Club, Inc.*, 248 Va. at 44, 445 S.E.2d at 143. The relevance of evidence of the financial condition of a defendant to an award of punitive damages is underscored further by the fact that, in an excessiveness appeal of a punitive damages award, "the ability of the defendant to pay" the punitive damages award is one of the factors considered by the Virginia Supreme Court. *See Baldwin v. McConnell*, 273 Va. 650, 658-659, 643 S.E.2d 703, 707 (2007) ("judicial review of the amount of punitive damages upon a motion for remittitur requires: 1. consideration of reasonableness between the damages sustained and the amount of the award, . . . and 5. t*he ability of the defendant to pay*") (emphasis added) (*quoting Poulston v. Rock*, 251 Va. 254, 263, 467 S.E.2d 479, 484 (1996)).

As the Virginia Supreme Court held in *Flippo v. CSC Associates*:

> The purpose of punitive damages is to punish the wrongdoer and warn others. *Smith v. Litten*, 256 Va. 573, 578, 507 S.E.2d 77, 80 (1998). Evidence of a party's net worth is admissible because it is material to this purpose and is relevant to a determination of the size of the award and whether it is so large as to be destructive. *Id.*; *The Gazette, Inc. v. Harris*, 229 Va. 1, 50-51, 325 S.E.2d 713, 746-47, cert. denied sub nom. *Fleming v. Moore*, 472 U.S. 1032 (1985).
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> *Flippo v. CSC Associates*, 262 Va. 48, 58, 547 S.E.2d 216, 222 (2001).

See also Smith v. Litten, 256 Va. 573, 507 S.E.2d 77 (1998) (stipulation of the defendant's net worth was material as the punitive damages award's two-fold purpose of punishing the wrongdoer and warning others, and her net worth was relevant evidence). Thus, evidence of the defendant's financial condition, income, assets, net worth (or lack thereof) might very well be considered relevant by the trial court, because it enables the jurors to determine the amount of punitive damages that should be awarded in order to punish the defendant and to set an example.

Nevertheless, in the interest of full disclosure of the relevant evidence once this "poverty gate" has been opened, and in order to prevent the defendant from taking unfair advantage of his purported poverty while he also takes refuge in the general rule that evidence of insurance is inadmissible, you can argue that the trial court should exercise its discretion to allow evidence of liability insurance in this instance. To do so, though, you will have to convince the court that it *should not* follow the result reached in *Edwards v. Whitlock*, 57 Va. Cir. 337, 343, 2002 Va. Cir. LEXIS 213 (Chesterfield Co. Cir. Ct. 2002), where the trial judge (Herbert Gill, Jr.) refused to allow the plaintiff to present evidence of liability insurance in a punitive damages case and in response to defendant's evidence that he was poor. In the *Edwards* case, Judge Gill concluded that, "[i]n Virginia, it appears the plaintiff may suggest the existence of insurance coverage *only to rebut statements by the defendant that mislead the jury* into believing that the defendant will have to pay the punitive damage award out of his own pocket." 57 Va. Cir. at 343 (emphasis added). A problem with this restricted view of when a reference to insurance might be appropriate, however, is that, in a punitive damages case, the jury is essentially *always* invited to believe that the award will be paid out of the defendant's own pocket. That's why the parties present evidence as to what the defendant's pockets contain.

Therefore, by utilizing authority from Virginia and other jurisdictions concerning "opening the door" and "curative admissibility" discussed above,[4] you may be able to convince the court that it should follow the lead of the Virginia Supreme Court in other "reference to insurance" cases (*see Lombard v. Rohrbaugh*, 262 Va. 484, 551 S.E.2d 349, 356 (2001)), as well as other well-reasoned appellate decisions from other jurisdictions which have dealt directly with the issue presented here: whether evidence of liability insurance covering punitive damages is admissible in a case where the plaintiff asserts his poverty (lack of assets) as relevant to the appropriateness of a potential punitive damages award. In every case that has addressed this issue, aside from the decision in *Edwards v. Whitlock*, the courts have decided that evidence of insurance *is relevant and admissible* (where it otherwise would not be) where the defendant has asserted his poverty as relevant to a punitive damages claim. *See Hall v. Wal-Mart Stores, Inc.*, 959 P.2d 109, 113 n.7 (Utah 1998); *Wheeler v. Porter*, 192 W.Va. 325, 452 S.E.2d 416, 426 (1994) ("when the defense offers an incomplete picture of a defendant's assets for consideration [which included insurance coverage] on a punitive damage issue, the plaintiff is entitled as a matter of right to rebut that evidence with evidence of the defendant's liability insurance"); *DeMatteo*

v. Simon, 112 N.M. 112, 812 P.2d 361, 364 (Ct. App. 1991) (court concluding that evidence of defendant's poverty, as well as evidence of liability insurance covering punitive damages, was properly excluded as being unfairly prejudicial because it would unfairly mislead the jury to admit evidence of the poverty of the defendant, while at the same time excluding evidence of insurance); and *Kemezy v. Peters*, 79 F.3d 33, 37 (7th Cir. 1996) (arising out of Indiana).

The fundamental unfairness of allowing a defendant in a punitive damages case to plead poverty *and* to hide behind the protections of the general prohibition against evidence of insurance was concisely and cogently stated by Judge Richard Posner[5] in the Seventh Circuit case, wherein he stated:

> The defendant should not be allowed to plead poverty if his employer or an insurance company is going to pick up the tab. *DeLoach v. Bevers*, 922 F.2d 618, 624 (10th Cir. 1990); *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897, 910 (W. Va. 1991); *DeMatteo v. Simon*, 112 N.M. 112, 812 P.2d 361, 364 (N. Mex. Ct. App. 1991). [Arguing] that the insurance contract is a purely private matter between the defendant and his insured, *ignores the consequence of such a view for the deterrent efficacy of punitive damages. It is bad enough that insurance or other indemnification reduces the financial incentive to avoid wrongdoing--which is why insuring against criminal liability is prohibited. It would be worse if the cost of the insurance fell, reducing the financial disincentive to engage in wrongful behavior, because the insurance company knew that its insured could plead poverty to the jury*.
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> *Kemezy*, 79 F.3d 33, 37 (emphasis added).

Likewise, the defendant and his insurer should not be allowed to take advantage of the "plea of poverty" in the present case without also allowing the *full truth* to be laid before the trier of fact: that there is insurance coverage that will be available to meet a punitive damages award. Otherwise, the jury might be *misled* into believing that the evidence concerning punitive damages is simply a waste of time or merely an academic exercise, based on the well-worn, visceral notion that "you can't get blood out of rock." Indeed, in virtually every punitive damages case where the defendant is allowed to plead poverty, but no evidence of insurance is allowed in, the jury is being presented with a *false* suggestion as to whether the defendant will be paying the award out of his own pocket.

In essence, a defendant's pocket – its depth and fullness – is the very thing that the Virginia case law concerning punitive damages asks the trier of fact to look into – to assess what amount of exemplary damages will "sting" the defendant, as well as what amount might serve as an appropriate example to others. *See Baldwin v. McConnell*, 273 Va. at 659, 643 S.E.2d at 707. Neither the penalty nor the "example" purpose of punitive damages can be fulfilled if the jury is misled or in the dark as to what the defendant's financial resources consist of and how he might be hurt by the damages award.

If the plaintiff in your case is not allowed to fight fire with fire by introducing evidence of insurance, then she will have no way of rebutting or effectively meeting the defendant's claim of poverty, an issue on which he has "opened the door" and has essentially asked the jury to take into account in deciding this case. And the *bias or prejudice* that can result from perhaps impecunious and uninsured jurors taking the defendant's "poverty" into account in assessing damages cannot be overlooked. The problem of *prejudice or bias* in a case, and how it can sometimes be offset by evidence of insurance, has been addressed by the Virginia Supreme Court in other contexts. *See Sawyer v. Comerci*, 264 Va. 68, 563 S.E.2d 748, 755 (2002); and *Lombard v. Rohrbaugh*, 262 Va. 484, 551 S.E.2d at 356 ("testimony concerning liability insurance may be elicited for the purpose of showing bias or prejudice of a witness if there is a substantial connection between the witness and the liability carrier. If a substantial connection is demonstrated, its probative value concerning potential bias or prejudice outweighs any prejudice to the defendant resulting from the jury's knowledge that the defendant carries liability insurance").

In making your pitch to the trial court then, you can emphasize that defendant's plea of "poverty" is misleading, and it will result in bias and prejudice toward the plaintiff when she makes a substantial punitive damages claim against someone who the jury will likely believe is a penniless pauper. Under such circumstances, as Virginia cases such as *Lombard* demonstrate, and as the on point cases from other jurisdictions would specifically hold, evidence of insurance would become relevant and admissible to offset the misleading nature and potential bias and prejudice of defendant's "poverty" evidence. The defendant has essentially "opened the door" on the issue of his financial status, and he ought not be allowed to block evidence of insurance coverage on the ground that he will somehow be prejudiced by such proof. "Strange cattle having wandered through a gap made by himself, he cannot complain." *Sisler v. Shaffer,* 43 W.Va. at 771, 28 S.E. at 721.

Endnotes

1. No, this is not from a William Carlos Williams poem. (n.b. "The Red Wheelbarrow" or "This Is Just to Say"). It is a slightly skewed paraphrase from an oft-quoted West Virginia case cited in some of the curative admissibility cases treated herein. In *Sisler v. Shaffer*, 43 W.Va. 769, 771, 28 S.E. 721 (1897), the court, quoting

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in part from *State v. Sargent*, 32 Me. 429, stated: " 'A party who draws from his own witnesses irrelevant testimony, which is prejudicial to the opposing party, ought not to be heard to object to its contradiction on the ground of its irrelevancy.' . . . *Strange cattle having wandered through a gap made by himself, he cannot complain*." (emphasis added). *See also State v. Long*, 257 Mo. 199, 165 S.W. 748, 756 (1914); and *State v. Brown*, 64 N.C. App. 637, 308 S.E.2d 346, 351 (1983) (both cases applying the "open the door" doctrine to allow in otherwise inadmissible evidence and citing and quoting the "strange cattle having wandered through the gap" language from *Sisler*).

2. I know I've mixed my animal metaphors here, but the two situations still seem to be on all fours. For an old farmer's tale closely related to "the cat being let out of the bag," please refer to "buying a pig in a poke." Sometimes, an unscrupulous farmer would sell someone piglets tied in a gunny sack or poke. The unsuspecting buyer thought he had squealing, mewling pigs in the poke, until somewhere down the road he opened the bag only to find worthless, squealing kittens. At that point, the cat was out of the bag. As competent counsel, we like to think that we do not go into a trial "buying a pig in a poke," *i.e.*, not having a full understanding of the situation or what is about to transpire. But sometimes, like the sudden outburst from the defendant in this case, the cat's out of the bag before you know it. Curative admissibility is a possible fix for such a predicament.

3. Note, that if the trial court determines that defendant's sudden and surprising testimony about his poverty is sufficiently relevant and non-prejudicial (in light of your punitive damages claim) to allow the testimony to stand and to overrule your objection to it, then you are faced with the problem of offering similar or contradictory evidence about the defendant's financial condition, including the existence of his liability coverage. You will also be faced with the related problem of whether, once you've offered evidence of this same character (defendant's finances), you will have waived your objection to the defendant's use of his "poverty" testimony. *See Pettus v. Gottfried*, 269 Va. 69, 606 S.E.2d 819, 825 (2005).

Although the "waiver of objection" cases are beyond the particular scope of this article, suffice it to say that the general rule is that "when a party unsuccessfully objects to evidence that he considers improper but introduces on his own behalf evidence of the same character, he waives his objection to the other party's use of that evidence. . . . *The rule* [of waiver], *however, is not applicable to matters elicited in the cross-examination of a witness or in the introduction of rebuttal evidence*." 606 S.E.2d at 825 (emphasis added) (*citing Drinkard-Nuckols v. Andrews*, 269 Va. 93, 606 S.E.2d 813, 818 (2004) (decided on the same day as *Pettus*). Thus, you might not necessarily have waived your objection to the "poverty evidence" if, on cross-examination or in rebuttal, you elicit the evidence about the existence of liability insurance. The question then becomes: what type of evidence goes beyond mere rebuttal of the other party's evidence for purposes of the waiver rule? Again, this inquiry is beyond the scope of this article, *but see, e.g., Combs v. Norfolk and Western Railway Co.*, 256 Va. 490, 507 S.E.2d 355, 360 (1998) (while the presentation of rebuttal evidence does not give rise to a waiver, "Combs' use of the exhibits during re-direct examination of Harper went beyond mere rebuttal"); and *Hubbard v. Commonwealth*, 243 Va. 1, 413 S.E.2d 875, 879 (1992) (Hubbard waived her objection to certain reconstructed opinion evidence concerning speed introduced by the Commonwealth, where she presented her own reconstructed opinion testimony from two witnesses on the same topic; it was not mere rebuttal evidence). *See generally* E. Cleary, *McCormick on Evidence* §55 at 128 (2d ed. 1972) ("If it happens that a party who has objected to evidence of a certain fact himself produces evidence from his own witness of the same fact, he has waived his objection") (footnotes omitted).

4. Technically speaking, if the defendant's testimony about his poverty is considered by the court to be relevant and admissible, then we are really dealing with the concept of "opening the door" or a rule of "expanded relevancy," as discussed by the Maryland court in *Clark v. State*, 332 Md. at 85-87 ("In sum, 'opening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on the same issue.' . . . Generally, 'opening the door' is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue"); *see also* 42 Santa Clara L. Rev. 807, 824-25 (discussing the difference between "specific contradiction" evidence and the doctrine of "curative admissibility," and describing how both differ from more general, yet freely used phrases such as "opening the door" to evidence or issues).

5. Chief Judge of the 7th Circuit Court of Appeals, prolific opinion writer, essayist, author of books, and, along with economist Gary Becker, a bodacious blogger (See "The Becker-Posner Blog"), who is also known for being associated with the notoriously conservative, free-market "Chicago School" of economics.