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Roger W. Mullins, Esquire
Boyd-Graves Conference Chair
106 Church Street
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Tazewell, Virginia 24651

Report of Boyd-Graves Conference Subcommittee on Charitable Immunity

Dear Roger:

Our committee, consisting of James McCauley, Beverly Burton, Matthew Murray, Robert Calhoun, Brad Cann, David Corrigan, William Harty, Honorable Clifford L. Athey, Jr., Honorable D. Arthur Kelsey and myself met to consider a change to Virginia's charitable immunity law to allow a recovery against charitable organizations for negligence claims up to the limits of any available liability insurance coverage.

I suggested this topic last year while representing a client whose wife was killed in a single vehicle collision while traveling with a church group from Virginia to Florida for a church function. While driving through South Carolina, the driver, a church deacon, fell asleep at the wheel causing the vehicle to run off the road and overturn. Two occupants of the vehicle were killed and one suffered a traumatic amputation of an arm. The church had a seven-figure automobile liability policy.

During litigation the defense asserted charitable immunity as an affirmative defense and argued in favor of the application of Virginia substantive law which would have resulted in an absolute bar to any recovery, since the church was clearly a charitable entity and the passengers were beneficiaries of its charitable purpose. Ultimately, Virginia's *lex loci delicti* approach to choice of law required the application of South Carolina's substantive law which did not impose an absolute bar under the circumstances, but merely imposed damage caps to any recovery.

The potential outcome in the case had Virginia law governed was sobering to say the least, and in my humble opinion patently unfair. These individuals would have been without any redress whatsoever in a case of clear liability and with substantial liability insurance available for payment. The experience prompted me to look at how other states approach charitable immunity.

The majority of states have abolished charitable immunity. In fact, it appears that the only remaining states clinging to the doctrine in some fashion are Alabama, Arkansas, Colorado, Georgia, Maine, Maryland, Massachusetts, New Jersey, South Carolina, Utah, Virginia and Wyoming. Even in these states where vestiges of charitable immunity remain, the application of the doctrine has been modified in some way to make it less than absolute. For example, Colorado law does not expressly prohibit suits against charitable organizations, but judgments are limited to the extent of existing insurance coverage (Colo.Rev.St. Ann. § 7-123-105). Similarly, South Carolina limits awards against charitable organizations to $300,000 per person in actions for injury or death caused by the tort of an agent, servant, employee, or officer (S.C. Code Ann. § 33-56-180). The recovery caps of South Carolina's charitable immunity statute are borrowed directly from the states Tort Claims Act.

Our committee had a very lively discussion on charitable immunity. Brad Cann provided the group with a copy of Carl Tobias' law review article entitled, *Reassessing Charitable Immunity in Virginia*, 40 U.Rich.L.Rev. 9 (2006), in which Professor Tobias sets forth a comprehensive argument in favor of the elimination of charitable immunity either by the Supreme Court of Virginia or the Virginia General Assembly. His conclusion is based primarily on his belief that the doctrine violates the general concept of the American tort system as well as the notion of personal responsibility. He also believes the historical justifications for the creation of the doctrine have waned significantly in modern society. The article was helpful in crystallizing the divergent positions within the committee on this issue.

Several in the group, mainly those engaged in plaintiff's personal injury practice, believe that a change in Virginia's approach to charitable immunity is in order largely because many charitable organizations in Virginia have become economic behemoths, bearing little resemblance to the charitable organizations contemplated when the doctrine was first created. Consequently, the doctrine may have outlived its intended purpose. Others on the committee took the position that this is a matter of pure public policy best left to the legislature.

Although there was no clear philosophical consensus among the committee members that a change is in order, there was a general agreement among the committee members that the committee needs additional time to analyze the cost of such a change to Virginia charitable organizations, which would require obtaining information from insurers and other states and non-profits themselves on claims and insurance rates. We also believe additional

time is necessary to study whether any previous legislative attempts have been made to alter the current state of Virginia charitable immunity law and the effect such prior legislative attempts may have on any future efforts. We would also like to study whether any substantive changes other than insurance recoveries would be a more balance positive approach. The committee would also like to consider procedural changes to the current law as well, including the elimination of the presumption that an organization is charitable based solely on a reference to a charitable purpose in organization's charter.

In order to better address these issues and provide a more comprehensive analysis, the committee requests that this issue be carried over until next year to allow the current committee to further study the issues set forth in this report.

Best regards,

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DLW/crg

cc: Honorable Clifford L. Athey, Jr.,
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