

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

JENNA DODGE, SARAH HASSMER,
HAYLEY J. MAXWELL,
LAURA McKEAN-PERAZA,
KELSEY McCUNE, JENNIFER C. MULLINS,
MARY ELIZABETH YARDLEY,
ALICE DAMMEYER PRIEBE and
ROY CLINTON JOHNS

Plaintiffs,

Case No. CL06000894-00

v.

THE TRUSTEES OF RANDOLPH-MACON
WOMAN'S COLLEGE,
D/B/A RANDOLPH-MACON WOMAN'S COLLEGE,
a Virginia non-stock charitable corporation

Defendant.

THE HONORABLE J. LEYBURN MOSBY, JR., PRESIDING

January 23, 2007
Lynchburg, Virginia

* * * *

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1 Appearances:

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1 January 23, 2007 PROCEEDINGS Lynchburg, Virginia

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3 MR. FUHR: May it please the Court, with me
4 still is Ginger Worden, interim president of the
5 college.

6 Your Honor, in this trust action, plaintiffs,
7 who consist of six or seven students and two donors
8 who donated a piece of art and \$40,000 to be used
9 for scholarships, allege that they are entitled to
10 an injunction barring the college from going coed
11 because such a decision would be a violation of
12 Virginia trust law.

13 There are four points I would like to make here
14 in response to that allegation. The first, the
15 Virginia Uniform Trust Code, on which plaintiffs
16 rely and base their claims, has no applicability to
17 the college.

18 Second, the General Assembly's decision to
19 provide authority to the office of the Attorney
20 General of the Commonwealth of Virginia so that the
21 Attorney General could protect the public interest
22 did not transform overnight all Virginia's
23 charitable corporations into trusts that are subject
24 to the very different and indeed conflicting duties
25 and standards.

1 Three, even if the college were a statutory
2 trust, and it most emphatically is not, plaintiffs
3 do not have standing.

4 And, four, as with the contract action, under
5 plaintiffs' theory here in the trust action, every
6 Virginia charitable corporation could be sued
7 whenever its governing board modifies its direction,
8 by anyone who is a student or a member or someone
9 who has contributed financially or otherwise to the
10 corporation, even if those contributions were
11 unrestricted.

12 Again, some very quick background. The college
13 is a nonstock charitable corporation under Virginia
14 law. It was established in the late 1800s. As a
15 nonstock corporation, the directors' duty is set
16 forth under Virginia statutory law, and that duty is
17 in the word of the Virginia code, "To act in
18 accordance with their good faith judgment of the
19 best interests of the corporation." That's in
20 13.1-870 of the Virginia code.

21 Prior to its September 9 amendment, the
22 college's articles of incorporation set out the
23 college's purpose is to provide higher education for
24 primarily of women. Following those amendments,
25 this group of plaintiffs filed suit, and they made

1 two nearly identical allegations.

2 One, that the board had violated its duties
3 under Section 55-548.02. That code provision states
4 that the trustee of a trust, "Shall administer the
5 trust solely in the interests of the beneficiaries."

6 Second, these plaintiffs alleged that these
7 trustees had violated 55-548.04, and that provision
8 provides that a trustee shall administer the trust
9 as a prudent person would, by considering the
10 purposes, terms, distributional requirements and
11 other circumstances of the trust.

12 Both of these provisions are found in the
13 Virginia Uniform Trust Code that took effect in July
14 of 2006. The Virginia Uniform Trust Code is modeled
15 on the Uniform Trust Code, which is a comprehensive
16 scheme regarding the administration of trusts.

17 Plaintiffs' suit must be dismissed as a matter
18 of law because, quite simply, the college is not a
19 trust governed by either of these two provisions.
20 Your Honor, I think we're going to have to do a walk
21 through the statutes in this argument, and for that
22 I apologize, but I fear there's no other way.

23 By its terms, the Virginia Uniform Trust Code
24 applies only to certain trusts, and it states
25 exactly what they are. If Your Honor has a copy of

1 the code in front of him.

2 THE COURT: I have a copy in front of me.

3 MR. FUHR: You can follow along. In Section
4 55-541.02, it states there that this chapter applies
5 only to, and I quote, inter vivos, v-i-v-o-s,
6 trusts, charitable or noncharitable, and trusts
7 created pursuant to a statute, judgment or decree
8 that requires the trust to be administered in the
9 manner of an express trust.

10 THE COURT: It's an express trust statute,
11 although Virginia has broadened that, I believe, by
12 the adoption of this code.

13 MR. FUHR: That's right. This statute only
14 applies to trusts created by a statute where the
15 statute requires it to be administered in the manner
16 of an express trust.

17 It applies to a few other types of trust which
18 everyone agrees is not applicable, so the whole
19 focus here by the plaintiffs is that we have here,
20 they say, a college that is a trust created by
21 statute and that the statute that created the
22 college requires it to be administered in the manner
23 of an express trust.

24 This argument doesn't work, Your Honor. The
25 plaintiffs offer only one possibility to avoid this

1 opening threshold requirement before you even get
2 into the trust code. They said, ah-ha, take a look
3 at Section 2.2-507.1. So I did. That section is in
4 Chapter 5 of Title 2.2, and that chapter is called
5 Department of Law.

6 What Chapter 5 is, in its entirety, is a
7 section of the code, a chapter of the Virginia code
8 that focuses on the governance of the Office of the
9 Attorney General. It describes such things as the
10 staffing within the Office of the Attorney General.

11 It talks about the opinions the Attorney
12 General can write, it talks about having deputies
13 within the Office of the Attorney General. It talks
14 about the types of matters and the types of agencies
15 that he has to oversee and the like.

16 That is Chapter 5, Administration of
17 Government, Department of Law, and this particular
18 section is entitled, "Authority of the Attorney
19 General Regarding Charitable Assets," so this then
20 is the statute that the plaintiffs say made and
21 created the college as a trust and requires it to be
22 administered in the manner of an express trust.

23 Nothing in this section, Your Honor, suggests
24 that it modifies the standard of conduct -- I'm
25 sorry. In the same section.

1 THE COURT: Paragraph B.

2 MR. FUHR: Paragraph B states, "Nothing
3 contained in this section suggests that it modifies
4 the standard of conduct applicable over existing law
5 to the directors of charitable corporations
6 incorporated or doing any business in Virginia."
7 And that's Section B.

8 So what are the things that jump out at you
9 about this statutory provision that plaintiffs put
10 all their eggs in? First, it's all about the
11 Attorney General. That's the section, that's the
12 title, that's the chapter.

13 It's all about the Attorney General, the very
14 structure is about the Attorney General. The
15 placement in the title of the code section is about
16 the Attorney General.

17 Is it right to consider those things? The
18 Supreme Court sure said so. The Court has said,
19 "The title of an act is often, but not always, a
20 sure guide to the true meaning and intents of the
21 legislature." That's in *Chambers v. Higgins* 169 Va.
22 34.

23 Likewise, in *Miller v. Commonwealth*, the Court
24 stated there, "Though not a part of the act itself,
25 the title may be read in an attempt to ascertain its

1 purpose."

2 Likewise, in *Krummert v. Commonwealth*, the
3 Supreme Court said, "The caption or headline of the
4 section, while accurately speaking, is not a part of
5 it. It is valuable and indicative of legislative
6 intent."

7 So that sure makes it sound like we're looking
8 at the office of the Attorney General and that it's
9 not creating a wholesale transformation of
10 Virginia's nonstock corporations into trusts.

11 Second, 507.1 does not purport to create any
12 trusts. It merely states that assets are deemed
13 held in trust for the public. The Virginia Uniform
14 Trust Code that we started with stated that it only
15 applies to trusts that are created pursuant to a
16 statute. 507.1 does not purport to create any
17 trusts. It merely states that the assets are deemed
18 held in trust for the public.

19 Third, it states that the assets are to be used
20 for such purposes as are established by the
21 governing documents. That's the articles of
22 incorporation, which can be amended over time and
23 which have been amended over time and which were
24 amended just this past September.

25 There's no statement there in the language of

1 the statute that the purposes of the institution
2 become frozen. 507.1 says nothing that these
3 purposes can't change.

4 Four, 507.1 contains no requirements pertaining
5 to the administration of charitable corporations,
6 much less any requirement that they must be
7 administered in the manner of an express trust, as
8 the Uniform Trust Code also required be the case.

9 There are examples that do, there are statutes
10 that contain that type of express administration. A
11 great example is the probate code, where it meets
12 all the definitions that 55-541 requires with
13 respect to a statute.

14 That 507.1 does not convert corporations into
15 trusts is further evidenced by Subsection B, which
16 states that it does not modify the standards of
17 conduct for corporate directors.

18 Corporate directors under Virginia law are
19 required to administer in the best interests of the
20 corporation using their subjective good faith.
21 That's in 13.18.

22 Indeed, the Fourth Circuit, in the WLR case,
23 which is one of the cases under corporate law,
24 stated, "Precisely such a comparison between a
25 director and a hypothetical reasonable person that

1 the Virginia legislature chose to reject."

2 So in the corporate world, directors aren't
3 held to a reasonable man's standard. Directors are
4 required to exercise their duties in good faith, so
5 subjectively they have to go through a proper
6 process to become adequately informed to make their
7 decisions, and then they're to make decisions that
8 are in the best interest of the corporation.

9 Judges and courts and juries don't go in and
10 have the ability to second guess the reasonableness
11 of a decision made by a director of Virginia's
12 corporations. Virginia is different than Delaware
13 in a critical respect.

14 By contrast, trustees under the Uniform Trust
15 Code have two very different standards and
16 obligations. Trustees under the Uniform Trust Code
17 must administer in the best interests, not of the
18 trust or the corporation, but of the beneficiary,
19 and they must do so using objective reasonableness.

20 The standard that they have to apply to
21 discharge their duties is entirely different and the
22 object of their duties is entirely different. And
23 those trust standards and duties are found in
24 55-548.02 capital A.

25 THE COURT: Why wouldn't Section A of that

1 507.1 make Randolph-Macon a public trust? It says,
2 "A charitable corporation doing business shall be
3 deemed to be held in trust for the public according
4 to the documents that set up the corporation."

5 Wouldn't that make this a charitable
6 corporation, wouldn't that be in effect a statutory
7 public trust?

8 MR. FUHR: It's not a statute that created a
9 trust, it's the statute that gives the Attorney
10 General the authority to get involved, to protect
11 the public good.

12 THE COURT: I agree with you on that. It was
13 set up in response to the JOCO case out of
14 Bedford.

15 MR. FUHR: That's exactly right.

16 THE COURT: The Attorney General took authority
17 over it.

18 MR. FUHR: That's exactly right, Your Honor.
19 What happened there is you had a corporation and the
20 Attorney General came in and said, I have got
21 concerns about how this corporation is performing
22 its role. It was a foundation that was supposed to
23 be doing public good.

24 And the Attorney General came in and filed suit
25 to remove some of the directors that were overseeing

1 that foundation and to have other changes
2 implemented in the foundation, and the Court said
3 two things.

4 One, Attorney General, you do not have
5 standing, you don't have authority to come in and
6 seek any change. And, two, the court, the circuit
7 courts don't have jurisdiction to hear the Attorney
8 General.

9 In response to that, then this legislation got
10 passed to eliminate that problem and imbue in the
11 Attorney General the authority to represent the
12 public and the public interest with respect to these
13 charitable corporations.

14 So you have got two very different universes.
15 You have the trust universe and you have the
16 corporate universe. Directors under corporations,
17 their duties are defined by Virginia law in Title
18 13, duties of trustees who oversee trusts, if they
19 meet those types of requirements are defined by the
20 Virginia Uniform Trust Code.

21 So very different standards of duties owed by
22 the directors and the trustees of these two
23 different types of animals. The only types of
24 trusts that the Uniform Trust Code applies is to
25 those trusts established by a statute.

1 The college wasn't established by a statute.
2 This statute went into effect in 2006, July of this
3 year. They didn't establish Randolph-Macon.
4 Randolph-Macon was established in the 1800s and it's
5 been around for a hundred and some odd years.

6 But what this statute regarding the Attorney
7 General did do is say that the assets of this
8 corporation are the ones that the Attorney General
9 has the ability to be heard on.

10 The statute didn't say, college you are now
11 being transformed from your corporate world into the
12 trust world. It didn't wholesale eliminate nonstock
13 corporations and charitable corporations under
14 Virginia law and transform them all into trusts.

15 It is simply saying, okay, for these charitable
16 corporations over here, the Attorney General has the
17 right to come in and be heard with respect of the
18 public interest.

19 THE COURT: The Attorney General was served in
20 this case but hasn't made an appearance.

21 MR. FUHR: That's correct. He was served,
22 counsel has made representation and indeed I saw a
23 paper that that occurred, and I'm confident that it
24 did occur.

25 I'm also confident the Attorney General knows

1 all about this litigation and this transformation
2 down here has been widely reported. And, if nothing
3 else, we can count on our top elected officials to
4 know well what's happening in the public domain and
5 what's being widely reported in the media. I have
6 no doubt he had a notice in lots of different ways.

7 It's very clear that the college is not a trust
8 that was established by a statute. You otherwise
9 would have this fundamental conflict in the duties
10 of the directors of the college versus the duties of
11 the trustees in terms of who those duties are owed
12 to and the standard in which they're going to be
13 governed.

14 Even if you have a statutory trust, the
15 plaintiffs here have no standing, Your Honor. A
16 statutory trust by definition has no distinct
17 settlor. They are a legislative creation, a
18 statutory trust is a trust created by statute, not
19 by settlors.

20 One of the cases that we have cited to Your
21 Honor stated, and I quote, unlike trusts set up by
22 wills or deeds of individuals, statutory trusts are
23 enacted into the legislature in which no settlor
24 plays a role.

25 Especially here where donors have not made

1 restricted gifts and are not seeking to enforce the
2 terms, the restrictive terms, that attached to their
3 gifts. That's not what this case is, this isn't a
4 case of donors who made a gift to the college and
5 made it in a restricted fashion and are now saying,
6 well, wait a second, I want to make sure that
7 restriction applies.

8 THE COURT: No allegation of restricted gift
9 that I have read so far.

10 MR. FUHR: That's absolutely correct, Your
11 Honor. That is not what this suit is all about.
12 That has consequence, because under Virginia law
13 where donors have made gifts in unrestricted form,
14 they have no right to be heard further with respect
15 to how those gifts are used.

16 As the Supreme Court stated in the Clark v.
17 Oliver case that we have cited to Your Honor, quote,
18 the contributors to this fund parted with their
19 interest in it and when it was paid, their control
20 over it ceased. The money was devoted to a
21 charitable use, as we have said, the whole interest
22 in the donors was divested. There remained in them
23 no scintilla of right. How then can they be heard
24 in a court of equity with respect to the disposition
25 of it, end quote.

1 Your Honor, it would be senseless to allow
2 donors, regardless of the size of their donation,
3 whether it be \$40,000 as the donors here
4 contributed, or \$100 or many times these numbers, to
5 have the power over Virginia's colleges, libraries,
6 museums, and its hundreds of other forms that
7 charitable corporations, nonprofit corporations may
8 take in Virginia, to challenge and enjoin the
9 ability of the directors and trustees who oversee
10 these corporations from discharging their duties.

11 Indeed, the Virginia Uniform Trust Code says
12 with respect to settlors, the other type of trust,
13 if it's not a statutory trust, it says, settlors,
14 you can come in, but only with respect to your
15 contribution. That's a pretty sensible result.

16 If you make a restricted gift to a college, to
17 a library, what have you, you have the right to come
18 in and be heard with respect to the contribution
19 that you made, but you don't have the right, and the
20 code says this expressly, you don't have the right
21 to come in and say how all the other assets are used
22 or what the direction of the college or the library
23 or the museum or the foundation is going to be.

24 It was to avoid just this problem, Your Honor,
25 of conflicting and potentially numerous plaintiff

1 claims that the Attorney General was given and
2 understood historically to have exclusive authority
3 to come in and protect the public interest.

4 That's the way it has been set up in Virginia
5 and that's the way it's been set up, frankly, in
6 many other states as well.

7 The students, too, don't have standing, Your
8 Honor. They try to say the students are
9 beneficiaries under the Virginia Uniform Trust Code.
10 But, again, charitable trusts, Your Honor, do not
11 have beneficiaries in this sense.

12 In the comments to the Uniform Trust Code, the
13 definition of beneficiary includes only those who
14 hold beneficial interest in the trust. Because a
15 charitable trust is not created to benefit
16 ascertainable beneficiaries, but to benefit the
17 community at large, persons receiving distributions
18 from a charitable trust are not beneficiaries as
19 that term is used in the code.

20 So in the world where you have trust
21 established, I establish a trust to take care of my
22 children. My children are a specific beneficiary.
23 That is not a charitable trust and they would have a
24 claim.

25 People who contributed restricted monies into

1 that trust, again, not a charitable trust, but for
2 these specific individuals, they can protect that
3 restriction.

4 But what is a charitable trust, let's talk
5 about that. It's the Attorney General, who
6 represents the public at large and who has the
7 authority to step in. "In the case of a charitable
8 trust," and I'm quoting now from the law of trust
9 from the Treatise by Fracture, "In the case of a
10 charitable trust, the beneficial interest is not
11 given to individual beneficiaries, but the property
12 is devoted to the community."

13 As the Supreme Court stated just back in 1990
14 in the case In Re For Appointment of Church
15 Trustees, "Ordinarily the Attorney General has a
16 preclusive exclusive right to institute proper
17 proceedings to prevent a misuse of property devoted
18 to a public charity." That has not occurred here.

19 My friends, Wyatt and Barrett, have cited a
20 number of cases and authorities from jurisdictions
21 outside of Virginia, saying Virginia should take a
22 more enlightened approach and look elsewhere. Let
23 the standards evolve and look to the law reviews of
24 Miami and Indiana.

25 But they also talked about D.C., and they said

1 look at D.C. law and what the Court said there. In
2 Hooker v. Edes Home, "Principally the rationale for
3 investing exclusive power in a public officer stems
4 from the inherent impossibility of establishing
5 distinct distinguishable interests on the part of a
6 member of a large and constantly shifting benefited
7 class and the recurring burdens on the trust res,"
8 r-e-s, "and trustee of that litigation that would
9 result in recognition of a cause of action by any
10 and all of a large number of individuals who might
11 benefit from the trust."

12 That's exactly the problem you would have here.
13 And so the solution that the Virginia code has
14 established, as many others, is they put that power
15 in the Office of the Attorney General rather than
16 people who attend the school or visit the museums
17 and the like.

18 Indeed, in response to this, plaintiffs come
19 back and say, well, we think the approach to
20 standing ought to come from the charitable immunity
21 doctrine. If you are somebody who could be
22 protected in litigation by invoking the charitable
23 immunity doctrine, you ought to be able to sue that
24 entity.

25 This is a strange theory, Your Honor. The

1 definition of a beneficiary for purposes of having
2 the benefit of the immunity defense, which is
3 designed to reduce the number of suits the entity
4 has to face and deal with, should be read
5 expansively to include that same group so that they
6 can sue the entity.

7 You look at several of the examples involving
8 the Lee Memorial Church that we cite to you. The
9 Court holds charitable immunity there protects the
10 church from a tort suit by visitors of the church.

11 Plaintiffs' theory, you visit the church, you
12 can sue the church, if the church makes a theory
13 change in their policies.

14 We cited to the Confederate Memorial
15 Association case in which the Court found that the
16 charitable immunity doctrine bars suits by visitors
17 to the exhibit. Under plaintiffs' theory, they
18 could sue the association, or if you had a
19 foundation, they could sue the foundation if the
20 foundation decided to change what it had been doing
21 historically.

22 That's a strange place to look for the
23 definition, Your Honor, as to who has standing.
24 There's no need to do that because the standing
25 terms are defined in the code itself. Beneficiary

1 and settlor are defined terms, and these plaintiffs
2 do not meet these definitions.

3 I think it's, frankly, in recognition of those
4 problems that plaintiffs urge upon this court an
5 evolving standard of standing. They acknowledge
6 that it's usually the Attorney General, but they say
7 look to these law review articles for a better
8 approach.

9 But when you read those law review articles,
10 they actually note that such an evolution requires
11 legislative change. And in that respect, those
12 authors are clearly right. If the law is to be
13 fundamentally changed in this manner, it is the
14 province of the General Assembly.

15 And, indeed, the authors of one of the law
16 review articles even proffers up what he thinks the
17 proposal is going to look like. There's no basis in
18 Virginia law for courts rewriting the statutes
19 themselves and adopting this type of evolving
20 standing.

21 The last point I would make, Your Honor, as was
22 true with the contract case, is plaintiffs' trust
23 theory would have disastrous application and effect
24 on Virginia's nonstock corporations. Virginia's
25 YMCAs, YWCAs, hospitals, research foundations that

1 expand the diseases they are going to fight,
2 hospitals that expand their client base, private
3 schools that decide to go coed, clubs that decide to
4 integrate, all of these institutions now can be sued
5 by people who visit those clubs or anyone who has
6 made an unrestricted gift to any of these entities.

7 Indeed, under plaintiffs' reading of this
8 Attorney General provision, everyone who gave an
9 unrestricted gift now has veto power, not with
10 respect simply to their gift, even though it was
11 unrestricted, but to the whole institution and what
12 it does with respect to its members and visitors,
13 the diseases they decide to fight, the people they
14 allow into their midst.

15 It's not surprising then that we have no case
16 anywhere that has allowed standing in this type of
17 situation. This change to the law with respect to
18 the Uniform Trust Code here in Virginia is new.

19 There is no precedent for this type of
20 expansive approach that Your Honor would visit an
21 incredible amount of litigation risks on Virginia's
22 charitable corporations if everyone who visits,
23 everyone who gives money had the ability then to
24 file a suit, should the board of directors of those
25 institutions decide to make changes to the actions

1 and membership of those institutions.

2 So, Your Honor, we would respectfully request
3 that Your Honor decline plaintiffs' invitation to
4 interpret the provisions creating authority for the
5 Office of the Attorney General in a way that would
6 fundamentally rewrite Virginia corporate law and
7 Virginia trust law. Thank you, Your Honor.

8 THE COURT: All right. Thank you.

9 Any response?

10 MR. POPE: Yes, sir. May it please the Court,
11 I will state at the outset that I will address the
12 applicability of the Uniform Trust Code with respect
13 to Count 1 of the charitable trust suit and
14 Mr. Durette will address the issues of standing
15 throughout as well as the issues raised in Count 2
16 of the complaint.

17 The essence of the charitable trust suit is
18 simply this. The assets of the defendant are held
19 in trust. It is not that the defendant itself is a
20 trust, but the assets of the defendant are held in
21 trust.

22 The actions taken by the governing body of the
23 defendant in September of last year constitute then
24 and will continue to constitute a breach of that
25 trust.

1 This court is empowered to enjoin that breach
2 and prevent the defendant from going forward with
3 this strategic plan, unless and until the defendant
4 comes to this court and demonstrates that the
5 purposes of the charitable trust are either
6 impossible or impractical to fulfill. They haven't
7 done that yet.

8 Now, let's focus on Count 1. Count 1, again,
9 is predicated on the UTC. The General Assembly
10 adopted that legislative scheme in 2005 and it
11 became effective July 1, 2006. If we turn
12 specifically to Section 55-541.02, we see that it
13 states, among other things, that "This code scheme
14 applies to trusts that are created pursuant to a
15 statute that requires the trust to be administered
16 in the manner of an express trust."

17 We go elsewhere in the code to precisely such a
18 statute. As counsel has indicated, that is Section
19 2.2-507.1. Let me state preliminarily that this
20 court should not be persuaded by Mr. Fuhr's argument
21 that the placement of this statute in the portion of
22 the Virginia code dealing with the administration of
23 justice somehow is indicative that we are not to
24 accord the breadth or the scope that the plaintiffs
25 accord in this case.

1 As we pointed out in Footnote 6 on Page 7 of
2 our brief in opposition, the fact that the General
3 Assembly chose to incorporate this very clear
4 pronouncement entitled 2.2 of the code rather than
5 elsewhere, including Title 13.1, does not in any way
6 diminish the law's applicability here.

7 We cite to the HCA Health Services of Virginia
8 v. Levin case, which appears at 260 Va. 215, with a
9 proposition that when the legislative intent is
10 clear and unambiguous as it is here, the statute is
11 not subject to collateral attacks by virtue of where
12 it is placed in the code.

13 And in that particular case, they talk about a
14 particular statute not being limited simply to the
15 context of the Medical Malpractice Act.

16 That aside, let's look at what the language is
17 in 2.2-507.1 insofar as the fact that it creates a
18 trust that is to be administered in the manner of a
19 an express trust.

20 It states, and I quote, the assets of a
21 charitable corporation incorporated and doing any
22 business in Virginia shall be deemed to be held in
23 trust for the public for such purposes as are
24 established by the government documents of such
25 charitable corporation, et cetera.

1 Now, the charitable purpose of Randolph-Macon
2 Woman's College, which is owned and operated by the
3 defendant, is clear and straightforward. It appears
4 in the November 24, 1952, certificate of
5 incorporation. It was reaffirmed in 1983 and again
6 in 1990, and it is simply this. To operate a
7 college under the name of Ranolph-Macon Woman's
8 College, for the higher education primarily of women
9 in the liberal arts.

10 I'm paraphrasing there, but that's the essence
11 of what it said. I will also state that to the
12 extent the word primarily modifies women, the
13 unbroken course of activity during the entire 115
14 years of the history of this institution is that
15 it's not only primarily for women, it is virtually
16 exclusively for women, and the college's conduct
17 itself reflects how he interprets that.

18 THE COURT: There's been a lawyer in Lynchburg
19 graduated from there. He's male.

20 MR. POPE: That well may be, Your Honor, but I
21 don't think there's any argument even raised by the
22 college itself that the focus of this school's
23 115-year history has been education, the higher
24 education of women.

25 THE COURT: I think you are correct on that

1 focus, it's definitely been female.

2 MR. POPE: The September 9 governing body, as I
3 indicated, is completely at odds with that
4 charitable purpose and that is why these plaintiffs
5 are attempting to rely upon the UTC to rely upon the
6 creation of an express trust or a trust administered
7 as an express trust set forth in Section 2.2-507.1
8 to get the relief here.

9 I will also add that irrespective of how the
10 Court views the applicability of the UTC, this
11 particular section sets forth the factual predicate,
12 if you will, for Count 2.

13 Namely, it recognizes those assets are held in
14 trust and we believe the UTC is triggered by that,
15 but even if it isn't, we believe, as Mr. Durette
16 will explain further, that the creation of this
17 trust gives these students and donors rights as a
18 common law to seek enforcement of same.

19 I want to address the arguments that have been
20 raised by the defendant against the application of
21 the UTC in furtherance of their effort to have this
22 court conclude Count 1 does not set forth a legal
23 claim.

24 If the Court examines these arguments in
25 detail, it will recognize that none of them

1 disqualifies us from going forward on Count 1. They
2 have argued, primarily on brief, not so much this
3 afternoon, that 2.2-507.1 does not require this
4 trust to be administered as an express trust as is
5 indicated in the code section of the UTC.

6 Now, are these precise words found in 507.1?
7 No, they're not. Do they have to be there? No,
8 they don't. The clear implication of this section,
9 Subsection A, is that the assets of a charitable
10 corporation are in trust and they must be
11 administered as such.

12 There is no other way, Your Honor, for those
13 assets, those trust assets, to be administered. If
14 they are deemed held in trust, then that designation
15 transcends the mere application of the Virginia
16 Nonstock Corporation Act.

17 There is no third category, there is no hybrid
18 category as between trust and corporate law. It is
19 abundantly clear that the only reasonable
20 explanation and the only reasonable inference to be
21 drawn from that statute is the assets of a
22 charitable corporation were not only deemed as held
23 in trust, but the trust is to be administered as if
24 it is an express trust.

25 It's important to note that in the first

1 sentence of Subsection A, the General Assembly
2 removed any distinction between the assets of a
3 charitable corporation and the assets of a
4 charitable trust. It is the nature of the property,
5 not the form and the entity that is holding legal
6 title to the property.

7 It's the nature of the property itself that is
8 paramount and, likewise, the nature of the statute,
9 particularly Subsection A, is that the trust created
10 therein be administered as an express trust to
11 accord the very protection that the General Assembly
12 intended to be brought about by the enactment of
13 this section.

14 I would also point out that even if the portion
15 of the UTC that contains that particular language is
16 not triggered, then there is a separate portion of
17 the statute that is. That's Subsection B of
18 55-541.02 that says, "Notwithstanding Subsection
19 A," and that's where you find the language to be
20 administered in the manner of an express trust,
21 "Notwithstanding Subsection A, the courts in
22 exercising jurisdiction over the supervision or
23 administration of trusts," such as the one here,
24 "may determine that application of the policies,
25 procedures or rules of the UTC is appropriate to

1 resolution of particular issues."

2 So the General Assembly itself recognized that
3 on a case specific basis, the UTC ought to be
4 applied under the circumstances set forth in B, even
5 if the circumstances in Section A are not triggered.
6 This case presents precisely such a scenario that
7 ought to be resolved under the UTC.

8 The Court has undoubtedly been aware of the
9 JOCO decision even prior to this case. As the Court
10 will recall, JOCO involved the Attorney General's
11 efforts with respect to an incorporated charitable
12 foundation to seek certain relief against it as well
13 as others, including some of the directors.

14 The Attorney General took that action as the
15 legal representative of the public, of the
16 beneficiaries. Now, the core issue in the JOCO case
17 was really one of subject matter jurisdiction.

18 I think in the dissent, Justice Lemons
19 recognized that there were also some hidden or not
20 so hidden concerns about the Attorney General's
21 standing. And clearly the defendant in here has
22 argued that standing seemed to be a concern in JOCO.

23 The primary consideration was that of whether
24 the Circuit Court has subject matter jurisdiction or
25 whether the dispute that was being litigated was

1 properly before the SEC.

2 The Supreme Court affirmed the trial court's
3 decision, which held that there was no subject
4 matter jurisdiction and they did so on a four to
5 three vote with, again, Justice Lemons dissenting.

6 Justice Lemons noted, and I don't believe
7 there's any argument here that the majority in the
8 JOCO case would have recognized subject matter
9 jurisdiction if the assets before them had been in a
10 trust instead of a corporation.

11 But the majority nonetheless rejected the
12 Attorney General's contention that a Virginia
13 nonstock corporation, charitable corporation, is
14 essentially a trust.

15 Then the majority invited the General Assembly
16 to take action. It stated, in essence, if circuit
17 courts are to have subject matter jurisdiction for
18 these types of claims, the General Assembly can so
19 provide, as it has done elsewhere.

20 Well, the General Assembly accepted that
21 invitation and it enacted Section 2.2-507.1 that
22 specifically accorded standing to the Attorney
23 General. It also enacted Section 17.1-513.01, which
24 specifically --

25 THE COURT: It did it at the same time, didn't

1 it?

2 MR. POPE: Yes, sir.

3 THE COURT: That's what I thought.

4 MR. POPE: And that specifically recognized
5 that this court, like all circuit courts have
6 subject matter jurisdiction over matters pertaining
7 to assets of a charitable corporation as circuit
8 courts then had jurisdiction over assets involving
9 unincorporated charitable trusts.

10 So the two sections worked in tandem, and
11 together they addressed the issues that were
12 troubling to the majority in the JOCO case.

13 This much is clear, Your Honor, the college
14 argues, incorrectly, that all that was accomplished
15 by the General Assembly in these two sections being
16 enacted was simply to address the JOCO concerns.

17 But that's not the case, the General Assembly
18 went further. If the legislature had simply wanted
19 to address the twin concerns in JOCO, it would have
20 passed the second sentence, the second sentence of
21 Subsection A of 2.2-507.1, together with the
22 jurisdictional statute.

23 That would have addressed the problem. It went
24 further. It enacted 2.2-507.1 with the first
25 sentence of Subsection A, and that's the one that I

1 quoted before.

2 Instead of simply saying that the Attorney
3 General has standing in instances where assets of a
4 charitable corporation are involved and, of course,
5 the Circuit Court has subject matter jurisdiction
6 over those, it went beyond that and said, "and
7 furthermore, those assets are deemed held in trust."

8 That wasn't superfluous language, it was
9 setting forth a separate and distinct proposition,
10 namely the creation of a trust, not of the
11 corporation that holds the assets, but of the assets
12 themselves.

13 I might also note that the defendant, on Page 9
14 of his reply brief, once again speaks to the
15 supposed purpose behind the adoption of 2.2-507.1.
16 There the defendant notes, "It was designed to
17 ensure the Virginia Attorney General had the
18 authority previously assumed to protect the public
19 interest in such assets," that being the assets of a
20 charitable corporation, "And that such assets were
21 used consistent with the purposes as established by
22 the governing documents of such charitable
23 corporations."

24 So the defendant not only acknowledges, the
25 defendant concedes that if the Attorney General were

1 here today, instead of these plaintiffs, that he
2 could take action to protect Randolph-Macon's
3 Woman's College's assets were this Court to conclude
4 that they were being used outside the purposes of
5 the trust that was created.

6 Thus, if we can demonstrate proper standing on
7 the part of these plaintiffs, as again Mr. Durette
8 will speak to you in a moment, then they too ought
9 to be able to pursue the objective of stopping the
10 college from breaching the trust.

11 I want to now shift to addressing the argument
12 that Subsection B of 2.2-507.1 somehow disqualifies
13 the application or prevents the application of the
14 Uniform Trust Code and at the same time memorializes
15 the lone body of law being applied, that of the
16 Virginia Nonstock Corporation Act.

17 If we look at Section B, it states, "Nothing
18 contained in this section is intended to modify the
19 standards of conduct applicable under existing law
20 to the directors of charitable corporations
21 incorporated in or doing business in Virginia."

22 Had the General Assembly sought to preserve the
23 wholesale application of the Nonstock Corporation
24 Act, it could have done so. It could have
25 referenced that entire legislative scheme from the

1 initial section to the end.

2 But it chose very carefully and very narrowly
3 drawn words. It simply said that the standard of
4 conduct applicable to directors is not being
5 modified by the enactment of this statute. The
6 defendant reads far too much into this particular
7 point.

8 This part of the statute merely leaves as
9 undisturbed whatever standards of conduct were then
10 in existence. This language deals primarily with
11 how a director, individually or directors
12 collectively, are to be judged by their behavior or
13 based upon their behavior.

14 It's essentially a liability issue. This part
15 of 2.2-507.1 cannot be interpreted so broadly as to
16 make corporate law the exclusive body of law that
17 applies here or to render the subsequent enactment
18 of the UTC as essentially meaningless insofar as the
19 trust created under this particular statute is
20 concerned.

21 I don't see how anyone could harmonize such a
22 position with the first sentence of Subsection A.
23 There has also been lengthy discussion by the
24 defendant with respect to how the directors of a
25 charitable corporation are to govern their behavior,

1 that it's in the interest of the corporation,
2 whereas the trustees of a charitable trust owe a
3 duty solely to the beneficiaries.

4 Your Honor, in this particular instance, when
5 the charitable purpose of the trust itself is on the
6 line, those two interests are coincident. As we
7 have already established, this is not an attack on a
8 decision to raise tuition or to change the
9 requirements of a particular major or to change the
10 rules of housing.

11 This is a wholesale departure from the
12 charitable purpose of this institution, going in an
13 altogether different direction. In that particular
14 situation, the interest of the corporation and the
15 interest of the beneficiaries are overlapping, they
16 are coincident. They are essentially the same.

17 But the overarching consideration that should
18 be given by this Court in response to the demurrer
19 is that these issues simply aren't relevant here.
20 This is not a suit against individual directors.
21 Damages are not being sought against individual
22 directors. The standard of conduct of the
23 individual directors are not on trial, nor will they
24 be. No one is seeking to impose any liability, but
25 rather receive injunctive relief.

1 We are trying to block a decision, which if
2 implemented over our objection, undeniably changes
3 the charitable purpose of this corporation. Indeed,
4 the college recognized that, and that's why they
5 felt the need to change the articles of
6 incorporation.

7 They knew that they were going to act in a
8 manner that's wholly inconsistent with the then
9 existing articles, and so they changed them. I will
10 conclude by saying that there is nothing illogical
11 or inappropriate about applying, not simply
12 corporate law, not simply the law in the Virginia
13 Nonstock Corporation Act, but also trust law given
14 the circumstances here or, indeed, in like
15 circumstances.

16 I would ask the Court to resist the temptation
17 to be influenced by the what ifs. What if you rule
18 this particular way for us, doesn't that open the
19 door to a whole host of other scenarios that are
20 troubling.

21 The Court ought to confine its rulings to the
22 issue at hand. Again, as Justice Lemons noted,
23 dissenting in the JOCO case, it is truly the nature
24 of the property itself, not how the property is
25 held, not whether it is held in an express trust,

1 not whether it is held by a charitable corporation,
2 whether it's stock or nonstock, it is the nature of
3 the property itself.

4 And that was the law, not only in the adoption
5 of 2.2-507.1, it was law set forth in the decision
6 that we cited on brief and that Justice Lemons
7 referred to in his opinion.

8 The UTC applies where there are trusts created
9 by statute. This 2.2-507.1 is such a statute. It
10 creates a trust, it creates a trust to be
11 administered as an express trust.

12 It is not in any way merely in response to
13 JOCO, and it serves as a as basis for the relief
14 that is being sought, and the Court should overrule
15 the demurrer as to Count 1.

16 THE COURT: Let's take a five-minute recess
17 before we begin.

18 (Whereupon, there was a recess.)

19 THE COURT: All right, Mr. Durette.

20 MR. DURRETTE: Thank you, Your Honor.

21 The remaining issue here essentially is that of
22 standing and the application of the law that
23 Mr. Pope talked about, particularly the legislative
24 enactment after JOCO, declaring that the assets of
25 the JOCO Corporation are deemed held in trust are

1 Count 2.

2 That's the simple part. We believe that that
3 sentence means what it says. The assets are held in
4 trust and, therefore, the duties with respect to
5 that trust are to continue the charitable purpose.

6 And I don't believe there's an issue here, it
7 certainly hasn't been raised, as to whether or not
8 moving from primarily women, if you will, to
9 coeducation is a change in the charitable purpose.
10 Of course it is.

11 So the issue is, can the trustees do that
12 unilaterally if they hold those assets in trust.
13 And the answer is, no, not if they are properly
14 challenged by the Attorney General or by someone
15 else with standing.

16 If, as Mr. Pope said, under the Uniform Trust
17 Act, if the Attorney General were standing here, he
18 would have standing and he could say to the Court,
19 these assets held in trust for the benefit of the
20 public, which the defendant concedes in its brief
21 have to be used for the purpose mandated by the
22 founding documents, and it says that in the statute,
23 the Attorney General can say, they can change the
24 charitable purpose, Your Honor, but they cannot do
25 that under the documents unless they avail

1 themselves of the document of cy pres and come in to
2 you and say, Your Honor, we can no longer continue
3 the charitable purpose.

4 It would be wasteful, it would be inefficient,
5 it would be impossible, and so we have to be able to
6 change it, and then you can decide whether they can
7 or can't. That would be the result if the Attorney
8 General were standing here.

9 So the question is, can it be the result
10 without him standing here, and the answer is yes,
11 clearly it can be. Mr. Fuhr referred to,
12 characterized our argument as asking you to go
13 outside Virginia and to recognize an evolving
14 doctrine that somehow has filtered through the
15 courts of other states and has not made its way to
16 Virginia yet.

17 I think he used the word, "in our view,
18 Virginia wasn't enlightened at this point." Well,
19 Virginia was ahead of the curve, because Virginia
20 recognized what has come to be known in recent years
21 as the special interest exception. Virginia
22 recognized it in 1895, just four years after
23 Randolph-Macon Woman's College was founded, in the
24 Clark v. Oliver decision.

25 Both of us cite that decision. We cite it for

1 different reasons. They cite it for what it holds
2 with regard to standing of settlors. We cite it for
3 what it holds with regard to the standing of our
4 student plaintiffs.

5 This is what the Court said in Clark v. Oliver,
6 again, all the way back in 1895. "An information or
7 bill may be exhibited by the Attorney General, as
8 was done in the case of Gallego's Ex'ors v. the
9 Attorney General." Your Honor, this is on, if you
10 are looking for the page in the decision, it is on
11 Page 11, 11 and 12. No, it's on page 427 and 428 in
12 the Virginia cite.

13 "An information or bill may be exhibited by the
14 Attorney General when it's done in a case that they
15 cite, or a bill may be filed by the trustees or one
16 of them asking the aid of a court of equity or,"
17 third category, "by any beneficiary of the trust
18 calling upon the Court to compel its due execution."

19 And then the Court goes on to say, "The
20 disposition and control of this fund, meaning its
21 use for its charitable purpose, must be called into
22 active exercise either by the Attorney General
23 acting on behalf of the public or by the trustees
24 charged with its custody and administration or by
25 some person having a beneficial interest in the

1 object of the trust."

2 So Virginia has always recognized that it was
3 not sound public policy to leave the enforcement of
4 the charitable purpose of the trust, and we have to
5 emphasize once again here, Your Honor, that we're
6 not talking about day-to-day decisions of the board,
7 we're not talking about the host of things that
8 Mr. Pope listed, we're not talking about the parade
9 of horrors that the courts are going to take over
10 trying to govern charitable corporations.

11 We're talking only about what law applies when
12 the issue is the changing of the charitable purpose
13 and taking the assets in trust and using them for a
14 purpose other than that authorized by the then
15 existing founding documents.

16 Now, in 1999, in *Richelieu v. Kirby*, which is
17 cited in our brief, it's a Circuit Court decision 48
18 Va. Cir. 260, decided by Judge Nay in Fairfax, he
19 wrote, "There is no question that the Attorney
20 General has common law authority to act on behalf of
21 the public in matters involving charitable assets."

22 And he cites *Tolbert* and he cites this case,
23 *Clark v. Oliver*. Although the Attorney General may
24 be empowered or authorized to act, a suit filed by
25 the Attorney General is not the exclusive vehicle,

1 not the exclusive vehicle for relief for agreed
2 members absent precedent or statutory provision to
3 the contrary.

4 There is no precedent to the contrary, there is
5 no statutory provision to the contrary. So
6 Virginia, using different language, alluding to
7 those with a beneficial interest in the purposes of
8 the trust, has recognized what has come to be called
9 the special interest exception.

10 Now, it is absolutely true that we cite this
11 court to a host of decisions from other states. It
12 is absolutely true that we cite this court to the
13 Hooker v. Edes Home case from the highest court in
14 the District of Columbia.

15 It is absolutely true that we cite this court
16 to the Blasko article, which does not propose
17 statutory change, but discusses the five factors
18 that courts all over this country are using to try
19 to analyze when to invoke the special interest
20 exception.

21 We cite on Page 20 of our brief a host of
22 cases, and I'm just going to talk about a couple of
23 them in just a moment. The premise that must be
24 recognized here, Your Honor, and I know you know
25 this, I think we all know this. Standing is a

1 judicially created doctrine.

2 The legislature, of course, can grant or take
3 away standing by a legislative act, but standing is
4 essentially the gatekeeper function of the courts.
5 The development of the doctrine of standing by the
6 courts has gone on for centuries, as courts have
7 tried to decide who should have the right to stand,
8 if you will, before the Court and complain of
9 certain wrongs.

10 And the balance, of course, always is the same.
11 The Court is faced with the dilemma of dealing with
12 a perceived problem or an admitted problem. It is
13 concerned that if it accords standing to a
14 particular individual, it will accord standing to
15 multiple individuals and be confronted with repeated
16 and vexatious litigation. And that is the balancing
17 act required by the Court in judging whether or not
18 to accord standing.

19 As the courts has wrestled with this over the
20 years, Virginia, as I have said, recognized it a
21 long time ago, but hasn't had too many opportunities
22 to apply it. Maybe you would say unfortunately, so
23 if they had more opportunities, I might have more
24 guidance from the Virginia Supreme Court.

25 But other courts seemed to have that

1 opportunity more frequently. It doesn't mean
2 Virginia doesn't recognize it, it just means that
3 other than the two decisions I have cited, I'm not
4 aware of where that issue has been addressed.

5 The case that we cited and asked the Court to
6 consider most seriously, of course, is the Hooker v.
7 Edes Home case, and we cited that because it is so
8 closely analogous to this case. You could almost
9 substitute Randolph-Macon Woman's College for Edes
10 Home and our plaintiffs for Hooker.

11 Before discussing the particular aspect of it
12 that I'm going to discuss here, I want to call the
13 Court's attention to a footnote. "Although Edes
14 Home is technically a charitable corporation,
15 charged by an act of Congress, the trial court
16 concluded, and the parties agree, that rules
17 applying to charitable trusts govern the standing
18 issue." Mr. Fuhr read from this decision in which
19 this court recognized that historically and
20 traditionally the Attorney General was the one who
21 came before the Court to enforce the public interest
22 when dealing with charitable trusts.

23 But what this court also did was to recognize
24 the standing of prospective residents of the Edes
25 Home. The defendants in the Edes case conceded that

1 existing residents of the Edes Home would have
2 standing.

3 We represent existing students, not prospective
4 course students. The Edes case involved prospective
5 residents. What the Court ruled there was, "An
6 exception to the general rule recognized by this
7 court exists in situations where an individual
8 seeking enforcement of the trust has a special
9 interest in continued performance of the trust
10 distinguishable from that of the public at large.

11 They go on to discuss how you arrive at that.
12 They conclude that in the case in which they are
13 addressing, which is one just like this where the
14 charitable purpose was altered from a home for
15 elderly, needy women in the District of Columbia to
16 those with affliction, they cite to the restatement.

17 And what they say is that there, are in these
18 type of situations, special beneficiaries narrowly
19 defined who can come forward and have standing to
20 challenge a decision of the board, the governing
21 body, to change the charitable purpose.

22 Now, interestingly enough, very interestingly
23 enough, in this case, after this suit was filed, the
24 board governing the Edes Home did in fact petition
25 the Court for leave to change the charitable

1 purpose. That wasn't at issue in this case, but the
2 board there recognized that perhaps that is what
3 they needed to do.

4 Now, what we ask to the Court to do is to
5 recognize that this decision confers standing on a
6 specific identifiable group of individuals who have
7 a special interest distinguished from the public at
8 large in the enforcement of the charitable purpose.
9 And having accorded them standing, to then say to
10 the defendant, you --

11 THE COURT: Is that applicable to the donors as
12 well as the students, then?

13 MR. DURRETTE: I'm going to get to the donors,
14 Your Honor, but you only need to accord standing to
15 one of them.

16 THE COURT: All right.

17 MR. DURRETTE: Having accorded standing and
18 recognizing that the charitable purpose has been
19 changed, you say to the defendant, you can do this,
20 but you have to come back in here in front of me and
21 justify it, otherwise I'm going to enforce the
22 charitable purpose as the Commonwealth requires me
23 to do.

24 Now, as I mentioned earlier, we did refer you
25 to the Blasko article, and we did that because this

1 article is a compendium of cases from across the
2 country.

3 In the Footnote 17 on Page 20 that I cited for
4 you, we cited cases from a host of states, but there
5 are two or three that are particularly important,
6 one from North Carolina, one from Texas, and one in
7 particular from Arizona.

8 Because in the Arizona Supreme Court decision,
9 they analyzed the Hooker case, they followed it,
10 they used the Blasko article and they said, yes,
11 those are the five factors or something similar to
12 those five factors that courts should examine in
13 deciding whether or not to accord standing to
14 particular petitioning plaintiffs.

15 So this is not a new area of the law. It's an
16 area that has existed in Virginia since 1895,
17 recognized by Judge Nay in 1999, and recognized by
18 courts all over this country.

19 In the Blasko article, which we cited for you,
20 once again this is a compendium of cases around the
21 country. It's entitled, "Standing to Sue in the
22 Charitable Sector," and this is what they say on
23 Page 61, elements of the special interest doctrine
24 according to case law.

25 "Research across states' jurisdictions

1 indicates that certain factual elements consistently
2 influence a court's willingness to allow a private
3 party to sue for the enforcement of the charitable
4 obligations. Courts use these elements to determine
5 if a potential plaintiff has a sufficient special
6 interest in the charity to justify the grant of
7 standing.

8 "These elements include, A, the extraordinary
9 nature of the acts explained of and the remedies
10 sought. B, the presence of fraud or misconduct. C,
11 the state Attorney General's availability or
12 effectiveness. D, the nature of the benefited class
13 and its relationship to the charity.

14 "In this section we examine each of those four
15 elements together with the fifth, subjective and
16 case specific factual circumstances and explain the
17 parts that they play in a court's decision-making
18 process."

19 And they go on to analyze that. We discuss
20 this at great length in our brief, and I know you
21 read it. We discussed all five of those points, so
22 I'm not going to dwell on them here today, but I
23 will point out that the first one mentioned is the
24 extraordinary nature of the act complained of. It
25 can't get more extraordinary than the changing of

1 the charitable purpose.

2 The presence of fraud or misconduct, that's not
3 an issue in this case at this time. The State
4 Attorney General's availability or effectiveness.
5 We know he is available, but he's not here.

6 The nature of the benefited class and its
7 relationship to the charity. Well, this class is
8 why this charity exists, there isn't anyone with a
9 closer or more special or more direct or more
10 integral interest in this charitable purpose than
11 the student plaintiffs who stand before the Court
12 today.

13 Then the subjective and case specific factual
14 circumstances. Well, Your Honor, the case law that
15 has evolved over decades throughout this country,
16 found in these articles and found in these cases, is
17 an increasing recognition of what Virginia knew in
18 1895 and Judge Nay reaffirmed seven years ago, that
19 there is an impermissible an indefensible void if
20 only an existing trustee or only the Attorney
21 General has standing in a case involving the
22 changing of the charitable purpose.

23 So the courts have recognized repeatedly that
24 we're not going there. We're not going to leave the
25 beneficiary of the charitable trusts with only two

1 sources of relief. Generally the trustees are the
2 ones who made the decision, and who knows why an
3 Attorney General's office does or does not intervene
4 in a particular case.

5 We know resources are scarce, we know that
6 there are political considerations, I have no idea.
7 Maybe if 20-some years ago I had won the election, I
8 might know those things.

9 THE COURT: I was just thinking that.

10 MR. DURRETTE: But I didn't win and I don't
11 know. What we do know is he is not here, but you
12 are the gatekeeper, respectfully, you're the
13 gatekeeper. Standing is judicially created.

14 What happens if you accord standing to these
15 plaintiffs? You get one lawsuit. There's a
16 challenge to the charitable purpose. You accord
17 them standing, you make a ruling. They change the
18 charitable purpose and you say to them, you can't do
19 that. You have got to come in here and talk to me
20 before you do that. It's over.

21 It's not vexatious litigation. You can go the
22 other way. You say, I find you didn't change the
23 charitable purpose. Or, I find you have the
24 authority to change the charitable purpose. You
25 have only accorded standing to students, you have

1 made your ruling, and that's exactly what the Edes
2 Home case recognized.

3 That court spent some time talking about the
4 fact that where you have this small identifiable
5 group of people, we know who they are, that you
6 don't have the risk of vexatious litigation. The
7 purpose of keeping the gate closed doesn't exist.

8 You don't have to close the gate if you have
9 got a group of beneficiaries who can meet that
10 narrow, narrow special interest exception. And
11 we're asking you to recognize that Virginia has
12 always allowed what in effect is a special interest
13 exception, a special beneficiary, a person with
14 particular interest in the trust.

15 Now, what about the settlors or what about
16 standing under the Uniform Trust Act for both, let
17 me go at it this way. I have talked primarily about
18 standing of the student plaintiffs, and it is
19 correct, as the defendant points out in his brief,
20 that the case that both of us cite from 1895 doesn't
21 accord standing to a settlor.

22 The defendant argues primarily two things with
23 respect to the settlors. Number one, this is by our
24 contention a statutorily created trust, and they
25 cite to a decision which logically holds for the

1 particular trust covered by that decision that a
2 statutorily created trust has no settlor. But that
3 was an unemployment compensation fund.

4 That case and every case like it, where the
5 statute creates the funding source and sets up a
6 trust fund where the money comes from taxpayers or
7 mandated from employers or anything like that, of
8 course, there is no settlor.

9 But this is a different type of statutorily
10 created trust. This is one that just says that the
11 charitable corporation, which already exists doing
12 business in Virginia, is in trust. That trust had
13 settlors before the General Assembly passed that
14 statute and since the General Assembly passed that
15 statute.

16 So argument number one, that a statutorily
17 created trust doesn't have settlors, doesn't apply
18 to this type of trust.

19 Argument number two is that it derives from the
20 1895 case that we talked about earlier, Clark v.
21 Oliver. It's true that that court held the way that
22 it did, if that's what is applicable in Virginia as
23 far as the settlors here are concerned.

24 The Uniform Trust Code has changed things, in
25 our view. In the Uniform Trust Code, a settlor

1 means a person, including a testator, who creates or
2 contributes property to a trust. Creates or
3 contributes property to a trust.

4 Section 544.05 says the settlor of a charitable
5 trust, among others may maintain a proceeding to
6 enforce the trust. So we contend that the Uniform
7 Trust Code on its face, the clear meaning of the
8 terms, which is all the Court is supposed to look at
9 when interpreting a statute, if it's clear and
10 unambiguous, grants standing to the settlors.

11 Let me go to Uniform Trust Code with respect to
12 beneficiaries. 541.03, "Beneficiary means a person
13 that," little "i," "has a present or future
14 beneficial interest in a trust vested or
15 contingent." And then there's a rule 2i that
16 doesn't apply here, a person that has a present or
17 future beneficial interest in the trust.

18 A beneficiary is afforded standing in the
19 Uniform Trust Code. As further evidence of this
20 evidence in the Uniform Trust Code, I want to direct
21 your attention to 541.06 of the Uniform Trust Code,
22 which says the common law of trust and principles of
23 equity supplement this chapter except to the extent
24 modified by this chapter or another statute of the
25 Commonwealth.

1 Then, finally, under judicial proceedings
2 Article 2, Section 542.01, the role of the Court in
3 administration of the trusts, the Court may
4 intervene in the administration of the trust to the
5 extent its jurisdiction is evoked by an interested
6 person or as provided by law. Section 542.01, to
7 the extent its jurisdiction is invoked by an
8 interested person.

9 Does that sound like Clark v. Oliver in 1895,
10 that the trust can be enforced by any beneficiary of
11 the trust or by some person having a beneficial
12 interest in the object of the trust? Yes, it does.
13 And it continues, the law of Virginia, unbroken from
14 1895 to the present, that there is a third category
15 of individuals who have standing to raise the issue
16 of whether or not the charitable purpose can be
17 changed.

18 Our student plaintiffs meet that criteria, they
19 clearly meet it, there's an abundance of law around
20 the country that define the special interest
21 exception in a way that clearly they fit. There's
22 really no dispute about the fact that they fit.

23 Finally, Your Honor, we conclude with this.
24 There's nothing really extraordinary about what
25 we're asking this court to do. We're asking you to

1 recognize that for whatever reason, the trustees
2 made the decision they made with respect to this
3 college, they changed its charitable purpose and
4 reversed its 115-year history.

5 For whatever reason, the Attorney General has
6 seen fit not to intervene, but our plaintiffs have
7 seen fit to bring the issue before the Court. The
8 only relief they ask, the only relief they ask, is
9 for you to just put up a stop sign and say to the
10 college, stop.

11 Take a breath, don't go any further, gather
12 your facts, and if you're right, that you really
13 can't continue the charitable purpose, just come on
14 down here and convince me. And that's all we're
15 asking. We're not asking you to open the floodgates
16 of litigation, we're not asking you to micromanage
17 the college.

18 THE COURT: It sounds like all of the above.

19 MR. DURRETTE: We're just asking you to
20 recognize the standing of our plaintiffs to raise
21 the issue of whether or not the board can change the
22 charitable purpose. That's all.

23 THE COURT: All right. Thank you,
24 Mr. Durette.

25 Does the college have any response?

1 MR. FUHR: Your Honor, I hope I'm rested up,
2 because I think there were more rabbit trails laid
3 down. I'm not going to chase after all of them, but
4 a few of them are irresistible.

5 It's interesting, as I listen to Wyatt make his
6 argument with respect to Count 2, I ought to go back
7 and read what Count 2 is, because it sure is a lot
8 different hearing how Mr. Durette describes it and
9 what they're trying to accomplish.

10 Count 1 is the Uniform Trust Code count, right,
11 and that's the one we talked about extensively.
12 Count 2 is very short, Page 10 of their complaint.

13 THE COURT: It's the cy pres doctrine, isn't
14 it?

15 MR. FUHR: It's the cy pres doctrine, and what
16 they allege there is, Paragraph 59, that's their
17 whole kit and caboodle right there, Paragraph 59.
18 Under the common law doctrine of cy pres as
19 recognized in Virginia, defendant cannot change
20 Randolph-Macon's charitable purpose without first
21 obtaining an order from a Virginia Circuit Court
22 after proving to the court's satisfaction that it is
23 impossible or impracticable to continue the
24 charitable purpose.

25 A pretty broad statement. Citation, Virginia

1 Code Section 55-268.7. I thought we would dig that
2 up, see what that says. 268.7, release of
3 restrictions on use or investments. It states
4 there, "A restriction on the use or investment of an
5 institutional fund imposed by the applicable gift
6 instrument may be released entirely or in part by
7 the governing board with the written consent of the
8 donor."

9 That's in A. B says if consent of the donor
10 cannot be obtained by reason of a death, disability
11 or unavailability of the donor, you can go into
12 court and get the restriction lifted. That's 268.7,
13 that's what Paragraph 59 is based on.

14 Nothing in 268.7 says to the charitable
15 corporation of Virginia, you can't dare change your
16 charitable purposes, you can't decide to go from
17 single sex to coed, you can't decide to integrate,
18 you can't decide to address other diseases beyond
19 that which you initially set out without going to
20 the court and getting permission.

21 No, 268.7 is all about helping the trust in the
22 event they have gotten a restricted gift in and you
23 can't get the donor to lift that restriction because
24 the donor isn't even alive anymore or can't be
25 located. It gives the charitable corporation a

1 tool, the ability to come into a court and say,
2 court, help me out, I would like you to lift that
3 restriction.

4 So Count 2 doesn't state a claim in any
5 respect. Count 2, there is no authority under
6 Virginia law that before a college or before a
7 charitable corporation under Virginia law can change
8 what it's doing it must go get the approval of the
9 court.

10 There's no authority like that in Virginia or
11 anywhere else. Even the law review article from the
12 University of Miami that plaintiffs are so fond of
13 doesn't even suggest that. That's all Count 2 is.

14 So we have heard a very extended argument about
15 different laws of standing and the like outside of
16 the Uniform Trust Code unrelated to Count 2. Count
17 2 doesn't exist, there's nothing in Count 2, it's a
18 nonstarter. The whole argument is off the point.
19 Let me chase down some other rabbit trails that have
20 been set up here.

21 There was reference to this Washington D.C.
22 decision in the Edes Home. That was a decision,
23 Your Honor, where a home in Washington was going to
24 be closed and all the assets were going to be
25 transferred out into another corporation. The Court

1 there goes through and cites that under the normal
2 law, if the plaintiff class is identifiable, you
3 don't have standing.

4 So even if it was all white Protestant teachers
5 in a certain county in Connecticut, that doesn't
6 constitute standing. You have got to identify the
7 people. You have to identify them, you're a
8 beneficiary, but that's like all the examples we
9 talked about in the very beginning, right.

10 We establish a trust to benefit A, B, and C,
11 and we say A, B, C, you didn't have claims as the
12 beneficiaries of a trust to enforce them. That's
13 what was going on in the Edes Home decision.

14 So in the that sense, Mr. Durette's argument
15 seriously misses the mark. Let me talk about some
16 of the arguments that Mr. Pope raised, because they
17 relate back to Count 1, which is really what this
18 suit is all about.

19 Mr. Pope argued at some length that the first
20 sentence in the statute that creates authority for
21 the office of the Attorney General is surplus. Why
22 did the General Assembly do that? It didn't need to
23 do that, they say.

24 Well, the reason they did that is because in
25 Justice Lemons dissent in JOCO, he made that exact

1 point. He made the exact point that the General
2 Assembly endorsed, in the first sentence of that
3 statute, that if you look to the assets of these
4 corporations in this context, and he made sure he
5 used the phrase "in this context," that they were a
6 charitable nature.

7 So what the General Assembly did, they simply
8 parroted the language that Justice Lemons first used
9 in his dissent. This isn't language that came out
10 of left field and said, okay, why don't we do
11 something much broader.

12 No. What they did is they went to Justice
13 Lemons and they followed the analysis that he set
14 forth, and he had two steps. The first step was
15 that the assets were essentially charitable in
16 nature so as to allow the Attorney General to come
17 into play. And, two, they dealt with the fact that
18 the Attorney General himself dealt with the Attorney
19 General.

20 So the first sentence is not at all surplus.
21 It's not an invention of the General Assembly trying
22 to transform Virginia corporate trust law. It's a
23 follow up of Justice Lemons' precise points.

24 Mr. Pope argues, we're not challenging the
25 conduct and the decisions of the trustees of this

1 college. Have you gone back and read your
2 complaint? That's exactly what your complaint is.
3 Your complaint is an allegation, we already went
4 through it, that the trustees of the college
5 violated their duties under Subsection 02 and
6 Subsection 04 of the Virginia Uniform Trust Code and
7 therefore must be enjoined.

8 It is exactly that. It's a challenge to the
9 decisions of the trustees and they're asking this
10 court to enjoin that decision. The reason he wants
11 to say what he says in his argument, though, is
12 because Subsection B of that Attorney General
13 statute knocks him out of the water.

14 Subsection B says, this statute above doesn't
15 change the standards of conduct. The standards of
16 conduct of Virginia's corporations continue to be in
17 effect. Well, that's not a good thing if you're a
18 plaintiff and you're trying to hold the trustees to
19 a different standard, a standard in a trust statute.

20 It doesn't add up. Their complaint is black
21 and white, an allegation that these trustees made a
22 mistake in a decision that should be enjoined by
23 reference to these two sections of the trust code,
24 two sections that are expressly under the Attorney
25 General's statute, inapplicable.

1 Both Mr. Pope and Mr. Durette talked about the
2 settlers, people who have contributed money to the
3 college, and gee, they just want to have their day
4 here in court and can't we just put a stop sign in
5 front of the college and say no to their decision.

6 They want an injunction. They're very clear,
7 this isn't a suit for damages, it's a suit for an
8 injunction. What leverage that provides. The
9 Virginia Uniform Trust Code, even if it applies,
10 states that a settlor is so only with respect to a
11 portion of the trust property attributable to that
12 person's contribution.

13 That's in the very definition of the settlor.
14 So you have got two donors who have contributed a
15 piece of art and \$40,000 who are going to enjoin the
16 use of all the college's assets, wherever it
17 derived, whether it be student fees, rent, anything.
18 Any monies that come into the college, these donors
19 are going to think that they have got the right to
20 enjoin how all monies are used, and these are donors
21 who didn't make restricted gifts.

22 The whole purpose of the trust code, if you
23 make a restricted gift, the restrictions that you
24 attach to those gifts, those are enforceable, but
25 that's not what this is. There's no allegation here

1 that there are restrictions that are being ignored
2 by the college, there's no such allegation, nor
3 could there be.

4 Mr. Pope said the interests, remember we talked
5 about the dichotomy, that under the Virginia
6 Nonstock Corporation Act the directors are charged
7 with looking out for the best interests of the
8 corporation. Under the trust code, the approach is
9 different, your focus is on what's in the best
10 interests of the beneficiary.

11 Mr. Pope says the interests are the same,
12 they're coincident. Not necessarily, and this may
13 be a good case that illustrates that. I have no
14 doubt, we have no doubt that the students enrolled
15 at the college fundamentally, at least some of them,
16 maybe many of them, desire for this institution to
17 remain a single sex education, at least during the
18 time they are at the school.

19 The directors' duty is a larger one, to
20 preserve the college. So there remains, not just
21 for the next two or three years, but for a number of
22 years thereafter, for decades thereafter, and
23 continues to be a vibrant part of this community and
24 educates not just these students but generations
25 that follow after them.

1 They had to think about that larger picture of
2 the corporation, and that's what Virginia corporate
3 law directs them to do.

4 THE COURT: Why wouldn't the plaintiffs be
5 entitled to their day in court on that issue?

6 MR. FUHR: Because under Virginia corporate
7 law, who is allowed to sue? There are only two
8 people, one is a shareholder.

9 THE COURT: Why isn't 507.1 applicable, why
10 aren't the assets of Randolph-Macon a public trust?

11 MR. FUHR: Mr. Pope concedes this point. He
12 said the college, we acknowledge that the college is
13 not a trust, this didn't make the college a trust.

14 THE COURT: I agree it didn't make it a trust.
15 It made the assets a trust.

16 MR. FUHR: It made the assets -- it declared
17 and deemed the assets are held in trust for purposes
18 of allowing the Attorney General to come in, where
19 before this amendment he couldn't come in.

20 Nothing in this action then said that every
21 person who is a student at any school in an
22 analogous situation, anybody who has given an
23 unrestricted gift, can come in and challenge the
24 decisions made by those people who are on the board
25 that are charged with making those decisions.

1 Nothing in the Uniform Trust Code changes that. The
2 Virginia Uniform Trust Code --

3 THE COURT: Are you saying the Attorney General
4 is the only one that can do that, no one else has
5 standing?

6 MR. FUHR: Yes, Your Honor, that's precisely
7 right. The Uniform Trust Code says it only applies
8 to trusts created by statute and that the statute
9 requires, and this is the second part, it's right
10 there, and that the statute requires it to be
11 administered in the manner of a express trust.
12 That's 55-541.0.

13 So you have got two critical pieces there
14 before the code even begins to come into play. You
15 must have a statute that establishes a trust and
16 that statute must --

17 THE COURT: You have got that under 507.1.

18 MR. FUHR: I don't think we even have that.

19 THE COURT: I know you don't.

20 MR. FUHR: Even if that were the case, 507.1
21 certainly doesn't say that is a trust that must be
22 administered in the manner of an express trust.
23 That's what the probate code does. That's not what
24 507.1 does.

25 So there are two critical components to 501.02.

1 This is a very threshold question and both of them
2 are critical. If you don't have either one, game,
3 set, match. You must have a statute that
4 establishes a trust and that statute must require,
5 require, that the trust be administered in the
6 manner of an express trust.

7 You look at 507.1, the Attorney General
8 section, what language in there even arguably comes
9 within some number of saying anything about how the
10 trust is to be administered, much less that it is to
11 be administered in the manner of an express trust.

12 A, there's nothing there. There's nothing that
13 even comes close, and B, to sort of drive home the
14 point, the General Assembly put in Subsection B.
15 Otherwise, you have this incredible transformation
16 of Virginia corporate law and all of Virginia's
17 nonstock corporations have all their duties
18 redefined.

19 Directors are now subject to a reasonable man
20 test rather than the good faith test and you have a
21 difference in terms of who you are focused on. So
22 the Uniform Trust Code in here does not apply.

23 Count 1 must be dismissed, Your Honor, because
24 at the very least there is not a statute that
25 establishes the college, that requires it to be

1 administered in the manner of an express trust.

2 I submit that there's a second reason, that
3 there's no statute that even establishes it as a
4 trust. So that's the second reason, but you got to
5 have both, and if you don't have both, the Uniform
6 Trust Code gets washed aside.

7 And I submit that the appropriate reading of
8 507.1 is that it's exactly what it states in its
9 title, "Authority of the Attorney General Regarding
10 Charitable Assets." That's what the title of the
11 very section is.

12 It's in a chapter that is addressed exclusively
13 to the Attorney General and all of which are proper
14 ways, if you think there's any ambiguity about 507.1
15 and what it means, it just means about the Attorney
16 General.

17 But I have not seen in the briefs, in the
18 arguments, any language, any suggestion that there's
19 something in this language here that requires the
20 college to be administered in the manner of an
21 express trust.

22 In this critical respect, the arguments that we
23 have had here, Your Honor, is very much like the one
24 that we heard in the contract suit, where in the
25 contract suit they tried to change general

1 statements into specific promises. Here they try to
2 change the phrase "deems held" into the phrase
3 "creates." I think there's a difference.

4 In 2, they try to imply a requirement that the
5 college be administered in an express trust, when
6 there's no such requirement there, and indeed you
7 have a direct statement stating that that is not how
8 the statute should be construed.

9 I think that's the same type of effort going on
10 here. In, I think it was Mr. Pope's argument, he
11 sort of had a curious response to the what if, that
12 every corporation could be sued and challenged and
13 the like.

14 He said that's wrong, just don't worry about
15 it. That's for another day, but that's their
16 theory. That's exactly what their theory would
17 allow. Next year the students come in. You go in
18 and you say we want to change the academic program.
19 Oh, no, it's not in the academic catalog and you're
20 changing your purpose and you're changing your
21 direction.

22 You're doing something new and different and
23 now I'm invoking contract law and trust law, here I
24 am. I gave an unrestricted gift, gave \$25, here I
25 am. I'm going to enjoin the college from using its

1 millions of dollars to do what the directors think
2 is necessary to preserve it and allow it to keep on
3 going.

4 Instead, Mr. Durette is saying, I'm not asking
5 for anything too extraordinary, but I would like you
6 to get involved here in micromanaging this college
7 and this board and before they make any changes to
8 what they do, they need to come to you.

9 That's not Virginia law. There's no precedent
10 for that, there's absolutely no precedent for that.
11 This is a case that before any hospital decides to
12 expand who they are serving, any foundation that is
13 all one sex or one race or whatever, that before
14 they can make those changes, they need to come see
15 you and they need to persuade you that it's -- I
16 don't know what the test they're going to apply,
17 what that standard is, because now they're saying,
18 is it trust law, is it corporate law.

19 The one thing that Virginia law says that
20 reasonableness is the standard that the directors
21 are judged by. Whatever it is, we will figure that
22 out with twenty more briefs and four more hearings
23 and every institution can come before you and get
24 permission before they make those changes.

25 That is an incredible change and expansion of

1 Virginia law. There is no precedent for it. For
2 all these reasons, Your Honor, we would respectfully
3 request that this trust action be dismissed and that
4 you find that there's no cause of action by which
5 these five or six students, these two donors have
6 stated a claim to enjoin the college.

7 THE COURT: Do they have any standing?

8 MR. FUHR: No, Your Honor. Even if you, even
9 if somehow 507.1 were construed to A, establish a
10 trust; B, to set forth exactly how that trust has to
11 be administered, even then this group doesn't have
12 standing, these plaintiffs don't have standing.

13 When you have a statutory trust, a charitable
14 trust, the person who has standing is the Attorney
15 General. And I think plaintiff counsel has been
16 very candid with this Court, saying that's been the
17 historical rule in Virginia.

18 Nothing in the Virginia Uniform Trust Code has
19 changed that. It didn't change that one wit. If
20 you have a different type of trust that's not a
21 statutory trust, the trust to take care of A, B, and
22 C, then A, B, and C are allowed to sue.

23 But when you have a statutory trust, a
24 charitable trust, the law in Virginia is the
25 Attorney General shall have, is the one that has

1 exclusive authority.

2 THE COURT: Doesn't Virginia recognize the
3 special interest doctrine?

4 MR. FUHR: No, Your Honor, it does not. The
5 special interest doctrine is only recognized in
6 Washington D.C. and a couple of other states.

7 As the authors of the law review articles
8 wrote, the way to accomplish this change is through
9 legislative change. We agree, if you're going to
10 change the law of standing that way, it's province
11 of the General Assembly. It's not for this court,
12 or any court for that matter.

13 The Virginia Supreme Court has been very
14 consistent over the years in trying to define the
15 line carefully between what is in the province of
16 the Court and what is in the province of the General
17 Assembly and it is not the province to start
18 creating standing under a statutory regime where
19 it's not provided for. There's no basis for that.

20 Washington D.C. has its own unique set of laws,
21 and when you go through and look at that, it's
22 dramatically different from Virginia in lots of
23 ways, Your Honor, and especially with respect to
24 standing.

25 I would respectfully submit that the Virginia

1 Supreme Court and the General Assembly aren't
2 generally looking to D.C. and California, the two
3 primary jurisdictions plaintiffs' counsel are citing
4 for these expanding, evolving --

5 THE COURT: The Virginia Supreme Court is not
6 following them.

7 MR. FUHR: That's not where they're looking.
8 We have the charitable trust. The office of the
9 Attorney General is the exclusive person who has
10 authority to come forward, and the Attorney General
11 was made aware formally of the concerns that
12 Mr. Durette's clients have here.

13 He has not come forward and given voice to any
14 such concerns, and I think appropriately so. In the
15 end, you have a board that has 25 to 30 directors
16 and trustees that are fighting for the life of this
17 college and they're making a decision that, you
18 know, it wasn't an easy decision, but they made a
19 decision here to go coed to preserve this place, and
20 suddenly the idea that trust law allows people to
21 come in and seek an injunction.

22 This isn't saying I want my money back or I
23 want some of my tuition money back. This is going
24 to be an injunction that prevents you from doing it.
25 That's not Virginia law. Where is the precedent?

1 We have had in the United States over the last
2 two decades dozens, if not a hundred, colleges go
3 coed. The Virginia Uniform Trust Code, Virginia is
4 the most recent state to adopt the Uniform Trust
5 Code, so this is a code that's been around before
6 Virginia adopted it. You have all these colleges go
7 coed. You have all these institutions --

8 THE COURT: There are a couple of Virginia
9 colleges gone coed, W and L.

10 MR. FUHR: W and L did it separately between
11 the law school and the undergraduate school.

12 Where is the evidence, where is the authority,
13 where is the precedent, even close or remotely so,
14 saying trust law stops you from doing that unless
15 you get the approval of the Court.

16 That can't be right. That just reads way too
17 much into the Attorney General statute. It
18 fundamentally misreads the Virginia Uniform Trust
19 Code, the statute, to accomplish either one of
20 those. There is absolutely no precedent for the
21 claims that have been made here. You don't even
22 find cases where the claims have been made and
23 rejected elsewhere. No one else has even brought
24 forward that claim that we have got there.

25 THE COURT: Well, Mr. Durette has always been

1 a good lawyer and very inventive.

2 MR. FUHR: He is one of the most creative,
3 great guys there is and I love him, but respectfully
4 here, the theory here doesn't work and it ought to
5 be dismissed, because otherwise the courts are going
6 to be involved in doing just as Mr. Durette asked
7 this court to do.

8 Haul the directors in there and justify your
9 decision to me, justify your decision to admit women
10 or to admit men. Every club, country club of
11 Virginia, every club that decides to change, allow
12 men, allow women, make these changes, got to come
13 into the courtroom, because somebody who is
14 currently a member, who is currently a student at
15 that school says, oh, no, I don't want you to do it
16 unless you persuade the judge.

17 That's not Virginia law. That's not the law
18 anywhere and there's no precedent for it, and so
19 respectfully, Your Honor, we would ask that you
20 dismiss this case. I think the sentiment that was
21 in a motion that Mr. Durette filed about the need
22 to move quickly because the college, we're at a
23 crossroads, got to make decisions, the students are
24 too.

25 Some of the students have to make decisions, so

1 the need for prompt decisions is greatly
2 appreciated, and we thank you for your great
3 patience and time this afternoon.

4 THE COURT: Thank you for your comments.

5 This issue is a difficult issue for the Court,
6 mainly because we are applying a lot of new law in
7 Virginia to the facts in this particular case.

8 There's not much authority or precedent for the
9 Court to rely on or read or study, although I have
10 studied the statutes that the attorneys have
11 mentioned and the case they have mentioned.

12 And, in particular, this case somewhat rises on
13 Section 2.2-507.1 of the code and it has two parts,
14 A and B. I believe under that section, that A part,
15 it says that assets of a charitable corporation
16 incorporated doing business in Virginia shall be
17 deemed to be held in trust for the public for such
18 purposes as for the governing documents established.

19 I think, clearly from the pleadings,
20 Randolph-Macon Woman's College is a charitable
21 nonstock corporation doing business in Virginia and
22 their assets would be deemed to be in trust for the
23 public under this statute.

24 However, the second part of that code section,
25 Part B, says nothing contained in this section is

1 intended to modify the standard of conduct
2 applicable and existing to the directors of a
3 charitable corporation incorporated doing business
4 in Virginia.

5 So you almost have a, to some extent, an
6 inherent conflict between the two sections of the
7 statute, and it's up to the Court to interpret that.
8 I think clearly Virginia corporate law governs the
9 Randolph-Macon Woman's College and their board of
10 directors in the actions in this case.

11 Also, as I said, I think the assets are in
12 trust for the public, and under this statute that
13 was enacted because of a case out of Bedford County,
14 the Attorney General has the authority to act on
15 behalf of the public and the assets, if he believes
16 they are not being handled properly.

17 The Attorney General has been served with
18 papers in this case and has made no position in this
19 case to this date. Then the question becomes does
20 the new Virginia Uniform Trust Code Act apply to the
21 assets of Randolph-Macon Woman's College.

22 Section 55-541.02A, talks about what trusts are
23 established and subject to this new trust code. It
24 says, express trust, inter vivos trust, charitable
25 and noncharitable, trust created pursuant to a

1 statute, judgment or decree that requires the trust
2 to be administered in the manner of an express
3 trust.

4 So, in effect, based on the Court's ruling, we
5 have got assets of Randolph-Macon are in effect
6 public trust assets and the corporation has been
7 held for charitable benefit for years and operated
8 as a college.

9 But I don't find anything in that Section 507.1
10 of the Code of Virginia that requires their assets
11 to be administered in the manner of an express
12 trust.

13 So I agree with Mr. Fuhr that the court system
14 is just not set up to be an overseer for every
15 charitable hospital and club or function and college
16 in the state of Virginia. That's not the purpose
17 of, I think, either one of these statutes.

18 I think if there's an allegation of criminal
19 fraud, misdoing or the Attorney General wants to be
20 involved, the Attorney General could be involved.
21 But I don't think the Uniform Trust Code is really
22 applicable to the assets of Randolph-Macon, because
23 it's not under that code section required to be in
24 the manner of an expressed trust.

25 Having said that, I will grant your motion,

1 Mr. Fuhr, for the reasons in your brief and what you
2 stated and also sustain the demurrer in this case.

3 MR. FUHR: Thank you, Your Honor.

4 THE COURT: I think the cy pres doctrine is
5 just not applicable at all. Thank you, Counsel.

6 _____

7 (The foregoing matter concluded at 5:17 p.m.)

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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2

3 I, Kimberly A. Henderson, do certify that
4 the foregoing transcript is complete and accurate to the
5 best of my ability.

6 I further certify that I am not employed by any
7 party or counsel to this proceeding, nor otherwise
8 interested in the outcome thereof.

9 Given under my hand this 7th day of February,
10 2007.

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KIMBERLY A. HENDERSON, RPR

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