

ARTICLES

CIVIL PRACTICE AND PROCEDURE

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I. INTRODUCTION

This article summarizes the major developments in Virginia civil practice and procedure over the past two years, specifically covering significant decisions by the Supreme Court of Virginia and changes to the Rules of the Supreme Court of Virginia dating from April 22, 2005, to April 20, 2007. The article also addresses legislative enactments by the General Assembly in its 2005 and 2006 sessions.

II. SUPREME COURT DECISIONS

A. *Choice of Law*

In *Dreher v. Budget Rent-A-Car System, Inc.*, the Supreme Court of Virginia held that a New York statute imposing vicarious liability on the owner of a vehicle for death or injuries caused by the negligence of a person driving the car with the owner's

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permission applied to the plaintiffs' personal injury action involving an accident in Virginia.¹ The plaintiffs sued the defendant car rental companies alleging that the liability created by New York Vehicle and Traffic Law section 388(1)² was a matter of contract, and therefore, under Virginia's choice of law rules, the plaintiffs could recover against the defendants.³ The defendants argued that the issue was a matter of tort, and, under the doctrine of *lex loci delicti*, the defendant owners had no vicarious liability for the acts of the permittee under Virginia law.⁴

The issue turned on whether the alleged liability under Virginia Code section 388(1) was a matter of tort or contract.⁵ Virginia's choice of law rules applied because the automobile accident at issue occurred in Virginia.⁶ If the defendants' alleged liability was a matter of tort, then the law of the place of the wrong would govern all matters related to the right of action.⁷ If it was a matter of contract, however, then the law of the place where the parties entered into the contract controlled—in this case, New York.⁸

By holding in favor of the plaintiffs, the court found *Buchanan v. Doe*⁹ persuasive.¹⁰ The plaintiff's claim in *Buchanan* involved the uninsured motorist statutes of Virginia and West Virginia.¹¹ Under West Virginia law, a plaintiff in a John Doe tort action must prove actual, physical contact with the John Doe vehicle.¹²

1. 272 Va. 390, 393, 634 S.E.2d 324, 325 (2006).

2. The New York statute states:

Every owner of a vehicle used or operated in [New York] shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

N.Y. VEH. & TRAF. LAW § 388(1) (Consol. 1992). Contrarily, under Virginia law, the plaintiffs in *Dreher* would have needed to show some form of agency relationship in order to sustain a claim of vicarious liability against the rental car owners. *Dreher*, 272 Va. at 394, 634 S.E.2d at 326.

3. See *Dreher*, 272 Va. at 395–96, 634 S.E.2d at 326–27.

4. See *id.* at 395–97, 634 S.E.2d at 326–28.

5. *Id.* at 395, 634 S.E.2d at 327.

6. *Id.*

7. *Id.*

8. *Id.*

9. 246 Va. 67, 431 S.E.2d 289 (1993).

10. *Dreher*, 272 Va. at 398, 634 S.E.2d at 328.

11. 246 Va. at 69–70, 431 S.E.2d at 290.

12. *Id.*

Virginia's uninsured motorist statutes, however, have no such requirement.¹³ The Supreme Court of Virginia in *Buchanan* held that the issue was a matter of contract between the plaintiff driver and his uninsured motorist insurance carrier because neither state's tort law required proof of physical contact, and West Virginia's proof-of-contact rule neither imposed a duty on the John Doe driver nor benefited a tortfeasor.¹⁴

Similarly, in *Dreher*, the alleged liability of the owners was created solely by the New York statute.¹⁵ Further, "[t]he provisions of N.Y. Law § 388 are a matter of substantive law and go to the very right of action at issue."¹⁶ The New York statute imposed no duty on the tortfeasor and did not benefit any tortfeasor.¹⁷ Thus, the statute was designed to protect motorists and imposed a "contractual duty upon the [owner of the vehicle] having no relation to [the underlying] tort action."¹⁸ Accordingly, the New York statute was contractual in nature and the defendants were potentially liable on plaintiffs' personal injury claims.¹⁹

B. *Declaratory Judgment*

In *Asplundh Tree Expert Co. v. Pacific Employers Insurance Co.*, the Supreme Court of Virginia held that the trial court retained jurisdiction in a declaratory judgment action to determine an insurer's obligations under a liability insurance policy after the insurer voluntarily paid a settlement on the underlying tort action against the insured.²⁰ The insured was sued by one of its employees after the employee suffered injuries in an automobile

13. *Id.* at 69, 431 S.E.2d at 290.

14. *Id.* at 71–72, 431 S.E.2d at 291–92.

15. *Dreher*, 246 Va. at 399, 634 S.E.2d at 329.

16. *Id.*

17. *Id.*

18. *Id.* at 400, 634 S.E.2d at 329 (quoting *Buchanan*, 246 Va. at 73, 431 S.E.2d at 292). The court held further that the application of the New York statute did not offend the public policy of the Commonwealth because both favor the "compensation of innocent victims in automobile accidents." *Id.*, 634 S.E.2d at 330.

19. *See id.* at 398, 634 S.E.2d at 328. The court acknowledged its disagreement with the Fourth Circuit's holding in *Kline v. Wheels by Kinney, Inc.*, 464 F.2d 184 (4th Cir. 1972), because there the Fourth Circuit held that section 388(1) was purely a matter of tort law and therefore North Carolina's tort law prevented a claim against the defendant rental owners. *Dreher*, 272 Va. at 397–98, 634 S.E.2d at 328.

20. *See* 269 Va. 399, 402, 409, 611 S.E.2d 531, 532, 536 (2005).

accident.²¹ The employee brought suit in West Virginia alleging personal injury against the insured.²² Meanwhile, the insurer filed suit in Virginia seeking a declaration that it was not liable on the policy with the insured.²³ The insured filed an answer asserting the declaratory action was improper because it sought a “determination of disputed issues that must be determined in some future litigations between the parties.”²⁴

Eventually, the employee, insured, and insurer entered into settlement negotiations on the underlying tort claim.²⁵ The insurer repeatedly asserted that its participation was made with reservation of its rights “as determined in the pending declaratory judgment proceeding.”²⁶ With this in mind, the insurer agreed to fund a settlement of the employee’s claims against the insured.²⁷ After the tort claim settled, the Virginia trial court held in favor of the insurer in its declaratory action, ruling that the employee was acting within the scope of his employment at the time of the accident, and, therefore, the insurer was not liable on the policy.²⁸

The insured appealed, asserting that the trial court lacked subject matter jurisdiction over the declaratory action after the insurer made a voluntary payment to resolve the underlying tort claim.²⁹ “In such instances, . . . the real purpose of the [declaratory judgment action] is to obtain a money judgment,” making the declaratory judgment an improper method to obtain relief.³⁰ Citing *Liberty Mutual Insurance Co. v. Bishop*,³¹ the insured argued that the settlement of the underlying tort claim extinguished the trial court’s jurisdiction in the declaratory judgment action be-

21. *See id.* at 403, 611 S.E.2d at 532–33.

22. *See id.*

23. *Id.*, 611 S.E.2d at 533.

24. *Id.* at 404, 611 S.E.2d at 533.

25. *Id.* The insurer was not a party to the underlying tort claim.

26. *Id.* at 405, 611 S.E.2d at 534.

27. *Id.*

28. *Id.* at 406, 611 S.E.2d at 534.

29. *Id.*, 611 S.E.2d at 535.

30. *Id.* at 407, 611 S.E.2d at 535 (citing *Liberty Mutual Ins. Co. v. Bishop*, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970)).

31. 211 Va. 414, 177 S.E.2d 519.

cause “there was no longer an actual controversy between” the insured and the insurer.³²

The supreme court ruled that the trial court properly retained jurisdiction over the declaratory judgment action.³³ Contrary to the facts in *Bishop*, the insurer’s declaratory judgment action was filed before it agreed to fund the settlement.³⁴ The reservation of rights established that the insurer’s interests were divergent from the insured’s.³⁵ Furthermore, the court in *Reisen v. Aetna Life & Casualty Co.*,³⁶ held that an insurer is permitted to file a declaratory judgment action while an action on the underlying tort claim is pending.³⁷

The court rejected the insured’s argument that the declaratory judgment action had become a suit for money damages.³⁸ The trial court had subject matter jurisdiction when the insurer filed the claim, and “[i]t should be self-evident that after a declaratory judgment action is filed the circumstances that caused the party seeking to have its rights and responsibilities determined by the court in equity may change.”³⁹ Moreover, a court of equity retains jurisdiction once acquired and may complete adjudication “to the extent of establishing legal rights and granting legal remedies which would otherwise be beyond the scope of its authority.”⁴⁰ Accordingly, the trial court did not err in retaining jurisdiction after the insurer’s voluntary payment on the underlying tort claim.⁴¹

C. Final Judgment

The Supreme Court of Virginia determined in two decisions what effects, if any, a scrivener’s error may have on a final judgment. In *Morgan v. Russrand Triangle Associates*, the court held

32. *Asplundh Tree*, 269 Va. at 405, 611 S.E.2d at 534.

33. *Id.* at 409, 611 S.E.2d at 536.

34. *See id.* at 404–05, 611 S.E.2d at 533.

35. *Id.* at 408, 611 S.E.2d at 535.

36. 225 Va. 327, 302 S.E.2d 529 (1983).

37. *See Asplundh Tree*, 269 Va. at 408, 611 S.E.2d at 535 (citing *Reisen*, 225 Va. at 336, 302 S.E.2d at 534).

38. *See id.*, 611 S.E.2d at 536.

39. *Id.*

40. *Id.* at 409, 611 S.E.2d at 536 (quoting *Erlich v. Hendrick Constr. Co.*, 217 Va. 108, 115, 225 S.E.2d 665, 670 (1976)).

41. *See id.*

that a trial court's "inadvertent" entry of a final order disposing of the merits of a claim did not constitute a clerical error.⁴² The trial court entered a final order signed by the parties in favor of the plaintiff.⁴³ Although the court granted Defendant's motion to reconsider and issued an oral ruling in favor of the defendant, no written order to that effect was entered by the court within twenty-one days after the original final order.⁴⁴ Eventually, the trial court entered a second written order stating that the original final order had been entered due to a clerical error.⁴⁵

The supreme court disagreed, holding that the entry of the original final order did not constitute clerical error.⁴⁶ Therefore, Virginia Code section 8.01-428(B) did not apply and the trial court erred in entering a *nunc pro tunc* order modifying that final order.⁴⁷ "Characterizing the signing of the order by the trial judge, and by counsel for both parties, as an 'oversight' or an 'inadvertent error' is inconsistent with the affirmative acts of the trial court and counsel."⁴⁸ Along with all of the parties, the trial court is charged with the knowledge that an order is entered when signed by the judge.⁴⁹ Accordingly, pursuant to Rule 1:1, the trial court lost jurisdiction over the matter at the expiration of twenty-one days after entry of the final order, notwithstanding the court's oral ruling otherwise.⁵⁰

The Supreme Court of Virginia addressed a related issue in *State Farm Mutual Automobile Insurance Co. v. Remley*.⁵¹ In *Remley*, the trial court mistakenly entered a final order in which the court juxtaposed the parties' names.⁵² After the expiration of twenty-one days, pursuant to Virginia Code section 8.01-428, the court modified the final order to reflect the correct positioning of

42. See 270 Va. 21, 26–27, 613 S.E.2d 589, 591–92 (2005).

43. See *id.* at 24, 613 S.E.2d at 590.

44. *Id.*

45. *Id.*

46. *Id.* at 26, 613 S.E.2d at 591.

47. *Id.*

48. *Id.*

49. See *id.*

50. See *id.* at 26–27, 613 S.E.2d at 591–92.

51. 270 Va. 209, 618 S.E.2d 316 (2005).

52. See *id.* at 213, 618 S.E.2d at 317. In the order, the trial court inadvertently stated that Craig Griffin was the plaintiff, even though Christine Remley was the plaintiff and Griffin the defendant. *Id.*

the parties.⁵³ The uninsured motorist insurance carrier moved to set aside the final order, arguing in part that the trial court “re-acquired” jurisdiction in the matter by modifying the final order under Virginia Code section 8.01-428(B).⁵⁴ The trial court disagreed and the supreme court affirmed, holding that a trial court’s authority under Virginia Code section 8.01-428(B) is limited only to those issues specifically set forth in the statute.⁵⁵ Further, Virginia Code section 8.01-428(B) and other statutes creating exceptions to the finality of Rule 1:1 are consistently applied narrowly by the courts.⁵⁶

D. *Judicial Estoppel*

In *Parson v. Carroll*, the Supreme Court of Virginia held that a criminal defendant’s *Alford* plea will not support a trial court’s application of judicial estoppel.⁵⁷ The plaintiff plead guilty to six counts of sexual battery against the defendant.⁵⁸ Plaintiff did so by entering “*Alford* pleas,” in which he asserted his innocence but stipulated that the evidence presented, if credible, was sufficient to convict him.⁵⁹ Approximately five months later, the plaintiff filed suit against the defendant victim for making allegedly defamatory statements about the plaintiff related to the sexual battery.⁶⁰ The circuit court granted defendant’s motion for summary judgment, holding that plaintiff’s *Alford* pleas barred his claims.⁶¹

The purpose of the equitable doctrine of judicial estoppel “is to protect the integrity of the judicial process and to guard it from improper use.”⁶² Under the doctrine, a party is prohibited from asserting conflicting or contradictory positions, with regard to the

53. *See id.* at 215, 618 S.E.2d at 319.

54. *See id.* at 220–21, 618 S.E.2d at 322.

55. *Id.* at 221, 618 S.E.2d at 322.

56. *Id.* (citing *McEwen Lumber Co. v. Lipscomb Bros. Lumber*, 234 Va. 243, 247, 360 S.E.2d 845, 848 (1987)). The court also rejected the defendants’ assertions that the plaintiff had committed actual or constructive fraud by moving for default judgment. *Id.* at 218, 618 S.E.2d at 321.

57. *See* 272 Va. 560, 565, 636 S.E.2d 452, 454 (2006).

58. *Id.* at 562, 636 S.E.2d at 453.

59. *Id.* *See generally* *North Carolina v. Alford*, 400 U.S. 25 (1970) (giving rise to the term “*Alford* plea”).

60. *See Parson*, 272 Va. at 563, 636 S.E.2d at 453.

61. *Id.*

62. *Id.* at 564, 636 S.E.2d at 454; *see also* *New Hampshire v. Maine*, 532 U.S. 742, 749–51 (2001).

same fact or facts, in successive legal proceedings.⁶³ The doctrine, however, does not prevent a party from asserting contradictory legal positions.⁶⁴ Thus, the issue in *Parson* was whether the plaintiff's *Alford* plea constituted a factual or legal assertion by the plaintiff.⁶⁵

The court held that the plaintiff maintained a position of law in making his *Alford* plea because he "conceded only that the evidence was sufficient to convict him of the offenses and did not admit as a factual matter that he had participated in the acts constituting the crimes."⁶⁶ Therefore, the remedy of judicial estoppel was improper because the plaintiff did not assert conflicting factual positions.⁶⁷ Further, the issue of whether plaintiff actually committed the defamatory acts was a question of fact, and therefore, the circuit court erred in granting the extraordinary remedy of summary judgment.⁶⁸

E. *Medical Malpractice*

In *Harris v. Kreutzer*, the Supreme Court of Virginia recognized a limited cause of action for medical malpractice arising out of a Rule 4:10 independent medical examination ("IME").⁶⁹ In the underlying personal injury action, the claimant alleged that she sustained traumatic brain injury in an automobile accident.⁷⁰ The trial court ordered the plaintiff to submit to an IME conducted by the defendant, a licensed clinical psychologist specializing in neuropsychology.⁷¹ Plaintiff alleged that the defendant breached the applicable standard of care by failing to appropriately examine and evaluate the mental condition of the plaintiff, and by being deliberately abusive to the plaintiff during the examination.⁷²

The defendant contended that there was no physician-patient relationship between the parties in a Rule 4:10 examination, and,

63. See *Parson*, 272 Va. at 565, 636 S.E.2d at 454 (citing *Bentley Funding Group v. SK & R Group*, 269 Va. 315, 325, 609 S.E.2d 49, 53-54 (2005)).

64. See *id.* (citing *Bentley Funding*, 269 Va. at 326, 609 S.E.2d at 54).

65. See *id.* at 566, 636 S.E.2d at 455.

66. *Id.*

67. *Id.*

68. *Id.*

69. See 271 Va. 188, 198, 624 S.E.2d 24, 30 (2006).

70. *Id.* at 193, 624 S.E.2d at 27.

71. *Id.*

72. *Id.* at 194, 624 S.E.2d at 27.

as a result, the plaintiff's claim of medical malpractice must fail as a matter of law.⁷³ The court disagreed and ruled instead that pursuant to Rule 3:1 the plaintiff had impliedly consented to a Rule 4:10 medical examination by placing her mental condition at issue in the underlying personal injury claim.⁷⁴ According to the court, the parties had therefore formed a limited physician-patient relationship for the purposes of the examination.⁷⁵

The court ruled further that the IME doctor had a cognizable duty under the Medical Malpractice Act, Virginia Code sections 8.01-581.1 to 8.01-581.20:1, the breach of which could sustain a claim for malpractice for conduct during the examination.⁷⁶ Virginia Code section 8.01-581.1 defines malpractice as "any . . . action for personal injuries . . . based on health care or professional services rendered . . . by a health care provider, to a patient."⁷⁷ The court held that the statutory definition of "health care"⁷⁸ was broad enough to encompass a medical diagnosis conducted for the benefit of parties involved in litigation, including the court.⁷⁹ Thus, a Rule 4:10 IME is "health care" within the meaning of section 8.01-581.1.⁸⁰

Although the court recognized a cause of action for malpractice arising out of a Rule 4:10 examination, it added that "the scope of such a cause of action is very limited."⁸¹ The Court held:

The physician's professional duty in the conduct of a Rule 4:10 examination relates solely to the actual performance of the examination. Unlike a physician in a traditional physician/patient relationship, a Rule 4:10 examiner has no duty to diagnose or treat the patient, and no liability may arise from his report or testimony regarding the examination. Because the Rule 4:10 examination functions only to ascertain information relative to the underlying litiga-

73. *Id.* at 195, 624 S.E.2d at 28.

74. *Id.* at 199, 624 S.E.2d at 30.

75. *Id.*

76. *See id.* at 200, 624 S.E.2d at 31.

77. VA. CODE ANN. § 8.01-581.1 (Repl. Vol. 2007); *Harris*, 271 Va. at 199, 624 S.E.2d at 31.

78. "Health care" is defined as "any act . . . performed . . . by any health care provider for [or] to . . . a patient during the patient's medical diagnosis." VA. CODE ANN. § 8.01-581.1 (Repl. Vol. 2007).

79. *See Harris*, 271 Va. at 199-200, 624 S.E.2d at 31.

80. *Id.* at 200, 624 S.E.2d at 31.

81. *Id.*

tion, the physician's duty in a Rule 4:10 setting is solely to examine the patient without harming her in the conduct of the examination.⁸²

By limiting the scope of the examining physician's liability, the court recognized the "policy imperative that Rule 4:10 malpractice actions not be used to intimidate physicians from undertaking court-ordered examinations or to manipulate the outcome of such an examination."⁸³

The Supreme Court of Virginia has also interpreted the definition of "health care" in the increasingly important area of nursing home care. In *Alcoy v. Valley Nursing Homes, Inc.*, the court held that the exclusivity provisions of the malpractice statutes did not bar the plaintiff's claims for negligence and sexual assault and battery against the nursing home defendant.⁸⁴ Four days after checking into the nursing home, the decedent was sexually assaulted by an unknown assailant.⁸⁵ The plaintiff administrator alleged that his claims involved administrative, personnel, and security decisions made by the defendant, rather than health care or professional services rendered by the nursing home.⁸⁶ The court agreed, giving a limited reading of the statutory definitions by holding that "the definitions of 'malpractice' and 'health care' apply to patients on an individual basis, rather than to the staffing and security of any medical facility in which the patients are located."⁸⁷ Accordingly, Virginia Code section 8.01-581.1 did not bar plaintiff's claims for negligence and sexual assault and battery.⁸⁸

F. *Nonsuit*

In a decision that was effectively reversed by legislative enactment,⁸⁹ the Supreme Court of Virginia held that a trial court may grant a plaintiff's motion for a second nonsuit despite the plaintiff's failure to provide notice to the defendant.⁹⁰ The plaintiff in

82. *Id.* at 201, 624 S.E.2d at 31.

83. *Id.*, 624 S.E.2d at 32.

84. *See* 272 Va. 37, 43-44, 630 S.E.2d 301, 304 (2006).

85. *Id.* at 40, 630 S.E.2d at 302.

86. *Id.* at 43, 630 S.E.2d at 304.

87. *Id.*

88. *See id.* at 44, 630 S.E.2d at 304.

89. *See* VA. CODE ANN. § 8.01-380(B) (Repl. Vol. 2007).

90. *See* *Janvier v. Arminio*, 272 Va. 353, 367, 634 S.E.2d 754, 761 (2006).

Janvier v. Arminio took her voluntary nonsuit pursuant to Virginia Code section 8.01-380(B) after failing to effect service of process on the defendant within the one-year period prescribed by Virginia Code section 8.01-275.1.⁹¹ Plaintiff filed a second similar medical malpractice claim, but once again failed to serve the defendant within one year.⁹² The trial court granted her motion for a second nonsuit and plaintiff filed her third motion for judgment, this time successfully serving the defendant with process within the statutory period.⁹³ Plaintiff's multiple filings and motions had the practical effect of extending the two-year statute of limitations for medical malpractice actions⁹⁴ to approximately four-and-a-half years.⁹⁵ Defendant was not aware of the previous nonsuit orders before filing responsive pleadings to the third complaint.⁹⁶

The defendant asserted that Virginia Code section 8.01-380 required a plaintiff to give notice to the defendant before the trial court could properly grant a motion for a second nonsuit.⁹⁷ Accordingly, the trial court's order awarding the second nonsuit was *void ab initio* and therefore, the third complaint was time-barred by the statute of limitations while the second complaint remained an open case.⁹⁸ The court disagreed. Justice Koontz wrote that it is the "duty of the courts . . . 'to construe the law as it is written.'"⁹⁹ Further, "nothing in the language of [Virginia] Code § 8.01-380(B) suggests that the General Assembly intended to place any additional restriction on the granting of the second nonsuit other than to leave the matter to the trial court's discretion or the concurrence of the parties."¹⁰⁰ Therefore, absent any fraud on the part of the plaintiff, Virginia Code section 8.01-380 (as it existed

91. *See id.* at 359, 634 S.E.2d at 756.

92. *Id.*

93. *Id.*, 634 S.E.2d at 757.

94. *See* VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 2007).

95. Plaintiff was last treated by the defendant doctor on November 14, 1999. *Janvier*, 272 Va. at 359, 634 S.E.2d at 756. Her first lawsuit was filed on May 21, 2001, and nonsuited on June 3, 2002. *Id.* Pursuant to Virginia Code section 8.01-229(E)(3), plaintiff filed the second lawsuit on October 7, 2002. *Id.* She nonsuited the second action without notifying defendant on December 4, 2003, and filed her third claim on May 27, 2004. *Id.*, 634 S.E.2d at 757.

96. *Id.*

97. *See id.* at 360, 634 S.E.2d at 757.

98. *Id.* at 361, 634 S.E.2d at 758.

99. *Id.* at 366, 634 S.E.2d at 761 (quoting *Hampton Rds. Sanitation Dist. Comm'n v. City of Chesapeake*, 218 Va. 696, 702, 240 S.E.2d 819, 823 (1978)).

100. *Id.*, 634 S.E.2d at 760.

then) did not require notice to the defendant for motions for a second nonsuit.¹⁰¹ Despite its endorsement of judicial restraint, the court appeared to suggest that the interests of justice would best be served by allowing all parties to address the trial court when ruling on a motion for a second nonsuit.¹⁰² The General Assembly apparently listened, amending Virginia Code section 8.01-380 to require reasonable notice to defendants before allowing a second nonsuit.¹⁰³

The Supreme Court of Virginia issued several other rulings over the past two years involving motions for nonsuits. In *Williamsburg Peking Corp. v. Kong*, the court held that a motion for sanctions survives an order granting a nonsuit because the motion “has no bearing on the facts giving rise to the right to seek judicial remedy.”¹⁰⁴ Furthermore, according to the court, the “General Assembly never intended that a nonsuit order could exonerate a litigant’s misconduct.”¹⁰⁵

The court held in *Nerri v. Adu-Gyamfi* that an order granting a nonsuit is invalid where the movant attorney’s law license has been suspended.¹⁰⁶ In *Bio-Medical Applications of Virginia, Inc. v. Coston*, the court ruled that a plaintiff’s motion for nonsuit was untimely after submission of the matter to the trial court on summary judgment—despite the trial judge’s request for any additional motions after rendering his verdict.¹⁰⁷ Finally, in *Berry v. F&S Financial Marketing, Inc.*, the court held a motion for nonsuit timely where it was filed prior to submission of the defendant’s motion to dismiss based on the one-year service of process requirement of former Rule 3:3(c).¹⁰⁸

101. See *id.* at 367, 634 S.E.2d at 761. The court’s ruling in *Janvier* is an extension of its earlier opinion in *Waterman v. Halverson*, 261 Va. 203, 540 S.E.2d 867 (2001). In *Waterman*, the court ruled that notice is not required for a plaintiff’s voluntary nonsuit. *Id.* at 208, 540 S.E.2d at 869.

102. For example, the court noted that “[b]oth future plaintiffs and defendants might well benefit should the General Assembly amend Code § 8.01-380 by providing a requirement for notice or the exercise of due diligence to give notice to a defendant when a plaintiff seeks a second or subsequent nonsuit.” *Janvier*, 272 Va. at 357, 634 S.E.2d at 755.

103. See Act of Mar. 15, 2007, ch. 367, 2007 Va. Acts 510 (codified as amended at VA. CODE ANN. § 8.01-380(B) (Repl. Vol. 2007)).

104. 270 Va. 350, 354, 619 S.E.2d 100, 102 (2005).

105. *Id.*

106. See 270 Va. 28, 31, 613 S.E.2d 429, 430 (2005).

107. See 272 Va. 489, 494–95, 634 S.E.2d 349, 351–52 (2006).

108. See 271 Va. 329, 333–34, 626 S.E.2d 821, 823–24 (2006). Former Rule 3:3(c) required service of process on a defendant within one year of filing. VA. SUP. CT. R. 3:3(c)

G. *Physician Immunity*

In what may be one of the most short-lived decisions in its history, the Supreme Court of Virginia issued a decision interpreting a physician's immunity under Virginia Code section 8.01-581.18, and then overruled the decision four months later.¹⁰⁹ In *Auer v. Miller*, the plaintiff brought a wrongful death claim against one of the defendant physicians for failing to properly review and evaluate a medical report.¹¹⁰ The court affirmed the trial court's grant of immunity to a physician pursuant to former Virginia Code section 581.18(B).¹¹¹ It stated in part:

Any physician shall be immune from civil liability for any failure to review, or to take any action in response to the receipt of, any report of the results of any laboratory test or other examination of the physical or mental condition of any person, which test or examination such physician neither requested nor authorized in writing, unless such report is provided directly to the physician by the person so examined or tested with a request for consultation or by the State Department of Health.¹¹²

The evidence showed that another treating physician authorized the report.¹¹³ Furthermore, there was no indication that the decedent provided the defendant with a copy of the report requesting consultation.¹¹⁴ The court rejected plaintiff's assertion that the statutory immunity was not intended to apply to attending physicians, stating "[h]ad the General Assembly intended to limit the statute's application to outpatient situations, it could have so stated."¹¹⁵ Therefore, the defendant's immunity was based on his failure to review the report of his own patient.¹¹⁶

(2004) (repealed 2006). It has been replaced by Rule 3:5(e). *See* VA. SUP. CT. R. 3:5(e).

109. *See Auer v. Miller*, 270 Va. 172, 174, 613 S.E.2d 421, 422 (2005), *overruled by* Oraee v. Breeding, 270 Va. 488, 491, 621 S.E.2d 48, 49 (2005).

110. *See id.* at 174–76, 613 S.E.2d at 422–23.

111. *Id.* at 177, 613 S.E.2d at 424.

112. VA. CODE ANN. § 8.01-581.18(B) (2005) (repealed 2006).

113. *See Auer*, 270 Va. at 177, 613 S.E.2d at 424.

114. *Id.*

115. *Id.*, 613 S.E.2d at 423. Plaintiff's claims against the physician who requested the report and two medical practice groups were not barred. A jury returned verdicts against the co-defendant physician and the practice groups, but the award against one of the practice groups was vacated by the trial court on other grounds. *Id.* at 175, 613 S.E.2d at 422.

116. *See id.* at 177, 613 S.E.2d at 424.

The Supreme Court of Virginia revisited the issue approximately four months later, overturning *Auer* in *Oraee v. Breeding*.¹¹⁷ In *Oraee*, the plaintiff asserted that subsections A and B of Virginia Code section 8.01-581.18 must be read together and that subsection A limited the applicability of subsection B to situations where a non-physician has ordered the medical report.¹¹⁸ Virginia Code section 8.01-581.18(A), as it existed when *Oraee* was decided in 2005, stated in part:

Whenever a laboratory test or other examination of the physical or mental condition of any person is conducted by or under the supervision of a person other than a physician and not at the request or with the written authorization of a physician . . . [s]uch report shall state in bold type that it is the responsibility of the recipient to arrange with his physician for consultation and interpretation of the results of such test or examination.¹¹⁹

“According to the plaintiff, the intent of the statute [was] to direct the appropriate course of action when an individual, as opposed to a physician, requests a laboratory test or examination.”¹²⁰ The plaintiff argued that subsection B must have related only to instances involving reports and examinations ordered by non-physicians.¹²¹

The court admitted in *Auer* that it had failed to consider whether subsection B must be read in light of subsection A.¹²² Applying well-known rules of statutory interpretation, the court noted: “[A] statute should be read and considered as a whole, and the language of a statute should be examined in its entirety to determine the intent of the General Assembly from the words contained in the statute.”¹²³ Separate sections of a statute should be interpreted to provide a “consistent and harmonious whole,” thereby effectuating the “legislative goal.”¹²⁴ Accordingly, the immunity granted in subsection B “in essence follows the report de-

117. 270 Va. 488, 491, 621 S.E.2d 48, 49 (2005).

118. *See id.* at 498–99, 621 S.E.2d at 53.

119. VA. CODE ANN. § 8.01-581.18(A) (Repl. Vol. 2000).

120. *Oraee*, 270 Va. at 496, 621 S.E.2d at 51–52.

121. *Id.*, 621 S.E.2d at 52.

122. *Id.* at 497–98, 621 S.E.2d at 52.

123. *Id.* at 498, 621 S.E.2d at 53 (quoting *Dep’t of Med. Assistance Servs. v. Beverly Healthcare of Fredericksburg*, 268 Va. 278, 285, 601 S.E.2d 604, 607–08 (2004)).

124. *Id.*, 621 S.E.2d at 52 (quoting *Va. Elec. & Power Co. v. Bd. of County Supervisors*, 226 Va. 382, 387–88, 309 S.E.2d 308, 311 (1983)).

scribed in subsection A.”¹²⁵ To hold otherwise would lead to consequences the General Assembly never envisioned in enacting Virginia Code section 8.01-581.18.¹²⁶

Justice Agee, in a strongly worded dissent, stated that the court’s unanimous decision in *Auer* was the correct interpretation of Virginia Code section 8.01-581.18(B).¹²⁷ Justice Agee criticized the majority for its “passing reference” to the doctrine of *stare decisis*, stating that “[p]rior decisions of this Court are entitled to respect and deference.”¹²⁸ The majority’s cursory reversal of *Auer*, in the dissenters’ view, “lessens the value of *stare decisis*” and “tends to bring adjudications of the tribunal into the same class as a restricted railroad ticket, good for this day and train only.”¹²⁹ Justice Agee attacked the judgment on substantive bases as well, noting that the court’s own precedent contains numerous examples of statutory subsections being read and applied separately.¹³⁰ Furthermore, the General Assembly could have easily inserted language into subsection B that would have clearly limited its application to situations governed by subsection A, but it did not.¹³¹ Finally, the majority’s concern for the “unintended consequences” of the plain statutory language was a matter for the legislature, not the judiciary.¹³²

H. *Pro Se Representation*

In *Kone v. Wilson*, the Supreme Court of Virginia ruled that the administrator of a decedent’s estate may not file a wrongful death action *pro se*.¹³³ After the plaintiff administrator filed suit, the defendants moved to strike the motion for judgment, asserting that the plaintiff was engaged in the unauthorized practice of law.¹³⁴

125. *Id.* at 499, 621 S.E.2d at 53.

126. *Id.* The court gave the example of a physician who performs surgery on a patient even though a report ordered by another treating physician indicates that surgery is not necessary. According to *Auer*, the surgeon would be immune under section 8.01-581.18(B). *Id.*

127. *Id.* at 500–01, 621 S.E.2d at 54 (Agee, J., dissenting).

128. *Id.* at 501, 621 S.E.2d at 54.

129. *Id.*, 621 S.E.2d at 55 (quoting *Newman v. Erie Ins. Exch.*, 256 Va. 501, 510, 507 S.E.2d 348, 353 (1998) (Compton, J., dissenting)).

130. *See id.* at 505, 621 S.E.2d at 57.

131. *Id.* at 507, 621 S.E.2d at 58.

132. *Id.* at 508, 621 S.E.2d at 58.

133. 272 Va. 59, 62–63, 630 S.E.2d 744, 746 (2006).

134. *Id.* at 61, 630 S.E.2d at 745.

The trial court denied the motion to strike but held that the plaintiff could not proceed without representation.¹³⁵ An attorney entered an appearance for the administrator, but the defendants again moved to strike based on the grounds that the plaintiff had not filed any pleading that would have tolled the statute of limitations.¹³⁶ The circuit court agreed with the defendants, granted the motion to strike, and dismissed the claim with prejudice.¹³⁷

On appeal, the plaintiff asserted that the administrator “steps into the shoes” of the decedent and may “initiate an action *pro se* and be sued in [the decedent’s] name.”¹³⁸ Plaintiff further contended that the circuit court abused its discretion in not allowing the plaintiff’s counsel to file an amended complaint and in not allowing the attorney’s signature to relate back to the plaintiff’s initial pleading.¹³⁹

The supreme court held in favor of the defendants, ruling that a wrongful death action is a statutory creation and must be applied according to Virginia Code section 8.01-50,¹⁴⁰ which allows the decedent’s personal representative to bring an action for wrongful death on behalf of the decedent’s beneficiaries;¹⁴¹ however, “the personal representative merely acts as a surrogate for the decedent’s beneficiaries.”¹⁴² The plaintiff was unable to maintain an action for himself and therefore had no right to file the lawsuit *pro se*.¹⁴³

Furthermore, because the plaintiff had no right to file the action *pro se*, the trial court could not enter an order allowing an amended complaint bearing the signature of an attorney because “[a]n amendment to a pleading ‘presupposes a valid instrument as its object.’”¹⁴⁴ The initial filing was invalid and therefore precluded an amended complaint.¹⁴⁵ Similarly, the signature of

135. *Id.*

136. *Id.* at 62, 630 S.E.2d at 745.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*, 630 S.E.2d at 745–46.

141. VA. CODE ANN. § 8.01-50(B) (Repl. Vol. 2007); *Kone*, 272 Va. at 62, 630 S.E.2d at 746.

142. *Kone*, 272 Va. at 62, 630 S.E.2d at 746.

143. *Id.* at 62–63, 630 S.E.2d at 746.

144. *See id.* at 63, 630 S.E.2d at 746 (quoting *Wellmore Coal Corp. v. Harman Mining Corp.*, 264 Va. 279, 283, 568 S.E.2d 671, 673 (2002)).

145. *Id.*

Plaintiff's attorney could not relate back to the initial filing because there were no valid proceedings pending before the trial court.¹⁴⁶ Plaintiff's initial filing was a nullity that could not be recognized by the court without condoning the unauthorized practice of law.¹⁴⁷ Thus, the trial court properly dismissed Plaintiff's claim with prejudice.¹⁴⁸

I. *Sanctions*

The Supreme Court of Virginia addressed the issue of sanctions in several decisions over the past two years. The most important decision is almost certainly the opinion in *Ford Motor Co. v. Benitez*.¹⁴⁹ In a decision sure to cause a stir in both the plaintiffs' and defendants' bar, the court affirmed a trial court's sanctioning of a defense counsel for asserting affirmative defenses that were not "well-grounded in fact" pursuant to Virginia Code section 8.01-271.1.¹⁵⁰ The court appeared to limit the well-known practice of including any affirmative defense—regardless of whether the defense is applicable—in the defensive pleadings. The ruling in *Benitez*, however, may not be as far-reaching as the plaintiffs' bar might hope. The opinion concludes with an axiom familiar to plaintiff and defense attorneys alike: "In no event may counsel file a pleading he knows to be unfounded in fact."¹⁵¹

The plaintiff in *Benitez* filed suit alleging injuries from a defective air bag.¹⁵² The plaintiff conducted extensive discovery but nonsuited the claim before trial.¹⁵³ The plaintiff filed a second suit on the same cause of action approximately five months later and the defendants asserted thirteen affirmative defenses.¹⁵⁴ Af-

146. *Id.*

147. *See id.*

148. *Id.*

149. 273 Va. 242, 639 S.E.2d 203 (2007).

150. *See id.* at 245, 253, 639 S.E.2d at 204, 208.

151. *Id.* at 253, 639 S.E.2d at 208.

152. *Id.* at 245, 639 S.E.2d at 204.

153. *Id.*

154. *See id.* at 246, 639 S.E.2d at 204. The defendant asserted that it would "rely on the following affirmative defenses, if applicable, and if proved at trial" . . . (1) contributory negligence, (2) assumption of the risk, (3) negligence of third parties, (4) failure to state a cause of action, (5) lack of notice of warranty claims as required by the Uniform Commercial Code, (6) failure to mitigate damages, (7) claim barred by terms of limited warranty, (8) unauthorized misuse or alteration of vehicle by plaintiff or others, (9) failure to

ter the trial court granted Plaintiff's motion to strike some of the defenses for lack of factual support, the plaintiff moved for sanctions under Virginia Code section 8.01-271.1.¹⁵⁵ The court granted the motion, holding that the defenses were not grounded in fact when the pleading was signed, and the court awarded \$2,000 in sanctions against the defendants' attorney.¹⁵⁶

The supreme court affirmed the trial court's decision, noting that the issue of sanctions turns on a mixed question of law and fact.¹⁵⁷ Virginia Code section 8.01-271.1 provides that an attorney's signature has a two-prong effect: by signing a pleading, the attorney certifies that the pleading is well-grounded in fact to the best of his or her knowledge, and the pleading is supported by law, or a good-faith argument to change the existing law.¹⁵⁸ Therefore, a trial court first must determine the attorney's actual knowledge of the facts and whether the attorney's understanding of the facts is based on a reasonable inquiry.¹⁵⁹ Further, the court must assess whether the pleading is supported by legal authority or a well-founded argument to change the law.¹⁶⁰

Unlike the supreme court's prior rulings involving Virginia Code section 8.01-271.1, the affirmative defenses asserted by the defendants in *Benitez* involved solely the first prong of this analysis—whether the defenses are fact-based.¹⁶¹ Accordingly, the outcome depended on whether the pleading was grounded in fact, based on the signing attorney's knowledge, information, and belief after reasonable inquiry.¹⁶² Because the original claim was

comply with terms of warranty, (10) constitutional bars respecting punitive damage claims, (11) bars imposed by the applicable statute of limitations, (12) "all other defenses that may become applicable or available up to and including the time of trial," and (13) "release and/or accord and satisfaction."

Id.

155. *Id.* at 247, 639 S.E.2d at 205. The court struck the defenses of contributory negligence, assumption of the risk, negligence of a third party, failure to mitigate damages, unconstitutionality of punitive damages, and the statute of limitations. *Id.* The court reserved judgment on the warranty defenses and the defendants withdrew the remaining affirmative defenses. *Id.*

156. *Id.* at 248, 639 S.E.2d at 205–06.

157. *Id.* at 249, 253, 639 S.E.2d at 206, 208.

158. See VA. CODE ANN. § 8.01-271.1 (Repl. Vol. 2007); *Benitez*, 273 Va. at 249–50, 639 S.E.2d at 206.

159. *Benitez*, 273 Va. at 250, 639 S.E.2d at 206.

160. *Id.*

161. *Id.* at 250–51, 639 S.E.2d at 206–07.

162. *Id.*, 639 S.E.2d at 207.

nonsuited after the parties conducted extensive discovery, it was clear that the signing attorney knew the affirmative defenses were not supported by the facts.¹⁶³

The court rejected the defendants' argument that the pleading merely reserved the defenses "if applicable, and if proved at trial," ruling instead that "the fundamental purpose of pleadings . . . [is] to 'inform the opposite party of the true nature of the claim or defense.'"¹⁶⁴ The defendants' attempt to reserve potential defenses constituted the very type of abuse of process which Virginia Code section 8.01-271.1 was enacted to prevent.¹⁶⁵ The court explained that the defendants should move to amend their pleadings as facts come to light supporting new defenses.¹⁶⁶

Based on *Benitez*, a word of caution is warranted before moving for Virginia Code section 8.01-271.1 sanctions in every case because the opinion is very fact-specific. The plaintiff nonsuited and refiled the exact same claim; the defendant's attorney's pleading of inapplicable affirmative defenses was clearly improper after the same parties and counsel took part in full discovery.¹⁶⁷ Defense attorneys would be well-advised to conduct thorough inquiries into the facts of each lawsuit before pleading affirmative defenses in future cases.

In *Nusbaum v. Berlin*, the Supreme Court of Virginia held that a trial court does not have inherent authority to discipline an attorney by awarding monetary sanctions consisting of attorneys' fees and costs.¹⁶⁸ The incident arose out of an alleged physical contact between the parties' attorneys.¹⁶⁹ During trial, one of the plaintiffs' attorneys requested a brief bench conference.¹⁷⁰ As the bailiff later testified, while standing at the side bar, the plaintiffs' counsel allegedly shoved the defendants' counsel with his el-

163. *Id.* at 251, 639 S.E.2d at 207.

164. *Id.* at 251-52, 639 S.E.2d at 207 (citing VA. SUP. CT. R. 1:4(d)).

165. *Id.* at 252, 639 S.E.2d at 207.

166. *Id.*, 639 S.E.2d at 208. For an interesting corollary to the issue of pleading affirmative defenses, see *Monahan v. Obici Medical Management Services, Inc.* where the court held that the defense of mitigation of damages need not be specifically pled in order for a defendant to assert it, "provided the issue has otherwise been shown by the evidence." 271 Va. 621, 632, 628 S.E.2d 330, 336 (2006).

167. See *Benitez*, 273 Va. at 251, 639 S.E.2d at 207.

168. 273 Va. 385, 390, 641 S.E.2d 494, 496 (2007).

169. See *id.* at 390-91, 641 S.E.2d at 496.

170. *Id.* at 390, 641 S.E.2d at 496.

bow.¹⁷¹ Because the alleged altercation occurred in sight of the jury, the trial court declared a mistrial and turned to the issue of punishing the offending attorney.¹⁷² The attorneys involved in the dispute disagreed as to whether the contact by the plaintiffs' attorney was intentional or inadvertent.¹⁷³ After briefing and oral argument from both sides, the trial court eventually sanctioned the plaintiffs' attorney in the amount of the defendants' reasonable attorneys' fees and costs.¹⁷⁴ The court awarded the defendants a total amount of \$52,738.88.¹⁷⁵

The plaintiffs' attorney appealed the decision, arguing that "the purpose of the trial court's inherent power to discipline an attorney is to protect the public, not to punish the attorney or to compensate the parties."¹⁷⁶ A trial court's authority to suspend an attorney's license to practice in a particular court or action is a result of its inherent authority to manage the courtroom.¹⁷⁷ Contrarily, an award of attorneys' fees merely punishes the attorney and compensates the opposing party.¹⁷⁸ Therefore, the trial court had no inherent authority upon which to base such an award.¹⁷⁹

The supreme court agreed with the plaintiffs' attorney and reversed the trial court's award.¹⁸⁰ Pursuant to the court's decision in *Lannon v. Lee Conner Realty Corp.*,¹⁸¹ trial courts have no authority to sanction a party litigant based on costs and attorneys' fees.¹⁸² Likewise, the trial court erred in awarding attorneys' fees against a litigant's counsel.¹⁸³ Moreover, an assessment of fees against an opposing party or counsel—without statutory or contractual authority—violated the "American rule" against recovery

171. *Id.* at 391, 641 S.E.2d at 496.

172. *See id.* at 392, 641 S.E.2d at 497.

173. *See id.* at 394–95, 641 S.E.2d at 498–99 (explaining the different accounts of the attorneys' conduct).

174. *Id.* at 395–97, 641 S.E.2d at 499. The trial court initially declined to award sanctions, but it reversed the decision on defendants' motion to reconsider. *Id.* at 396–97, 641 S.E.2d at 499–500.

175. *Id.* at 397, 641 S.E.2d at 500.

176. *Id.* at 398, 641 S.E.2d at 500–01.

177. *See id.* at 399, 641 S.E.2d at 501.

178. *See id.* at 400, 641 S.E.2d at 502.

179. *Id.* at 400–01, 641 S.E.2d at 502.

180. *Id.*

181. 238 Va. 590, 385 S.E.2d 380 (1989).

182. *See Nusbaum*, 273 Va. at 399–400, 641 S.E.2d at 501.

183. *Id.* at 400, 641 S.E.2d at 502.

of attorneys' fees.¹⁸⁴ The trial court's sanction award was designed solely to punish the plaintiffs' attorney and it was therefore improper.¹⁸⁵

J. *Standing*

In *Campbell v. Harmon*, the Supreme Court of Virginia ruled that a decedent's personal representative has standing to assert any cause of action existing at the time of the decedent's death pursuant to section 8.01-25.¹⁸⁶ The plaintiff in *Campbell* was the personal representative of the estate of the decedent who was a lifetime beneficiary of a trust.¹⁸⁷ Plaintiff filed suit against the trustees seeking an accounting of the trust administration pursuant to Virginia Code section 8.01-31, which grants the trial court authority to order an accounting at the request of the beneficiary.¹⁸⁸ Plaintiff asserted standing based on the survival provisions of Virginia Code section 8.01-25.¹⁸⁹ The trial court ruled that Plaintiff lacked standing because the will did not incorporate any right to an accounting under Virginia Code section 8.01-31 on behalf of the personal representative.¹⁹⁰

The supreme court reversed the trial court's decision, ruling that the clear language of Virginia Code section 8.01-25 states the General Assembly's intent that "[e]very cause of action whether legal or equitable, which is cognizable in the Commonwealth of Virginia, shall survive . . . the death of the person in whose favor the cause of action existed."¹⁹¹ Therefore, assuming the decedent's beneficiary had a right to an accounting under Virginia Code section 8.01-31, the personal representative had standing to assert a similar claim after the decedent's death.¹⁹² The court rejected the defendant trustees' attempt to limit the types of actions that sur-

184. *See id.*, 641 S.E.2d at 501.

185. *Id.* at 400–01, 641 S.E.2d at 502. Interestingly, the court indicated by citations to unfavorable caselaw that its decision appears to be at odds with the Supreme Court of the United States' decision in *Chamber v. NASCO, Inc.*, 501 U.S. 32 (1991), and other state supreme court decisions. *See id.* at 401, 641 S.E.2d at 502.

186. 271 Va. 590, 601, 628 S.E.2d 308, 314 (2006).

187. *Id.* at 593, 628 S.E.2d at 309.

188. *Id.* at 595, 628 S.E.2d at 310.

189. *Id.*

190. *See id.* at 596, 628 S.E.2d at 311.

191. *Id.* at 598, 628 S.E.2d at 312.

192. *See id.* at 598–99, 628 S.E.2d at 312.

vive an individual's death to those specifically preserved by statute.¹⁹³ Accordingly, the personal representative had standing to demand an accounting from the trustees because the cause of action existed at the time of the decedent's death.¹⁹⁴

K. *Statute of Limitations*

The Supreme Court of Virginia recently addressed several matters involving statutes of limitation. In *Harmon v. Sadjadi*, the court held that the one-year statute of limitations in Virginia Code section 8.01-229(B)(1) for claims brought on behalf of an estate accrues on the date the plaintiff qualifies as personal representative within Virginia.¹⁹⁵ In so holding, the court reversed its earlier decision in *McDaniel v. North Carolina Pulp Co.*¹⁹⁶

Plaintiff qualified as personal representative of the decedent's estate in West Virginia and then improperly filed suit in Virginia on behalf of the estate.¹⁹⁷ After nonsuiting her initial claim, the administration of the estate in West Virginia closed, and the plaintiff was discharged of her representation.¹⁹⁸ She then qualified as personal representative of the estate in Virginia, and filed a second lawsuit on behalf of the estate alleging the same cause of action.¹⁹⁹ The trial court granted the defendant's special plea of the one-year statute of limitations and dismissed the claim.²⁰⁰ Specifically, the trial court held that the statutory period began to run when Plaintiff qualified as personal representative in West Virginia.²⁰¹ The trial court further held that the period was tolled by Plaintiff filing her first lawsuit.²⁰² The tolling ceased when the administration of the estate in West Virginia closed.²⁰³ Conse-

193. *Id.*

194. *See id.* at 601, 628 S.E.2d at 314. The Court affirmed the trial court's dismissal of the plaintiff's request for an accounting as to the decedent's personal property allegedly taken by the trustees, citing a lack of standing for any such action. *Id.* at 601-02, 628 S.E.2d at 314.

195. *See* 213 Va. 184, 198, 639 S.E.2d 294, 302 (2007).

196. *Id.* at 192-93, 639 S.E.2d at 299 (overruling *McDaniel v. North Carolina Pulp Co.*, 198 Va. 612, 95 S.E.2d 201 (1956)).

197. *See id.* at 187, 639 S.E.2d at 295.

198. *Id.*

199. *Id.*, 634 S.E.2d at 295-96.

200. *Id.* at 187-88, 639 S.E.2d at 296.

201. *See id.* at 188, 639 S.E.2d at 296.

202. *See id.*

203. *Id.*

quently, according to the trial court, Plaintiff's second lawsuit was filed outside of the one-year period provided by section 8.01-229(B)(1).²⁰⁴

In reaching its decision, the trial court relied on *McDaniel*.²⁰⁵ In *McDaniel*, the court explained that the plaintiffs qualified as personal representatives of the decedent in Nevada.²⁰⁶ The court in *McDaniel* held that the "statute of limitations was tolled during the pendency of an action filed by a personal representative who is qualified in a foreign jurisdiction, but not qualified in Virginia, because 'the real party in interest remained the same.'"²⁰⁷ In applying *McDaniel*, the trial court held by implication that the term "qualification" in Virginia Code section 8.01-229(B)(1) meant qualification in any state, not only Virginia.²⁰⁸

The court reversed *McDaniel* based on the doctrine of standing, holding that a foreign administrator or representative lacks standing to bring an action within the Commonwealth.²⁰⁹ It is clear that "when a party without standing brings a legal action, the action so instituted is, in effect, a legal nullity."²¹⁰ Therefore, the filing of an action by a foreign representative has no effect on the one-year period for bringing suit under Virginia Code section 8.01-229(B)(1).²¹¹ This is because the plaintiff's qualification as personal representative in West Virginia and her filing of the original lawsuit had no legal effect on her ability to file suit against the defendant.²¹² The one-year statutory period commenced when the plaintiff qualified in Virginia as the personal representative and so her lawsuit was timely filed.²¹³

204. *Id.* Virginia Code section 8.01-229(B)(1) allows the personal representative to file suit either within the time allowed by the applicable statute of limitations on the underlying claim or within one year of the individual's qualification as personal representative, whichever is later. *See* VA. CODE ANN. § 8.01-229(B)(1) (Repl. Vol. 2007).

205. *Harmon*, 213 Va. at 188, 639 S.E.2d at 296.

206. *See id.* at 192, 639 S.E.2d at 298 (citing *McDaniel*, 198 Va. at 613-14, 95 S.E.2d at 202-03).

207. *Id.* (quoting *McDaniel*, 198 Va. at 619-20, 95 S.E.2d at 206-07).

208. *Id.*

209. *See id.* at 197, 639 S.E.2d at 301. After reviewing all of its own citations to the *McDaniel* decision, the court held that the decision was "clearly a mistake and a flagrant error" and, notwithstanding the doctrine of *stare decisis*, was reversible. *Id.* at 192-97, 639 S.E.2d at 299-302.

210. *Id.* at 193, 639 S.E.2d at 299.

211. *Id.* at 198, 639 S.E.2d at 302.

212. *Id.*

213. *Id.* The court held that the term "qualification" must refer to qualification in the

In *Restaurant Co. v. United Leasing Corp.*, the Supreme Court of Virginia held that the assumption of an unexpired lease in a Chapter 11 bankruptcy plan did not affect the plaintiff leasing company's ability to sue the sureties.²¹⁴ The debtor on the lease defaulted on its obligations two years before filing Chapter 11 bankruptcy.²¹⁵ The bankruptcy court confirmed the debtor's reorganization plan, which provided for the debtor to assume the lease in its entirety.²¹⁶ The debtor continued to default on the lease after confirmation of the plan and the lessor filed suit against the sureties.²¹⁷ The trial court rejected the defendant sureties' special plea of the statute of limitations, holding that the statutory period commenced to run at the time of the debtor's first default after confirmation of the bankruptcy plan.²¹⁸

The supreme court disagreed, ruling that the assumption of an unexpired lease in a Chapter 11 bankruptcy plan was not tantamount to executing a new lease.²¹⁹ Although bankruptcy law treats a pre-petition unexpired lease "the same as a new, post-petition lease, for purposes of establishing the priority of payments from the bankruptcy estate in the event the reorganization is unsuccessful," the assumption did not create any new promises, obligations, or rights between the parties.²²⁰ Therefore, the four-year statute of limitations for filing suit against the sureties began to run when the debtor first defaulted on its obligations to the lessor.²²¹ Because the lessor's lawsuit against the sureties was not filed until seven years after the initial default, it was barred by the four-year statute of limitations.²²²

In *Newman v. Walker*, the Supreme Court of Virginia held that a defendant's affirmative misrepresentation of his identity may toll the applicable statute of limitations pursuant to Virginia

Commonwealth, as any other reading could result in the one-year period ending before the representative could file suit—a result that made little sense and would only frustrate the General Assembly's purpose in codifying Virginia Code section 8.01-229(B)(1). *See id.*

214. *See* 271 Va. 529, 532–33, 628 S.E.2d 520, 521 (2006).

215. *See id.* at 534, 628 S.E.2d at 522.

216. *Id.*

217. *Id.*

218. *Id.* at 534–35, 628 S.E.2d at 522.

219. *See id.* at 541, 628 S.E.2d at 526.

220. *Id.* at 538, 628 S.E.2d at 524.

221. *Id.* at 539, 628 S.E.2d at 525.

222. *Id.* at 540, 628 S.E.2d at 525. The court ruled further that the debtor's bankruptcy did not toll the lessor's claims against the sureties. *Id.* at 540–41, 628 S.E.2d at 525–26.

Code section 8.01-229(D).²²³ After an automobile accident, the defendant provided the attending police officer with false identification.²²⁴ Based on this information, the plaintiff filed suit naming the falsely-identified individual as the party-defendant.²²⁵ Plaintiff discovered her error and amended the motion for judgment, naming the correct defendant.²²⁶ Unfortunately, the correct defendant was not named as a party defendant within the two-year statute of limitations for personal injury claims,²²⁷ and consequently, the trial court granted the uninsured motorist carrier's motion to dismiss the action for untimeliness.²²⁸

The trial court relied on *Grimes v. Suzukawa*²²⁹ in holding that the defendant's misrepresentation did not constitute a "direct or indirect" means of obstructing plaintiff's action as required by Virginia Code section 8.01-229(D).²³⁰ In *Grimes*, the Supreme Court of Virginia held that an assailant's concealment of his identity by wearing a mask did not constitute direct or indirect obstruction of a plaintiff's filing a cause of action.²³¹ The defendant in *Newman* contended that because his use of false identification was similar to the assailant's use of a mask in *Grimes* (i.e., not used to obstruct the filing of an action) it did not constitute the "affirmative misrepresentation" required by Virginia Code section 8:01-229(D).²³²

The supreme court rejected this comparison, ruling that while the defendant offered the false identification to conceal his identity, he also affirmatively misrepresented his identity to the po-

223. 270 Va. 291, 293, 618 S.E.2d 336, 336 (2005).

224. *Id.*, 618 S.E.2d at 336-37.

225. *Id.*, 618 S.E.2d at 337.

226. *Id.* at 294, 618 S.E.2d at 337. Plaintiff first amended the complaint to name William Walker, Jr. as the defendant based on information from defendant's former employer. *Id.* Plaintiff discovered that this also was a false name, and she amended the motion for judgment again, naming Leonard Walker, Jr. as the defendant. *Id.*

227. *Id.*

228. *Id.*

229. 262 Va. 330, 551 S.E.2d 644 (2001).

230. *Newman*, 270 Va. at 294, 618 S.E.2d at 337. Virginia Code section 8:01-229(D) states, in part, "[w]hen the filing of an action is obstructed by a defendant's . . . [use of any] direct or indirect means to obstruct the filing of an action, then the time that such obstruction has continued shall not be counted as any part of the period within which the action must be brought." VA. CODE ANN. § 8.01-229(D) (Repl. Vol. 2007).

231. *Newman*, 270 Va. at 297-98, 618 S.E.2d at 339.

232. *Id.* at 295, 618 S.E.2d at 338.

lice officer.²³³ The defendant thus “undertook an affirmative act.”²³⁴ Accordingly, the court reversed the trial court’s decision and remanded the matter to determine whether the defendant’s use of the identification was indirectly or directly designed to obstruct the filing of plaintiff’s cause of action and, if so, the period of time such obstruction continued.²³⁵

L. Venue

In *Barnett v. Kite*, the Supreme Court of Virginia held that in determining proper venue, the trial courts should consider the affairs and business activity of a corporation as separate and distinct from the activities of a named party defendant who is a majority shareholder of that corporation.²³⁶ The plaintiff filed suit in the Richmond City Circuit Court against the individual defendant, alleging assault and battery for an incident that occurred in Powhatan County.²³⁷ The defendant’s only connection to Richmond was his majority shareholder status in a closely held corporation which conducted business and advertised in the city.²³⁸ Nonetheless, the trial court overruled the defendant’s objection to venue because the corporation “advertised its business in media that reached the City’s general population.”²³⁹

After losing a jury trial, the defendant appealed, asserting that the trial court’s decision effectively treated the defendant and the third-party corporation as “one and the same.”²⁴⁰ The supreme court agreed, ruling that Virginia Code section 8.01-262 “unambiguously refers to the affairs or business activity conducted by ‘the defendant,’ not to the affairs or business activity conducted by a corporation in which the defendant is a majority shareholder.”²⁴¹ Indeed, as long as the corporation at issue was not “held to be the alter ego, alias, stooge, or dummy of the individual shareholder,” the activities of the corporation have no bearing on the question

233. *Id.* at 298, 618 S.E.2d at 339.

234. *Id.* (quoting *Grimes*, 262 Va. at 332, 551 S.E.2d at 646).

235. *Id.*, 618 S.E.2d at 340.

236. *See* 271 Va. 65, 70–71, 624 S.E.2d 52, 54–55 (2006).

237. *Id.* at 67, 624 S.E.2d at 53.

238. *See id.* at 67–68, 624 S.E.2d at 53–54.

239. *Id.* at 68–69, 624 S.E.2d at 54.

240. *Id.* at 69, 624 S.E.2d at 54.

241. *Id.* at 70, 624 S.E.2d at 54.

of venue.²⁴² The evidence showed that the defendant traveled occasionally to Richmond only to meet his attorney.²⁴³ These contacts did not support a finding of proper venue, and therefore the trial court's decision was reversed.²⁴⁴

M. *Waiver of Objections*

In *Bitar v. Rahman*, the Supreme Court of Virginia held that a defendant waived any objection to a medical expert's testimony not stated within a "reasonable degree of medical probability" because the defendant failed to make a contemporaneous objection.²⁴⁵ The plaintiff in *Bitar* sued the defendant for medical malpractice after the plaintiff allegedly suffered injuries related to a plastic surgery procedure.²⁴⁶ During trial, the plaintiff called a medical expert in the field of plastic surgery to testify as to the standard of care and the defendant's negligence.²⁴⁷ The expert was never asked whether his opinions were given to a reasonable degree of medical certainty.²⁴⁸ At the close of the presentation of all evidence, the defendant moved to strike the expert's testimony and to enter judgment in favor of the defendant.²⁴⁹ The trial court denied the motion to strike, citing the general rule that "the appropriate time for [the motion to strike] was at the time the witness offered the opinion[,] . . . not after the opinion is in the record."²⁵⁰

The supreme court affirmed the trial court's decision.²⁵¹ Medical expert testimony must be given to a "reasonable degree of medical probability."²⁵² "[A]n objection based on the fact that a medical expert's opinion is not stated to a reasonable degree of medical probability, lacks an adequate factual foundation, or fails to consider all the relevant variables challenges the admissibility

242. *See id.*, 624 S.E.2d at 55.

243. *Id.*

244. *Id.* at 70–71, 624 S.E.2d at 55.

245. 272 Va. 130, 142, 630 S.E.2d 319, 326 (2006).

246. *See id.* at 133–34, 630 S.E.2d at 321.

247. *See id.* at 134–35, 630 S.E.2d at 321–22.

248. *See id.* at 137, 630 S.E.2d at 323.

249. *Id.* at 135, 630 S.E.2d at 322.

250. *Id.* at 136, 630 S.E.2d at 322–23 (quoting the trial court's order denying the motion).

251. *Id.* at 143, 630 S.E.2d at 326.

252. *Id.* at 138, 630 S.E.2d at 323.

of evidence rather than the sufficiency of evidence.”²⁵³ Objections to admissibility must be raised contemporaneously with the offending evidence.²⁵⁴ Contrarily, a motion to strike made at the close of the plaintiff’s case in chief attacks the sufficiency of the plaintiff’s evidence against the defendant.²⁵⁵ “[A] litigant may not, in a motion to strike [the evidence], raise for the first time a question of admissibility of evidence.”²⁵⁶ As a result, because the defendant did not object at the time of the expert’s testimony, any subsequent objection could not be the basis for a motion to strike the plaintiff’s claim.²⁵⁷

In *Lyren v. Ohr*, the Supreme Court of Virginia ruled that a defendant waived the one-year service requirement in Rule 3:3(c) by filing grounds of defense without objecting to the court’s jurisdiction.²⁵⁸ Rule 3:3(c) states that “[n]o judgment shall be entered against a defendant who was served with process more than one year after the commencement of the action against him unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on him.”²⁵⁹ The plaintiff in *Lyren* failed to effect proper service of process on the defendant within one year of filing the lawsuit.²⁶⁰ Nonetheless, the defendant filed grounds of defense based, at least in part, on the plaintiff’s counsel’s assurances that the lawsuit had been timely served.²⁶¹

The supreme court reversed the trial court’s decision dismissing the claim based on Rule 3:3(c).²⁶² Notwithstanding the plaintiff’s attorney’s statements regarding the filing of the claim, the court held that the defendant surrendered to the personal jurisdiction of the trial court by making a general appearance without objecting to the court’s jurisdiction.²⁶³ A general appearance “is a waiver of process, equivalent to personal service of process, and

253. *Id.* at 139, 630 S.E.2d at 324.

254. *Id.* (citing *Kondaurov v. Kerdosha*, 271 Va. 646, 655, 629 S.E.2d 181, 185 (2006)).

255. *See id.* at 140, 630 S.E.2d at 325.

256. *Id.* (citing *Woodson v. Commonwealth*, 211 Va. 285, 288, 176 S.E.2d 818, 821 (1970)).

257. *See id.* at 142, 630 S.E.2d at 326.

258. *See* 271 Va. 155, 160, 623 S.E.2d 883, 885 (2006).

259. *Id.* at 158, 623 S.E.2d at 884 (quoting VA. SUP. CT. R. 3:3(c)).

260. *Id.*

261. *Id.* at 157, 160, 623 S.E.2d at 883–84, 885.

262. *Id.* at 161, 623 S.E.2d at 885.

263. *Id.* at 160, 623 S.E.2d at 885.

confers jurisdiction of the person on the court.”²⁶⁴ By pleading to the merits of plaintiff’s claim, the defendant was thus precluded from asserting the protection of the time-bar provided in Rule 3:3(c).²⁶⁵

III. RULE CHANGES

On June 13, 2005, the Supreme Court of Virginia adopted several amendments to the Rules. For example, Rule 5A:5, regarding the original jurisdiction of the Court of Appeals of Virginia, was completely re-written.²⁶⁶ The Rule now states that all original actions in the court of appeals are to be conducted in accordance with Rule 5:7, except no responsive pleadings are required in actions brought by prisoners pro se, and it outlines the specific procedures for filing a petition for a writ of actual innocence.²⁶⁷ Additionally, Rules 5A:20 and 5A:21 were amended to substitute references to Rule 5A:19(e) with references to Rule 5A:19(f).²⁶⁸

By far the most significant amendment, however, was the supreme court’s amendment of Part Three of the Rules and Rules 4:0, 4:5, 4:7, and 4:8, which reflects the merger of law and equity in Virginia courts.²⁶⁹ Former Part Three of the Rules, including Rules 3:1 through 3:19, was entirely repealed and a new Part Three, Rules 3:1 through 3:23, was adopted.²⁷⁰ Stylistic changes were also made to Rules 4:0, 4:5, 4:7, and 4:8 to conform with the new Part Three and to include terminology consistent with the merger of law and equity.²⁷¹

On July 21, 2005, the Supreme Court of Virginia amended the Appendix of Forms to Part 5A by adopting Form 12, a “Petition for Writ of Actual Innocence Based on Nonbiological Evidence,” to be effective August 15, 2005.²⁷²

264. *Id.* at 159, 623 S.E.2d at 885 (quoting *Gilpin v. Joyce*, 257 Va. 579, 581, 515 S.E.2d 124, 125 (1999)).

265. *Id.* at 160, 623 S.E.2d at 885.

266. VA. SUP. CT. R. 5A:5.

267. *See id.*

268. VA. SUP. CT. R. 5A:20–21.

269. *See generally* W. Hamilton Bryson, *Annual Survey of Virginia Law: The Merger of Common Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77 (2006).

270. *See* VA. SUP. CT. R. 3:1–3:23.

271. *See* VA. SUP. CT. R. 4:0, 4:5, 4:7, 4:8.

272. *See* VA. SUP. CT. R. 5A:f-12.

On August 29, 2005, Rule 4:5, regarding the taking of oral depositions, was amended to allow the court, for good cause, to designate the place of a party or nonparty deposition.²⁷³ The Rule states that “[g]ood cause may include the expense or inconvenience of a non-resident party defendant appearing in one of the locations” permitted under the Rule.²⁷⁴

Important amendments were also made to Rule 3:23 regarding the use of, and proceedings before, a Commissioner in Chancery.²⁷⁵ The rule now states that any matter, not only equitable claims, may be referred to a Commissioner in Chancery.²⁷⁶ Further, a new subparagraph was inserted and provides that Commissioners in Chancery may be appointed in circuit court cases, “including uncontested divorce cases, *only* when (1) there is agreement by the parties with concurrence of the court or (2) upon motion of a party or the court on its own motion with a finding of good cause shown in each individual case.”²⁷⁷ Finally, the amendment made minor stylistic changes to the Rule.²⁷⁸

An amendment to Rule 4:4 extended its provisions on stipulations regarding discovery to non-party witnesses, providing that “[s]tipulations may include agreements with non-party witnesses, consistent with [Virginia] Code § 8.01-420.4.”²⁷⁹ A technical change at the end of the Rule also clarified that stipulations regarding discovery should also be filed along with the depositions and completed discovery.²⁸⁰

On October 21, 2005, the Supreme Court of Virginia adopted a number of amendments which extended previous amendments to certain Rules regarding denials of appeal and petitions for rehearing in the court of appeals; the rules had been set to expire on December 31, 2005.²⁸¹ The amendments deleted the December

273. VA. SUP. CT. R. 4:5(a1).

274. *Id.*

275. *See* VA. SUP. CT. R. 3:23.

276. *See id.* 3:23(b).

277. *Id.* (emphasis added).

278. *See id.*

279. VA. SUP. CT. R. 4:4.

280. *Id.*

281. Rules 5:20, 5:39, 5:39A, 5A:15A, 5A:33, 5A:33A, 5A:34, 5A:34A were amended. *See* Amendments to the Rules of Court, Supreme Court of Virginia (Oct. 21, 2005), http://www.courts.state.va.us/scv/amendments/102105_scv_cav_pfr_rules.pdf.

31, 2005 sunset provisions from these Rules, effective January 1, 2006.²⁸²

As discussed in greater detail in the *University of Richmond Law Review's* 2005 Annual Survey, the amendments primarily stated new technical requirements for the filing of petitions for rehearing with the court of appeals, including changes to formatting, certifications of service and compliance with word-count limit, method of filing, and time of filing.²⁸³

On February 28, 2006, the Supreme Court of Virginia adopted a number of amendments.²⁸⁴ The language of Rules 4:2, 4:8, 4:9, 4:11, 7B:3, 7B:4, and 7B:10 was amended to reflect and conform with the merger of law and equity.²⁸⁵

Additionally, several amendments were made to Rule 1A:5, setting forth the regulations applicable to Virginia corporate counsel.²⁸⁶ First, the fee for obtaining a corporate counsel certificate and for registering as a corporate counsel registrant was raised from \$50.00 to \$150.00.²⁸⁷ Second, Part I, subsection f, forbidding corporate counsel from practicing law in Virginia except for the corporate counsel's employer, was amended to include a specific exception allowing pro bono practice in a Virginia State Bar program and under the supervision of a supervising attorney.²⁸⁸ Third, in Part II, a new subsection g was added, requiring corporate counsel registrants to promptly notify the Virginia State Bar of changes in employment or bar membership, or imposition of any disciplinary sanctions.²⁸⁹

New Rule 1:6, "Res Judicata Claim Preclusion," was added to Part One of the Rules.²⁹⁰ The Court also adopted new Rule 3:24,

282. *Id.*

283. See John R. Walk & Michael R. Spitzer, II, *Annual Survey of Virginia Law: Civil Practice and Procedure*, 40 U. RICH. L. REV. 95, 129–31 (2005) (detailing the technical changes made to the rules).

284. See Amendments to the Rules of Court, Supreme Court of Virginia (Feb. 28, 2006), http://www.courts.state.va.us/scv/amendments/2006_0228_rule_4_2.pdf.

285. See *id.*

286. Amendments to the Rules of Court, Supreme Court of Virginia (Feb. 28, 2006), http://www.courts.state.va.us/scv/amendments/2006_0228_rule_1a_5.pdf.

287. *Id.*

288. *Id.*

289. *Id.*

290. Amendments to the Rules of Court, Supreme Court of Virginia (Feb. 28, 2006), http://www.courts.state.va.us/scv/amendments/2006_0228_final_1_6_rule.pdf.

regarding the “Appeal of Orders of Quarantine or Isolation regarding Communicable Diseases of Public Health Threat,” which became effective May 1, 2006.²⁹¹ The Rule provides procedures for appealing an order of quarantine, issued pursuant to Virginia Code section 32.1-48.09, and for appealing an order of isolation, issued pursuant to Virginia Code section 32.1-48.012.²⁹² The appeals must be made to the appropriate circuit court and are governed by Virginia Code section 32.1-48.010 for quarantine orders, by section 32.1-48.013 for isolation orders, and also by related sections of Article 3.02 of Title 32.1 for both types of orders.²⁹³ Subsection C of the rule permits the circuit court to take appropriate precautions, such as hearing appeals by telephone or video conference or issuing an order requiring participants to wear personal protective equipment, to protect the health and safety of all individuals involved and the general public.²⁹⁴

Finally, Rules 3:4, 3:8, 3:9, and 3:10 were amended to reflect the new provision in Virginia Code section 8.01-286.1 that permits a circuit court plaintiff to ask a defendant to waive service of process in the commencement of the complaint.²⁹⁵ Under amended Rule 3:4, if the defendant waives service pursuant to Virginia Code section 8.01-286.1, the plaintiff need not provide the clerk of court with a copy of the complaint for each defendant.²⁹⁶ Under amended Rules 3:8, 3:9, and 3:10, if the defendant waives service of process, the time for the filing of responsive pleadings, counterclaims, and cross-claims is extended from twenty-one days to within sixty days of the date when the request for waiver was sent if the defendant is within the Commonwealth, or within ninety days of the date the waiver was sent if the defendant is outside the Commonwealth.²⁹⁷

291. Amendments to the Rules of Court, Supreme Court of Virginia (Feb. 28, 2006), http://www.courts.state.va.us/scv/amendments/2006_0228_quarantine_order_3_24.pdf.

292. VA. SUP. CT. R. 3:24(A)–(B).

293. *Id.*

294. *Id.*

295. Amendments to the Rules of Court, Supreme Court of Virginia (Feb. 28, 2006), http://www.courts.state.va.us/scv/amendments/2006_0228_final_3_4_order.pdf.

296. VA. SUP. CT. R. 3:4.

297. VA. SUP. CT. R. 3:8, 3:9, 3:10.

Effective July 11, 2006, Rules 5A:6 and 5A:11 were amended to increase the filing fee for a Notice of Appeal to the supreme court from \$25.00 to \$50.00.²⁹⁸

Rule 3A:9(c) was amended on October 31, 2006 to include an exception for special sessions of court held pursuant to Virginia Code section 17.1-304.²⁹⁹

On November 28, 2006, the supreme court added Form 1, "Application to appear *Pro Hac Vice* Before a Virginia Tribunal," to Part 1A of the rules.³⁰⁰

On December 20, 2006, the supreme court amended additional rules. Stylistic changes were made to Rules 3:2 and 5:17.³⁰¹ Technical amendments were made to subsection g of Rule 5:7A, regarding the page limits of petitions for writs of habeas corpus.³⁰² Rule 3:21 was amended by adding a provision that the court may set a final date for service of jury demands in a civil action.³⁰³ Rule 3:22 was amended by adding a provision stating that in cases of mixed jury and non-jury claims, the court shall adopt a trial sequence and procedures to assure all claims are properly heard and decided by the jury or court, as appropriate.³⁰⁴

IV. RECENT LEGISLATION

A. *Parties*

The General Assembly adopted an amendment regarding certification of expert witnesses in medical malpractice actions, which

298. Amendments to the Rules of Court, Supreme Court of Virginia (July 11, 2006), http://www.courts.state.va.us/scv/amendments/07_11_06_rule_5a_6.pdf.

299. Amendments to the Rules of Court, Supreme Court of Virginia (Oct. 31, 2006), http://www.courts.state.va.us/scv/amendments/2006_1031_rule_change_3a9_5_2.pdf.

300. Amendments to the Rules of Court, Supreme Court of Virginia (Nov. 28, 2006), http://www.courts.state.va.us/scv/amendments/2006_1128_rule_change_1a4_form_1.pdf.

301. Amendments to the Rules of Court, Supreme Court of Virginia (Dec. 20, 2006), http://www.courts.state.va.us/scv/amendments/2007_03_01_rule_3A_21_1_rule_3_2_rule_3_21_rule_3_22.pdf; Amendments to the Rules of Court, Supreme Court of Virginia (Dec. 20, 2006), http://www.courts.state.va.us/scv/amendments/2007_02_01_rule_5_17_5_35_5A_2_5A_28.pdf.

302. Amendments to the Rules of Court, Supreme Court of Virginia (Dec. 20, 2006), http://www.courts.state.va.us/scv/amendments/2007_03_01_rule_5_7A.pdf.

303. See Amendments to the Rules of Court, Supreme Court of Virginia (Dec. 20, 2006), http://www.courts.state.va.us/scv/amendments/2007_03_01_rule_3A_21_1_rule_3_2_rule_3_21_rule_3_22.pdf.

304. *Id.*

effected changes to Virginia Code sections 8.01-20.1, 8.01-50.1, and 16.1-83.1.³⁰⁵ The amendment clarifies that when a plaintiff requests service of process, or requests the defendant accept service of process, the defendant has certified that he has obtained an expert who opines that the defendant has deviated from the applicable standard of care.³⁰⁶ The amendment also clarifies that neither the certifying expert's identity, *nor* the expert's "qualifications" are discoverable, except pursuant to Rule 4:1 if the expert is expected to testify at trial.³⁰⁷

B. *Actions*

An amendment to Virginia Code section 8.01-35.1 broadens the applicability of the section, regarding the effect of a covenant not to sue, to include *all* injuries to persons or property, or wrongful death.³⁰⁸ The amendment deleted language that previously made the section inapplicable to certain torts.³⁰⁹

New Virginia Code section 8.01-44.7 states that a provider of utility services that have been tampered with or diverted has a cause of action for both injunctive and equitable relief, and damages plus reasonable attorneys fees and costs for the greater of actual damages or \$500.³¹⁰

An amendment regarding the removal of property pursuant to an ejectment proceeding affected Virginia Code sections 8.01-156, 55-237.1, and 55-248.38.2.³¹¹ The amendments clarified that a sheriff does not have a duty to actually effect the removal, but must oversee the process, and the amendment also provides that neither the sheriff nor the owner of the real property at issue may be liable for any personal property removed.³¹²

305. Act of Mar. 19, 2007, ch. 489, 2007 Va. Acts 663 (codified as amended at VA. CODE ANN. §§ 8.01-20.1, -50.1 (Repl. Vol. 2007); VA. CODE ANN. § 16.1-83.1 (Cum. Supp. 2007)).

306. See VA. CODE ANN. §§ 8.01-20.1, -50.1 (Repl. Vol. 2007); VA. CODE ANN. § 16.1-83.1 (Repl. Vol. 2003).

307. VA. CODE ANN. §§ 8.01-20.1, -50.1 (Repl. Vol. 2007); VA. CODE ANN. § 16.1-83.1 (Cum. Supp. 2007).

308. See *id.* § 8.01-35.1 (Repl. Vol. 2007).

309. *Id.*

310. See *id.* § 8.01-44.7 (Repl. Vol. 2007).

311. *Id.* § 8.01-156 (Repl. Vol. 2007); VA. CODE ANN. §§ 55-237.1, -248.38:2 (Repl. Vol. 2007).

312. See VA. CODE ANN. § 8.01-156 (Repl. Vol. 2007); VA. CODE ANN. §§ 55-237.1, -248.38:2 (Repl. Vol. 2007).

Virginia Code sections 8.01-195.6, 8.01-222, and 15.2-209 were amended to reflect changes in the proper submission procedures and form of a notice of claim against the Commonwealth, a transportation district, or a local government entity.³¹³

New Virginia Code section 8.01-223.2 provides civil immunity to any citizen appearing at “a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies and authorities thereof, and other governing bodies of any local governmental entity” for any “claim of tortious interference with an existing contract or a business or contractual expectancy based solely on statements made by that person at [the] public hearing.”³¹⁴

Pre-existing Virginia Code section 8.01-226.7, regarding compliance with residential lead-based paint notification and immunity for lead-based paint poisoning, was amended to provide immunity to the owner or agent of residential property if the owner or agent informs the purchaser or tenant of all known lead-based paint and/or lead-based paint hazards before the purchase or lease is executed.³¹⁵ The duty to inform continues throughout the tenancy.³¹⁶ Further, the amendment provides that a hearing on any responsive pleading asserting the immunity may be held before the case-in-chief.³¹⁷

Virginia Code section 8.01-226.8 previously afforded civil immunity to public officials and private volunteers participating in any roadway litter pick-up program for any liability to any probationers participating in the same program.³¹⁸ A 2007 amendment to this section extends the civil immunity for public officials and private volunteers to cover any programs involving recycling duties at landfills, garbage transfer sites, and other waste disposal systems.³¹⁹

New Virginia Code section 8.01-226.11 provides civil immunity for the Virginia Sheriffs' Association and Virginia Community Po-

313. See VA. CODE ANN. §§ 8.01-195.6, 8.01-222 (Repl. Vol. 2007); VA. CODE ANN. § 15.2-209 (Cum. Supp. 2007).

314. *Id.* § 8.01-223.2 (Repl. Vol. 2007).

315. See *id.* § 8.01-226.7 (Repl. Vol. 2007).

316. *Id.* § 8.01-226.7(B)(5) (Repl. Vol. 2007).

317. *Id.* § 8.01-226.7(D) (Repl. Vol. 2007).

318. See *id.* § 8.01-226.8 (Repl. Vol. 2007).

319. See § 8.01-226.8 (Repl. Vol. 2007).

licing Institute, and their directors, members, managers, officers, and employees, for acts or omissions not resulting from gross negligence or willful misconduct that relate to establishing and operating any automated victim notification system.³²⁰

C. *Limitations of Actions*

Existing Virginia Code section 8.01-232 was amended to make all written promises not to plead the statute of limitations valid only “*when (i) it is made to avoid or defer litigation pending settlement of any case, (ii) it is not made contemporaneously with any other contract, and (iii) it is made for an additional term not longer than the applicable limitations period.*”³²¹

D. *Venue*

Pre-existing Virginia Code section 8.01-265 was amended to allow *any* party, not only the defendant, to move for a change of venue, and to allow any party to oppose such motion.³²² The amendment also provided that compliance with the law of any other state or the United States shall be deemed to constitute good cause for which a motion for transfer of venue may be granted.³²³

E. *Civil Actions; Commencement, Pleadings, and Motions*

Virginia Code section 8.01-277 was amended to allow any defendant upon whom process has not been served within one year of the filing of an action to move by special appearance for dismissal of the action.³²⁴ If the court finds the plaintiff did not exercise due diligence to effect timely service, the court shall dismiss the action with prejudice.³²⁵ If the court finds the plaintiff did exercise due diligence, the court shall deny the motion to dismiss and order the defendant to file a responsive pleading within twenty-one days of the ruling.³²⁶ The amendment also preserves

320. *Id.* § 8.01-226.11 (Repl. Vol. 2007).

321. *Id.* § 8.01-232 (Repl. Vol. 2007) (emphasis added).

322. *See id.* § 8.01-265 (Repl. Vol. 2007).

323. *Id.*

324. *Id.* § 8.01-277 (Repl. Vol. 2007).

325. *Id.* § 8.01-277(B) (Repl. Vol. 2007).

326. *Id.*

the plaintiff's right to file a nonsuit before the entry of an order to dismiss and provides that nothing in the amendment shall apply to actions involving asbestos.³²⁷

F. *Personal Jurisdiction in Certain Actions*

Virginia Code section 8.01-328.1, Virginia's long-arm statute, was amended to provide that courts of the Commonwealth have personal jurisdiction over a nonresident in actions where the nonresident owes a local tax, fine, penalty, interest, or similar charge in the Commonwealth.³²⁸

G. *Dockets*

Existing Virginia Code section 8.01-335 was amended to add a subsection allowing the court to order a discontinuance of an action for failure of the plaintiff to serve process within a year of filing.³²⁹ At least thirty days prior to entry of the order, the court must give the plaintiff notice, providing an opportunity to prove that either service was timely effected, or the plaintiff exercised due diligence to have it timely effected.³³⁰ If the plaintiff succeeds in proving either of these, the discontinuance order shall not be entered and the action remains on the court's docket.³³¹ The amendment similarly does not apply to asbestos cases.³³²

H. *Juries*

Amendments to Virginia Code sections 8.01-187, 8.01-345, 8.01-346, and 25.1-229, relating to condemnation proceedings, provide that jury selections in condemnation cases shall now be conducted in accordance with Virginia Code section 8.01-336.³³³ The amendments further provide that a condemnation jury shall

327. *Id.*

328. *Id.* § 8.01-328.1 (A)(10) (Repl. Vol. 2007).

329. *Id.* § 8.01-335(D) (Repl. Vol. 2007).

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* § 8.01-187, -345, -346 (Repl. Vol. 2007); VA. CODE ANN. § 25.1-229(A) (Supp. 2007).

consist of at least five jurors, from a panel of at least thirteen, and the court may appoint alternate jurors.³³⁴

Technical amendments were made to Virginia Code sections 8.01-343 and 17.1-105 to clarify that what was formerly known as the “common law order book” is now known as the “civil order book.”³³⁵

I. *Certain Incidents of Trial*

An amendment to Virginia Code section 8.01-375 provides that in civil proceedings to determine child or spousal support, upon motion of a party, the court may allow one expert witness for each party to remain in the courtroom throughout the proceedings.³³⁶

An amendment to Virginia Code section 8.01-380, governing nonsuit procedures, provides that if, after the plaintiff's initial nonsuit of right, the court grants an additional nonsuit, it must provide reasonable notice of the allowance to all counsels of record for all defendants and must make a reasonable attempt to provide notice of the allowance to all unrepresented parties.³³⁷ This amendment is notable because the court previously was not required to provide notice of the allowance to any of the defendants.³³⁸ Further, the amendment provides that the party seeking a nonsuit must inform the court of any previous nonsuits the party has taken in the action, and an order entering an additional nonsuit must include the number and dates of any previous nonsuits.³³⁹

J. *Evidence*

New Virginia Code section 8.01-391.1 states that any check created pursuant to the Federal Check Clearing for the 21st Century Evidence Act (“Check 21 Act”), providing for an official copy

334. VA. CODE ANN. § 25.1-229(B) (Supp. 2007).

335. VA. CODE ANN. § 8.01-343 (Repl. Vol. 2007); VA. CODE ANN. § 17.1-105 (Cum. Supp. 2007).

336. VA. CODE ANN. § 8.01-375 (Repl. Vol. 2007).

337. *Id.* § 8.01-380(B) (Repl. Vol. 2007).

338. *See supra* Part II.F.; *see also* Janvier v. Arminio, 272 Va. 353, 366–67, 634 S.E.2d 754, 760–61 (2006).

339. VA. CODE ANN. § 8.01-380(B) (Repl. Vol. 2007).

of an original check, is admissible in evidence to the same extent as the original check.³⁴⁰

Previously existing Virginia Code section 8.01-404, regarding contradiction of a witness by a prior inconsistent writing, generally provided that in a personal injury or wrongful death action, extrajudicial recordings of a witness were not admissible to contradict the testimony of that witness.³⁴¹ The 2007 amendment to this section provides, however, that extrajudicial recordings made *at the time of* the wrongful act or negligence at issue may be used to contradict the testimony of the witness.³⁴²

An amendment to existing Virginia Code section 8.01-407, regarding witness subpoenas to judicial officers, provides that when this type of subpoena is served less than five days before the date the appearance of the judicial officer is requested, and when the judicial officer would generally be incompetent to testify under Virginia Code section 19.2-271, the subpoena has no legal force *unless* it has been issued by a judge.³⁴³

K. *Payment and Setoff*

Virginia Code section 8.01-419.1 was amended to state that admissible evidence of the fair market value of a motor vehicle may be provided not only in the form of the National Automobile Dealers' Association "yellow" or "black" books, but also by "any vehicle valuation service regularly used and recognized in the automobile industry" in effect on the relevant date.³⁴⁴

L. *Courts Not of Record*

Previously, Virginia Code section 16.1-69.55 did not provide any procedures for satisfaction of a general district court judgment when a judgment creditor could not be located.³⁴⁵ A recent amendment addressed this issue, providing that when a judgment debtor wishes to discharge a judgment pursuant to Virginia

340. *Id.* § 8.01-391.1(A) (Repl. Vol. 2007).

341. *Id.* § 8.01-404 (Repl. Vol. 2007).

342. *See id.* (emphasis added).

343. *Id.* § 8.01-407(A) (Repl. Vol. 2007).

344. *Id.* § 8.01-419.1 (Repl. Vol. 2007).

345. VA. CODE ANN. § 16.1-69.55 (Repl. Vol. 2003 & Cum. Supp. 2007).

Code section 8.01-456 but cannot locate the judgment creditor, he may, within the period of enforcement, pay the circuit court docketing and indexing fees on judgments from other courts, and any other required filing fees to have the judgment docketed in circuit court.³⁴⁶

Pursuant to an amendment to Virginia Code section 16.1-107, a plaintiff is no longer required to post an appeal bond to appeal a judgment if the defendant has not asserted a counterclaim.³⁴⁷

M. Executions and Other Means of Recovery

Virginia Code section 8.01-470 was amended to provide that, if a party to be served with a writ to recover property is not found at that property, the sheriff effects service by posting a copy of the writ on the property's door.³⁴⁸

Virginia Code sections 8.01-471, 55-248.9:1, 55-248.15:2, 55-248.21:1, and 55-248.34:1, all relating to the Virginia Residential Landlord and Tenant Act, were recently amended to reflect changes in the confidentiality of tenant records.³⁴⁹ Generally, a landlord has a duty to keep tenants' records confidential; these amendments, however, add two exceptions to this rule.³⁵⁰ The landlord may provide information from a tenant's records if the records are requested pursuant to a subpoena in a civil case, or if they are requested by a contract purchaser of the landlord's property, provided that the purchaser agrees in writing to maintain the records' confidentiality.³⁵¹

Virginia Code section 8.01-501 was recently amended to extend to 180 days the time a writ of *feri facias* applies to newly acquired property.³⁵² Virginia Code section 8.01-514, which addresses the time period during which a wage garnishment is valid, was also amended to reflect the same 180 day time period.³⁵³

346. *Id.* § 16.1-69.55(B)(4) (Cum. Supp. 2007).

347. *Id.* § 16.1-107 (Cum. Supp. 2007).

348. *See* VA. CODE ANN. § 8.01-470 (Repl. Vol. 2007).

349. *Id.* §§ 8.01-471, 55-248.9:1, -248.15:2, -248.21:1, -248.34:1 (Repl. Vol. 2007).

350. *See* VA. CODE ANN. § 55-248.9:1(A)(6), (7) (Repl. Vol. 2007).

351. *Id.*

352. VA. CODE ANN. § 8.01-501 (Repl. Vol. 2007).

353. *Id.* § 8.01-514 (Repl. Vol. 2007).

Virginia Code section 20.108-1 was amended to clarify that while the income of a child support obligor may be garnished, actual child support payments, current or in arrears, are not subject to garnishment.³⁵⁴ Further, a depository of child support payments has no obligation to determine what portion of the deposits may be subject to garnishment.³⁵⁵

N. *Medical Malpractice*

Recent amendments to several Virginia Code sections relating to facilitation of the emergency medical services quality of care initiative made changes relating to civil immunity and privileged communications for members of monitoring entities.

Virginia Code section 8.01-581.17, regarding privileged committees and entities, was amended specifically to provide that any reports generated as a self-assessment of compliance with the standards of the Joint Commission on Accreditation of Healthcare Organizations are privileged and confidential, and are neither subject to subpoena nor admissible as evidence in any administrative or civil proceeding.³⁵⁶

Virginia Code sections 8.01-581.18 and 8.01-581.18:1, regarding physicians' civil immunity for reviewing laboratory results and examinations, were recently amended.³⁵⁷ First, the definition of "physician" was amended to include podiatrists.³⁵⁸ Further, the statutes were amended to state that a physician will not be civilly liable for failure to review or act on the results of laboratory tests or examinations if that physician did not order or authorize such tests or examinations, unless

- (i) the report of such results is provided directly to the physician by the patient so examined or tested with a request for consultation; (ii) the physician assumes responsibility to review or act on the results; or (iii) the physician has reason to know that in order to manage the specific mental or physical condition of the patient, review of or action on the pending results is needed. However, no physician shall be immune under this section unless the physician establishes that (a) no physician-patient relationship existed when the results were re-

354. VA. CODE ANN. § 20-108.1(G) (Cum. Supp. 2007).

355. *Id.*

356. *Id.* § 8.01-581.17(I) (Repl. Vol. 2007).

357. *Id.* §§ 8.01-581.18, -581.18:1 (Repl. Vol. 2007).

358. *Id.* § 8.01-581.18(B) (Repl. Vol. 2007).

ceived or accessed; or (b) the physician received or accessed the results without a request for consultation and without responsibility for management of the specific mental or physical condition of the patient relating to the results; or (c) the physician consulted on a specific mental or physical condition, the results were not part of that physician's management of the patient and the physician had no reason to know that he was to inform the patient of the results or refer the patient to another physician; or (d) the physician received or accessed results, the interpretation of which would exceed the physician's scope of practice and the physician had no reason to know that he was to inform the patient of the results or refer the patient to another physician.³⁵⁹

Virginia Code section 8.01-581.17, relating to privileged communications for physician peer review and physician accreditation entities, was also amended to clarify that the privilege accorded attaches to all of the proceedings, minutes, records, reports of quality assurance, quality of care, etc., generated by a peer review committee of a national or state physician peer review entity, or a physician accreditation entity.³⁶⁰

Pre-existing Virginia Code section 16.1-88.2 was amended to allow the same procedures used to introduce medical evidence in general district court proceedings to be utilized in actions appealed to circuit courts.³⁶¹

O. *Virginia Prisoner Litigation Reform Act*

Recent amendments to Virginia Code section 8.01-695, and the addition of sections 8.01-696 and 8.01-697, relating to prisoner civil litigation, made significant changes to the discovery procedures in such litigation. First, the amendment provides that no subpoena shall be issued in prisoner civil suits unless reviewed and authorized by a judge, who retains power to determine the scope of the subpoena as well as any conditions and terms on which it should be issued.³⁶² Second, at any point after the commencement of a pro se prisoner civil action, any party may move for summary judgment based on the pleadings, admissions, and supporting affidavits, and the adverse party may submit support-

359. *Id.* § 8.01-581.18:1 (Repl. Vol. 2007). For a discussion on the Supreme Court of Virginia's application of section 8.01-581.18:1, see *supra* Part II.G.

360. VA. CODE ANN. § 8.01-581.17(B) (Repl. Vol. 2007).

361. *See* VA. CODE ANN. § 16.1-88.2 (Cum. Supp. 2007).

362. VA. CODE ANN. § 8.01-695 (Repl. Vol. 2007).

ing affidavits within ten days of service of the motion.³⁶³ Finally, all records the Department of Corrections maintains in individual prisoners' names are the property of the department, although the "Director of the Department may share any records maintained by the Department in the name of the prisoner filing suit with counsel representing the above-named defendants."³⁶⁴

P. Enforcement of Instruments

Virginia Code section 8.3A-311, when read in conjunction with section 8.3A-118.1, establishes a six-year statute of limitations for the enforcement and satisfaction of negotiable instruments.³⁶⁵ The amendments take effect on January 1, 2007, and will be retroactive.³⁶⁶ Any cause of action accruing after January 1, 1997, however, will have until January 1, 2013, or until the end of six years from accrual of the action, whichever is longer, to file suit.³⁶⁷ The amendments further provide that any person tendering a check in full satisfaction of a loan is not acting in good faith when the amount of the check is less than the full amount due under the loan, and the check is tendered to a person without knowledge of any dispute regarding the amount due under the loan.³⁶⁸

363. *Id.* § 8.01-696 (Repl. Vol. 2007).

364. *Id.* § 8.01-697 (Repl. Vol. 2007).

365. VA. CODE ANN. §§ 8.3A-118.1, -311 (Cum. Supp. 2007).

366. VA. CODE ANN. § 8.3A-118.1 (Cum. Supp. 2007).

367. *Id.*

368. *Id.* § 8.3A-311(a) (Cum. Supp. 2007).