

1992

## Annual Survey of Virginia Law: Civil Practice and Procedure

George J. Dancigers

A. William Charters

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Civil Law Commons](#), and the [Civil Procedure Commons](#)

---

### Recommended Citation

George J. Dancigers & A. W. Charters, *Annual Survey of Virginia Law: Civil Practice and Procedure*, 26 U. Rich. L. Rev. 679 (1992).  
Available at: <http://scholarship.richmond.edu/lawreview/vol26/iss4/11>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# CIVIL PRACTICE AND PROCEDURE

*George J. Dancigers\**  
*A. William Charters\*\**

## I. INTRODUCTION

This article reviews recent developments and changes in legislation, case law, and Virginia Supreme Court Rules affecting civil litigation. Its scope does not extend to criminal procedure or to topics unique to equity practice.

## II. RECENT VIRGINIA SUPREME COURT DECISIONS

### A. Negligence — *Prima Facie* Case

In two cases this year, the Virginia Supreme Court analyzed the effect of the standard and burden of proof required to establish a *prima facie* case of negligence.<sup>1</sup> Although both cases involved motor vehicles that skidded or slipped on the roadway, the opinions are broad enough to encompass other assertions of negligence, and the proposition that a *prima facie* case showing of negligence is not irrebuttable.

*Medlar v. Mohan*<sup>2</sup> involved a personal injury automobile accident where one automobile collided with another after skidding through a slippery intersection against a red light.<sup>3</sup> The defendant driver asserted that her conduct was reasonable under the circumstances, and that the plaintiff had failed to keep a sufficient lookout and was therefore contributorily negligent.<sup>4</sup> The plaintiff contended that the defendant's action constituted negligence "as a matter of law," but the trial court allowed the issues to go to the

---

\* Member, Heilig, McKenry, Fraim and Lollar, Norfolk, Va.; B.A., 1971, Virginia Military Institute; J.D., 1976, T.C. Williams School of Law, University of Richmond.

\*\* Associate, Heilig, McKenry, Fraim and Lollar, Norfolk, Va.; A.B., 1976, Dartmouth College; J.D., 1979, Syracuse University College of Law; LL.M., 1987, The Judge Advocate General's School, U.S. Army; M.L.T., 1987, Georgetown University College of Law.

1. *Medlar v. Mohan*, 242 Va. 162, 409 S.E.2d 123 (1991); *Edlow v. Arnold*, 243 Va. 345, 415 S.E.2d 436 (1992).

2. 242 Va. 162, 409 S.E.2d 123 (1991).

3. *Id.* at 164, 409 S.E.2d at 124.

4. *Id.* at 166-67, 409 S.E.2d at 125-26.

jury and the jury found for the defendant.<sup>5</sup> The supreme court, affirming the decision of the trial court, held that “[m]ere proof that a motor vehicle skidded on a slippery highway does not establish the operator’s negligence *per se*, but skidding is a circumstance to be considered along with all the other evidence in determining whether negligence has been proved.”<sup>6</sup> The focus of inquiry should be on the conduct of the operator prior to the skidding.<sup>7</sup> In *Edlow v. Arnold*,<sup>8</sup> another personal injury automobile accident case, the supreme court again held that proof of skidding of a motor vehicle on a slippery roadway did not establish the operator’s *per se* negligence.<sup>9</sup> The defendant in *Edlow* skidded into the rear of the plaintiff’s vehicle while it was stopped, but as in *Medlar*, the supreme court found the skidding or sliding only one circumstance to be considered in determining whether negligence was shown.<sup>10</sup>

The plaintiff, relying on the rule set forth in *Weems v. Blalock*,<sup>11</sup> argued that “her evidence that Arnold’s car struck the rear end of [the plaintiff’s] car while it was lawfully stopped . . . ‘established a prima facie case of negligence.’”<sup>12</sup> The court reaffirmed this rule but stated that “proof of facts raising a prima facie case of negligence may be rebutted by other evidence.”<sup>13</sup> Although a rear-end vehicle impact, as in this case, might be sufficient to establish a prima facie showing of negligence, and might be sufficient to support a recovery, it was only sufficient “in the absence of evidence that raises jury questions on the issues” of negligence and proximate cause.<sup>14</sup>

### B. *Dispositive Motions — Standard*

One of the issues most addressed by the supreme court over the course of the last year involved the standard for dispositive mo-

---

5. *Id.* at 164-65, 409 S.E.2d at 124-25.

6. *Id.* at 165, 409 S.E.2d at 125 (citing *Pullen v. Fagan*, 204 Va. 601, 604, 132 S.E.2d 718, 721 (1963); *Whitley v. Patterson*, 204 Va. 36, 38, 129 S.E.2d 19, 21 (1963); *Crist v. Coach Co.*, 196 Va. 642, 650, 85 S.E.2d 213, 217 (1955)).

7. *Id.*

8. 243 Va. 345, 415 S.E.2d 436 (1992).

9. *Id.* at 351, 415 S.E.2d at 439.

10. *Id.* at 348-51, 415 S.E.2d at 437-39.

11. 226 Va. 304, 305-306, 309 S.E.2d 302, 303 (1983).

12. 243 Va. at 349, 415 S.E.2d at 438.

13. *Id.* at 350, 415 S.E.2d at 439.

14. *Id.*

tions, including motions to strike and motions for summary judgment.

In *Izadpanah v. Boeing Joint Venture*,<sup>15</sup> the trial court, after hearing and weighing the evidence, granted the defendants' motion to strike. The supreme court reversed, finding that the trial court's weighing of the evidence prior to its decision impermissibly usurped the jury's role.<sup>16</sup> The court reiterated the analysis standard applicable to a motion to strike: "the trial court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the plaintiff."<sup>17</sup>

Again, in *Rogers v. Marrow*,<sup>18</sup> the supreme court found that the trial court had improperly substituted its judgment for that of the jury. *Rogers* was a medical malpractice case wherein two expert witnesses testified that the defendant violated the appropriate standard of care in treating his patient, and a third expert testified that the doctor's treatment of the patient "met the required standard of care."<sup>19</sup> The jury returned a verdict in favor of the defendant, but the trial court set aside the verdict, holding that pursuant to section 8.01-430 of the Code of Virginia "there was sufficient evidence for it to determine the case on the merits."<sup>20</sup> Finding that the evidence was "virtually not rebutted," the trial judge entered judgment for the plaintiff.<sup>21</sup>

The supreme court reinstated the verdict for the defendant, finding that the trial court could not substitute its result for that of the jury merely because the court found the defendant's evidence "inconclusive" or "ambiguous."<sup>22</sup> The burden of proof in a negligence case is always on the plaintiff and never shifts to the defendant.<sup>23</sup> "If there is a conflict in the testimony on a material point, or if reasonable men may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent

---

15. 243 Va. 81, 412 S.E.2d 708 (1992).

16. *Id.* at 83, 412 S.E.2d at 709 (citing *Higgins v. Bowdoin*, 238 Va. 134, 141, 380 S.E.2d 904, 908 (1989); *Williams v. Vaughan*, 214 Va. 307, 310, 199 S.E.2d 515, 517-18 (1973)).

17. *Id.* at 82, 412 S.E.2d at 709.

18. 243 Va. 162, 413 S.E.2d 344 (1992).

19. *Id.* at 165, 413 S.E.2d at 345.

20. *Id.* at 165-66, 413 S.E.2d at 345.

21. *Id.* at 166, 413 S.E.2d at 345-46.

22. *Id.* at 166-67, 413 S.E.2d at 346.

23. *Id.* at 167, 413 S.E.2d at 346 (citing *Myers v. Sutton*, 213 Va. 59, 61, 189 S.E.2d 336, 338 (1972)).

on the weight to be given the testimony,'” the jury’s verdict must stand.<sup>24</sup>

A similar situation occurred in *Holland v. Shively*,<sup>25</sup> where the trial court set aside the jury verdict “in favor of a tenant who was injured as a result of her landlord’s alleged negligent repair of the premises.”<sup>26</sup> The supreme court, in reversing, held that the issues raised at the trial were those of fact.<sup>27</sup> On the issue of negligence, there was “sufficient evidence upon which the jury could have relied to find that [the defendant] was negligent.”<sup>28</sup> Further, as the court noted, “assumption of the risk and contributory negligence are normally jury issues unless reasonable minds could not differ about their resolution.”<sup>29</sup> Since reasonable minds could have differed as to the reasonableness of the plaintiff’s conduct, the trial court erred in holding that she was contributorily negligent as a matter of law, and any assumption of the risk analysis was a jury issue as well.<sup>30</sup>

### C. *Permissible Scope of Expert Opinions*

In *Todd v. Williams*,<sup>31</sup> the supreme court had the opportunity to interpret section 8.01-401.1 of the Code, which generally authorizes the admission into evidence of an expert’s opinion even if that opinion is based on inadmissible hearsay.<sup>32</sup> In *Todd*, a medical malpractice case, one of the medical experts testified that he had conducted a survey of the medical literature in the field and stated that “his reading of the literature support[ed] his own view.”<sup>33</sup> The court found it permissible for the expert to disclose to the jury the

24. *Id.* at 166, 413 S.E.2d at 346 (quoting *Lane v. Scott*, 220 Va. 578, 581, 260 S.E.2d 238, 240 (1979)).

25. 243 Va. 308, 415 S.E.2d 222 (1992).

26. *Id.* at 309, 415 S.E.2d at 223.

27. *Id.* at 311-12, 415 S.E.2d at 224.

28. *Id.* at 311, 415 S.E.2d at 224.

29. *Id.* (citing *Artrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 358, 397 S.E.2d 821, 824 (1990)).

30. *Id.* at 312, 415 S.E.2d at 224-25.

31. 242 Va. 178, 409 S.E.2d 450 (1991).

32. VA. CODE ANN. § 8.01-401.1 (Repl. Vol. 1992) provides in pertinent part:

The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.

*Id.*

33. 242 Va. at 182-83, 409 S.E.2d at 452-53.

sources he utilized in developing his opinion. The court concluded, however, that it is not permissible for the expert to go “beyond disclosing the identity of his sources and tell[] the jury the opinions actually expressed in those sources.”<sup>34</sup> To allow this type of “‘hearsay expert opinion without the testing safeguard of cross-examination’ would subject the opposing party to ‘overwhelming unfairness.’”<sup>35</sup>

In *Llamera v. Commonwealth*,<sup>36</sup> the court held that it was reversible error to allow an expert opinion on the ultimate issue of fact.<sup>37</sup> Further, the court noted that the qualification by the witness that the facts “would suggest” a particular result was not sufficient to make the opinion proper, as the witness still had expressed an opinion on the ultimate issue of fact.<sup>38</sup> An expert can give an “opinion relative to the existence or non-existence of facts not within common knowledge, [but] cannot give his opinion upon the precise or ultimate fact in issue.”<sup>39</sup>

In *Greater Richmond Transit Co. v. Wilkerson*<sup>40</sup> the court took the opportunity to reiterate its holding in *Bulala v. Boyd*<sup>41</sup> concerning the necessary foundation for an expert’s opinion. In this case, the expert opinion related to loss of earning capacity, and the court stated that “‘such evidence must be grounded upon facts specific to the individual whose loss is being calculated.’”<sup>42</sup> Because in *Greater Richmond Transit* the expert had not been provided with all of the relevant data prior to his testimony, the supreme court found that his projections and opinions lacked sufficient foundation, and should not have been admitted in evidence.<sup>43</sup>

---

34. *Id.* at 183, 409 S.E.2d at 453.

35. *Id.* at 181, 409 S.E.2d at 452 (quoting *McMunn v. Tatum*, 237 Va. 558, 566, 379 S.E.2d 908, 912 (1989)).

36. 243 Va. 262, 414 S.E.2d 597 (1992).

37. *Id.* at 264-65, 414 S.E.2d at 598-99.

38. *Id.* at 265, 414 S.E.2d at 599.

39. *Id.* at 264, 414 S.E.2d at 598 (quoting *Webb v. Commonwealth*, 204 Va. 24, 33, 129 S.E.2d 22, 29 (1963)).

40. 242 Va. 65, 406 S.E.2d 28 (1991).

41. 239 Va. 218, 233, 389 S.E.2d 670, 677 (1990).

42. 242 Va. at 72, 406 S.E.2d at 33 (quoting *Bulala*, 239 Va. at 233, 389 S.E.2d at 677).

43. *Id.*

### D. *Legal Malpractice — Standard of Proof — Measure of Damages*

When the Virginia Supreme Court decided *Goldstein v. Kaestner*,<sup>44</sup> a case of first impression, it fashioned a standard for reviewing an attorney's liability for damages in a case sounding in legal malpractice. The court held that the standard was whether the client could prove as "a matter of law" that the underlying case giving rise to the malpractice claim would have been decided in his favor.<sup>45</sup> In *Goldstein*, the allegation centered on the failure of the defendant to timely perfect an appeal.<sup>46</sup> The supreme court held that even if a timely appeal had been entered, a reversal of the cause and an entry of judgment in favor of the plaintiff would not have resulted "as a matter of law."<sup>47</sup> Therefore, the court affirmed the trial court's judgment for the defendant attorney.<sup>48</sup>

In *Duwall, Blackburn, Hale & Downey v. Siddiqui*,<sup>49</sup> the court stated that the measure of damages in a legal malpractice action is "the difference between what [the plaintiff] bargained for . . . and the value of what she actually received."<sup>50</sup> The attorney is liable only for actual injury to the client,<sup>51</sup> and the plaintiff must show facts and circumstances from which a reasonably certain estimate of those damages can be made.<sup>52</sup>

### E. *Products Liability*

The supreme court used its decision in *Owens-Corning Fiberglas Corp. v. Watson*<sup>53</sup> as a vehicle for addressing many of the current concerns of products liability litigators. This case, dealing with a manufacturer's duty to warn, the foundation for and extent of allowable expert testimony, and the allowance of punitive damages,<sup>54</sup>

---

44. 243 Va. 169, 413 S.E.2d 347 (1992).

45. *Id.* at 172, 413 S.E.2d at 349.

46. *Id.*

47. *Id.* at 175, 413 S.E.2d at 350.

48. *Id.*

49. 243 Va. 494, 416 S.E.2d 448 (1992).

50. *Id.* at 498, 416 S.E.2d at 450; see *Long & Foster Real Estate v. Clay*, 231 Va. 170, 343 S.E.2d 297 (1986); *Jennings v. Lake*, 230 S.E.2d 903, 904 (S.C. 1976).

51. *Siddiqui*, 243 Va. at 497, 416 S.E.2d at 450 (citing *Allied Productions v. Dueterdick*, 217 Va. 763, 764-65, 232 S.E.2d 774, 775 (1977)).

52. *Id.* (citing *Goldstein v. Kaestner*, 243 Va. 169, 173, 413 S.E.2d 347, 349-50 (1992)).

53. 243 Va. 128, 413 S.E.2d 630 (1992).

54. Note that the Fourth Circuit's decision in *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991), found that to comport with the due process requirements of the Fifth

has an impact beyond its obvious applicability to pending asbestos litigation in Virginia.

The court let stand an award of punitive damages rendered against Owens-Corning by utilizing the willful or wanton conduct standard established in *Infant C. v. Boy Scouts of America*.<sup>55</sup> The court found that the award could have been justified by the jury, concluding that Owens-Corning, like the owner of A-Line Industries in *Philip Morris, Inc. v. Emerson*,<sup>56</sup> "committed certain positive acts which the jury could have concluded constituted willful or wanton conduct evincing a conscious disregard of the rights of others."<sup>57</sup>

Also in *Owens-Corning*, the court defined the applicable standard for imposition of a duty of care in a case involving a manufacturing defect or the dangerous propensity of a product.<sup>58</sup> The court clearly stated that the appropriate standard in Virginia is whether the manufacturer "has a reason to know," as opposed to whether a manufacturer "should know" of a defect or dangerous propensity in its product.<sup>59</sup> In *Owens-Corning*, however, instructions were given to the jury which imposed the "should know" standard on the defendant. This standard implies that the actor owes another the duty of ascertaining the fact in question.<sup>60</sup> Because the defendant did not object, this standard became the law of the *Owens-Corning* case.<sup>61</sup>

In an area of tremendous importance to products liability litigation, the court allowed the introduction of workers' compensation claims filed by other asbestos workers, finding that they were "substantially similar" to the facts and circumstances in Watson's

---

Amendment, the post-trial and appellate review of Virginia punitive damage awards in the federal courts of the Fourth Circuit must utilize standards similar to those enunciated by the Alabama courts in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), *Central Ala. Elec. Coop. v. Tapley*, 546 So.2d 371 (Ala. 1989), as upheld in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), and *Hammon v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).

55. 239 Va. 572, 581-83, 391 S.E.2d 322, 327-28 (1990).

56. 235 Va. 380, 407, 368 S.E.2d 268, 283 (1988).

57. 243 Va. at 146, 413 S.E.2d at 640-41. In *Tazewell Oil Co. v. United Virginia Bank*, 243 Va. 94, 413 S.E.2d 611 (1992), the supreme court upheld an award of punitive damages based on a count of conspiracy to injure the plaintiff's business in violation of Code §§ 18.2-499(a) & -500.

58. 243 Va. at 135, 413 S.E.2d at 634-35.

59. *Id.* at 136, 413 S.E.2d at 634-35.

60. *Id.*; see RESTATEMENT (SECOND) OF TORTS § 12 cmt. a (1965).

61. 243 Va. at 136, 413 S.E.2d at 635.



claim. The *Owens-Corning* court reiterated the standards set in *Spurlin v. Richardson*<sup>62</sup> and concluded that:

Evidence of other similar accidents or occurrences, when relevant, is admissible to show that the defendant had notice and actual knowledge of a defective condition; . . . [if the prior] occurrences happened . . . under substantially the same circumstances, and had been caused by the same or similar defects and dangers as those in issue . . . the 'substantial similarity' test is satisfied because the other insulators claimed that they acquired lung disease caused by exposure to asbestos dust while using insulation products.<sup>63</sup>

Although not expressly adopting the view, the court in *Harris v. T.I., Inc.*<sup>64</sup> assumed that in a proper case it would recognize a post-sale duty to warn on behalf of a successor corporation in a products liability/breach of warranty case.<sup>65</sup>

*Besser Co. v. Hansen*<sup>66</sup> involved a manufacturer's tort and implied warranty liability arising out of a third party's alleged misuse of a product.<sup>67</sup> The court found that the plaintiff had the burden of showing: "(1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some other reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the goods left the defendant's hands."<sup>68</sup> Because the evidence showed that the product had been used in an unforeseeable fashion,<sup>69</sup> there could be "no recovery against the manufacturer for breach of these implied warranties."<sup>70</sup>

#### F. Breach of Contract — Tortious Breach of Duty

The court, further interpreting *Kamlar Corp. v. Haley*<sup>71</sup> and *Wright v. Everett*,<sup>72</sup> held in *Foreign Mission Board v. Wade*<sup>73</sup> that

---

62. 203 Va. 984, 128 S.E.2d 273 (1962).

63. 243 Va. at 137, 413 S.E.2d at 635-36.

64. 243 Va. 63, 413 S.E.2d 605 (1992).

65. *Id.* at 72, 413 S.E.2d at 610.

66. 243 Va. 267, 415 S.E.2d 138 (1992).

67. *Id.* at 269, 415 S.E.2d at 139.

68. *Id.* at 277, 415 S.E.2d at 144 (citing *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975)).

69. *Id.* at 278, 415 S.E.2d at 144.

70. *Id.* at 277-78, 415 S.E.2d at 144 (citing *Featherall v. Firestone*, 219 Va. 949, 963-64, 252 S.E.2d 358, 367 (1979)).

71. 224 Va. 699, 299 S.E.2d 514 (1983).

72. 197 Va. 608, 90 S.E.2d 855 (1956).

those cases do *not* stand for the proposition that the breach of a contractual duty necessarily constitutes an independent tort sufficient to form the basis of a negligence action.<sup>74</sup> In both *Wright* and *Kamlar* the court recognized that in certain circumstances the actions of the party breaching the contract can show “both a breach of the contract terms and a tortious breach of duty.”<sup>75</sup> However, “the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract.”<sup>76</sup> The court eliminated any questions left by *Wright* and *Kamlar* and found that to establish a tort action based solely on the negligent breach of a contractual duty there must be a corresponding breach of a common law duty.<sup>77</sup>

Following general agency law, in *Miller v. Quarles*<sup>78</sup> the supreme court found that both a principal and his agent “are jointly liable to injured third parties for the agent’s negligent performance of his common law duty of reasonable care,”<sup>79</sup> and that “an agent has a *tort* liability for injuries to a third party resulting from the agent’s negligent act while acting within the scope of his employment by the principal.”<sup>80</sup> Because a “principal is liable to the other contracting party who has been damaged by the agent’s negligent performance of the principal’s contract,” the negligent agent’s act should also impose the same liability upon him.<sup>81</sup>

### G. *Respondeat Superior*

*Sayles v. Piccadilly Cafeterias, Inc.*<sup>82</sup> involved a plaintiff’s claim against a negligent employee and his employer under the doctrine of respondeat superior. After a Christmas party hosted by Piccadilly Cafeterias for its employees, the plaintiff and the Piccadilly employee left the party at approximately the same time, and were

---

73. 242 Va. 234, 409 S.E.2d 144 (1991).

74. *Id.* at 241, 409 S.E.2d at 148.

75. 224 Va. at 705, 299 S.E.2d at 517.

76. 242 Va. at 241, 409 S.E.2d at 148; *Spence v. Norfolk & W.R. Co.*, 92 Va. 102, 22 S.E. 815 (1895).

77. 242 Va. at 241, 409 S.E.2d at 148.

78. 242 Va. 343, 410 S.E.2d 639 (1991).

79. *Id.* at 347, 410 S.E.2d at 642.

80. *Id.* at 347, 410 S.E.2d at 641; see *McLaughlin v. Siegel*, 166 Va. 374, 185 S.E.2d 873 (1936); see also *Thurston Metals & Supply Co. v. Taylor*, 230 Va. 475, 483-484, 339 S.E.2d 538, 543 (1986).

81. 242 Va. at 348, 410 S.E.2d at 642.

82. 242 Va. 328, 410 S.E.2d 632 (1991).

subsequently involved in an automobile accident.<sup>83</sup> The plaintiff contended that the employee was acting "within the scope of his employment" while attending the party, and was therefore acting as the servant of Piccadilly Cafeterias.<sup>84</sup> The supreme court made a clear distinction between whether an accidental injury "[arose] out of and in the course of employment,' within the meaning of Code § 65.1-7 [now 65.2-101],"<sup>85</sup> and whether a servant acted within the scope of his employment under the doctrine of respondeat superior.<sup>86</sup> It is the master-servant relationship that must be analyzed in arriving at a respondeat superior determination.<sup>87</sup> Further, it is necessary to establish that the master-servant relationship claimed "existed at the time of the injuries"<sup>88</sup> and "in respect to the very transaction out of which the injury arose."<sup>89</sup>

#### H. *Virginia Birth-Related Neurological Injury Compensation Act*

The Virginia Supreme Court upheld the constitutionality of the Virginia Birth-Related Neurological Injury Compensation Act<sup>90</sup> against the claim of twenty-nine non-participating physicians in *King v. Virginia Birth-Related Neurological Injury Compensation Program*.<sup>91</sup>

#### I. *Charitable Immunity*

The doctrine of limited immunity applicable to charities in Virginia was restricted to the direct beneficiaries of the charitable activities by *Straley v. Urbanna Chamber of Commerce*.<sup>92</sup> In *Straley*, the plaintiff, a spectator at a parade, was struck in the eye by a piece of candy thrown by a parade participant.<sup>93</sup> The court found that, because she was not a resident of the town and received no particular pecuniary benefit from the funds generated by the festi-

---

83. *Id.* at 329-30, 410 S.E.2d at 632-33.

84. *Id.* at 330, 410 S.E.2d at 633.

85. VA. CODE ANN. § 65.2-101 (Cum. Supp. 1992).

86. *Sayles*, 242 Va. at 331, 410 S.E.2d at 634.

87. *Id.*

88. *Id.* at 332, 410 S.E.2d at 634.

89. *Id.* (quoting *Wyllie v. Palmer*, 33 N.E. 381, 383 (N.Y. 1893), *quoted in Blair v. Broadwater*, 121 Va. 301, 308, 93 S.E. 632, 634 (1917)).

90. VA. CODE ANN. §§ 38.2-5000 to -5021 (Repl. Vol. 1990 & Cum. Supp. 1992).

91. 242 Va. 404, 410 S.E.2d 656 (1991).

92. 243 Va. 32, 413 S.E.2d 47 (1992).

93. *Id.* at 33, 413 S.E.2d at 48.

val,<sup>94</sup> she was not a beneficiary of the charity's purposes which, in this case, were to advance the commercial and civic interests of the town and surrounding area.<sup>95</sup> On these facts, the court found that the plaintiff was an "invitee to whom the defendants owed the duty of reasonable care,"<sup>96</sup> and reversed the trial court's dismissal of her claim on the grounds of charitable immunity.<sup>97</sup>

#### J. *Finality of Decisions*

Practitioners have come to rely on the communication established with the courts and their clerks, sometimes to their great detriment. At the conclusion of the plaintiff's case-in-chief during a jury trial of the underlying action in *Smith v. Stanaway*,<sup>98</sup> the trial court sustained the defendant's motion to strike the plaintiff's evidence.<sup>99</sup> On September 18, 1990, the final day of trial, a draft order was prepared by the clerk of court, and the trial judge entered the order without notice to counsel of record, and without their endorsement.<sup>100</sup> On October 24, the trial judge granted the defendant's previously filed motion for sanctions. The plaintiff filed a notice of appeal on October 23, 1990, and a petition for appeal on January 23, 1991.<sup>101</sup>

The supreme court found that the September 18, 1990 order was valid and properly entered by the trial court,<sup>102</sup> and that the October 23, 1990 notice of appeal had therefore not been timely filed pursuant to Rule 5:9(a).<sup>103</sup> The court therefore dismissed the appeal. Further, since the September 18, 1990 order was final pursu-

---

94. *Id.* at 37, 413 S.E.2d at 50-51.

95. *Id.* at 37-38, 413 S.E.2d at 50-51.

96. *Id.* (citations omitted).

97. *Id.* at 38, 413 S.E.2d at 51.

98. 242 Va. 286, 410 S.E.2d 610 (1991).

99. *Id.* at 287, 410 S.E.2d at 611.

100. *Id.* at 287-88, 410 S.E.2d at 611.

101. *Id.*

102. *Id.* at 288-89, 410 S.E.2d at 612. The supreme court found that the final sentence of VA. SUP. CT. R. 1:13 authorized the trial court "in its discretion" to dispense with requirements for notice or endorsement of counsel. *Id.*

103. VA. SUP. CT. R. 5:9 (requiring notice of appeal to be filed within 30 days after entry of final judgment).

ant to Rule 1:1,<sup>104</sup> the trial court was without jurisdiction to enter its October 24, 1990 order of sanctions.<sup>105</sup>

### K. *Peremptory Challenges*

In *Faison v. Hudson (Henrico)*,<sup>106</sup> the Virginia Supreme Court adopted the U.S. Supreme Court's decision in *Edmonson v. Leesville Concrete Co.*,<sup>107</sup> extending to civil cases the *Batson*<sup>108</sup> rule prohibiting racially-motivated peremptory strikes. In *Faison (Henrico)* a white plaintiff brought a wrongful death action against a black defendant, and utilized a peremptory strike to remove the only black member of the venire.<sup>109</sup> The plaintiff stated at trial that the juror was removed because of her age, demeanor, and occupation, reasons counsel asserted were racially neutral.<sup>110</sup> The supreme court reversed and found that the defendant had met his prima facie standard of jury discrimination by a showing that the plaintiff had removed from the venire the only member of the defendant's race,<sup>111</sup> and that the plaintiff had not overcome that burden.<sup>112</sup>

### L. *Venue — Finality of Decisions — Res Judicata*

In *Faison v. Hudson (Richmond)*,<sup>113</sup> venue was improper in the original forum, and the defendant promptly filed a motion to

---

104. In pertinent part, VA. SUP. CR. R. 1:1 provides that:

All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated or suspended for twenty-one days after the date of entry, and no longer.

*Id.*

105. 242 Va. at 289, 410 S.E.2d at 612.

106. 243 Va. 397, 417 S.E.2d 305 (1992). On April 17, 1992, the supreme court settled two different appeals arising out of the *Faison* case. As the case currently cited was from the Circuit Court of Henrico County it is referred to in that fashion for clarity.

107. 111 S. Ct. 2077 (1991).

108. *Batson v. Kentucky*, 476 U.S. 79 (1986).

109. *Faison (Henrico)*, 243 Va. at 399-400, 417 S.E.2d at 307.

110. *Id.* at 400, 417 S.E.2d at 307. Justice Compton, joined in dissent by Chief Justice Carrico, believed that the plaintiff's stated reasons for striking the black juror were racially neutral, and that age, demeanor, and occupation were proper considerations when utilizing peremptory strikes. *Id.* at 408, 417 S.E.2d at 311 (Compton, J., dissenting).

111. *Id.* at 402, 417 S.E.2d at 308.

112. *Id.* at 402-03, 417 S.E.2d at 308.

113. 243 Va. 413, 417 S.E.2d 302 (1992). On April 17, 1992, the supreme court settled two different appeals arising out of the *Faison* case. As the case currently cited was from the Circuit Court of the City of Richmond it is referred to in that fashion for clarity.

transfer venue.<sup>114</sup> After a period of six months, and approximately one month prior to trial, the defendant brought the motion to transfer to the attention of the trial court.<sup>115</sup> Relying on section 8.01-264(A) of the Code,<sup>116</sup> the trial court found that the moving party had failed in her burden of going forward "promptly" with the matter by not having the motion heard until six months after its filing,<sup>117</sup> and pursuant to the authority of section 8.01-265<sup>118</sup> found good cause to retain the case for trial.<sup>119</sup> The Virginia Supreme Court found that the trial court had properly exercised its discretion in retaining the case.

In *Faison (Richmond)*, the supreme court also addressed the finality of a judgment for res judicata purposes. Holding that "a judgment is not final for the purposes of res judicata or collateral estoppel when it is being appealed or when the time limits fixed for perfecting the appeal have not expired,"<sup>120</sup> the court reversed the trial court's decision and remanded the case.

#### M. Nonsuits

In a case mentioned in this survey last year, the supreme court upheld the trial court's decision in *Homeowners Warehouse, Inc. v. Rawlins*.<sup>121</sup> During the trial, the defendant moved to strike the plaintiff's evidence in open court; the court then heard full argument on the motion and retired to consider its decision. The court returned some time later to announce its decision to grant the motion to strike.<sup>122</sup> While the trial judge explained his rationale, plaintiff's counsel interrupted and moved for a nonsuit. The trial court granted the nonsuit, and the defendant appealed.<sup>123</sup> The supreme court, relying on *Newton v. Veney & Raines*<sup>124</sup> and *Berryman v. Moody*,<sup>125</sup> found that the motion to strike had not yet

---

114. *Id.* at 415, 417 S.E.2d at 302.

115. *Id.* at 415, 418, 417 S.E.2d at 302, 304.

116. VA. CODE ANN. § 8.01-264(A) (Repl. Vol. 1992).

117. *Faison (Richmond)*, 243 Va. at 415, 417 S.E.2d at 302.

118. VA. CODE ANN. § 8.01-265 (Repl. Vol. 1992).

119. *Faison (Richmond)*, 243 Va. at 418, 417 S.E.2d at 308.

120. *Id.* at 419, 417 S.E.2d at 308.

121. 242 Va. xiii, 409 S.E.2d 115 (1991) (by order).

122. *Id.* at xiv, 409 S.E.2d at 115 (Russell, J., dissenting).

123. *Id.*

124. 220 Va. 947, 265 S.E.2d 707 (1980).

125. 205 Va. 516, 137 S.E.2d 900 (1964).

been "sustained" as provided in Code section 8.01-380(A)<sup>126</sup> and that the plaintiff was entitled to the nonsuit.<sup>127</sup>

### III. CHANGES IN THE VIRGINIA SUPREME COURT RULES

There have been some important changes in the Rules of the Virginia Supreme Court during the past year relating to general civil practice and procedure in Virginia courts.

Rule 1:14 was entirely rewritten. Effective July 1, 1992, it now provides: "A court may authorize the use of electronic or photographic means for the preservation of the record or parts thereof."<sup>128</sup>

Rule 4:5(a1) was amended effective September 1, 1991.<sup>129</sup> Depositions may now also be taken in a county or city of the Commonwealth in which "a nonparty witness resides, is employed, or has his principal place of business."<sup>130</sup> This change makes the Rule consistent with the statutory provisions of Code section 8.01-420.4 enacted during the 1991 legislative session.<sup>131</sup>

Rule 4:8(b) has been amended to delete the requirement to furnish the court with copies of the interrogatory answers and oath.<sup>132</sup> This brings Rule 4:8(b) into harmony with Rule 4:8(c).

A physical and mental examination pursuant to Rule 4:10<sup>133</sup> may now be administered by a health care provider as defined in sec-

---

126. VA. CODE ANN. § 8.01-380(A) (Repl. Vol. 1992) provides in pertinent part:

A party shall not be allowed to suffer a nonsuit as to any cause of action . . . unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision.

*Id.*

127. 242 Va. at xiii, 409 S.E.2d at 115.

128. VA. SUP. CT. R. 1:14.

129. See VA. SUP. CT. R. 4:5 cmt.

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

131. Act of Mar. 5, 1991, ch. 81, 1991 Va. Acts 105 (codified at VA. CODE ANN. § 8.01-420.4 (Repl. Vol. 1992)). This statute allows depositions to be taken in the manner now provided for in this rule. It had been presumed that in the case of conflict that the specific statutory provision would control. The change to Rule 4:5 brings the statute and the rule into accord.

132. VA. SUP. CT. R. 4:8(b).

133. *Id.* 4:10.

tion 8.01-581.1.<sup>134</sup> Previously examinations must have been performed by a physician.<sup>135</sup>

Rule 5:17A was added effective July 1, 1991.<sup>136</sup> This rule sets forth the provisions for a petition for supreme court review, pursuant to Code section 8.01-626,<sup>137</sup> of a circuit court's granting or denial of an injunction.<sup>138</sup>

The amendments to Rules 5:24<sup>139</sup> and 5A:17,<sup>140</sup> effective July 1, 1991, expand the acceptable forms of security for appeals to include irrevocable letters of credit, and added a new Form 11 for those instruments.<sup>141</sup>

References throughout the Rules to the "Industrial Commission" have been amended to substitute the "Virginia Workers' Compensation Commission,"<sup>142</sup> to become consistent with the terminology of the Workers' Compensation Act.<sup>143</sup>

#### IV. RECENT DEVELOPMENTS IN LEGISLATION

This section outlines some important statutory changes enacted during the 1992 legislative session. It does not purport to be all-inclusive, and only attempts to highlight legislation of general interest to all civil practitioners. Unless otherwise provided, the provisions discussed are effective July 1, 1992.

---

134. VA. CODE ANN. § 8.01-581.1 (Repl. Vol. 1992), in pertinent part, defines health care provider as:

(i) a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services as a physician or hospital, dentist, pharmacist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, physical therapy assistant, clinical psychologist, health maintenance organization, . . . .

*Id.*

135. Former VA. SUP. CT. R. 4:10 (Repl. Vol. 1991).

136. VA. SUP. CT. R. 5:17A.

137. VA. CODE ANN. § 8.01-626 (Repl. Vol. 1992).

138. VA. SUP. CT. R. 5:17A.

139. *Id.* 5:24.

140. *Id.* 5A:17.

141. *Id.* part 5, form 11.

142. The following rules were amended effective Feb. 1, 1992: VA. SUP. CT. R. 5:5; 5A:1, :3, :7, :9-:11, :16, :18, :29-31; part 5, form 7; part 5A, form 7; and part 6, § I, rule 1, UPC 1-1.

143. VA. CODE ANN. §§ 65.2-100 to -1310 (Repl. Vol. 1991 & Cum. Supp. 1992).



### A. *Accrual for Causes of Action Involving Breast Implants*

The amendment to Code section 8.01-249 adds to the limited list of specific accrual times products liability cases "arising as a result of implantation of any prosthetic device for breast augmentation or reconstruction."<sup>144</sup> The cause of action is deemed to accrue when the fact of the injury and its causal connection to the implantation is first communicated to the person by a physician.<sup>145</sup> The statute by its terms applies to all actions filed on or after July 1, 1992.<sup>146</sup> The new section does not apply to actions sounding against health care providers as they are defined in Code § 8.01-581.1.<sup>147</sup> The supreme court has not yet decided whether the amended statute applies retroactively.

### B. *Expert Standard in Medical Malpractice*

A witness is now qualified to testify as an expert on the standard of care in medical malpractice actions if he "demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards"<sup>148</sup> and has had an active clinical practice "in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action."<sup>149</sup>

The former provision required that the testifying expert have an active clinical practice in the same field or specialty as the defendant.<sup>150</sup> The addition of the "or a related field of medicine" language greatly expands the discretion of the trial court to allow experts from related fields to provide evidence on breaches of the standard of care. This change will both greatly expand the ease with which counsel can obtain expert testimony and will enable counsel to rely on experts in certain sub-specialties who may not have qualified under the pre-1992 standard in their "general" field of practice.

---

144. Act of Apr. 6, 1992, ch. 817, 1992 Va. Acts 1310 (codified at VA. CODE ANN. § 8.01-249(7) (Repl. Vol. 1992)).

145. *Id.*

146. *Id.*

147. *Id.*; see *supra* note 134.

148. Act of Mar. 10, 1992, ch. 240, 1992 Va. Acts 299 (codified at VA. CODE ANN. § 8.01-581.20(A) (Cum. Supp. 1992)).

149. *Id.*

150. VA. CODE ANN. § 8.01-581.20(A) (Cum. Supp. 1991).

### C. *Additional Jurors*

Code section 8.01-360 has been amended to abolish the practice of using alternate jurors.<sup>151</sup> The court may now direct the selection of up to two additional jurors for cases it determines are likely to be protracted.<sup>152</sup> For each two additional jurors to be chosen, the plaintiff and defendant will each be granted one additional peremptory challenge.<sup>153</sup> The identity of the additional jurors will be determined by lot, and known only to the plaintiff and the defendant at the time the jury is impaneled.<sup>154</sup> Any additional jurors not needed to deliberate the case would be excused before final submission of the case to the jury to preserve the correct number of jurors.<sup>155</sup>

### D. *Evidence*

Section 8.01-381 now provides that upon request by either party, courts must instruct the jury that it may request exhibits for their use during deliberations.<sup>156</sup> Exhibits requested by the jury will then be sent to the jury room or otherwise made available for the jury's use during deliberations.<sup>157</sup>

A new section, 8.01-417.1, has been added to allow any party, upon timely motion, to read to the jury or to introduce into evidence only selected portions of lengthy or multiple documents. This right is tempered by the ability of the court to allow the entire document to be received.<sup>158</sup>

Section 8.01-384 has been amended to clarify the non-waiver of objections.<sup>159</sup> The amendment is declaratory of existing law<sup>160</sup> and provides that:

---

151. Act of Mar. 30, 1992, ch. 536, 1992 Va. Acts 677 (codified at VA. CODE ANN. § 8.01-360 (Repl. Vol. 1992)).

152. VA. CODE ANN. § 8.01-360 (Repl. Vol. 1992).

153. *Id.*

154. *Id.*

155. *Id.*; see also VA. CODE ANN. §§ 8.01-359 (Repl. Vol. 1992) & 19.2-262 (Repl. Vol. 1990).

156. VA. CODE ANN. § 8.01-381 (Cum. Supp. 1992).

157. *Id.*

158. Act of Apr. 5, 1992, ch. 720, 1992 Va. Acts 1102 (codified at VA. CODE ANN. § 8.01-417.1 (Repl. Vol. 1992)).

159. Act of Mar. 30, 1992, ch. 564, 1992 Va. Acts 725 (codified at VA. CODE ANN. § 8.01-384(A) (Repl. Vol. 1992)).

160. VA. CODE ANN. § 8.01-384 (Repl. Vol. 1992).

No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.<sup>161</sup>

This change may resolve the uncertainty of counsel as to the form of objections, or tenacity with which objections need to be made to rulings, orders, or actions of the trial court.<sup>162</sup>

Recorded telephone conversations are now admissible in civil actions pursuant to Code section 8.01-420.2 if the portion of the recording to be admitted contains admissions which if true would constitute criminal conduct which is the basis for the civil action, provided one of the parties was aware the conversation was being recorded.<sup>163</sup> By its terms, the provision is not applicable to proceedings for divorce, separate maintenance, or annulment.<sup>164</sup>

Code section 8.01-391 has been amended to allow authenticated copies of any court or court clerk's records to be submitted as evidence in the same manner as the original, provided they are properly authenticated by the clerk or deputy clerk of that court.<sup>165</sup>

### E. *Striking of Civil Cases*

The Code allows a court to strike from its docket any pending civil action in which there has been, after two years, no order or

---

161. *Id.*

162. *See, e.g., Spitzli v. Minson*, 231 Va. 12, 341 S.E.2d 170 (1986). In *Spitzli*, the trial court found that the defendant's failure to object to jury instructions on the issues of contributory negligence and proximate cause waived any contention that the trial court erred in not ruling on those issues as a matter of law. *Id.* at 18, 341 S.E.2d at 173 (citing *Hilton v. Fayen*, 196 Va. 860, 866, 86 S.E.2d 40, 43 (1955)).

163. Act of Mar. 30, 1992, ch. 567, 1992 Va. Acts 729 (codified at VA. CODE ANN. § 8.01-420.2 (Repl. Vol. 1992)).

164. *Id.*

165. Act of Mar. 20, 1992, ch. 393, 1992 Va. Acts 505 (codified at VA. CODE ANN. § 8.01-391(C) (Repl. Vol. 1992)).

proceeding except to continue the action.<sup>166</sup> However, the most recent amendment to section 8.01-335 provides that no case may be discontinued if either party requests that it be continued; following such a request to continue by either party, the court must enter a pretrial order pursuant to Rule 4:13<sup>167</sup> controlling the subsequent course of the case to ensure its timely resolution.<sup>168</sup> Thereafter, if the court finds that the case has not been timely prosecuted pursuant to its order, it may strike the case from the docket.<sup>169</sup>

In addition, the amendments allow any court in which a case has been pending for more than three years without an order or proceeding other than to continue it, to strike the case from its docket upon notice to all parties at their addresses as shown on the pleadings.<sup>170</sup> Former law authorized a strike and dismissal only after five years and did not require notice.<sup>171</sup>

Further, where a civil action is pending on appeal from a general district court, and an appeal bond has been furnished by or on behalf of any party against whom judgment has been rendered for money or property, and there has been no order or proceeding for more than one year except to continue the matter, the court may, on notice,<sup>172</sup> dismiss the case and strike it from the docket.<sup>173</sup>

#### F. *Wrongful Death Beneficiaries*

The legislature, in amending Code section 8.01-53, has changed the classes and beneficiaries entitled to share a damage award for wrongful death. In addition to parents, brothers, and sisters of the decedent, the revised second class now includes a relative who was "primarily dependent upon the decedent for support or services and is also a member of the same household as the decedent."<sup>174</sup>

---

166. VA. CODE ANN. § 8.01-335(A) (Repl. Vol. 1992).

167. VA. SUP. CT. R. 4:13.

168. Act of Apr. 6, 1992, ch. 803, 1992 Va. Acts 1272 (codified at VA. CODE ANN. § 8.01-335(A) (Repl. Vol. 1992)).

169. *Id.*

170. *Id.* § 8.01-335(B).

171. VA. CODE ANN. § 8.01-335(B) (Repl. Vol. 1984 & Cum. Supp. 1991).

172. Notice is to the parties in interest, if known, or their counsel of record at his last known address, at least fifteen days before the entry of such order. Act of Apr. 6, 1992, ch. 792, 1992 Va. Acts 1250 (codified at VA. CODE ANN. § 8.01-335(A), (C) (Repl. Vol. 1992)).

173. *Id.*

174. Act of Mar. 2, 1992, ch. 74, 1992 Va. Acts 75 (codified at VA. CODE ANN. § 8.01-53(A) (Repl. Vol. 1992)).

For purposes of section 8.01-53, "relative" is defined to include "any person related to the decedent by blood, marriage, or adoption and also includes a stepchild of the decedent."<sup>175</sup>

### G. *Bad Check Transactions*

Code sections 8.01-27.1<sup>176</sup> and 8.01-27.2<sup>177</sup> have been amended to strengthen the rights of both parties to private rights of action arising out of bad check transactions. The 1992 amendments to section 8.01-27.1 create liability for the "holder of a [bad] check, draft or order" where charges to the "drawer" have been made in excess of those allowed by section 8.01-27.1(A).<sup>178</sup> In this circumstance, the holder will be "liable to the drawer for the lesser of (i) twenty dollars plus the excess of the authorized amount or (ii) twice the amount charged in excess of the authorized amount."<sup>179</sup>

Code section 8.01-27.2 has been amended to increase from \$100 to \$250 the civil recovery alternative for the giving of a bad check not paid within thirty days of written notice.<sup>180</sup> The recovery amount is the lesser of \$250 or three times the amount of the check,<sup>181</sup> and is in addition to the amounts allowable under section 8.01-27.1.<sup>182</sup>

### H. *Shoplifting and Employee Theft*

A civil action for shoplifting or employee theft has been created with the addition of Code section 8.01-44.4.<sup>183</sup> From an adult or emancipated minor who shoplifts, a merchant is now authorized to collect a civil judgment for twice the actual cost of the merchandise, with a minimum of \$50, or for liquidated damages of no more than \$350 if the merchant retrieves the property in merchantable

---

175. *Id.*

176. Act of Mar. 10, 1992, ch. 238, 1992 Va. Acts 297 (codified at VA. CODE ANN. § 8.01-27.1 (Repl. Vol. 1992)).

177. Act of Mar. 27, 1992, ch. 501, 1992 Va. Acts 639 (codified at VA. CODE ANN. § 8.01-27.2 (Repl. Vol. 1992)).

178. VA. CODE ANN. § 8.01-27.1 (Repl. Vol. 1992).

179. *Id.* § 8.01-27.1(B).

180. *Id.* § 8.01-27.2.

181. *Id.*

182. *Id.*

183. Act of Apr. 5, 1992, ch. 721, 1992 Va. Acts 1102 (codified at VA. CODE ANN. § 8.01-44.4 (Repl. Vol. 1992)) (renumbered by the Virginia Code Commission from § 8.01-44.3 to § 8.01-44.4).

condition.<sup>184</sup> Further, the “prevailing party . . . shall be entitled to reasonable attorneys’ fees and costs not to exceed \$150.”<sup>185</sup> Action under this section, however, may not be instituted if criminal action has been initiated against the perpetrator under any shoplifting statute.<sup>186</sup>

### I. *Firemen — Duty of Care*

Code section 8.01-226 now provides that law enforcement officers and firefighters engaged in the performance of their duties are owed a duty of ordinary care.<sup>187</sup> Emergency medical personnel are included in the definition of “firefighter.”<sup>188</sup>

### J. *Asbestos Consolidation*

Section 8.01-374.1 allows the consolidation of forty or more asbestos cases that are pending against manufacturers and suppliers if such cases involve common questions of law or fact.<sup>189</sup>

### K. *Tort Claims Against the Commonwealth*

The amendments to Code section 8.01-195.4 now allow tort claims against the Commonwealth not exceeding \$10,000<sup>190</sup> to be brought in general district court. In addition, the provisions of the Virginia Tort Claims Act<sup>191</sup> have been amended to allow service of the notice of claim on the Director of the Division of Risk Management as well as on the Attorney General.<sup>192</sup> In similar fashion, the

---

184. VA. CODE ANN. § 8.01-44.4(A) (Repl. Vol. 1992).

185. *Id.* § 8.01-44.4(C).

186. *Id.* (referring to §§ 18.2-95, -96, -102.1, -103, or any other criminal offense as defined in § 8.01-44.4(F)).

187. Act of Apr. 5, 1992, ch. 731, 1992 Va. Acts 1110 (codified at VA. CODE ANN. § 8.01-226 (Repl. Vol. 1992)).

188. *Id.*

189. Act of Apr. 3, 1992, ch. 615, 1992 Va. Acts 893 (codified at VA. CODE ANN. § 8.01-374.1 (Repl. Vol. 1992)).

190. Act of Mar. 3, 1992, ch. 111, 1992 Va. Acts 124 (codified at VA. CODE ANN. § 8.01-195.4 (Repl. Vol. 1992)). The former limitation was \$7,000. VA. CODE ANN. § 8.01-195.4 (Cum. Supp. 1991).

191. VA. CODE ANN. §§ 8.01-195.1 to -195.9 (Repl. Vol. 1992).

192. Act of Apr. 6, 1992, ch. 796, 1992 Va. Acts 1259 (codified at VA. CODE ANN. §§ 8.01-195.4, -195.6 (Repl. Vol. 1992)).

authority to adjust, compromise, or settle cases now also lies with the Director of the Division of Risk Management.<sup>193</sup>

L. *Confession of Judgment*

Business practitioners should note that pursuant to the amendments to section 8.01-433.1, confession of judgment provisions entered into after January 1, 1993 must contain on their face the following statement in boldface print of not less than eight point type:

**IMPORTANT NOTICE**

**THIS INSTRUMENT CONTAINS A CONFESSION OF JUDGMENT PROVISION WHICH CONSTITUTES A WAIVER OF IMPORTANT RIGHTS YOU MAY HAVE AS A DEBTOR AND ALLOWS THE CREDITOR TO OBTAIN A JUDGMENT AGAINST YOU WITHOUT ANY FURTHER NOTICE.<sup>194</sup>**

Failure to comport with this requirement will prevent a party from obtaining judgment based on a confession of judgment provision.<sup>195</sup>

---

193. Act of Apr. 6, 1992, ch. 796, 1992 Va. Acts 1259 (codified at VA. CODE ANN. § 8.01-195.5 (Repl. Vol. 1992)).

194. Act of Mar. 20, 1992, ch. 392, 1992 Va. Acts 504 (codified at VA. CODE ANN. § 8.01-433.1 (Repl. Vol. 1992)).

195. *Id.*