

1993

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

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### Recommended Citation

David D. Hopper, *Annual Survey of Virginia Law: Civil Practice and Procedure*, 27 U. Rich. L. Rev. 657 (1993).

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## CIVIL PRACTICE AND PROCEDURE

David D. Hopper\*

### I. INTRODUCTION

Virginia courts and the General Assembly have effected a number of changes in civil practice and procedure during the past year. This article focuses on some significant developments of interest to the general litigation attorney. Matters affecting real property,<sup>1</sup> juveniles,<sup>2</sup> and construction law<sup>3</sup> are treated elsewhere in this volume.

### II. RECENT DECISIONS OF THE SUPREME COURT OF VIRGINIA

#### A. Res Judicata and Collateral Estoppel

Applying familiar principles of claim preclusion, the Supreme Court of Virginia in *Smith v. Ware*<sup>4</sup> held that a plaintiff whose action for unlawful entry and detainer was dismissed was not barred from pursuing an action to recover dower.<sup>5</sup> The court explained that an action for unlawful entry and detainer is designed to restore possession and award damages.<sup>6</sup> The dower action, on the other hand, sought a different remedy and represented a different cause of action.<sup>7</sup> Consequently, even though the right to occupy the property at issue had been based on the plaintiff's statutory right as a surviving spouse to reside, rent-free, in the marital home until dower was assigned,<sup>8</sup> the court held that the two actions re-

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1. See generally L. Charles Long, Jr., *Annual Survey of Virginia Law: Property Law*, 27 U. RICH. L. REV. 805 (1993).

2. See generally Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 27 U. RICH. L. REV. 783 (1993).

3. See generally D. Stan Barnhill, *Annual Survey of Virginia Law: Construction Law*, 27 U. RICH. L. REV. 683 (1993).

4. 244 Va. 374, 421 S.E.2d 444 (1992).

5. *Id.* at 379, 421 S.E.2d at 447.

6. *Id.* at 377, 421 S.E.2d at 445.

7. *Id.* at 377, 421 S.E.2d at 446 (quoting former VA. CODE ANN. § 64.1-37 (repealed 1991)). Dower was abolished by VA. CODE ANN. § 64.1-19.2 (Repl. Vol. 1991).

8. VA. CODE ANN. § 64.1-33 (repealed 1990).

vealed neither "an identity of the remedies sought or an identity of the causes of action."<sup>9</sup> In *Virginia Dynamics Co. v. Payne*,<sup>10</sup> another case involving both unlawful detainer and claim splitting, the court held that despite an automatic acceleration clause in a lease, Virginia's unlawful entry and detainer statute<sup>11</sup> allowed a landlord to split its cause of action for rent.<sup>12</sup> Moreover, the court held that even if the statutory right to split a cause of action for rent could be contracted away, the right would need to be "expressly waived" with language beyond a mandatory acceleration clause.<sup>13</sup>

In *Arkansas Best Freight System, Inc. v. H.H. Moore, Jr. Trucking Co.*,<sup>14</sup> the court addressed the effect of a declaratory judgment action concerning insurance coverage on a cross-claim for indemnity in a wrongful death action. Under a trip lease agreement, H.H. Moore provided Arkansas Best with a tractor trailer and driver. Arkansas Best agreed to assume primary responsibility to the public for operation of the vehicle, and H.H. Moore agreed to indemnify Arkansas Best from any claims arising from operation of the tractor trailer.<sup>15</sup> After an automobile accident involving the tractor trailer, the estate of a passenger brought a wrongful death action against the estate of the driver, H.H. Moore, and Arkansas Best. Arkansas Best cross-claimed against H.H. Moore for indemnification under the terms of the trip lease.<sup>16</sup>

While that action was pending in state court, H.H. Moore's insurer, Carolina Casualty Insurance Company, instituted a declaratory judgment action in federal court against H.H. Moore, Arkansas Best, the decedent's estate, and two other insurers. The federal district court held that the indemnity provision of the trip lease was unenforceable and that the Carolina Casualty policy did not cover H.H. Moore for liability which it contracted to assume.<sup>17</sup>

In an unpublished opinion, the United States Court of Appeals for the Fourth Circuit affirmed the district court's decision, but

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9. *Smith*, 244 Va. at 376, 421 S.E.2d at 445.

10. 244 Va. 314, 421 S.E.2d 421 (1992).

11. VA. CODE ANN. § 8.01-128 (Repl. Vol. 1992).

12. *Payne*, 244 Va. at 318, 421 S.E.2d at 423.

13. *Id.* (citing *McMerit Constr. Co. v. Knightsbridge Dev. Co.*, 235 Va. 368, 374, 367 S.E.2d 512, 515 (1988); *VNB Mortgage Corp. v. Lone Star Indus.*, 215 Va. 366, 371, 209 S.E.2d 909, 914 (1974)).

14. 244 Va. 304, 421 S.E.2d 197 (1992).

15. *Id.* at 305, 421 S.E.2d at 197.

16. *Id.* at 306, 421 S.E.2d at 197-98.

17. *Id.* at 306, 421 S.E.2d at 198.

made clear that it did not reach the issue of whether the indemnity agreement was indeed unenforceable.<sup>18</sup> Instead, the court of appeals simply held that Carolina Casualty's policy clearly excluded coverage.<sup>19</sup>

Thereafter, in the wrongful death case, the trial court held that Arkansas Best's cross-claim for indemnity was barred by the doctrine of res judicata, based on the federal district court's ruling that the indemnity agreement was unenforceable.<sup>20</sup> On appeal, the court first noted that "a judgment which is being appealed is not final for res judicata purposes . . . ."<sup>21</sup> Based on that proposition, the court then held that because the court of appeals had found it unnecessary to address the correctness of the district court's holding that the indemnity provision was unenforceable, there had been no "previous, final adjudication of Arkansas Best's indemnity claim . . . ."<sup>22</sup>

### B. *Statutes of Limitations*

In *Starnes v. Cayouette*,<sup>23</sup> the court addressed whether a defendant, against whom the applicable statute of limitations has run, can acquire a vested right under the Virginia Constitution that cannot be abrogated by a later statutory amendment applied retroactively. The plaintiff, Starnes, was an adult who had been sexually abused for a number of years during her childhood by the defendant, Cayouette. The last act of abuse occurred in 1978; Starnes turned eighteen in 1982.<sup>24</sup> Starnes filed suit in July 1991, bringing claims for assault, battery, sexual battery, rape, sodomy, false imprisonment, and intentional infliction of emotional distress. The defendant pled the two-year statute of limitations for personal injury actions.<sup>25</sup> Starnes responded that the issue was governed by legislation that provided:

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18. *Id.*

19. *Id.* at 308, 421 S.E.2d at 198.

20. *Id.*

21. *Id.* at 307, 421 S.E.2d at 198 (citing *Faison v. Hudson*, 243 Va. 413, 419, 417 S.E.2d 302, 304-05 (1992)).

22. *Arkansas Best*, 244 Va. at 307, 421 S.E.2d at 198.

23. 244 Va. 202, 419 S.E.2d 669 (1992).

24. *Id.* at 204, 419 S.E.2d at 670.

25. VA. CODE ANN. § 8.01-243 (Repl. Vol. 1992).

In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incompetency of the person, [the cause of action shall be deemed to accrue] when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. However, no such action may be brought more than ten years after the later of (i) the last act by the same perpetrator which was part of a common scheme or plan of abuse or (ii) removal of the disability of infancy or incompetency.

As used in this subdivision, "sexual abuse" means sexual abuse as defined in subdivision 6 of § 18.2-67.10 and acts constituting rape, sodomy, inanimate object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 *et seq.*) of Chapter 4 of Title 18.2.

[T]he provisions of subdivision 6 of § 8.01-249 shall apply to all actions filed on or after July 1, 1991, without regard to when the act upon which the claim is based occurred provided that no such claim which accrued prior to July 1, 1991, shall be barred by application of those provisions if it is filed within one year of the effective date of this act.<sup>26</sup>

The court affirmed the trial court's dismissal of Starnes' suit and held that to the extent that the Act of Assembly applied retroactively to revive an otherwise time-barred claim, the statute violated the due process guaranties of the Virginia Constitution.<sup>27</sup> In so holding, the court relied on its opinion in *Shiflet v. Eller*<sup>28</sup> that "'substantive' rights, as well as 'vested' rights are included within those interests protected from retroactive application of statutes."<sup>29</sup> The court held that the right to a statute of limitations defense, where the statute has already run, is a substantive right, thereby resolving an issue left open in *School Board of Norfolk v. United States Gypsum Co.*<sup>30</sup> In response to the court's holding in *Starnes*, the General Assembly passed a joint resolution proposing to amend Article IV, section 14 of the Virginia Constitution to include the following language:

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26. Act of Apr. 3, 1991, ch. 674, 1991 Va. Acts 1273 (codified at 8.01-294 (Cum. Supp. 1993)).

27. *Starnes*, 244 Va. at 212, 419 S.E.2d at 675 (citing VA. CONST. art. I, § 11).

28. 228 Va. 115, 319 S.E.2d 750 (1984).

29. *Starnes*, 244 Va. at 209, 419 S.E.2d at 673 (quoting *Shiflet v. Eller*, 228 Va. 115, 120, 319 S.E.2d 750, 753 (1984)).

30. 234 Va. 32, 38 n.4, 360 S.E.2d 325, 328 n.4 (1987).

The General Assembly's power to define the accrual date for a civil action based on an intentional tort committed by a natural person against a person who, at the time of the intentional tort, was a minor shall include the power to provide for the retroactive application of a change in the accrual date. No natural person shall have a constitutionally protected property right to bar a cause of action based on intentional torts as described herein on the ground that a change in the accrual date for the action has been applied retroactively or that a statute of limitations or statute of repose has expired.<sup>31</sup>

In *Vines v. Branch*,<sup>32</sup> the court addressed when an amendment to a motion for judgment may relate back to the date of filing of the original motion for statute of limitations purposes:

The general rule in this Commonwealth is that amendments will be permitted where they seek determination of the same subject matter of the controversy originally pleaded. Amendments will not be allowed, however, when they raise a new substantive cause of action which is different from that which the plaintiff asserted when he or she first filed the action.<sup>33</sup>

Vines' original motion for judgment, seeking return of her automobile, was dismissed with leave to amend. Vines' attempt to amend her pleading to allege a cause of action for breach of an oral contract was barred, however, by the three year statute of limitations<sup>34</sup> because her amendment did "more than merely 'vary the mode of demanding the same thing.'"<sup>35</sup> Vines' original tort claim was for recovery of personal property and was therefore timely, regardless of whether it fell within the relation-back doctrine.

Vines' second amendment, however, alleged an action for trespass for the defendant's failure to return the automobile that had been the subject of the original motion for judgment.<sup>36</sup> The court

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31. Act of Feb. 25, 1993, ch. 892, 1993 Va. Acts 1347 (amending VA. CONST. art. IV, § 14. The 1994 General Assembly must reenact this provision, and it must be approved by a statewide referendum before it is effective. See VA. CONST. art. XII, § 1).

32. 244 Va. 185, 418 S.E.2d 890 (1992).

33. *Id.* at 188, 418 S.E.2d at 892 (citing *New River Mining Co. v. Painter*, 100 Va. 507, 510, 42 S.E. 300, 301 (1902)).

34. VA. CODE ANN. § 8.01-246(4) (Cum. Supp. 1992).

35. *Vines*, 244 Va. at 188-89, 418 S.E.2d at 892-93 (quoting *Painter*, 100 Va. at 511, 42 S.E. at 301-02).

36. *Id.* at 189, 418 S.E.2d at 893.

held that this trespass action alleged conduct directed at Vines' property and was therefore governed by the five-year limitations period for property damage injuries.<sup>37</sup>

### C. *Expert Testimony*

In three recent cases, the court addressed the propriety of admitting expert opinion testimony on a variety of issues. Relying on the rule that only the jury may draw inferences from marks or debris in the roadway at an accident scene, the court in *Brown v. Corbin*<sup>38</sup> held inadmissible an accident reconstructionist's testimony that the *absence* of certain marks in the roadway indicated that a vehicle had not been accelerating.<sup>39</sup>

The court in *Brown* also held that it was improper to admit testimony from the reconstructionist suggesting that a police officer's investigation of the accident was inadequate, and thus the police officer's testimony was not credible. "The issue of a witness's credibility falls squarely within the jury's province, and is one which a jury can resolve without any expert testimony to assist it."<sup>40</sup> Finally, the court held that it was error to allow the accident reconstructionist to give his opinion regarding the friction factors of the road and shoulder surfaces when the record did not "show that he arrived at the figures through any scientifically accurate tests or formulas, but instead [showed] only that [he] estimated the friction on the surfaces on 'an August day.'"<sup>41</sup> The expert's opinion, the court concluded, was thus "nothing more than speculation . . . ."<sup>42</sup>

In *Kendrick v. Vaz, Inc.*,<sup>43</sup> a plaintiff who had been injured while pushing her daughter on a playground merry-go-round, sued the property owner. The plaintiff attempted to introduce expert testimony that the playground's surface material construction violated a national standard of care and that the surface was unsafe

37. *Id.* at 189-90, 418 S.E.2d at 894 (citing *Pigott v. Moran*, 231 Va. 76, 81, 341 S.E.2d 179, 182 (1986)). See VA. CODE ANN. § 8.01-243(B) (Repl. Vol. 1992).

38. 244 Va. 528, 423 S.E.2d 176 (1992).

39. *Id.* at 531-32, 423 S.E.2d at 179 (citing *Lopez v. Dobson*, 240 Va. 421, 423, 397 S.E.2d 863, 865 (1990)).

40. *Id.* at 532, 423 S.E.2d at 179 (citing *Parker v. Davis*, 221 Va. 299, 305, 269 S.E.2d 377, 381 (1980)).

41. *Id.* at 533, 423 S.E.2d at 179.

42. *Id.* (citing *Commonwealth v. Thorpe*, 223 Va. 609, 614, 292 S.E.2d 323, 326 (1982)).

43. 244 Va. 380, 421 S.E.2d 447 (1992).

because it was not constructed of a resilient material.<sup>44</sup> The court held that the testimony was properly excluded because the plaintiff's motion for judgment, which alleged the defendant's failure to maintain the premises in a reasonably safe condition and the absence of a reasonable warning of concealed or unsafe conditions, did not contain a specific allegation that the playground surface was composed of an unsafe material.<sup>45</sup> Moreover, the court found that the testimony of the plaintiff and the playground's maintenance engineer framed the issue in the case as whether there was a hole in the ground and whether such a hole was an unreasonably dangerous condition.<sup>46</sup> Framed in this way, the court explained, "the issue Kendrick presented, by her pleadings and her testimony, was not a proper subject for expert opinion" because "the jury was equally as capable as [the expert] of reaching an informed opinion . . . ."<sup>47</sup>

In *Ravenwood Towers, Inc. v. Woodyard*,<sup>48</sup> the court affirmed the admissibility of testimony from a slip and fall plaintiff's ophthalmologist, who testified about her visual impairment at the time of her accident.<sup>49</sup> The doctor had examined the plaintiff's eyes several months before the accident and again eight months later. He testified that the plaintiff's poor vision in her left eye, as noted during the pre-accident examination, meant that she did not have depth perception. However, the doctor admitted on cross-examination that he could not determine whether the plaintiff had been able "to see the difference in depth between objects" on the day of the accident.<sup>50</sup> The court nevertheless concluded that the expert testimony was admissible as probative of the issue of what the plaintiff could have seen at the time of the accident.<sup>51</sup>

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44. *Id.* at 381-83, 421 S.E.2d at 449.

45. *Id.* at 384, 421 S.E.2d at 449.

46. *Id.*

47. *Id.* (citing *Lopez v. Dobson*, 240 Va. 421, 423, 397 S.E.2d 863, 865 (1990); *Hill v. Lee*, 209 Va. 569, 573, 166 S.E.2d 274, 277 (1969); *Grasty v. Tanner*, 206 Va. 723, 726, 146 S.E.2d 252, 254 (1966)).

48. 244 Va. 51, 419 S.E.2d 627 (1992).

49. *Id.* at 54, 419 S.E.2d at 629.

50. *Id.*

51. *Id.* at 56, 419 S.E.2d at 630.



#### D. *Photographic Evidence*

The court in *Brown v. Corbin*<sup>52</sup> addressed the proper foundation necessary to introduce a photograph purporting to show a driver's perspective as he approached an accident scene. In response to the question of whether the photograph accurately depicted what he had seen as he approached the accident scene, the driver responded that the photograph was "somewhat similar to" what he had seen.<sup>53</sup> The court held that a "staged photograph purporting to depict the circumstances at the time of an event . . . is in the nature of a test or experiment which is offered for the same purpose."<sup>54</sup> Consequently, to lay a proper foundation for such a photograph, the party who offers it must demonstrate that it is "substantially similar, although not necessarily identical, to the actual event in all of its essential particulars."<sup>55</sup> Because the witness testified only that the photograph was somewhat similar and failed to describe either the differences or the similarities between the photograph and the actual conditions and circumstances at the time of the accident, the trial court erred in admitting the photograph.<sup>56</sup>

#### E. *Medical Malpractice*

In *Fairfax Hospital System, Inc. v. McCarty*,<sup>57</sup> a case involving a suit by the parents of a severely injured newborn against two physicians and a hospital, the court addressed the interplay between the medical malpractice damages cap<sup>58</sup> and the statutory provision governing the effect of release of one or more joint tortfeasors.<sup>59</sup> The parents made claims for the infant's injuries and the mother's injuries, including an unnecessary hysterectomy and emotional distress.<sup>60</sup>

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52. 244 Va. 528, 423 S.E.2d 176 (1992).

53. *Id.* at 530, 423 S.E.2d at 178.

54. *Id.* at 531, 423 S.E.2d at 178 (citing 2 CHARLES C. SCOTT, *Photographic Evidence* § 1101 (2d ed. 1969)).

55. *Id.* (citing *Mary Washington Hosp. v. Gibson*, 228 Va. 95, 99, 319 S.E.2d 741, 743 (1984); *Habers v. Madigan*, 213 Va. 485, 487, 193 S.E.2d 653, 655 (1973); *Saunders v. Bullock*, 208 Va. 551, 558, 159 S.E.2d 820, 826 (1968)).

56. *Id.*

57. 244 Va. 28, 419 S.E.2d 621 (1992).

58. VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 1992).

59. VA. CODE ANN. § 8.01-35.1 (Repl. Vol. 1992).

60. 244 Va. at 30-31, 419 S.E.2d at 622-23.

Before trial, all claims against the physicians were settled. The settlement with the physician in charge of the delivery provided for structured payments to the infant not to exceed \$500,000. The mother received \$200,000 for her emotional distress claim and \$600,000 for her physical injuries.<sup>61</sup> She also settled her claim for an unnecessary hysterectomy with a second physician for \$150,000. The mother then nonsuited her claim for damages against the hospital in connection with the unnecessary hysterectomy.<sup>62</sup> The case went to trial on the infant's claims for his in utero injuries, the parents' claim for the infant's medical expenses, and the mother's claim for emotional distress.<sup>63</sup>

The jury returned a verdict for the infant of \$1,250,000. On the parents' claim for the infant's medical expenses, the jury awarded \$1,500,000. On the mother's emotional distress claim, the jury awarded \$750,000. The trial court reduced the infant's verdict to the \$1,000,000 statutory malpractice damages cap and then by an additional \$500,000, reflecting the cost of the structured settlement with the physician.<sup>64</sup> The trial court also refused to enter judgment for the medical expenses award because that amount was subject to the infant's malpractice cap, which had already been exhausted. The mother's verdict for emotional distress was reduced to the \$200,000 amount allocated to that claim in her settlement with the physician.<sup>65</sup>

On appeal, the hospital contended that the verdict in favor of the infant should have been reduced further by the \$150,000 the mother received from one physician for her hysterectomy claim and by the maximum amount that the infant would be likely to receive under the structured settlement if he survived in accordance with his life expectancy.<sup>66</sup> The court rejected these arguments as contrary to the plain language of the release statute. The \$150,000 the mother received from one physician for her unnecessary hysterectomy claim was clearly not for "the same injury" as the infant's claim for neurological damages.<sup>67</sup> Moreover, the release statute specifically calls for the trial court to consider the present

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61. *Id.* at 31, 419 S.E.2d at 623.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 35-36, 419 S.E.2d at 625-26 (quoting VA. CODE ANN. § 8.01-35.1 (Repl. Vol. 1992)).

value of structured settlements when determining what credit to apply.<sup>68</sup>

The hospital also argued that the mother was not entitled to a separate recovery for her emotional distress claim arising from injuries to the fetus. That argument ignored *Bulala v. Boyd*,<sup>69</sup> in which the court held that a mother could recover on a claim for mental suffering resulting from the birth of an impaired child,<sup>70</sup> because "an unborn child is part of the mother until birth."<sup>71</sup>

On a different issue the court in *McCarty* also held that the statute stating that the findings of a medical review panel are admissible evidence<sup>72</sup> does not allow admission of such findings concerning a health care provider who is no longer a party to the litigation.<sup>73</sup>

In *Pierce v. Caday*,<sup>74</sup> the Supreme Court of Virginia held that a plaintiff's suit against a physician for unauthorized disclosure of confidential information was governed by the Virginia Medical Malpractice Act.<sup>75</sup> Therefore, the suit is subject to dismissal for failure to give pre-filing notice to the defendant physician as required by the Act.<sup>76</sup> Because the Act defines "malpractice" as "any tort based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient,"<sup>77</sup> the court determined whether the plaintiff's cause of action sounded in contract, as the plaintiff claimed, or in tort.<sup>78</sup>

The court reasoned that because an "accurate medical history furnished by the patient is an indispensable component of medical treatment . . . receipt of that confidential information is 'an inseparable part of the health care . . .'"<sup>79</sup> Accordingly, the court con-

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68. *Id.* at 36, 419 S.E.2d at 626.

69. 239 Va. 219, 389 S.E.2d 670 (1990).

70. *McCarty*, 244 Va. at 37, 419 S.E.2d at 626-27 (citing *Bulala*, 239 Va. at 229, 389 S.E.2d at 675).

71. 244 Va. at 37, 419 S.E.2d at 627 (citing *Modaber v. Kelley*, 232 Va. 60, 66, 348 S.E.2d 233, 236-37 (1986)).

72. VA. CODE ANN. § 8.01-581.8 (Repl. Vol. 1992).

73. *McCarty*, 244 Va. at 28, 419 S.E.2d at 621.

74. 244 Va. 285, 422 S.E.2d 371 (1992).

75. VA. CODE ANN. §§ 8.01-581.1 to -581.20 (Repl. Vol. 1992).

76. *See id.* § 8.01-581.2(A).

77. *Id.* § 8.01-581.1.

78. *Pierce*, 244 Va. at 289, 422 S.E.2d at 373. The court assumed the existence of a cause of action for disclosure by a physician of information revealed in confidence by a patient. *Id.* at 291, 422 S.E.2d at 374.

79. *Id.* at 291, 422 S.E.2d at 374 (quoting *Hagan v. Antonio*, 240 Va. 347, 352, 397 S.E.2d 810, 812 (1990)).

cluded that the breach of an implied duty to maintain confidentiality "should be judged like the breach of the general duty. Thus, as with a violation of the standard of care generally, a breach of the duty of confidentiality, 'resulting in damages, gives rise to a cause of action sounding in tort against the physician.'"<sup>80</sup> Thus, the plaintiff's claim for wrongful disclosure of confidential information was a "tort based on health care" and malpractice under the act.<sup>81</sup> Her claim was thus properly dismissed for failure to give pre-filing notice as required by the Act.<sup>82</sup>

The court in *Turner v. Sheldon D. Wexler, D.P.M., P.C.*<sup>83</sup> held that a medical malpractice plaintiff who gave the required statutory notice prior to filing suit<sup>84</sup> could not gain the benefit of the medical malpractice act's statute of limitations tolling provision.<sup>85</sup> The court reasoned that at the time the plaintiff's cause of action arose, the definition of "health care provider" under the act did not include a professional corporation such as the one she had attempted to sue.<sup>86</sup> The court rejected the argument that Dr. Wexler and his corporation "were so intertwined" that the professional corporation should be "deemed" a health care provider under the act.<sup>87</sup>

#### F. Personal Jurisdiction

In *Gallop Leasing Corp. v. Nationwide Mutual Ins. Co.*,<sup>88</sup> the court examined the applicability of the Virginia long-arm statute<sup>89</sup> in a declaratory judgment action brought by an insurer against its policy holder and an out-of-state lienholder on the insured's vehicle. Nationwide sought a declaration that the policy it had issued, and under which the lienholder had been added as an additional insured, was void ab initio because of certain misrepresentations allegedly made during the application process by the named in-

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80. *Id.* (quoting *Alberts v. Devine*, 395 Mass. 59, 69, 479 N.E.2d 113, 120, *cert. denied* 474 U.S. 1013 (1985)).

81. *Id.* at 292, 422 S.E.2d at 374 (quoting VA. CODE ANN. § 8.01-581.2(A) (Repl. Vol. 1992)).

82. *Id.* at 292, 422 S.E.2d at 375.

83. 244 Va. 124, 418 S.E.2d 886 (1992).

84. VA. CODE ANN. § 8.01-581.2 (Repl. Vol. 1992).

85. *Id.* § 8.01-581.9.

86. *Turner*, 244 Va. at 126, 418 S.E.2d at 887 (citing former VA. CODE ANN. § 8.01-581.1).

87. *Id.*

88. 244 Va. 68, 418 S.E.2d 341 (1992).

89. VA. CODE ANN. § 8.01-328.1 (Repl. Vol. 1992).

sured.<sup>90</sup> Assuming that the lienholder had transacted some business within the Commonwealth as required under the long-arm statute,<sup>91</sup> the court held that, because the lienholder was not alleged to have made the misrepresentations upon which Nationwide based its claim, the declaratory judgment action was not one "arising from acts enumerated in" the long-arm statute.<sup>92</sup> Accordingly, the insurer could not use the statute to obtain personal jurisdiction over the lienholder.

### G. Release

In *Hiett v. Lake Barcroft Community Ass'n*,<sup>93</sup> the court held that a pre-injury release from liability for the negligent infliction of personal injuries was void as violative of public policy, reaffirming its holding in *Johnson's Administratrix v. Richmond and Danville R.R. Co.*<sup>94</sup> In reaching this conclusion, the court distinguished cases decided after *Johnson* that upheld pre-accident releases of property damage and indemnity agreements related to such damage.<sup>95</sup>

### H. Contempt

In *Bagwell v. International Union, United Mine Workers of America*,<sup>96</sup> the court resolved several issues that arose in connection with a circuit court's imposition of contempt fines on striking coal miners and their union. During the course of a strike against the Clinchfield Coal Company and the Sea "B" Mining Company

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90. *Gallop Leasing Corp.*, 244 Va. at 71, 418 S.E.2d at 342.

91. See VA. CODE ANN. § 8.01-328.1(A)(1) (Repl. Vol. 1990).

92. *Gallop Leasing Corp.*, 244 Va. at 71, 418 S.E.2d at 342 (quoting VA. CODE ANN. § 8.01-328.1(B)).

93. 244 Va. 191, 418 S.E.2d 894 (1992).

94. 86 Va. 975, 11 S.E. 829 (1890).

95. *Nido v. Ocean Owners' Council*, 237 Va. 664, 378 S.E.2d 837 (1989) (upholding contractual waiver of property damage claims contained in condominium bylaws); *Appalachian Power Co. v. Sanders*, 232 Va. 189, 349 S.E.2d 101 (1986) (because party asserting right to indemnity from claim for personal injury was not negligent, it is not necessary to determine the validity of indemnity clause); *Richardson-Wayland v. VEPCO*, 219 Va. 198, 247 S.E.2d 465 (1978) (upholding indemnity contract concerning property damage between Virginia Electric Power Company and a private company for repairs on the company's premises); *Hiett*, 244 Va. at 194-96, 418 S.E.2d at 896-97 (discussing *C & O Ry. Co. v. Telephone Co.*, 216 Va. 858, 224 S.E.2d 317 (1976) (upholding pre-accident release of property damage)); *Kitchin v. Gary Steel Corp.*, 196 Va. 259, 83 S.E.2d 348 (1954) (holding that indemnification agreement between contractor and subcontractor not predicated on negligence does not violate public policy).

96. 244 Va. 463, 423 S.E.2d 349 (1992), cert. granted sub. nom. *International Union, United Mine Workers of Am. v. Bagwell*, 113 S. Ct. 2439 (1993).

(collectively, "the company"), the company filed a bill of complaint to enjoin the union from engaging in certain unlawful activities.<sup>97</sup> After an injunction was issued and violated, the court established a schedule of prospective fines for subsequent violations of its orders. The court also appointed a special commissioner to collect the fines.<sup>98</sup> After the strike was settled and an appeal had been made, the union and the company moved the trial court to vacate the unpaid fines and dropped its appeal. The trial court, however, refused to vacate those fines that were payable to the Commonwealth and to Russell and Dickenson Counties, and the court of appeals refused to allow Bagwell, as special commissioner, to intervene before it as a new appellee.<sup>99</sup>

On appeal, the Supreme Court of Virginia first looked to the order appointing Bagwell as substitute commissioner and concluded that he had standing to appeal the court of appeals decision vacating the fines. Bagwell was appointed "in the place and stead of the former special commissioners and as attorney to act in the place and stead of the Commonwealth's Attorneys for Russell and Dickenson Counties to collect all unpaid and unbonded fines . . . ." <sup>100</sup> The trial court's order also specifically gave Bagwell the "authority to take all actions as may be necessary to collect the fines including but not limited to the filing of legal actions, pleadings, notices, liens, . . . in any jurisdiction necessary to effect the intent of this order." <sup>101</sup> Based on this language, the court concluded that Bagwell was the agent for the Commonwealth and the counties in attempting to collect the fines.<sup>102</sup>

The court next held that the court of appeals had erred in refusing to allow Bagwell to intervene in the appellate proceedings after the company withdrew as appellee.<sup>103</sup> In so holding, the court observed that Bagwell, as special commissioner, was "the logical replacement for the [c]ompany" as appellee and that "the [u]nion could not have been prejudiced by his intervention."<sup>104</sup>

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97. *Id.* at 466, 423 S.E.2d at 351.

98. *Id.* at 467, 423 S.E.2d at 351.

99. *Id.* at 467, 423 S.E.2d at 352.

100. *Id.* at 472, 423 S.E.2d at 354-55.

101. *Id.*

102. *Id.* at 473, 423 S.E.2d at 355.

103. *Id.* at 481, 423 S.E.2d at 360.

104. *Id.* at 474, 423 S.E.2d at 355.

The court also held that the fines were clearly "civil" in character and hence not violative of due process, because they had been imposed in accordance with a prospective fine schedule in an attempt to coerce compliance with the trial court's orders.<sup>105</sup> The court rejected the union's argument that fines imposed for violations of a prohibitory injunction were necessarily criminal in character.<sup>106</sup> Finally, the court held that, because of the need to maintain "the dignity of the law and public respect for the judiciary," settlement of the underlying dispute could not render the fines moot.<sup>107</sup>

### I. *Negligent Entrustment*

In *Turner v. Lotts*,<sup>108</sup> the court examined the doctrine of negligent entrustment in an automobile accident case. The plaintiff's motion for judgment included a claim that the owners of a motor vehicle were negligent in allowing their son to operate the vehicle at the time of the accident.<sup>109</sup> In response to an interrogatory, the plaintiff stated that the defendants knew their son was a reckless and negligent driver "as he had received three tickets for driving infractions and had been involved in at least two wrecks, causing [the defendants] to set up a different insurance policy for the motor vehicle being driven by their son . . . ." <sup>110</sup>

The court determined that a plaintiff who seeks to prove negligent entrustment "must present evidence which creates a factual issue whether '[t]he owner knew, or had reasonable cause to know, that he was entrusting his car to an unfit driver likely to cause injury to others.'" <sup>111</sup> The plaintiff must also prove "that the negligent entrustment of the motor vehicle to the tortfeasor was a proximate cause of the accident."<sup>112</sup> The court then held that summary

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105. *Id.* at 480, 423 S.E.2d at 359.

106. *Id.* at 481, 423 S.E.2d at 360.

107. *Id.* at 478, 423 S.E.2d at 358.

108. 244 Va. 554, 422 S.E.2d 765 (1992). For an additional discussion of *Turner* see Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 27 U. RICH. L. REV. 783, 803 (1993).

109. *Id.* at 555, 422 S.E.2d at 766.

110. *Id.*

111. *Id.* at 557, 422 S.E.2d at 767 (quoting *Denby v. Davis*, 212 Va. 836, 838, 188 S.E.2d 226, 229 (1972)(citation omitted)).

112. *Id.* (citing *Denby*, 212 Va. at 839, 188 S.E.2d at 229; *Hack v. Nester*, 241 Va. 499, 503-04, 404 S.E.2d 42, 43, *rev'd on other grounds on reh'g*, 241 Va. 499, 508-09, 404 S.E.2d 42, 46-47 (1991)).

judgment for the defendants based on the plaintiff's discovery response was appropriate.<sup>113</sup>

#### J. *The "Fireman's Rule"*

In *Benefiel v. Walker*,<sup>114</sup> the court held that the common law "fireman's rule" barring a culpable defendant's tort liability to an injured fireman or policeman did not apply where the tortfeasor's negligent acts did not cause the emergency that brought the policeman or fireman to the accident scene.<sup>115</sup> Thus, a fireman who was injured en route to a fire scene by a negligent driver and a policeman who was struck by a negligent driver while standing beside his police cruiser were free to pursue their negligence claims because their injuries were a result of "'risks beyond those inherently involved in firefighting or police work.'" <sup>116</sup>

#### K. *The "Special Relationship" Doctrine*

*Burdette v. Marks*<sup>117</sup> was an action against a police officer for failure to prevent the plaintiff's beating at the hands of a third person. The incident occurred after Burdette stopped at an accident scene and attempted to prevent one of the drivers involved from assaulting the other.<sup>118</sup> The attacker turned on Burdette, beating him first with his fists and then with a shovel and an iron pipe.<sup>119</sup> During the course of the first attack, the defendant, Marks, a uniformed deputy sheriff, arrived and witnessed the attack. The plaintiff alleged that the defendant knew the attacker and was reluctant to arrest him and that the defendant failed to come to the plaintiff's aid, even though he asked for assistance.<sup>120</sup>

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113. 244 Va. at 559, 422 S.E.2d at 768.

114. 244 Va. 488, 422 S.E.2d 773 (1992).

115. *Id.* at 495-96, 422 S.E.2d at 777.

116. *Id.* at 493, 422 S.E.2d at 775 (quoting *Pearson v. Canada Contracting Co.*, 232 Va. 177, 182, 349 S.E.2d 106, 110 (1986)). The court reached this conclusion even though there had been testimony at trial that the risk of third parties colliding with a fire truck while it is travelling to a fire scene is an ordinary risk encountered in responding to a fire call. *Id.* at 494 n.5, 422 S.E.2d at 766 n.5.

117. 244 Va. 309, 421 S.E.2d 419 (1992).

118. *Id.* at 310, 421 S.E.2d at 419-20.

119. *Id.* at 310, 421 S.E.2d at 420.

120. *Id.* at 311, 421 S.E.2d at 420.



Although a public official does not owe a legally cognizable duty to the public to protect it from the criminal acts of third parties,<sup>121</sup> where a "special relation" exists between the public official and an identifiable person, such a duty arises.<sup>122</sup> The court explained that in deciding whether such a special relationship existed, it was "important to consider whether Marks reasonably could have foreseen that he would be expected to take affirmative action to protect Burdette from harm."<sup>123</sup> Using this test, the court concluded that Marks owed Burdette a legal duty to protect him from attack. The court based this conclusion on Marks' presence at the scene as an on-duty, armed and uniformed officer, the apparent danger to Burdette, and Burdette's request for help in fending off the attacker.<sup>124</sup>

### III. RECENT LEGISLATION AFFECTING CIVIL PRACTICE

The General Assembly enacted a number of measures during its 1993 Session which affect civil litigation in state courts.<sup>125</sup> For ease of reference, the discussion of these enactments is classified below by subject matter.

#### A. *Discovery*

##### 1. Depositions

Section 8.01-420.4 of the Code of Virginia was the subject of two amendments relaxing the restrictions on the place where depositions may be held. The first amendment permits the deposition of a nonresident, nonparty witness to be taken in the jurisdiction where the witness lives or works, or at any other place agreed upon by the parties.<sup>126</sup> The second amendment provides that restrictions as to the location of the deposition do not apply if the defendant fails to file a responsive pleading or make an appearance.<sup>127</sup>

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121. *Id.* at 312, 421 S.E.2d at 421 (citing *Marshall v. Winston*, 239 Va. 315, 319, 389 S.E.2d 902, 905 (1988)).

122. *Id.*

123. *Id.*

124. *Id.*

125. Unless otherwise noted, all provisions became effective on July 1, 1993.

126. Act of Mar. 22, 1993, ch. 428, 1993 Va. Acts 500(codified at VA. CODE ANN. § 8.01-420.4 (Cum. Supp. 1993)).

127. Act of Apr. 7, 1993, ch. 940, 1993 Va. Acts 1524 (codified at VA. CODE ANN. § 8.01-420.4 (Cum. Supp. 1993)).

The General Assembly has also amended code section 8.01-412.4 relating to videotaped depositions to eliminate the prior requirement that such depositions be indexed by a time generator in order to be admissible in a subsequent proceeding.<sup>128</sup>

## 2. Subpoena duces tecum

Housekeeping legislation corrected apparent errors in the language of former section 8.01-506.1<sup>129</sup> by permitting the service of subpoenae duces tecum in connection with debtors' interrogatories upon any nonresident party or a nonresident party's attorney of record.<sup>130</sup> The former language permitted service upon counsel only in the case of nonresident "plaintiffs."<sup>131</sup>

### B. Pleading

An amendment to section 16.1-88.03, effective July 1, 1992, inadvertently prohibited the longstanding practice which permitted corporate and partnership employees to file certain civil pleadings and papers in the general district courts without assistance of counsel.<sup>132</sup> By two identical acts, the General Assembly has restored the right of such persons to file warrants in detinue, distress warrants, summonses for unlawful detainer, suggestions for a summons in garnishment, civil appeal notices and writs of fieri facias, possession, and interpleader.<sup>133</sup>

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128. Act of Mar. 15, 1993, ch. 208, 1993 Va. Acts 236 (codified at VA. CODE ANN. § 8.01-412.4 (Cum. Supp. 1993)).

129. Consider the former section, which provided in pertinent part:

If the subpoena duces tecum is against a *plaintiff* who is not a resident of the Commonwealth, but who has appeared in the case or been served with process in this Commonwealth, the service may be on his attorney-at-law.

VA. CODE ANN. § 8.01-506.1 (Repl. Vol. 1992) (emphasis added).

130. Act of Mar. 17, 1993, ch. 267, 1993 Va. Acts 295 (codified at VA. CODE ANN. § 8.01-506.1 (Cum. Supp. 1993)).

131. See *supra* note 129.

132. Act of Apr. 6, 1992, ch. 814, 1992 Va. Acts 1308 (codified at VA. CODE ANN. § 16.1-88.03 (Cum. Supp. 1992)).

133. Acts of Mar. 23, 1993, chs. 473 and 478, 1993 Va. Acts 567 and 572 (codified at VA. CODE ANN. § 16.1-88.03 (Cum. Supp. 1993)).

### C. Evidence

#### 1. Presumption of Authenticity and Reasonableness; Medical Bills

The General Assembly eased problems faced by personal injury and wrongful death plaintiffs in authenticating and proving the reasonableness of medical charges by adding section 8.01-413.01 to the code. A rebuttable presumption of authenticity and reasonableness regarding medical bills now arises in such actions when the plaintiff: (1) identifies the original bill or an authenticated copy and testifies as to the identity of the provider, (2) explains the circumstances surrounding the receipt of the bill, (3) describes the services rendered, and (4) states that the services were received in connection with treatment for injuries sustained in the event giving rise to the underlying cause of action.<sup>134</sup> The operation of the presumption has been limited, however, to instances where the opponent or the opposing counsel has been furnished copies of the records at least twenty-one days prior to trial.<sup>135</sup>

#### 2. Expert Testimony; Adoption of Federal Rule of Evidence 702

The comparatively restrictive common law rule of evidence regarding the admissibility of expert opinions has been abrogated by the statutory enactment of section 8.01-401.3 and the adoption of the more liberal Federal Rule of Evidence 702.<sup>136</sup> The former rule, which disfavored opinion testimony and tended to restrict witnesses to the restatement of facts, has often led to confusion over what constitutes "fact" and what constitutes "opinion." The result has led to contradictory holdings and criticism by both courts and scholars.<sup>137</sup>

In addition, the code now permits a qualified expert or lay witness testifying in a civil proceeding to express any otherwise ad-

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134. Act of Mar. 26, 1993, ch. 610, 1993 Va. Acts 610 (codified at VA. CODE ANN. § 8.01-413.01 (Cum. Supp. 1993)).

135. *Id.*

136. Compare Federal Rule of Evidence 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702.

137. See generally CHARLES E. FRIEND, EVIDENCE IN VIRGINIA §§ 201-03, 214, & 219 (3d ed. 1988 & Supp. 1992).

missible opinion or conclusion regarding any matter of fact, regardless of whether that fact is critical to the resolution of the case.<sup>138</sup> Witnesses are still prohibited from expressing opinions which constitute a conclusion of law, and the exceptions to the "ultimate fact in issue" rule recognized in Virginia prior to the effective date of this statute remain in effect.<sup>139</sup>

### 3. Physician-Patient Privilege

The scope of the physician-patient privilege in Virginia has traditionally been limited to barred compulsion of the physician's testimony regarding information which was acquired in and necessary to the course of treatment, without prior patient consent.<sup>140</sup> The General Assembly has expanded the privilege by amending Code of Virginia section 8.01-399 to cover any matter learned in the course of treatment. Where the patient's physical or mental condition is at issue, disclosure is still required. However, it is limited to discovery pursuant to the Rules of the Supreme Court of Virginia, testimony at trial, and where the trial court deems disclosure necessary.<sup>141</sup> Disclosure is further limited to those instances where the patient fails to establish to the satisfaction of the court that the subject matter is irrelevant or not reasonably calculated to lead to discovery of admissible evidence.<sup>142</sup> A blanket exemption permits disclosures necessary in the course of treatment, in defense of medical malpractice actions, as part of peer review procedures or the operation of a health care facility or health maintenance organization, or as otherwise necessary to comply with state or federal law.<sup>143</sup>

### 4. Competency of Witnesses; Age

The General Assembly added section 8.01-396.1 to provide that "[n]o child shall be deemed incompetent to testify solely because

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138. VA. CODE ANN. § 8.01-401.3 (Cum. Supp. 1993).

139. *Id.*

140. VA. CODE ANN. § 8.01-399 (Repl. Vol. 1992).

141. Act of Mar. 25, 1993, ch. 533 1993 Va. Acts 654 (codified at VA. CODE ANN. § 8.01-399 (Cum. Supp. 1993)).

142. *Id.*

143. Act of Mar. 25, 1993, ch. 556, 1993 Va. Acts 709 (codified at VA. CODE ANN. § 8.01-399 (Cum. Supp. 1993)).

of age."<sup>144</sup> This provision essentially codifies the common law rule.<sup>145</sup>

#### D. *Finality of Judgments*

The Rules of the Supreme Court of Virginia permit a party to note an appeal within thirty days of the entry of a final order by the circuit court.<sup>146</sup> Often a final order is entered without formal notice to the parties, and counsel must bear the burden of making periodic inquiries of the clerk to determine whether an order has been entered. This system has pitfalls, and substantial hardship and injustice can befall the party who, although diligent, is nonetheless without notice of an order's entry within thirty days. An amendment to Code of Virginia section 8.01-428 provides some relief. Where counsel, or a party appearing pro se, is not in default and is not advised of an order's entry by any means, the circuit court has discretion to grant leave to appeal. The court must be satisfied that the lack of notice did not arise from the party's lack of due diligence and that the lack of notice denied the party an opportunity to appeal. Leave must be granted within sixty days of the order's final entry.<sup>147</sup>

#### E. *Immunity*

##### 1. Nursing Homes

A 1992 enactment required nursing homes, home care organizations, homes for adults, and adult day care centers to obtain criminal histories for all employment applicants.<sup>148</sup> Such facilities were barred from employing persons convicted of certain crimes.<sup>149</sup> An amendment to those provisions which were enacted under an

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144. Acts of Mar. 22 and Mar. 26, 1993, chs. 441 and 605, 1993 Va. Acts 518 and 764 (codified at VA. CODE ANN. § 8.01-396.1 (Cum. Supp. 1993)).

145. See *Kiracofe v. Commonwealth*, 198 Va. 833, 840, 97 S.E.2d 14, 18 (1957). See generally CHARLES E. FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA* § 54 (3rd ed. 1988 & Supp. 1992). For a further discussion of the new code provision see Robert E. Shepherd, Jr., *Annual Survey of Virginia Law; Legal Issues Involving Children*, 27 U. RICH. L. REV. —, — (1993).

146. VA. SUP. CT. R. 5:9(a) (1992) (appeal to supreme court); VA. SUP. CT. R. 5A:6(a) (1992) (appeal to court of appeals).

147. Act of Apr. 7, 1993, ch. 951, 1993 Va. Acts 1539 (codified at VA. CODE ANN. § 8.01-428(C) (Cum. Supp. 1993)).

148. Acts of Apr. 15, 1992, chs. 844, 17,657, 1992 Va. Acts 1583 (codified at VA. CODE ANN. §§ 32.1-126.01, -162.9:1 (Repl. Vol. 1992); 63.1-173.2 -189.1, -194.13 (Cum. Supp. 1992)).

149. *Id.*

emergency clause,<sup>150</sup> narrows the list of barrier crimes and provides good faith immunity for those who administer the statute on behalf of nursing homes,<sup>151</sup> home care organizations,<sup>152</sup> homes for adults,<sup>153</sup> district homes for adults,<sup>154</sup> and adult day care centers.<sup>155</sup>

## 2. Chiropractors

Chiropractors now have the same statutory civil immunity as other health care professionals when acting as team physicians, investigating complaints regarding the impairment of other professionals in the field, serving in a peer review capacity, or serving on or providing information to a professional disciplinary committee.<sup>156</sup>

## 3. Free Health Services

The General Assembly has undertaken to limit the civil exposure of hospital employees who deliver free health care to patients treated in or referred from free clinics. Under the new statute, Code of Virginia section 32.1-127.3, a licensed or certified employee acting within the limits of her certification and at her place of employment is provided immunity absent gross negligence or willful misconduct; the same immunity is applied to an employee who is not required to be licensed or certified if her actions are within the scope of her employment. In addition, such employees are deemed to be acting in a governmental capacity as agents of the Commonwealth, and are therefore covered under the Commonwealth's insurance, provided that the hospital has a written agreement with a free clinic to provide care and is registered with the Virginia Division of Risk Management, and the employee has no legal or financial interest in the referring clinic.<sup>157</sup>

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150. Act of Feb. 23, 1993, ch. 17, cl. 2, 1993 Va. Acts 15 (emergency act).

151. VA. CODE ANN. § 32.1-126.01 (Cum. Supp. 1993).

152. *Id.* § 32.1-162.9:1.

153. *Id.* § 63.1-173.2.

154. *Id.* § 63.1-189.1.

155. *Id.* § 63.1-194.13.

156. Act of Mar. 28, 1993, ch. 702, 1993 Va. Acts 982 (codified at VA. CODE ANN. §§ 8.01-66.12, -225.1, -581.13, -581.16, -581.19, -581.19:1 (Cum. Supp. 1993)).

157. Act of Mar. 28, 1993, ch. 785, 1993 Va. Acts 1131 (codified at VA. CODE ANN. § 32.1-127.3 (Cum. Supp. 1993)).

#### 4. Anatomical Gifts

The Code of Virginia provides that recipients of organ transplants and other anatomical gifts may employ or authorize a physician, surgeon, or other technician to take the appropriate steps medically necessary to preserve the organ or tissues for transplantation.<sup>158</sup> An amendment enacted this session now provides civil and criminal immunity, absent gross negligence or willful misconduct, for persons who are employed or authorized by the recipient.<sup>159</sup>

#### F. Statutes of Limitation

##### 1. Tolling Upon the Death of a Party

Previously, the code provided that upon the death of a party to a cause of action, the statute of limitations would toll for up to one year pending the qualification of a personal representative.<sup>160</sup> Section 8.01-229 has been amended to increase the tolling period to two years in such situations.<sup>161</sup>

##### 2. Open Accounts

Creditors suing on past due open accounts have frequently encountered difficulty with the applicable three-year statute of limitation. Under former section 8.01-246,<sup>162</sup> the limitation period began to run from the date of the breach, so that the limitation period on an action to collect arrearages could expire before the last payment was due. An amendment to section 8.01-249 now provides that the three-year limitation period begins to accrue on the latter of the last payment or the last charge on the account.<sup>163</sup>

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158. VA. CODE ANN. § 32.1-290 (Cum. Supp. 1992).

159. Act of Apr. 7, 1993, ch. 986, 1993 Va. Acts 1619 (codified at VA. CODE ANN. §§ 32.1-290, -290.1, -292.1, -295, and 46.2-342 (Cum. Supp. 1993)).

160. VA. CODE ANN. § 8.01-229(B)(5) (Repl. Vol. 1992).

161. Act of Mar. 29, 1993, ch. 844, 1993 Va. Acts 1223 (codified at VA. CODE ANN. § 8.01-229(B)(6) (Cum. Supp. 1993)).

162. VA. CODE ANN. § 8.01-246 (Repl. Vol. 1992).

163. Act of Mar. 24, 1993, ch. 523, 1993 Va. Acts 646 (codified at VA. CODE ANN. § 8.01-249 (Cum. Supp. 1993)).

### 3. Residential Property Disclosure Act

The General Assembly amended code section 55-524 to provide that any action on a disclosure or disclaimer statement required under the Virginia Residential Property Disclosure Act must be brought within one year of the date that the purchaser received the disclosure or disclaimer.<sup>164</sup> If no disclosure or disclaimer was received, the action must be brought within one year of the date of settlement for sale transactions or within one year of occupancy for leases with an option to purchase.<sup>165</sup>

#### G. *Alternate Dispute Resolution*

Upon the joint recommendation of the Virginia State Bar and the Virginia Bar Association, the Assembly enacted "mandatory" alternative dispute resolution provisions.<sup>166</sup> Under this act, juvenile and domestic relations courts, general district courts, circuit courts, and appellate courts are empowered to refer contested civil matters or selected issues to qualified neutral persons for resolution. The court may order the parties to attend an initial evaluation session; all remaining participation is by consent of the parties.<sup>167</sup> Any party, however, may file a written objection within fourteen days. Upon the filing of an objection, the parties are excused from participation in even the initial, mandatory evaluation session.<sup>168</sup>

The initial evaluation is at no cost to the parties. Costs for subsequent sessions are determined on the basis of agreement, indigency, and assessment by the court.<sup>169</sup> Provisions are also made for confidentiality,<sup>170</sup> qualifications and duties of "neutrals,"<sup>171</sup> and the finality and vacating of orders and agreements.<sup>172</sup>

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164. Act of Mar. 29, 1993, ch. 847, 1993 Va. Acts 1232 (codified at VA. CODE ANN. § 55-524 (Cum. Supp. 1993)).

165. *Id.*

166. Act of Apr. 7, 1993, ch. 905, 1993 Va. Acts 1370 (codified at VA. CODE ANN. §§ 8.01-576.4 to -576.12 (Cum. Supp. 1993)).

167. *Id.* § 8.01-576.4 (Cum. Supp. 1993).

168. *Id.* § 8.01-576.6.

169. *Id.* § 8.01-576.7.

170. *Id.* §§ 8.01-576.9, -576.10.

171. *Id.* § 8.01-576.8, -576.9.

172. *Id.* §§ 8.01-576.11, -576.12.



#### IV. CHANGES IN THE SUPREME COURT OF VIRGINIA RULES

A number of changes of interest to litigation attorneys were enacted in Part V of the Rules of the Supreme Court of Virginia during the past year.

Rule 5:17(c), governing the form and content of petitions for appeal, was rewritten to provide:

Under a separate heading entitled "Assignments of Error," the petition shall list the specific errors in the rulings below upon which the appellant intends to rely. Only errors assigned in the petition for appeal will be noticed by this Court. Where appeal is taken from a judgment presented in, or to actions taken by, the Court of Appeals may be included in the petition for appeal to this Court. An assignment of error which merely states that the judgment or award is contrary to the law and the evidence is not sufficient. If the petition for appeal does not contain assignments of error, the appeal will be dismissed.

Under another separate heading entitled "Questions Presented," the petition shall list the questions upon which the appellant intends to submit argument, with a clear and exact reference to the particular assignment of error to which each question relates.

Where appeal is taken from a judgment of the Court of Appeals in a case where judgment is made final under Code § 17-116.07, the petition for appeal shall contain a statement setting forth in what respect the decision of the Court of Appeals involves (1) a substantial constitutional question as a determinative issue, or (2) matters of significant precedential value. If the petition for appeal does not contain such a statement, the appeal will be dismissed.

The petition shall also contain:

(1) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases shall be to the Virginia Reports and the Southeastern Reporter. Citations of all authorities shall include the year thereof.<sup>173</sup>

Rule 5:25 was amended to delete the last sentence of the rule, which had provided that "[a]n assignment of error which merely states that the judgment or award is contrary to the law and the

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173. VA. SUP. CT. R. 5:17(c).

evidence is not sufficient.”<sup>174</sup> That language now appears in Rule 5:17(c).<sup>175</sup>

Likewise, Rule 5:27, governing the form and content of an appellant’s opening brief, was rewritten to provide:

The form and contents of the opening brief of appellant shall conform in all respects to the requirements of the petition for appeal set forth in Rule 5:17(c), except that references shall be to the pages of the appendix rather than the pages of the record. In addition, the opening brief shall contain the signature and a certificate (which need not be signed in handwriting) that there has been compliance with Rule 5:26(d).<sup>176</sup>

Finally, Rule 5:29 was redrafted to reflect the changes in Rules 5:17 and 5:27. Overall, these changes in Part V of the rules make clear the requirements for briefs in the supreme court and reflect the reality that an appellant’s opening brief is often quite similar to his petition for appeal.

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174. VA. SUP. CT. R. 5:25 comment.

175. VA. SUP. CT. R. 5:17(c).

176. VA. SUP. CT. R. 5:27.

