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Annual Survey of Virginia Law: Civil Practice and Procedure

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CIVIL PRACTICE AND PROCEDURE

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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.

II. RECENT DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Pleading*

In *Hensley v. Dreyer*,[1] buyers of a residential lot sued the sellers for fraud after discovering that the lot did not contain a septic system, as the sellers allegedly represented. The buyers prayed for rescission of the deed and damages in their Bill of Complaint. The trial court found that there had been no fraud, but concluded that there had been a mutual mistake of fact, and ordered rescission on the grounds that the sellers had not been prejudiced by this variance between the pleadings and the proofs.[2]

The Supreme Court of Virginia reversed and entered final judgment for the sellers. The court held that a judgment or decree may not be based on facts not alleged or on a right not pleaded and claimed. Every litigant is entitled to be told in plain and explicit language the adversary's ground of complaint. In the case of a variance between evidence and allegations,

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1. 247 Va. 25, 439 S.E.2d 372 (1994).

2. *Id.* at 28-29, 439 S.E.2d at 374-75.

section 8.01-377 of the Virginia Code gives a trial court the discretion to permit amendment of the pleadings or to determine the facts and render judgment, but only on the condition that no prejudice results. The sellers had not had the opportunity to offer evidence in support of one defense to a mutual mistake claim and thus could have been prejudiced.[3]

The court applied the same rule in *Smith v. Sink*,[4] a case involving a dispute over access to a public road. The Smiths sought both a declaration that the road in question was not a public road and an injunction against the use of that road by Sink. The court ruled that although the power of an equity court is broad, it cannot extend beyond the rights asserted by the parties.[5] Therefore, the trial court erred in ruling that Sink had a prescriptive easement in the road. Sink's failure to plead or to claim and prove a prescriptive easement through the production of evidence precluded the imposition of such an easement.[6]

B. *Causes of Action and Damages*

1. Conspiracy

In *Luckett v. Jennings*,[7] the plaintiff, a real estate developer, sued after various difficulties arose out of an agreement to develop two parcels of land in Manassas. Plaintiff alleged the following in his claim under the Virginia Conspiracy Statute:[8]

> The acts of Mr. Jennings, his sons and Mr. McGinnis alleged above were the result of a mutual undertaking of Mr. Jennings, his sons and Mr. McGinnis to willfully and maliciously compel Mr. Luckett to make additional capital contributions against his will and to willfully and malicious-

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3. *Id.* A "settled maxim of equity jurisprudence . . . denies relief based on a mutual mistake of fact when a written instrument is involved and the equities are equal." *Id.* at 30, 439 S.E.2d at 375.

4. 247 Va. 423, 442 S.E.2d 646 (1994).

5. *Id.* at 425, 442 S.E.2d at 647.

6. *Id.*, 442 S.E.2d at 648.

7. 246 Va. 303, 435 S.E.2d 400 (1993).

8. VA. CODE ANN. §§ 18.2-499 to -500 (Repl. Vol. 1988).

> ly injure Mr. Luckett in his business in violation of Code § 18.2-499.[9]

The trial court sustained demurrers to this count on the ground that it failed to allege an injury to plaintiff's business, as distinct from his personal interest as an investor and employee in a corporation in which defendants were associated, as required by the statute.[10]

The supreme court reversed finding that the motion for judgment sufficiently alleged an injury to plaintiff's business.[11] Whether plaintiff had sustained injury to a business that was distinguishable from the corporation in which he was an investor was an issue of fact to be resolved at trial.[12]

2. Contracts

a. Duress

In *Goode v. Burke Town Plaza, Inc.*,[13] the landlord sued to set aside on the grounds of duress its agreement to subordinate its interest in real property to the tenant's loan. The landlord alleged that the tenant had abusively threatened litigation and that several "elderly beneficiaries" of the landlord, a partnership, had acquiesced in the tenant's demands rather than "face financial ruin."[14] The supreme court declined to recognize this claim for economic duress, explaining, "[d]uress exists when a defendant commits a wrongful act sufficient to prevent a plaintiff from exercising his free will, thereby coercing the plaintiff's consent . . . . [T]he application of economic pressure by threatening to enforce a legal right is not a wrongful act and therefore cannot constitute duress."[15] Even if the acts of the tenant and its counsel were "unethical, strident, and coercive," they

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9. 246 Va. at 305, 435 S.E.2d at 401.
10. *Id.* at 306, 435 S.E.2d at 402.
11. *Id.* at 306-07, 435 S.E.2d at 402.
12. *Id.* at 308, 435 S.E.2d at 402. The court did not reach the substantive issue in its review.
13. 246 Va. 407, 436 S.E.2d 450 (1993).
14. *Id.* at 410, 436 S.E.2d at 452.
15. *Id.* at 411, 436 S.E.2d at 452-53.

were done with the good-faith belief that the landlord was obligated to subordinate and did not constitute actionable duress.[16]

b. Public Policy

In *Dade v. Anderson*,[17] the court held that one spouse may not recover under either a theory of implied contract or unjust enrichment for services rendered to the other. The supreme court found that the trial court properly sustained the demurrer to a motion for judgment by a spouse seeking recovery for services rendered to her deceased husband during his period of incapacitation prior to death. According to the supreme court, there have not been any changes in public policy since the court decided this issue in 1951 that would justify reversing itself. Justices Whiting, Lacy, and Keenan dissented.[18]

c. Rescission

The plaintiff sued for rescission of a settlement agreement on the grounds of fraud and mutual mistake of fact in *Covington v. Skill Corp Publishers, Inc.*[19] The supreme court held that the trial court incorrectly sustained a demurrer on the ground that plaintiff "had failed to allege his 'readiness, willingness, and ability to restore [the defendant] . . . to the status quo by returning [the settlement] money."[20] Although courts of equity are "reluctant to rescind unless the parties can be put in [the] status quo,"[21] the court may have to determine an appropriate method of restoration or the exact amount to be restored. A tender of restoration, the court held, is not a precondition to a right of action for rescission.[22]

16. *Id.* at 411-12, 436 S.E.2d at 453.
17. 247 Va. 3, 439 S.E.2d 353 (1994).
18. *Id.*
19. 247 Va. 69, 439 S.E.2d 391 (1994).
20. *Id.* at 72, 439 S.E.2d at 392.
21. *Id.*
22. *Id.*

d. Tortious Interference

In *Peace v. Conway*,[23] two former employees went into competition with their former employer and solicited his customers solely using names that they recalled from memory. The customers had terminable at-will contracts with their former employer. Where contracts are terminable at-will, the court explained, a prima facie case of tortious interference exists only where there has been intentional interference using improper methods.[24] Here, the former employees did not take any documents or utilize any property belonging to their former employer, and the supreme court held that they were free to solicit business from customers whose names they remembered.[25] Because they did not use improper methods, they were not liable.[26]

In *Hilb, Rogal & Hamilton Co. v. DePew*,[27] the court held that an allegation of tortious interference with an at-will contract can be sustained only where the defendant used "improper methods" in the intentional interference causing a termination of the contract.[28] An employee's breach of a noncompetition agreement after ceasing work for his employer may constitute the "improper method" necessary to sustain a cause of action for intentional interference and for a conspiracy to interfere with such a contract.[29] Similarly, when an employee, during the course of employment, suggests to a customer that the customer cease doing business with the employer, there exists a breach of fiduciary duty sufficient to constitute an improper method. Once an employer terminates employment, however, the employee owes no fiduciary duty to the employer and may

23. 246 Va. 278, 435 S.E.2d 133 (1993).

24. "Improper methods may include violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship." *Id.* at 280, 435 S.E.2d at 135 (citing Duggin v. Adams, 234 Va. 221, 227, 360 S.E.2d 832, 836 (1987)).

25. *Id.*

26. *See* RESTATEMENT (SECOND) OF AGENCY § 396 (1958).

27. 247 Va. 240, 440 S.E.2d 918 (1994).

28. *Id.* at 245, 440 S.E.2d at 921-22.

29. *Id.*

compete with the employer in the absence of a contract or special circumstances to the contrary.[30]

3. Economic Loss

The supreme court consistently has ruled that privity of contract is an essential element in actions seeking damages for an economic loss resulting from negligent performance of a contractual commitment. In *Ward v. Ernst & Young*,[31] the court specifically declined to adopt section 552 of the *Restatement (Second) of Torts*, which allows a third-party beneficiary of a contract to maintain a cause of action for accountant malpractice even in the absence of privity of contract.[32] The loss suffered by the plaintiff, diminution in the value of stock sold to a third party, was disappointed economic expectations, a purely economic loss.[33] It was not property damage sufficient to overcome the privity requirement.[34]

4. Eminent Domain

Recent litigation involving eminent domain concerned the admissibility of evidence as well as the definition of "fair market value."

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30. *Id.* at 248, 440 S.E.2d at 923.

31. 246 Va. 317, 435 S.E.2d 628 (1993).

32. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

33. 246 Va. at 325, 435 S.E.2d at 632.

34. *Id.* In a surprising footnote, the court interpreted Rotonda Condominium Unit Owners Ass'n v. Rotonda Assocs., 238 Va. 85, 380 S.E.2d 876 (1989), as not barring a tort suit for economic loss:

> These observations [of the court in *Rotonda*], cannot fairly be interpreted to mean that economic losses are never recoverable in tort. The language employed here has its predicate in the tort alleged in the Association's *negligence* count; it does not purport to foreclose a right to recover an economic loss in other tort actions such as those for fraud, conspiracy to injure another in a trade, business, or profession, or tortious interference with contract.

246 Va. at 325 n.2, 435 S.E.2d at 632 n.2. Some circuit courts had interpreted *Rotonda* to mean exactly what this footnote says that it does not mean: i.e., Virginia law bars a tort claim for purely economic loss. *See, e.g.*, P&T Assocs. v. Paciulli, Simmons & Assocs., 27 Va. Cir. 405 (City of Richmond 1992); Pender Veterinary Clinic v. Patton, Harris, Rust & Assocs., 22 Va. Cir. 237 (Fairfax County 1990), *aff'd on reconsideration*, 23 Va. Cir. 106 (1991).

In *Kipps v. Virginia Natural Gas, Inc.*,[35] the trial court correctly excluded testimony of an appraiser in a condemnation case that the value of remaining land was diminished because of a prospective purchaser's fear of the danger of a natural gas pipeline explosion. The witness had not researched the subject, had performed no analysis of the pipeline's effect on the residue's value, and his opinion was unsupported by any study or analysis.[36] The trial court did not abuse its discretion in concluding that the witness did not have the necessary expertise to render an opinion on diminution in the value of the residue of the property.[37]

In *Lynch v. Commonwealth Transportation Commissioner*,[38] the trial court incorrectly excluded testimony and drawings relating to the effect that the highway department's taking would have on the landowner's ability to develop his property as an office/industrial park. In determining damages to the residue, consideration may be given to every circumstance, present or future, that affects the residue's value at the time of the taking.[39] Although remote or speculative advantages and disadvantages are not to be considered, the evidence here was that the landowner's property was adaptable and suitable for development as an office/industrial park and that such use may be the highest and best use of the land. It represented a real and present potential use in light of the existing conditions and circumstances.[40]

In *Fairfax County Park Authority v. Virginia Department of Transportation*,[41] the Virginia Department of Transportation sought to condemn a portion of property held by the Park Authority as the beneficiary of a trust. The trust provided that if the property was used for any purpose other than a public park, it would pass to the trustees of a church. The issue here, just as with real estate taxation, was the fair market value of the land, not the value of the land to the owner. The court held

35. 247 Va. 162, 441 S.E.2d 4 (1994).
36. *Id.*
37. *Id.*
38. 247 Va. 388, 442 S.E.2d 388 (1994).
39. *Id.* at 391, 442 S.E.2d at 390.
40. *Id.*
41. 247 Va. 259, 440 S.E.2d 610 (1994).

that the same definition of "fair market value" applies in taxation and condemnation cases.[42] There was no evidence that the land "was so committed to use as a park that it was not economically feasible to put the land to other uses."[43] The fair market value of the property condemned should have been determined without regard to the use restrictions placed on it by the trust agreement.

5. Employment

According to *Lockhart v. Commonwealth Education Systems Corp.*,[44] under certain circumstances plaintiffs may sue for wrongful discharge in Virginia. There, the plaintiffs brought suit against their former employer for wrongful discharge, alleging that they had been terminated because of their race and sex. Although "Virginia strongly adheres to the employment-at-will doctrine," discharges that violate public policy are actionable.[45] Here, the General Assembly has declared Virginia's strong public policy against employment discrimination based on race or gender in the Virginia Human Rights Act.[46] Even though the Act does not create private causes of action, it makes clear the public policy of Virginia. Consequently, plaintiffs have the right to sue for wrongful discharge. Chief Justice Carrico and Justices Compton and Stephenson dissented.[47]

6. Fraud

Concealment of a material fact may constitute the element of misrepresentation for purposes of a fraud action. In *Van Deusen v. Snead*,[48] the motion for judgment alleged that sellers of a home took affirmative steps designed to conceal the existence of defects of which they were aware, e.g., hiding cracks in the basement by placing objects in front of the cracks and spread-

42. *Id.* at 263, 440 S.E.2d at 612.
43. *Id.*
44. 247 Va. 98, 439 S.E.2d 328 (1994).
45. *Id.* at 102, 439 S.E.2d at 330.
46. VA. CODE ANN. § 2.1-715 (Repl. Vol. 1987).
47. 247 Va. 98, 439 S.E.2d 328 (1994).
48. 247 Va. 324, 441 S.E.2d 207 (1994).

ing mortar over cracks in the foundation. The court stated that "an allegation of concealment by conduct is equivalent to an allegation of a verbal misrepresentation of a material fact."[49] Thus the court found that the bill of complaint stated a cause of action for fraud.[50]

7. Premises Liability

a. Assumption of Risk

In *Waters v. Safeway Stores, Inc.*,[51] the plaintiff slipped on ice outside of a Safeway. Assumption of the risk connotes venturousness and is a jury question unless reasonable minds cannot differ on the issue.[52] The plaintiff knew that the ice was present and that one might slip and fall on it, but she had successfully reached the entrance to the store and believed that she also could safely exit.[53] Whether plaintiff was venturesome in exiting the premises was a factual matter to be resolved by the jury. The trial court erred in striking plaintiff's evidence.[54]

b. Criminal Acts of Another

The owner or occupier of premises ordinarily is under no duty to protect an invitee from a third person's criminal act committed while the invitee is upon the premises.[55] In *Gupton v. Quicke*,[56] however, the motion for judgment properly alleged facts falling within a narrow exception to the general rule. That exception applies when the owner or occupier knows that criminal assaults against persons are occurring or are about to occur on the premises that indicate an imminent probability of harm to an invitee.[57] The plaintiff alleged that he was threatened on the premises of defendants' café by one Lively, that Lively was

49. *Id.* at 329, 441 S.E.2d at 210.
50. *Id.*
51. 246 Va. 269, 435 S.E.2d 380 (1993).
52. *Id.* at 271, 435 S.E.2d 381.
53. *Id.*
54. *Id.* at 272, 435 S.E.2d at 382.
55. Wright v. Webb, 234 Va. 527, 362 S.E.2d 919 (1987).
56. 247 Va. 362, 442 S.E.2d 658 (1994).
57. *Wright*, 234 Va. at 533, 362 S.E.2d at 922.

removed from the café while still threatening the plaintiff, that the defendants thereafter allowed Lively to reenter the café, and that Lively violently attacked the plaintiff.[58] These facts alleged an "imminent probability of harm" to the plaintiff and triggered a duty on the defendants' part to exercise reasonable care to control Lively's conduct to prevent him from causing harm to the plaintiff.[59]

8. Workers' Injuries

The court returned to the meaning of "injury by accident" in *Middlekauff v. Allstate Insurance Co.*,[60] in which plaintiff sued her employer for emotional distress arising from abusive behavior by her supervisors. Defendant successfully invoked the Workers' Compensation Act in the trial court, which held that plaintiff alleged "an injury, by accident, arising out of and in the course of her employment with Allstate," and therefore her claim was barred by the Act.[61]

In *Middlekauff*, the court had to reconcile two conflicting cases. In *Morris v. Morris*,[62] the court defined an "injury by accident" as an "identifiable incident or sudden precipitating event [that results] in an obvious sudden mechanical or structural change in the body."[63] In *Haddon v. Metropolitan Life Insurance Co.*,[64] however, the court held that the Act is the ex-

58. *Gupton*, 247 Va. at 363, 442 S.E.2d at 659.

59. *Id.* A case decided before *Gupton*, *Godfrey v. Boddie-Noell Enter.*, interpreted *Wright v. Webb* slightly differently. In *Godfrey*, an unknown third party shot the plaintiff in the drive-through line of a Hardee's restaurant at 3 o'clock in the morning. There was some history of disturbances at the restaurant, but there was evidence that defendant had taken measures to increase security. The court held that the rule of *Wright v. Webb* applies to a business that incorporates a criminal element directly or indirectly into its method of conducting business, such as a business that somehow directly benefits from the presence of criminal or assaultive behavior. The court found that the Hardee's restaurant was not such a business. 843 F. Supp. 114, 123 (E.D. Va. 1994). The court decided *Godfrey* on a motion for judgment as a matter of law after the jury could not reach a verdict. It therefore may not be inconsistent with *Gupton*, which was an appeal of a dismissal on demurrer and therefore had no record for the supreme court to review.

60. 247 Va. 150, 439 S.E.2d 394 (1994).

61. *Id.* at 152, 439 S.E.2d at 395-96.

62. 238 Va. 578, 385 S.E.2d 858 (1989).

63. *Id.* at 589, 385 S.E.2d at 865.

64. 239 Va. 397, 389 S.E.2d 712 (1990).

clusive remedy for a claim of intentional infliction of emotional distress based on a continuing pattern of sexual harassment. Three Justices (Whiting, Lacy, and Keenan) voted to overrule *Haddon* because it had ignored the line of cases, including *Morris*, that have held that a gradual injury (such as emotional distress resulting from harassment) is not within the Act.[65] Two Justices (Poff and Stephenson) concurred in the result, explaining that they would not overrule *Haddon*, but would limit it to the proposition that an intentional tort by a fellow employee may be an "accident" within the Act.[66] The remaining two Justices (Carrico and Compton) dissented. They would hold that *Haddon* controls and requires the court to hold that Middlekauff's claim was valid.[67] Like the plaintiff in *Haddon*, the dissent argued Middlekauff suffered an injury from the intentional tort of a fellow servant, and her claim should therefore have been accepted.[68]

Five months after deciding *Middlekauff*, the court explicitly overruled *Haddon* in *Lichtman v. Knouf*.[69] In *Lichtman*, plaintiff sued for intentional infliction of emotional distress arising out of her employment. The trial court dismissed the suit on the grounds that the Workers' Compensation Act was plaintiff's exclusive remedy. The supreme court, with Chief Justice Carrico and Justice Compton dissenting, reversed. In a brief opinion that reviewed the conflicting lines of cases, the court stated that previous cases, including *Middlekauff*, had held that "an 'injury by accident' for purposes of the Act does not include a gradually incurred injury."[70] The court overruled *Haddon* "to the extent that it placed gradually incurred injuries within the definition of 'injury by accident.'"[71]

65. 247 Va. at 154, 439 S.E.2d at 397.
66. *Id.* at 155, 439 S.E.2d at 397-98.
67. *Id.* at 155, 439 S.E.2d at 398.
68. *Id.*
69. No. 931464 (Va. June 10, 1994).
70. *Id.* at 155, 439 S.E.2d at 398.
71. *Id.*, slip op. at 3.

C. *Affirmative Defenses*

1. Collateral Estoppel

The jury's failure to award damages in a wrongful-death action barred a participant in an automobile accident from denying contributory negligence in *Reid v. Ayscue*.[72] Gwendolyn Reid had been the driver in a two-car accident that resulted in the death of her mother. Gwendolyn's brother, Ronald, brought a wrongful death action against the driver and owner of the other vehicle. The defendants in the wrongful-death action filed a third-party motion for judgment against Gwendolyn, seeking contribution. The judge severed this claim from the wrongful-death action.[73] In the wrongful-death action, the jury returned a verdict against the defendants. The jury awarded $26,633 in medical and funeral expenses to the estate, $50,000 to Ronald, and nothing to Gwendolyn.[74] The contribution plaintiffs then moved for summary judgment against Gwendolyn.[75] The trial court correctly ruled that Gwendolyn was collaterally estopped from denying her contributory negligence. The jury in the wrongful death action was instructed that any negligence by Gwendolyn would bar a recovery by her.[76] The evidence established that Gwendolyn and her mother previously had a warm and loving relationship.[77] The only rational interpretation of the jury's failure to award damages to Gwendolyn is that the jury believed that she was negligent. The contribution plaintiffs met their burden of establishing the requisites of collateral estoppel.[78]

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72. 246 Va. 454, 436 S.E.2d 439 (1993).
73. *Id.* at 456, 436 S.E.2d at 440.
74. *Id.*
75. *Id.*
76. *Id.* at 457, 436 S.E.2d at 441.
77. *Id.*
78. *Id.* There was no dispute that there was an identity of parties between the two actions. The trial court found that the "real plaintiffs in the *Reid v. Ayscue* wrongful death action were the statutory beneficiaries, Ronald and Gwendolyn Reid," and Gwendolyn did not dispute this in the supreme court. *Id.* at 457, 436 S.E.2d at 440.

2. Contributory Negligence

The supreme court rejected age as a factor when determining the negligence of an automobile driver in *Thomas v. Settle.*[79] The plaintiff's decedent, age sixteen, was struck in the rear by a truck. The trial court incorrectly instructed the jury that the standard by which the decedent's conduct was to be measured was "that of a reasonable person of like age, intelligence, and experience."[80] The reasonable care of automobile drivers, the court noted, is not to be measured by their age or ability.[81] Rather, minors should be held to the same standard of care as an adult when operating a motor vehicle, namely, the degree of care that a reasonably prudent person would exercise under the same or similar circumstances.[82]

3. Fireman's Rule

In *Goodwin v. Hare,*[83] the Supreme Court of Virginia held for the first time that the fireman's rule is inapplicable to intentional torts. A police officer therefore was entitled to pursue her claim for personal injuries intentionally inflicted by the defendant in resisting a lawful arrest.[84] Dissenting, Justices Compton and Lacy would have held that the issue was whether the act causing injury was of the type that a police officer should expect to encounter, not whether the act was intentional or negligent.[85]

79. 247 Va. 15, 439 S.E.2d 360 (1994).
80. *Id.* at 21, 439 S.E.2d at 363.
81. *Id.* at 22, 439 S.E.2d at 364.
82. *Id.*
83. 246 Va. 402, 436 S.E.2d 605 (1993).
84. *Id.* at 405, 436 S.E.2d at 606.
85. *Id.* at 405-06, 436 S.E.2d at 606-07.

4. Limitations

a. Emotional Distress for Injury to Another

In *Mahony v. Becker*,[86] the plaintiffs sued for emotional distress resulting from alleged sexual abuse of their child by the defendant. The acts occurred from 1974 to 1978.[87] The plaintiffs learned of the acts in 1991, and filed suit in 1992. The plaintiffs' claims, if valid, were wholly derivative of their daughter's claim. Because any cause of action accrued at the latest in 1978 when the daughter allegedly was injured, not in 1991, the action was time-barred.[88]

b. Wrongful Birth

In *Glascock v. Laserna*,[89] a suit by parents for the medical expenses incurred in caring for their daughter, who was born with numerous congenital abnormalities, was time-barred. The parents alleged that had the mother's gynecologist properly detected the child's problems before birth, they would have chosen to abort the child.[90] They sought as damages the medical expenses incurred for their child's care and treatment.[91] The defendants pled in bar the two-year personal injury statute of limitations.[92] The trial court granted the special plea, and the supreme court affirmed.[93] Plaintiffs did not allege that defendants caused "personal injury" to the child, so plaintiffs were not entitled to the five-year limitation period of section 8.01-243(B).[94] They pled a personal action, to which the two-year statute applied.[95]

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86. 246 Va. 209, 435 S.E.2d 139 (1993).
87. *Id.* at 210, 435 S.E.2d at 140.
88. *Id.* at 213, 435 S.E.2d at 141.
89. 247 Va. 108, 439 S.E.2d 380 (1994).
90. *Id.* at 109-10, 439 S.E.2d at 381.
91. *Id.* at 110, 439 S.E.2d at 381.
92. VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1992).
93. 247 Va. at 110, 439 S.E.2d at 381.
94. VA. CODE ANN. § 8.01-243(B) (Repl. Vol. 1992).
95. 247 Va. at 110, 439 S.E.2d at 381.

5. Sovereign Immunity

The court applied the doctrine of sovereign immunity to actions of a physician employed by a public health facility in *Lohr v. Larsen*.[96] There, the plaintiff, a patient at the Waynesboro Public Health Clinic, sued a health clinic doctor for medical malpractice in failing to diagnose breast cancer. Unlike doctors at the University of Virginia Hospital in *James v. Jane*,[97] the defendant was performing a function that was an essential part of the clinic's delivery of health services, which in turn were an integral part of the Commonwealth's statutory objective of protecting public health. The doctor's exercise of discretion was part of the Commonwealth's health care program. The court noted that the element of discretion was not limited to "governmental policymakers."[98] The trial court correctly ruled that the action was barred by the doctrine of sovereign immunity.[99] Three justices dissented.[100]

D. *Trial Proceedings and Evidence*

1. Choice of Law

In *Jones v. R. S. Jones & Associates*,[101] the court held that the substantive law of Florida and the procedural law of Virginia applied to an action brought in Virginia arising out of an airplane accident in Florida. The two-year statute of limitations provided by Florida law, even though not a part of its wrongful death statute, is directed so specifically to the right of action under the act as to warrant saying that the limitation qualifies the right and is substantive law.[102]

96. 246 Va. 81, 431 S.E.2d 642 (1993).
97. 221 Va. 43, 282 S.E.2d 864 (1980).
98. *Lohr*, 246 Va. at 87, 431 S.E.2d at 645.
99. *Id.* at 88, 431 S.E.2d at 646.
100. *Id.*
101. 246 Va. 3, 431 S.E.2d 33 (1993).
102. *Id.* at 5, 431 S.E.2d at 34.

2. Expert Evidence

Expert testimony ordinarily is necessary in a medical malpractice action "to establish the appropriate standard of care, a deviation from that standard, and that such deviation was the proximate cause of damages. In certain rare instances, however, . . . expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience."[103] In *Beverly Enterprises—Virginia, Inc. v. Nichols*, the plaintiff's decedent suffered from Alzheimer's disease, was unable to feed herself, and had two serious choking incidents while under the care of her family.[104] All of this was known to the defendant nursing home. Nevertheless, the defendant's employee left a tray of food with the decedent and failed to assist her in eating her meal. The court held that the jury did not need expert testimony to determine whether the defendant was negligent under the circumstances.[105]

Expert testimony is admissible only when specialized skill and knowledge are required to assist the jury in evaluating the merits of a claim. Issues of this type generally arise in cases involving the practice of professions requiring advanced education, such as engineering, medicine, and law, or those involving trades that focus upon scientific matters, such as electricity and blasting. The issue in *Board of Supervisors v. Lake Services, Inc.*,[106] was whether defendant used ordinary care in dredging a lake given its knowledge of the fluctuating water level and the presence of known underwater obstructions, including plaintiff's sewer line. The issue did not concern a scientific matter that required expert testimony, and the trial court erred in striking the plaintiff's evidence.[107]

A litigant may cross-examine an expert witness by reading excerpts from scientific articles that the expert recognizes as

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103. Beverly Enterprises—Virginia, Inc. v. Nichols, 247 Va. 264, 267, 441 S.E.2d 1, 3 (1994).

104. *Id.* at 265, 441 S.E.2d at 2.

105. *Id.* at 268, 441 S.E.2d at 3.

106. 247 Va. 293, 440 S.E.2d 600 (1994).

107. *Id.* at 297, 440 S.E.2d at 602.

standard and authoritative in the field. In *Griffett v. Ryan*,[108] the witness acknowledged that the author of an article was authoritative on the staging of lung cancer but did not testify that the specific article was standard and authoritative in the field. It was error to allow the cross-examination. The article used during the cross-examination, not the author, must be recognized as standard and authoritative. The court found, however, that the error was harmless.[109]

3. Jury Selection

In *Hill v. Berry*,[110] the venire consisted of ten whites and three blacks. Defendant's counsel used his peremptory strikes to remove all three blacks.[111] Although the plaintiff's motion concerning the use of the peremptory strikes was made after the jury was sworn, the trial court implicitly granted him leave of court to make his motion, as allowed by Virginia Code section 8.01-352. Once the plaintiff established a prima facie case of purposeful discrimination, the burden shifted to the defendant to present a racially neutral explanation for removing the black veniremen.[112] The reasons offered by the defendant's counsel—"just intuitive reasons, the way people look—just a sense"—failed to satisfy the defendant's burden.[113] The trial court thus erred in denying the plaintiff's motion.[114]

E. *Appellate Practice*

1. Interlocutory Appeal

In *Leggett v. Caudill*,[115] the plaintiff sued a minister, his church, and other related entities. Her claim for infliction of emotional distress was dismissed on demurrer on October 7,

108. 247 Va. 465, 443 S.E.2d 149 (1994).
109. *Id.* at 474, 443 S.E.2d at 154.
110. 247 Va. 271, 441 S.E.2d 6 (1994).
111. *Id.* at 272, 441 S.E.2d 6 (1994).
112. *Id.* at 275, 441 S.E.2d at 8.
113. *Id.* at 273, 441 S.E.2d at 7.
114. *Id.* at 275, 441 S.E.2d at 8.
115. 247 Va. 130, 439 S.E.2d 350 (1994).

1992.[116] Plaintiff noted her appeal from this order on October 15, 1992.[117] Her other two counts were dismissed in November 1992, and the plaintiff did not appeal.[118] The court held that the October 7, 1992, order was interlocutory in nature because claims remained against the other defendants in the case.[119] The general rule is that a judgment is not final for purposes of appeal if it is rendered with regard to some but not all of the parties in the case.[120] An exception to this rule applies when there is an adjudication that is final with regard to a collateral matter, separate and distinct from the general subject of the litigation, and affecting only particular parties to the controversy.[121] In *Leggett*, however, the allegations against all defendants derived from the actions of the minister. The October 7, 1992, order was thus not appealable, and the court dismissed the appeal as improvidently granted.[122]

2. Preservation of Error

In *Luckett v. Jennings*,[123] the defendant argued that the failure to note on the final order the specific grounds of objection barred the plaintiff's appeal from an order sustaining a demurrer. The supreme court disagreed. Plaintiff-appellant's memorandum of points and authorities in opposition to the demurrer combined with his objection to the trial court's ruling as noted on the final order[124] was sufficient to preserve the issue for appeal.[125]

The appellant was not so fortunate in *United Leasing Corp. v. Thrift Insurance Corp.*[126] The trial court granted summary judgment for the defendant, stating that it was ruling "on

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 132, 439 S.E.2d at 351.
120. Wells v. Whittaker, 207 Va. 616, 628, 151 S.E.2d 422, 432 (1966).
121. *Id.*, 151 S.E.2d at 432.
122. *Leggett*, 247 Va. at 135, 439 S.E.2d at 353.
123. 246 Va. 303, 435 S.E.2d 400 (1993).
124. The opinion does not quote the objection.
125. 246 Va. 303, 435 S.E.2d 400.
126. 247 Va. 299, 440 S.E.2d 902 (1994).

[defendant's] reasons."[127] The "reasons" to which the trial court referred included all grounds advanced by the defendant. Because the plaintiff failed to assign error to two of the grounds urged by the defendants, the order entering summary judgment became final and barred any appellate relief that otherwise might have been available.[128] Moreover, the plaintiff's written response to the defendant's demurrer did not attempt to refute the defendant's argument that the motion for judgment failed to state a cause of action for negligence.[129] Plaintiff did not address the negligence theory in its argument before the trial court, and its general objection to the trial court's final order did not specify that the order was erroneous for this reason. The supreme court would not consider the argument on appeal.[130]

III. RECENT LEGISLATION AFFECTING CIVIL PRACTICE

The General Assembly enacted a number of measures during its 1994 Session that affect legislation in state courts.[131] For ease of reference, the discussion of these enactments is classified below by subject matter.

A. *Process*

Section 8.01-277 (motion to quash defective process) now provides that, upon sustaining the motion, the court may strike the proof of service, not "dismiss the action."[132]

B. *Mediation*

A new section 46.2-1572.2 (mediation of disputes involving motor vehicle franchises) was added to provide for nonbinding

127. *Id.* at 302, 440 S.E.2d at 904.
128. *Id.* at 307, 440 S.E.2d at 907.
129. *Id.* at 308, 440 S.E.2d at 908.
130. *Id.*
131. Unless otherwise noted, all provisions became effective on July 1, 1994.
132. Act of Mar. 7, 1994, ch. 37, 1994 Va. Acts 111 (codified at VA. CODE ANN. § 8.01-277 (Cum. Supp. 1994)).

mediation at the request of either party at any time prior to a hearing before the Commissioner of Motor Vehicles.[133]

C. *Affirmative Defenses*

A new section 8.01-264 grants volunteer workers in hospices for the terminally ill civil immunity for their acts of ordinary negligence.[134]

D. *Medical Records*

Amendments to section 8.01-413 (admissibility and subpoena of medical records) provide that computer printouts of records shall be admissible under the same conditions as other forms of records.[135] The legislature also amended the section to add "nursing facility" to the list of enumerated health care providers.[136] The section also now requires compensation to the health care provider for the service of maintaining, retrieving, reviewing, and preparing the medical records, but within the previous limits of fifty cents for each page up to fifty pages and twenty-five cents a page for the remainder.[137]

E. *Priest-Penitent Privilege*

An amendment to section 8.01-400 strengthened Virginia's priest-penitent privilege. The section now provides that no minister of religion to whom the statute applies shall be required to relinquish notes, records, or any written documentation made by the minister or to disclose the contents of any such notes, records, or written documentation in discovery proceedings.[138]

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133. Act of Apr. 7, 1994, ch. 418, 1994 586 (codified at VA. CODE ANN. § 4.62-1572.2 (Repl. Vol. 1994)).

134. Act of Apr. 10, 1994, ch. 738, Va. Acts 1101 (codified at VA. CODE ANN. § 8.01-226.4 (Cum. Supp. (1994)).

135. Act of Apr. 6, 1994, ch. 390, 1994 Va. Acts 566 (codified at VA. CODE ANN. § 8.01-413 (Cum. Supp. 1994)).

136. Act of Apr. 9, 1994, ch. 572, 1994 Va. Acts 796 (codified at VA. CODE ANN. § 8.01-413 (Cum. Supp. 1994)).

137. VA. CODE ANN. § 8.01-413 (Cum. Supp. 1994).

138. Act of Apr. 2, 1994, ch. 198, 1994 Va. Acts 290 (codified at VA. CODE ANN. § 8.01-400 (Cum. Supp. 1994)).

F. *Expert Testimony*

The General Assembly continued to enact the Federal Rules of Evidence into the Virginia Code with an amendment to section 8.01-401.1.[139] The amendment enacts Federal Rule of Evidence 803(18), which allows an expert to read from learned treatises under certain conditions.[140] The amended statute further provides that copies of the statements to be read from the learned treatise on direct examination shall be disclosed to the other side thirty days before trial.[141]

G. *Punitive Damages*

The General Assembly also added section 8.01-44.5 (exemplary damages for persons injured by intoxicated drivers) to allow punitive damages in an action for personal injury or death arising from operation of a motor vehicle, engine, or train, when (1) at the time of the accident, the defendant had a blood alcohol concentration of 0.15% or more by weight; (2) the defendant knew that he was going to be operating a motor vehicle, engine, or train at the time that he began, or while he was, drinking alcohol; and (3) the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff.[142]

H. *Additur*

Under revised section 8.01-383.1, the trial court, if it finds the damages to be inadequate, may award a new trial or put defendant on terms to pay a greater amount or submit to a new trial.[143] If additur is accepted by either party under protest, it may be reviewed on appeal.

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139. Act of Apr. 5, 1994, ch. 328, 1994 Va. Acts 458 (codified at VA. CODE ANN. § 8.01-401.1 (Cum. Supp. 1994)).

140. *Id.*

141. *Id.*

142. Act of Apr. 9, 1994, ch. 570, 1994 Va. Acts 795 (codified at VA. CODE ANN. § 8.01-44.5 (Cum. Supp. 1994)).

143. Act of Apr. 11, 1994, ch. 807, 1994 Va. Acts 1253 (codified at VA. CODE ANN. § 8.01-383.1 (Cum. Supp. 1994)).

IV. CHANGES IN THE SUPREME COURT OF VIRGINIA RULES

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

Rule 4:5 (Depositions upon oral examination) was amended to provide that if a nonparty witness is not a resident of the Commonwealth, his deposition may be taken in the locality where he resides or is employed, or at any other location agreed upon by the parties.[144] The Rule was also amended to provide that the restrictions as to parties within the Commonwealth set forth in the Rule shall not apply where no responsive pleading has been filed or an appearance otherwise made.[145]

Rule 4:7A (Audio-visual depositions) was amended to delete former subsection (b), "Use of clock."[146]

Rule 5:7 (Original jurisdiction of Supreme Court) was amended to rewrite subsections (a)-(c) and to add the requirement that in cases brought by prisoners *pro se*, a copy of the application shall be forwarded to the respondent by first class mail, accompanied by a certificate of service.[147]

Rule 5:23 (Perfection of appeal; docketing) was amended to make technical changes in subsection (b).[148]

144. VA. SUP. CT. R. 4:5(a1) (Repl. Vol. 1994).
145. *Id.*
146. VA. SUP. CT. R. 4:7A (Repl. Vol. 1994).
147. VA. SUP. CT. R. 5:7(a)-(c) (Repl. Vol. 1994).
148. VA. SUP. CT. R. 5:23(b) (Repl. Vol. 1994).