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Donald P. Boyle Jr.

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CIVIL PRACTICE AND PROCEDURE

*Donald P. Boyle Jr.**

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, VIRGINIA CIRCUIT COURTS, AND FEDERAL COURTS APPLYING VIRGINIA LAW

A. *Jurisdiction, Venue, and Service of Process*

1. Removal

In *Burroughs v. Palumbo*,[1] defendant was served with process through the Secretary of the Commonwealth. The grounds of defense was due to be filed on September 22, 1994. On September 29, 1994, defendant filed the notice of removal in federal court. On September 30, 1994, the state court entered default judgment against defendant. Later that same day, defendant filed the notice of removal with the state court. Between the time that defendant filed the notice of removal in federal court and the time that he filed it with the state court, both courts had jurisdiction over the case; therefore the default judgment was valid. The federal court set aside the default judgment, however, on the grounds that defendant was out of town

* Associate, Hunton & Williams, Richmond, Va.; B.A., 1984, University of Virginia; J.D., 1989, Marshall-Wythe School of Law, College of William & Mary.

1. 871 F. Supp. 870, 871 (E.D. Va. 1994).

when process reached his home and that he did not return until September 23, 1994.[2]

2. Venue

Section 8.01-262 does not specify whether the relevant place where "the defendant resides or has his principal place of employment" for purposes of Category B venue is to be determined as of the time of filing or as of the time of the accrual of the cause of action.[3] Relying on federal cases,[4] the Circuit Court for the City of Richmond held that section 8.01-262 refers to the residence or workplace of the defendant at the time of filing of the action.[5]

B. *Causes of Action and Damages*

1. Acts of Third Persons

In *Nasser v. Parker*,[6] the supreme court refused to impose liability on a psychiatrist and a hospital for failure to warn a woman that the psychiatrist's patient intended to cause her harm. Plaintiff alleged liability based on a "special relation" between defendants and the patient as described in section 315(a) of the *Restatement (Second) of Torts*.[7] Such liability only exists, however, if a defendant "takes charge" of the assailant.[8] The psychiatrist and the hospital did not "take charge" of the patient so that liability could be imposed on them for the patient's actions.[9]

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2. *Id.* at 872-73.

3. VA. CODE ANN. § 8.01-262 (1994).

4. *See* Tenefrancia v. Robinson Corp., 921 F.2d 556 (4th Cir. 1990).

5. Godsey v. Maitland, 34 Va. Cir. 262 (Richmond City 1994).

6. 249 Va. 172, 455 S.E.2d 502 (1995).

7. *Id.* at 176, 455 S.E.2d at 503. *See* RESTATEMENT (SECOND) OF TORTS § 315(a) (1964).

8. RESTATEMENT (SECOND) OF TORTS § 319 (1964).

9. *Nasser*, 249 Va. at 181, 455 S.E.2d at 506. The court criticized Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976), for failing to recognize the effect of § 319 on "special relation" claims. *Nasser*, 249 Va. at 179, 455 S.E.2d at 505.

2. Automobile Accidents—Sudden Emergency

In *Bentley v. Felts*,[10] Felts ran a stop sign at an intersection, causing Bentley to swerve into a guard rail to avoid Felts. The evidence showed that Felts's engine had unexpectedly stalled, causing a loss of power to the power-assisted brakes.[11] Felts argued that the engine cut-off constituted a "sudden emergency" to which he responded as a reasonable person under the circumstances. The trial court granted an appropriate instruction.[12] The supreme court held that this was error:

> A sudden emergency presupposes a happening which, in the exercise of reasonable care under the circumstances, cannot be foreseen or expected. *See Garnot v. Johnson*, 239 Va. 81, 86, 387 S.E.2d 473, 476 (1990) (sudden emergency instruction improper where vehicle in front of defendant stopped suddenly on highway). Automobile engines do occasionally cut off without warning, thereby requiring the operators to use increased brake force to stop cars equipped with power-assisted brakes. Accordingly, automobile operators should anticipate this eventuality and be prepared to use increased force on the brakes. Thus, Felts's loss of power-assisted braking was not a sudden emergency as we have defined and applied that term.[13]

3. Common Carrier

The Supreme Court of Virginia has said that "[a] common carrier [is] defined as one who, by virtue of his calling and as a regular business, undertakes for hire to transport persons or commodities from place to place, offering his services to all such as may choose to employ him and pay his charges."[14] In *Bregel*

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10. 248 Va. 117, 445 S.E.2d 131 (1994).

11. *Id.* at 118, 445 S.E.2d at 132.

12. *Id.* at 119-20, 445 S.E.2d at 133-34.

13. *Id.* at 120-21, 445 S.E.2d at 133-34. Justices Compton, Lacy, and Keenan dissented. They reasoned that an engine cut-off is considerably more unusual than the sudden stop of a preceding vehicle. *Id.* at 122, 445 S.E.2d at 134-35. (Lacy, J., dissenting in part).

14. Carlton v. Boudar, 118 Va. 521, 527, 88 S.E. 174, 176 (1916) (quoting Black's Law Dictionary); *see also* BLACK'S LAW DICTIONARY 214 (6th ed. 1990).

v. Busch Entertainment Corp.,[15] plaintiff was injured while on the Skyride, a monocable system that transports patrons around the park at Busch Gardens. The Skyride, which offers patrons an aerial view of the park, is for entertainment purposes; the transportation function is incidental to the entertainment function.[16] The trial court properly refused a common carrier instruction.[17]

4. Conspiracy

The supreme court rejected the argument that the Virginia Conspiracy Statute[18] requires proof of actual malice. Instead, the Act only requires proof of legal malice, i.e., that defendant "acted intentionally, purposely, and without lawful justification."[19] In *Saliba v. Exxon Corp.*,[20] a federal district court reasoned that a single entity cannot conspire with itself. A corporation, therefore, cannot be held liable under the Virginia Conspiracy Statute for conspiring with its wholly owned subsidiary.

5. Contracts

a. Consideration

A debtor's promise to pay sums already due is not sufficient consideration to support a creditor's agreement to refinance the loan.[21] In addition, a debtor's failure to seek financing elsewhere does not supply the necessary consideration for a creditor's agreement to refinance a defaulted loan.[22]

Mere forbearance, without an agreement to that effect, is not sufficient consideration for a promise, even though the fact of forbearance was induced by the promise.[23] The fact of forbear-

15. 248 Va. 175, 176, 444 S.E.2d 718, 719 (1994).
16. *Id.* at 177, 444 S.E.2d at 719.
17. *Id.* at 177, 444 S.E.2d at 720.
18. VA. CODE ANN. §§ 18.2-499, -500 (Repl. Vol. 1988 & Cum. Supp. 1994).
19. Commercial Business Sys. v. Bellsouth Servs., Inc., 249 Va. 39, 47, 453 S.E.2d 261, 267 (1995).
20. 865 F. Supp. 306, 313 (W.D. Va. 1994).
21. Albright v. Burke & Herbert Bank & Trust Co., 249 Va. 463, 466, 457 S.E.2d 776, 778 (1995).
22. *Id.*
23. Greenwood Assocs., Inc. v. Crestar Bank, 248 Va. 265, 269, 448 S.E.2d 399,

ance to act does not establish consideration for the undertaking unless there was an agreement, express or implied, that the plaintiff would forbear to act.[24] "Such an agreement is absolutely essential."[25] In *Greenwood Associates, Inc. v. Crestar Bank*, plaintiff failed to plead such an agreement, and thus the trial court's judgment dismissing this count of the bill of complaint was proper.[26]

b. Good-Faith Covenant

In *Mahoney v. NationsBank of Virginia, N.A.*,[27] the supreme court held that section 8.1-203[28] does not imply a good-faith covenant into commercial contracts. The court followed cases from other jurisdictions that have rejected the notion of a good-faith covenant based on section 1-203 of the Uniform Commercial Code.[29] Instead, when the parties to a contract have created "valid and binding rights," a party cannot breach any duty of good faith by exercising those contractual rights.[30]

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402 (1994).

24. *Id.*

25. *Id.* (quoting Saunders v. Bank of Mecklenberg, 112 Va. 443, 454, 71 S.E. 714, 717 (1911)).

26. *Id.*

27. 249 Va. 216, 221, 455 S.E.2d 5, 8 (1995).

28. "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement." VA. CODE ANN. § 8.1-203 (1991).

29. *See, e.g.*, Nantahala Village, Inc. v. NCNB National Bank, 976 F.2d 876, 881 (4th Cir. 1992); Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 674 (2d Cir. 1985); Triangle Mining Co. v. Stauffer Chem. Co., 753 F.2d 734, 739 (9th Cir. 1985); Cardinal Stone Co. v. Rival Mfg. Co., 669 F.2d 395, 396 (6th Cir. 1982); Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 138 (5th Cir.), *cert. denied*, 444 U.S. 938 (1979).

30. *Mahoney*, 249 Va. at 220, 455 S.E.2d at 8.

Also applying this rule was Albright v. Burke & Herbert Bank & Trust Co., 249 Va. 463, 457 S.E.2d 776 (1995). Plaintiff alleged that defendant breached its "obligations to act in good faith in contracting" by foreclosing on a secured loan and suing plaintiff for the balance due on an unsecured note. Defendant had a contractual right to do this, however, and there can be no breach of Code § 8.1-203 in enforcing a contractual right. *Id.* at 467, 457 S.E.2d at 778.

c. Impossibility

In *Long Signature Homes, Inc. v. Fairfield Woods, Inc.*,[31] the parties entered into a contract for the sale of 382 building lots to be used for a subdivision. The contract was contingent upon the purchaser's receiving certification from county authorities for adequate water, sewer, and electric facilities.[32] The county did not provide the certification, and the seller refused to perform beyond the fifty lots already sold on the grounds that it was impossible to perform the contract.[33] Ordinarily, a supervening condition that renders a promisor's performance temporarily impossible will not release him from the duty of performing, but will only suspend that obligation.[34] This general rule is inapplicable, however, if the delay will make the promisor's performance materially more burdensome. "In that instance, the promisor's duty of performance is discharged rather than suspended."[35] Nevertheless, this rule is subject to contrary agreement by the parties.[36] Here, the contract provided that the purchaser could delay the date for closing until sixty days after the contingency is satisfied. The trial court was ordered to enter a declaratory judgment that the contract is still in effect and will remain effective until the expiration of the twenty-one year period of the rule against perpetuities.[37]

d. Modification

In *Powell Mountain Joint Venture v. Moore*,[38] the parties had a contract to sublease certain coal lands. The contract provided for two six-month extensions, if Powell Mountain gave notice within thirty days of the scheduled expiration of the agreement. Powell Mountain properly gave notice of the first

31. 248 Va. 95, 96, 445 S.E.2d 489, 490 (1994).
32. *Id.* at 97, 445 S.E.2d at 490.
33. *Id.* at 97-98, 445 S.E.2d at 491.
34. *Id.* at 99, 445 S.E.2d at 491 (citing RESTATEMENT (SECOND) OF CONTRACTS § 269 (1981)).
35. *Id.*
36. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 269 cmt. a (1981)).
37. *Id.* at 99-100, 445 S.E.2d at 492.
38. 248 Va. 63, 64, 445 S.E.2d 135, 136 (1994).

six-month extension.[39] On July 6, 1990, within the thirty-day period for the second extension, counsel for Powell Mountain proposed certain modifications to the agreement before agreeing to a new extension. Counsel for the Moores did not respond. On July 26, 1990, still within the thirty-day period, Powell Mountain gave notice of its election to extend the agreement, notwithstanding the earlier letter. The court held that Powell Mountain could propose a modification without forfeiting its right to extend.[40] A modification cannot occur without the express mutual agreement of the parties. "[W]hen one party claims that the other party has surrendered a right guaranteed by the contract, the party asserting such [surrender] must prove either passage of valuable consideration, estoppel *in pais*, or waiver of the right."[41] None was shown here.

e. Performance

In *Lenders Financial Corp. v. Talton*,[42] plaintiff filed a motion for judgment alleging breach of a "finders fee agreement" relating to obtaining financing for defendant's real estate development. A loan was obtained, but defendant refused to pay.[43] At trial, defendant moved to strike plaintiff's evidence on the grounds that plaintiff had not made a prima facie showing of its own performance of the agreement.[44] The supreme court held that the trial court properly denied the motion.[45] The language of the agreement, when viewed in the light most favorable to plaintiff, covered the type of loan that defendant received.[46] Further, because defendant's repudiation of this executory contract constituted an anticipatory breach, plaintiff could sue on the contract without waiting for the time of defendant's performance to arrive.[47]

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39. *Id.* at 65, 445 S.E.2d at 136-37.
40. *Id.* at 66, 445 S.E.2d at 137.
41. *Id.* (quoting Stanley's Cafeteria v. Abramson, 226 Va. 68, 73, 306 S.E.2d 870, 873 (1983)).
42. 249 Va. 182, 183, 455 S.E.2d 232, 233 (1995).
43. *Id.* at 186, 455 S.E.2d at 235.
44. *Id.* at 187, 455 S.E.2d at 235.
45. *Id.* at 187-88, 455 S.E.2d at 235-36.
46. *Id.* at 188-89, 455 S.E.2d at 236.
47. *Id.* at 189, 455 S.E.2d at 236.

f. Standing

In *Cottrell v. General Systems Software Corp.*,[48] the court considered the question of when a corporation has standing to sue for breach of contract. General Systems Software was incorporated in 1983. In 1988, William J. Kenney, the corporation's president, allowed the corporation to dissolve by operation of law. In 1989, the State Corporation Commission issued a notice of termination of corporate existence to General Systems. On March 6, 1991, Kenney signed a contract for the sale of property that had been purchased by General Systems in 1986. The contract of purchase stated that it was "between William J. Kenney, Jr. (the 'Seller,' whether one or more), and David E. [and] Christine G. Cottrell (the 'Purchaser,' whether one or more)."[49] The Cottrells did not close on the property, and General Systems sold the property to other buyers for $47,500 less than the price provided in the contract with the Cottrells.[50]

General Systems sued the Cottrells for breach of contract and recovered $44,650 in a trial before the chancellor.[51] The supreme court reversed on the grounds that General Systems was not a party to the contract. The "clear language of the contract" identified Kenney as the seller and the Cottrells as the purchasers. Although Kenney signed as "William Kenney, Jr., pres. for General Systems Software," this did not alter the language of the contract identifying Kenney as the seller.[52]

g. Third-Party Beneficiary

In *Aetna Casualty & Surety Co. v. Fireguard Corp.*,[53] the contract between Cranshaw, the general contractor, and Fireguard, a subcontractor, provided that Fireguard would indemnify "the Owner" and the "Contractor" (Cranshaw) against damage, loss, claims, suits, actions, expense, liability, or obliga-

48. 248 Va. 401, 402, 448 S.E.2d 421, 422 (1994).
49. *Id.*
50. *Id.*
51. *Id.* at 402-03, 448 S.E.2d at 422-23.
52. *Id.* at 403, 448 S.E.2d at 422-23.
53. 249 Va. 209, 211, 455 S.E.2d 229, 230 (1995).

tion of any kind by reason of or arising from any actions of Fireguard, its agents, employees, or subcontractors. After Fireguard's negligent testing of a fire pump system that it installed on the project caused extensive water damage, Quincy, the owner of the project, and Aetna, its insurer, sued Fireguard on a third-party beneficiary theory. Fireguard filed a motion for summary judgment, arguing that the contract referred to another party, not Quincy, as the "Owner."[54] The court held that it was clear that the parties intended to confer a benefit on the "Owner," but it was not clear who they meant. The trial court therefore was not justified in holding, as a matter of law, that Quincy was not the "Owner."[55]

6. Corporate Veil

In *Sloan v. Thornton*,[56] the jury was instructed that in order to impose liability on a shareholder for the debts of the corporation, the plaintiff had the burden to prove that the corporation was a sham and was either the alter ego of the shareholder or was used to disguise a wrong or obscure a fraud of the shareholder. Plaintiff introduced no evidence that the corporation was a sham or that it had been used to disguise a wrong or to obscure a fraud. Therefore, the trial court correctly set aside the verdict for plaintiff.

7. Damages

a. Evidence

In *Stohlman v. S & B Ltd. Partnership*,[57] Stohlman entered into a lease of property owned by S & B for use as an auto dealership. When the building was eighty-five percent completed, Stohlman refused to go forward with the lease. The property eventually was sold because of a failure to find a new tenant. At trial in this declaratory judgment action, Stohlman moved for judgment on the grounds that S & B had not proved

54. *Id.* at 214, 455 S.E.2d at 231.
55. *Id.* at 215, 455 S.E.2d at 232.
56. 249 Va. 492, 457 S.E.2d 60 (1995).
57. 249 Va. 251, 252, 454 S.E.2d 923, 924 (1995).

its damages because it had not introduced evidence of the fair market value of the premises "ready to go and functional" on the date of the breach.[58] The supreme court affirmed the trial court's denial of Stohlman's motion. S & B showed that it was unable to lease the property and that the real estate market had substantially declined. This was sufficient to make a prima facie case that the lease had no apparent market value on the date of the breach.[59] Stohlman had the burden of going forward to show that the cost of completing the building ($950,000) would have been a reasonable effort to limit damages. Stohlman produced no such evidence.[60]

In *Estate of Taylor v. Flair Property Associates*,[61] Taylor sold two parcels of undeveloped land to Flair. The parties amended their agreement to state that Flair would provide sewer service to the properties in exchange for Taylor's reduction of the sale price by $60,000. Flair never made these improvements, and Taylor sued for breach of contract.[62] Taylor introduced no evidence of its damages in its case in chief, but had Flair's expert testify on cross-examination regarding his estimate of $63,600 for the work. The supreme court held that Taylor could not rely on the $60,000 figure absent an agreement on liquidated damages. The evidence from Flair's expert, however, was sufficient proof of Taylor's damages to survive a motion to strike.[63]

b. New Business

In *Commercial Business Systems v. Bellsouth Services, Inc.*,[64] plaintiff sued defendant for failure to renew its contract to repair Digital Equipment Corporation (DEC) equipment. Plaintiff based its damage estimate on the repair records of the company that defendant used instead of plaintiff during the two-year contract period.[65] This did not violate the "new busi-

58. *Id.* at 253, 454 S.E.2d at 925.
59. *Id.*
60. *Id.* at 256, 454 S.E.2d at 926.
61. 248 Va. 410, 412, 448 S.E.2d 413, 414 (1994).
62. *Id.* at 412, 448 S.E.2d at 415.
63. *Id.* at 413, 448 S.E.2d at 416.
64. 249 Va. 39, 453 S.E.2d 261 (1995).
65. *Id.* at 49, 453 S.E.2d at 268.

ness" rule because plaintiff was an established business with a prior record of repairing defendant's equipment.[66]

c. Punitive Damages

In *Hamilton Development Co. v. Broad Rock Club, Inc.*,[67] plaintiff sued defendant for trespass on a .176-acre parcel. The jury found in favor of the plaintiff, awarding $20,000 in compensatory damages and $200,000 in punitive damages. An award of punitive damages must be supported by evidence of "misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others."[68] In this case, there was credible evidence to support the jury's punitive award:

> Twelve months before the trespass, defendant's principals had been warned that the plaintiff owned the property necessary to "square up" the lot Hodges wanted for his personal use. Nevertheless, determined to "get it from whoever owned it," defendant's principals arranged to acquire plaintiff's land, without performing a title examination, by use of another corporation controlled by them. Subsequently, and after ignoring another notice that plaintiff owned the subject property, defendant committed the trespass. This conduct demonstrates that defendant acted with such recklessness or negligence to evince conscious disregard of plaintiff's property rights.[69]

The court also held that the award was not excessive, where defendant recklessly caused plaintiff $20,000 in actual damages and, during the year of the trespass, defendant had total income of approximately $1.2 million and defendant's two principals received approximately $670,160 in distributions from the corporation.[70]

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66. *Id.* at 50, 454 S.E.2d at 268-69.

67. 248 Va. 40, 445 S.E.2d 140 (1994).

68. *Id.* at 45, 445 S.E.2d at 143 (quoting Giant of Va., Inc. v. Pigg, 207 Va. 679, 685, 152 S.E.2d 271, 277 (1967)).

69. *Id.*

70. *Id.* at 46, 445 S.E.2d at 144.

d. Stigma

In *Adams v. Star Enterprise*,[71] plaintiffs sought compensation for diminution in their property value that they alleged was caused by defendants' oil spill. None of the oil made contact with plaintiffs' property.[72] Under Virginia law, such "stigma" damages are not recoverable without a physical impact, whether under a nuisance or a negligence theory.[73]

8. Defamation

a. Defamation Per Se

In *Schnupp v. Smith*, Schnupp, a police officer, reported to Smith's supervisor the following:

> [An ARA] van license LKA 792 with . . . Andre L. Smith [driving] was seen at 3:25 p.m. at a high profile drug area on 900 North 26th Street. He was observed pulling up to that location and a passenger got out of passenger side went up to this location gave people something and received something in return, then this person known as Robert B. Regan [sic], Jr., got back in the van and they drove by the officer.[74]

The trial court instructed the jury to return their verdict for Smith if Smith proved by clear and convincing evidence that Schnupp made or implied this statement.[75] Schnupp argued that the statement did not qualify as defamation per se because it did not impute to Smith the commission of a crime of moral turpitude for which Smith could be indicted and punished.[76]

The supreme court disagreed. The crime alleged need not be one involving moral turpitude, but only one that is "punishable by imprisonment in a state or federal institution."[77] Smith

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71. 51 F.3d 417 (4th Cir. 1995).
72. *Id.* at 421.
73. *Id.* at 422-25.
74. 249 Va. 353, 359, 457 S.E.2d 42, 45 (1995).
75. *Id.*
76. *Id.* at 359-60, 457 S.E.2d at 45-46.
77. *See* Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 147, 334 S.E.2d

claimed that the statement imputed the crime of aiding and abetting in the possession of narcotics, which is punishable by imprisonment under Virginia law.[78] The court also rejected Schnupp's assertion that the defamatory words must be sufficient in themselves to establish all the elements of the crime. It is enough if the crime may be reasonably inferred from the words used.[79]

b. Sexual Harassment

Williams v. Garraghty[80] presented an unusual set of facts. Gloria Williams worked for David Garraghty, a prison warden. The two saw each other from 1982 to 1986. After Williams became engaged to another man, her personal relationship with Garraghty ended. Williams alleged that Garraghty continued to make amorous advances to her in 1986-88 and 1992. She wrote him a memorandum describing her view of the facts and accusing him of sexual harassment. An investigation followed, and Garraghty was terminated. Garraghty sued Williams for defamation. The jury returned a verdict for Garraghty in the amount of $152,597 in compensatory damages and $125,000 in punitive damages.[81]

Williams asserted on appeal that she had a qualified privilege under federal law to report sexual harassment and that the trial court erred in refusing her proffered instruction on this point.[82] The supreme court disagreed with Williams. There is no such qualified privilege in a state action for defamation.[83]

846, 850 (1985) (quoting RESTATEMENT (SECOND) OF TORTS § 571 (1976)).

78. *Schnupp*, 249 Va. at 359, 457 S.E.2d at 45.

79. *Id.* at 360-61, 457 S.E.2d at 46.

80. 249 Va. 224, 455 S.E.2d 209 (1995).

81. *Id.* at 227-31, 455 S.E.2d at 212-14.

82. *Id.* at 234, 455 S.E.2d at 215-16.

83. *Id.* at 234, 455 S.E.2d at 216. The court also held that Garraghty's claims for "personal damages" for defamation and emotional distress were not within the exclusive jurisdiction of the Workers' Compensation Act because Garraghty had not sustained an "injury by accident." *Id.* at 238, 455 S.E.2d at 218.

9. Detinue

Virginia's detinue statutes do not authorize and require a sheriff to break and enter a dwelling house, without the occupant's permission, for the purpose of seizing personal property pretrial. Such action was forbidden by the common law, and the General Assembly has not seen fit to abrogate this common law principle by statute.[84]

10. Insurance[85]

a. Automobile—Consent Judgment

In *Liberty Mutual Insurance Co. v. Eades*,[86] the insurer denied coverage to the defendant in an action arising out of an automobile accident. The defendant in the accident case then entered into a consent judgment with the personal injury plaintiff. After the defendant assigned plaintiff her rights against the insurer, the plaintiff filed an action against the insurer seeking indemnification.[87] The insurer argued that the consent judgment was the result of fraud and collusion. The supreme court held that the consent judgment was not subject to collateral attack.[88]

b. Automobile—Construction of Terms

In *Moore v. State Farm Mutual Automobile Insurance Co.*,[89] plaintiff was injured when he was struck by a "family-class stock car" at a race track. Plaintiff's insurance policy with State Farm covered reasonable medical expenses incurred "through being struck by an automobile or by a trailer of any type" but excluded coverage for injuries sustained "through being struck

84. *See* Williams v. Matthews, 248 Va. 277, 448 S.E.2d 625 (1994).

85. For a more detailed discussion of changes in insurance law see E. Lewis Kincer, Jr., *Annual Survey of Virginia Law: Insurance Law*, 29 U. RICH. L. REV. 1089 (1995).

86. 248 Va. 285, 448 S.E.2d 631 (1994).

87. *Id.* at 289, 448 S.E.2d at 632.

88. *Id.* at 289, 448 S.E.2d at 633.

89. 248 Va. 432, 448 S.E.2d 611 (1994).

by . . . a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads."[90] When State Farm denied plaintiff's claim, plaintiff sued for breach of the policy terms. The trial court found the policy language unambiguous and ruled that the modified Chevrolet Nova that struck plaintiff, which had no headlights or taillights, no muffler, no turn signals, no side mirrors, and no working emergency brake was "equipment designed for use principally off public roads."[91]

On appeal, the supreme court reversed. To bar coverage, exclusionary policy language must clearly bring the particular event, thing, or circumstances in question within its scope.[92] The car that struck plaintiff was not "a farm type tractor or other equipment designed for use principally off public roads."[93] The vehicle was not so altered as not to be an "automobile" within the policy definition.[94]

c. Automobile—Underinsured Motorist—Stacking

In order to determine whether a motor vehicle is "underinsured," the total amount of uninsured motorist coverage available on *all* policies applicable to the plaintiff must be compared to the coverage on such vehicle.[95]

d. Automobile—Uninsured Motorist

An unusual situation, but one that the supreme court had previously encountered, was involved in *Erie Insurance Co. Exchange v. Jones*.[96] In *Jones*, decedent, West, was a passenger in a car driven by Banks. Banks followed closely a truck driven by Tyree. Tyree got out of his truck, carrying his rifle. When he tapped the rifle against the window of Banks's vehi-

90. *Id.* at 433, 448 S.E.2d at 612.
91. *Id.* at 435, 448 S.E.2d at 612.
92. *Id.* at 436, 448 S.E.2d at 613.
93. *Id.* at 435, 448 S.E.2d at 612.
94. *Id.* at 435, 448 S.E.2d at 613.
95. USAA Casualty Ins. Co. v. Alexander, 248 Va. 185, 445 S.E.2d 145 (1994).
96. 248 Va. 437, 448 S.E.2d 655 (1994).

cle, the rifle discharged, injuring Banks and killing West.[97] The insurers of West's vehicle sought a declaratory judgment that their policies did not provide uninsured or underinsured motorist coverage to West or Banks. The trial court ruled that they did provide such coverage.[98]

The supreme court reversed. Prior case law required a "nexus" between the injury and the uninsured vehicle.[99] The court stressed that insurance policies provide coverage for "vehicle-caused property losses, personal injuries, and death. Such damages are not vehicle-caused when the proximate cause is merely incidental or tangential to the ownership, maintenance, or use of the vehicle."[100] Here, the proximate cause of the wrongful death was Tyree's criminal assault, not meaningfully related to the use of the uninsured automobile.[101]

A particularly significant insurance case was *State Farm Mutual Automobile Insurance Co. v. Cuffee*.[102] *Cuffee* was an action against an uninsured motorist, Sivels, and plaintiff's uninsured motorist carrier, State Farm. Sivels, through counsel, admitted liability. The trial court ruled that State Farm accordingly could not present evidence on contributory negligence or assumption of the risk because that would be inconsistent with the position of Sivels.[103] On appeal, the supreme court reversed. Section 38.2-2206, the court held, is clear.[104] The court applied the plain language of the statute, notwithstanding plaintiff's argument that to do so would "result in chaos in

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97. *Id.* at 438-39, 448 S.E.2d at 656.

98. *Id.* at 439, 448 S.E.2d at 657.

99. *See* State Farm Mut. Auto. Ins. Co. v. Rice, 239 Va. 646, 650, 391 S.E.2d 71, 73 (1990).

100. *Erie Insurance*, 248 Va. at 442-43, 448 S.E.2d at 658-59.

101. *Id.* at 443, 448 S.E.2d at 659.

102. 248 Va. 11, 444 S.E.2d 720 (1994).

103. *Id.* at 13, 444 S.E.2d at 721.

104. The statute provides:

> The insurer shall . . . have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured . . . motor vehicle or in its own name. Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

VA. CODE ANN. § 38.2-2206(F) (Repl. Vol. 1994).

courtrooms below."[105] As the court reminded plaintiff, "[f]inding ways to control chaos is a daily task of courts everywhere."[106]

e. Contribution

In *Allstate Insurance Co. v. United Services Automotive Association*,[107] USAA was the primary insurer and Allstate was the excess insurer of the defendant in a wrongful-death action. USAA settled the case for an amount greater than its primary coverage and called on Allstate to contribute one-half of the amount over that sum. Allstate refused, USAA then filed suit against Allstate and recovered a judgment.[108] The supreme court reversed because the right to contribution depends on a common obligation. Here, Allstate had no obligation to provide coverage under the terms of its policy, which required either a settlement agreement to which Allstate was a party or a final judgment against the insured.[109]

f. "Death or Destruction"

In a case of first impression, the supreme court was called upon to construe the meaning of "death or destruction" of livestock for purposes of motor cargo liability coverage in *Lumbermen's Mutual Casualty Co. v. Keller*.[110] A truck carrying cattle was involved in an accident, killing several steers and injuring others. The cattle were visibly injured and lost weight. Prospective buyers were informed of the cattle's condition, and as a result the average price per pound of the cattle at auction was 18.5 percent less than their purchase price a few days earlier.[111]

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105. *Cuffee*, 248 Va. at 14, 448 S.E.2d at 722.

106. *Id.* A few months later, in State Farm Mut. Auto. Ins. Co. v. Beng, 249 Va. 165, 455 S.E.2d 2 (1995), the court extended this holding to underinsured motorist carriers.

107. 249 Va. 9, 452 S.E.2d 859 (1995).

108. *Id.* at 11, 452 S.E.2d at 860.

109. *Id.* at 13-14, 452 S.E.2d at 861-62.

110. 249 Va. 458, 456 S.E.2d 525 (1995).

111. *Id.* at 459, 456 S.E.2d at 525.

The policy covered "Direct Physical 'Loss' which results in death or destruction to covered property." The insurance company denied that there had been any "destruction" of cattle that were merely injured in the accident.[112] The supreme court agreed: "destruction" requires at least that the property be damaged to such an extent that it becomes useless for its intended purpose.[113]

g. Independent Medical Examination

In *Allstate Insurance Co. v. Eaton*,[114] Eaton was injured in an automobile accident. Allstate paid $2,762.97 under her medical payments coverage, but requested that she undergo an independent medical examination before any further payments would be made. Eaton refused and sued for the remaining payments. Eaton asserted that because she was contemplating an uninsured motorist claim, she was justified under section 38.2-2206[115] in refusing to undergo the examination.[116] The trial court ruled for Eaton, but the supreme court reversed. The statute has no effect on medical payments coverage, even if a UM claim either is contemplated or made under the policy.[117]

h. Prejudgment Interest

In *Dairyland Insurance Co. v. Douthat*,[118] Douthat was injured in an automobile accident by Dunford. Douthat sued Dunford and recovered a judgment of $95,000 plus prejudgment interest. Before the entry of judgment, Dunford's two insurers paid Douthat their combined policy limits of $100,000. Douthat then filed a second action against the insurers, seeking the remainder of the prejudgment interest. The trial court entered judgment for Douthat in the amount of $27,175.56.[119]

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112. *Id.* at 460, 456 S.E.2d at 526.
113. *Id.* at 460-62, 456 S.E.2d at 526-27.
114. 248 Va. 426, 448 S.E.2d 652 (1994).
115. VA. CODE ANN. § 38.2-2206 (Repl. Vol. 1994).
116. *Eaton*, 248 Va. at 429, 448 S.E.2d at 654.
117. *Id.* at 430, 448 S.E.2d at 654-55.
118. 248 Va. 627, 449 S.E.2d 799 (1994).
119. *Id.* at 630, 449 S.E.2d at 800.

The insurers appealed, arguing that they had no obligation to pay prejudgment interest under their policies.[120] The supreme court began its analysis by noting that "[i]f the terms of an insurance policy do not conflict with any provision of law, the terms of the contract, as written, will govern and limit the extent of recovery under the policy."[121] The court noted that section 8.01-382 provides for *discretionary* awards of prejudgment interest, but *mandatory* awards of postjudgment interest. Thus, the court held, an insurer has no duty to pay prejudgment interest beyond the policy limits, absent a contractual provision to the contrary.[122]

i. Stolen Property

In *Hall, Inc. v. Empire Fire & Marine Insurance Co.*,[123] plaintiff, a used-car dealer, purchased in good faith, for $17,000, what turned out to be a stolen vehicle. The vehicle was destroyed in a fire at plaintiff's dealership. Plaintiff's insurer denied coverage for the loss on the grounds that the policy did not cover the vehicle.[124] The policy provided that it covered "[o]nly the private passenger autos [Hall] own[s]. This includes those private passenger autos [Hall] acquire[s] ownership of after the policy begins."[125] The language was clear and unambiguous that only someone with legal title "owns" an automobile, and the parties had stipulated that the legal owner was State Farm, the former owner's insurer. The insurer thus properly denied coverage.[126]

11. Invasion of Privacy

Town & Country Properties, Inc. v. Riggins[127] involved a claim of "invasion of privacy" by a very public man. Plaintiff, a former football player for the Washington Redskins, was di-

120. *Id.* at 630, 449 S.E.2d at 801.
121. *Id.* at 631, 449 S.E.2d at 801.
122. *Id.* at 632, 449 S.E.2d at 801-02.
123. 248 Va. 307, 448 S.E.2d 633 (1994).
124. *Id.* at 309, 448 S.E.2d at 635.
125. *Id.* at 308, 448 S.E.2d at 634.
126. *Id.* at 310, 448 S.E.2d at 635.
127. 249 Va. 387, 457 S.E.2d 356 (1995).

vorced from his wife in 1991. Soon after that, his ex-wife became a licensed real estate agent with defendant Town & Country. In 1992, she decided to sell the former marital home. She had a flyer printed that stated in large, bold type "John Riggins' former home." Plaintiff had not given his consent to the use of his name.[128]

Plaintiff sued Town & Country for misappropriation of his name under section 8.01-40(A)[129] as well as other theories. A jury awarded him compensatory damages of $25,000 and punitive damages of $28,608.[130]

On appeal, the supreme court had to decide whether the placement of plaintiff's name on the flyer constituted use of the name "for advertising purposes" within the meaning of section 8.01-40(A). Following New York cases interpreting a similar statute, the supreme court said that "a name is used 'for advertising purposes' when 'it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service.'"[131] Applying this test, the court held that plaintiff's name was used for advertising purposes and was not "merely incidental" to the commercial message of the flyer.[132]

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128. *Id.* at 392, 457 S.E.2d at 361.

129. That statute provides:

> Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

VA. CODE ANN. § 8.01-40(A) (Repl. Vol. 1992).

130. *Riggins*, 249 Va. at 393, 457 S.E.2d at 361.

131. *Id.* at 395, 457 S.E.2d at 362 (quoting Beverley v. Choices Women's Medical Center, Inc., 587 N.E.2d 275, 278 (N.Y. 1991)).

132. *Id.* at 395, 457 S.E.2d at 363.

12. Malpractice—Lawyers

In a case of first impression, the court decided in *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*[133] that contributory negligence is a defense to a claim for legal malpractice. The court already had decided that contributory negligence is a defense to medical malpractice claims,[134] and saw no reason to treat legal malpractice claims differently.[135]

In *Hendrix v. Daugherty*,[136] plaintiffs sued their former lawyers for malpractice after their wrongful death suit was dismissed pursuant to the statute of limitations. Plaintiffs' initial motion for judgment in the malpractice action alleged the lawyers' negligence but did not allege that the negligence proximately caused them injury.[137] The trial court properly granted the lawyers' demurrer. Plaintiffs were allowed to file an amended motion for judgment, which alleged proximate causation, and these allegations were sufficient to withstand demurrer.[138]

Generally, the questions of whether an attorney has exercised the appropriate degree of care and, if not, whether the failure was the proximate cause of the client's loss, are to be decided by a fact finder after considering testimony of expert witnesses. However, when these questions are purely matters of law, they are reserved for determination by a court and cannot be the subject of expert testimony. In *Heyward & Lee Construction Co. v. Sands, Anderson, Marks & Miller*,[139] plaintiff alleged that defendant law firm had committed malpractice in failing to join necessary parties to its bill of complaint to enforce two mechanics' liens. The trial court sustained the law firm's demurrer, and the supreme court affirmed.[140] The law firm had

133. 249 Va. 426, 457 S.E.2d 28 (1995).
134. *See* Eiss v. Lillis, 233 Va. 545, 552-53, 357 S.E.2d 539, 543-44 (1987); Lawrence v. Wirth, 226 Va. 408, 412-13, 309 S.E.2d 315, 317-18 (1983).
135. *Lyle, Siegel, Croshaw & Beale*, 249 Va. at 431, 457 S.E.2d at 32.
136. 249 Va. 540, 457 S.E.2d 71 (1995).
137. *Id.* at 548, 457 S.E.2d at 76.
138. *Id.*
139. 249 Va. 54, 453 S.E.2d 270 (1995).
140. *Id.* at 60, 453 S.E.2d at 274.

relied upon well-established law and could not have foreseen that the supreme court would overrule a line of precedent.[141]

13. Malpractice—Medical

a. Damages Cap

The effect on the medical-malpractice damages cap of a settlement with a joint tortfeasor was at issue in *Fairfax Hospital System, Inc. v. Nevitt*.[142] Plaintiff, born with birth defects, suffered cardiac arrest five days after undergoing cardiac surgery at a hospital operated by Inova/Fairfax Hospital System, Inc.[143] Plaintiff sued the hospital, Pediatric Cardiology Associates (PCA), Dr. Mardini, and others. Plaintiff settled with PCA and Dr. Mardini for $600,000, then took her case against the remaining defendants to trial.[144] The jury returned a verdict of $2,000,000, from which the trial judge subtracted the $600,000 settlement. The remaining $1,400,000 was then reduced to $1,000,000 pursuant to section 8.01-581.15.[145] The supreme court reversed this ruling. The formula applied by the trial court in effect deprived the hospital of any benefit for the settlement with PCA and Dr. Mardini. The court held that when the total amount recovered at trial of the malpractice action and in all settlements exceeds $1,000,000, the total amount that the plaintiff can recover is $1,000,000. The settlement credit should have been applied to the $1,000,000 statutory cap, not to the verdict amount, leaving plaintiff with a judgment of $400,000.[146]

b. Expert Testimony

In *Fairfax Hospital System, Inc. v. Curtis*,[147] plaintiff, administrator of the estate of an infant who died soon after birth

141. *Id.* at 59, 453 S.E.2d at 273.
142. 249 Va. 591, 457 S.E.2d 10 (1995).
143. *Id.* at 593, 457 S.E.2d at 11.
144. *Id.*
145. *Id.* at 596-97, 457 S.E.2d at 13; *see* VA. CODE ANN. § 8.01-581.15 (1994).
146. *Nevitt*, 249 Va. at 599, 457 S.E.2d at 14-15.
147. 249 Va. 531, 457 S.E.2d 66 (1995).

at defendant's hospital, sued for negligence. The trial court admitted the hospital's expert witnesses testimony that the risk of "near-SIDS syndrome" has some statistical correlation with a mother's seizures during pregnancy, diabetes, and smoking.[148] The trial court, however, refused to admit evidence from the hospital's expert witness that the risk factors were present in the infant's mother's prenatal history.[149] Expert testimony is inadmissible, the court held, when predicated upon insignificant statistical possibilities, not probabilities.[150]

c. Informed Consent

In *Rizzo v. Schiller*,[151] an infant was injured when the obstetrician, Dr. Schiller, used forceps during delivery. Dr. Schiller argued that the mother had given her informed consent to the use of the forceps by signing the following form:

AUTHORIZATION FOR MEDICAL AND SURGICAL PROCEDURES

PATIENT HISTORY NO. */P/9456*

I hereby authorize *Dr. Schiller*, and/or other members of the Medical Staff of The Fairfax Hospital of his choice, to perform diagnostic or therapeutic medical and surgical procedures on and to administer anesthetics to *Pamela Rizzo* . I further authorize The Fairfax Hospital to dispose of any removed tissue or amputated parts.

11/07/89	[Signed] Pamela S. Rizzo
(Date)	(Signature)
[Signed] Vera Thomas	
(Witness)	(Relationship)[152]

148. *Id.* at 534, 457 S.E.2d at 68.
149. *Id.*
150. *Id.* at 535, 457 S.E.2d at 69.
151. 248 Va. 155, 445 S.E.2d 153 (1994).
152. *Id.* at 157, 445 S.E.2d at 154.

The Court held that the mother was not sufficiently informed:

> [T]his form did not inform her of any specific procedures that Dr. Schiller intended to perform; nor did it inform her of foreseeable risks associated with any procedures or risks in failing to perform any procedures. As Dr. Arner observed, the form is so general in nature that "you could also justify amputating her foot." *We hold that the duty imposed upon a physician to obtain a patient's informed consent requires more than simply securing the patient's signature on a generalized consent form, similar to the form present here. The law requires informed consent, not mere consent, and the failure to obtain informed consent is tantamount to no consent.*[153]

d. Meaning of "Physician"

In *Taylor v. Mobil Corp.*,[154] decedent, an employee of Mobil, died of a heart attack after a cardiologist at Mobil's clinic failed to diagnose decedent's heart disease during examinations in January and February 1991. During discovery in the wrongful death action brought by decedent's widow against the cardiologist (Dr. Johnson) and Mobil, Dr. Johnson discovered that his license to practice medicine in Virginia had expired on December 31, 1990. Dr. Johnson had inquired about its renewal prior to its expiration, but the licensing authority erroneously informed him that his license had been renewed. After learning of the mistake, Dr. Johnson immediately applied for and received the necessary license.[155] Defendants moved for the application of the medical-malpractice cap of section 8.01-581.15, and the trial court denied the motion.[156] On appeal, the supreme court

153. *Id.* at 159, 445 S.E.2d at 155-56 (emphasis added).

In Pettengill v. United States, 867 F. Supp. 380 (E.D. Va. 1994), plaintiff sued for injuries arising from a bilateral tubal ligation. Plaintiff contended that her doctor was negligent per se for failing to obtain her written informed consent as required by § 54.1-2974. *Id.* at 381. The court held that this was not negligence per se because plaintiff was not a member of the class of persons for whose benefit the statute was enacted; § 54.1-2974 was enacted to provide immunity to physicians. *Id.* at 384.

154. 248 Va. 101, 444 S.E.2d 705 (1994).

155. *Id.* at 105, 444 S.E.2d at 707.

156. *Id.*

affirmed because the plain language of the statute provides that it applies to actions against a "health care provider" for "malpractice."[157] "Health care provider" is defined in the chapter as "a person . . . licensed by this Commonwealth to provide health care or professional services as a physician."[158] "Malpractice" is defined 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."[159] "Physician" is defined as "a person licensed to practice medicine . . . in this Commonwealth."[160] Because Dr. Johnson was not licensed when the cause of action arose in January and February 1991, he was not a "physician" or "health care provider" for purposes of the Act, and the plaintiff's action was not one for malpractice within the meaning of the Act.[161] If there is to be an exception for a physician in Dr. Johnson's circumstances, the court concluded, it will have to be provided by the legislature.[162]

e. Review Panel

In *Fairfax Hospital System, Inc. v. Curtis*,[163] the trial court excluded the opinion of the review panel on the grounds that it was not rendered within six months of the designation of the panel, as required by section 8.01-581.7:1. The panel had sua sponte continued the proceedings, thus resulting in the late issuance of the opinion.[164] Whether or not the continuance was influenced by the hospital's actions, the statute is clear that unless both sides agree, a late opinion is inadmissible.[165] It was also clear that plaintiff had not caused the delay.

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157. *Id.* at 109, 444 S.E.2d at 709-10.
158. VA. CODE ANN. § 8.01-581.1 (Cum. Supp. 1995).
159. *Id.*
160. *Id.*
161. *Taylor*, 248 Va. at 109, 444 S.E.2d at 709.
162. *Id.* at 109, 444 S.E.2d at 710. The court also held that plaintiff's claim was barred by the Workers' Compensation Act. Taylor's death did not arise out of his employment because the cause of his injury was not an "actual risk" of employment. It was not enough that the clinic was located at the place of employment because his employer did not require or even expect him to use the clinic. *Id.* at 107, 444 S.E.2d at 708.
163. 249 Va. 531, 457 S.E.2d 66 (1995).
164. *Id.* at 538, 457 S.E.2d at 71.
165. *Id.* at 539, 457 S.E.2d at 71.

14. Partnerships

A finding that one is a general partner must be based on proof of the statutory elements required for such status.[166] Introducing evidence that suggests only the trappings of general partner status cannot create a jury question regarding whether an individual is a general partner. In *Sloan v. Thornton*, none of the statutory requirements was met, and thus there was no evidence to support a jury finding of general partnership.[167]

Generally, one partner is not entitled to compensation for services rendered attending to partnership affairs, unless there is an express or implied contract for such compensation.[168] In *Skretvedt v. Kouri*, one partner testified that he could not afford to join forces with a company that would not pay him and that "$3,000 a month . . . was discussed in specific terms."[169] The trial court was justified in finding an implied contract between the partnership and the defendant for compensation.

Under section 50-17, the liability of an incoming partner for debts of the partnership incurred before he became a partner may be satisfied only out of the partnership assets.[170] The federal district court held in *Citizens Bank v. Parham-Woodman Medical Associates*[171] that this rule applies even when the partnership receives part of the consideration for the debt after he becomes a partner.

15. Premises Liability

The supreme court showed some reluctance to approve orders striking plaintiffs' evidence in *Holcombe v. NationsBanc Financial Services Corp.*[172] Plaintiff was employed by a commercial cleaning service to clean defendant's branch office. Defendant stored in the bathroom two heavy partitions that had been

166. Sloan v. Thornton, 249 Va. 492, 497, 457 S.E.2d 60, 62 (1995).
167. *Id.*
168. Skretvedt v. Kouri, 248 Va. 26, 34, 445 S.E.2d 481, 486 (1994).
169. *Id.*
170. VA. CODE ANN. § 50-17 (Repl. Vol. 1994).
171. 874 F. Supp. 705, 710 (E.D. Va. 1995).
172. 248 Va. 445, 450 S.E.2d 158 (1994).

bolted to a wall in another part of the office. The partitions leaned against the wall in the bathroom, just inside the door. When plaintiff was cleaning the bathroom one day, the partitions fell on her, causing her injury.[173] Defendant argued that plaintiff showed no evidence of a defective condition on the premises.[174] The court took defendant's motion to strike under advisement at the end of plaintiff's case. At the close of all the evidence, defendant renewed the motion, which was granted.[175] The supreme court reversed. The evidence was not without conflict. A jury could conclude that it was foreseeable that injury would result from the storage of the partitions in the bathroom.[176]

Similar judicial reluctance to keep a premises liability case from the jury was shown in *Little Creek Investment Corp. v. Hubbard*.[177] Plaintiff tripped over an automobile muffler on the sidewalk in front of her place of employment while walking to her car at around ten o'clock in the evening. Plaintiff testified that she did not look down at the sidewalk, "but looked straight ahead."[178] Defendant asserted that this was contributory negligence as a matter of law.[179] The trial court disagreed, and the jury returned a verdict for plaintiff in the amount of $300,000.[180]

The supreme court, reviewing prior cases, held that there is no per se rule that a person who does not look down while walking forward is contributorily negligent; instead, "the circumstances of each case must be considered."[181] Here, it was a dark, rainy night, and plaintiff testified that her vision was obscured by her fellow employees who were walking in front of her. Under the circumstances, the trial court properly submitted the issue of contributory negligence to the jury for decision.[182]

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173. *Id.* at 446-47, 450 S.E.2d at 159.
174. *Id.* at 447, 450 S.E.2d at 159.
175. *Id.* at 447, 450 S.E.2d at 159-60.
176. *Id.* at 448, 450 S.E.2d at 160.
177. 249 Va. 258, 455 S.E.2d 244 (1995).
178. *Id.*
179. *Id.*
180. *Id.* at 261, 455 S.E.2d at 246.
181. *Id.*
182. *Id.* at 264, 455 S.E.2d at 248. Another premises liability case was Arthur v.

16. Product Liability

a. Crashworthiness

In a long-awaited decision, the supreme court considered in *Slone v. General Motors Corp.*[183] whether Virginia law recognizes the concept of "crashworthiness." The opinion, however, raises as many questions as it answers.

Several federal courts have considered the issue over the past two decades. All have held or assumed that Virginia would recognize the crashworthiness doctrine, which requires a manufacturer to use reasonable care to design a vehicle that will protect occupants from an unreasonable risk of injury in reasonably foreseeable collisions.[184] *Slone* did not even mention any of these cases. Instead, the supreme court swiftly dismissed the *term* "crashworthiness": "We have repeatedly articulated the relevant principles that govern whether a manufacturer of a product owes a duty to a person injured by that product. We find no reason to confuse our well-settled jurisprudence by injecting the doctrine of 'crashworthiness' and, therefore, we reject this doctrine."[185]

The analysis followed in *Slone*, however, is crashworthiness in everything but name. Plaintiff was attempting to back a dump truck up a gravel ramp in order to dump his load at a depot in Botetourt County. When he was within a few feet of

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Crown Cent. Petroleum Corp., 866 F. Supp. 951 (E.D. Va. 1994). Plaintiff was injured when she slipped and fell while stepping down from a cashier's island at defendant's gas station. Defendant's motion for summary judgment was denied, and the case was submitted to the trial court for decision. *Id.* at 952. The court found that defendant was negligent for failing to warn plaintiff of the change in elevation, which was not open and obvious. The court also found, however, that plaintiff was contributorily negligent because she stepped up on the island to pay and thus was familiar with the condition, but proceeded to step down even though she could not see the step. *Id.* at 955.

183. 249 Va. 520, 457 S.E.2d 51 (1995).

184. *See* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1069 (4th Cir. 1974) (assuming, but not deciding, that Virginia would recognize crashworthiness); Euler v. American Isuzu Motors, Inc., 807 F. Supp. 1232, 1236 (W.D. Va. 1992) (predicting that Virginia would recognize doctrine); Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368, 1370 (E.D. Va. 1978) (assuming that Virginia would recognize doctrine).

185. *Slone*, 249 Va. at 525, 457 S.E.2d at 53.

the dump site, the ground gave way and the dump truck flipped over backwards, sliding down the side of the ramp for about 60 feet. The roof was crushed in the accident.[186] Plaintiff alleged that the truck should have been designed to withstand the rollover.[187] The trial court granted defendants' motion for summary judgment on the grounds that there was no claim for crashworthiness under Virginia law.[188] The supreme court reversed, holding that the case should be allowed to go to trial because plaintiff should be allowed to show that the rollover was a reasonably foreseeable "misuse" of the truck.[189]

b. Disclaimer of Warranty

In *Buettner v. R.W. Martin & Sons*,[190] plaintiff was injured by a flatwork ironer that defendant had sold to plaintiff's employer, SHS. The sales contract between defendant and SHS provided that the ironer was sold "as is." Plaintiff argued that the disclaimer of warranties, although effective as to SHS, was not effective as to her.[191] The court rejected this argument; a third-party user can rise no higher than the purchaser through which he claims.[192] An effective disclaimer that is not unconscionable to the parties to a sales contract cannot be unconscionable to the parties' employees.[193]

In *Fisher v. Monsanto Co.*,[194] plaintiff's decedent died of brain cancer allegedly because of exposure to PCBs. The sale of the product between Monsanto and decedent's employer, Westinghouse, disclaimed all warranties other than good title and production according to specifications.[195] Although plaintiff

186. *Id.* at 523, 457 S.E.2d at 52.
187. *Id.*
188. *Id.* at 524, 457 S.E.2d at 53.
189. *Id.* at 527, 457 S.E.2d at 54-55. Justices Compton and Whiting dissented: "According to the majority's reasoning, a jury should be permitted to decide that foreseeably a truck could be negligently driven into water, thus requiring the manufacturer to equip the vehicle with pontoons to avoid injury to occupants." *Id.* at 530, 457 S.E.2d at 56 (Compton, J., dissenting in part).
190. 47 F.3d 116 (4th Cir. 1995).
191. *Id.* at 118.
192. *Id.* at 119.
193. *Id.*
194. 863 F. Supp. 285 (W.D. Va. 1994). PCBs are polychlorinated biphenyls.
195. *Id.* at 289-90.

argued that section 8.2-719(3) prohibits such limitations of liability as to consumer goods, there was no evidence that this product was a consumer good.[196]

c. Notice

In *Cole v. Keller Industries*,[197] plaintiff was injured on June 15, 1991, while on a ladder manufactured by defendant. Plaintiff did not notify defendant of the claim until October 12, 1992. The court held that section 8.2-607 requires a third-party beneficiary to give reasonable notice of the claim.[198] In 1991, plaintiff's attorney had obtained the ladder. By early 1992, an expert had been retained to examine it. On June 27, 1992, the expert drafted a report explaining the ladder's defects. In light of the expert's destructive testing of the ladder between June 27 and the notification of defendant on October 12, the three-and-a-half month delay in notifying defendant was unreasonable as a matter of law, requiring summary judgment for defendant.[199]

d. Open and Obvious

In *Austin v. Clark Equipment Co.*,[200] plaintiff, an employee at a carpet warehouse, was injured while operating a forklift truck. A "mast" used to carry rolls of carpet on another forklift struck her in the back and impaled her. The court noted that a manufacturer is not liable for failing to warn of an "open and obvious" defect.[201] A risk is "open and obvious" if the person

196. *Id.* at 290. Another federal case held that with regard to industrial (not consumer) products, a warranty disclaimer that is not unconscionable between the seller and purchaser cannot be unconscionable as applied to a third-party beneficiary of the warranty. Reibold v. Simon Aerials, Inc., 859 F. Supp. 193, 199 (E.D. Va. 1994).

197. 872 F. Supp. 1470, 1471 (E.D. Va. 1994).

198. *Id.* at 1472.

199. *Id.* at 1475. There was a further basis for the court's ruling. Before plaintiff filed suit, one of his experts examined the ladder and destroyed part of it during the examination. *Id.* at 1472. The court held that this destruction of crucial evidence prejudiced defendant so that summary judgment for defendant was required. *Id.* at 1473.

200. 48 F.3d 833 (4th Cir. 1995).

201. *Id.* at 836.

using the product is or should be aware of the risk.[202] A warning is therefore superfluous because the user is or should be aware of the risk. It should have been obvious to plaintiff that the forklifts were not equipped with the safety devices (audible motion alarms, rearview mirrors, and flashing lights) that plaintiff alleged were needed.[203] It also should have been obvious that the masts on the forklifts could obstruct forward vision.[204]

17. Wrongful Death

In *Mann v. Hinton*,[205] decedent had died in 1990, leaving his wife, his father, and two stepchildren. Under the version of section 8.01-53 in effect at the time of death, the stepchildren were not statutory beneficiaries.[206] By the time of trial in 1992, however, the statute had been amended. The supreme court held that any person who is a beneficiary as defined in the statute at the time that the verdict is entered is entitled to recover.[207]

C. *Affirmative Defenses*

1. Collateral Estoppel

In *Angstadt v. Atlantic Mutual Insurance Co.*,[208] Angstadt sued Rask and Multicomm, Rask's employer, for personal injuries. Atlantic, Multicomm's liability carrier, insured both defendants. Rask failed to attend his deposition, and the trial court entered a default judgment as to liability against both defendants. Atlantic informed the defendants that they had breached the cooperation clause of the policy and refused to defend them further. Angstadt recovered $1,650,000 in compensatory damages and $350,000 in punitive damages.[209] Atlantic

202. *Id.*
203. *Id.*
204. *Id.*
205. 249 Va. 555, 457 S.E.2d 22 (1995).
206. *Id.* at 562, 457 S.E.2d at 27.
207. *Id.* at 563, 457 S.E.2d at 27.
208. 249 Va. 444, 457 S.E.2d 86 (1995).
209. *Id.* at 446, 457 S.E.2d at 87.

then filed a declaratory judgment action against Angstadt, Rask, and Multicomm, seeking a ruling that Rask's failure to obey a court order in the tort suit established a failure to cooperate.[210] The trial court entered judgment for Atlantic, but the supreme court reversed, reasoning that this was not a case for collateral estoppel, as there was no identity of parties or issues, nor was there mutuality.[211]

In *Glasco v. Ballard*,[212] plaintiff was walking down a street in Ashland when a police officer pulled alongside him, suspecting that he had stolen some items from a nearby store. The police officer saw "a shiny, metallic, oblong object and a plastic-wrapped object" in plaintiff's front jacket pocket. The officer pulled his gun and stepped out of his car to question plaintiff. The police car began to roll forward, and the officer leaned into it and put his foot on the brake pedal and put the gear shift into park. While the officer was doing this, his pistol accidentally discharged, striking plaintiff in the neck.[213]

Plaintiff filed suit against the officer in the United States District Court for the Eastern District of Virginia under 42 U.S.C. § 1983. The federal court granted summary judgment for defendant on the ground that the firing of the pistol was an accidental act.[214] Plaintiff then filed a second action in the Circuit Court of Hanover County, alleging negligence and assault and battery. The circuit court granted summary judgment for the officer on the basis of collateral estoppel and sovereign immunity.[215]

The supreme court affirmed in part and reversed in part. The court affirmed the trial court's order on the assault and battery claim reasoning that the federal court already had decided that the shooting was not an intentional act.[216] The court also agreed that sovereign immunity barred plaintiff's claim unless the officer was grossly negligent.[217] Plaintiff was not, however,

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210. *Id.*
211. *Id.* at 447, 457 S.E.2d at 87-88.
212. 249 Va. 61, 63, 452 S.E.2d 854, 855 (1995).
213. *Id.* at 63, 452 S.E.2d at 855.
214. *Id.*
215. *Id.*
216. *Id.* at 64, 452 S.E.2d at 855-56.
217. *Id.* at 64-65, 452 S.E.2d at 856.

collaterally estopped from arguing that the officer was grossly negligent. The court therefore remanded the case for further proceedings on that issue.[218]

In *Horton v. Morrison*,[219] Morrison and Horton were drivers of cars involved in an accident. Horton and her son, Shaver, sued Morrison for her injuries. In response to Shaver's action, Morrison filed a third-party motion for judgment against Horton. Horton filed no responsive pleadings, and Morrison obtained a default judgment.[220] Morrison then filed a plea of res judicata and a motion to dismiss Horton's action, which the trial court granted: Horton's liability "ha[d] been adjudicated when judgment was granted on behalf of Ms. Morrison against Ms. Horton in the third party action filed in [Shaver's] case."[221]

The supreme court reversed. Res judicata did not apply because Horton's action against Morrison for personal injuries was not the same cause of action as Morrison's third-party action against Horton for contribution.[222] Collateral estoppel also did not apply. The doctrine of collateral estoppel requires that the issue have been actually litigated in a previous action: "the requirement that an issue must have been the subject of actual litigation, rather than potential litigation, is one of the features that distinguishes collateral estoppel from res judicata."[223] Horton's liability was never actually litigated.

2. Illegal Act

Trotter v. Okawa[224] was a claim for damages arising out of a sexual relationship between plaintiff and his psychotherapist, Okawa. Plaintiff sued Okawa, Okawa's supervisor, and George Washington University, where Okawa was employed. Plaintiff alleged "gross breach of professional duty, misconduct and gross negligence" on the part of all defendants as a result of Okawa's

218. *Id.* at 65, 452 S.E.2d at 856.
219. 248 Va. 304, 448 S.E.2d 629 (1994).
220. *Id.* at 305, 448 S.E.2d at 630.
221. *Id.*
222. *Id.* at 306, 448 S.E.2d at 630.
223. *Id.* at 306, 448 S.E.2d at 631.
224. 248 Va. 212, 445 S.E.2d 121 (1994).

actions, failure of the supervisor and the University to monitor Okawa, and the failure of all defendants to provide him proper treatment.[225] Defendants demurred on the grounds that plaintiff's participation in an illegal act (fornication) barred the action.[226]

The supreme court distinguished *Zysk v. Zysk*[227] and *Miller v. Bennett*[228] by noting that plaintiff alleged that he had participated in the act of sexual intercourse under duress and coercion caused by Okawa's "exploitative treatment" of him.[229] This brought the allegations within the "fraud or duress" exception to *Zysk*.[230]

3. Limitations

a. Accrual

The accrual of a cause of action was the subject of several recent decisions. In *Lo v. Burke*,[231] plaintiff sued for wrongful death as a result of her mother's death from cancer. Decedent had been treated by Dr. Lo, a radiologist. On September 1, 1988, decedent underwent a CT scan for the purpose of investigating a possible liver tumor. Dr. Lo read the results of the CT scan to decedent but did not observe, though the CT scan showed, that she had a three-centimeter cyst on her pancreas. On April 29, 1991, Dr. Lo performed another CT scan on decedent and this time observed the cyst, which had grown to five centimeters. The cyst was surgically removed and found to be malignant. Decedent died on November 8, 1991.[232]

Plaintiff filed a notice of claim under section 8.01-581.2 on February 19, 1992. He filed his motion for judgment against Dr. Lo and his employer on June 18, 1992. Defendants pled the two-year statute of limitations under section 8.01-244, but the

225. *Id.* at 214, 445 S.E.2d at 123.
226. *Id.* at 215, 445 S.E.2d at 123.
227. 239 Va. 32, 404 S.E.2d 721 (1990).
228. 190 Va. 162, 56 S.E.2d 217 (1949).
229. *Trotter*, 248 Va. at 216, 445 S.E.2d at 124.
230. *Id.*
231. 249 Va. 311, 455 S.E.2d 9 (1995).
232. *Id.* at 313, 455 S.E.2d at 11.

trial court denied the plea.[233] The trial court also denied motions for summary judgment and post-trial motions based on the limitations defense.[234] The supreme court affirmed the trial court. The burden is on the defendant to prove the necessary facts to prevail on a plea of the statute of limitations.[235] The statute began to run when decedent sustained her injury, defined as a "positive, physical, or mental hurt."[236] Decedent suffered injury only when the cancer developed, and there was no evidence showing when that occurred. Defendants accordingly failed to meet their burden of proof.[237] The court noted that it was not applying a "discovery" rule.[238]

In *Bullion v. Gadaleto*,[239] the federal district court held that an action for breach of a physician's or psychologist's duty of confidentiality does not accrue when the plaintiff learns of the breach, but when any injury, such as damage to reputation or relationship, results from the unauthorized disclosure. Plaintiff need not know of the injury for the cause of action to accrue.[240]

McHenry v. Adams[241] involved the allegedly improper burial of plaintiff's mother. The mother died on April 15, 1988, and was buried on April 19, 1988, in a casket supplied by Rappahannock Vault Company. On July 15, 1988, plaintiff began to notice strange conditions around his mother's grave. He saw holes in the ground "about six inches in diameter" and flies coming from one of the holes.[242] On July 18, 1988, plaintiff complained of the conditions to the local health department and the Virginia Department of Health Professions. At a later time, one of the principals of Rappahannock inspected the gravesite and reported to plaintiff that nothing was wrong. On

233. *Id.* at 314, 455 S.E.2d at 11.
234. *Id.* at 315, 455 S.E.2d at 11-12.
235. *Id.*, 455 S.E.2d at 12 (citing Locke v. Johns-Manville Corp., 221 Va. 951, 958, 275 S.E.2d 900, 905 (1981); Louisville & Nashville R.R. v. Saltzer, 151 Va. 165, 168, 144 S.E. 456, 457 (1928)).
236. *Id.* at 315-16, 455 S.E.2d at 12 (quoting *Locke*, 221 Va. at 957, 275 S.E.2d at 904).
237. *Id.* at 317, 455 S.E.2d at 12.
238. *Id.* at 317, 455 S.E.2d at 13.
239. 872 F. Supp. 303, 307 (W.D. Va. 1995).
240. *Id.*
241. 248 Va. 238, 448 S.E.2d 390 (1994).
242. *Id.* at 240, 448 S.E.2d at 391.

March 20, 1990, however, plaintiff had the casket disinterred. On examination, it was found that the vault leaked and that there was water in the casket. Plaintiff alleged that he had been told that the vault was waterproof.[243]

Plaintiff filed suit against Rappahannock, the funeral home, and several of their owners and employees on August 9, 1990, seeking damages for the "unlawful invasion of his right to afford his mother a proper burial" as recognized in *Sanford v. Ware*.[244] The supreme court affirmed the trial court's dismissal of plaintiff's motion for judgment based on the statute of limitations.[245] Whether a one-year or two-year statute applied, plaintiff's cause of action accrued at the latest on July 22, 1988, when he made the complaints after discovering the conditions at the gravesite. Plaintiff argued that the statute was tolled by the defendants' "ongoing campaign" of concealment, but he was bound by his own testimony about his discovery of the problem in July 1988.[246]

b. Continuing Undertaking

The United States Court of Appeals for the Fourth Circuit certified the following question to the Supreme Court of Virginia in *Harris v. K&K Insurance Agency*: "Does the continuing undertaking doctrine apply to insurance agents and agencies?"[247] The court said no, noting that it had applied the doctrine only in cases involving a "continuous or recurring course of professional services related to an undertaking."[248] The services provided by an insurance broker and insurance agency for an insured do not fit this definition.[249]

In *Pidgeon v. Wake*,[250] a Virginia circuit court held that for the continuing treatment rule to apply, (1) there must be a continuous course of treatment with the defendant health-care

243. *Id.* at 240-41, 448 S.E.2d at 391.
244. 191 Va. 43, 60 S.E.2d 10 (1950).
245. *McHenry*, 248 Va. at 244, 448 S.E.2d at 393.
246. *Id.* at 243-44, 448 S.E.2d at 393.
247. 249 Va. 157, 160, 453 S.E.2d 284, 285 (1995).
248. *Id.* at 161, 453 S.E.2d at 286.
249. *Id.* at 162, 453 S.E.2d at 286-87.
250. 34 Va. Cir. 336, 339 (Winchester City 1994).

provider; and (2) the treatment must be for the same or related ailments. Where plaintiff received treatment at defendant hospital by physicians who were not employees of the hospital, the first prong of the test was not satisfied, and therefore, plaintiff never had a physician-patient relationship with the hospital.[251]

4. Workers' Compensation/Statutory Employer[252]

In *Richmond Newspapers, Inc. v. Hazelwood*,[253] plaintiff sued his supervisor and his employer for assault and battery and negligent hiring arising out of several "goosings" that plaintiff received from another employee. The employer, invoking the workers' compensation bar, asserted that "goosing" was a regular activity in the pressroom and was a way for the employees to let off steam.[254] The supreme court affirmed the trial court's denial of the employer's motion to set aside the verdict, holding that an injury does not arise out of employment if the assault is personal to the employee and not directed against him as an employee or because of the employment.[255] The evidence in this case showed that the goosing was personal in nature and not motivated by business concerns.[256]

In *Lichtman v. Knouf*,[257] plaintiff sued her employer and fellow employees for intentional infliction of emotional distress as a result of repeated acts of harassment over a one-year period. The trial court held that her claims were barred by the Workers' Compensation Act under *Haddon v. Metropolitan Life Insurance Co.*[258] The supreme court reversed, overruling

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251. *Id.* at 340-42.

252. For a more detailed analysis of Employment and Workers' Compensation Law over the past year, see Paul G. Beers, *Annual Survey of Virginia Law: Employment Law*, 29 U. RICH. L. REV. 1027 (1995), Wood W. Lay and Bruin S. Richardson, III, *Annual Survey of Virginia Law: Workers' Compensation*, 29 U. RICH. L. REV. 1199 (1995).

253. 249 Va. 369, 370-71, 457 S.E.2d 56-57 (1995).

254. *Id.*

255. *Id.* at 372-75, 457 S.E.2d at 58-59.

256. *Id.* at 375, 457 S.E.2d at 59.

257. 248 Va. 138, 139, 445 S.E.2d 114, 114 (1994).

258. 239 Va. 397, 389 S.E.2d 712 (1990).

Haddon and holding that gradually incurred injuries are not "injuries by accident" for purposes of the Act.[259]

In *Lipsey v. Case*,[260] plaintiff was employed as a working student on a farm owned by the Cases, where she took care of and trained horses. Plaintiff was injured when a Doberman pinscher belonging to her co-worker, Post, bit her. Assuming that plaintiff was an employee and that the accident occurred in the course of her employment by the Cases, the court held that the accident did not arise out of her employment. "An accident arises out of the employment when it is apparent to a rational mind, under all attending circumstances, that a causal connection exists between the conditions under which the work is required to be performed and the resulting injury."[261] Here, plaintiff's work in taking care of horses could not reasonably have exposed or subjected her to the danger of being bitten by a co-worker's pet dog.[262]

D. *Pleading, Practice and Procedure*

1. Arbitration

The extent of an arbitrator's authority was at issue in *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*[263] The Asbury United Methodist Church contracted with Taylor & Parrish, Inc. ("Taylor"), for a construction project. After a dispute arose over a change order that Taylor issued, the church sought a declaratory judgment that the change order was invalid.[264] Taylor moved for an order compelling arbitration pursuant to section 8.01-581.02(A), and the trial court granted the motion.[265] The arbitrator ruled that the change order was invalid, but awarded Taylor $263,310.97 on a quantum meruit theory, which was approved by the trial court.[266]

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259. *Lichtman*, 248 Va. at 140, 445 S.E.2d at 115.
260. 248 Va. 59, 60, 445 S.E.2d 105, 106 (1994).
261. *Id.* at 61, 445 S.E.2d at 107.
262. *Id.* at 61-62, 445 S.E.2d at 107.
263. 249 Va. 144, 452 S.E.2d 847 (1995).
264. *Id.* at 147, 452 S.E.2d at 849.
265. *Id.* at 148, 452 S.E.2d at 849.
266. *Id.* at 150, 452 S.E.2d at 850-51.

The supreme court reversed, reasoning that "[a]rbitrators derive their authority solely from the parties' contractual agreement to arbitrate disputes arising under the contract. Thus, arbitrators exceed the scope of their authority when they purport to act beyond the terms of the contract from which they draw their authority."[267] The parties' contract provided that a change order must be "signed by the Owner," which the invalid change order was not.[268] Claims relating to the change order were thus beyond the arbitrator's authority to decide.[269]

2. Demurrer

In *Concerned Taxpayers v. County of Brunswick*,[270] citizens filed two bills of complaint challenging the County's action in approving the construction of a landfill and recycling center. The trial court sustained the County's demurrers to both bills of complaint.[271] The supreme court affirmed in part and reversed in part, stating that "[w]hile a demurrer admits as true all averments of material facts which are sufficiently pleaded, it does not admit the correctness of the conclusions of law stated by the pleader."[272] Even assuming that the facts pleaded were true, they did not support a conclusion that the County acted arbitrarily, unreasonably, or unlawfully.[273]

3. Election

In *Hendrix v. Daugherty*,[274] plaintiffs sued for legal malpractice and alleged that defendant attorneys wrongfully nonsuited their wrongful death action (which was later held barred by the statute of limitations) and failed to prosecute a survival cause of action. The court held that these causes of action are inconsistent. A person may not recover under the

267. *Id.* at 153, 452 S.E.2d at 852.
268. *Id.* at 154, 452 S.E.2d at 852.
269. *Id.* at 154, 452 S.E.2d at 852-53.
270. 249 Va. 320, 455 S.E.2d 712 (1995).
271. *Id.* at 325, 455 S.E.2d at 715.
272. *Id.* at 326, 455 S.E.2d at 715.
273. *Id.*
274. 249 Va. 540, 542, 457 S.E.2d 71, 72-73 (1995).

survival statute and the wrongful death statute.[275] Plaintiffs are required to elect one of the two theories after discovery has been completed.[276]

4. Joinder

The supreme court continued to follow the common-law rule against misjoinder of causes of action in *Powers v. Cherin*.[277] Powers was injured in an automobile accident when her vehicle was struck by Pope and was treated by Dr. Cherin for her injuries. Plaintiff alleged that Dr. Cherin's treatment was malpractice and caused her further injury.[278] Powers brought suit against Pope and Cherin in one action. Cherin demurred on the basis of misjoinder of parties and causes of action, and the court granted the demurrer.[279]

The supreme court affirmed. Although section 8.01-272 allows a party to join tort and contract claims and section 8.01-281(A) allows a party to plead alternative facts and theories of recovery against alternative parties, both statutes require that all such claims arise out of the same transaction or occurrence.[280] Here, Powers sought recovery not only for injuries suffered in the accident, but also for *different* injuries caused by Dr. Cherin's alleged malpractice. The court concluded that these injuries did not arise out of the same transaction or occurrence, and the trial court properly granted the demurrer.[281]

5. Nonsuit

In *Albright v. Burke & Herbert Bank & Trust Co.*,[282] plaintiff had sued defendant twice previously and nonsuited both cases. Defendant demurred to the present motion for judgment. The trial court sustained the demurrer and allowed plaintiff

275. *Id.* at 546-47, 457 S.E.2d at 75-76.
276. *Id.*
277. 249 Va. 33, 452 S.E.2d 666 (1995).
278. *Id.* at 36, 452 S.E.2d at 668.
279. *Id.* at 37, 452 S.E.2d at 669.
280. *Id.*
281. *Id.* at 38, 452 S.E.2d at 668-69.
282. 249 Va. 463, 457 S.E.2d 776 (1995).

leave to amend contingent on paying defendant's attorney's fees in the nonsuited actions.[283] The supreme court held that this was error. Section 8.01-380(B) does not authorize an assessment of attorney's fees in an action subsequent to the nonsuited action, nor does it give the trial court the right to condition the filing of an amended motion for judgment on the payment of such fees.[284]

In *Winchester Homes, Inc. v. Osmose Wood Preserving, Inc.*,[285] plaintiff filed an action in state court against the defendants. After the state court dismissed several of the counts in the motion for judgment, plaintiff took a nonsuit.[286] When plaintiff refiled the action in federal court, defendants argued that the dismissal of the counts in the first suit was the law of the case, and the district court agreed.[287] The Fourth Circuit rejected this argument, holding that a nonsuit under Virginia law operates on the entire cause of action, even as to those counts that have been dismissed at the time of the nonsuit.[288]

6. Pleading

In *Sloan v. Thornton*,[289] plaintiff proffered two instructions based on theories of liability that were not pleaded or otherwise identified at any time before the defendant moved to strike plaintiff's evidence. The supreme court held that the trial court properly refused these instructions since a court may not enter judgment on a right not pleaded and claimed.[290]

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283. *Id.* at 466, 457 S.E.2d at 777.
284. *Id.*
285. 37 F.3d 1053 (4th Cir. 1994).
286. *Id.* at 1056.
287. *Id.* at 1057.
288. *Id.* at 1058-59. On remand, defendant obtained summary judgment again. *See* Winchester Homes, Inc. v. Osmose Wood Preserving, Inc., Civ. No. 93-378-A (E.D. Va. Feb. 10, 1995), *appeal docketed*, No. 95-1662 (4th Cir. Feb. 27, 1995).
289. 249 Va. 492, 495, 457 S.E.2d 60, 61 (1995).
290. *Id.* at 500, 457 S.E.2d at 64.

7. Sanctions

In *Concerned Taxpayers v. County of Brunswick*,[291] citizens challenged the County's approval of a proposed landfill and recycling center on the grounds that the County did not comply with the Public Procurement Act. The trial court granted the County's demurrer and imposed sanctions.[292] The supreme court affirmed reasoning that there is no common law right of action to enforce the Public Procurement Act.[293] The trial court dismissed the bill on January 3, 1994, and expressly reserved jurisdiction to consider an award of sanctions, which it made on March 31, 1994. The supreme court held that the trial court had jurisdiction to award sanctions.[294]

E. *Trial Proceedings and Evidence*

1. Burden of Proof

In *Gossett v. Jackson*,[295] plaintiff, then fourteen years old, was injured when a car that defendant, then seventeen years old, was driving hit a telephone pole. The car did not belong to plaintiff or defendant, although they were using it with permission. Defendant had been driving sixty mph in a twenty-five mph zone. After the accident, it was discovered that many of the items beneath the hood were held together by nylon ropes and bungee cords. The trial court granted defendant's motion to strike on the grounds that plaintiffs did not show how the accident occurred.[296] The supreme court reversed, stating that there was evidence from which the jury could infer that defendant's negligence caused the accident: defendant stopped several times minutes before the accident, which tended to show that the brakes were functioning. In addition, defendant

291. 249 Va. 320, 455 S.E.2d 712 (1995). *See* Public Procurement Act, VA. CODE ANN. §§ 11-35 to -80 (1994).

292. *Concerned Taxpayers*, 249 Va. at 324, 455 S.E.2d at 714.

293. *Id.* at 331, 455 S.E.2d at 718.

294. *Id.* at 334, 455 S.E.2d at 720.

295. 249 Va. 549, 457 S.E.2d 97 (1995).

296. *Id.* at 552, 457 S.E.2d at 99.

took his hands off of the steering wheel as it was weaving moments before the collision.[297]

In *Mann v. Hinton*,[298] decedent was killed while riding a bicycle on a public road. Defendant's truck passed decedent immediately before decedent was found dead next to a telephone pole. Plaintiff argued that defendant's truck either passed too close to decedent, causing him to run off the road, or struck decedent as it passed him.[299] The supreme court held that plaintiff presented a prima facie case of negligence.[300] The two factual theories were not mutually contradictory: both rested on the premise that defendant passed too closely.[301]

2. Evidence—Business Records

In *Kettler & Scott, Inc. v. Earth Technology Cos.*,[302] an engineering firm sued a former client for services rendered. Plaintiff had kept lab data on computer. When the computer system was being "improved," the program that sorted plaintiffs' data was destroyed, resulting in a jumble of data. Defendant refused to pay plaintiff without adequate documentation.[303] At trial, plaintiff introduced into evidence a ninety-one-page computer printout and a summary of billing records prepared by plaintiff's data processor and billing specialist.[304]

On appeal, defendant argued that the computer data did not qualify under the shopbook rule.[305] The supreme court disagreed reasoning that under the facts of this case, the data and summaries had a "circumstantial guarantee of trustworthiness."[306]

297. *Id.* at 553, 457 S.E.2d at 99-100.
298. 249 Va. 555, 457 S.E.2d 22 (1995).
299. *Id.* at 557, 457 S.E.2d at 23.
300. *Id.* at 561, 457 S.E.2d at 26.
301. *Id.* at 562, 457 S.E.2d at 26-27.
302. 248 Va. 450, 449 S.E.2d 782 (1994).
303. *Id.* at 455, 449 S.E.2d at 785.
304. *Id.*
305. *Id.* at 457, 449 S.E.2d at 785.
306. *Id.* at 449 S.E.2d at 785-86.

3. Evidence—Dead Man's Statute

In *Vaughn v. Shank*,[307] Vaughn went to live with Conner at age twelve as a foster child. Vaughn lived there until she married in 1976. Conner died in 1990, leaving Vaughn nothing in her will. Vaughn alleged that Conner orally agreed to leave Vaughn and her daughter a certain house, used as a nursing home, if Vaughn would live there and perform certain duties.[308] Under section 8.01-397, testimony against the executor of an estate must be corroborated with evidence that tends in some degree to support some essential allegation or issue raised by the pleadings and testified to by the surviving witness, which allegation or issue, if unsupported, would be fatal to the case.[309] Here, the corroboration consisted of testimony that Conner had said that she would give Vaughn and her daughter the house and that the house was purchased for Vaughn and her daughter.[310] The court ruled that this testimony was consistent with an intent to make a gift and did not corroborate plaintiff's claim of an oral contract.[311]

4. Evidence—Internal Rules

Although the Federal Rules of Evidence typically govern in diversity cases, there are circumstances in which a question of admissibility of evidence is so intertwined with a state substantive rule that the state rule will be followed in order to give full effect to the state's substantive policy. An example of this is *Hottle v. Beech Aircraft Corp.*[312] In *Hottle*, the Fourth Circuit held that Virginia's exclusion of the internal rules of an entity to fix the standard of its duties in order to prove negligence, as expressed in *Pullen v. Nickens*[313] and *Virginia Rail-*

307. 248 Va. 224, 445 S.E.2d 127 (1994).
308. *Id.* at 226-27, 445 S.E.2d at 128-29.
309. *Id.* at 229, 445 S.E.2d at 130. *See* VA. CODE ANN. § 8.01-397 (Repl. Vol. 1992).
310. *Vaughn*, 248 Va. at 228-29, 445 S.E.2d at 130.
311. *Id.* at 230, 445 S.E.2d at 130.
312. 47 F.3d 106 (4th Cir. 1995).
313. 226 Va. 342, 310 S.E.2d 452 (1983).

way & Power Co. v. Godsey,[314] is sufficiently bound up with state policy to require its application in federal court.[315]

5. Evidence—Miscellaneous

Brooks v. Bankson[316] arose out of a contract for the sale of a house. During the walk-through inspection, the buyers observed what they thought were defects and refused to go forward with the purchase. The sellers then sued the buyers for breach of contract. Over the sellers' objection, the buyers introduced evidence at trial of the conditions observed during the walk-through. The sellers also introduced evidence of their own regarding the condition of the house. The jury returned a verdict in favor of the buyers.[317] On appeal, the buyers argued that the sellers had waived any objections to the admissibility of the walk-through testimony by introducing similar evidence themselves.[318] The supreme court, however, found no waiver:

> The rule of *Snead* invoked by the Buyers is well settled, but before it will be applied, "'there must be some reasonable and just foundation for holding that there was in fact a waiver.'" *Whitten v. McClelland*, 137 Va. 726, 742, 120 S.E. 146, 150 (1923) (quoting *Washington-Virginia Ry. v. Deahl*, 126 Va. 141, 151, 100 S.E. 840, 844 (1919)). The rule will not be applied in distortion of its purpose. *Id.* Here, the Sellers made known to the trial court their objections to the court's interpretation of the contract, and to its evidentiary ruling predicated on that interpretation. In order to meet the Buyers' evidence of the condition of the crawl space introduced pursuant to these rulings, the Sellers were entitled to present evidence of their own on the same subject.[319]

314. 117 Va. 167, 83 S.E. 1072 (1915).
315. *Hottle*, 47 F.3d at 110.
316. 248 Va. 197, 445 S.E.2d 473 (1994).
317. *Id.* at 202, 445 S.E.2d at 476.
318. *Id.* at 207, 445 S.E.2d at 478. *See* Snead v. Commonwealth, 138 Va. 787, 121 S.E. 82 (1924).
319. *Brooks*, 248 Va. at 207, 445 S.E.2d at 478-79.

6. Jury

a. Misconduct

The jury in *Robertson v. Metropolitan Washington Airport Authority*[320] violated the judge's instructions not to deliberate until the evidence was concluded and the parties had made their closing arguments. Plaintiff alleged that she was injured when she stepped into a pothole in the parking lot at National Airport. The evidence was concluded in one day of trial, and the judge instructed the jury not to discuss the case with anyone overnight.[321] On the morning of the second day of trial, before closing arguments were to begin, the jury handed the judge a note that contained several questions about the evidence in the case.[322] Plaintiff moved for a mistrial, but the court denied the motion. Instead the court admonished the jury to consider the arguments of counsel fully.[323] The supreme court affirmed, ruling that the jury had not made up its mind, but was merely asking for more information about the case.[324] The judge therefore had no duty to investigate further into the pre-closing deliberations, especially when plaintiff did not move for any further investigation.[325]

b. Selection of Jurors

The supreme court applied the bar against race-based peremptory strikes to condemnation proceedings in *Commonwealth Transportation Commissioner v. Thompson*.[326] When counsel for the landowner was asked to explain why he had struck the only two black commissioners, he responded:

> If Your Honor please, for the record, upon inquiry I stated that my reason for doing it was strategic, tactical and

320. 249 Va. 72, 452 S.E.2d 845 (1995).
321. *Id.* at 74, 452 S.E.2d at 846.
322. *Id.*
323. *Id.*
324. *Id.* at 76, 452 S.E.2d at 847.
325. *Id.* at 76-77, 452 S.E.2d at 847.
326. 249 Va. 292, 455 S.E.2d 206 (1995).

> instinctive, and it still is. And I would state for the record it had not one scintilla of racial motivation in it.[327]

The trial court accepted this explanation, but the supreme court reversed.[328] The proffered explanation was "vague, ambiguous, and conclusional, and is insufficient to rebut a prima facie case of racial discrimination in the removal of the commissioners."[329]

7. Res Ipsa Loquitur

In *Cooper v. Horn*,[330] plaintiffs sued for property damage caused when defendants' earthen dam burst during a severe storm. Plaintiffs prevailed at trial, recovering compensatory and punitive damages.[331] The supreme court reversed on, among other grounds, the giving of an instruction on res ipsa loquitur.[332] Plaintiffs could not rely on res ipsa loquitur because they did not claim or even attempt to show that they were powerless to ascertain the cause of the dam's failure or that the cause was accessible only to defendants.[333] In addition, the doctrine of res ipsa loquitur applies only when the instrumentality that caused the injury is exclusively within the control of the defendants.[334] Here, the flood water was the instrumentality and one of its causes was the water flowing into the dam from a stream, which was beyond defendants' exclusive control.[335]

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327. *Id.* at 294, 455 S.E.2d at 207.
328. *Id.*
329. *Id.* at 297, 455 S.E.2d at 208. *But see* Purkett v. Elem, 115 S. Ct. 1769, 1771 (1995) (opponent of strike has burden of proving that a race-neutral explanation is a pretext for discrimination).
330. 248 Va. 417, 448 S.E.2d 403 (1994).
331. *Id.* at 421, 448 S.E.2d at 405.
332. *Id.* at 425, 448 S.E.2d at 408.
333. *Id.* at 422, 448 S.E.2d at 406.
334. *Id.* (citing Danville Community Hosp., Inc. v. Thompson, 186 Va. 746, 757, 43 S.E.2d 882, 887 (1947)).
335. *Id.*

F. *Appellate Practice*

1. Preservation of Error

In eight cases, the supreme court refused to address issues on appeal that were not included in the assignments of error.[336]

2. Scope of review

Under section 8.01-680, the trial court's decision will be upheld unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it.[337] When the trial court hears the evidence ore tenus, its findings based on an evaluation of the testimony are entitled to the same weight as those of a jury. In *Hudson v. Hudson*,[338] the plaintiff sought to invalidate a deed of gift on the grounds that plaintiff was a prior creditor of decedent and that decedent was rendered insolvent by the conveyance. The supreme court reversed the trial court and refused to invalidate the deed because there was no evidence to support the trial court's ruling that decedent was rendered insolvent by the conveyance.[339]

3. Statement in Lieu of Transcript

In *White v. Morano*,[340] plaintiff sued defendant for legal malpractice in prosecuting her slip-and-fall case. Defendant prevailed at trial, where fifteen witnesses testified and a court reporter, retained by defendant, was present.[341] Plaintiff prop-

336. *See* Snyder-Falkinham v. Stockburger, 249 Va. 376, 381, 457 S.E.2d 36, 39 (1995); Schnupp v. Smith, 249 Va. 353, 368, 457 S.E.2d 42, 50 (1995); Mann v. Hinton, 249 Va. 555, 564 n.2, 457 S.E.2d 22, 27 n.2 (1995); Williams v. Garraghty, 249 Va. 224, 239, 455 S.E.2d 209, 218 (1995); Powers v. Cherin, 249 Va. 33, 35, 452 S.E.2d 666, 667 (1995); Faizi-Bilal Int'l Corp. v. Burka, 248 Va. 219, 222, 445 S.E.2d 125, 126 (1994); Black v. Eagle, 248 Va. 48, 57, 445 S.E.2d 662, 666-67 (1994); Hamilton Dev. Co. v. Broad Rock Club, Inc., 248 Va. 40, 44, 445 S.E.2d 140, 143 (1994).

337. VA. CODE ANN. § 8.01-680 (Repl. Vol. 1992).

338. 249 Va. 335, 336, 455 S.E.2d 14, 15 (1995).

339. *Id.* at 342, 455 S.E.2d at 18.

340. 249 Va. 27, 452 S.E.2d 856 (1995).

341. *Id.* at 29, 452 S.E.2d at 857.

erly noticed her appeal, but did not obtain a transcript; instead, she prepared a twenty-one page written statement in lieu of transcript pursuant to Virginia Supreme Court Rules.[342] Defendant objected to the written statement as inaccurate and incomplete. The trial court refused to certify it for several reasons: (1) the trial lasted two days, and the judge could not remember all the testimony; (2) fifteen witnesses testified, and he could not recall the details of their testimony; (3) the court reporter was present and working during trial, so the judge had not felt that he had to take meticulous notes; and (4) the statement mischaracterized matters of pretrial procedure as "facts."[343]

Plaintiff appealed, arguing that the trial judge's refusal to certify the statement was impermissible under Supreme Court Rule 5:11(d). The supreme court affirmed, ruling that the word "shall" in Rule 5:11(d) is directory in meaning, not mandatory.[344] The burden is on appellant to secure a transcript or to prepare a proper statement of the trial proceedings.[345] The court reporter is under the control of the court[346] and could have assisted plaintiff in preparing a written statement, had plaintiff made such a request. Therefore, the trial judge did not err in refusing to sign the statement.[347]

G. *Settlement*

The binding nature of an oral settlement was clarified in *Snyder-Falkinham v. Stockburger*.[348] Plaintiff's legal malpractice action was submitted to a mediator. At the mediation, plaintiff was represented by counsel and did not indicate any disagreement with any statements made by her counsel. A "Mediation Memorandum of Agreement" was prepared that resolved certain issues. Five days later and the day before trial, further settlement discussions occurred at which, according to

342. *Id. See* VA. SUP. CT. R. 5:11(c)(1).
343. *White*, 249 Va. at 30, 452 S.E.2d at 858.
344. *Id.* at 32, 452 S.E.2d at 859.
345. *Id.*
346. *See* VA. SUP. CT. R. 1:3.
347. *White*, 249 Va. at 32, 452 S.E.2d at 859.
348. 249 Va. 376, 457 S.E.2d 36 (1995).

defendants, plaintiff agreed to a full settlement. Pursuant to this agreement, plaintiffs' counsel appeared in court the next day and consented to orders dismissing the litigation with prejudice.[349] When her attorneys presented the plaintiff with settlement papers the next day, she said that she had discussed the matter with one of her expert witnesses and was having second thoughts about settlement.[350] Plaintiffs' new attorneys then moved to vacate the dismissal orders, and plaintiffs' original attorneys moved to withdraw.[351] The trial court granted the motion to withdraw, but denied the motion to vacate the dismissal orders, finding that plaintiff had agreed to the settlement.[352]

The supreme court found ample factual evidence to support the trial court's finding that plaintiff had agreed to the settlement. When a competent party makes a settlement and acts affirmatively to enter into the settlement, the party's second thoughts about the wisdom of the settlement do not constitute good cause for setting it aside.[353]

H. *Miscellaneous—Prejudgment Interest*

Ordinarily, prejudgment interest is not allowed when accounts are unliquidated and disputed between the parties.[354] Nevertheless, whether interest should be awarded, and from what date interest should run, are matters within the sound discretion of the trial court.[355] In *Skretvedt v. Kouri*,[356] a partnership dispute, the trial court did not abuse its discretion in refusing to award plaintiff prejudgment interest.

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349. *Id.* at 386, 457 S.E.2d at 41.
350. *Id.* at 384, 457 S.E.2d at 41.
351. *Id.* at 380, 457 S.E.2d at 38.
352. *Id.*
353. *Id.* at 385, 457 S.E.2d at 41.
354. *See, e.g.*, Stearns v. Mason, 65 Va. (24 Gratt.) 484, 494 (1874).
355. *See* VA. CODE ANN. § 8.01-382 (Repl. Vol. 1992).
356. 248 Va. 26, 445 S.E.2d 481 (1994).

III. RECENT LEGISLATION AFFECTING CIVIL PRACTICE

The General Assembly enacted a number of measures during its 1995 Session that affect litigation in state courts.[357] For ease of reference, the discussion of these enactments is classified below by subject matter.

A. *Removal*

A new section 8.01-127.1 (Removal of residential unlawful detainer actions) was added. It provides for removal to the circuit court of any case involving a residential tenancy not involving a default in rent on the filing of an affidavit of substantial defense and the payment of the writ tax and costs accrued to the time of removal.[358]

B. *Immunity*

Section 8.01-47 (Immunity of school personnel investigating or reporting certain incidents) was amended to immunize school principals or their designees who make reports of certain unlawful activities to local law-enforcement officials as required by § 22.1-280.1.[359]

C. *Limitation of Actions*

A new section 8.01-247.1 (Limitation on action for defamation, etc.), was added. It provides that every action for injury resulting from libel, slander, insulting words, or defamation

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357. Unless otherwise noted, all provisions became effective on July 1, 1995.

358. VA. CODE ANN. § 8.01-127.1 (Cum. Supp. 1995).

359. VA. CODE ANN. § 8.01-47 (Cum. Supp. 1995). An amendment to § 22.1-280.1 provides:

> The principal or his designee shall promptly report to local law-enforcement officials all incidents occurring on school property involving (i) the assault and battery against school personnel, the maiming, death, shooting or stabbing of any person or the intentional cutting or wounding of a person by another, (ii) a controlled substance, or (iii) the illegal carrying of a firearm onto school property.

VA. CODE ANN. § 22.1-280.1(B) (Cum. Supp. 1995).

shall be brought within one year after the cause of action accrues.[360] The Supreme Court of Virginia had previously held that defamation was subject to the one-year catch-all limitation period.[361] The same bill amended the catch-all statute, section 8.01-248 (Personal actions for which no other limitation is specified), to provide that every personal action accruing on or after July 1, 1995, for which no limitation is otherwise prescribed shall be brought within two years after the right to bring such action has accrued.[362]

D. *Multiple Claimant Litigation*

The General Assembly enacted an ambitious "Multiple Claimant Litigation Act" to provide for joinder, coordination, consolidation, or transfer of multiple claimant litigation.[363] The Act is a vehicle for management of the "mass disaster" case.[364] The circuit court may enter an order "joining, coordinating, consolidating or transferring civil actions" upon a finding that:

> 1. Separate civil actions brought by six or more plaintiffs involve common questions of law or fact and arise out of the same transaction, occurrence or series of transactions or occurrences;
> 2. The common questions of law or fact predominate and are significant to the actions; and
> 3. The order (i) will promote the ends of justice and the just and efficient conduct and disposition of the actions, and (ii) is consistent with each party's right to due process of law, and (iii) does not prejudice each individual party's right to a fair and impartial resolution of each action.[365]

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360. VA. CODE ANN. § 8.01-247.1 (Cum. Supp. 1995).

361. *See, e.g.*, Watt v. McKelvie, 219 Va. 645, 248 S.E.2d 826 (1978); Weaver v. Beneficial Fin. Co., 199 Va. 196, 98 S.E.2d 687 (1957).

362. VA. CODE ANN. § 8.01-248 (Cum. Supp. 1995).

363. *Id.* §§ 8.01-267.1 to -267.9 (Cum. Supp. 1995).

364. Similar acts have been passed in other states. *See, e.g.*, CAL. CIV. PROC. CODE §§ 404.1-404.8 (West 1995); COLO. R. CIV. P. 42.1; ILL. SUP. CT. R. 384; KAN. STAT. ANN. § 60-242 (1993); MASS. GEN. LAWS ANN. ch. 223, § 2A (West 1986); N.H. SUPER. CT. R. 113; N.Y. CIV. PRAC. L. & R. 602 (Law. Co-op. 1978); R.I. GEN. LAWS § 8-2-27 (1985); W. VA. R. CIV. P. 42; WIS. STAT. ANN. § 805.05 (West 1994).

365. VA. CODE ANN. § 8.01-267.1 (Cum. Supp. 1995).

The Act also provides for separate or bifurcated trials of certain issues,[366] special interrogatories to the jury,[367] binding of later-filing plaintiffs by previous proceedings in the multiple-claimant litigation (to the extent consistent with due process),[368] and interlocutory appeal to the Supreme Court or Court of Appeals, at the discretion of the appellate courts.[369]

Section 8.01-374.1 (Consolidation or bifurcation of asbestos cases) was scheduled to expire on June 30, 1995. The General Assembly has removed that language from the statute, which now has no sunset provision.[370]

E. *Workers' Compensation*

The General Assembly made several changes to the definitions contained in the Workers' Compensation Act. The definition of "injury" was amended to provide that it does not include any injury, disease, or condition resulting from an employee's voluntary participation in employer-sponsored off-duty recreational activities that are not part of the employee's duties.[371] The definition of "employee" was amended to include members of volunteer search and rescue organizations and volunteer emergency medical technicians.[372]

F. *Exhibits*

Section 8.01-452.1 (Disposal of exhibits in civil cases) was amended to allow the clerk to donate exhibits of concluded cases after the appeal has expired and on notice to the owner.[373] Previous law had only allowed disposal of the exhibits.

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366. *Id.* § 8.01-267.6 (Cum. Supp. 1995).
367. *Id.*
368. *Id.* § 8.01-267.7 (Cum. Supp. 1995).
369. *Id.* § 8.01-267.8 (Cum. Supp. 1995).
370. *Id.* § 8.01-374.1 (Cum. Supp. 1995).
371. VA. CODE ANN. § 65.2-101 (Cum. Supp. 1995).
372. *Id.*
373. VA. CODE ANN. § 8.01-452.1.

IV. CHANGES IN THE VIRGINIA COURT RULES

A. *Supreme Court and Court of Appeals Rules*

A number of changes of interest to litigators were enacted in Parts 5 and 5A of the Rules of the Supreme Court of Virginia during the past year:

Rule 5:20 (Denial of appeal; petition for rehearing) was amended to increase the number of copies of the petition to be filed from eight to ten.[374]

Rule 5A:6 (Notice of appeal) was amended to require a party filing a notice of appeal of right to the Court of Appeals to file simultaneously in the trial court an appeal bond in compliance with section 8.01-676.1.[375]

Rule 5A:16 (Perfection of appeal; docketing) was amended to clarify that the appeal bond is filed in the trial court.[376]

B. *Medical Malpractice Rules*

Several changes were made to the Medical Malpractice Rules of Practice:

Rule 3 (Designation of panel; certificate of parties) was amended to provide that the judge presiding over the panel need not attend or participate in the deliberations.[377] The Rule was also amended to add to the list of health care provider members 10 clinical social workers, 10 professional counselors, and 10 dental hygienists.[378]

Rule 6 (Conduct of an *ore tenus* hearing) was amended to provide that the judge presiding over the panel need not attend or participate in the deliberations.[379]

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374. VA. SUP. CT. R. 5:20.
375. VA. SUP. CT. R. 5A:6(a).
376. VA. SUP. CT. R. 5A:16(a).
377. VA. MED. MAL. R. 3(b).
378. VA. MED. MAL. R. 3(d)(13)-(15).
379. VA. MED. MAL. R. 6(j)(13).