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Annual Survey of Virginia Law: Property Law

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PROPERTY LAW

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I. INTRODUCTION

The year 1997 proved to be exceptional in the relatively quiet area of property law.¹ After a number of failed attempts, bills addressing the unauthorized practice of law were finally presented to the General Assembly and passed. Effective July 1, 1997, the Commonwealth of Virginia will regulate residential real estate settlements for the first time in its 390-year history.

While the Supreme Court of Virginia issued many opinions touching upon real estate in 1997, the bulk of the supreme court's decisions merely clarified points of law and have no substantive effect. The same cannot be said for the supreme court's separate decisions concerning zoning, condemnations and the patent grants of British monarchs. This survey also discuss-

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1. This survey article covers state legislative and judicial developments concerning real estate from June 1996 to June 1997.

es numerous circuit court opinions since the lower court decisions provide much guidance to the real estate practitioner.

II. LEGISLATION

A. *The Consumer Real Estate Settlement Protection Act*

The Consumer Real Estate Settlement Protection Act² (CRESPA) was enacted in the 1997 legislative session and became effective July 1, 1997. Its purpose is to "authorize existing licensing authorities in the Commonwealth of Virginia to require persons performing escrow, closing or settlement services to comply with certain consumer protection safeguards relating to licensing, financial responsibility and the handling of settlement funds."³ In response to a 1995 request by Michael M. Mannix, Chair of the Real Estate Section of the Virginia State Bar (VSB), the Virginia State Bar Standing Committee on the Unauthorized Practice of Law issued Draft Opinion UPL 183 in 1996. Draft Opinion UPL 183 limited the right to conduct a real estate settlement to lawyers only. The VSB Council recommended to the Supreme Court of Virginia that it adopt UPL 183. In Virginia, the authority to define the practice of law is granted to the Supreme Court of Virginia.⁴ However, the General Assembly has in the past modified or limited this delegated authority.⁵ Accordingly, those at odds with the position taken in UPL 183 petitioned the General Assembly in an effort to protect their economic interests.

In the 1996 and 1997 General Assembly sessions, a legislative slate was brought forward by the Virginia Real Estate Attorney's League (VAREAL), a newly formed voluntary bar association whose mission was to maintain the predominant role of attorneys as settlement agents in the Commonwealth.⁶

2. Consumer Real Estate Settlement Protection Act, VA. CODE ANN. §§ 6.1-2.19 to -2.29 (Cum. Supp. 1997).

3. VA. CODE ANN. § 6.1-2.19(B) (Cum. Supp. 1997).

4. See VA. CODE ANN. § 54.1-3909 (Repl. Vol. 1994).

5. See, e.g., VA. CODE ANN. § 54.1-3905 (Repl. Vol. 1994); VA. CODE ANN. § 55-246.1 (Repl. Vol. 1995).

6. See Patricia Flatley, *Coalition to VaREAL: "Get real,"* 11 VA. LAW. WKLY. 185 (1996); Baker McClanahan, *Showdown on Closing: UPL #183, VaREAL meets, readies for Council,* 11 VA. LAW. WKLY. 361 (1996).

In response, another new group arose, the Coalition for Choice in Real Estate Closing (Coalition for Choice). The mission of Coalition for Choice was to maintain the growing market position of lay settlement agents.⁷ Prior to the Supreme Court of Virginia's consideration of UPL 183, the Coalition for Choice proposed CRESPA to the Virginia General Assembly.

CRESPA was modeled after the National Association of Insurance Commissioner's Title Insurance Agent Model Act. It originated in the Senate of Virginia under the patronage of Senator Warren E. Barry.⁸ Although Senator Barry's bill passed the Senate with minor modifications, it was substantially amended in the House of Delegates' Committee on Corporations, Insurance and Banking and again during floor debate in the House of Delegates.⁹ VAREAL was active in proposing the House amendments that ultimately allowed CRESPA to receive the unanimous "aye" vote of the House and the near unanimous "aye" vote in the Senate upon the bill's reconsideration. These compromise amendments (i) mandated that all settlement agents register with and pay a registration fee to the VSB, (ii) gave the VSB the authority to promulgate guidelines to assist settlement agents in avoiding the unauthorized practice of law, and (iii) prohibited all settlement agents, not just lawyers, from keeping the interest earned on escrow accounts.¹⁰

Terms defined in CRESPA include "[e]scrow, closing or settlement services," "[p]arty to the real estate transaction" and "[s]ettlement agent."¹¹ Additionally, CRESPA requires that settlement agents be either attorneys licensed in Virginia, title insurance companies or agents, licensed real estate brokers, or regulated financial institutions.¹² Further, CRESPA requires settlement agents (other than title insurance companies or financial institutions) to maintain the following: (i) errors and omissions or malpractice insurance providing a minimum of \$250,000 in coverage; (ii) a blanket fidelity bond or employee dishonesty insurance policy covering persons employed by the

7. See Flatley, *supra* note 6, at 185.

8. See S.B. 1104, Va. Gen. Assembly (Reg. Sess. 1997).

9. See *id.*

10. See *id.*

11. VA. CODE ANN. § 6.1-2.20 (Cum. Supp. 1997).

12. See *id.* § 6.1-2.21(A) (Cum. Supp. 1997).

settlement agent providing a minimum of \$100,000 in coverage; and (iii) a surety bond of not less than \$100,000.¹³ Settlement agents, other than attorneys, are required to have annual audits of their escrow accounts by either an independent certified public accountant or, if the settlement agent is a licensed title insurance agency, by its title insurance company.¹⁴

The legislature also required that all sales contracts involving the purchase of real estate containing four or less residential dwelling units include the following in bold face, and 10 point type:

Choice of Settlement Agent: You have the right to select a settlement agent to handle the closing of this transaction. The settlement agent's role in closing your transaction involves the coordination of numerous administrative and clerical functions relating to the collection of documents and the collection and disbursement of funds required to carry out the terms of the contract between the parties. If part of the purchase price is financed, your lender will instruct the settlement agent as to the signing and recording of loan documents and the disbursement of loan proceeds. No settlement agent can provide legal advice to any party to the transaction except a settlement agent who is engaged in the private practice of law in Virginia and who has been retained or engaged by a party to the transaction for the purpose of providing legal services to that party.

Escrow, closing and settlement service guidelines: The Virginia State Bar issues guidelines to help settlement agents avoid and prevent the unauthorized practice of law in connection with furnishing escrow, settlement or closing services. As a party to a real estate transaction, you are entitled to receive a copy of these guidelines from your settlement agent, upon request, in accordance with the provisions of Consumer Real Estate Settlement Protection Act.¹⁵

Further conditioning a settlement agent's ability to escrow funds or conduct settlements, the General Assembly required the following: (i) the funds deposited shall be handled in a fiduciary capacity and be kept in a separate fiduciary trust

13. *See id.* § 6.1-2.21(D) (Cum. Supp. 1997).

14. *See id.* § 6.1-2.21(E) (Cum. Supp. 1997).

15. *Id.* § 6.1-2.22 (Cum. Supp. 1997).

account; (ii) escrow funds be applied and/or disbursed only in accordance with the terms of instructions or agreements, HUD-1 Settlement Statements which have been signed by the seller and the purchaser or borrower shall be deemed sufficient; and (iii) the settlement agent not retain any interest received on funds deposited in connection with any escrow, settlement or closing.¹⁶ Although attorneys historically have been prohibited from earning interest on their escrow accounts, no such restriction existed for non-attorney settlement agents.

The VSB will register attorney settlement agents as well as all other settlement agents.¹⁷ The VSB registration requirement requires each licensed Virginia attorney who conducts a settlement service to register and does not permit the singular registration of a law firm.¹⁸ Non-attorney settlement agents who are licensed entities, shall only be required to register the entity, not the individual employees of the entity.¹⁹ The Act specifically confers to the VSB the power to continue to regulate the unauthorized practice of law.²⁰ However, the State Corporation Commission shall police the compliance of financial institutions and the title insurance industry with other aspects of CRESPA and the Virginia Real Estate Board shall perform the same function for licensed real estate brokers.²¹ The split between the jurisdictional authority of the administrative agencies is intricate.

CRESPA even mandated that the VSB should consult with the State Corporation Commission and the Virginia Real Estate Board in the development of guidelines concerning the unauthorized practice of law.²² A subcommittee of the VSB, com-

16. See *id.* § 6.1-2.23(A)(1), (A)(2), (B), (C) (Cum. Supp. 1997).

17. See *id.* § 6.1-2.25 to -2.26 (Cum. Supp. 1997).

18. See *Virginia State Bar Proposed Regulations Under the Virginia Consumer Real Estate Settlement Protection Act*, 45 VA. LAW. REG. 13, 14 (1997).

19. See *id.*

20. See VA. CODE ANN. § 6.1-2.26 (Cum. Supp. 1997).

21. See *id.* §§ 6.1-2.25 to -2.26 (Cum. Supp. 1997). It is interesting to note that federally chartered banking institutions are regulated by the Board of Governors of the Federal Reserve Board, the Office of the Comptroller of the Currency at the United State Department of Treasury or by the Office of Thrift Supervision. Federally chartered financial institutions, therefore, shall avoid all regulation under CRESPA. One wonders whether the General Assembly should reexamine this hole in the legislation.

22. See *id.* § 6.1-2.26(B) (Cum. Supp. 1997).

posed of members of each of these agencies, met in the spring of 1997 and drafted the Unauthorized Practice of Law Guidelines for Real Estate Settlement Agents ("Guidelines"). The Guidelines were adopted pursuant to Virginia Code section 6.1-2.26(c), in accordance with the by-laws of the VSB.²³ Susan M. Pesner, co-author of this article, was a member of this subcommittee.

In the future, the VSB shall receive all complaints concerning a settlement agent's or financial institution's noncompliance with the Guidelines.²⁴ A non-lawyer employee of a law firm settlement agent who commits an act constituting the unauthorized practice of law may be guilty of a misdemeanor, fined up to \$2500 and imprisoned for up to twelve months.²⁵ Unless the attorney settlement agent is "engaged in the private practice of law in Virginia and . . . has been retained or engaged by a party to the transaction for the purpose of providing legal services to that party," the attorney settlement agent is prohibited from providing legal advice to the parties.²⁶ If any settlement agent violates CRESPA or any CRESPA regulation, the appropriate licensing authority may (i) order a penalty not exceeding \$5,000 for each violation; (ii) revoke or suspend the applicable license(s); or (iii) impose any other penalties as provided by law or regulation.²⁷ CRESPA requires all settlement agents to retain records pertaining to each settlement handled for a minimum of five years after the settlement is completed.²⁸ It should be noted that the five-year statute of limitations under a written contract²⁹ would start to run when the work of the settlement agent is completed. The authors recommend that a settlement agent keep their files for five years from the last

23. *Proposed State Bar CRESPA Guidelines for Real Estate Settlement Agents*, 45 VA. LAW. REG. 18, 18-20 (1997).

24. *See* VA. CODE ANN. § 6.1-2.26 (Cum. Supp. 1997).

25. *See* VA. CODE ANN. § 54.1-3904 (Repl. Vol. 1994) (providing that the unauthorized practice of law is a class 1 misdemeanor, the penalty for which is found in VA. CODE ANN. § 18.2-11 (Repl. Vol. 1996)). An attorney settlement agent cannot be found guilty of the unauthorized practice of law since he or she is a licensed Virginia lawyer.

26. VA. CODE ANN. § 6.1-2.22 (Cum. Supp. 1997).

27. *See id.* § 6.1-2.27 (Cum. Supp. 1997).

28. *See id.* § 6.1-2.24 (Cum. Supp. 1997).

29. *See* VA. CODE ANN. § 8.01-246(2) (Repl. Vol. 1992).

date work was completed (i.e., the recording of the release of the prior liens).

The State Corporation Commission already implemented statutes governing the affairs of persons engaged in the title insurance business³⁰ and issued Administration Letter 1997-1, dated March 10, 1997, to assist its licensees in complying with existing statutes and regulations.

B. Property Owners' Association Act

When originally enacted, the Virginia Property Owners' Association Act³¹ specifically allowed a purchaser of a property located within a qualified homeowners' association, to waive, by separate agreement, the rights of the purchaser to receive and the obligations of the seller to deliver the resale packet from the homeowners association. The 1997 legislative amendment deleted, in its entirety, the right of the purchaser to sign a separate waiver,³² thereby leaving a residential real estate contract contingent until three days after delivery of the resale packet to the purchaser (without action by a purchaser to unilaterally cancel) or upon the completion of settlement, whichever occurs first.

C. Licensing Statute for Real Estate Salespersons and Brokers

The Virginia Association of Realtors® was successful in persuading the 1997 Virginia legislature to enact an amendment allowing real estate salespersons and brokers to "prepare written contracts for the sale, purchase, option, exchange, or rental of real estate provided the preparation of such contracts is incidental to a real estate transaction in which the licensee (i) is involved and (ii) does not charge a separate fee for preparing the contracts."³³ Moreover, a licensee having a substantive discussion about a specific property or properties with a prospective buyer or seller need only disclose the brokerage relation-

30. See VA. CODE ANN. §§ 38.2-1809, -1810, -1812, -1813, -1820 to -1825, -1832 to -1834 (Repl. Vol. 1994).

31. VA. CODE ANN. § 55-511 (Repl. Vol. 1995).

32. *Id.* § 55-511 (Cum. Supp. 1997).

33. VA. CODE ANN. § 54.1-2101.1 (Cum. Supp. 1997).

ship the licensee has with another party to the transaction if the prospective participant to the transaction *is not represented by another licensee*.³⁴

D. *Banking Statutes Enlarging the Rights of Lenders to Accelerate Loans*

Mortgage lenders also received new protections this past legislative session. A licensed mortgage lender or broker may prepare an agreement that contains an acceleration clause permitting all sums owed under a mortgage loan to be declared due if a borrower fails to pay his/her loan, submits false information in connection with an application for the mortgage loan, breaches any representation or covenant in the loan documents, or fails to perform any other obligation in the loan documents.³⁵

E. *Homeowners Associations and Condominium Associations*

Amendments to both the homeowners' association and the condominium association statutes now require such associations to register with the Virginia Real Estate Board and to include in their respective resale certificates the association's registration number and date of registration with the Real Estate Board.³⁶ This requirement is part of the General Assembly's effort, beginning in 1993, to persuade common-interest communities to adopt enlightened management and dispute resolution mechanisms.³⁷

At the same time the General Assembly is gradually mandating state regulation of common interest associations, it also is giving such associations significant new powers. The General Assembly passed legislation that authorizes condominium associations and property owners' associations to enforce their liens for assessments in non-judicial foreclosures.³⁸ In the opinion of

34. See *id.* § 54.1-2138 (Cum. Supp. 1997).

35. See VA. CODE ANN. § 6.1-422 (Cum. Supp. 1997).

36. See VA. CODE ANN. §§ 55-79.97, -484, -512, -530 (Cum. Supp. 1997).

37. See *id.* § 55-530 (Cum. Supp. 1997).

38. See *id.* §§ 55-79.84, -516 (Cum. Supp. 1997).

the authors, this legislative action definitively tips the balance of power in favor of the common-interest ownership associations vis-a-vis the associations' members.

F. *Land Records*

Both the state executive branch and the General Assembly have been studying proposals to consolidate Virginia land records in a central administrative agency. During the 1996 session, the General Assembly increased the taxes clerks of court may charge so that monies could be set aside in a special technology fund.³⁹ It was anticipated the fund would be expended to purchase computer equipment necessary to scan and digitize land records.⁴⁰ As originally conceived, the Department of Information Technology (DIT) was intended to be the central repository of all land records, thereby significantly diminishing the stature of local clerks.⁴¹ The clerks fought back this session, however, and wrested control of the centralization project away from the DIT.⁴² The General Assembly requested the Council on Information Management to develop protocols whereby land records would remain in the possession of local clerks, but would be accessible on-line in a standardized format.⁴³

G. *Fishing Rights*

It did not make the front page of the news, but the General Assembly passed legislation making it a Class three misdemeanor for anyone to impede a licensed fisherman from fishing in tidal or inland waters within the Commonwealth.⁴⁴ Un-

39. See VA. CODE ANN. § 14.1-125.2 (Cum. Supp. 1996).

40. See *id.*

41. See Baker McClanahan, *All Land Records May Go In Central Database*, 11 VA. LAW. WKLY., 681, 684 (1996).

42. See VA. CODE ANN. § 14.1-125.2 (Cum. Supp. 1997).

43. See *id.*

44. See VA. CODE ANN. §§ 28.2-903.1, and 29.1-554.1 (Repl. Vol. 1997).

doubtedly, this legislative action was a response to the Supreme Court of Virginia's decision in *Kraft v. Burr*,⁴⁵ discussed below.

III. JUDICIAL DECISIONS

A. Nuisances

In the tragic case of *Chapman v. City of Virginia Beach*,⁴⁶ the Supreme Court of Virginia found that a public beach is a recreational facility under Virginia Code section 15.1-291 and that in order to recover under this section, the claimant must prove the municipality was guilty of gross negligence.⁴⁷ In *Chapman*, a nine-year-old child strangled herself when she caught her head in an access gate to a public beach. The lower court dismissed the plaintiff's nuisance count, finding that it was subsumed in the count for negligence.⁴⁸ In reversing this decision, the supreme court held that negligence and nuisance are distinct concepts, especially because negligence is only one of the two alternative prerequisites required to impose liability on a municipality in a nuisance cause of action.⁴⁹ The City contended that section 15.1-291 required a finding of gross negligence before the imposition of liability upon it, even for nuisance actions, but the supreme court deferred ruling on this issue until the later case of *Hawthorn v. City of Richmond*.⁵⁰

In *Hawthorn*, a majority of the Supreme Court of Virginia found that Virginia Code section 15.1-291 abrogated the common law and that the General Assembly specifically intended the section to reverse the 4 to 3 holding of *Hoggard v. City of Richmond*⁵¹ in which the Supreme Court of Virginia imposed liability upon a municipality for the negligent operation of a swimming pool.⁵² Accordingly, the majority found that in order for a municipality operating a recreational facility to be liable,

45. 252 Va. 273, 476 S.E.2d 715 (1996).

46. 252 Va. 186, 475 S.E.2d 798 (1996).

47. See *id.* at 189, 475 S.E.2d at 800.

48. See *id.*

49. See *id.* at 192-93, 475 S.E.2d at 802.

50. 253 Va. 283, 484 S.E.2d 603 (1997).

51. 172 Va. 145, 200 S.E. 610 (1939).

52. See *Hawthorn*, 253 Va. at 287, 484 S.E.2d at 605; *Hoggard*, 172 Va. at 157, 200 S.E. at 615-16.

it must be found grossly negligent in a personal injury action, and it is irrelevant whether the condition complained of constituted a nuisance.⁵³ Justice Stephenson's dissent, in which Justice Hassell joined, departed from the majority's decision on the issue of how strictly the supreme court should construe an abrogation of the common law.⁵⁴ Justice Stephenson held that Virginia Code section 15.1-291 must be strictly construed because it is in abrogation of the common law.⁵⁵ However, strict reading reveals that the section makes no reference to nuisances. Therefore, Justice Stephenson concluded, the General Assembly did not intend to abrogate the common law.⁵⁶

Outside the context of recreational facilities, the lower courts continued to apply traditional sovereign immunity concepts. The Loudoun Circuit Court held that the issues raised in a municipality's plea of sovereign immunity must be raised at trial because the municipality introduced insufficient evidence in support of its plea.⁵⁷ At trial the defendant must prove that the municipality acted with authority and did not act negligently.⁵⁸ Applying the same principles to another case, the Richmond Circuit Court held that the plaintiff alleged sufficient facts to state a cause of action for nuisance when she allegedly fell over a chain strung between two posts and injured herself while attending a baseball game.⁵⁹ The city would be entitled to the protection of sovereign immunity if the condition claimed to be a nuisance was authorized by law and the creation or maintenance of the nuisance was not negligent.⁶⁰ Obviously, the Richmond Circuit Court decision is now questionable in light of *Hawthorn*.

53. See *Hawthorn*, 253 Va. at 289, 484 S.E.2d at 606.

54. See *id.* at 290, 484 S.E.2d at 607 (Stephenson, J., dissenting).

55. See *id.* (Stephenson, J., dissenting).

56. See *id.* at 291, 484 S.E.2d at 607 (Stephenson, J., dissenting).

57. See *Parrott v. Town of Hamilton*, 39 Va. Cir. 224 (Loudoun County 1996).

58. See *id.*

59. See *Hutchinson v. Richmond Metro. Auth.*, 39 Va. Cir. 230, 233 (Richmond City 1996).

60. See *id.* at 232 (citing *City of Virginia Beach v. Virginia Beach Steel Fishing Pier, Inc.*, 212 Va. 425, 427, 184 S.E.2d 749, 750-51 (1971)).

B. Easements

1. Express Easements

Construing an express easement, the Supreme Court of Virginia held in *Walton v. Capital Land, Inc.*⁶¹ that an easement in gross reserved by the grantor and described in the deed as "an exclusive easement of right of way for purposes of ingress and egress" did not prohibit that grantee from all uses of the land covered by the easement.⁶² In reversing the lower court, the supreme court held that the trial court's decision prohibiting the grantee from using the easement "transmuted a grant of an easement into the grant of a possessory interest or an estate by allowing the owner of the easement to deprive the servient estate owner of the use of his land."⁶³ Since the deed limited the easement to a "right of way" and for "ingress and egress" purposes only, the supreme court held a fee simple conveyance was not intended.⁶⁴

The Supreme Court of Virginia had more difficulty determining the scope of an express easement in *Auerbach v. County of Hanover*.⁶⁵ The description of the easement at issue was as follows,

[the grantors] hereby reserve an easement of right-of-way 50 feet in width along the western line of parcel A leading from State Route 606 to Parcel B as a means of ingress and egress to and from Parcel B and State Route 606, said easement being shown as lying on the westerly side of Parcel A on the hereinabove described plat.⁶⁶

A local zoning official found that the Parcel A easement did not serve a large section of the property and denied a resubdivision application for lack of access.⁶⁷ Did the Parcel A easement serve all of the property or only Parcel B? Which Parcel B?

61. 252 Va. 324, 477 S.E.2d 499 (1996).

62. See *id.* at 327, 477 S.E.2d at 501.

63. *Id.* at 326, 477 S.E.2d at 501.

64. See *id.* at 327, 477 S.E.2d at 501.

65. 252 Va. 410, 478 S.E.2d 100 (1996).

66. *Id.* at 412, 478 S.E.2d at 101.

67. See *id.* at 413, 478 S.E.2d at 101.

Unfortunately, the subject parcels were replatted twice.⁶⁸ A majority of the court held the easement's scope was clear when one considered the revised plat.⁶⁹ The majority further determined that the second replatting consolidated the land holdings because of the phrase "added-on."⁷⁰ Chief Justice Carrico in a tersely worded dissent, joined by Justices Hassell and Keenan, called the "add-on" language incomprehensible.⁷¹

As it is, I think that the language used adds nothing even remotely connecting the use of the easement to the 122.5-acre tract. At least, I hope we have not yet reached the point where we will allow such meaningless language to be considered sufficient to affect estates in land.⁷²

Turning to less contentious matters, the Rockingham Circuit Court held that a plat indicating a right of way that abuts and appears to serve two parcels of land is a deeded easement for the benefit of both parcels, even if the deeds to the parcels did not refer to the easement.⁷³ The King George Circuit Court found that where an express reciprocal easement burdened several lots in a subdivision and did not limit the use thereof, the easement could be used for any reasonable purpose.⁷⁴ However, the trial court held that the owners of a subservient estate could not construct fences or park vehicles and thereby obstruct the enjoyment of the easement.⁷⁵

2. Prescriptive Easement

Courts construe the scope of prescriptive easements much more narrowly and require more difficult proof than for express easements. A plaintiff suing to establish a prescriptive easement for commercial logging failed to prove by clear and convincing evidence the existence of the easement claimed.⁷⁶ On

68. *See id.*

69. *See id.* at 414-15, 478 S.E.2d at 102.

70. *See id.* at 415-16, 478 S.E.2d at 102.

71. *See id.* at 417, 478 S.E.2d at 103 (Carrico, C.J., dissenting).

72. *Id.* (Carrico, C.J., dissenting).

73. *See Cave v. Mitchell*, 40 Va. Cir. 427, 427-28 (Rockingham County 1996).

74. *See Rose v. Durst*, 38 Va. Cir. 358, 359 (King George County 1996).

75. *See id.*

76. *See Hastings v. Franklin*, 39 Va. Cir. 340, 343 (Shenandoah County 1996).

the other hand, the plaintiff did prove a prescriptive easement for hunting and cutting firewood.⁷⁷

C. Condemnation

During the period covered by this survey article, the courts have provided some clarification of a landowner's responsibility to return funds withdrawn from the state during the course of condemnation actions. The Supreme Court of Virginia held in *Transportation Commissioner v. Matyiko*⁷⁸ that directors of a corporation are required to repay the amounts withdrawn pursuant to a condemnation certificate when the commissioners award less than the certificate amount and the directors vote to make a distribution of the funds withdrawn on the certificate without making adequate provision for contingent liabilities.⁷⁹ Similarly, the Fairfax Circuit Court held that where a landowner receives funds pursuant to a withdrawal order requiring him to repay the funds in the event that the condemnation award is less than the certificate amount, the landowner is obligated to repay such funds even though the withdrawn funds were paid directly to the landowner's lender, rather than to the landowner.⁸⁰

The Stafford Circuit Court held when valuing land for condemnation purposes, "comparables" must be similar in locality and in character to the land in question and the "developmental cost" method of valuation of undeveloped land is too speculative to be admissible as evidence.⁸¹ The Fredericksburg Circuit Court held in an inverse condemnation action that the property owners had no compensable right to a view from their property.⁸² Finally, the Accomack Circuit Court decided that a school board, which had acquired title to the land by voluntary conveyance, could not file a condemnation suit against the for-

77. *See id.*

78. 253 Va. 1, 481 S.E.2d 468 (1997).

79. *See id.* at 10, 481 S.E.2d at 472.

80. *See Transportation Comm'r v. Lynch*, 39 Va. Cir. 124, 127 (Fairfax County 1996).

81. *See Stafford Reg'l Airport Comm'n v. Lawrence*, 39 Va. Cir. 179, 180 (Stafford County 1996).

82. *See Johnson v. Virginia Dep't of Transp.*, 39 Va. Cir. 157, 158 (Fredericksburg City 1996).

mer owner to remove that owner's tenant from the land.⁸³ Rather, the condemnor must file either an action at law against the tenant or institute condemnation proceedings directly against the tenant.⁸⁴

D. *Cotenancy*

In *Butler v. Hayes*,⁸⁵ the Supreme Court of Virginia held that coparcenaries may not receive reimbursement for improvements in a partition action, if they have reason to know that the deed by which they acquired title from the other coparcenaries was procured by forgery.⁸⁶ The supreme court stated that the equitable adjustment between coparcenaries or cotenants was meant to prevent one tenant from becoming enriched at the expense of another.⁸⁷ However, in order to invoke an equitable remedy, the litigant must have clean hands. Here the coparcener seeking relief built the subject improvements with knowledge of allegations that his title was a forgery. Thus, the cotenant had unclean hands.⁸⁸ Likewise, the cotenant may not obtain relief under Virginia Code section 8.01-166 because a claimant under that section must have no notice of a title defect.⁸⁹

E. *Deeds*

1. Construction

In perhaps the most controversial and far-reaching decision of the year, the Supreme Court of Virginia held in a 4 to 3 decision that owners of land who could trace their title back to patents made by two British monarchs could exclude fishermen

83. See *Accomack County Sch. Bd. v. Shields*, 39 Va. Cir. 411, 413 (Accomack County 1996).

84. See *id.*

85. 254 Va. 38, 487 S.E.2d 229 (1997).

86. See *id.* at 43-44, 487 S.E.2d at 232.

87. See *id.* at 43, 487 S.E.2d at 232.

88. See *id.* at 43-44, 487 S.E.2d at 232.

89. See *id.* at 44, 487 S.E.2d at 232-33; VA. CODE ANN. § 8.01-166 (Repl. Vol. 1992 & Cum. Supp. 1997).

from a navigable waterway, in this case, the Jackson River.⁹⁰ Holding that the Magna Carta did not prohibit the British Crown from granting exclusive rights to fish, a majority of the supreme court in *Kraft v. Burr* held that the patent from King George II to William Jackson gave title to his successors-in-title in that section of the Jackson River adjoining their property.⁹¹ In regards to a second patent, one to Richard Morris from King George III, the supreme court found that the patent also included the exclusive right to fish because "the use of the word 'etc.' in the patent records was a short-hand phrase used to incorporate by reference terms in the original patents," and the patent form commonly used during the tenure of Governor Alexander Spotswood included an interest in river bottoms and the right to fish.⁹² Chief Justice Carrico joined the majority concerning the Jackson patent and joined the dissent concerning the Morris patent. Chief Justice Carrico felt the majority's decision on the Morris patent involved too much guesswork.⁹³ In his dissent, Justice Koontz disputed the majority's view that the British Crown had the right to grant exclusive fishing rights.⁹⁴ Justice Koontz felt that as long as a fisherman remained in navigable waters and did not touch the banks or drag the stream with nets, anchors or seines, he could not be stopped by the holder of a crown patent.⁹⁵ Justice Koontz may have had the last laugh, however. The General Assembly passed a law making it a misdemeanor to obstruct the right of a licensed fishermen from fishing in inland or tidal waters.⁹⁶

2. Capacity

In *Hill v. Brooks*,⁹⁷ the Supreme Court of Virginia overruled a lower court's decision to nullify a conveyance by deed of gift

90. See *Kraft v. Burr*, 252 Va. 273, 476 S.E.2d 715 (1996).

91. See *id.* at 277, 476 S.E.2d at 717.

92. *Id.* at 279, 476 S.E.2d at 718.

93. See *id.* at 281, 476 S.E.2d at 719 (Carrico, C.J., concurring in part and dissenting in part).

94. See *id.* at 282, 476 S.E.2d at 720 (Koontz, J., dissenting).

95. See *id.* at 284, 476 S.E.2d at 721.

96. See VA. CODE ANN. §§ 28.2-903.1, 29.1-554.1 (Repl. Vol. 1997).

97. 253 Va. 168, 482 S.E.2d 816 (1997).

on the basis of lack of capacity, fraud and unilateral mistake.⁹⁸ After stating that the party attempting to void a conveyance must prove the grounds therefore by clear and convincing evidence, the supreme court found that the grantor, plaintiff in the suit, failed to prove his own incapacity, especially because the attorney who drafted the deed gave un rebutted testimony that the grantor understood the nature of the transaction and agreed to its provisions.⁹⁹ Moreover, the supreme court would not set aside the conveyance for lack of consideration because it said "by definition, a deed of gift requires no consideration."¹⁰⁰

F. Restrictive Covenants

The Supreme Court of Virginia had several opportunities to interpret restrictive covenants during the period covered by this article. These opinions, however, did not break new ground. In *Anderson v. Lake Arrowhead Civic Ass'n*,¹⁰¹ the supreme court narrowed the scope of the Virginia Property Owners' Association Act¹⁰² (POAA) to apply only to those developments in which the declaration requires the association to maintain common areas and specially empowers the association to make maintenance assessments. The POAA is inapplicable, in instances similar to the *Lake Arrowhead* case, where the association is merely empowered to make assessments, but is not obligated to do so.¹⁰³ In *Woodward v. Morgan*,¹⁰⁴ the Supreme Court of Virginia held, in a divided opinion, that a prohibition against building more than one residence per "lot" was not ambiguous even though the original grantor conveyed sites in the subdivision containing more than one "lot" to the same purchasers and the covenant refers to "residences" located on the lot.¹⁰⁵ Justice Keenan, in her dissent, argued that the majority had no reason to assume that "lot" in the restrictive

98. See *id.* at 179, 482 S.E.2d at 823.

99. See *id.* at 176, 482 S.E.2d at 821.

100. *Id.* at 178, 482 S.E.2d at 823.

101. 253 Va. 264, 271-72, 483 S.E.2d 209, 213 (1997).

102. VA. CODE ANN. §§ 55-508 to -516.2 (Repl. Vol. 1995).

103. See *Anderson*, 253 Va. at 271-72, 483 S.E.2d at 213.

104. 252 Va. 135, 475 S.E.2d 808 (1996).

105. See *id.* at 138, 475 S.E.2d at 810.

covenants had the same meaning as "lot" in the property description.¹⁰⁶

The Fairfax Circuit Court found that a restrictive covenant authorizing a homeowners association to assess expenses necessary "to promote the recreation, health, safety and welfare of the residents" gave the association sufficient power to require an individual homeowner to pay for the community's trash collection, even though the defendant homeowner had diligently removed his trash.¹⁰⁷

G. *Construction/Workmanship*

While the Supreme Court of Virginia failed to issue any opinions concerning construction contracts and builder warranties, circuit court opinions continued to perform their useful role of filling in the gaps. The Spotsylvania Circuit Court held that a cause of action for breach of an implied warranty under Virginia Code section 55-70.1 accrues upon the passage of title to the purchaser.¹⁰⁸ Since the statute of limitations for the implied statutory warranty is two years, the circuit court held at summary judgment that the purchaser's cause of action was time-barred.¹⁰⁹ Another lower court held that when the purchasers bought a home by purchasing the stock of a sole-asset corporation, they were not entitled to rely upon the implied statutory warranties under Virginia Code section 55-70.1.¹¹⁰ According to the circuit court, only contracts for the sale of new dwellings fall within the ambit of that statute, not contracts for the purchase of stock.¹¹¹

A good cause of action, however, does not ensure satisfaction of the judgment. In *Jeffries v. Virginia Board for Contractors*,¹¹² the Fairfax Circuit Court affirmed a decision of the

106. See *id.* at 140, 475 S.E.2d at 811 (Keenan, J., dissenting).

107. See *Prosperity Heights Homeowner Ass'n v. George*, 38 Va. Cir. 88, 90 (Fairfax County 1995).

108. See *Grogg v. Massey & Leonard Constr., Inc.*, 39 Va. Cir. 522, 524 (Spotsylvania County 1996).

109. See *id.*

110. See *Ell v. Moss*, 39 Va. Cir. 8, 16 (Fairfax County 1995).

111. See *id.*

112. 38 Va. Cir. 251 (Fairfax County 1995).

Virginia Real Estate Board denying a developer's claim filed pursuant to the Virginia Contractor Transaction Recovery Act¹¹³ (VCTRA). In so holding, the circuit court found that VCTRA specifically excluded recovery by anyone whose business involves the development of property.¹¹⁴ The claimant in *Jeffries* fit this definition since she had entered into an informal partnership with the builder in question to construct a home for resale.¹¹⁵

Large claimants can have difficulty recovering as well. A residential home builder could not obtain indemnification from the manufacturers of flame-retardant treated plywood for replacement costs because the builder was merely a volunteer and did not give the defendant manufacturers an opportunity to defend the homeowner claims.¹¹⁶ The theory of recovery selected can be crucial. For instance, the developer of a subdivision was entitled to enforce the agreement between a lot purchaser and a construction company in which the latter agreed to pay the developer a marketing fee of five percent of the contract price.¹¹⁷ In holding for the developer suing as a third-party beneficiary, the circuit court found, after a trial *ore tenus*, that the developer was an intended beneficiary under the parties' contract and that parol evidence was inadmissible since the contract was unambiguous.¹¹⁸

In an administrative law decision, the Supreme Court of Virginia probably closed the book on an issue that caused much controversy—"shrink/swell" soil in Chesterfield County. In this most recent installment of the dispute between residential home builders and consumers, the supreme court upheld the constitutionality of the Chesterfield County building permit fee of \$125 in *W.S. Carnes, Inc. v. Board of Supervisors*.¹¹⁹ The County used building permit fees to investigate "shrink/swell" soil in Chesterfield. The supreme court held the County's building

113. VA. CODE ANN. § 54.1-1118 (Repl. Vol. 1994).

114. See *Jeffries*, 38 Va. Cir. at 252-53.

115. See *id.* at 253.

116. See *Winchester Homes, Inc. v. Hoover Universal, Inc.*, 39 Va. Cir. 107, 115-16 (Fairfax County 1996).

117. See *Fairfield Williamsburg, Inc. v. Governor's Land Ass'n*, 40 Va. Cir. 312 (Williamsburg City and James City County 1996).

118. See *id.* at 317.

119. 252 Va. 377, 384, 478 S.E.2d 295, 300 (1996).

permit fee did not constitute special legislation since it did not "arbitrarily separate[] some persons, places, or things from those on which, without such separation, it would also operate."¹²⁰ Also, after examining statutes and regulations pertinent to the Chesterfield program, the supreme court found that the imposition of the permit fee was not ultra vires.¹²¹

H. *Mechanics' Liens*

The Supreme Court of Virginia ruled in *United Savings Ass'n v. Jim Carpenter Co.*¹²² that materialmen supplying materials for a construction site under a specific continuing contract, as distinguished from marketplace providers under an open account, are entitled to perfect their mechanic's liens ninety days from the date they last delivered items.¹²³ In *Jim Carpenter Co.*, the supreme court heard three cases on appeal, two of which the lower courts held that the materialmen were not entitled to liens for much of the supplies given because they obtained separate contracts for each delivery.¹²⁴ The supreme court established a test to distinguish open accounts from particular continuing contracts:

[w]here the course of dealing between the parties shows that each understood that the materials were being supplied for a particular project, rather than merely for general use by the contractor, and nothing in the record suggests that a mere open account was intended, a continuing contract will be found.¹²⁵

Applying this test to the three cases on appeal, a unanimous supreme court found that the contracts in each case were continuing contracts.¹²⁶

A lower court addressed the novel issue of whether an architect may assert a mechanic's lien for work done in connection

120. *Id.*

121. *See id.* at 385-86, 478 S.E.2d at 301.

122. 252 Va. 252, 475 S.E.2d 788 (1996).

123. *See id.* at 264, 475 S.E.2d at 794.

124. *See id.* at 257-59, 475 S.E.2d at 790-91.

125. *Id.* at 261, 475 S.E.2d at 793.

126. *See id.* at 264, 475 S.E.2d at 794.

with soil testing and the development of plans that were later used by others in the construction of a building.¹²⁷ The Loudoun Circuit Court held that the architect's lien was invalid because the architect's work-product did not enhance the value of the property against which the lien was being asserted.¹²⁸

I. *Brokers*

When does a commercial real estate broker's lien come into existence? When the lien is filed in the land records or when the broker performs services? In *Harrison & Bates, Inc v. Featherstone Ass'n*,¹²⁹ the Supreme Court of Virginia answered that a real estate broker's lien exists, if at all, only when the required filing occurs. The supreme court distinguished the commercial broker's lien from mechanics' liens, in which the claimant may obtain an inchoate lien from the date the work or materials were provided.¹³⁰ The supreme court narrowly construed the Commercial Real Estate Broker's Lien Act¹³¹ because it is in derogation of the common law.¹³² The real estate brokers received their revenge in another case. When a seller contributed his land to a limited liability company in exchange for that company's assumption of the debt secured by the land, the Supreme Court of Virginia held in *Hagan v. Adams Property Associates, Inc.*¹³³ that the seller owed his real estate broker a commission.¹³⁴ The supreme court found that the seller's contribution to the limited liability company in exchange for membership interest in the company was more than a mere change in the form of ownership.¹³⁵ Finally, the Richmond Circuit Court found that a broker could not recover damages because he failed to prove an oral exclusive right-to-sell agree-

127. See *Fort Evans Ass'n v. Davis Buckley, P.C.*, 38 Va. Cir. 155, 155 (Loudoun County 1995).

128. See *id.* at 158.

129. 253 Va. 364, 370-71, 484 S.E.2d 883, 886 (1997).

130. See *id.* at 370, 484 S.E.2d at 886-87.

131. VA. CODE ANN. §§ 55-526 to -527 (Repl. Vol. 1995).

132. See *Harrison & Bates*, 253 Va. at 370-71, 484 S.E.2d at 887.

133. 253 Va. 217, 482 S.E.2d 805 (1997).

134. See *id.* at 221, 482 S.E.2d at 808.

135. See *id.* at 220, 482 S.E.2d at 807.

ment and failed to prove that he was the procuring cause of the sale.¹³⁶

J. *Lis Pendens*

The circuit courts heard two *lis pendens* actions that were prominently featured in professional publications. A builder who planned to buy finished lots from a developer was entitled to a vendee's lien upon the developer's breach of a purchase agreement.¹³⁷ In so holding, the Fairfax Circuit Court also stated that a party filing a memorandum of *lis pendens* may seek to establish an interest in the subject property, but not title.¹³⁸ The circuit court further held that a vendee's lien is recognizable under Virginia common law since such liens are recognized elsewhere and Virginia does enforce equitable liens.¹³⁹ In the second case, the Loudoun Circuit Court awarded sanctions against a defendant for filing a memorandum of *lis pendens* in a suit that could not possibly affect title to the land.¹⁴⁰ The circuit court held that a memorandum of *lis pendens* cannot be based on litigation that does not assert jurisdiction over an owner of the land or over the land itself.¹⁴¹

K. *Appraisers*

In a decision that should serve as a warning to real estate litigators, a circuit court held that a power company could not introduce its expert witness to testify to the value of property.¹⁴² The court interpreted the Supreme Court of Virginia's decision in *Lee Gardens Ltd. Partnership v. Arlington County Board*¹⁴³ to mean that persons receiving compensation for their appraisal opinion cannot testify in court as to the value of

136. See *Virginia Bus. Exch., Inc. v. Matthews*, 38 Va. Cir. 370, 372 (Richmond City 1996).

137. See *DRHI v. L'Ambiance Assocs.*, 39 Va. Cir. 434, 435 (Fairfax County 1996).

138. See *id.*

139. See *id.*

140. See *CMF Loudoun, L.P. v. Brown*, 39 Va. Cir. 101, 104 (Loudoun County 1996).

141. See *id.* at 103.

142. See *Appalachian Power Co. v. Orr*, 40 Va. Cir. 370 (Washington County 1996).

143. 250 Va. 534, 463 S.E.2d 646 (1996).

real estate unless they are licensed.¹⁴⁴ The Washington Circuit Court refused to depart from the holding of *Lee Gardens* even though the General Assembly passed an amendment effective July 1, 1995, (prior to the *Lee Gardens* decision) which states that "nothing construed herein shall proscribe the power[s] of a judge to determine who may qualify as an expert witness to testify in any legal proceeding."¹⁴⁵

L. *Settlement Agents*

Addressing the dual agency role of settlement agents, the Fairfax Circuit Court dismissed a motion for judgment finding that between a seller and buyer of real property, the seller bears the loss when an escrow holder absconds with the proceeds of sale after the seller has become legally entitled to them.¹⁴⁶ The circuit court noted that an escrow agent is a dual agent of both parties at closing and upon settlement becomes the agent of each of the parties with respect to those things placed in escrow to which each party becomes entitled.¹⁴⁷ Once closing occurs, the seller is legally entitled to the proceeds of sale, and accordingly, bears the risk if the settlement agent absconds with them.¹⁴⁸

M. *Fire Insurance*

The Fairfax Circuit Court held that a casualty insurer has the qualified right to repair, rebuild or replace damaged property.¹⁴⁹ On the other hand, where the insured and the insurer are attempting to settle the claim, under Virginia Code section 38.2-517 the insurer may not force the insured to accept its contractors as a prerequisite to settlement.¹⁵⁰ In another case originating from the same court, it was held that a lender was

144. See *Appalachian Power Co.*, 40 Va. Cir. at 370.

145. *Id.* at 371 (quoting VA. CODE ANN. § 54.1-2010 (Cum. Supp. 1997)).

146. See *Perkins v. Stewart Title Guar. Co.*, 38 Va. Cir. 71, 72 (Fairfax County 1995).

147. See *id.*

148. See *id.*

149. See *Allstate Ins. v. Moody*, 39 Va. Cir. 429, 431 (Fairfax County 1996).

150. See *id.* at 432. The insured may choose a cash settlement at an appraised value in lieu of accepting the insurer's contractor. See *id.*

entitled to all of the proceeds of an insurance policy, as provided in the deed of trust, even though the lender had foreclosed on the property for the amount of the secured indebtedness.¹⁵¹

N. *Condominiums*

The Virginia Beach Circuit Court held that members of an unincorporated condominium association are not liable for the acts of another member of the association, unless the association's agent or officer committed a tort in the course of his or her duties or the association breached an independent duty that it owed to the injured party.¹⁵² Interjecting itself into governance issues, the Alexandria Circuit Court held that a suit to compel the condominium association to re-count ballots cast at an annual meeting was proper because courts have inherent equitable jurisdiction to review elections when a property right is at issue and the plaintiff need not join every condominium unit owner to such suit.¹⁵³

O. *Real Estate Taxes*

Several real estate assessment cases were reported this past year despite the diminishing number of bad assessment cases. The Chesterfield Circuit Court held that no authority specifically requires an aggrieved taxpayer to appeal to the Board of Equalization prior to seeking relief in circuit court.¹⁵⁴ In other cases, taxpayers failed to rebut the presumption of the validity of the real estate assessments, and it was held that a taxpayer could not introduce a discounted cash-flow analysis to prove the value of real estate because the technique is too speculative.¹⁵⁵

151. See *Clay v. First Union Nat'l Bank*, 39 Va. Cir. 43, 54-55 (Fairfax County 1995).

152. See *Croker-Sanford v. Landrum*, 40 Va. Cir. 282, 283-84 (Virginia Beach City 1996).

153. See *Cobble v. Colecroft Station Condominium Unit Owners' Ass'n*, 40 Va. Cir. 105, 105 (Alexandria City 1996).

154. See *Martin v. Chesterfield County*, 40 Va. Cir. 210, 210 (Chesterfield County 1996).

155. See *B.O.B. Title XXVI, Inc. v. Loudoun County Bd. of Supervisors*, 39 Va. Cir. 128, 129 (Loudoun County 1996); *Fieldfare Corp. v. Loudoun County Bd. of Supervisors*, 39 Va. Cir. 393, 393-94 (Loudoun County 1996).

P. Mortgages

No Supreme Court of Virginia cases reported during the period covered by this survey directly addressed mortgages and foreclosure issues. However, the Loudoun Circuit Court held that a mortgage that secures a negotiable instrument in the hands of a holder in due course shares the instrument's immunity from defenses.¹⁵⁶ On demurrer, the Fairfax Circuit Court, ruled that a noteholder and assignee of a mortgage had standing to sue for waste on the mortgaged property, even though the same party lacked such a right in his capacity as the purchaser of the property at a foreclosure sale.¹⁵⁷ Interestingly, the circuit court held that the noteholder lacked the capacity to sue for waste upon his purchase of the property at foreclosure under the doctrine of merger.¹⁵⁸ Accordingly, the case went forward only on the plaintiff's cause of action as the assignee of the mortgagee.¹⁵⁹

Trial courts issued two published opinions concerning a trustee's duties in foreclosure sales. In a widely followed case, the Warren Circuit Court in *Cherokee Corp. v. Chicago Title Insurance Corp.*¹⁶⁰ held that a trustee in a foreclosure sale is the agent of both the debtor and creditor and has a duty to obtain the highest and best price for the property.¹⁶¹ In this case, the trustee breached his fiduciary duty by announcing the existence of a cloud on the title and then immediately proceeding with the auction of the land.¹⁶² Commissioners of account may appreciate the *In Re Rosenblum*¹⁶³ opinion by the Stafford Circuit Court. In a show cause proceeding against a trustee who failed to file an accounting, the court held that a trustee is not required to receive a deposit because the Virginia

156. See *Loudoun County Bd. of Supervisors v. Vanguard L.P.*, 40 Va. Cir. 201, 203 (Loudoun County 1996).

157. See *Mims Street L.L.C. v. G.D.C., Inc.*, 38 Va. Cir. 254, 255 (Fairfax County 1995).

158. See *id.* at 256.

159. See *id.*

160. 40 Va. Cir. 1 (Warren County 1995).

161. See *id.* at 6.

162. See *id.* at 7.

163. 39 Va. Cir. 420 (Stafford County 1996).

Code gives trustees broad discretion concerning the terms and conditions of sale.¹⁶⁴ Furthermore, the circuit court held the trustee has no duty to discharge real estate tax liens when the purchaser at the foreclosure sale merely assumes the debt encumbering the property.¹⁶⁵ On the other hand, the trustee must file an accounting with the Commissioner of Accounts, even if the sale generates no proceeds.¹⁶⁶

Q. *Fixtures*

In a case concerning ownership of a fixture, the Supreme Court of Virginia in *Adams Outdoor Advertising L.P. v. Long*¹⁶⁷ ruled in favor of the freeholder. The owner of real estate terminated a billboard advertising lease with an advertising agency and claimed ownership of the billboard.¹⁶⁸ The trial court ruled in favor of the landowner and awarded damages resulting from a preliminary injunction that the advertising agency had obtained.¹⁶⁹ In affirming the trial court's decision that the landowner owned the sign, the supreme court began its analysis by stating that a fixture remains personalty, owned by the person who erected the structure, or becomes a part of the realty, depending upon the agreement between the parties.¹⁷⁰ Here the leases provided that the billboard was the property of the party which erected the sign, but that party could not be found.¹⁷¹ Furthermore, the leases provided that the lessee had the right to remove the fixture, yet the original lessee had not removed the sign. Accordingly, the party that constructed the sign had abandoned it, and the sign now belonged to the owner of the fee.¹⁷² In reversing the lower court's decision to award damages, the supreme court found that the landowner failed to introduce any evidence of the dam-

164. See *id.* at 421.

165. See *id.* at 422-23.

166. See *id.* at 423-24.

167. 253 Va. 206, 483 S.E.2d 224 (1997).

168. See *id.* at 207, 483 S.E.2d at 225.

169. See *id.* at 208, 483 S.E.2d at 226.

170. See *id.* at 209, 483 S.E.2d at 226-27.

171. See *id.* at 208-09, 483 S.E.2d at 226-27.

172. See *id.* at 209, 483 S.E.2d at 226-27.

ages that were naturally and proximately caused by the preliminary injunction.¹⁷³

R. *Landlord/Tenant*

In a rare, reported decision under the Virginia Fair Housing Law¹⁷⁴ (VFHL), the Portsmouth Circuit Court held that allegations that a landlord discriminated against members of another race in leasing and wrongfully terminated the plaintiff's lease because his child associated with members of another race constituted a good cause of action.¹⁷⁵ The plaintiffs were aggrieved parties under the VFHL because the landlord injured their rights to associate with members of another race.¹⁷⁶ Finally, the Wise Circuit Court found that a landlord does not owe a duty to protect tenants from the criminal acts of third persons unless the landlord knows that criminal assaults are occurring or about to occur.¹⁷⁷

173. *Id.* at 210-11, 483 S.E.2d at 227.

174. VA. CODE ANN. §§ 36-96.1 to -96.23 (Repl. Vol. 1996).

175. *See Stinson v. Nemie*, 39 Va. Cir. 85, 86 (Portsmouth City 1996).

176. *See id.*

177. *See Cantrell v. Norton Redevelopment & Hous. Auth.*, 39 Va. Cir. 99, 100 (Wise County 1996).

