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CIVIL PROCEDURE AND PRACTICE

*W. Hamilton Bryson**

This article considers recent developments in the field of Virginia civil procedure and practice, including statutes, rules of court, and opinions of the Supreme Court of Virginia and the Court of Appeals of Virginia that have appeared between May 1986 and May 1987. This article also comments on cases in volumes five through eight of *Virginia Circuit Court Opinions*, many of which were decided before 1986. It is appropriate to mention them here since they were only recently made generally available through publication. In order to facilitate the discussion of numerous Virginia Code sections, they will be referred to in the text by their section numbers only.

I. APPEALS FROM DISTRICT COURTS

In an appeal from a district court, an appeal bond must be posted within thirty days of the lower court judgment in order to perfect the appeal.¹ Upon an appeal from a general district court, the plaintiff may not amend the ad damnum in the circuit court to a sum greater than the jurisdiction of the district court.² When a judgment of a general district court in favor of one defendant but against another is appealed, all issues will be tried de novo.³ However, in an appeal from a district court upon a denial of a motion for a new trial, the circuit court will only consider the judge's de-

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1. *Bowles v. Jones*, 6 Va. Cir. 321 (Fairfax County Juvenile and Domestic Relations Dist. Ct. 1986); *Swimley v. Lamp*, 4 Va. Cir. 22 (Frederick County 1980); *Bland v. Byer*, 5 Va. Cir. 463 (Alleghany County 1975); *Pentagon Realty Co. v. Oddenino*, 5 Va. Cir. 448 (Arlington County 1974) (construing VA. CODE ANN. §§ 16.1-106, -107 (Repl. Vol. 1982)).

2. *Federal Real Estate & Inv. Corp. v. Carl Frye's Mobile Home & Modular Housing, Inc.*, 5 Va. Cir. 11 (Frederick County 1980).

3. *Nanney v. Navy Car Storage, Inc.*, 7 Va. Cir. 397 (Norfolk 1969).

nial of that motion.⁴ A general district court may not set aside a judgment under section 16.1-97 after thirty days have passed.⁵

After a circuit court has transferred the determination of child support, custody, and visitation to a juvenile and domestic relations court, it loses jurisdiction over those matters except on appeal from the lower court. The circuit court will not reconsider such matters when it determines the issue of divorce. The support orders of a juvenile court can be appealed to the circuit court or modified by the juvenile court, but the divorce suit under section 20-79(b) cannot be used as an alternative to the appellate procedure.⁶ Where matters relating to the custody and support of children are transferred to the juvenile and domestic relations district court of another county or city, appeals from such courts lie to the circuit court that had jurisdiction in the first instance.⁷

II. SERVICE OF PROCESS AND NOTICE OF CLAIMS

A. *General*

A person can have more than one place of abode, but service of process by tacking on the door of a house that is not any of the defendant's usual places of abode is invalid.⁸ A foreign corporation authorized to do business in Virginia can be served through any agent where such person resides;⁹ however, substituted service of process by posting on the door of the residence of the agent of the defendant corporation is invalid.¹⁰

The failure to serve process within one year after filing a motion for judgment will result in a dismissal under Rule 3:3.¹¹ Upon such a motion, the plaintiff has the burden of showing that he has exercised due diligence in attempting to have process served. Due diligence requires resort to the long arm statutes to obtain service.¹² A

4. *Plaza Motors, Inc. v. Walker*, 8 Va. Cir. 451 (Richmond 1987); *Showman v. Mumaw*, 6 Va. Cir. 43 (Shenandoah County 1983); *Lake Holiday Country Club v. Morton*, 6 Va. Cir. 21 (Winchester 1982).

5. *Rigg v. Old*, 6 Va. Cir. 9 (Norfolk 1981).

6. *Butterworth v. Butterworth*, 8 Va. Cir. 397 (Roanoke 1987); *O'Brien v. O'Brien*, 7 Va. Cir. 26 (Henrico County 1980) (construing VA. CODE ANN. § 20-79 (Repl. Vol. 1983)).

7. *Martin v. Carter*, 8 Va. Cir. 285 (Henrico County 1986).

8. *Coons & Thompson, Inc. v. Lapin*, 7 Va. Cir. 73 (Virginia Beach 1981).

9. *Butler v. Howard Johnson's*, 6 Va. Cir. 34 (Spotsylvania County 1983) (interpreting VA. CODE ANN. § 8.01-329(A) (Repl. Vol. 1984)).

10. *Lamb v. Seaboard Citizens Nat'l Bank*, 6 Va. Cir. 436 (Virginia Beach 1967).

11. *Christian v. Hautz*, 6 Va. Cir. 486 (Norfolk 1972) (citing VA. SUP. CT. R. 3:3).

12. *Longus v. Holben*, 5 Va. Cir. 57 (Arlington County 1982).

motion to dismiss for failure to serve process within one year will be overruled where the defendant was aware that he had been sued.¹³ A defendant can always make a voluntary appearance to respond and defend his interests.

The issue of paternity involves an in personam adjudication which cannot be made where process has been obtained by order of publication against an out-of-state defendant.¹⁴

An objection to personal or active jurisdiction must be raised by a motion to quash process or a motion in abatement filed simultaneously with or prior to any demurrer.¹⁵ If an objection to service of process is made at the same time that a notice is given to take depositions to prove improper service, any improper service is not waived by the general appearance. If a person is in Virginia solely to testify by deposition, he is immune from service of process.¹⁶

The curing statute, section 8.01-288, will not apply to defective service of process where the party did not actually receive notice in writing. Service on a party's secretary is insufficient unless the secretary was authorized to accept service.¹⁷

Several statutes¹⁸ were recently amended by the General Assembly so that service or acceptance of service of process in divorce and annulment cases is accomplished by the same procedures and in the same manner as all other civil suits. The former restrictions for divorce and annulment suits were removed.

B. *Long Arm Statute*

The Long Arm Statute is a single transaction statute. However, the defendant must have purposefully availed himself of the privilege of transacting business in Virginia in order to have minimum contacts with Virginia.¹⁹ Where the defendant acted directly in Virginia through its agent, the plaintiff, the Virginia courts can get jurisdiction over the defendant under the Long Arm Statute.²⁰

13. *Spinella v. Lynch*, 6 Va. Cir. 445 (Norfolk 1969).

14. *Nichols v. Nichols*, 5 Va. Cir. 478 (Alleghany County 1976).

15. *Cardinal Airlines v. McCauley Indus. Corp.*, 5 Va. Cir. 465 (Richmond 1975).

16. *Walker v. Witt*, 6 Va. Cir. 464 (Norfolk 1970).

17. *Lancaster & Clark Constr. Co. v. Davis*, 7 Va. Cir. 463 (Richmond 1976).

18. VA. CODE ANN. §§ 8.01-288, -320, -327, -328.1 (Repl. Vol. 1984 & Cum. Supp. 1987); *id.* §§ 20-99, -99.1 (Repl. Vol. 1983 & Cum. Supp. 1987).

19. *Goehring v. Roberts*, 5 Va. Cir. 234 (Alexandria 1985).

20. *C & P Air Conditioning Corp. v. Sure Air Ltd.*, 6 Va. Cir. 480 (Norfolk 1970) (interpreting VA. CODE ANN. § 8.01-328.1 (Cum. Supp. 1986)).

However, a series of telephone calls into Virginia giving orders for the shipment of goods is insufficient to establish "minimum contacts" with Virginia to give jurisdiction under the Long Arm Statute.²¹

An out-of-state corporation which used telephone calls and letters to cause an in-state employee to breach his contract with his in-state employer is not subject to the jurisdiction of in-state courts. Where a Virginia plaintiff and a Florida defendant negotiated by mail and telephone and then entered into a contract in Florida, there were not enough contacts with Virginia to give a Virginia court jurisdiction.²² However, an out-of-state corporation acting in state through its agent is covered by the Long Arm Statute.²³

C. *Service on the Secretary of the Commonwealth*

In recent years, the "long-arm" jurisdiction of the Virginia trial courts has grown to avalanche proportions, and the village in the valley that is threatened thereby is the Office of the Secretary of the Commonwealth. Creditors and their attorneys have realized that the Long Arm Statute applies to defaulting debtors who are domiciliaries of Virginia who have absconded and cannot be found.²⁴ The Long Arm Statute gives jurisdiction to the general district courts as well as to the circuit courts. The "long-arm" jurisdiction of the courts is obtained by serving the process on the Secretary of the Commonwealth, who is the statutory agent of a defendant who cannot be located and served in Virginia. Having been served with process, the Secretary of the Commonwealth is then under a statutory duty to mail the process to the defendant at his last known address and to send a certificate of compliance to the clerk of the court.²⁵

The recent great increase in the serving of process through the Office of the Secretary of the Commonwealth has raised several serious problems. The General Assembly dealt with these problems

21. *Onduline U.S.A. v. Baker*, 6 Va. Cir. 49 (Spotsylvania County 1983) (construing VA. CODE ANN. § 8.01-328.1(A)(1) (Cum. Supp. 1986)); *ESMA Chemicals, Inc. v. Norfolk Dental Labs., Inc.*, 6 Va. Cir. 29 (Virginia Beach 1982) (construing former VA. CODE ANN. § 13.1-119 (Repl. Vol. 1973), present § 13.1-758 (Repl. Vol. 1985 & Cum. Supp. 1987)).

22. *Econo-Travel Motor Hotel Corp. v. Bailey*, 7 Va. Cir. 461 (Norfolk 1976).

23. *North Fork Shenandoah, Inc. v. Bunning*, 7 Va. Cir. 327 (Warren County 1986).

24. See VA. CODE ANN. § 8.01-328 (Cum. Supp. 1986).

25. See *id.* §§ 8.01-328 to -330 (Repl. Vol. 1984 & Cum. Supp. 1986).

at its last session, by amending section 8.01-329 in several significant ways.

A new sentence was added to the end of subsection A1 to emphasize and to define the "due diligence" requirement of this statute. When the defendant is a resident of the Commonwealth, the plaintiff must file an affidavit that he was unable to locate the defendant "after exercising due diligence" to find him. When the plaintiff files such an affidavit, he is now certifying that he has attempted service in the normal manner pursuant to section 8.01-293 and also that he "has made a bona fide attempt to determine the actual place of abode or location" of the defendant. It appears that the absolute minimum search would include the telephone directory and the city directory. Proof of failure to exercise due diligence to find the defendant will invalidate the service of process and thus defeat the jurisdiction of the court.²⁶ It is to be remembered that service of process under the Long Arm Statute is an "extraordinary" procedure to be used only when the normal methods fail. The affidavit of due diligence is not a mere formality to be signed with no thought given to its truth.

An amendment to subsection B allows the plaintiff to mail the process, the pleadings, and the affidavit of due diligence directly to the office in Richmond, thereby serving the Secretary of the Commonwealth. The plaintiff can save time and control the procedure by avoiding the local clerks' and sheriffs' offices. The procedure will also relieve the Sheriff of the City of Richmond from the enormous burden of officially serving the Secretary with these papers received from all parts of the state. In the past, the Secretary received these papers through official service and by informal delivery and mailing. The Secretary voluntarily accepted process, and this was a cure for any defect. Now, delivery by hand or by mail is expressly permitted.

Another amendment to subsection B allows the Secretary of the Commonwealth to send the papers to the defendant by first class mail instead of registered or certified mail. Although there will be no official notice in the Secretary's file that a mailing was not successful, the undeliverable letter itself will be returned by the post office. If the plaintiff wants a receipt from the post office to show to the court, he can send a copy of the papers by certified mail himself. The purpose of deleting the old requirement of registered

26. *Mannino v. Manley*, 8 Va. Cir. 535 (Richmond 1979).

or certified mail was the belief that first class mail is more effective notice because many persons refuse to accept registered mail. Does good news ever come by registered mail? Are checks ever sent by certified mail?

The most fundamental change in the law of service of process is the new sentence that was added to the end of subsection B. The general rule is that service of process is effective on the date that it was given to the defendant or his statutory agent. The twenty-one day period of Rules 2:7 and 3:5 regarding a defendant's default begins to run from that date. In the recent past, the inadequate staffing of the Office of the Secretary of the Commonwealth has resulted in delays between the date of service on the Secretary and the mailing of the papers to the defendant. Although it is not known to have happened, it is not unimaginable that the papers might be mailed after the twenty-one day period for the defendant's response has expired. A judge has the discretion under Rule 1:9 to allow a late response. However, if the defendant does not receive the papers before the plaintiff moves for default judgment, he will be unaware of his need to make a motion for leave to file late. In this situation or if the court should refuse to allow a late response and default judgment goes against the defendant, the Commonwealth might be liable. This would be negligence on the part of the Office of the Secretary of the Commonwealth in performing the non-discretionary duty of mailing the papers to the defendant.

The new sentence at the end of subsection B avoids this potential liability and gives an additional measure of fairness to defendants by giving them the full twenty-one days notice in fact. It dates the effectiveness of the service on the Secretary of the Commonwealth from the time that the Secretary's certificate of compliance is filed in the clerk's office of the trial court where the action is pending. Thus, the time that it takes the Secretary's office to complete the handling and mailing of the papers is not counted against the defendant's twenty-one day period to find an attorney and make a response.

Other amendments clarify the statute by expressly permitting agents of a plaintiff to make the affidavit and to deliver the papers to the Secretary. By changing the date of the effectiveness of the process, the amendment gives the Secretary of the Commonwealth some leeway if a backlog should develop. However, it does not solve the problem of service of process in the general district courts

where the time of default is the return day set by the plaintiff. In many past instances, the Office of the Secretary has received process within a day or two of the return day, making it impossible to give fair notice to the defendant.²⁷ A new subsection B1 states that process that is received by the Secretary within ten days of the return date is invalid. The Secretary will reject it and return it and the fee to the plaintiff. A notice of the rejection will then be sent to the clerk of the general district court. This amendment, like the others, will increase the fairness of the procedure to defendants who are being served by this statutory method.²⁸

D. *Virginia Tort Claims Act*

The Commonwealth is liable for the torts of its employees under the doctrine of respondeat superior, but no recovery can exceed \$25,000 or a sum for which the Commonwealth is insured.²⁹ The Commonwealth can and does insure its employees in addition to insuring itself, but this is a matter of the liability of and indemnity to the employee, not to the Commonwealth itself.

The doctrine of sovereign immunity bars claims under the Tort Claims Act that are not prosecuted according to the requirements of that statute.³⁰ For example, actual notice is not an acceptable substitute for substantial compliance with the notice requirements of the Tort Claims Act.³¹ A state prisoner claiming to have been injured by the negligent computation of his parole eligibility date must file a written statement giving the nature of the claim and the time and place that it occurred. The statement must be given to the head of the Department of Corrections within six months.³² The notice of a claim under the Virginia Tort Claims Act must be given to the Attorney General. The court cannot deem anyone to be the statutory agent of the Attorney General.³³

27. Note that process in a general district court must be served five days before the return date. VA. CODE ANN. § 16.1-80 (Repl. Vol. 1982).

28. The author would like to acknowledge the assistance of Myra Federspiel, Deputy Secretary of the Commonwealth, and Gregory J. Haley, Assistant Attorney General, with this section.

29. *Trimyer v. Commonwealth*, 5 Va. Cir. 209 (Henrico County 1984) (construing VA. CODE ANN. § 8.01-195.3 (Cum. Supp. 1986)).

30. *Gouldthorpe v. Commonwealth*, 6 Va. Cir. 295 (Nottoway County 1986); *United Va. Bank v. Commonwealth*, 6 Va. Cir. 262 (Richmond 1985).

31. *Ortiz v. Commonwealth*, 6 Va. Cir. 312 (Augusta County 1986).

32. *Jones v. Vassar*, 6 Va. Cir. 167 (Richmond 1984).

33. *Greene v. Lynch*, 5 Va. Cir. 315 (Richmond 1986) (construing VA. CODE ANN. § 8.01-195.6 (Cum. Supp. 1986)).

The requirement of section 8.01-222 that notice be given to a city of a claim for damages for negligence is not jurisdictional. The exact location of the accident need not be pinpointed as long as the city has fair notice and can find or has already found it.³⁴

III. VENUE

In an action against an unknown uninsured motorist, venue is determined as if the insurance carrier were the defendant.³⁵ In a suit where most of the parties and witnesses reside or are employed in another city and the transaction occurred in that same city, the court will transfer the suit to that city as a more convenient forum.³⁶ Even though venue is proper under section 8.01-263 relating to multiple parties, the court has the discretion to transfer the case to a more convenient forum under section 8.01-265.³⁷ A corporation can have a residence for the purpose of the venue statute dealing with multiple parties, and where there are multiple corporate defendants, venue must be correct as to at least one resident corporation. A case arising out of the same transaction as another case in another forum should be transferred to that other forum as a matter of judicial economy.³⁸

The Virginia forum non conveniens statute applies to the Federal Employer's Liability Act (F.E.L.A.) actions that are filed in state courts.³⁹ The constitutionality of the forum non conveniens statute, which prohibits a court from dismissing a suit to a more convenient forum in another state, has been recently questioned⁴⁰ and defended.⁴¹

A new subsection C was added recently to section 20-96 to allow a judge in a divorce or annulment suit to transfer the case to another forum that has jurisdiction under the Code.⁴² It appears that

34. *Benson v. City of Fredericksburg*, 6 Va. Cir. 122 (Fredericksburg 1984).

35. *Howell v. Doe*, 5 Va. Cir. 418 (Richmond 1967).

36. *Sea Mist, Inc. v. Gloucester Trawlers, Inc.*, 6 Va. Cir. 33 (Norfolk 1982).

37. *Simmons v. Drew*, 5 Va. Cir. 519 (Virginia Beach 1978).

38. *Claypoole v. Ag-Chem Equip. Co.*, 6 Va. Cir. 404 (Richmond 1986) (construing VA. CODE ANN. §§ 8.01-263(1), -265 (Repl. Vol. 1984)).

39. *Spencer v. N. & W. Ry.*, 8 Va. Cir. 12 (Norfolk 1980). The provisions of F.E.L.A. are codified at 45 U.S.C. §§ 51 to 60 (1982).

40. *Towe v. Southern Ry.*, 6 Va. Cir. 422 (Norfolk 1986).

41. *Poston v. Norfolk Southern Ry.*, 6 Va. Cir. 548 (Norfolk 1979) (construing VA. CODE ANN. § 8.01-265 (Repl. Vol. 1984)).

42. VA. CODE ANN. § 20-96(C) (Cum. Supp. 1987).

this new power can be exercised only where the suit was originally brought in a correct forum and there is another correct forum to receive the case. Since venue is jurisdictional in divorce cases, it would seem that the court would not have the power to make an order of transfer if the suit was brought in an incorrect forum. In the present era of no-fault divorce, it may be that the principle that venue is mandatory and jurisdictional because divorce is a purely statutory right should be changed. Arguably, venue in divorce suits should be made a matter of preferred venue under section 8.01-261.⁴³ This would prevent an inadvertent choice of the wrong forum from making the entire divorce proceeding void. It would allow the parties to waive the venue requirements if they both chose to do so.

Actions that are subject to the federal Fair Debt Collection Practices Act (the "Act") must be brought where the defendant consumer "signed the contract sued upon" or where he resides.⁴⁴ In 1986, this Act was amended to include attorneys collecting a debt on behalf of a client. Thus, banks, merchants, and others who hire lawyers to sue their debtors may be indirectly brought within the ambit of this federal venue requirement.⁴⁵ Apparently, the purpose of the 1986 amendment was to include attorneys who are in the business of collecting debts of others and are acting as collection agencies. The Act is so broadly drafted, however, that it appears to include all attorneys who are representing a plaintiff who is suing on a debt. Numerous anomalies and problems have been created, but they lead into the area of debtor-creditor relations and are thus beyond the scope of this article.

IV. PARTIES

In a suit to enforce a mechanic's lien, the trustee and the beneficiary of an antecedent deed of trust on the land are necessary parties.⁴⁶

The requirement of section 53-307, that a person convicted of a

43. This section lists forums designated preferred venues for a variety of actions. VA. CODE ANN. § 8.01-261 (Cum. Supp. 1987). Venue in divorce proceedings is explicitly excluded. *Id.* § 8.01-259 (Cum. Supp. 1987).

44. 15 U.S.C. § 1692i(a)(2) (1982).

45. Pub. L. No. 99-361, 100 Stat. 768 (1986) (amending 15 U.S.C. § 1692a(6)); Hazard, *Debtors Who Don't Act Waive Their Rights*, Richmond Times-Dispatch, Jan. 14, 1987, at C1-2.

46. *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 348 S.E.2d 223 (1986).

felony and sentenced to prison may not sue but his litigation must be brought by a committee, is procedural, not jurisdictional, and the court may allow the pleadings to be amended to substitute the committee as plaintiff.⁴⁷

Where multiple plaintiffs allege separate and distinct claims, there is a misjoinder of parties plaintiff. Co-plaintiffs must have joint interests.⁴⁸ There is a misjoinder of defendants where a motion for judgment alleges independent claims against separate defendants not alleged to be jointly liable.⁴⁹

An intervenor in a suit cannot assert rights and defenses belonging to other parties that were not asserted by those other parties.⁵⁰

A proper party plaintiff cannot be substituted in the place of a plaintiff who had no standing to sue because he had no cause of action against the defendant. To substitute a new party who has developed a cause of action or a different cause of action is very different from joining or substituting a new party who has the same cause of action already in litigation.⁵¹

Section 16.1-77 was recently amended to give the general district courts the jurisdiction to decide suits in interpleader if the suit does not require the issuance of an injunction. General district courts do not have injunctive powers.

An insurance company that has become subrogated to the rights of its insured may sue in its own name or in the name of its insured.⁵²

V. PLEADING

A. *General*

A plaintiff cannot avoid the requirement of a medical malpractice review panel by couching his claim in contractual terms.⁵³

47. *Cassell v. Bundy Truck Line, Inc.*, 5 Va. Cir. 475 (Botetourt County 1976).

48. *Dixon v. Robertson*, 5 Va. Cir. 544 (Henrico County 1979).

49. *Rasnick v. Pittston Co.*, 5 Va. Cir. 336 (Wise County 1986); *Pierce v. AVCO Fin. Servs.*, 7 Va. Cir. 420 (Richmond 1972).

50. *Norfolk Division of Social Serv. v. Unknown Father*, 2 Va. App. 420, 345 S.E.2d 533 (1986).

51. *Chesapeake House on the Bay, Inc. v. Virginia Nat'l Bank*, 231 Va. 440, 344 S.E.2d 913 (1986).

52. *Harbour v. Travelers Indem. Co.*, 7 Va. Cir. 406 (Norfolk 1971) (interpreting VA CODE ANN. § 38.1-31.2 (Repl. Vol. 1981), present § 38.2-207 (Repl. Vol. 1986)).

53. *Ferguson v. Ford*, 5 Va. Cir. 65 (Lynchburg 1982).

As a general rule, a single cause of action cannot be divided and sued in several actions. However, a defendant may consent to the splitting of a cause of action, and such consent can be implied by the defendant's conduct.⁵⁴

A plaintiff will not be allowed to amend his pleadings after a verdict to increase the ad damnum clause where the claim is for unliquidated damages. As the Virginia Supreme Court ruled,

[i]t would be unfair to cause a defendant and other interested parties to believe that plaintiff's claim is for a certain amount and no more only to let the jury award a greater amount. Such a procedure would disrupt the orderly conduct of trials and bring uncertainty to defendants and others who may be called upon to pay the amounts awarded against defendants.⁵⁵

A bill of particulars will not be ordered when the motion for judgment gives the defendant sufficient information to prepare a defense. A bill of particulars will not require a plaintiff to go into matters of evidence.⁵⁶

The doctrine of laches cannot be applied as a defense to an action at common law, nor can laches be imputed to a municipal corporation acting in its governmental capacity.⁵⁷

Where a bill of complaint was filed before the effective date of a statute that did not affect "pending litigation," a cross-bill filed after the date of the statute is not governed by the statute since it becomes a part of the litigation already pending.⁵⁸

An unliquidated counterclaim in the nature of an offset can be asserted under Rule 3:8.⁵⁹ The time for filing counterclaims in cases appealed or removed from the district courts is not controlled by any rule of court or statute but is governed by the judicial discretion of the circuit court judge.⁶⁰

A judgment may be set aside for fraud in the procurement of the

54. *Norfolk Wholesale Floral Corp. v. Fraim*, 6 Va. Cir. 438 (Norfolk 1968).

55. *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 469, 344 S.E.2d 916, 919 (1986).

56. *Commonwealth v. Smith*, 7 Va. Cir. 103 (Norfolk 1982); *Commonwealth v. Rasnake*, 7 Va. Cir. 521 (Norfolk 1978); *Cephas v. Flowers*, 5 Va. Cir. 414 (Richmond 1962).

57. *City of Portsmouth v. City of Chesapeake*, 232 Va. 158, 164, 349 S.E.2d 351, 354 (1986).

58. *Bowen v. Bowen*, 6 Va. Cir. 71 (Newport News 1983).

59. *Johns-Manville Sales Corp. v. Carper & Mace Corp.*, 7 Va. Cir. 385 (Richmond 1963).

60. *G & G Roofing Co. v. Harris*, 5 Va. Cir. 332 (Clarke County 1986).

judgment but not for fraud in the procurement of the underlying contract. In an action of debt on a foreign judgment, no counterclaim barred by the foreign judgment can be prosecuted in Virginia.⁶¹

A defendant who acts in good faith and with care, and sends the process to his insurance company, will be allowed to file a late answer.⁶² A plaintiff will be granted leave to file a late reply where there will be no surprise or prejudice to the defendant.⁶³

B. Joinder

Two separate plaintiffs having separate and distinct claims arising out of the same transaction may not unite such claims in a single action against a defendant.⁶⁴ A motion for judgment which joins two defendants but does not allege joint liability is subject to demurrer.⁶⁵

A plaintiff may join a suit to set aside a fraudulent conveyance with a suit for a divorce under Rule 1:4 if the claims arise out of the same transaction.⁶⁶ On the other hand, a cross-bill for alimony is not germane to a bill for the partition of property. A court can divide marital property under section 20-107.3 only in a divorce proceeding.⁶⁷

The statute that grants a right of action for death by wrongful act⁶⁸ prevents the operation of the survival statute⁶⁹ from keeping alive any right of action resulting from the same act that caused the wrongful death. Thus, in a wrongful death case, the estate of the decedent and its creditors lose any compensation for pain and suffering, but the decedent's surviving dependents receive damages as solace for their loss.⁷⁰ If an injured person dies from the injuries,

61. *American Inst. of Mktg. Sys., Inc. v. Womble Realty, Inc.*, 6 Va. Cir. 473 (Norfolk 1970).

62. *Gimbert v. Rowley*, 6 Va. Cir. 435 (Norfolk 1964); *see also Gannt v. Kay Management, Inc.*, 8 Va. Cir. 221 (Alexandria 1986).

63. *Cottrell v. West*, 6 Va. Cir. 440 (Norfolk 1969).

64. *Dixon v. Robertson*, 5 Va. Cir. 544 (Henrico County 1979).

65. *Rasnack v. Pittston Co.*, 5 Va. Cir. 336 (Wise County 1986); *Pierce v. AVCO Fin. Servs.*, 7 Va. Cir. 420 (Richmond 1972).

66. *Ghaffarian v. Ghaffarian*, 6 Va. Cir. 345 (Fairfax County 1986).

67. *Dodson v. Dodson*, 6 Va. Cir. 196 (Fairfax County 1985).

68. VA. CODE ANN. § 8.01-50(A) (Repl. Vol. 1984).

69. *Id.* § 8.01-25.

70. *Bagley v. Weaver*, 211 Va. 779, 180 S.E.2d 686 (1971) (injured plaintiff died of natural causes).

only a wrongful death action may be brought.⁷¹ If an injured person sues and then dies of those injuries, then the action for personal injury is transformed into an action for wrongful death.⁷² If an injured person dies but it is unclear whether the death resulted from those injuries, then, according to a recent ruling, the only action available is one for wrongful death.⁷³

An action for personal injury not resulting in the death of the plaintiff's decedent can probably be pleaded alternatively with one for wrongful death where the cause of death is at issue.⁷⁴ The Wrongful Death Statute forbids the survival of actions for personal injury only where the wrongful death has been alleged or established. If there was no wrongful death, then there should be compensation for personal injuries. Thus, these separate and independent causes of action should be allowed as alternatives though not as cumulative remedies. Otherwise, a jury might find that the defendant injured the decedent but that the injury did not kill him. The plaintiff would then have to initiate a new action for personal injury, if it were not barred by the statute of limitations.

C. *Declaratory Judgments*

Declaratory judgment proceedings may not be used as a substitute for regular and adequate remedies. An adequate remedy at law does not mean a perfect remedy.⁷⁵ However, an action for a declaratory judgment must be based on a justiciable case or controversy. The Declaratory Judgment Act does not provide for advisory opinions.⁷⁶ The interpretation of a statute is a proper subject for a declaratory judgment.⁷⁷ A county can be made a defendant in a declaratory judgment action to construe a zoning ordinance.⁷⁸ A third party claim under Rule 3:10 may seek declaratory relief.⁷⁹

Where a party is being prosecuted in the general district court

71. *Orne v. Kendrick*, 6 Va. Cir. 136 (Richmond 1984); *Rhodes v. Painter*, 6 Va. Cir. 68 (Fredericksburg 1983).

72. VA. CODE ANN. §§ 8.01-25, -56 (Repl. Vol. 1984).

73. *Anderson v. Fleming*, 6 Va. Cir. 208 (Dickenson County 1985); *see also Rhodes v. Painter*, 6 Va. Cir. 68 (Fredericksburg 1983).

74. *See* VA. CODE ANN. § 8.01-281 (Repl. Vol. 1984).

75. *Berry v. Hartford Cas. Co.*, 5 Va. Cir. 481 (Richmond 1977) (construing former VA. CODE ANN. § 8-585 (Repl. Vol. 1957), present § 8.01-191 (Repl. Vol. 1984)).

76. *Prudential Property & Casualty Ins. Co. v. Jeffers*, 7 Va. Cir. 107 (Richmond 1982).

77. *Tony Guiffre Distrib. Co. v. A.B.C. Comm'n*, 5 Va. Cir. 243 (Alexandria 1985).

78. *Moore Bros. v. Augusta County*, 5 Va. Cir. 454 (Augusta County 1974).

79. *Shaw v. Sean Enter., Inc.*, 6 Va. Cir. 191 (Fairfax County 1985).

and he then sues in the circuit court for a declaratory judgment on the same issues and for an injunction, the circuit court will stay its suit until the district court has rendered a judgment.⁸⁰

VI. STATUTES OF LIMITATIONS

A. *General*

An action filed in the clerk's office on the last day allowed by the statute of limitations but after the normal business hours of the clerk's office is not timely filed.⁸¹

Although section 8.01-229 tolls the statute of limitations for plaintiffs who take nonsuits, it does not apply to cross-claims between defendants in nonsuited actions.⁸²

Bringing a new party into a suit is a new and different demand which does not relate back to the original filing, and the statute of limitations is not tolled until the new party is brought in.⁸³ A plaintiff cannot toll the statute of limitations by suing an unknown person under the name of John Doe. To call an unknown person John Doe is not a misnomer but a misdescription.⁸⁴

B. *Accrual*

The statute of limitations period does not start to run until the plaintiff has sustained an injury. Where a negligently designed and manufactured appliance causes a fire, the cause of action for negligence accrues on the date of the fire.⁸⁵ The action accrues, however, when the damage occurs whether the injured party discovers the damage or not.⁸⁶

In a professional malpractice case, the statute of limitations starts to run when the course of professional advice ends.⁸⁷ This

80. *Fraternal Order of Police v. Fairfax County*, 7 Va. Cir. 349 (Fairfax County 1986).

81. *Vaillancourt v. Paton*, 6 Va. Cir. 344 (Newport News 1986).

82. *Tillman v. Taylos Dev. Corp.*, 5 Va. Cir. 137 (Alexandria 1984).

83. *United Inc. v. National Capital*, 8 Va. Cir. 48 (Alexandria 1982).

84. *Carroll v. Charles E. Smith, Inc.*, 8 Va. Cir. 222 (Alexandria 1986).

85. *Stone v. Ethan Allen, Inc.*, 232 Va. 365, 350 S.E.2d 629 (1986) (no damage had occurred before the appliance allegedly set fire to the plaintiff's house).

86. *Evans v. National Hosp. for Orthopaedics & Rehabilitation*, 5 Va. Cir. 385 (Arlington County 1986) (construing VA. CODE ANN. § 8.01-243(A) (Cum. Supp. 1986)).

87. *Keller v. Denny*, 236 Va. 512, 352 S.E.2d 327 (1987); *Virginia Corp. v. Hessler*, 5 Va. Cir. 247 (Alexandria 1985) (construing VA. CODE ANN. § 8.01-246 (Repl. Vol. 1984)); *Cockrell v. Brogan*, 7 Va. Cir. 176 (Warren County 1982) (applying VA. CODE ANN. § 8.01-230 (Repl.

“continuing treatment” rule does not apply to pharmacists.⁸⁸ A claim for professional malpractice cannot be characterized as a claim for a mistake in having paid the fee in order to delay the accrual of the cause of action.⁸⁹ An action for professional negligence is one for a breach of contract.⁹⁰

Where persons maintain a continuous course of interrelated services, a cause of action does not accrue until the services are terminated. Thus, where a client is represented by the same attorney over a long period of time in reference to many interrelated transactions, the attorney can sue for all of his fees within three years of the last transaction.⁹¹

A cause of action for fraud accrues when the fraud is discovered or should have been discovered by the exercise of due diligence.⁹² Where libelous material is published more than once, the cause of action arises when the material was first made available to the public.⁹³ A cause of action for subrogation accrues when the payment is made by the subrogee. A subrogation action is governed by the three-year limitation of section 8.01-246(4).⁹⁴

A cause of action for contribution against a joint tortfeasor does not accrue until payment of the judgment or claim. The recent amendment to the tolling provisions of the statutes of limitations, section 8.01-229(I), applies to causes of action that have accrued but have not been brought. Section 8.01-229(I) extends for sixty days any limitation period for third party claims when the original action is brought within thirty days before the expiration of the limitation period.⁹⁵

An insurance policy with a limitation period required by statute does not transform the limitation into a mere contractual agree-

Vol. 1984)); *Smith v. Hampton*, 7 Va. Cir. 168 (Alexandria 1982); *Roussell v. Clark*, 7 Va. Cir. 99 (Richmond 1982); *Branca v. Northern Va. Doctors Hosp.*, 5 Va. Cir. 19 (Arlington County 1981); *Bottomly v. Sullivan*, 7 Va. Cir. 484 (Arlington County 1978); *Donovan v. Deyerle*, 8 Va. Cir. 464 (Richmond 1963).

88. *Coakley v. Orr*, 6 Va. Cir. 170 (Loudoun County 1984).

89. *Cockrell v. Brogan*, 7 Va. Cir. 176 (Warren County 1982).

90. *Roussell v. Clark*, 7 Va. Cir. 99 (Richmond 1982); *Smith v. Hampton*, 7 Va. Cir. 168 (Alexandria 1982); *Branca v. Northern Va. Doctors Hosp.*, 5 Va. Cir. 19 (Arlington County 1981); *Bottomly v. Sullivan*, 7 Va. Cir. 484 (Arlington County 1978).

91. *Wood v. Carwile*, 231 Va. 320, 343 S.E.2d 346 (1986).

92. *Wood v. Feddon*, 5 Va. Cir. 228 (Alexandria 1985) (construing VA. CODE ANN. § 8.01-249 (Cum. Supp. 1986)).

93. *Moon v. CBS, Inc.*, 7 Va. Cir. 68 (Richmond 1981).

94. *GEICO v. Haffey*, 6 Va. Cir. 433 (Norfolk 1963).

95. *Vaughan v. Callear*, 5 Va. Cir. 366 (Richmond 1986).

ment. Therefore, section 8.01-229(E)(3) allows a suit on such a policy to be recommenced within six months of a nonsuit.⁹⁶

Where a defendant conceals a right of action from the plaintiff, the statute of limitations is tolled until the cause of action is discovered.⁹⁷ Only actual concealment, involving fraud and moral turpitude will toll the statute of limitations.⁹⁸ Fraud necessary to toll the running of the statute of limitations must be such as is intended "to conceal the discovery of the cause of action by trick or artifice and must have thus actually concealed it."⁹⁹ Arbitrary, capricious, and erroneous actions will not toll the statute of limitations.¹⁰⁰

C. *Time Limits*

Section 8.01-248 is a general statute of limitations for personal actions for which no other statute of limitations applies. There are other statutes which clearly apply to contracts, to property rights, and to personal injuries. The one-year period of section 8.01-248 refers to personal actions but not to personal, physical injuries. Thus, section 8.01-248 applies to actions for defamation,¹⁰¹ insulting words,¹⁰² wrongful termination of employment,¹⁰³ malicious prosecution and abuse of process,¹⁰⁴ false imprisonment,¹⁰⁵ and humiliation arising from a battery.¹⁰⁶

An action for personal injury must be brought within two years.¹⁰⁷ The tort of intentional infliction of emotional harm is gov-

96. *Tolley v. Southern Mut. Ins. Co.*, 7 Va. Cir. 23 (Henrico County 1980).

97. *Marshall v. Robinson*, 6 Va. Cir. 1 (Norfolk 1980).

98. *Maroto v. Weddle*, 6 Va. Cir. 360 (Virginia Beach 1986).

99. *Midland-Ross Corp. v. Adamson Co.*, 6 Va. Cir. 512 (Richmond 1977); *see also* *Donovan v. Deyerle*, 8 Va. Cir. 464 (Richmond 1963).

100. *John Driggs Co. v. Commonwealth*, 7 Va. Cir. 53 (Richmond 1981).

101. *Ellison v. St. Mary's Hosp.*, 8 Va. Cir. 330 (Henrico County 1987); *Marshall v. Medical Facilities of Am., Inc.*, 6 Va. Cir. 410 (Lynchburg 1986); *Reinforced Earth Co. v. Ashcraft & Gerel*, 3 Va. Cir. 143 (Alexandria 1983); *Beasley v. Kayo Oil Co.*, 3 Va. Cir. 119 (Chesterfield County 1983); *Moon v. CBS, Inc.*, 7 Va. Cir. 68 (Richmond 1981); *Gaines v. Safeway Stores*, 7 Va. Cir. 468 (Richmond 1977).

102. *Gaines*, 7 Va. Cir. 468.

103. *Medical Facilities*, 6 Va. Cir. 410; *Crowder v. Chap Stick Co.*, 6 Va. Cir. 115 (Lynchburg 1984).

104. *Crowder*, 6 Va. Cir. 115; *Beasley*, 3 Va. Cir. 119; *Ferguson v. Flinchum*, 7 Va. Cir. 373 (Roanoke 1959).

105. *Beasley*, 3 Va. Cir. 119; *Gaines*, 7 Va. Cir. 468; *Ferguson*, 7 Va. Cir. 373.

106. *Gaines*, 7 Va. Cir. 468.

107. *Evans v. National Hosp.*, 5 Va. Cir. 385 (Arlington County 1986) (applying VA. CODE ANN. § 8.01-243(A) (Cum. Supp. 1986)).

erned by the two-year statute of limitations of section 8.01-243(A).¹⁰⁸ A cause of action for personal injuries arising out of an innkeeper's duty to protect his guests is also covered by this section.¹⁰⁹ Section 8.01-243(A) was recently amended to give a two-year limitations period for actions for damages resulting from fraud.

An action for direct damage to property must be brought within five years of accrual, but an action for indirect damages must be brought within one year.¹¹⁰ An action for conversions of personal property must be brought within the five-year limitations period of section 8.01-243(B).¹¹¹

In a contract for the sale of real estate, a misrepresentation of the number of habitable units results in damage to the buyer's property interest, and therefore, section 8.01-243(B) is applicable.¹¹² A suit for breach of warranty against structural defects sounds in contract and the right accrues on the date of breach, in this case, when the repairs were completed.¹¹³ An action for negligence resulting in damage to property is governed by the five-year statute of limitations, and accrues at the time of injury.¹¹⁴

An elevator is machinery and not an improvement to real property for the purposes of the section 8.01-250 limitations period.¹¹⁵ An action for negligence of an attorney in performance of professional services while sounding in tort is an actual breach of contract, and thus it is governed by the three-year statute of limitations applicable to contracts, section 8.01-246(4).¹¹⁶ A suit to impose a constructive trust must be brought within five years after the right accrues.¹¹⁷

108. *Medical Facilities*, 6 Va. Cir. 410.

109. *Mulliken v. Sheraton Inns, Inc.*, 7 Va. Cir. 466 (Spotsylvania County 1977).

110. *Wolf v. Groh*, 5 Va. Cir. 217 (Virginia Beach 1984).

111. *Commercial and Sav. Bank v. Coss Welding Supply, Inc.*, 8 Va. Cir. 59 (Winchester 1983).

112. *Roussell v. Clark*, 7 Va. Cir. 99 (Richmond 1982) (applying the five-year limitations period).

113. *Harbour Gate Owners' Ass'n v. Berg*, 232 Va. 98, 348 S.E.2d 252 (1986) (construing VA. CODE ANN. § 55-79.79(b) (Cum. Supp. 1987)).

114. *Tannery House Condominium Unit Owners Ass'n v. Development Resources, Inc.*, 8 Va. Cir. 207 (Alexandria 1986).

115. *Sanders v. Reynolds Assoc.*, 8 Va. Cir. 162 (Alexandria 1986).

116. *Keller v. Denny*, 232 Va. 512, 352 S.E.2d 327 (1987); *Virginia Corp. v. Hessler*, 5 Va. Cir. 247 (Alexandria 1985); *Roussell v. Clark*, 7 Va. Cir. 99 (Richmond 1982).

117. *Foltz v. Foltz*, 5 Va. Cir. 141 (Frederick County 1984) (construing VA. CODE ANN. § 8-24 (Repl. Vol. 1957) (recodified at VA. CODE ANN. § 8.01-243(B) (Repl. Vol. 1984))).

The constitutionality of the disparity in time limits for suing on foreign judgments as opposed to domestic judgments was considered in the case of *Carter v. Carter*.¹¹⁸ Four Justices of the Virginia Supreme Court felt that the disparity was constitutional; three thought not.

VII. DISCOVERY

In *Seabrook v. Health Group*,¹¹⁹ the plaintiff made 756 requests for admissions. The court held that the sheer volume and scope of requests for admissions alone made them objectionable.

Income tax returns are discoverable if they relate to damages alleged by the plaintiff. A party must disclose communications from his attorney unless such communications would reveal privileged matters confided by him to his attorney.¹²⁰ The work product doctrine applies to materials prepared in anticipation of litigation by persons who are not parties to the pending litigation. Where the witnesses are freely available to all parties, there is no good cause to violate the work product privilege.¹²¹ A document prepared in the course of employment is not privileged from discovery unless it was made in anticipation of litigation.¹²²

Section 63.1-53, which provides for the confidentiality of welfare records, prohibits the voluntary disclosure by their custodians. When they are called for by a subpoena duces tecum, however, they must be produced.¹²³

A person is not required to respond to discovery in a civil suit if it may result in self-incrimination in a later criminal prosecution. "Use immunity" is an insufficient protection, but if the person has a "blanket immunity" from prosecution, he will be compelled to respond in the civil action.¹²⁴ An attorney may assert his client's privilege against self-incrimination.¹²⁵

A required blood test to determine paternity does not violate a

118. 232 Va. 166, 349 S.E.2d 95 (1986) (construing VA. CODE ANN. §§ 8.01-252, -251 (Cum. Supp. 1987)).

119. 8 Va. Cir. 220 (Alexandria 1986).

120. *Eden, Hannon & Co. v. Boothe, Prichard & Dudley*, 8 Va. Cir. 225 (Alexandria 1986).

121. *Harris v. Skyhook Corp.*, 8 Va. Cir. 307 (Richmond 1987).

122. *Mayfield v. District of Columbia*, 8 Va. Cir. 157 (Alexandria 1986).

123. *Meckenberg v. Becker*, 5 Va. Cir. 458 (Arlington County 1974).

124. *Security Title Guar. Corp. v. Brice*, 5 Va. Cir. 226 (Virginia Beach 1985).

125. *Jiorle v. Jiorle*, 7 Va. Cir. 535 (Arlington County 1979).

person's privilege against self-incrimination. The power to order a blood test implies the power to order the alleged father to pay the expenses of making the test and of calling witnesses.¹²⁶ Where a court was unable to determine paternity, the order dismissing the case is not a bar to later litigation of the same issue.¹²⁷

Since the attorney-client privilege exists only to protect the client, only the client can waive it.¹²⁸ An inadvertent disclosure does not waive an attorney's work product privilege.¹²⁹

An expert witness is one whose first connection with the case is a result of his employment to testify. Therefore, a physician who treats a party before the litigation is a fact witness, not an expert witness.¹³⁰ A defendant physician must give his expert opinion as to the standard of care in a particular community, and he must answer as to whether he adhered to that standard of care.¹³¹

City council members may be required to give depositions to discover the motives and actions of third parties.¹³² As a general rule, the expenses of a deponent in attending a deposition will be reimbursed by the party requiring the deposition.¹³³

The dismissal of a party for failing to respond to interrogatories is with prejudice.¹³⁴ An attorney who fails to make timely discovery may be required to pay the costs and attorney's fees for making a motion for sanctions even though no sanctions are applied.¹³⁵ However, where both parties are unreasonable as to discovery, sanctions under Rule 4:12 will not be granted against either party.¹³⁶

VIII. INCIDENTS OF TRIAL

A plaintiff can take a nonsuit after an unfavorable ruling on an issue of misjoinder of parties.¹³⁷ The date of a nonsuit is the date

126. *Commonwealth v. Jones*, 6 Va. Cir. 296 (Lee County 1986).

127. *Commonwealth v. Curry*, 6 Va. Cir. 211 (Rockingham County 1985).

128. *Lataif v. Restaurant Equities, Inc.*, 7 Va. Cir. 514 (Arlington County 1978).

129. *Stupp Bros. Bridge & Iron Co. v. Commissioner*, 6 Va. Cir. 240 (Richmond 1985).

130. *Brunson v. Daughtrity*, 6 Va. Cir. 459 (Norfolk 1969).

131. *Blaisdell v. Johnson*, 6 Va. Cir. 252 (Fredericksburg 1985); *Gerwin v. Moss*, 6 Va. Cir. 113 (Virginia Beach 1984).

132. *Virginia Beach Telecom. Corp. v. Cox Cable Communications, Inc.*, 6 Va. Cir. 526 (Norfolk 1977).

133. *First & Merchants Nat'l Bank v. Huxtable*, 6 Va. Cir. 7 (Norfolk 1981).

134. *Murphy v. City of Virginia Beach*, 6 Va. Cir. 140 (Virginia Beach 1984).

135. *Daber, Inc. v. Corbisiero*, 7 Va. Cir. 532 (Richmond 1979).

136. *Benze v. Ross*, 6 Va. Cir. 11 (Norfolk 1981).

137. *Rasnick v. Pittston Co.*, 5 Va. Cir. 336 (Wise County 1986).

on which it is requested by the plaintiff, not the date of the judge's order. The six month period of section 8.01-229(E)(3) begins when the plaintiff acts to end the suit.¹³⁸

A continuance should not be granted when a witness is absent unless his testimony would be material and not merely cumulative, and the witness will be present at a future date. If the object of the motion is to delay the trial, it should not be granted.¹³⁹

Although witnesses are usually excluded from the courtroom during trials, a recent amendment to section 8.01-375 provides that "[w]here expert witnesses are to testify in the case, the court may, at the request of all parties, allow one expert witness for each party to remain in the courtroom."¹⁴⁰ This will significantly increase the effectiveness of the cross-examination of expert testimony.

IX. VERDICTS AND JUDGMENTS

Upon a motion to set aside a verdict on the ground of jury misconduct or bias, the presiding judge should "investigate the charges" by examining the juror who was the subject of the complaint.¹⁴¹ Where a person is sued under his business name, is served with process, and appears at a trial, a verdict against him is valid over objections on the grounds of misnomer.¹⁴²

A judgment may be set aside for fraud in the procurement of the judgment but not for fraud in the procurement of the underlying contract. In an action of debt on a foreign judgment, no counterclaim barred by the foreign judgment can be prosecuted in Virginia.¹⁴³

Punitive damages for breach of contract are awarded only in the most exceptional circumstances. Virginia will not give full faith and credit to a foreign judgment in a contracts case where the

138. *Morrison v. Bestler*, 8 Va. Cir. 456, 457 (Roanoke County 1987); *see also Haring v. Stephenson*, 8 Va. Cir. 381 (Fairfax County 1987); *Burton v. Fifer*, 5 Va. Cir. 230 (Charlottesville 1985).

139. *Watson v. Dailey*, 5 Va. Cir. 427 (Richmond 1970).

140. VA. CODE ANN. § 8.01-375 (Cum. Supp. 1987).

141. *Commercial Union Ins. Co. v. Moorefield*, 231 Va. 260, 343 S.E.2d 329 (1986).

142. *Douglas v. San Francisco Hairport*, 5 Va. Cir. 318 (Richmond 1986).

143. *American Inst. of Mktg. Sys., Inc. v. Womble Realty, Inc.*, 6 Va. Cir. 473 (Norfolk 1970).

judge has lightly granted punitive damages. It is against Virginia's clear public policy.¹⁴⁴

Where notice of a hearing date is not given to all parties entitled to notice, any order entered is void under Rule 1:13. A void order can be set aside at any time.¹⁴⁵

X. COURT COSTS; ATTORNEYS' FEES; INTEREST

In 1987, the General Assembly enacted a statute which requires attorneys and parties not represented by counsel to certify to the court that all pleadings and motions are made in good faith and not for any improper purpose.¹⁴⁶ This statute, which follows the Federal Rules of Civil Procedure 11,¹⁴⁷ also requires the judge, if he finds a violation, to impose appropriate sanctions including reasonable attorneys' fees upon the offending lawyer or party or both.¹⁴⁸ This new statute goes considerably beyond the present Virginia Rules of Court.¹⁴⁹ It also goes beyond present Federal Rule 11 in that it expressly includes oral motions. The statute applies in both district and circuit courts.

Whether section 8.01-271.1 applies to nonsuits is unclear. It might be argued that a nonsuit is neither a pleading nor a motion. A nonsuit can be used in bad faith since it is a withdrawal of an action without prejudice. If a plaintiff does not prepare for trial hoping to settle his claim before trial, perhaps even on the morning of the trial, he knows that if the settlement fails to materialize, he can nonsuit the action. However, the defendant must always prepare for trial in the event that there is no last minute settlement. If the defendant has brought in expert witnesses and the plaintiff nonsuits, the defendant loses a significant sum of money. It seems only fair that the nonsuited plaintiff pay the expenses of the defendant's expert witnesses and attorney in such cases. Settlements are encouraged and it may well be that a nonsuit is not taken for an "improper purpose." Nevertheless the costs of the nonsuit to the defendant should be shifted to the plaintiff.

The defendant who has paid into court the amount of the judg-

144. *Schwaber v. Steele*, 6 Va. Cir. 274 (Spotsylvania County 1985).

145. *Norfolk Div. of Social Servs. v. Unknown Father*, 2 Va. App. 420, 345 S.E.2d 533 (1986).

146. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1987).

147. FED. R. CIV. P. 11.

148. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1987).

149. VA. SUP. CT. R. 1:4(a).

ment before trial, is deemed to have prevailed on the issues and should recover costs.¹⁵⁰ An in-state, non-expert witness attending a civil trial is entitled to reimbursement of transportation expenses. Such expenses are taxable as court costs.¹⁵¹ Reimbursable court costs include the clerk's fee for the preparation of the appeal record, but not the fees of a court reporter, the costs of a transcript, premiums on supersedeas bonds, or discovery depositions.¹⁵²

Attorneys' fees may not be included in arbitration awards. Attorneys' fees are not a part of the administrative expenses of arbitration.¹⁵³

In its verdict, a jury has the discretion to award interest payments, but it cannot change the rate of interest from the statutory rate.¹⁵⁴ The legal rate of interest, rather than the judgment rate of interest, applies to debts found to be owing by the defendant to the plaintiff before entry of final judgment.¹⁵⁵ A judgment will include the contracted for finance charges, but after judgment, the judgment rate of interest applies to the unpaid judgment.¹⁵⁶

When a plaintiff in detinue, after taking possession of the goods in dispute, removes them from the state and then takes a nonsuit, the defendant is entitled to reimbursement for any damages resulting from such action.¹⁵⁷

XI. EXECUTION OF JUDGMENTS

Where summary judgment for the plaintiff is granted but a trial on a counterclaim is pending, execution of the judgment on behalf of the plaintiff will be stayed until after the trial.¹⁵⁸

Section 8.01-506 was amended at the last session of the General Assembly to permit debtor interrogatories to be used to discover

150. *Providence Forge Oil Co. v. C & P Tel. Co.*, 8 Va. Cir. 470 (Richmond 1966).

151. *G.L. Hopkins, Inc. v. C & O Dev. Co.*, 6 Va. Cir. 546 (Norfolk 1978).

152. *Herrick v. Quality Home Builders of Norfolk, Inc.*, 6 Va. Cir. 467 (Norfolk 1970).

153. *E.B. Rudiger & Sons v. Norfolk Air Conditioning Corp.*, 7 Va. Cir. 200 (Norfolk 1983).

154. *Kohne v. Intermodal Servs., Inc.*, 5 Va. Cir. 294 (Alexandria 1985) (construing V.A. CODE ANN. § 8.01-382 (Repl. Vol. 1984)).

155. *Jenkins v. Jenkins*, 8 Va. Cir. 228 (Henrico County 1986).

156. *Norfolk Sash & Door Co. v. International Insulating Sys., Inc.*, 7 Va. Cir. 153 (Norfolk 1982).

157. *J.I. Case Co. v. United Va. Bank*, 232 Va. 210, 349 S.E.2d 120 (1986).

158. *CAS, Inc. v. Skylight, Inc.*, 5 Va. Cir. 56 (Alexandria 1982).

the existence and location of intangible as well as tangible property.¹⁵⁹

XII. APPELLATE PRACTICE

The major change in Virginia appellate practice last year was an addition to the supreme court's jurisdiction. By an amendment to article VI, section 1, of the Constitution of Virginia, the Virginia Supreme Court is now expressly permitted "to answer questions of state law certified by a court of the United States or the highest appellate court of any other state."¹⁶⁰ This new jurisdiction is governed by Rule 5:42,¹⁶¹ which is based on the Uniform Certification of Questions of Law Act.¹⁶² The Uniform Act was changed in many places to give more specific procedural guidance, but the general substantive intent remains intact.

It is within the discretion of a federal or other state court to certify a question of Virginia law to the Virginia Supreme Court, and it is entirely within the discretion of the supreme court to accept such a certification. In diversity and habeas corpus cases, federal courts sitting in Virginia are often called upon to decide novel points of Virginia law. The ability to certify such problems to the highest state court for resolution will greatly aid in the administration of justice and will avoid the incongruity of having the only case on a point of Virginia law coming from a different system and being subject to later disapproval by the Virginia Supreme Court.

The certification is made by the foreign court, not by the parties. Such a certification must state the relevant facts of the case and the question of law that is in doubt. There also should be a "brief statement" as to how the question affects the pending litigation and why any relevant Virginia case authority is not controlling. The Virginia Supreme Court may, in any particular case, also ask for a copy of the record, request a clarification of the question, or restate the question.

Pursuant to Rule 5:42(e),¹⁶³ the supreme court will notify the certifying court and the litigants whether the certification has been accepted, whether oral presentation will be permitted, and the dates for briefing and argument. This permits the certifying court

159. VA. CODE ANN. § 8.01-506 (Cum. Supp. 1987).

160. VA. CONST. art. VI, § 1.

161. VA. SUP. CT. R. 5:42.

162. UNIF. CERT. ACT, 12 U.L.A. 52-56 (1975).

163. VA. SUP. CT. R. 5:42(e).

to withdraw its certification if it believes that the schedule will be so time-consuming as to be unduly prejudicial to the parties. The Supreme Court of Virginia may revoke its acceptance of a question certified to it. If the parties settle the case, the certification process ends. Any opinion that the Virginia Supreme Court issues will be of precedential value and will be published in the *Virginia Reports*.

Certification promotes federalism by according proper deference to state courts as the authoritative arbiters of state law. Certification may also be preferable to abstention because it does not require the state court to go through a redetermination or relitigation of facts. Certification may also be more expeditious and less expensive to the parties.¹⁶⁴

Section 8.01-676.1, which provides for appeal bonds, was recently amended in several respects. Subsection C, which deals with supersedeas bonds now provides that such bonds are continuing bonds and are thus in effect throughout the appellate process. A new subsection K1 was enacted that allows a claimant appealing an adverse decision of the Industrial Commission to move for a waiver of the appeal bond requirement if his injuries are preventing his return to work. Finally, subsection M was added to the statute to allow a single judge of the court of appeals to rule on motions concerning bonds.¹⁶⁵

A transcript is indispensable to the disposition of an appeal, and therefore, its filing is jurisdictional. The time for filing a transcript may be extended by the trial court upon a request made before the deadline of Rule 5A:8(a), but not afterwards.¹⁶⁶ Rule 5:11(b) was recently amended to require that the notice given to other counsel of the filing of the transcript be in writing and be given within five days. A copy of this written notice must be filed with the clerk of the trial court and must contain a certificate of mailing to or acceptance by all other counsel in the case. This amendment solves the problems of whether written or oral notice is required, what is prompt notice, and what is necessary to prove that notice was given.¹⁶⁷

164. T. S. Ellis, III, Memorandum to the Boyd-Graves Conference, Oct. 24, 1986, at 5.

165. VA. CODE ANN. § 8.01-676.1 (Cum. Supp. 1987).

166. *Jordan v. Price*, 3 Va. App. 672, 353 S.E.2d 168 (1987).

167. VA. SUP. CT. R. 5:11(b).

Neither a school board nor a board of zoning appeals is an administrative agency of the state government. Therefore, circuit court actions relating to their decisions are appealable to the supreme court and not to the court of appeals.¹⁶⁸ On the other hand, the Department of Highways and Transportation is considered an administrative agency,¹⁶⁹ and its decisions are appealable to the Virginia Court of Appeals.

168. *Masterson v. Board of Zoning Appeals*, 223 Va. 37, 353 S.E.2d 727 (1987); *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 344 S.E.2d 899 (1986); *Schwartz v. Highland County School Bd.*, 2 Va. App. 554, 346 S.E.2d 544 (1986), *dismissing an appeal from* 3 Va. Cir. 395 (1985); *see also Allstar Towing, Inc. v. City of Alexandria*, 231 Va. 421, 344 S.E.2d 903 (1986).

169. *Commonwealth v. E.W. Yeatts, Inc.*, 233 Va. 17, 353 S.E.2d 717 (1987).

