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## Civil Practice and Procedure

John R. Walk  
*Hirschler Fleischer, P.C.*

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# ARTICLES

## CIVIL PRACTICE AND PROCEDURE

*John R. Walk* \*

### I. INTRODUCTION

This article will summarize recent developments of interest to practitioners handling civil cases in the courts of the Commonwealth of Virginia. Specifically included are relevant decisions of the Supreme Court of Virginia dating from the opinions announced on January 10, 2003 to those announced on April 23, 2004; changes to the Rules of the Supreme Court of Virginia announced during the same period; and legislation enacted by the General Assembly at its 2003 session, effective July 1, 2003, and at its 2004 session, effective July 1, 2004.

### II. EXPERT TESTIMONY

In *Whitley v. Chamouris*,<sup>1</sup> the Supreme Court of Virginia held that expert testimony was not necessary to prove causation and damages in a legal malpractice case.<sup>2</sup> In that case, Chamouris had hired Whitley to bring various causes of action in federal court.<sup>3</sup> One week before trial, and without Chamouris's consent, Whitley agreed to a dismissal with prejudice of all but one cause

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\* Shareholder, Hirschler Fleischer, P.C., Richmond, Virginia. B.A., 1977, College of William & Mary; J.D., 1980, University of Richmond School of Law. He is an Adjunct Associate Professor of Law at the University of Richmond School of Law.

1. 265 Va. 9, 574 S.E.2d 251 (2003).

2. *Id.* at 11, 574 S.E.2d at 253.

3. *Id.* at 10, 574 S.E.2d at 252.

of action.<sup>4</sup> Chamouris fired Whitley, successfully settled the remaining cause of action in state court, and then sued Whitley for legal malpractice.<sup>5</sup> Chamouris obtained summary judgment on the issues of negligence and breach of contract.<sup>6</sup> Thus, the only issues tried were causation and damages.<sup>7</sup>

The trial of a legal malpractice action "involves a 'case within the case,'" in which the plaintiff must prove that, but for the alleged negligence of the defendant, he would have prevailed in the underlying action.<sup>8</sup> Damages are the amount of the likely recovery in the underlying action.<sup>9</sup> Significantly, Chamouris presented no expert testimony on either issue.<sup>10</sup> Nonetheless, the case was allowed to go to the jury, which decided in favor of Chamouris.<sup>11</sup>

On appeal, Whitley cited several cases<sup>12</sup> for the proposition that these issues are to be decided by the jury after consideration of expert testimony.<sup>13</sup> The Supreme Court of Virginia, however, distinguished these cases, holding that "these cases do not stand for the proposition that such expert testimony is required in each instance."<sup>14</sup> In *Whitley*, the expert testimony would have either constituted "a prediction of what some other fact finder would have concluded or an evaluation of the legal merits of Chamouris' claims."<sup>15</sup> The former, according to the Supreme Court of Virginia, would have been unduly speculative since "[n]o witness can predict the decision of a jury," and the latter would have been an inadmissible legal opinion.<sup>16</sup>

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 11, 574 S.E.2d at 252-53 (citing *Campbell v. Bettius*, 244 Va. 347, 352, 421 S.E.2d 433, 436 (1992)).

9. *See, e.g.*, *Duvall, Blackburn, Hale & Downey v. Siddiqui*, 243 Va. 494, 416 S.E.2d 448 (1992).

10. *Whitley*, 265 Va. at 10, 574 S.E.2d at 252.

11. *Id.*

12. *Ripper v. Bain*, 253 Va. 197, 482 S.E.2d 832 (1997); *Heyward & Lee Constr. Co. v. Sands, Anderson, Marks & Miller*, 249 Va. 54, 453 S.E.2d 270 (1995); *Seaward Int'l, Inc. v. Price Waterhouse*, 239 Va. 585, 391 S.E.2d 283 (1990).

13. *Whitley*, 265 Va. at 11, 574 S.E.2d at 252.

14. *Id.* The issue of negligence was not before the jury in this case. Thus, there was no need for expert testimony on the standard of care. It was on this basis that the court distinguished the case cited by Whitley. *See id.*

15. *Id.*, 574 S.E.2d at 253.

16. *Id.* Virginia Code section 8.01-401.3(B) provides that otherwise proper expert tes-

## III. DEAD MAN'S STATUTE

The case of *Williams v. Condit*<sup>17</sup> involved the application of Virginia Code section 8.01-397, also known as the “dead man’s statute.”<sup>18</sup> At trial, Williams was the only witness who testified in her case-in-chief to the facts surrounding the automobile accident in question.<sup>19</sup> The driver of the other vehicle, Ross Condit, died after the automobile accident from unrelated causes.<sup>20</sup> Katarina Condit, the decedent’s personal representative and also a passenger in the car at the time of the accident, moved to strike on the basis that Williams’s uncorroborated evidence failed to meet the requirements of Virginia Code section 8.01-397.<sup>21</sup> The trial judge took the motion under advisement.<sup>22</sup> Ms. Condit was then called to testify to her recollection of the accident, which was materially different from that presented by Williams.<sup>23</sup> At the conclusion of the case, the trial court granted the defendant’s motion to strike.<sup>24</sup>

On appeal, the Supreme Court of Virginia reversed and remanded.<sup>25</sup> The majority opinion, written by Chief Justice Hassell, focused on compliance with the dead man’s statute.<sup>26</sup> It rejected the defendant’s contention that, in ruling on the motion to strike, the trial court was compelled to consider only the plaintiff’s evidence.<sup>27</sup> Citing several cases,<sup>28</sup> the court held that “if a circuit

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timony shall not be excluded because it goes to the “ultimate issue;” however, “in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law.” VA. CODE ANN. § 8.01-401.3(B) (Repl. Vol. 2000 & Cum. Supp. 2004).

17. 265 Va. 49, 574 S.E.2d 241 (2003).

18. *Id.* at 50, 574 S.E.2d at 242. The Dead Man’s Statute provides that “in an action by or against a person who . . . is incapable of testifying . . . no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.” VA. CODE ANN. § 8.01-397 (Repl. Vol. 2000 & Cum. Supp. 2004).

19. *Williams*, 265 Va. at 50, 574 S.E.2d at 242.

20. *Id.*

21. *Id.* at 50–51, 574 S.E.2d at 242.

22. *Id.* at 51, 574 S.E.2d at 242.

23. *Id.*

24. *Id.*

25. *Id.* at 53, 574 S.E.2d at 243.

26. *Id.* at 50, 574 S.E.2d at 242.

27. *Id.* at 52, 574 S.E.2d at 242.

28. *Austin v. Shoney’s, Inc.*, 254 Va. 134, 486 S.E.2d 285 (1997); *Estate of Taylor v. Flair Prop. Assocs.*, 248 Va. 410, 448 S.E.2d 413 (1994); *Kendrick v. Vaz, Inc.*, 244 Va. 380, 421 S.E.2d 447 (1992); *Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 377 S.E.2d 589 (1989); *Spangler v. Commonwealth*, 188 Va. 436, 50 S.E.2d 265 (1948).

court grants a defendant's motion to strike the plaintiff's evidence at the conclusion of a trial, we will consider all the evidence, including evidence presented by the defendant."<sup>29</sup> The court similarly held this rule to apply where the motion is made at the conclusion of the plaintiff's case, but taken under advisement and ruled upon at the conclusion of trial.<sup>30</sup> The court held that Ms. Condit's testimony satisfied the corroboration requirement of Virginia Code section 8.10-397 and reversed the trial court.<sup>31</sup>

The concurring opinion by Justice Lacy<sup>32</sup> focused on whether the dead man's statute was correctly applied in the case.<sup>33</sup> Justice Lacy's opinion stated that the dead man's statute is inapplicable "when another interested party testifies to a version of the facts on behalf of the party unable to testify."<sup>34</sup> Thus, the proper issue was not whether Ms. Condit's testimony tended to corroborate Williams's version of the facts, but whether the requirement of corroboration applied at all.<sup>35</sup> The concurring opinion agreed with the majority that the trial court was compelled to consider all the evidence in ruling on this motion.<sup>36</sup> Taking into consideration Ms. Condit's testimony, the concurring opinion also agreed that the trial judge erred in granting the motion to strike.<sup>37</sup> However, it was on the basis that the statute was inapplicable and that the trial judge should have denied the motion to strike.<sup>38</sup>

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29. *Williams*, 265 Va. at 52, 574 S.E.2d at 242.

30. *Id.*, 574 S.E.2d at 243. The court explained that had the defendant rested and renewed the motion to strike, the trial court would have been compelled to rule on the motion based on the plaintiff's testimony alone. *Id.* Without expressly stating this, the majority presumably would have affirmed the trial court in this case.

31. *Id.* at 52-53, 574 S.E.2d at 243.

32. *Id.* at 53-58, 574 S.E.2d at 243-46 (Lacy, J., concurring). Justice Lacy was joined by Justices Kinser and Lemons. *Id.* at 53, 574 S.E.2d at 243 (Lacy, J., concurring).

33. *Id.*

34. *Id.* at 54, 574 S.E.2d at 244 (Lacy, J., concurring) (citing *Epes' Adm'r v. Hardaway*, 135 Va. 80, 115 S.E. 712 (1923)). It is also required that the party testifying have a pecuniary interest in the outcome of the litigation. *Id.* (citing *Merchant's Supply Co. v. Ex'rs of the Estate of John Hughes*, 139 Va. 212, 123 S.E. 355 (1924)).

35. *Williams*, 265 Va. at 55, 574 S.E.2d at 245 (Lacy, J., concurring).

36. *Id.* at 56, 574 S.E.2d at 245 (Lacy, J., concurring). The concurring opinion also pointed out that had the defendant rested and renewed the motion, the exception to the dead man's statute would have been inapplicable and corroboration would have been required. *Id.* Presumably, Justices Lacy, Kinser, and Lemons would have affirmed the trial judge in this event as well.

37. *Id.* at 56-57, 574 S.E.2d at 245-46 (Lacy, J., concurring).

38. *Id.*

The concurring opinion took issue with the majority's holding that Ms. Condit's testimony tended to corroborate Williams's testimony.<sup>39</sup> Rather, she directly contradicted Williams's version of the facts.<sup>40</sup> Stating that "[c]orroboration for purposes of the dead man's statute requires testimony or other evidence that tends to support some issue or allegation advanced by the party able to testify which is essential to sustain a judgment in such party's favor,"<sup>41</sup> the concurring opinion specifically found corroboration to be lacking in the case.<sup>42</sup> Nonetheless, since the concurring justices would not have applied the statute at all, they agreed that the trial judge erred in striking Williams's case.<sup>43</sup>

#### IV. RES JUDICATA

In what was probably the most significant procedural decision of 2003, the Supreme Court of Virginia redefined the doctrine of res judicata in *Davis v. Marshall Homes, Inc.*<sup>44</sup> An entire article could be devoted to this case and its ramifications. *Davis* arose out of a series of real estate transactions pursuant to which Davis lent money to Marshall Homes for the acquisition and alleged renovation of certain homes.<sup>45</sup> Davis filed a motion for judgment against Marshall Homes alleging that Marshall Homes had misrepresented the value of the homes, had never intended to renovate the homes, and had fraudulently induced Davis to enter into the deal.<sup>46</sup> The suit was dismissed with prejudice.<sup>47</sup> Thereafter, Davis again sued Marshall Homes, this time seeking judgment on notes executed in connection with the transaction.<sup>48</sup> The trial court sustained Marshall Homes' plea of res judicata.<sup>49</sup> In a

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39. *Id.* at 57, 574 S.E.2d at 245-46 (Lacy, J., concurring). The concurring opinion states that "[i]n this case, the majority has ignored principles applied in prior relevant cases [and] adopted positions at odds with, or contrary to, precedent without explanation." *Id.* at 58, 574 S.E.2d at 246 (Lacy, J., concurring).

40. *See id.* at 57, 574 S.E.2d at 246 (Lacy, J., concurring). For example, Ms. Condit testified that "there were no oncoming cars." *Id.*

41. *Id.* (citing *Rice v. Charles*, 260 Va. 157, 166, 532 S.E.2d 318, 323 (2000)).

42. *Id.* at 57, 574 S.E.2d at 246 (Lacy, J., concurring).

43. *Id.* at 57-58, 574 S.E.2d at 246 (Lacy, J., concurring).

44. 265 Va. 159, 576 S.E.2d 504 (2003).

45. *Id.* at 162, 576 S.E.2d at 505.

46. *Id.* at 162-63, 576 S.E.2d at 505.

47. *Id.* at 163, 576 S.E.2d at 505.

48. *Id.*

49. *Id.* at 164, 576 S.E.2d at 505-06.

sharply divided decision, the Supreme Court of Virginia reversed the circuit court.<sup>50</sup>

The majority opinion, written by Chief Justice Hassell, cited the familiar statement that “[t]he bar of *res judicata* precludes relitigation of the same cause of action, or any part thereof, which could have been litigated between the same parties and their privies.”<sup>51</sup> The focus of the decision was whether the breach of contract claim constituted part of the same “cause of action” which “could have been litigated” in the former action.<sup>52</sup> Recognizing that both claims arose out of the same “transaction or occurrence,”<sup>53</sup> the majority specifically rejected this analysis as determining whether the claims were part of the same “cause of action.”<sup>54</sup> Instead, the majority analyzed the legal elements of the two claims and the evidence that would be necessary to support each.<sup>55</sup> Reversing the trial court, the majority ruled that the fraud and breach of contract claims constituted distinct “causes of action” and, thus, the similarity of causes of action required to establish *res judicata* was absent.<sup>56</sup>

Justice Kinser wrote a lengthy and vigorous dissent.<sup>57</sup> She emphasized that many of the court’s prior decisions concerning *res judicata* could be explained by Virginia’s separation of law and equity and the former prohibition on joining tort and contract in a single action.<sup>58</sup> Thus, in these cases, the plaintiff confronted a legal bar in the second action to seeking the relief sought in the

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50. *Id.* at 172, 576 S.E.2d at 510.

51. 265 Va. at 164, 576 S.E.2d at 506 (quoting *Smith v. Ware*, 244 Va. 374, 376, 421 S.E.2d 444, 445 (1992)).

52. *See id.*

53. This phrase has been used by the General Assembly in adopting a transactional analysis in other contexts. VA. CODE ANN. §§ 8.01-272, -281 (Repl. Vol. 2000 & Cum. Supp. 2004) (providing for the joining of all claims arising out of the same transaction or occurrence).

54. *Davis*, 265 Va. at 171, 576 S.E.2d at 510. In so doing, the majority relied upon *Smith v. Ware*, 244 Va. 374, 421 S.E.2d 444 (1992), *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 367 S.E.2d 493 (1988), *Brown v. Haley*, 233 Va. 210, 355 S.E.2d 563 (1987), and *Allstar Towing, Inc. v. City of Alexandria*, 231 Va. 421, 344 S.E.2d 903 (1986). Each of these cases was discussed at length in the majority opinion.

55. *Davis*, 265 Va. at 171-72, 576 S.E.2d at 510.

56. *Id.* at 172, 576 S.E.2d at 510.

57. *Id.* at 172-85, 576 S.E.2d at 511-18 (Kinser, J., dissenting). Justice Kinser was joined by Justices Lacy and Lemons. *Id.* at 172, 576 S.E.2d at 511 (Kinser, J., dissenting).

58. *Id.* at 173, 576 S.E.2d at 511 (Kinser, J., dissenting). This prohibition was abolished by the adoption of Virginia Code section 8.01-272 (Repl. Vol. 2000 & Cum. Supp. 2004).

previously adjudicated matter.<sup>59</sup> This was not the case in the present action in that both actions were filed at law and both sought only damages.<sup>60</sup> Instead, the dissenting opinion focused on the “definable factual transaction” test, which the dissenting justices asserted had been adopted by the court in *Bates v. Devers*<sup>61</sup> and reaffirmed in *Allstar Towing, Inc. v. City of Alexandria*.<sup>62</sup> Quoting from the Restatement of Judgments, the dissenting opinion stated that “[t]he present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff.”<sup>63</sup> Application of the strict “same evidence test” used by the majority effectively negates the “could have been litigated” portion of the doctrine of res judicata and limits it to “when an unsuccessful plaintiff re-files the identical claim based on the same legal theory.”<sup>64</sup>

Justice Lemons wrote a separate dissent in which he characterized it as “unmistakable” that the court had previously adopted the transactional analysis.<sup>65</sup> He asserted that the majority opinion “reverts to the national minority on this issue of great importance to individuals and businesses alike.”<sup>66</sup> In particular, he cited to the typical business dispute which often involves “theories of breach of contract, breach of fiduciary duty, common law conspiracy, statutory conspiracy, common law fraud, constructive fraud, and conversion.”<sup>67</sup> Under the majority opinion, each would be permitted to be asserted in separate suits unless the elements

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59. See *Davis*, 265 Va. at 173–74, 576 S.E.2d at 511 (Kinser, J., dissenting).

60. See *id.* at 163, 165, 576 S.E.2d at 505–06.

61. *Id.* at 174, 576 S.E.2d at 512 (Kinser, J., dissenting) (citing *Bates v. Devers*, 214 Va. 667, 672 n.8, 202 S.E.2d 917, 921 n.8 (1974)).

62. *Id.* (citing *Allstar Towing, Inc. v. City of Alexandria*, 231 Va. 421, 425, 344 S.E.2d 903, 905–06 (1986)).

63. *Id.* at 179, 576 S.E.2d at 515 (Kinser, J., dissenting) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1980)). The dissent cited several decisions from courts outside the Commonwealth to further illustrate the modern trend toward a transaction analysis. *Id.* The dissent also noted the General Assembly’s adoption of the transaction approach. *Id.* (referring to the use of the phrase “out of the same transaction or occurrence” in Virginia Code section 8.01-281 (Repl. Vol. 2000 & Cum. Supp. 2004)).

64. *Id.* at 183, 576 S.E.2d at 517 (Kinser, J., dissenting).

65. *Id.* at 185, 576 S.E.2d at 518 (Lemons, J., dissenting).

66. *Id.*

67. *Id.*



and proof were identical.<sup>68</sup> “Of course, the reason there are separate legal theories is precisely because there are differences in the elements of the causes of action,” wrote Justice Lemons.<sup>69</sup> This case will almost certainly prompt further appeals or legislative action in the area of *res judicata* in the years to come.

## V. STATUTORY CONSPIRACY

Virginia Code section 18.2-499 makes it illegal to conspire for the purpose of “willfully and maliciously injuring another in his reputation, trade, business or profession.”<sup>70</sup> Virginia Code section 18.2-500 provides a civil remedy including recovery of treble damages and attorneys’ fees.<sup>71</sup> The potential application of this statute was greatly expanded by the Supreme Court of Virginia’s decision in *Feddeman & Co. v. Langan Associates*,<sup>72</sup> in which the court held a group of employees of an accounting firm who organized a resignation *en masse* and formed a competing accounting firm liable under the statute to their former employer.<sup>73</sup> In the recent case of *Williams v. Dominion Technology Partners*,<sup>74</sup> the Supreme Court of Virginia distinguished *Feddeman* and reversed a verdict granted to an employer under fairly comparable circumstances.<sup>75</sup>

Dominion was in the business of providing computer consultants and placing them, either directly or through brokers, with various companies.<sup>76</sup> Williams was recruited by Dominion to render such services to Stihl, Inc. in connection with a computer upgrade.<sup>77</sup> Although Williams was initially employed on an at-will

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68. *Id.*

69. *Id.* at 185–86, 576 S.E.2d at 518 (Lemons, J., dissenting).

70. VA. CODE ANN. § 18.2-499 (Repl. Vol. 2004).

71. VA. CODE ANN. § 18.2-500 (Repl. Vol. 2004).

72. 260 Va. 35, 530 S.E.2d 668 (2000).

73. *Id.* at 44, 46, 530 S.E.2d at 673, 675.

74. 265 Va. 280, 576 S.E.2d 752 (2003). For additional discussion of the case in the context of fiduciary duty and agreements not to compete, see Thomas M. Winn, III & Lindsey H. Dobbs, *Annual Survey of Virginia Law: Labor and Employment Law*, 39 U. RICH. L. REV. 285, 298–300 (2004) and Michael F. Urbanski, James R. Creekwood & Ellen S. Moore, *Annual Survey of Virginia Law: Antitrust and Trade Regulation Law*, 38 U. RICH. L. REV. 59, 80–82 (2003).

75. *See id.* at 292, 576 S.E.2d at 759.

76. *Id.* at 283, 576 S.E.2d at 753.

77. *Id.* at 283–84, 576 S.E.2d at 753.

basis directly by Dominion, the parties subsequently entered into a series of contracts whereby Stihl contracted with a broker, ACSYS Information Technology, Inc., which in turn contracted with Dominion for Williams's services.<sup>78</sup> As Williams's initial assignment was ending, he discovered that Stihl was contemplating another project that would likely require his services.<sup>79</sup> He also discovered the extent to which his services were being marked up by Dominion and ACSYS.<sup>80</sup> In combination with ACSYS, Williams arranged to be retained by Stihl after completion of his initial assignment, but without the participation of Dominion, and then resigned his employment with Dominion.<sup>81</sup>

Dominion recovered a verdict on theories of breach of fiduciary duty, interference with business relationships, and statutory conspiracy.<sup>82</sup> On appeal, the Supreme Court of Virginia reversed the trial court's action denying Williams's motion to strike and subsequent motion to set aside the verdict.<sup>83</sup> The court recognized that an employee has a common law fiduciary duty of loyalty to his employer that precludes, among other things, competition with the employer during the term of his employment.<sup>84</sup> Absent a non-competition covenant, however, "an employee has the right to make arrangements during his employment to compete with his employer after resigning his post."<sup>85</sup> This right, according to the court, "is not absolute"<sup>86</sup> and "must be balanced with the importance of the integrity and fairness attaching to the relationship between employer and employee."<sup>87</sup> Whether specific conduct undertaken prior to resignation breaches the duty of loyalty "requires a case by case analysis."<sup>88</sup>

In this case, the court held that due to a number of factors, principally the fact that the opportunity with Stihl was not se-

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78. *Id.* at 284, 576 S.E.2d at 754.

79. *Id.* at 285, 576 S.E.2d at 754.

80. *Id.*

81. *Id.* at 285-87, 576 S.E.2d at 755.

82. *Id.* at 288, 576 S.E.2d at 756.

83. *Id.* at 292, 576 S.E.2d at 759.

84. *Id.* at 289, 576 S.E.2d at 757 (citing *Hilb, Rogal & Hamilton Co. of Richmond v. DePew*, 247 Va. 240, 249, 440 S.E.2d 918, 923 (1994); *Horne v. Holley*, 167 Va. 234, 241, 188 S.E.2d 169, 172 (1936)).

85. *Williams*, 265 Va. at 289, 576 S.E.2d at 757.

86. *Id.*

87. *Id.* (quoting *Feddeman & Co.*, 260 Va. at 42, 530 S.E.2d at 672).

88. *Id.*

cret, that Williams completed his engagement, and that Williams had not signed any sort of non-competition agreement with Dominion, he had not breached the duty of loyalty to Dominion.<sup>89</sup> Moreover, the court held the opportunity with Stihl to be no more than a "lead" and not a business expectancy.<sup>90</sup> Finally, since it was the breach of the duty of loyalty that had provided the element of malice supporting recovery under Virginia Code sections 18.2-499 and -500, the verdict on this count fell as well.<sup>91</sup> The court was careful to note that where the employee had "misappropriated trade secrets, misused confidential information, [or] solicited an employer's clients or other employees prior to termination," breach of fiduciary duty will be found.<sup>92</sup> Nonetheless, *Williams* presents a roadmap for employees seeking to avoid the *Feddeman* decision.

The Supreme Court of Virginia interpreted the phrase "reputation, trade, business or profession" in *Andrews v. Ring*.<sup>93</sup> In that case, the Chairperson of the Grayson County School Board and the Director of School Maintenance sued the Commonwealth's Attorney and Building Official of the County arising out of the issuance of criminal warrants under the Uniform Statewide Building Code in connection with construction at Grayson County High School.<sup>94</sup> The trial court granted summary judgment to the defendants on the statutory conspiracy claim.<sup>95</sup> On appeal, the Supreme Court of Virginia affirmed, holding that the word "reputation" in the statute, interpreted in the context of the words "trade, business or profession," which follow it, does not include damage to personal reputation.<sup>96</sup> More importantly, in this case, the alleged damage to reputation had occurred in the context of the plaintiffs' employment.<sup>97</sup> Nonetheless, the court held that the statute did not cover "employment interests."<sup>98</sup>

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89. *Id.* at 291-92, 576 S.E.2d at 758-59.

90. *Id.* at 291, 576 S.E.2d at 758.

91. *Id.* at 292, 576 S.E.2d at 759.

92. *Id.* at 291, 576 S.E.2d at 758 (quoting *Feddeman & Co.*, 260 Va. at 42, 530 S.E.2d at 672).

93. 266 Va. 311, 316, 585 S.E.2d 780, 782 (2003).

94. *Id.* at 316-17, 585 S.E.2d at 782-83.

95. *Id.* at 318, 585 S.E.2d at 783.

96. *Id.* at 319, 585 S.E.2d at 784.

97. *Id.*

98. *See id.* The court noted that the federal courts in Virginia had already reached this conclusion in *Buschi v. Kirven*, 775 F.2d 1240, 1259 (4th Cir. 1985) and in *Nationwide*

The *Andrews* opinion also includes an interesting discussion of immunity as to the plaintiffs' malicious prosecution claims.<sup>99</sup> The Commonwealth's Attorney was held to be clothed with absolute judicial immunity from suit on the basis that bringing criminal charges is an essential prerequisite of the process of adjudicating them.<sup>100</sup> The Building Official claimed "quasi-judicial immunity" on the basis that he functioned as a prosecutor in enforcing the Uniform Statewide Building Code.<sup>101</sup> The court agreed that such immunity exists, stating: "[w]e have recognized that quasi-judicial immunity may extend to certain non-judicial public officials acting within their jurisdiction, in good faith, and while performing judicial functions."<sup>102</sup> The court concluded, however, that the Building Official's role was more closely akin to that of a police officer than a prosecutor.<sup>103</sup> While absolute immunity was denied,<sup>104</sup> the Building Official may have been entitled to qualified immunity similar to that of a police officer.<sup>105</sup> The burden of establishing entitlement to qualified immunity, which entails a showing of good faith and probable cause, rests on the party asserting immunity.<sup>106</sup> Under the facts presented in this appeal, the Building Official had not met this burden.<sup>107</sup> Thus, as to one of the plaintiffs, the trial court's summary judgment order was reversed and the matter remanded for trial.<sup>108</sup>

## VI. NONSUIT

In the first of five decisions involving nonsuits, the Supreme Court of Virginia in *Wilby v. Gostel*<sup>109</sup> held that a plaintiff could nonsuit all claims notwithstanding the entry of partial summary

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*Mutual Fire Insurance Co. v. Jones*, 577 F. Supp. 968, 970 (W.D. Va. 1984).

99. *Andrews*, 266 Va. at 320–21, 585 S.E.2d at 784–85.

100. *Id.* at 321, 585 S.E.2d at 785.

101. *Id.* at 325, 585 S.E.2d at 787.

102. *Id.*, 585 S.E.2d at 787–88 (citing *Harlow v. Clatterbuck*, 230 Va. 490, 493, 339 S.E.2d 181, 184 (1986)).

103. *Id.*, 585 S.E.2d at 788.

104. *Id.* at 325–26, 585 S.E.2d at 788.

105. *Id.* at 326, 585 S.E.2d at 788.

106. *Id.*

107. *Id.*

108. *Id.* at 327, 585 S.E.2d at 788–89.

109. 265 Va. 437, 578 S.E.2d 796 (2003).

judgment on the issue of contributory negligence.<sup>110</sup> In a prior decision, *Dalloul v. Agbey*,<sup>111</sup> the court had interpreted Virginia Code section 8.01-380 to disallow nonsuits of individual counts or claims as to which an interlocutory dispositive ruling had been rendered.<sup>112</sup> In *Wilby*, the plaintiff had combined her claims of negligence and willful and wanton conduct into a single count.<sup>113</sup> Thus, although the trial court entered a partial summary judgment order that the plaintiff was guilty of contributory negligence, this order did not result in the dismissal of any count of her motion for judgment.<sup>114</sup> Rather, the court characterized the trial court's ruling as an in limine determination that the plaintiff's burden of proof would be "to establish willful and wanton conduct."<sup>115</sup> Since all claims were still pending, they could be nonsuited under Virginia Code section 8.01-380.<sup>116</sup>

Another nonsuit decision decided on the same day, *Simon v. Forer*,<sup>117</sup> is of even greater application. The tolling provision of Virginia Code section 8.01-229(E)(3) provides that the time permitted for refileing a nonsuited action shall be the greater of six months or "the original period of limitation."<sup>118</sup> Prior to this decision, there was substantial room for debate as to whether in cal-

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110. *Id.* at 446, 578 S.E.2d at 801.

111. 255 Va. 511, 499 S.E.2d 279 (1998).

112. *Id.* at 514, 499 S.E.2d at 281. *Dalloul* involved a seven-count motion for judgment as to which the trial court had dismissed Counts III through VII prior to the nonsuit. *Id.* at 512-13, 499 S.E.2d at 280. The court held that these counts had been submitted for decision, which, under Virginia Code section 8.01-380, terminates the right to take a nonsuit. *Id.* at 514, 499 S.E.2d at 281 (referring to VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 2004)). Thus, the plaintiff's nonsuit was held to apply only to the claims remaining in the case at the time of the nonsuit, Counts I and II. *Id.* at 515, 499 S.E.2d at 282. The nonsuit rendered the decision on Counts III through VI an appealable final order, and upon the plaintiff's failure to appeal these counts, they became res judicata. *Id.* at 514, 499 S.E.2d at 281.

113. *Wilby*, 265 Va. at 441, 578 S.E.2d at 798.

114. *See id.* at 443, 578 S.E.2d at 799. Under *Wolfe v. Baube*, 241 Va. 462, 465, 403 S.E.2d 338, 339 (1991), contributory negligence is not a defense to actions for willful and wanton conduct, unless the plaintiff's conduct is similarly willful and wanton.

115. *Wilby*, 265 Va. at 446, 578 S.E.2d at 801.

116. *See id.*; VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 2004). Justice Kinser filed a dissenting opinion in which she characterized the claims for simple negligence and willful and wanton conduct as separate claims that could have been brought in separate counts, in which case *Dalloul* would clearly have applied to the count for simple negligence. *See Wilby*, 265 Va. at 447-49, 578 S.E.2d at 801-03 (Kinser, J., dissenting). The failure of the majority to bar relitigation of this claim "places form over substance." *Id.* at 448, 578 S.E.2d at 802 (Kinser, J., dissenting).

117. 265 Va. 483, 578 S.E.2d 792 (2003).

118. VA. CODE ANN. § 8.01-229(E)(3) (Cum. Supp. 2004).

culating the “original period of limitation,” the statute of limitation was considered tolled while the nonsuited action was pending. The statute provides that as to all dismissals without prejudice other than by nonsuit, “the time such action is pending shall not be computed as part of the [limitations] period.”<sup>119</sup> As to nonsuits, the statute states that “the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action” and then provides for refile within six months or the “original period of limitation.”<sup>120</sup> Many interpreted the “tolling” language of Virginia Code subsection (E)(3) as a reference to the above quoted language from subsection (E)(1), such that the time during which the nonsuited action was pending should “not be computed.”<sup>121</sup> Thus, the treatment of nonsuits would be the same as other dismissals without prejudice, except that the plaintiffs nonsuiting actions would be guaranteed a minimum of six months from the date of nonsuit in which to refile. The Court in *Simon* emphatically rejected this approach and held that the “original period of limitation” should be calculated from the date of accrual without interruption, as if the nonsuited action had never been brought.<sup>122</sup>

In *Atkins v. Rice*,<sup>123</sup> the Supreme Court of Virginia revisited the “submitted . . . for decision” language of Virginia Code section 8.01-380(A).<sup>124</sup> In that case, the plaintiff had failed to serve her suit within one year of filing.<sup>125</sup> The defendant entered a special appearance and filed a motion to dismiss on the grounds of untimely service.<sup>126</sup> At the hearing on the defendant’s motion to dismiss, the plaintiff’s counsel argued that due diligence had been undertaken to effect timely service and that the court should deny the motion or “in the alternative at least permit us to take a nonsuit.”<sup>127</sup> The trial judge twice confirmed that the plaintiff was

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119. *Id.* § 8.01-229(E)(1) (Cum. Supp. 2004).

120. *Id.* § 8.01-229(E)(3) (Cum. Supp. 2004).

121. *Id.* § 8.01-229(E)(1) (Cum. Supp. 2004).

122. *Simon*, 265 Va. at 491, 578 S.E.2d at 796.

123. 266 Va. 328, 585 S.E.2d 550 (2003).

124. *Id.* at 331, 585 S.E.2d at 551 (quoting VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 2004)).

125. *Id.* at 330, 585 S.E.2d at 551. Rule 3:3 requires that service be made within one year of filing unless the court finds that the plaintiff exercised “due diligence” to effect timely service. VA. SUP. CT. R. 3:3 (Repl. Vol. 2004).

126. *Atkins*, 266 Va. at 330, 585 S.E.2d at 551.

127. *Id.*

not taking a nonsuit by this comment.<sup>128</sup> The defense counsel then presented rebuttal argument.<sup>129</sup> At the conclusion of argument, the trial judge commenced ruling on the motion, stating, "I sympathize with your frustration but," at which point the plaintiff's counsel interrupted by taking a nonsuit.<sup>130</sup>

The trial court ruled, based upon *Hilb, Rogal & Hamilton Co. v. DePew*,<sup>131</sup> that "a party may nonsuit even during the trial court's comments in anticipation of its ruling on a motion to strike so long as the ruling has not yet been made."<sup>132</sup> In *Hilb*, involving remarkably similar facts, the Supreme Court of Virginia had held a nonsuit taken while the trial judge was announcing the ruling on a motion to strike timely.<sup>133</sup> The motion in *Atkins*, however, was not a motion to strike but a motion to dismiss.<sup>134</sup> This proved to be a critical difference. Virginia Code section 8.01-380(A) permits a nonsuit to be taken at any time "before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision."<sup>135</sup> The operative language was not "motion to strike . . . has been sustained" but "submitted to the court for decision."<sup>136</sup> In *Atkins*, while the motion to dismiss had not been ruled upon, it had clearly been "submitted for decision" and, in fact, the trial court was in the process of ruling on the motion.<sup>137</sup> On this basis, the trial court's action permitting the nonsuit was held to be in error.<sup>138</sup>

In *Phipps v. Liddle*,<sup>139</sup> the Supreme Court of Virginia interpreted the requirement of Virginia Code section 8.01-229(E)(3) that a nonsuited action be re-filed within six months of "the order entered by the court."<sup>140</sup> Phipps appealed the nonsuit of his per-

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128. *Id.*

129. *Id.* at 330-31, 585 S.E.2d at 551.

130. *Id.*

131. 247 Va. 240, 440 S.E.2d 918 (1994).

132. *Atkins*, 266 Va. at 331, 585 S.E.2d at 551.

133. *Hilb*, 247 Va. at 245, 440 S.E.2d at 921.

134. *Atkins*, 266 Va. at 330, 585 S.E.2d at 551.

135. VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 2004).

136. *Id.*

137. *See Atkins*, 266 Va. at 330-31, 585 S.E.2d at 551.

138. *Id.* at 332, 585 S.E.2d at 552.

139. 267 Va. 344, 593 S.E.2d 193 (2004).

140. *Id.* at 346-47, 593 S.E.2d at 194 (interpreting VA. CODE ANN. § 8.01-229(E)(3) (Cum. Supp. 2004)).

sonal injury action to the Supreme Court of Virginia.<sup>141</sup> He refiled the action within six months of the court's mandate affirming the trial court's decision granting the nonsuit.<sup>142</sup> The trial court sustained Liddle's special plea, however, on the basis that Phipps had failed to refile within six months of the trial court's nonsuit order in the original action.<sup>143</sup> Citing Virginia Code section 8.01-685, which requires the Supreme Court of Virginia's mandate to be entered by the trial court "as its own,"<sup>144</sup> the decision of the trial court was reversed.<sup>145</sup>

Finally, the Supreme Court of Virginia interpreted the "submitted for decision" language of Virginia Code section 8.01-380 in the context of a confession of judgment in *AAA Disposal Services, Inc. v. Eckert*.<sup>146</sup> In that case, Eckert sought \$60,000 in damages for injuries allegedly sustained in an automobile accident.<sup>147</sup> More than two months before trial, he moved to amend his *ad damnum* to \$350,000.<sup>148</sup> This motion was denied as untimely and the defendants, who had admitted liability, responded by filing a confession of judgment pursuant to Virginia Code section 8.01-431 in the clerk's office in the full amount of the plaintiff's *ad damnum*.<sup>149</sup> The following day, Eckert filed a motion to nonsuit the case.<sup>150</sup> The defendants opposed the nonsuit on the basis that their confession of judgment in the full amount of the plaintiff's *ad damnum* "effectively ended the case."<sup>151</sup> The plaintiff's right to nonsuit had, therefore, been terminated pursuant to the "submitted for decision" language of Virginia Code section 8.01-380.<sup>152</sup>

The trial court nonetheless permitted the nonsuit, citing to the requirement of Virginia Code section 8.01-432 that a defendant may confess judgment "for only such principal and interest as [the] creditor may be willing to accept a judgment for."<sup>153</sup> Since

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141. *Id.* at 345, 593 S.E.2d at 194.

142. *Id.*

143. *Id.* at 345-46, 593 S.E.2d at 194.

144. VA. CODE ANN. § 8.01-685 (Repl. Vol. 2000 & Cum. Supp. 2004).

145. *Phipps*, 267 Va. at 346-47, 593 S.E.2d at 195.

146. 267 Va. 442, 593 S.E.2d 260 (2004).

147. *Id.* at 444, 593 S.E.2d at 261.

148. *Id.*

149. *Id.*

150. *Id.*, 593 S.E.2d at 261-62.

151. *Id.* at 444-45, 593 S.E.2d at 262.

152. *See id.* at 445, 593 S.E.2d at 262.

153. *Id.* (quoting VA. CODE ANN. § 8.01-432 (Repl. Vol. 2000)).



the plaintiff had not accepted the confession of judgment, it was ineffective and did not constitute submitting the case for decision.<sup>154</sup> The defendants argued that since the plaintiff could not recover more than the *ad damnum*, such consent was implied.<sup>155</sup> The Supreme Court of Virginia disagreed and affirmed the trial court's order permitting the nonsuit.<sup>156</sup>

## VII. RELIEF FROM ADMISSIONS

Rule 4:11(a) of the Supreme Court of Virginia provides that requests for admissions are deemed admitted unless either objected to or denied within twenty-one days of service.<sup>157</sup> Matters which are admitted under Rule 4:11 are "conclusively established" unless the court on motion permits withdrawal or amendment of the admission under Rule 4:11(b).<sup>158</sup> In *Shaheen v. County of Mathews*,<sup>159</sup> the Supreme Court of Virginia addressed the circumstances under which a trial court should permit relief from admissions.<sup>160</sup>

The county alleged that the Shaheen's predecessor in title had filed a petition in 1896 that had established the Auburn Public Boat Landing on the North River; the county claimed ownership of the landing.<sup>161</sup> During discovery, the Shaheens had propounded two sets of requests for admissions, including one that the county admit that there was no reference in the county land records to the suit or the county's interest in the road and boat landing.<sup>162</sup> The county failed to timely respond to either set of admissions.<sup>163</sup> Over a month after the Shaheens filed the second set of requests, the county sought leave to file late answers to the Shaheens' admission requests.<sup>164</sup> The trial court granted relief from the admissions under Rule 4:11(b), holding that otherwise the county had

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154. *See id.*

155. *Id.* at 446, 593 S.E.2d at 262.

156. *Id.* at 446-47, 593 S.E.2d at 263.

157. VA. SUP. CT. R. 4:11(a).

158. *Id.* at 4:11(b).

159. 265 Va. 462, 579 S.E.2d 162 (2003).

160. *Id.* at 465, 579 S.E.2d at 165.

161. *Id.* at 466, 468, 579 S.E.2d at 165-66.

162. *Id.* at 470, 474, 579 S.E.2d at 167, 170.

163. *Id.* at 470, 579 S.E.2d at 167.

164. *Id.*

“admit[ted] away the case.”<sup>165</sup> The court then continued the case for approximately eight months in order to allow the parties additional time to prepare for trial in light of its rulings on the county’s motion.<sup>166</sup> At trial, the court determined that the county had established an easement for the road and boat landing.<sup>167</sup>

On appeal, the Supreme Court of Virginia adopted a “two-part test” based on federal decisions under Federal Rule of Civil Procedure 36(b), which contains language identical to Virginia Supreme Court Rule 4:11(b) regarding relief from admissions.<sup>168</sup> Under this test, the court’s discretion to grant relief must be exercised: “(1) when the presentation of the merits of the action will be subserved thereby[;]” and (2) ‘the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.’<sup>169</sup> As to the former element, the court agreed that refusal to grant relief from the admissions would result in the county “admitting away the case.”<sup>170</sup> Regarding the element of prejudice, the supreme court held:

This prejudice has been described as “not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, *e.g.*, caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.”<sup>171</sup>

The Shaheens did not, and could not, demonstrate this type of prejudice.<sup>172</sup> In fact, the admissions appeared to relate primarily to matters of record as to which the Shaheens produced two expert witnesses at trial.<sup>173</sup> They instead focused on the lateness of the county’s responses and on the unfairness of granting relief from admissions less than forty-eight hours before trial.<sup>174</sup> The

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165. *Id.* at 471, 474, 579 S.E.2d at 168, 170.

166. *Id.* at 471, 579 S.E.2d at 168.

167. *Id.* at 472, 579 S.E.2d at 168.

168. *Id.* at 473, 475 n.6, 579 S.E.2d at 169 & n.6.

169. *Id.* at 473, 579 S.E.2d at 169 (quoting VA. SUP. CT. R. 4:11(b) (Repl. Vol. 2004)).

170. *Id.* at 474, 579 S.E.2d at 170.

171. *Id.* (quoting *Brook Village N. Assocs. v. General Elec. Co.*, 686 F.2d 66, 70 (1st Cir. 1982)).

172. *Id.* at 475, 579 S.E.2d at 170.

173. *Id.* at 468, 579 S.E.2d at 166.

174. *Id.* at 475, 579 S.E.2d at 170.

supreme court found these considerations immaterial in view of the continuance granted by the trial court.<sup>175</sup>

Importantly, one of the Shaheens' arguments was that "the County did not offer any reason or excuse for its tardiness."<sup>176</sup> Nowhere in the decision is there any discussion of this argument. Although the opinion contains a detailed factual recitation, it does not appear that the county offered any justification for failing to timely respond to the admissions or its delay in seeking relief under Rule 4:11(b). If the county did attempt to do so, the Supreme Court of Virginia did not appear to regard it as material to its decision. The omission of any requirement of showing of "excusable neglect"<sup>177</sup> in the opinion is perhaps its most significant feature. Instead, under *Shaheen* and the "two-part test" of Rule 4:11(b), a showing that relief will promote a decision of the case on the merits, coupled with the inability of the opposing party to demonstrate prejudice, is all that is required.<sup>178</sup>

### VIII. RELIEF FROM ARBITRATION AWARD

*Lackman v. Long & Foster Real Estate, Inc.*<sup>179</sup> involved a disputed real estate commission.<sup>180</sup> The parties had agreed to arbitrate any disputes, and a panel of arbitrators had returned a decision favorable to Long & Foster.<sup>181</sup> Relief from arbitration awards is governed by Virginia Code section 8.01-581.010, which provides:

Upon application of a party, the court shall vacate an award where:

1. The award was procured by corruption, fraud or other undue means;
2. There was evident partiality by an arbitrator appointed as a neutral, corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;
3. The arbitrators exceeded their powers;

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175. *See id.*

176. *Id.* at 472, 579 S.E.2d at 169.

177. *See* FED. R. CIV. P. 6(b).

178. *See Shaheen*, 265 Va. at 475, 579 S.E.2d at 170.

179. 266 Va. 20, 580 S.E.2d 818 (2003).

180. *See id.* at 22, 580 S.E.2d at 820.

181. *Id.*

4. The arbitrators refused to . . . hear evidence material to the controversy or otherwise so conducted the hearing . . . in such a way as to substantially prejudice the rights of a party . . . .<sup>182</sup>

Lackman sued for relief from the arbitration award.<sup>183</sup> In addition to asserting several of the grounds listed in the statute, he maintained that the arbitrators had simply misconstrued the controlling brokerage contract<sup>184</sup> and invoked the court's general equitable powers in seeking relief from the arbitration award.<sup>185</sup> He asserted that Virginia Code section 8.01-581.010 was unconstitutional because it allows arbiters to ignore the contract between the parties.

The Supreme Court of Virginia upheld the constitutionality of the statute, citing the fact that parties must agree to arbitrate their disputes.<sup>186</sup> This agreement was deemed to include consent to Virginia Code section 8.01-581.010's provisions regarding enforcement of the resulting award.<sup>187</sup> The court also rejected Lackman's attempt to obtain equitable relief from the arbitration award, holding that the statute provided the exclusive basis for such relief.<sup>188</sup> In this regard, the court noted that the predecessor to the current statute, Virginia Code section 8.01-580, had specifically provided that it "shall not be construed to take away the power of courts of equity over awards."<sup>189</sup> This language was deleted in adopting Virginia Code section 8.01-581.010, which the court interpreted to terminate the power of the courts to set aside awards on general equitable principles and render the statute the exclusive basis for obtaining relief from arbitration awards.<sup>190</sup> Finally, the court held that the evidence failed to support Lack-

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182. VA. CODE ANN. § 8.01-581.010 (Repl. Vol. 2000 & Cum. Supp. 2004).

183. *Lackman*, 266 Va. at 22, 580 S.E.2d at 820.

184. *Id.* at 22-23, 24, 580 S.E.2d at 820-21.

185. *Id.* at 23, 580 S.E.2d at 820.

186. *Id.* at 25, 580 S.E.2d at 822.

187. *See id.*

188. *Id.* at 26, 580 S.E.2d at 822. This situation is in contrast to Virginia Code section 8.01-428 regarding relief from judgments generally. *See* VA. CODE ANN. § 8.01-428 (Repl. Vol. 2000 & Cum. Supp. 2004). In *Charles v. Precision Tune, Inc.*, 243 Va. 313, 414 S.E.2d 831 (1992), the Supreme Court of Virginia reaffirmed the continued ability of courts to grant relief from judgments under general equitable powers. *Id.* at 317, 414 S.E.2d at 833.

189. *Lackman*, 266 Va. at 26, 580 S.E.2d at 822.

190. *Id.* Compare this result to Virginia Code section 8.01-428(D) which provides: "This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceeding . . . ." VA. CODE ANN. § 8.01-428(D) (Repl. Vol. 2000 & Cum. Supp. 2004).

man's allegations as to fraud, partiality, and procedural errors and upheld the award.<sup>191</sup>

## IX. VARIANCE

It is a fundamental proposition that there must be identity between the pleadings, proof, and the resulting judgment or decree.<sup>192</sup> This proposition is aptly illustrated by the recent case of *Jenkins v. Bay House Associates*,<sup>193</sup> which involved the ownership of a pond opening to the Chesapeake Bay.<sup>194</sup> Bay House Associates asserted exclusive ownership and sought to enjoin adjacent landowners from erecting piers extending into the pond.<sup>195</sup> The adjacent owners asserted that once the opening was created joining the waters of the pond with the Chesapeake Bay, they acquired riparian rights to use the pond.<sup>196</sup> The trial court sustained Bay Associates' position and enjoined the defendants from erecting piers or otherwise using the pond.<sup>197</sup> On appeal, however, the Supreme Court of Virginia held that Bay House Associates' pleadings had asserted ownership only in the land beneath the pond and not in the water which comprised the pond.<sup>198</sup> Thus, while it affirmed the trial court's adjudication of the underlying title dispute, it reversed the entry of an injunction as to use of the pond.<sup>199</sup> Instead, the injunction should have prohibited only trespassing on the land under the pond, consistent with the allegations and prayer for relief in the Bill of Complaint.<sup>200</sup> In so holding, the court stated: "[a] litigant's pleadings are as essential as his proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings."<sup>201</sup>

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191. See *Lackman*, 266 Va. at 26, 580 S.E.2d at 822.

192. See, e.g., *Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139, 1141, 277 S.E.2d 228, 229 (1981) (reversing judgment where there was a variance between the legal theory asserted in the motion for judgment and the jury instructions).

193. 266 Va. 39, 581 S.E.2d 510 (2003).

194. *Id.* at 41, 581 S.E.2d at 511.

195. *Id.* at 41-42, 581 S.E.2d at 511.

196. *Id.* at 42, 581 S.E.2d at 512.

197. *Id.* at 42-43, 581 S.E.2d at 512.

198. *Id.* at 44, 581 S.E.2d at 512-13.

199. *Id.* at 45, 581 S.E.2d at 513.

200. See *id.* at 44, 581 S.E.2d at 513.

201. *Id.* at 43, 581 S.E.2d at 512.

What gives the foregoing statement particular significance is that *Jenkins* was a chancery proceeding. Unlike the rule at law which limits the ability of the court to grant judgment in excess of the *ad damnum*,<sup>202</sup> once the court's general equitable powers have been properly invoked, it is not limited to the specific equitable relief sought by the plaintiff.<sup>203</sup> Bay House Associates asserted that, although it had not specifically sought that portion of the injunction related to use of the waters comprising the pond, it was within the court's general equitable powers to grant it.<sup>204</sup> The Supreme Court of Virginia disagreed<sup>205</sup> and provided the following guidance:

When a party prays for both special and general relief and no relief may be granted under the special prayer, a court of equity may grant proper relief under the general prayer that is consistent with the case stated in the bill of complaint. . . . However, a general prayer will support relief only for those matters placed in controversy by the pleadings and, thus, any relief granted must be supported by allegations of material facts in the pleadings that will sustain such relief. This rule reflects the principle that although the power of an equity court is broad, that power does not permit a court to adjudicate claims that the parties have not asserted.<sup>206</sup>

## X. WRONGFUL DEATH

*Fowler v. Winchester Medical Center, Inc.*<sup>207</sup> interpreted and applied the statute of limitations applicable to wrongful death suits.<sup>208</sup> Under Virginia Code section 8.01-244, these suits must be brought within two years of the decedent's death.<sup>209</sup> Subsection (B) provides that the limitations period is tolled when a suit has been timely brought, but abates other than by nonsuit without an adjudication on the merits.<sup>210</sup> In this case, the decedent's widow

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

203. *Jenkins*, 266 Va. at 44-45, 581 S.E.2d at 513.

204. *Id.* at 43, 581 S.E.2d at 512.

205. *Id.*

206. *Id.* at 44-45, 581 S.E.2d at 513 (citations omitted).

207. 266 Va. 131, 580 S.E.2d 816 (2003).

208. *Id.* at 133, 580 S.E.2d at 817.

209. VA. CODE ANN. § 8.01-244(A) (Repl. Vol. 2000 & Cum. Supp. 2004).

210. *Id.* § 8.01-244(B) (Repl. Vol. 2000 & Cum. Supp. 2004). Nonsuits of wrongful death cases are governed by Virginia Code section 8.01-229(E)(3) (Cum. Supp. 2004).

had qualified as administrator of his estate in West Virginia.<sup>211</sup> After administration of the West Virginia estate was complete and without qualifying in Virginia, she filed this action for wrongful death.<sup>212</sup> After the expiration of the two year limitations period, defendants challenged her standing.<sup>213</sup> Fowler responded by attempting to nonsuit in order to qualify and refile.<sup>214</sup> The trial judge refused to permit the nonsuit and the action was dismissed with prejudice.<sup>215</sup>

In this regard, Fowler could cite *McDaniel v. North Carolina Pulp Co.*<sup>216</sup> in which the Supreme Court of Virginia held the statute of limitations to be tolled by the filing of a wrongful death suit by a personal representative who was qualified in Nevada, but had not qualified in Virginia.<sup>217</sup> In *McDaniel*, the nonsuit was permitted.<sup>218</sup> A few months later the plaintiff refiled the case, joined by a co-plaintiff who was a resident of Virginia and had recently qualified as the decedent's personal representative in the Commonwealth.<sup>219</sup> Notwithstanding the lack of proper qualification in Virginia, *McDaniel* had been held the "real party in interest" and, as such, was entitled to nonsuit and to take advantage of Virginia Code section 8.01-244(B)'s tolling provision.<sup>220</sup> The plaintiff in *Fowler*, however, was not qualified in West Virginia or Virginia at the time the suit was filed.<sup>221</sup> On this basis, the court distinguished *McDaniel* and affirmed the trial judge's refusal to permit the nonsuit.<sup>222</sup>

## XI. IMPROPER ARGUMENT

The Supreme Court of Virginia addressed the subject of improper jury argument in *Velocity Express Mid-Atlantic, Inc. v.*

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211. *Fowler*, 266 Va. at 132, 580 S.E.2d at 816.

212. *Id.* at 133, 580 S.E.2d at 816.

213. *Id.*

214. *Id.*

215. *Id.*, 580 S.E.2d at 816-17.

216. 198 Va. 612, 95 S.E.2d 201 (1956).

217. *Id.* at 619-20, 95 S.E.2d at 207.

218. *Id.* at 614, 95 S.E.2d at 203.

219. *Id.* at 619, 95 S.E.2d at 206.

220. *Id.* at 619-20, 95 S.E.2d at 206-07.

221. *Fowler*, 266 Va. at 134, 580 S.E.2d at 817.

222. *Id.* at 136, 580 S.E.2d at 818.

*Hugen*.<sup>223</sup> In that case, Hugen suffered catastrophic injuries as a result of a collision with a van operated by an employee of Velocity Express.<sup>224</sup> Both parties agreed that Hugen was permanently disabled and would require around-the-clock assistance for the balance of his life.<sup>225</sup> Hugen contended that his injuries required the services of a licensed practical nurse, at a cost of approximately \$17 million over his remaining life expectancy.<sup>226</sup> Velocity Express' expert testified that a certified nursing aide would be capable of providing appropriate care at a lower cost of \$4 million.<sup>227</sup> During closing argument, Hugen's counsel made several arguments which were objected to by defense counsel.<sup>228</sup> The jury returned a verdict of \$60 million in favor of Hugen.<sup>229</sup> Velocity Express moved for a mistrial, which the trial judge denied.<sup>230</sup>

At one point, Hugen's counsel suggested to the jury that it should award damages that would permit Hugen to procure the services of the more expensive licensed practical nurse, because wealthy persons such as Howard Hughes or Bill Gates would do so if similarly injured.<sup>231</sup> The Supreme Court of Virginia held that the trial judge erred in overruling the defendant's objection to this and other comments and in denying its motion for a mistrial, stating:

This argument was improper because plaintiff's counsel asked the jury to award damages based upon irrelevant economic considerations that are not part of the record in this case. The above-referenced portion of plaintiff's closing argument asked the jury to award damages to the plaintiff so that he could afford the same quality of medical care and treatment that the world's richest individuals might purchase for themselves. The law of this Commonwealth, however, only requires that a jury award plaintiff compensatory damages that will fairly compensate him for his injuries proximately caused by defendant's negligence.<sup>232</sup>

Hugen's counsel also repeatedly suggested to the jury that they

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223. 266 Va. 188, 585 S.E.2d 557 (2003).

224. *Id.* at 191, 585 S.E.2d at 559.

225. *See id.* at 192, 585 S.E.2d at 559-60.

226. *Id.*

227. *Id.* at 192, 585 S.E.2d at 560.

228. *Id.* at 194-97, 585 S.E.2d at 561-62.

229. *Id.* at 192, 585 S.E.2d at 560.

230. *Id.* at 197, 585 S.E.2d at 562.

231. *Id.* at 195, 585 S.E.2d at 561.

232. *Id.* at 200-01, 585 S.E.2d at 564.



place themselves in the place of Hugen or his wife.<sup>233</sup> For example, the plaintiff's counsel at one point argued: "*Suppose your husband were choking to death and he couldn't open his mouth? Do you want an aide trying to get your husband's throat clear or would you like to have a nurse . . .*"<sup>234</sup> The trial court admonished that "it is not appropriate to ask the jurors to put themselves in the place of the party."<sup>235</sup> The supreme court ruled that, given the plaintiff's counsel's repeated violations of the prohibition on invoking the "Golden Rule," the trial judge's admonition to Hugen's lawyer was insufficient to avoid prejudice.<sup>236</sup> Since liability was relatively clear and the improper argument went to the issue of damages only, however, the matter was remanded for a new trial on this issue alone.<sup>237</sup>

## XII. REQUIREMENT OF CONTEMPORANEOUS OBJECTION

Rule 5A:18<sup>238</sup> applicable to the Court of Appeals of Virginia, and Rule 5:25<sup>239</sup> applicable to the Supreme Court of Virginia, both require that the appellant make a contemporaneous objection to the trial court in order to preserve the ability to appeal. *Williams v. Gloucester Sheriff's Department*<sup>240</sup> involved an appeal from a decision by the Worker's Compensation Commission.<sup>241</sup> Williams claimed he had developed heart disease due to his employment by the Gloucester County Sheriff's Department.<sup>242</sup> His claim had been initially denied by a deputy commissioner.<sup>243</sup> On appeal, the full Commission affirmed the denial of Williams's claim; its decision, however, was based on a determination that his last "injurious exposure" occurred while employed elsewhere.<sup>244</sup>

The court of appeals refused Williams's appeal on the grounds

233. *See id.* at 196, 585 S.E.2d at 561-62.

234. *Id.* at 196, 585 S.E.2d at 562. Similar arguments were made repeatedly by plaintiff's counsel during closing argument. *See id.* at 196-97, 585 S.E.2d at 562.

235. *Id.* at 196, 585 S.E.2d at 562.

236. *Id.* at 202, 585 S.E.2d at 565.

237. *Id.* at 203, 585 S.E.2d at 566.

238. VA. SUP. CT. R. 5A:18 (Repl. Vol. 2004).

239. VA. SUP. CT. R. 5A:25 (Repl. Vol. 2004).

240. 266 Va. 409, 587 S.E.2d 546 (2003).

241. *Id.* at 410, 587 S.E.2d at 547.

242. *Id.*

243. *Id.*

244. *Id.*

that he had failed to make a contemporaneous objection to this ruling, as required by Rule 5A:18.<sup>245</sup> Williams contended that there was no opportunity to make such an objection, as “the basis for the Commission’s decision was not raised, litigated, or in any way considered as an issue in the case prior to the issuance of the Commission’s decision.”<sup>246</sup> The Supreme Court of Virginia held that, notwithstanding this fact, Williams could have brought his arguments before the Commission in a motion for reconsideration and that his failure to do so barred his appeal.<sup>247</sup>

### XIII. ACTIONS BROUGHT BY MINORS

Virginia Code section 8.01-8 provides that actions on behalf of a minor should be brought by “his next friend.”<sup>248</sup> In *Herndon v. St. Mary’s Hospital, Inc.*,<sup>249</sup> the action on behalf of the injured minor was brought by “Debbie Thompson Herndon, as mother and next friend of Matthew McNeil Herndon.”<sup>250</sup> St. Mary’s moved to dismiss on the grounds that the action had not been brought in Matthew’s own name by his “next friend.”<sup>251</sup> It was undisputedly the requirement at common law that the action be initiated in the minor’s name by his “next friend,” rather than in the name of the “next friend.”<sup>252</sup> Herndon pointed to language added to the statute in 1998 that “[e]ither or both parents may sue on behalf of a minor as his next friend,”<sup>253</sup> and argued that this language altered the common law rule.<sup>254</sup> The Supreme Court of Virginia held this language to be ambiguous; but, based upon the rule of construction that “a statutory provision will not be held to change the

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245. *Id.*, 587 S.E.2d at 548.

246. *Id.* at 411, 587 S.E.2d at 548.

247. *Id.* at 411–12, 587 S.E.2d at 548. For additional discussion of *Williams*, see Lawrence D. Tarr & Salvatore Lupica, *Annual Survey of Virginia Law: Worker’s Compensation*, 39 U. RICH. L. REV. 475, 506–07 (2004).

248. VA. CODE ANN. § 8.01-8 (Repl. Vol. 2000 & Cum. Supp. 2004).

249. 266 Va. 472, 587 S.E.2d 567 (2003).

250. *Id.* at 474, 587 S.E.2d at 568.

251. *Id.*

252. See *Kirby v. Gilliam*, 182 Va. 111, 116, 28 S.E.2d 40, 43 (1943).

253. Act of Apr. 12, 1998, ch. 402, 1998 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 8.01-8 (Repl. Vol. 2000 & Cum. Supp. 2004)).

254. *Herndon*, 266 Va. at 475, 587 S.E.2d at 569.

common law unless the legislative intent to do so is plainly manifested," it affirmed the trial court's dismissal of the action.<sup>255</sup>

#### XIV. SETTING ASIDE DEFAULT JUDGMENT

*Ryland v. Manor Care, Inc.*<sup>256</sup> involved an action seeking equitable relief from a default judgment pursuant to Virginia Code section 8.01-428(D),<sup>257</sup> which sets forth various statutory grounds for relief from judgments.<sup>258</sup> Subsection (D) preserves the power of courts to grant equitable relief from judgments.<sup>259</sup> In this case, Manor Care timely notified its insurer of service of the plaintiff's action.<sup>260</sup> The insurer encountered difficulty in engaging the defense counsel, with the first counsel engaged resigning when the insurer was put in receivership and the second counsel discovering a conflict after accepting the engagement.<sup>261</sup> The insurer finally engaged the defense counsel; by this time, however, default judgment had been entered.<sup>262</sup> Manor Care sought to have the default reconsidered or set aside under the statute, and this relief was granted by the trial court.<sup>263</sup> Ryland then brought the subject chancery proceeding seeking equitable relief.<sup>264</sup>

In *Charles v. Precision Tune, Inc.*,<sup>265</sup> the Supreme Court of Virginia held the exercise of this power to be appropriate where the following five factors are present:

(1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of

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255. *Id.* at 476-77, 587 S.E.2d at 569-70 (citing *Linhart v. Lawson*, 261 Va. 30, 35, 540 S.E.2d 875, 877 (2001)).

256. 266 Va. 503, 587 S.E.2d 515 (2003).

257. *Id.* at 505, 587 S.E.2d at 517.

258. VA. CODE ANN. § 8.01-428(D) (Repl. Vol. 2000 & Cum. Supp. 2004).

259. *Id.*

260. *Ryland*, 266 Va. at 506, 587 S.E.2d at 517.

261. *Id.* at 506-08, 587 S.E.2d at 517-18.

262. *Id.* at 508, 587 S.E.2d at 518.

263. *Id.*

264. *Id.* at 509, 587 S.E.2d 519.

265. 243 Va. 313, 414 S.E.2d 831 (1992).

his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.<sup>266</sup>

In the subsequent case of *Media General, Inc. v. Smith*,<sup>267</sup> the Supreme Court of Virginia had expressly declined to adopt the federal “excusable neglect” standard for relief from defaults.<sup>268</sup> Importantly, in both of these cases, the court found equitable relief inappropriate.<sup>269</sup>

The trial court in *Ryland*, citing primarily the first factor enumerated in *Precision Tune*, granted equitable relief from the default judgment.<sup>270</sup> On appeal, the Supreme Court of Virginia affirmed this decision.<sup>271</sup> Its initial analysis focused on the absence of specific findings on the other four elements of the *Precision Tune* test.<sup>272</sup> Although it “stress[ed] that a trial court must articulate its findings with particularity regarding each of the five elements set forth in *Precision Tune*,”<sup>273</sup> the court affirmed the trial court on the basis that it “presume[d] that the court nonetheless made the necessary findings since it set aside the default judgment.”<sup>274</sup> The court then focused on the particular circumstances presented under the “fraud, accident, or mistake” and “absence of fault or negligence” prongs of the test.<sup>275</sup> In particular, it cited the ethical dilemma faced by the second defense counsel who discovered a conflict after committing to the engagement.<sup>276</sup> Before this information could be communicated to the insurer and acted upon, the time for filing responsive pleadings expired and default judgment was entered.<sup>277</sup> The court distinguished this situation from a matter of inadvertence or neglect.<sup>278</sup> The court also held that Manor Care was free from fault because it justifiably relied

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266. *Id.* at 317–18, 414 S.E.2d at 833.

267. 260 Va. 287, 534 S.E.2d 733 (2000).

268. *Id.* at 291, 587 S.E.2d at 735.

269. *Id.* at 291–92, 534 S.E.2d at 736; *Precision Tune*, 243 Va. at 318, 414 S.E.2d at 833.

270. See *Ryland v. Manor Care, Inc.*, 266 Va. 503, 508–09, 587 S.E.2d 515, 518–19 (2003).

271. *Id.* at 512, 587 S.E.2d at 521.

272. *Id.* at 510, 587 S.E.2d at 519.

273. *Id.*

274. *Id.* at 509, 587 S.E.2d at 519.

275. *Id.* at 508–09, 587 S.E.2d 518–19.

276. *Id.* at 510–11, 587 S.E.2d at 520.

277. *Id.*

278. *Id.*

upon defense counsel's initial commitment to the engagement before discovery of the conflict.<sup>279</sup>

Finally, the court discussed and distinguished its decision in *Media General*.<sup>280</sup> In that case, all that had been shown was that there was a system in place for responding to lawsuits and that the system had failed.<sup>281</sup> Conversely, in *Ryland*, Manor Care had shown precisely why responsive pleadings had not been timely filed, and that showing indicated no fault or negligence on its part.<sup>282</sup>

## XV. VIRGINIA TORT CLAIMS ACT

The Virginia Tort Claims Act<sup>283</sup> provides for a limited waiver of the sovereign immunity of the Commonwealth.<sup>284</sup> In *Rector and Visitors of the University of Virginia v. Carter*,<sup>285</sup> the Supreme Court of Virginia held that the sovereign immunity of agencies of the Commonwealth survived adoption of the Act.<sup>286</sup> This case arose from a medical malpractice action brought by Carter against the University of Virginia and a resident physician in its hospital.<sup>287</sup> The Commonwealth, however, was not named as a defendant in the suit.<sup>288</sup> The physician asserted sovereign immunity and was dismissed from the case.<sup>289</sup> The trial court denied the University's plea of sovereign immunity<sup>290</sup> and this issue was certified to the Supreme Court of Virginia.<sup>291</sup>

Citing to the language of Virginia Code section 8.01-195.3 that "the Commonwealth shall be liable for claims,"<sup>292</sup> the Supreme Court of Virginia held that this waiver of common law sovereign

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279. *Id.* at 511, 587 S.E.2d at 520.

280. *Id.* at 511-12, 587 S.E.2d at 520.

281. *Id.* at 511, 587 S.E.2d at 520.

282. *Id.* at 511-12, 587 S.E.2d at 520.

283. VA. CODE ANN. §§ 8.01-195.1 to -195.9 (Cum. Supp. 2004).

284. *Id.* § 8.01-195.3 (Repl. Vol. 2000 & Cum. Supp. 2004).

285. 267 Va. 242, 591 S.E.2d 76 (2004).

286. *Id.* at 246, 591 S.E.2d at 78-79.

287. *Id.* at 244, 591 S.E.2d at 77.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. VA. CODE ANN. § 8.01-195.3 (Repl. Vol. 2000 & Cum. Supp. 2004).

immunity did not extend to agencies of the Commonwealth.<sup>293</sup> The court rejected Carter's argument based on Virginia Code section 8.01-195.4 which provides that the Commonwealth "shall be a proper party defendant."<sup>294</sup> Carter pointed out that unless the waiver of sovereign immunity applied to agencies of the Commonwealth, the only party that could be sued under the Act would be the Commonwealth itself, thus making it a "necessary" party and not merely a "proper" party.<sup>295</sup> Carter also pointed to the notice provision of Virginia Code section 8.01-195.6 which requires the notice to identify "the agency or agencies alleged to be liable."<sup>296</sup> Nonetheless, the court ruled: "[i]f the General Assembly desired in the Act to waive the sovereign immunity of the Commonwealth's agencies in addition to the immunity of the Commonwealth, it could have easily done so. It did not."<sup>297</sup>

The sufficiency of the plaintiff's notice of claim under Virginia Code section 8.01-195.6 was at issue in *Bates v. Commonwealth*,<sup>298</sup> where the plaintiff's decedent died while a patient at the University of Virginia Medical Center.<sup>299</sup> In her notice of claim, plaintiff identified the place of injury as "University of Virginia Health Sciences Center, Charlottesville, Virginia."<sup>300</sup> Virginia Code section 8.01-195.6 specifically requires that notice be given to the Attorney General, "which includes the time and place at which the injury is alleged to have occurred."<sup>301</sup> Moreover, in *Halberstam v. Commonwealth*,<sup>302</sup> the Supreme Court of Virginia strictly construed this requirement and held that a notice specifying the place of injury as "the school parking lot" at George Mason University was insufficient on the basis that the University had "a number of parking lots and more than one campus."<sup>303</sup> In *Bates*, the Commonwealth argued that the University of Virginia Medical Center similarly contains multiple buildings, floors, and

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293. *Carter*, 267 Va. at 244, 591 S.E.2d at 77-78.

294. VA. CODE ANN. § 8.01-195.4 (Cum. Supp. 2004).

295. *Carter*, 267 Va. at 245, 591 S.E.2d at 78.

296. *Id.* (quoting VA. CODE ANN. § 8.01-195.6 (Cum. Supp. 2004)).

297. *Id.* at 246, 591 S.E.2d at 78-79.

298. 267 Va. 387, 593 S.E.2d 250 (2004).

299. *Id.* at 389-90, 593 S.E.2d at 252.

300. *Id.* at 390, 593 S.E.2d at 252.

301. VA. CODE ANN. § 8.01-195.6 (Cum. Supp. 2004).

302. 251 Va. 248, 467 S.E.2d 783 (1996).

303. *Id.* at 251, 467 S.E.2d at 785.

rooms.<sup>304</sup> The trial court agreed and based upon *Halberstam* dismissed the action.<sup>305</sup>

On appeal, the Supreme Court of Virginia reversed the trial court's decision.<sup>306</sup> In so doing, the court reaffirmed that the statute should be strictly construed and that *Halberstam* had been correctly decided.<sup>307</sup> It stated, however, that the purpose of the requirement of identifying the place of injury was to enable the Commonwealth to undertake an investigation of the claim.<sup>308</sup> On the facts presented, it found that "[Virginia] code § 8.01-195.6 does not mandate that Bates was required to identify the floor or room within the hospital at which the alleged injury to Banks occurred because that degree of specificity was unnecessary to accomplish the purpose of the statute."<sup>309</sup>

The Supreme Court of Virginia interpreted the "legislative function" exception to the Virginia Tort Claims Act, Virginia Code section 8.01-195.3(2), in *Maddox v. Commonwealth*.<sup>310</sup> Maddox, a minor, was injured while riding his bicycle on a sidewalk in Amelia, Virginia.<sup>311</sup> He alleged that the Commonwealth was negligent in its design and maintenance of the sidewalk by allowing a "sharp and sudden drop off" to the adjacent land without a railing or other barrier.<sup>312</sup> He also alleged that by allowing the condition to persist, the Commonwealth was maintaining a nuisance.<sup>313</sup> The trial court sustained the Commonwealth's plea of sovereign immunity as to all claims.<sup>314</sup> Maddox appealed only the ruling on his nuisance claim.<sup>315</sup>

Virginia Code section 8.01-195.3(2) excepts from the Tort Claims Act's waiver of sovereign immunity "[a]ny claim based upon an act or omission of the General Assembly . . . or to the legislative function of any agency subject to the provisions of this ar-

304. *Bates*, 267 Va. at 390-91, 593 S.E.2d at 252.

305. *Id.* at 391, 593 S.E.2d at 252.

306. *Id.* at 395, 593 S.E.2d at 255.

307. *Id.* at 394, 593 S.E.2d at 255.

308. *Id.*, 593 S.E.2d at 254.

309. *Id.* at 394-95, 291 S.E.2d at 255.

310. 267 Va. 657, 594 S.E.2d 567 (2004).

311. 267 Va. at 660, 594 S.E.2d at 568.

312. *Id.*

313. *Id.*

314. *Id.* at 659, 594 S.E.2d at 658.

315. *Id.*

title.”<sup>316</sup> Maddox argued that in this context, “legislative function” was more limited than the term “governmental function,” as used in various sovereign immunity decisions, and should be interpreted as applying only to discretionary matters, such as setting utility rates, drafting statutes, and promulgating rules.<sup>317</sup> Maddox also cited to *Taylor v. City of Charlottesville*<sup>318</sup> in which the Supreme Court of Virginia had held that a municipality could not plead sovereign immunity in defense of a nuisance claim under remarkably similar circumstances.<sup>319</sup>

The Supreme Court of Virginia disagreed, holding that the design of streets, including adjacent sidewalks, is within the legislative power of the General Assembly.<sup>320</sup> Although delegated to the Commonwealth Transportation Commissioner and the Virginia Department of Transportation, the design of roads retains its legislative character.<sup>321</sup> The court declined to distinguish nuisance claims from negligence or other causes of action and limited the application of *Taylor* to claims against municipalities and not “an agent or instrumentality of the state.”<sup>322</sup> Accordingly, the trial court’s dismissal of the action was affirmed.<sup>323</sup>

## XVI. DECLARATORY JUDGMENT ACT

At common law, a dispute could not be adjudicated unless there was a cause of action “ripe” for decision. In the context of contracts and other written instruments, this meant that one party was forced to breach the obligation in order to be entitled to an adjudication of rights.<sup>324</sup> In Virginia Code section 8.01-184, the

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316. VA. CODE ANN. § 8.01-195.3(2) (Repl. Vol. 2000 & Cum. Supp. 2004).

317. *Maddox*, 267 Va. 662, 594 S.E.2d at 569.

318. 240 Va. 367, 397 S.E.2d 832 (1990).

319. *Maddox*, 267 Va. 662, 594 S.E.2d at 569. *Taylor* involved a claim that the city was maintaining a nuisance by failing to install a barrier at the end of a road beyond which was a steep precipice. *Taylor*, 240 Va. at 369–70, 372–74, 397 S.E.2d at 834–37.

320. *Maddox*, 267 Va. at 663–65, 594 S.E.2d at 570–71.

321. *See id.*, at 665, 594 S.E.2d at 571.

322. *Id.* at 664–65, 594 S.E.2d at 570–71. In this regard, the court cited to its earlier decision in *Kellam v. School Board*, 202 Va. 252, 117 S.E.2d 96 (1960), in which it had held that a school board, as “an agent or instrumentality of the state” was immune from suit for maintaining a nuisance. *Id.* at 258–59, 117 S.E.2d at 100.

323. *Maddox*, 267 Va. at 665, 594 S.E.2d at 571.

324. *Cf.* W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE 477 (3d ed. 1997).



General Assembly provided for the issuance of declaratory judgments.<sup>325</sup> This statute was not, however, intended to authorize the issuance of mere "advisory opinions."<sup>326</sup> Rather, it specifically requires that there be an "actual controversy" between the parties.<sup>327</sup> In *River Heights Associates v. Batten*,<sup>328</sup> the Supreme Court of Virginia interpreted and applied this requirement.

*River Heights* involved the enforceability of covenants, dating to 1959, restricting the use of certain lots fronting on Route 29 in Albemarle County to "residential purposes only."<sup>329</sup> At the time, Route 29 was a two-lane road with residences and small businesses on both sides of the road.<sup>330</sup> Presently, Route 29 is eight-to-ten lanes wide in the vicinity of the property, with intense commercial development on both sides of the road.<sup>331</sup> No residential uses had been implemented along Route 29 since 1959.<sup>332</sup> Moreover, in 1969 when Albemarle County implemented its zoning ordinance, the subject property had been zoned B-1, a commercial classification in which residential use is prohibited.<sup>333</sup>

The defendant argued that the declaratory judgment proceeding was premature and that it had taken no "substantial steps" toward developing the property in violation of the covenant, such as the "expenditure of significant monies" or "the development of specific plans."<sup>334</sup> While agreeing that something more than speculation is required, the court held that the plaintiff's pleading did establish the existence of an "actual controversy."<sup>335</sup> In this regard, the court pointed to the fact that the defendant had met with residents in the subdivision and "indicated that he intended to commercially develop the properties at issue" and had engaged an architect to prepare plans for this development.<sup>336</sup>

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325. VA. CODE ANN. § 8.01-184 (Repl. Vol. 2000 & Cum. Supp. 2004).

326. *City of Fairfax v. Shanklin*, 205 Va. 227, 229-30, 135 S.E.2d 773, 775-76 (1964).

327. VA. CODE ANN. § 8.01-184 (Repl. Vol. 2000 & Cum. Supp. 2004).

328. 267 Va. 262, 591 S.E.2d 683 (2004).

329. *Id.* at 265, 266, 591 S.E.2d at 684, 685.

330. *Id.* at 267, 591 S.E.2d at 685.

331. *Id.*

332. *Id.*

333. *Id.* at 266, 591 S.E.2d at 685.

334. *Id.* at 268, 591 S.E.2d at 686.

335. *Id.* at 270, 591 S.E.2d at 687.

336. *Id.* at 269-70, 591 S.E.2d at 687.

## XVII. SOVEREIGN IMMUNITY

*Gambrell v. City of Norfolk*<sup>337</sup> involved a “slip and fall” in a city owned parking lot following a significant snowfall.<sup>338</sup> The plaintiff was an employee of Bank of America, which leased about 900 of the 1,100 available spaces in the lot from the city at a rental rate of \$375,000 per year.<sup>339</sup> Immediately following the snowfall, the city closed the lot, reopening the lot two days later without plowing it.<sup>340</sup> The plaintiff was injured walking across the unplowed lot to the shuttle bus stop.<sup>341</sup> Witnesses for the city testified that work crews had been plowing city streets around the clock since the snowfall, but had not been able to plow the lot in question, as there were secondary streets which remained to be cleared.<sup>342</sup> The trial court sustained the city’s plea of sovereign immunity.<sup>343</sup>

On appeal, the Supreme Court of Virginia reviewed the law of sovereign immunity, which distinguishes between governmental functions, to which immunity applies, and proprietary functions, to which the municipality is liable for negligence on the same basis as a private party.<sup>344</sup> A function is considered governmental “if it is directly related to the general health, safety, and welfare of the citizens.”<sup>345</sup> On the other hand, “a function is proprietary in nature if it involves a privilege and power performed primarily for the benefit of the municipality.”<sup>346</sup> In particular, the court stated that “routine maintenance or operation of a service being provided by a municipality” is typically considered proprietary.<sup>347</sup>

Interestingly, the court did not discuss at length Gambrell’s assertion that the overwhelmingly private use of the allegedly “public” parking lot rendered the city’s operation of the lot proprietary. Instead, it focused on the city’s snow removal efforts

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337. 267 Va. 353, 593 S.E.2d 246 (2004).

338. *Id.* at 354, 593 S.E.2d at 247.

339. *Id.* at 355, 593 S.E.2d at 247.

340. *Id.*

341. *Id.*

342. *Id.* at 356, 593 S.E.2d at 248.

343. *Id.*

344. *Id.* at 357–59, 593 S.E.2d at 249–50.

345. *Id.* at 357, 593 S.E.2d at 249.

346. *Id.*

347. *Id.* at 357–58, 593 S.E.2d at 249.

following the snowstorm.<sup>348</sup> Citing prior cases holding that snow removal was “an integral part of the governmental function of rendering the city streets safe for public travel,”<sup>349</sup> the court held that sovereign immunity applied to bar the plaintiff’s action.<sup>350</sup>

### XVIII. STATUTE OF LIMITATIONS

In *Shipman v. Kruck*,<sup>351</sup> the Supreme Court of Virginia interpreted and applied the “continuous representation rule” to an action for legal malpractice.<sup>352</sup> The Shipmans had engaged Kruck to defend them in an action brought by one of their creditors.<sup>353</sup> They stated that their primary objective was to protect their residence from creditors, which was held by Mr. Shipman as trustee pursuant to a Declaration of Trust.<sup>354</sup> Kruck incorrectly interpreted the trust to be irrevocable and filed a bankruptcy petition on their behalf on March 9, 1998.<sup>355</sup> The bankruptcy trustee asserted that the trust was revocable and should be included in the Shipmans’ bankruptcy estate.<sup>356</sup> On January 19, 1999, Kruck withdrew as counsel for the Shipmans.<sup>357</sup> In subsequent proceedings, the Bankruptcy Court held the trust revocable and ordered the property sold to satisfy creditor claims.<sup>358</sup> The Shipmans repurchased the property from the bankruptcy trustee to prevent its sale to a third party on June 29, 2001.<sup>359</sup> The case dealt with the timeliness of their motion for judgment against Kruck, filed on September 11, 2002.<sup>360</sup>

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348. *Id.* at 359, 593 S.E.2d at 250.

349. *Stanfield v. Peregoy*, 245 Va. 339, 344, 429 S.E.2d 11, 13 (1993); *see also* *Bialk v. City of Hampton*, 242 Va. 56, 59, 405 S.E.2d 619, 621 (1991).

350. *Gambrell*, 267 Va. 358–59, 593 S.E.2d at 249–50.

351. 267 Va. 495, 593 S.E.2d 319 (2004).

352. *Id.* at 502, 593 S.E.2d at 323.

353. *Id.* at 499, 593 S.E.2d at 320–21.

354. *Id.*, 593 S.E.2d at 321.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* at 499–500, 593 S.E.2d at 321.

359. *Id.* at 500, 593 S.E.2d at 321.

360. *See id.* The Shipmans initially filed suit on January 8, 2002, which, under the Supreme Court of Virginia’s decision, would have been timely. *Id.* However, at the time the bankruptcy was still pending, the cause of action against Kruck had not been abandoned by the bankruptcy trustee. *Id.* Kruck challenged the Shipmans’ standing and they elected to nonsuit and seek abandonment by the bankruptcy trustee. *Id.* They refiled their action

Kruck asserted that the cause of action accrued on March 9, 1998, when the bankruptcy petition was filed, subject to tolling under the “continuous representation rule” until January 19, 1999, when he withdrew from the representation.<sup>361</sup> The Shipmans contended that they incurred no damages, and thus their cause of action did not mature until they repurchased their house from the bankruptcy trustee on June 29, 2001.<sup>362</sup> In this regard, the Shipmans relied heavily on *Allied Productions v. Duesterdick*,<sup>363</sup> in which the Supreme Court of Virginia had held that an action for legal malpractice was demurrable on the basis that the plaintiff had not alleged payment of the default judgment suffered due to alleged negligence of his counsel.<sup>364</sup> The Supreme Court of Virginia noted that it had addressed only the sufficiency of the plaintiff’s allegations of damages and not the statute of limitations in *Duesterdick*.<sup>365</sup> Nonetheless, it found the *Duesterdick* decision contrary to longstanding precedent such as *Housing Authority v. Laburnum Construction Corp.*<sup>366</sup> and *Virginia Military Institute v. King*,<sup>367</sup> which hold that even slight damages will support the accrual of a cause of action and trigger the running of the statute of limitations.<sup>368</sup> Among other things, adoption of a “payment rule” would allow plaintiffs to indefinitely defer accrual of malpractice claims.<sup>369</sup> Accordingly, the court formally adopted the dissenting opinion of Justice Poff in *Duesterdick* and overruled the majority opinion in the case.<sup>370</sup> The court went on to af-

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on September 11, 2002. *Id.* The trial judge held that the nonsuited action did not toll the statute of limitations and no error was assigned to this ruling on appeal. *Id.* at 500, 593 S.E.2d at 322. Thus, the applicable filing date for purposes of the decision was September 11, 2002. *Id.* In a footnote at the end of the decision, however, the court pointed out that no argument had been presented as to the potential tolling effect of the bankruptcy or the nonsuited action and stated, “hence, we express no opinion on such arguments in the present disposition.” *Id.* at 509 n.7, 593 S.E.2d at 327 n.7.

361. *Id.* at 502, 593 S.E.2d at 323 (citing *Keller v. Denny*, 232 Va. 512, 352 S.E.2d 327 (1987)).

362. *Id.* at 502, 593 S.E.2d at 322.

363. 217 Va. 763, 232 S.E.2d 774 (1977).

364. *Id.* at 766, 232 S.E.2d at 776.

365. *Shipman*, 267 Va. at 507, 593 S.E.2d at 325.

366. 195 Va. 827, 80 S.E.2d 574 (1954).

367. 217 Va. 751, 232 S.E.2d 895 (1977).

368. *Shipman*, 267 Va. at 503, 593 S.E.2d at 323.

369. *Id.* at 507, 593 S.E.2d at 326.

370. *Id.* at 509, 593 S.E.2d at 327.

firm the trial court's dismissal of the case following the reasoning advanced by Kruck.<sup>371</sup>

In *Richmeade, L.P. v. City of Richmond*,<sup>372</sup> the Supreme Court of Virginia held that claims for regulatory takings are subject to the three-year statute of limitations as being akin to implied contracts, rather than the five-year statute of limitations for damage to property.<sup>373</sup> In that case, Richmeade requested that the city vacate a street separating two parcels owned by the partnership in order to permit joint development of the property.<sup>374</sup> City Council initially agreed, but then reversed itself and refused to vacate the street.<sup>375</sup> Richmeade brought a claim for inverse condemnation alleging that its property had been "taken or damaged" by the city's action.<sup>376</sup>

The trial court sustained a plea of the statute of limitations on the basis that the action had been brought more than three years after accrual, citing *Prendergast v. Northern Virginia Regional Park Authority*.<sup>377</sup> In *Prendergast*, the plaintiff alleged that water from restoration work on the Authority's property had flooded the lower level of its adjacent building.<sup>378</sup> Among the claims asserted was one for inverse condemnation.<sup>379</sup> The Supreme Court of Virginia held that the inverse condemnation claim was subject to the three-year statute of limitations on the basis that the claim was analogous to a contract implied at law.<sup>380</sup>

On appeal, Richmeade argued that its injury could more properly be characterized as an injury to property subject to the five-year statute of limitations of Virginia Code section 8.01-243.<sup>381</sup> It also argued that "the object of the litigation and not its form de-

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371. *Id.*

372. 267 Va. 598, 594 S.E.2d 606 (2004).

373. *Id.* at 602, 594 S.E.2d at 608. The three-year statute of limitations for implied contracts is set forth in Virginia Code section 8.01-246 (Repl. Vol. 2000 & Cum. Supp. 2004). Virginia Code section 8.01-243(B) (Repl. Vol. 2000 & Cum. Supp. 2004) sets the statute of limitations for claims for damage to property at five years.

374. *Richmeade*, 267 Va. at 600, 594 S.E.2d at 607.

375. *Id.*

376. *Id.*

377. *Id.*, 594 S.E.2d at 608 (citing *Prendergast v. N. Va. Reg'l Park Auth.*, 227 Va. 190, 313 S.E.2d 399 (1984)).

378. *Prendergast*, 227 Va. at 192, 313 S.E.2d at 400.

379. *Id.*

380. *Id.* at 194-95, 313 S.E.2d at 401.

381. *Richmeade*, 267 Va. at 602-03, 594 S.E.2d at 609.

termines the applicability of a statute of limitations<sup>382</sup> and that “the object of every inverse condemnation action is to recover for injury to property.”<sup>383</sup> The Supreme Court of Virginia disagreed, stating: “[t]o take or damage property in the constitutional sense does not require that the sovereign actually invade or disturb the property. Taking or damaging property in the constitutional sense means that the governmental action adversely affects the landowner’s ability to exercise a right connected to the property.”<sup>384</sup> The court agreed that *Prendergast* controlled<sup>385</sup> and affirmed the trial court’s dismissal of the action.<sup>386</sup>

### XIX. SERVICE OF PROCESS

In *Lifestar Response of Maryland, Inc. v. Vegosen*,<sup>387</sup> the Supreme Court of Virginia interpreted and applied the “curing statute.”<sup>388</sup> In that case, Vegosen served an amended motion for judgment on Lifestar which did not include the notice of motion for judgment prepared by the clerk.<sup>389</sup> Lifestar failed to respond, and default judgment was entered by the trial court in the amount of \$100,000.<sup>390</sup> Thereafter, Lifestar filed a motion to vacate pursuant to Virginia Code section 8.01-428(A)(ii) on the basis that it had not been served with process and the trial court had therefore not acquired jurisdiction over Lifestar.<sup>391</sup> The trial court held that Lifestar had actual knowledge of the proceedings<sup>392</sup> and invoked the curing statute, Virginia Code section 8.01-288, which

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382. *Id.* at 602, 594 S.E.2d at 609.

383. *Id.*

384. *Id.*

385. *Id.*, 594 S.E.2d at 608.

386. *Id.* at 604, 594 S.E.2d at 610.

387. 267 Va. 720, 594 S.E.2d 589 (2004).

388. *Id.* at 722, 594 S.E.2d at 590 (referring to VA. CODE ANN. § 8.01-288 (Repl. Vol. 2000 & Cum. Supp. 2004)).

389. *Id.* at 722 n.1, 594 S.E.2d at 590 n.1.

390. *Id.* at 722–23, 594 S.E.2d at 590.

391. *Id.* at 723, 594 S.E.2d at 590.

392. *Id.*, 594 S.E.2d at 590–91. The notice of motion for judgment includes official notice that a responsive pleading must be filed within twenty-one days. In this case, the trial court found that plaintiffs counsel had orally notified Lifestar’s registered agent of the date responsive pleadings were due. *Id.*

provides that defects in the manner of service are cured upon proof of timely and actual receipt by the defendant.<sup>393</sup>

The Supreme Court of Virginia reversed, holding that "process" includes both the plaintiff's pleading and the notice of motion for judgment issued by the clerk.<sup>394</sup> Without service of both documents, the defendant has not been served with "process," and the trial court did not acquire jurisdiction over *Lifestar*.<sup>395</sup> As to the application of the curing statute, the court held that it cures only defects in the manner of serving process, but not defects in the process itself.<sup>396</sup> In this case, "process," meaning the plaintiff's pleading and the notice of motion for judgment, never reached *Lifestar*.<sup>397</sup> Thus, the curing statute had no application and the trial court was in error in awarding default judgment and in denying *Lifestar*'s motion to vacate.<sup>398</sup>

## XX. RULE AMENDMENTS

Effective January 1, 2003, the Supreme Court of Virginia amended Rules 4:1(c), regarding protective orders,<sup>399</sup> 4:12, regarding motions to compel discovery;<sup>400</sup> and 4:15, regarding motions practice generally to require the moving party to append a certification "that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."<sup>401</sup>

The Supreme Court of Virginia announced an amendment to Rule 1:12, effective October 15, 2003, relating to service by elec-

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393. VA. CODE ANN. § 8.01-288 (Repl. Vol. 2000 & Cum. Supp. 2004).

394. *Lifestar*, 267 Va. at 725, 594 S.E.2d at 591-92. Rule 3:3(c) sets out the form of the notice of motion for judgment and provides that "[t]he clerk shall issue the notice and attach it to a copy of the motion for judgment, and the combined papers shall constitute the notice of motion for judgment to be served as a single paper." VA. SUP. CT. R. 3:3(c) (Repl. Vol. 2004).

395. *Lifestar*, 267 Va. at 725, 594 S.E.2d at 591-92.

396. *Id.*

397. *Id.*, 594 S.E.2d at 591.

398. *Id.*, 594 S.E.2d at 591-92.

399. VA. SUP. CT. R. 4:1(c) (Repl. Vol. 2004).

400. VA. SUP. CT. R. 4:12 (Repl. Vol. 2004).

401. VA. SUP. CT. R. 4:15 (Repl. Vol. 2004).

tronic mail.<sup>402</sup> Previously, Rule 1:12 provided that copies of all pleadings, motions, and other papers after service of initial process be served by delivering, dispatching by commercial delivery service, transmitting by facsimile, or mailing to all counsel of record.<sup>403</sup> To these means of service, the court added “delivering by electronic mail when consented to in writing signed by the person to be served.”<sup>404</sup> The amendment also provided that “[s]ervice by electronic mail under this Rule is not effective if the party making service learns that the attempted service did not reach the person to be served.”<sup>405</sup>

Conforming amendments were also made to Rule 1:7, regarding computation of time,<sup>406</sup> Rule 1:13, regarding endorsements,<sup>407</sup> and Rule 4:9, regarding production of documents<sup>408</sup> to permit service by electronic mail and to provide that one additional day be added to the stipulated response time, as with service by commercial delivery service or facsimile.<sup>409</sup> These rules now simply refer to Rule 1:12, rather than specifying service by hand delivery, commercial delivery service, facsimile, or mail.<sup>410</sup>

Rule 4:7, concerning use of depositions in court proceedings, was also amended, effective October 15, 2003.<sup>411</sup> Previously, subsection (b) of Rule 4:7 only dealt with objections to admissibility, but it now also governs “Form of Presentation” and provides that a party may offer deposition testimony in stenographic or “non-stenographic” form.<sup>412</sup> If a party offers a deposition in “nonstenographic” form, “the offering party shall also provide the court with a transcript of the portions so offered.”<sup>413</sup>

Finally, effective as of February 1, 2004, the Supreme Court of Virginia amended Rules 5:17, petition for appeal,<sup>414</sup> 5:18, brief in

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402. VA. SUP. CT. R. 1:12 (Repl. Vol. 2004).

403. *Id.*

404. *Id.*

405. *Id.*

406. VA. SUP. CT. R. 1:7 (Repl. Vol. 2004).

407. VA. SUP. CT. R. 1:13 (Repl. Vol. 2004).

408. VA. SUP. CT. R. 4:9 (Repl. Vol. 2004).

409. *Id.*

410. VA. SUP. CT. R. 1.12 (Repl. Vol. 2004).

411. VA. SUP. CT. R. 4:7 (Repl. Vol. 2004).

412. *Id.* at 4:7(b).

413. *Id.*

414. VA. SUP. CT. R. 5:17 (Repl. Vol. 2004).



opposition,<sup>415</sup> and 5:19, reply brief,<sup>416</sup> to require the filing of seven copies.<sup>417</sup> Previously, each rule had required the filing of only four copies.<sup>418</sup>

## XXI. RECENT LEGISLATION

Among the more significant changes to title 8.01 in 2003 was the adoption of Virginia Code section 8.01-15.1 relating to proceedings brought by an anonymous plaintiff.<sup>419</sup> In the event anonymous participation is contested, the party seeking to maintain anonymity must show "special circumstances" by reference to a number of enumerated factors.<sup>420</sup> These factors include: (i) whether "the need for anonymity outweighs the public's interest in knowing the party's identity;" (ii) whether the party is merely attempting to avoid "annoyance" or is seeking to preserve privacy in a "sensitive and highly personal matter," (iii) the risk of retaliatory physical or mental harm; (iv) the age of the persons seeking anonymity; (v) "whether the action is against a governmental or private party;" and (vi) "the risk of unfairness to other parties."<sup>421</sup> Even where a party is permitted to proceed anonymously, all parties to the litigation have the right to know the true identity of the anonymous party, subject to entry of a confidentiality order by the court, and to conduct appropriate discovery.<sup>422</sup>

The General Assembly also adopted a significant revision to the Medical Malpractice Act in 2003.<sup>423</sup> Section 8.01-581.20 was amended to provide that in any proceeding subject to the Act, a party may only call two expert witnesses per medical discipline.<sup>424</sup> This provision does not apply to treating physicians as to which

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415. VA. SUP. CT. R. 5:18 (Repl. Vol. 2004).

416. VA. SUP. CT. R. 5:19 (Repl. Vol. 2004).

417. VA. SUP. CT. R. 5:17, 5:18, 5:19 (Repl. Vol. 2004).

418. *Id.*

419. Act of Mar. 18, 2003, ch. 572, 2003 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 8.01-15.1).

420. VA. CODE ANN. § 8.01-15.1(A) (Cum. Supp. 2004).

421. *Id.*

422. *Id.* at § 8.01-15.1(B).

423. Act of Mar. 16, 2003, ch. 251, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-581.20 (Cum. Supp. 2004)).

424. *Id.*

there is no limitation.<sup>425</sup> The trial court may, upon good cause shown, grant leave for additional experts to be called. Such leave, however, is to be conditioned upon payment to the opposing party of costs for discovery necessitated by the additional experts.<sup>426</sup>

Virginia Code section 8.01-606 permits relatively modest amounts under the control of the court and payable to persons under a legal disability to be disbursed directly.<sup>427</sup> Otherwise, the appointment of a guardian is required along with the attendant expense of posting a bond, filing annual accountings, etc.<sup>428</sup> Formerly, the amount the court was permitted to disburse pursuant to the statute was \$10,000.<sup>429</sup> In 2003, the General Assembly increased this sum to \$15,000.<sup>430</sup>

In 2004, the General Assembly amended Virginia Code section 16.1-77 to provide that counterclaims and cross-claims in commercial unlawful detainer cases are not subject to the \$15,000 limitation applicable to actions in General District Courts.<sup>431</sup> Previously, the \$15,000 limitation did not apply to claims for unlawful detainer involving non-residential property, but counterclaims and cross-claims were arguably subject to the court's normal jurisdictional limitations.<sup>432</sup>

One of the more far reaching amendments passed by the General Assembly in 2004 was chapter 1014 of the Acts of Assembly, which amended Virginia Code section 8.01-413 along with sections 2.2-3705, 16.1-266, 16.1-343, 32.1-127.1:03, 37.1-67.3, 37.1-134.9, 37.1-134.12, 37.1-134.21, 37.1-226 through 37.1-230, and 38.2-608,<sup>433</sup> largely to bring these statutes into conformity with certain provisions of the federal Health Insurance Portability and

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425. *Id.*

426. *Id.*

427. VA. CODE ANN. § 8.01-606(A) (Cum. Supp. 2004).

428. *Id.* § 8.01-606(B).

429. Act of Mar. 16, 2003, ch. 195, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-606 (Cum. Supp. 2004)).

430. *Id.*

431. Act of Apr. 8, 2004, ch. 344, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 16.1-77 (Supp. 2004)).

432. *Id.*

433. Act of Apr. 21, 2004, ch. 1014, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 2.2-3705, 8.01-413 (Cum. Supp. 2004), 16.1-266, -343 (Supp. 2004), 32.1-127.1:03 (Supp. 2004), 37.1-67.3, -134.9, -134.12, -134.21, -226 to -230 (Cum. Supp. 2004), and 38.2-608 (Cum. Supp. 2004)).

Accountability Act<sup>434</sup> and related federal regulations.

Virginia Code section 8.01-413(B) previously provided that patient records were to be furnished by any health care provider upon request of the patient or any authorized attorney or insurer making such request on behalf of the patient.<sup>435</sup> This requirement was subject, however, to an exception where the "treating physician" had made a written statement part of the medical record to the effect that disclosure to the patient would be "injurious to the patient's health or well being."<sup>436</sup> The amendment added "clinical psychologist" to this provision and changed the standard for withholding disclosure to situations where disclosure would be "reasonably likely to endanger the life or physical safety of the patient or another person" or where "such health records make reference to a person, other than a health care provider, and the access requested would be reasonably likely to cause substantial harm to such referenced person."<sup>437</sup>

Finally, a new provision was inserted for third-party review where disclosure is being withheld pursuant to this exception.<sup>438</sup> The third-party review may be done by a physician or clinical psychologist with credentials comparable to the treating physician or clinical psychologist of the patient's choosing and at the patient's expense; or by a physician or clinical psychologist not involved in the original treatment selected by the health care provider and at the health care provider's expense.<sup>439</sup>

Virginia Code section 8.01-417 was amended to provide that parties obtaining documents by subpoena are required to provide copies, upon request, to any other party.<sup>440</sup> This requirement is subject to payment of reasonable copying charges.<sup>441</sup> Previously, this statute only addressed the right of an injured party to obtain a copy of his own witness statement from opposing parties.<sup>442</sup>

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434. 42 U.S.C. § 201 (2000).

435. Act of Apr. 21, 2004, ch. 1014, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-417 (Cum. Supp. 2004)).

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. Act of Apr. 8, 2004, ch. 345, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-417 (Cum. Supp. 2004)).

441. *Id.*

442. *Id.*

Appeal bonds are subject to a \$25 million limitation pursuant to Virginia Code section 8.01-676.1.<sup>443</sup> Under prior law, this limitation applied to “noncompensatory” damages only.<sup>444</sup> The General Assembly amended section 8.01-676.1 to provide that the \$25 million limitation applied to all damages.<sup>445</sup>

Pursuant to Virginia Code section 8.01-380, a plaintiff may take a nonsuit at any time until a motion to strike has been granted, the jury has retired for its deliberation of the case, or the matter has been submitted for decision by the court.<sup>446</sup> This right is subject to the assessment of travel costs and fees of expert witnesses if a nonsuit is taken within seven days of trial.<sup>447</sup> Previously, this provision had been triggered if the nonsuit was taken within five days of trial.<sup>448</sup>

The amendment of pleadings to correct a misnomer is governed by Virginia Code section 8.01-6.<sup>449</sup> It provides that for statute of limitations purposes, the amendment will relate back to the original filing date of the action if (i) the amended claim arose out of the same transaction or occurrence as the original pleading; (ii) the defendant received notice of the action within the statute of limitations period; (iii) the defendant is not prejudiced in maintaining his defense on the merits; and (iv) the defendant knew or should have known that, but for mistake concerning the identity of the proper party, the action would have been brought against the defendant.<sup>450</sup> The amendment to this statute now includes situations where the defendant “or his agent” had knowledge of the action.<sup>451</sup> As to amendments based on confusion of trade names, the statute already contained the language relating to agents.<sup>452</sup>

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443. VA. CODE ANN. § 8.01-676.1 (Cum. Supp. 2004).

444. Act of Apr. 8, 2004, ch. 356, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-676.1 (Cum. Supp. 2004)).

445. *Id.*

446. VA. CODE ANN. § 8.01-380 (Cum. Supp. 2004).

447. *Id.*

448. Act of Apr. 8, 2004, ch. 362, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-380 (Cum. Supp. 2004)).

449. VA. CODE ANN. § 8.01-6 (Cum. Supp. 2004).

450. *Id.*

451. Act of Mar. 15, 2003, ch. 141, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-6 (Cum. Supp. 2004)).

452. *See* VA. CODE ANN. § 8.01-6.2 (Repl. Vol. 2000 & Cum. Supp. 2004).

Virginia Code sections 16.1-88.03 and 55-246.1 permit certain non-attorneys to appear in General District Court.<sup>453</sup> This typically occurs in unlawful detainer cases, and the statute formerly permitted licensed real estate brokers or agents or "resident managers" to appear in such cases.<sup>454</sup> These sections have been amended to permit any authorized employee, property manager or managing agent, in addition to licensed real estate brokers or agents, to both sign pleadings and appear to take judgment for rent and/or possession.<sup>455</sup>

In *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*,<sup>456</sup> the Supreme Court of Virginia held that a claim for legal malpractice involving the preparation of a revocable trust did not accrue during the decedent's lifetime since no damages were sustained until the assessment of estate taxes due to the allegedly negligently prepared trust.<sup>457</sup> Since there was no claim during the decedent's life, pursuant to Virginia Code section 8.01-25, no claim survived the decedent's death.<sup>458</sup> The General Assembly amended Virginia Code section 64.1-145 to modify this result in the case of irrevocable trusts.<sup>459</sup> By statute, such a claim will exist and survive the death of the grantor.<sup>460</sup> It will be deemed to accrue upon completion of the representation in which the alleged malpractice occurred and is subject to a five-year statute of limitations for written engagements or three years for oral engagements.<sup>461</sup> No action may be maintained if damages could reasonably be avoided or result from a change in law subsequent to the representation.<sup>462</sup> Revocable trusts will continue to be subject to the holding in *Rutter*.<sup>463</sup>

The General Assembly also amended the venue provision of Virginia Code section 8.01-262 to include among the Category B,

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453. *Id.* §§ 16.1-88.03, 55-246.1 (Supp. 2004).

454. *Id.*

455. Act of Apr. 8, 2004, ch. 338, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 16-1-88.03, 55-246.1) (Supp. 2004).

456. 264 Va. 310, 568 S.E.2d 693 (2002).

457. *Id.* at 314, 568 S.E.2d at 695.

458. *Id.* at 313-14, 568 S.E.2d at 694-95.

459. Act of Apr. 8, 2004, ch. 368, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-145) (Cum. Supp. 2004).

460. VA. CODE ANN. § 64.1-145 (Cum. Supp. 2004).

461. *Id.*

462. *Id.*

463. See *Rutter*, 264 Va. at 314, 568 S.E.2d at 695.

or permissible venues, any place where the defendant “regularly conducts substantial business activity.”<sup>464</sup> Previously, this provision permitted actions to be brought where the defendant “regularly conducts affairs or business activity.”<sup>465</sup>

Finally, the General Assembly amended Virginia Code sections 8.01-407 and 16.1-265, relating to attorney-issued subpoenas, to remove the restriction on the issuance of such subpoenas within five days of trial.<sup>466</sup> Under the amendment, attorney-issued subpoenas are subject to the same time limitations as clerk-issued subpoenas.<sup>467</sup> The court is not required to enforce any subpoena issued within five days of trial, nor is the sheriff required to serve such subpoenas.<sup>468</sup>

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464. Act of Apr. 15, 2004, ch. 979, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-262) (Cum. Supp. 2004)).

465. *Id.*

466. Act of Apr. 8, 2004, ch. 335, 2004 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 8.01-407 (Cum. Supp. 2004), 16.1-265 (Supp. 2004)).

467. *Id.*

468. *Id.*

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