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MEDICAL MALPRACTICE LAW

Kathleen M. McCauley *

William F. Demarest III **

For many years, medical malpractice law in Virginia remained static and somewhat predictable. Historically, *Annual Survey* medical malpractice articles focused on infrequent statutory amendments and the handful of cases that came down from the Supreme Court of Virginia each year,¹ which were often more important for their facts than their law. Medical malpractice cases in the supreme court, however, have become increasingly common, and the once predictable outcomes have become more unpredictable. In recognition of this changing landscape, Part I of this article looks at what to expect in the coming year from the Virginia General Assembly, and Part II details similar expectations from the courts. Part III examines major legislation from the 2008 General Assembly Session. Part IV addresses decisions by the supreme court during the past year.

I. THE YEAR TO COME IN THE GENERAL ASSEMBLY

The Virginia General Assembly has not made many major changes to the Medical Malpractice Act² in recent years. Although it has passed a number of health care statutes and minor amendments, the General Assembly has not passed any major

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1. See, e.g., Sean P. Byrne & Paul Walkinshaw, *Annual Survey of Virginia Law: Health Care Law*, 42 U. RICH. L. REV. 441 (2007); Kathleen M. McCauley & Dana A. Dews, *Annual Survey of Virginia Law: Medical Malpractice Law*, 41 U. RICH. L. REV. 231 (2006); Kathleen M. McCauley, *Annual Survey of Virginia Law: Health Care Law*, 38 U. RICH. L. REV. 137 (2003).

2. VA. CODE ANN. §§ 8.01-581.1 to -581.20:1 (Repl. Vol. 2007 & Supp. 2008).

legislation. The 2009 Session, however, will likely involve more General Assembly action concerning medical malpractice and related laws.

A. *Medical Malpractice Cap*

As part of the tort reform measures passed in 1976, Virginia adopted a medical malpractice cap on damages.³ The General Assembly has amended the cap numerous times since its passage. In 1999, the General Assembly amended the cap to include an increase in coverage every year until 2008.⁴ The cap has risen steadily from \$1.5 million for causes of action accruing after 1999 to its current level of \$2 million for causes of action accruing after July 1, 2008.⁵ However, the statute provides that “[t]he July 1, 2008, increase shall be the final annual increase.”⁶ The 2008 General Assembly did not amend or even address the statute. Accordingly, a flurry of activity likely will occur in the 2009 Session with regard to this important aspect of the Medical Malpractice Act.

As Peter Vieth recently stated, “Familiar battle lines between plaintiffs’ lawyers and doctors will be forming soon over a possible increase in Virginia’s \$2 million cap on damages in medical malpractice cases.”⁷ The Medical Society of Virginia (“MSV”) argues that “[t]he cap protects the health, safety, and welfare of patients by ensuring the availability of health care providers and the adequacy of health services in Virginia.”⁸ MSV urges that there be no additional increases in the cap.⁹ The Virginia Trial Lawyers Association (“VTLA”) has not yet stated its formal position on the cap but likely will weigh in before the next legislative session be-

3. Act of Apr. 9, 1976, ch. 611, 1976 Va. Acts 784 (codified as amended at VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 2007)).

4. Act of Mar. 28, 1999, ch. 711, 1999 Va. Acts 1190 (codified as amended at VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 2007)).

5. See VA. CODE ANN. § 8.01-581.15.

6. *Id.*

7. Peter Vieth, *Med-Mal Cap Fight on Horizon for 2009*, VA. LAW. WKLY., Aug. 4, 2008, at 1, 19.

8. Medical Society of Virginia, *Medical Malpractice Cap, MSV Backgrounder*, (Oct. 19, 2007), <http://www.msv.org/files/public/%2708malpracticecapbackgrounder.pdf>.

9. *Id.*

gins.¹⁰ Several publications, however, have already begun actively writing and lobbying to change the cap.¹¹

Virginia has a global cap on all damages related to the alleged injury.¹² Of those states with caps on recovery, the majority only caps non-economic damages (e.g., pain and suffering, loss of consortium, emotional distress, punitive damages, etc).¹³ The upcoming legislative session likely will include proposals to increase the cap, to abolish the cap, and perhaps even to adopt a non-economic damages cap instead. At the end of the day, the General Assembly likely will not abolish the limitation entirely or limit the cap to non-economic damages. Instead, the legislature probably will change the incremental increase going forward or apply some type of annual index to the overall cap to keep pace with the cost of living and the ever-increasing cost of medical care in the United States.

B. Peer Review Statutes

The Medical Malpractice Act includes two sections commonly referred to as "Peer Review Statutes."¹⁴ The purpose of these statutes is to shield peer review participants and documents from liability and discovery.¹⁵ Virginia Code section 8.01-581.17 provides, among other things:

10. Plaintiffs' attorneys have challenged the constitutionality of the medical malpractice cap on several occasions. However, the Supreme Court of Virginia twice defended the cap's constitutionality. See *Pulliam v. Coastal Emergency Serv.*, 257 Va. 1, 7, 509 S.E.2d 307, 310 (1999); *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 97, 100-01, 103-04, 376 S.E.2d 525, 529, 531-34 (1989).

11. See, e.g., Editorial, *Malpractice Victims out of Luck in Virginia*, ROANOKE TIMES, June 8, 2008, Horizon Editorial, at 2.

12. See generally *Bulala v. Boyd*, 239 Va. 218, 228, 389 S.E.2d 670, 675 (1990) (holding that the cap limits the total amount of damages recoverable by a plaintiff).

13. See, e.g., CAL. CIV. CODE § 3333.2 (West 1997 & Supp. 2008); FLA. STAT. ANN. § 768.73 (West 2006 & Supp. 2008); KAN. STAT. ANN. § 60-3701 (2005 & Supp. 2007); MASS. ANN. LAWS ch. 231, § 60H (LexisNexis 2000 & Supp. 2008); MO. ANN. STAT. § 538.215 (West 2008); N.H. REV. STAT. ANN. § 508.4-d (1997); N.D. CENT. CODE § 32-42-02 (1996); S.C. CODE ANN. § 15-32-220 (Supp. 2007); WASH. REV. CODE ANN. § 4.56.250 (West 2006); WIS. STAT. ANN. § 655.017 (West Supp. 2007).

14. VA. CODE ANN. §§ 8.01-581.16, -581.17 (Repl. Vol. 2007 & Supp. 2008).

15. See *id.*; see also Christopher S. Morter, Note, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?*, 74 VA. L. REV. 1115, 1131-37 (1988).

The proceedings, minutes, records, and reports of any (i) medical staff committee, utilization review committee, or other committee, board, group, commission or other entity as specified in § 8.01-581.16; (ii) nonprofit entity that provides a centralized credentialing service; or (iii) quality assurance, quality of care, or peer review committee . . . together with all communications, both oral and written, originating in or provided to such committees or entities, are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless a circuit court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports, or communications. . . . Nothing in this section shall be construed as providing any privilege to health care provider, emergency medical services agency, community services board, or behavioral health authority medical records kept with respect to any patient in the ordinary course of business of operating a hospital, emergency medical services agency, community services board, or behavioral health authority nor to any facts or information contained in such records nor shall this section preclude or affect discovery of or production of evidence relating to hospitalization or treatment of any patient in the ordinary course of hospitalization of such patient.¹⁶

The scope of these protections was the focus of the Supreme Court of Virginia's opinion in *Riverside Hospital, Inc. v. Johnson*.¹⁷ The *Johnson* opinion limited the scope of section 8.01-581.17 regarding discovery of peer review related documents. Specifically, the court declared that the statute does not protect factual incident reports even if produced for or by a peer review committee.¹⁸ The court stated:

The use of this factual information in some way in the peer review or quality care committee process alone is insufficient to automatically cloak such information with the protection of non-disclosure. Factual patient care incident information that does not contain or reflect any committee discussion or action by the committee reviewing the information is not the type of information that must "necessarily be confidential" in order to allow participation in the peer or quality assurance review process.¹⁹

Thus, some documents once assumed protected are now discoverable as a result of *Johnson*.

16. VA. CODE ANN. § 8.01-581.17(B)-(C) (Repl. Vol. 2007 & Supp. 2008).

17. See 272 Va. 518, 636 S.E.2d 416 (2006). For a detailed analysis of the court's opinion, see Byrne & Walkinshaw, *supra* note 1, at 443-47.

18. *Johnson*, 272 Va. at 533-34, 636 S.E.2d at 424-25.

19. *Id.* at 533, 636 S.E.2d at 424.

In response to the *Johnson* opinion, Delegate John M. O'Bannon, III offered House Bill 382 to amend section 8.01-581.17.²⁰ The bill would add the following language to the statute:

Delivery to a committee or other entity specified in § 8.01-581.16 of information that was not restricted information prior to its delivery to such committee or other entity shall not make such document restricted information; however, the fact of delivery to such committee or other entity and the content of any communication accompanying the information shall be restricted information. Information created at the request of or for the express purpose of review by a committee or other entity specified in § 8.01-581.16 shall constitute restricted information without regard to the nature of the information contained therein.²¹

Thus, O'Bannon's bill would abrogate the *Johnson* ruling. The General Assembly, however, continued the bill in the House Committee for Courts of Justice until the 2009 Session.²² Hospitals, medical schools, physician practice groups, and their counsel will be watching this legislation closely next spring, attempting to maintain the protection afforded to those other categories of peer review materials covered under the statute.

C. *Response to Hicks v. Mellis*

The General Assembly likely will address Virginia Code section 8.01-335(B)²³ in the coming year after the Supreme Court of Virginia's recent decision in *Hicks v. Mellis*.²⁴ Section 8.01-335(B) provides:

Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. . . . Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.²⁵

20. H.B. 382, Va. Gen. Assembly (Reg. Sess. 2008).

21. *Id.*

22. See Legislative Information System, Bill Tracking, H.B. 382, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=hb382> (last visited Oct. 28, 2008).

23. VA. CODE ANN. § 8.01-335(B) (Repl. Vol. 2007 & Supp. 2008).

24. 275 Va. 213, 657 S.E.2d 142 (2008).

25. VA. CODE ANN. § 8.01-335(B) (Repl. Vol. 2007 & Supp. 2008).

In *Hicks*, the court addressed the notice portion of the statute, specifically, whether the statute's language that the case "may be reinstated, on motion, *after notice to the parties in interest, if known*" created a jurisdictional requirement.²⁶

The *Hicks* case involved an incredibly complicated procedural history.²⁷ The plaintiff filed the first motion for judgment in the Circuit Court for the City of Richmond in 1993 for events that occurred in 1990.²⁸ The trial court granted her request for a voluntary nonsuit in 1995, more than two years after she first filed suit.²⁹ Four years later, the plaintiff filed a second motion for judgment.³⁰ In 2003, the circuit court struck the case from its docket pursuant to the three-year rule of section 8.01-335(B).³¹ The plaintiff filed for, and was granted, reinstatement of her claim ten months later.³² She obtained a second voluntary nonsuit in 2004.³³ On the same day that the circuit court granted the second nonsuit, the plaintiff filed a third motion for judgment, naming Dr. Mellis as the sole defendant.³⁴ The defendant was served with this motion in 2005.³⁵ This was the first time Dr. Mellis was served and, in fact, it was his first notice of the lawsuit, even though he had been named in a prior motion for judgment.³⁶ The defendant filed a plea of the statute of limitations, and the circuit court dismissed the claim with prejudice.³⁷ The circuit court's decision focused on the plaintiff's failure to notify the defendant prior to the reinstatement as required by section 8.01-335(B).³⁸

The Supreme Court of Virginia disagreed with the circuit court's interpretation of section 8.01-335(B).³⁹ After examining

26. *Hicks*, 275 Va. at 218–19, 657 S.E.2d at 145 (emphasis added).

27. *Id.* at 218, 657 S.E.2d at 144.

28. *Id.* at 216, 657 S.E.2d at 143. Because the plaintiff brought suit on behalf of her three-year-old child, *id.*, the suit was tolled by Virginia Code section 8.01-243.1. VA. CODE ANN. § 8.01-243.1 (Repl. Vol. 2007).

29. *Hicks*, 275 Va. at 216, 657 S.E.2d at 143.

30. *Id.*

31. *Id.*, 657 S.E.2d at 143–44.

32. *Id.*, 657 S.E.2d at 144.

33. *Id.*

34. *Id.*

35. *Id.* at 217, 657 S.E.2d at 144.

36. *Id.* at 216–17, 657 S.E.2d at 143–44.

37. *Id.* at 217, 657 S.E.2d at 144.

38. *Id.*

39. *Id.* at 219, 657 S.E.2d at 145.

the statutory text, the court concluded that “a circuit court may enter an order reinstating a discontinued case only after notice is given to known parties in interest.”⁴⁰ The court also concluded that the circuit court erred by reinstating the case in 2003, given that the plaintiff had not notified the defendant by that time.⁴¹

The court then addressed whether this “requirement” made the circuit court’s decision void ab initio or merely voidable.⁴² If the decision was void ab initio, then the 2004 nonsuit, a final order, was a nullity, and the defendant could challenge it.⁴³ If the decision was merely voidable, however, Dr. Mellis could not challenge the order more than twenty-one days after it was entered.⁴⁴ The court concluded that because the statute “permits a circuit court to enter a reinstatement order without prior notice to anyone when the circuit court has determined that there are no known interested parties or counsel of record,” the notice requirement was not jurisdictional, and the order was merely voidable.⁴⁵ Therefore, the appellant successfully insulated the circuit court’s erroneous order by filing a nonsuit.⁴⁶

The supreme court acknowledged in its opinion “that because [the defendant] was not served in the nonsuited action[] and had no other notice of those proceedings, he did not know that the May 25, 2004 order of nonsuit had been entered and could have been appealed.”⁴⁷ However, the court stated, “This problem . . . cannot be considered in this collateral action but may raise a question for the General Assembly’s consideration in future revisions to Code § 8.01-335(B).”⁴⁸

This is the same sort of challenge that the supreme court presented to the General Assembly in *Janvier v. Arminio*.⁴⁹ Like *Hicks*, *Janvier* addressed whether a particular code section, Virginia Code section 8.01-380(B), included a notice provision.⁵⁰

40. *Id.* at 218, 657 S.E.2d at 145.

41. *Id.*

42. *Id.* at 219, 657 S.E.2d at 145.

43. *See id.* (citing *Collins v. Shepherd*, 274 Va. 390, 402, 649 S.E.2d 672, 678 (2007)).

44. *See id.* (citing *Singh v. Mooney*, 261 Va. 48, 51–52, 541 S.E.2d 549, 551 (2001)).

45. *Id.* at 219–20, 657 S.E.2d at 145–46.

46. *See id.* at 220, 657 S.E.2d at 146.

47. *Id.* at 221, 657 S.E.2d at 146.

48. *Id.*

49. 272 Va. 353, 366, 634 S.E.2d 754, 761 (2006).

50. *Id.* at 357, 634 S.E.2d at 755.

Whereas the court in *Hicks* found a notice requirement, the court in *Janvier* concluded that the General Assembly had not intended to require notice.⁵¹ As the court noted in *Hicks*, the General Assembly amended section 8.01-380(B) in 2007 in response to *Janvier* “to require that a defendant be given notice of a plaintiff’s request for a second or subsequent nonsuit.”⁵² In light of the General Assembly’s immediate response to *Janvier*, the legislature likely will amend its statutes again to inform the supreme court of its intentions more clearly.

D. *The Medical Malpractice Settlement Offer and Recovery Act*

Delegate Clifford L. Athey, Jr., of Virginia’s 18th District proposed House Bill 1282 in January 2008.⁵³ H.B. 1282, the Medical Malpractice Settlement Offer and Recovery Act (the “Recovery Act”), would alter substantially the legal landscape for medical malpractice actions in Virginia. The Recovery Act would create a new form of settlement that the defendant may offer voluntarily within the first 180 days after filing a responsive pleading.⁵⁴ The settlement offer would be irrevocable, but the plaintiff would have just thirty days to accept or reject the offer.⁵⁵ Under the proposed legislation, for the Recovery Act to apply, the offer must cover the plaintiff’s compensatory damages—including lost wages and medical expenses—but it may not cover non-economic damages.⁵⁶ If the plaintiff rejects the offer, she must prove, by clear and convincing evidence, that her injuries were the result of “gross negligence or wanton and willful misconduct.”⁵⁷ The Recovery Act was left in the House Committee for Courts of Justice at the close of the 2008 Session.⁵⁸ Practitioners in the legal and medical fields will want to be aware of this legislation for the next session.

51. *Id.* at 366, 634 S.E.2d at 760.

52. *Hicks*, 275 Va. at 220 n.1, 657 S.E.2d at 146 n.1.

53. H.B. 1282, Va. Gen. Assembly (Reg. Sess. 2008).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. See Legislative Information System, Bill Tracking, H.B. 1282, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=hb1282> (last visited Oct. 28, 2008).

II. ANTICIPATED CASES IN THE SUPREME COURT OF VIRGINIA

The Supreme Court of Virginia is scheduled to hear several medical malpractice cases in the next session. Like the potential legislation described above, these cases will likely have significant impacts on the future of medical malpractice and health care law in Virginia.

A. Charitable Immunity

1. Eastern Virginia Medical School Academic Physicians and Surgeons Health Services Foundation

The Supreme Court of Virginia will address three cases concerning the charitable immunity status of Eastern Virginia Medical School Academic Physicians and Surgeons Health Services Foundation: *Mayfield-Brown v. Sayegh*, *Wright v. Silver*, and *Clark v. De Veciana*.⁵⁹ In all three cases, the circuit court granted the physician's plea of charitable immunity.⁶⁰ After the supreme court's recent decision in *University of Virginia Health Services Foundation v. Morris*, the resolution of these cases will be eagerly anticipated.⁶¹

2. The *Morris* Case

In *Morris*, the court addressed three appeals regarding the charitable immunity status of the University of Virginia Health Services Foundation ("HSF").⁶² In two of the cases, the trial court denied the physician's plea while another court sustained it.⁶³ The supreme court highlighted four of the *Ola*⁶⁴ factors as demonstrating that HSF did not operate as a charitable organiza-

59. Supreme Court of Virginia Record No. 071167, available at <http://courts.state.va.us/scv/appeals/071167.html> (last visited on Oct. 28, 2008); Supreme Court of Virginia Record No. 071175, available at <http://courts.state.va.us/scv/appeals/071175.html> (last visited on Oct. 28, 2008); Supreme Court of Virginia Record No. 072312, available at <http://courts.state.va.us/scv/appeals/072312.html> (last visited on Oct. 28, 2008).

60. *Id.*

61. 275 Va. 319, 657 S.E.2d 512 (2008).

62. *Id.* at 329–30, 657 S.E.2d at 516–17.

63. *Id.*

64. *Ola v. YMCA of S. Hampton Rds., Inc.*, 270 Va. 550, 621 S.E.2d 70 (2005).

tion and, therefore, did not qualify for the immunity.⁶⁵ Specifically, the court noted (1) that HSF was created for billing and collection; (2) the ratio of HSF's cost of charitable service to revenue (0.66% or \$1,500,000/\$225,898,000, according to the court's calculation); (3) that the profits are distributed in a bonus-like structure based on departmental revenue, not charitable care; and (4) that HSF does not accept charitable gifts, lending further support to the determination.⁶⁶ Ultimately, the court focused on whether HSF operated like a nonprofit or like a for-profit organization.⁶⁷

The court's decision was largely fact intensive. Similarly, the outcome of the Eastern Virginia Medical School Academic Physicians and Surgeons Health Services Foundation cases likely will turn on whether the court is convinced that the entity acted in a nonprofit or a for-profit manner.

B. *Wrongful Death and Survivorship Claims*

The Supreme Court of Virginia is also scheduled to hear the appeal in *Centra Health, Inc. v. Mullins* in the upcoming session.⁶⁸ The appellant presented the following assignment of error: "The Circuit Court erred by denying the defendant's Motion to Elect, and permitting the plaintiff to submit both a wrongful death claim and a survivorship claim to the jury, rather than requiring the plaintiff to elect between them prior to trial."⁶⁹

It is well-settled under Virginia law that a party may not collect for both wrongful death and survivorship claims.⁷⁰ However, if and when the plaintiff must choose the preferred claim is unclear. The difference between a wrongful death claim and a survivorship claim lies in the damages allowed.⁷¹ A survivorship claim is limited to the damages that the decedent would have collected

65. See *Morris*, 275 Va. at 335–39, 657 S.E.2d at 520–22.

66. *Id.*

67. *Id.* at 340, 657 S.E.2d at 522.

68. Supreme Court of Virginia Record No. 080008, available at <http://courts.state.va.us/scv/appeals/080008.html> (last visited Oct. 28, 2008).

69. *Id.* The appellant also contends that the jury mistakenly returned a verdict on the survivorship claim, even though the plaintiff's expert testified that the defendant's negligence caused the decedent's death. *Id.*

70. See VA. CODE ANN. §§ 8.01-25, -56 (Repl. Vol. 2007); *Hendrix v. Daugherty*, 249 Va. 540, 547, 457 S.E.2d 71, 75–76 (1995).

71. Peter Vieth, *High Court To Address Election of Remedies?*, VA. LAW. WKLY., Mar. 24, 2008, at 1.

if she had brought the claim during her lifetime, and punitive damages are not allowed at all.⁷² In contrast, a plaintiff may collect punitive damages and solace damages in wrongful death actions.⁷³ Counsel for the appellant in *Mullins* contends that “evidence of a decedent’s pain and suffering should be inadmissible in a death action, and that evidence of the families’ sorrow and loss of solace should not be allowed in a survivorship claim.”⁷⁴ This issue is becoming increasingly common with the rise in nursing home malpractice cases.⁷⁵

III. RECENT LEGISLATION FROM THE GENERAL ASSEMBLY

Although the upcoming 2009 Session of the Virginia General Assembly may be the more notable session in terms of changes to medical malpractice law, the 2008 Session had several significant contributions of its own.

A. *Virginia Birth-Related Neurological Injury Compensation Program*

In the 2008 Session, the General Assembly considered several bills to amend the Virginia Birth-Related Neurological Injury Compensation Program (the “Program”).⁷⁶ The Program provides an exclusive no-fault-based recovery system for infants and their representatives, where the infant suffered birth-related neurological injuries, if the birth was performed by a participating physician or in a participating hospital.⁷⁷ Much has been written, however, about the Program’s financial troubles.⁷⁸ In 2007, the Program was \$127.6 million in debt.⁷⁹ As the *Richmond Times-Dispatch* reported earlier this year, “For the first time . . . children born in the past year are likely to outlive the current benefit

72. See VA. CODE ANN. § 8.01-25 (Repl. Vol. 2007).

73. See *id.* §§ 8.01-50, -52 (Repl. Vol. 2007 & Supp. 2008).

74. Vieth, *supra* note 71.

75. *Id.*

76. See VA. CODE ANN. §§ 38.2-5000 to -5021 (Repl. Vol. 2007 & Supp. 2008).

77. *Id.* at §§ 38.2-5002 (Repl. Vol. 2007).

78. See, e.g., Bill McKelway, *Birth-Injury Fund Could Run 20 More Years*, RICH. TIMES-DISPATCH, May 14, 2008, at B12.

79. *Id.*; VIRGINIA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM, COMPREHENSIVE ANNUAL FINANCIAL REPORT 3 (2008), available at <http://vabirthinjury.com/documents/2007AnnualAudit.pdf>.

structure.”⁸⁰ House Bills 1305 and 1306 addressed, among other things, amending the annual assessments for physicians to fund the Program.⁸¹ The bills provided for an increase in participating physician assessments from \$5,100 per year to \$5,600 per year, with a \$300 increase in 2010 and a \$100 increase each year to a maximum of \$6,200 per year.⁸² The bills also increased the assessments for participating hospitals \$2.50 per live birth per year, from \$50 to a maximum of \$55 per live birth.⁸³ House Bill 1305 was passed into law on March 10, 2008,⁸⁴ but House Bill 1306 failed to pass.⁸⁵

B. *Definitions Under the Medical Malpractice Act*

House Bill 501, approved on March 3, 2008, amended Virginia Code sections 8.01-581.1 and 8.01-581.20.⁸⁶ The bill was introduced in response to *Alcoy v. Valley Nursing Homes, Inc.*,⁸⁷ which the Supreme Court of Virginia decided in 2006.⁸⁸

In *Alcoy*, a decedent’s representative brought claims of negligence, sexual assault, and battery against the nursing home where the decedent lived and where he allegedly suffered a sexual assault by an unknown individual.⁸⁹ The nursing home, Valley Nursing Homes, Inc. (“Valley”), argued that the “professional services” it provided were covered by the Medical Malpractice Act and, therefore, the Act, specifically section 8.01-581.20 regarding

80. McKelway, *supra* note 78.

81. See H.B. 1305, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 10, 2008, ch. 520, 2008 Va. Acts ___); H.B. 1306, Va. Gen. Assembly (Reg. Sess. 2008).

82. H.B. 1305; H.B. 1306.

83. H.B. 1305; H.B. 1306.

84. Act of Mar. 10, 2008, ch. 520, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 38.2-5008, -5009, -5016, -5020, -5021 (Supp. 2008)).

85. See Legislative Information System, Bill Tracking, H.B. 1306, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=hb1306> (last visited Oct. 28, 2008). H.B. 1306 also provided for an increase in reimbursements to 120% and would have required all Virginia licensed physicians to make non-participant payments into the system, not just practicing physicians. See H.B. 1306.

86. H.B. 501, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 3, 2008, ch. 169, 2008 Va. Acts ___); see also VA. CODE ANN. §§ 8.01-581.1, -581.20 (Supp. 2008).

87. 272 Va. 37, 630 S.E.2d 301 (2006).

88. Legislative Information System, Bill Tracking, H.B. 501, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=hb501> (last visited Oct. 28, 2008). The bill summary indicates the bill was introduced in response to *Alcoy v. Valley Nursing Homes, Inc. Id.*

89. *Alcoy*, 272 Va. at 40, 630 S.E.2d at 302.

standard-of-care expert testimony, covered the administrator's claims.⁹⁰ The trial court agreed, but the supreme court did not.⁹¹ The supreme court noted that the Medical Malpractice Act failed to define "professional services," whereas it did define "malpractice" and "health care."⁹² The court concluded that "the alleged omissions involve[d] administrative, personnel, and security decisions related to the operation of the . . . facility, rather than to the care of any particular patient."⁹³

House Bill 501 amended section 8.01-581.1 to include "professional services in nursing homes" under the definition of "health care" and also to include a definition for "professional services."⁹⁴ That statute now provides, in part:

"Professional services in nursing homes" means services provided in a nursing home, as that term is defined in clause (iv) of the definition of health care provider in this section, by a health care provider related to health care, staffing to provide patient care, psycho-social services, personal hygiene, hydration, nutrition, fall assessments or interventions, patient monitoring, prevention and treatment of medical conditions, diagnosis or therapy.⁹⁵

The bill also amended section 8.01-581.20 to clarify that an expert satisfying the requirements of that section is necessary concerning the standard of care regarding professional services in a nursing home.⁹⁶ Although the General Assembly clearly passed House Bill 501 in response to *Alcoy*, the bill neither abrogates nor codifies the *Alcoy* decision. It merely fills in the holes uncovered by the court and clarifies the General Assembly's intent behind the Medical Malpractice Act with regard to nursing homes.

C. Nursing Experts

In 2005, Virginia became a participant in the Nurse Licensure Compact (the "Compact").⁹⁷ The Compact allows nurses in partic-

90. *Id.* at 40–41, 630 S.E.2d at 302–03.

91. *Id.*

92. *Id.* at 42, 630 S.E.2d at 303.

93. *Id.* at 43, 630 S.E.2d at 304.

94. H.B. 501, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 3, 2008, ch. 169, 2008 Va. Acts ___); *see also* VA. CODE ANN. § 8.01-581.1 (Supp. 2008).

95. VA. CODE ANN. § 8.01-581.1 (Supp. 2008).

96. *See* H.B. 501; *see also* VA. CODE ANN. § 8.01-581.20 (Supp. 2008).

97. Act of Mar. 16, 2003, ch. 249, 2003 Va. Acts 263 (codified as amended at VA. CODE ANN. §§ 54.1-3007, -3030 to -3040 (Repl. Vol. 2005)).

ipating states to practice in any other participating state without applying for a license in that state.⁹⁸ This year the General Assembly passed House Bill 584 to amend Virginia Code section 8.01-581.20 to recognize the commonwealth's inclusion in the Compact.⁹⁹ Section 8.01-581.20 now provides that "any nurse licensed by a state participating in the Nurse Licensure Compact" is presumed to know the standard of care for a nurse practicing in Virginia.¹⁰⁰

D. *Statute of Limitations*

Perhaps the most significant legislative change from this past session was House Bill 616, which amended the statute of limitations.¹⁰¹ The Supreme Court of Virginia has refused repeatedly to adopt the "discovery" rule for applying the statute of limitations.¹⁰² Historically, the "discovery" rule establishes that the statute of limitations does not begin to run until the harm is discovered or should have been discovered.¹⁰³ To clarify the rule in Virginia, the General Assembly provided a modified discovery rule in certain circumstances, such as in retained foreign object cases and in cases involving fraud and deception.¹⁰⁴ House Bill 616 provides a new factual scenario giving rise to the discovery rule. As passed, the bill amended Virginia Code section 8.01-243(C) to include the following provision:

In a claim for the negligent failure to diagnose a malignant tumor or cancer, for a period of one year from the date the diagnosis of a malignant tumor or cancer is communicated to the patient by a health care provider, provided the health care provider's underlying act or omission was on or after July 1, 2008. Claims under this section for the negligent failure to diagnose a malignant tumor or cancer, where the health care provider's underlying act or omission occurred prior

98. See Virginia Board of Nursing, Nurse Licensure Compact, http://www.dhp.virginia.gov/nursing/nursing_compact.htm (last visited Oct. 28, 2008).

99. H.B. 584, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 2, 2008, ch. 125, 2008 Va. Acts ___); see also VA. CODE ANN. § 8.01-581.20 (Supp. 2008).

100. VA. CODE ANN. § 8.01-581.20 (Supp. 2008).

101. H.B. 616, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 3, 2008, ch. 175, 2008 Va. Acts ___).

102. See, e.g., *Lo v. Burke*, 249 Va. 311, 317, 455 S.E.2d 9, 13 (1995) (citing *Locke v. Johns-Manville Corp.*, 221 Va. 951, 959, 275 S.E.2d 900, 905-06 (1981)).

103. *Locke*, 221 Va. at 959, 275 S.E.2d at 905.

104. Act of Apr. 3, 1986, ch. 389, 1986 Va. Acts 650 (codified as amended at VA. CODE ANN. §§ 8.01-38, -243 (Supp. 2008)).

to July 1, 2008, shall be governed by the statute of limitations that existed prior to July 1, 2008.¹⁰⁵

This statute will affect a very narrow class of malpractice cases and will not begin to affect cases for at least another two years, as it only applies to negligent acts occurring after July 1, 2008.¹⁰⁶ Notwithstanding, it has settled the issue of when the statute begins to run in cancer cases and likely will be an important tool for claimants in the future.

This amendment presents several important questions Virginia courts will have to address in the future. First, when must a patient's tumor be malignant? Must the physician have failed to diagnose a malignant tumor, or may a misdiagnosed benign tumor become malignant? In *Lo v. Burke*, the physician failed to diagnose a benign tumor that subsequently became malignant.¹⁰⁷ The Supreme Court of Virginia determined that the injury did not occur until the tumor became malignant and that the defendant failed to prove when that occurred.¹⁰⁸ If the court determines that this statute applies when the physician fails to diagnose a benign tumor, the amendment likely would abrogate *Lo* by providing a set date upon which the statute of limitations begins to run. Courts could conclude, however, that the physician must have failed to diagnose a malignant tumor for this statute to apply.

Second, if courts determine that the physician must misdiagnose a malignant tumor, an issue arises concerning when and how a plea of the statute of limitations can be made. As in *Lo*, the issue of when the tumor became malignant can be a difficult factual question. As such, it likely will require a jury determination before the statute of limitations may be imposed. The question becomes, which party has the burden of proof? Traditionally, as in *Lo*, the defendant has the burden of proof concerning the statute of limitations.¹⁰⁹ In this case, however, the statute extends the time that the plaintiff has to bring a claim,¹¹⁰ suggesting that the plaintiff would have the burden. Practitioners may want to consider these issues when addressing this statute.

105. Act of Mar. 3, 2008, ch. 175, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 8.01-243(c)(3) (Supp. 2008)).

106. See VA. CODE ANN. § 8.01-243(c)(3) (Supp. 2008).

107. 249 Va. 311, 313, 455 S.E.2d 9, 10-11 (1995).

108. *Id.* at 316, 455 S.E.2d at 12.

109. *Id.*

110. See VA. CODE ANN. § 8.01-243(c)(3) (Supp. 2008).

IV. SIGNIFICANT DECISIONS FROM THE SUPREME COURT OF VIRGINIA

A. *John Crane, Inc. v. Jones*

In September of 2007, the Supreme Court of Virginia decided *John Crane, Inc. v. Jones*, a significant case for medical malpractice jurisprudence.¹¹¹ Although *Jones* is not a medical malpractice case, it addressed the sufficiency of expert disclosures.¹¹² Because medical malpractice cases almost always require expert testimony, the import of this case on medical malpractice cases is self-evident.¹¹³

In *Jones*, the plaintiff brought a products liability claim after being diagnosed with mesothelioma from inhaling asbestos dust.¹¹⁴ The trial court disallowed testimony of two of the defendant's expert witnesses, and the defendant appealed.¹¹⁵ The supreme court affirmed the trial court's decision after determining that the defendant had not satisfied the expert disclosure requirements of Virginia Supreme Court Rule 4:1(b)(4)(A)(i).¹¹⁶ Rule 4:1(b)(4)(A)(i) provides:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.¹¹⁷

As to its first expert, the defendant failed to disclose that the expert would "testify about asbestos in the ambient air."¹¹⁸ The court overruled the defendant's argument that the plaintiff was aware of this potential testimony, stating that "a party is not re-

111. 274 Va. 581, 650 S.E.2d 851 (2007).

112. *Id.* at 591, 650 S.E.2d at 856.

113. *See Raines v. Lutz*, 231 Va. 110, 113, 341 S.E.2d 194, 196 (1986) ("We have held that expert testimony is ordinarily necessary to establish the appropriate standard of care, to establish a deviation from the standard, and to establish that such a deviation was the proximate cause of the claimed damages." (citing *Bly v. Rhoads*, 216 Va. 645, 653, 222 S.E.2d 783, 789 (1976))).

114. *Jones*, 274 Va. at 585, 650 S.E.2d at 852.

115. *Id.* at 586, 650 S.E.2d at 853.

116. *Id.* at 591-93, 650 S.E.2d at 856-57.

117. VA. SUP. CT. R. 4:1(b)(4)(A)(i) (2008).

118. *Jones*, 274 Va. at 592, 650 S.E.2d at 856.

lieved from its disclosure obligation under the Rule simply because the other party has some familiarity with the expert witness or the opportunity to depose the expert.”¹¹⁹

In the case of the second expert, the defendant disclosed the “topic” of the expert’s testimony, but failed to disclose its “substance.”¹²⁰ Although the defendant disclosed that the expert “would offer testimony on, among other topics, his ‘research and/or his testing of various asbestos insulation products,’” it failed to attach the expert’s report of that testing.¹²¹ Thus, *Jones* makes it clear that an expert disclosure must specifically provide the topic and substance of all of the expert’s proffered testimony.¹²² Additionally, the disclosing party cannot excuse a substandard disclosure by arguing that the other party had notice of the testimony.¹²³

B. *Dagner v. Anderson*

In *Dagner v. Anderson*, the Supreme Court of Virginia determined whether the defendant’s expert was qualified to offer proffered testimony.¹²⁴ The administratrix of the deceased patient’s estate brought a claim against the hospital and emergency room physician that treated the decedent prior to her death.¹²⁵ The decedent was a diabetic and went to the emergency room after her daughter found her unconscious.¹²⁶ She had not eaten and had consumed a significant amount of alcohol.¹²⁷ Following an injection of glucagon en route to the hospital and several tests in the emergency room, the physician discharged her after determining that she was stable.¹²⁸ Over eight hours later, the decedent was found in a comatose state in the waiting area and died several months later without regaining consciousness.¹²⁹ At trial, the

119. *Id.*

120. *Id.* at 592–93, 650 S.E.2d at 857.

121. *Id.*

122. *See id.*

123. *Id.* at 592, 650 S.E.2d at 856.

124. 274 Va. 678, 680–81, 651 S.E.2d 640, 641 (2007).

125. *Id.* at 683, 651 S.E.2d at 642.

126. *Id.* at 681, 651 S.E.2d at 641.

127. *Id.*

128. *Id.* at 681–82, 651 S.E.2d at 641–42.

129. *Id.* at 683, 651 S.E.2d at 642. The attending nurse called the decedent’s daughter around the time of discharge. *Id.* at 682, 651 S.E.2d at 642. The daughter, however, told

physician introduced an expert in emergency medicine to testify, among other things, that the decedent died of an Alcohol Withdrawal Syndrome (“AWS”) seizure.¹³⁰ The plaintiff appealed the propriety of this testimony.¹³¹

The supreme court determined that although it was appropriate for the defendant to introduce evidence concerning AWS, the proffered expert was not qualified to testify that AWS caused the decedent’s brain injury and death.¹³² The proffered expert was an emergency room physician with experience treating AWS seizures.¹³³ The court concluded that the expert’s “stated familiarity with AWS in the context of treating patients in an emergency department setting is not a sufficient basis for the circuit court to have qualified him as an expert on the issue of whether [the decedent] suffered an AWS seizure.”¹³⁴ Thus, the court indicated that experience in treating a disorder does not supply the necessary knowledge for testifying about the cause of that disorder.¹³⁵

C. *Bostic v. About Women OB/GYN, P.C.*

The issue in *Bostic v. About Women OB/GYN, P.C.* was whether the defense properly laid a foundation for introducing medical literature.¹³⁶ Virginia Code section 8.01-401.1 provides:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay.¹³⁷

The plaintiff filed suit on behalf of her infant child, who was diagnosed with Erb’s palsy as a result of shoulder dystocia during

the nurse that she could not come until the next morning. *Id.* The nurse did not relay the daughter’s message to the decedent or to the physician. *Id.*

130. *Id.* at 684, 651 S.E.2d at 643.

131. *Id.* at 685, 651 S.E.2d at 644.

132. *Id.* at 686–88, 651 S.E.2d at 644–45.

133. *Id.* at 684, 687, 651 S.E.2d at 643–45.

134. *Id.* at 687, 651 S.E.2d at 645.

135. *See id.*

136. 275 Va. 567, 570, 659 S.E.2d 290, 291 (2008); *see* VA. CODE ANN. § 8.01-401.1 (Repl. Vol. 2007 & Supp. 2008).

137. VA. CODE ANN. § 8.01-401.1 (Repl. Vol. 2007 & Supp. 2008).

delivery.¹³⁸ The defense argued that “maternal propulsive forces of labor” caused the injury, not the negligence of the nurse midwife.¹³⁹ The defense introduced medical literature that stated, “During the past 15 years studies have provided considerable indirect evidence that maternal propulsive forces are responsible for the injury leading to Erb’s palsy,” first through the nurse, a fact witness, and then through its expert.¹⁴⁰ The plaintiff argued that the defense had not laid a proper foundation, and the Supreme Court of Virginia agreed.¹⁴¹ The court concluded that “the circuit court erred in admitting the opinions contained in published medical literature without an adequate foundation as required by Code § 8.01-401.1.”¹⁴²

In explaining its conclusion, the court stated that “the precondition that the testifying witness must have ‘relied upon’ the published article before it may be read into evidence does not mean that he accepts it only partially and is unwilling fully to subscribe to its views.”¹⁴³ The defense’s expert seemed to have doomed his own testimony by testifying that he relied upon the article “to talk to this jury.”¹⁴⁴ The court concluded that the statute requires the expert to rely upon the article when forming his opinions, not just when he is preparing for trial.¹⁴⁵ The court seems to have engrafted this rule upon the statute. The plain language of the statute does not clarify when the expert must have come to rely upon the literature. In fact, the statute only says that the expert needs to rely upon the literature during direct examination.¹⁴⁶

Additionally, defense counsel asked the expert: “Do you agree with the following: ‘During the past 15 years, studies have provided considerable indirect evidence that maternal propulsive forces are responsible for the injury leading to Erb’s palsy.’ Do you agree with that?” In reply, the expert stated that he “would

138. *Bostic*, 275 Va. at 570–71, 659 S.E.2d at 291–92.

139. *Id.* at 571, 659 S.E.2d at 292.

140. *See id.* at 571–73, 659 S.E.2d at 292–93 (quoting Herbert F. Sandmire, M.D. & Robert K. DeMott, M.D., *Erb’s Palsy Causation: Iatrogenic or Resulting from Labor Forces?*, 2005 J. REPROD. MED. 563, 563).

141. *Id.* at 578, 659 S.E.2d at 295–96.

142. *Id.*

143. *Id.* at 577, 659 S.E.2d at 295.

144. *See id.* at 573, 659 S.E.2d at 293.

145. *Id.* at 577, 659 S.E.2d at 295.

146. VA. CODE ANN. § 8.01-401.1 (Repl. Vol. 2007 & Supp. 2008).

use the word ‘could be responsible.’”¹⁴⁷ The court concluded that because the expert was unwilling to accept the conclusions of the article in whole, the proper foundation was lacking.¹⁴⁸ Thus, the court declared that to lay the foundation adequately for medical literature under section 8.01-401.1, the expert must testify that she relied upon the literature *when forming her opinion in the case*, which requires *full acceptance* of the conclusions of the article.¹⁴⁹ Therefore, when deposing experts, counsel should probe the experts on this issue concerning any articles that the opposing party identifies as reliable.

D. Lloyd v. Kime

In *Lloyd v. Kime*, the Supreme Court of Virginia addressed whether the trial court improperly used deposition testimony when considering a motion in limine and whether the trial court improperly excluded the plaintiff’s expert as unqualified under Virginia Code section 8.01-581.20.¹⁵⁰ Lloyd underwent an anterior cervical discectomy decompression by Dr. Kime to repair two herniated disks.¹⁵¹ Following the surgery, Lloyd alleged that Dr. Kime “was negligent in performing the surgery” and failed to recognize a partial spinal cord injury.¹⁵² The plaintiff’s only expert was a neurologist proffered to offer testimony that Dr. Kime negligently performed the surgery and that his post-operative care caused Lloyd’s injury.¹⁵³ At trial, Dr. Kime moved to exclude Lloyd’s expert as unqualified under section 8.01-581.20, which motion the trial court granted, relying upon deposition testimony.¹⁵⁴ Dr. Kime then moved for summary judgment because the plaintiff lacked necessary expert testimony; the court also granted that motion.¹⁵⁵

The first issue the supreme court addressed was whether the trial court erred in using deposition testimony when considering

147. *Bostic*, 275 Va. at 573, 659 S.E.2d at 293.

148. *See id.* at 577, 659 S.E.2d at 295.

149. *See id.*

150. 275 Va. 98, 103, 654 S.E.2d 563, 566 (2008).

151. *Id.*

152. *Id.* at 104–05, 654 S.E.2d at 567.

153. *Id.* at 105, 654 S.E.2d at 567.

154. *Id.*

155. *Id.*

the motion in limine.¹⁵⁶ Technically, Rule 3:20 only prevents the use of deposition testimony to support motions for summary judgment or motions to strike.¹⁵⁷ The court declared, however, that a motion in limine to exclude an expert “is functionally a motion for summary judgment” when that motion in limine “is followed by [a] motion for summary judgment.”¹⁵⁸ The court cited *Parker v. Elco Elevator Corp.* to support its conclusion.¹⁵⁹ The *Parker* Court, however, did not establish the rule as urged by the *Lloyd* Court. In fact, the *Parker* Court refused to make that determination as it was unnecessary to the resolution of the case.¹⁶⁰ In contrast, although not clearly necessary to resolve the case at bar, the *Lloyd* Court officially set forth this limitation on the use of depositions, a once common defense tool.¹⁶¹

The supreme court did not need to address whether deposition testimony could be used because, as the court later concluded, the plaintiff had acquiesced in the trial court’s use of the deposition testimony.¹⁶² Dr. Kime argued that because the plaintiff utilized deposition testimony to oppose the motion in limine, he had acquiesced.¹⁶³ The court, however, noted that deposition testimony is barred only to *support* a motion for summary judgment, not to *oppose* one.¹⁶⁴ Instead, the court held that *Lloyd* had failed to object to the use of deposition testimony and therefore acquiesced.¹⁶⁵

The next issue the supreme court faced was whether *Lloyd*’s expert, a neurologist, was qualified to give the proffered testimony against Dr. Kime, an orthopedic surgeon.¹⁶⁶ Regarding intra operative negligence, the plaintiff was unable to demonstrate an overlap between the two fields, and Dr. Kime demonstrated that

156. *Id.* at 106, 654 S.E.2d at 568.

157. VA. SUP. CT. R. 3:20 (2008).

158. *Lloyd*, 275 Va. at 107, 654 S.E.2d at 568.

159. *Id.* (citing *Parker v. Elco Elevator Corp.*, 250 Va. 278, 281 n.2, 462 S.E.2d 98, 100 n.2 (1995)).

160. *Parker*, 250 Va. at 281 n.2, 462 S.E.2d at 100 n.2. *Parker* did not object to the use of the deposition testimony. *Id.* Thus, the court did not consider such use when reviewing—and ruling on—the issues on appeal. *See id.*

161. *Lloyd*, 275 Va. at 107, 654 S.E.2d at 568.

162. *Id.* at 107–08, 654 S.E.2d at 568–69.

163. *Id.* at 107, 654 S.E.2d at 568.

164. *Id.* (citing W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 9.05(10)(e) (4th ed. 2005)).

165. *Id.* at 107–08, 654 S.E.2d at 568–69.

166. *See id.* at 108–10, 654 S.E.2d at 569–70.

the expert had not performed any surgery since 1997.¹⁶⁷ Lloyd argued that because the parties did not dispute the standard of care, section 8.01-581.20 did not apply.¹⁶⁸ Nevertheless, the court concluded that the requirements of that section are mandatory.¹⁶⁹ In the area of post-operative care, however, the plaintiff did demonstrate an overlap between neurology and orthopedics and, therefore, the expert was qualified to testify regarding the post-operative negligence.¹⁷⁰ Finally, the court concluded that the trial court erred when it excluded the expert's testimony on proximate causation.¹⁷¹ The court stated that the section 8.01-581.20 "requirements do not address whether an expert witness is qualified to testify on proximate causation."¹⁷² Therefore, even though the expert could not testify that the defendant negligently performed the surgery, the expert could testify that the negligence caused the alleged harm.¹⁷³

E. *Coston v. Bio-Medical Applications of Virginia, Inc.*

Coston v. Bio-Medical Applications of Virginia, Inc. exemplifies the increasingly regular "common knowledge and experience" exception to the requirement of expert testimony.¹⁷⁴ The facts in *Coston* are unremarkable. The medical facility's staff placed the patient into a defective chair during dialysis; the chair failed, dumping the patient onto the floor.¹⁷⁵ After the plaintiff failed to identify any experts, the defense successfully moved for summary judgment.¹⁷⁶ The plaintiff appealed, arguing that she did not require experts.¹⁷⁷ The Supreme Court of Virginia reviewed several of the major cases that addressed the necessity of expert testimony in medical malpractice cases before summarily concluding that "the issue whether the defendant's acts or omissions in this case constitute medical negligence is within a jury's common know-

167. *Id.* at 111, 654 S.E.2d at 570.

168. *Id.*

169. *Id.* (quoting *Perdieu v. Blackstone Family Practice Ctr., Inc.*, 264 Va. 408, 419, 568 S.E.2d 703, 709 (2002)).

170. *Id.* at 111-12, 654 S.E.2d at 570-71.

171. *Id.* at 112, 654 S.E.2d at 571.

172. *Id.*

173. *Id.* at 113, 654 S.E.2d at 571.

174. 275 Va. 1, 4, 654 S.E.2d 560, 561 (2008).

175. *Id.* at 3, 654 S.E.2d at 561.

176. *Id.* at 3-4, 654 S.E.2d at 561.

177. *Id.* at 4, 654 S.E.2d at 561.

ledge and experience and, therefore, expert testimony is not necessary.”¹⁷⁸

What is most enlightening about *Coston* is that it denotes a shift in the court’s view of the necessity of expert witnesses to prove a prima facie case of medical negligence. In *Dickerson v. Fatehi*, the court stated, “In almost all medical malpractice cases, expert testimony is necessary to assist a jury . . . [but] [i]n certain rare cases, however, when the alleged negligent acts or omissions clearly lie within the range of a jury’s common knowledge and experience, expert testimony is unnecessary.”¹⁷⁹ In a subtle, but perhaps telling contrast, the *Coston* opinion declares that “issues involving medical negligence often fall beyond the realm of the common knowledge and experience of a lay jury.”¹⁸⁰ The number and regularity of cases falling within the “common knowledge and experience” exception seems to have increased in the last decade. This statement, that medical issues “often”¹⁸¹—as opposed to almost always—require expert testimony,¹⁸² suggests a shift in the court’s view and a sign that counsel may see more cases proceeding to trial without expert testimony.

F. *Webb v. Smith*

Following *Coston*, the Supreme Court of Virginia heard another case regarding the necessity of expert testimony in *Webb v. Smith*.¹⁸³ In *Webb*, the plaintiff, suffering “pain associated with her menstrual cycle,” sought the services of Dr. Smith for a hysterectomy and bilateral salpingo-oophorectomy (“BSO”).¹⁸⁴ “Dr. Smith performed the hysterectomy” but, according to the court, “he forgot to perform the BSO.”¹⁸⁵ The plaintiff presented an expert who testified to the standard of care, but not to causation; instead, Webb herself testified that Dr. Smith’s failure to perform the BSO necessitated a second surgery.¹⁸⁶ Following a jury ver-

178. *Id.* at 5–7, 654 S.E.2d at 562–63.

179. 253 Va. 324, 327, 484 S.E.2d 880, 881–82 (1997) (citation omitted) (emphasis added).

180. *Coston*, 275 Va. at 5, 654 S.E.2d at 562 (emphasis added).

181. *Id.*

182. See *Dickerson*, 253 Va. at 327, 484 S.E.2d at 881.

183. 276 Va. 305, 308, 661 S.E.2d 457, 459 (2008).

184. *Id.* at 307, 661 S.E.2d at 458.

185. *Id.*

186. *Id.*

dict for the plaintiff, the trial court granted Dr. Smith's motion to strike, which it had taken under advisement following the plaintiff's case-in-chief.¹⁸⁷ The supreme court reversed the trial court and reinstated the jury's verdict, declaring:

As a result of Dr. Smith's failure to perform the BSO, Webb had to undergo the second surgery and incur damages attendant thereto. A reasonably intelligent juror did not need an expert to explain why Dr. Smith's negligence was the proximate cause of Webb's damages because the issue of causation was within the common knowledge of laymen.¹⁸⁸

Especially intriguing about *Webb* is that it is one of the truly "rare" cases from the supreme court in the area of medical malpractice that includes a dissenting opinion.¹⁸⁹ The dissent highlighted two dichotomies between the plaintiff's case and the majority's opinion: the distinction between an elective surgery and a medically necessary surgery, and the distinction between tort law and contract law.¹⁹⁰

First, the dissent noted that "Webb casts her argument in terms suggesting that the two medical procedures she consented for Dr. Smith to perform were 'elective.'"¹⁹¹ In contrast, Webb's testimony and the majority's opinion stated that she "needed" the BSO¹⁹² and "had to undergo the second surgery."¹⁹³ Furthermore, the dissent noted that Dr. Smith presented testimony, including from Webb's expert, that showed that a surgeon could decide within the standard of care not to perform the BSO if unnecessary, as Dr. Smith argued he did.¹⁹⁴ The dissent thus concluded, "Only a medical expert witness could testify as to whether Webb *needed* to have the BSO during the first surgery and, whether as a result of Dr. Smith's failure to perform the BSO, it remained *medically necessary* for her to undergo that procedure, thereby *requiring* the second surgery."¹⁹⁵

187. *Id.* at 306–07, 661 S.E.2d at 458.

188. *Id.* at 308, 661 S.E.2d at 459.

189. *See id.* at 309–11, 661 S.E.2d at 459–61 (Kinser, J., dissenting). According to the authors' count, the supreme court has released just three dissents in the twenty-seven medical malpractice cases since 2006.

190. *Id.*

191. *Id.* at 309, 661 S.E.2d at 460.

192. *Id.*

193. *Id.* at 308, 661 S.E.2d at 459 (majority opinion).

194. *Id.* at 309–10, 661 S.E.2d at 460 (Kinser, J., dissenting).

195. *Id.* at 310, 661 S.E.2d at 460 (emphasis added).

The dissent noted that the trial court recognized the second dichotomy.¹⁹⁶ The dissent stated, “The majority fails to recognize the distinction that the trial court correctly pointed out in its letter opinion, [that] ‘[t]his cause of action is one for medical malpractice based on negligence, not breach of contract.’”¹⁹⁷ The dissent noted that the plaintiff’s evidence, including the expert testimony, was limited to the fact that “Dr. Smith, during the first surgery did not perform a procedure that he had agreed to perform.”¹⁹⁸ The majority concluded that this agreement necessitated the second surgery.¹⁹⁹ As the dissent concluded, however, under a tort theory, the question is not one of failed contractual expectations but of medical necessity.²⁰⁰

Like *Coston*, *Webb* exemplifies the supreme court’s growing leniency concerning the requirement of expert testimony. The court’s opinion likely is limited to the specific facts. However, it could have a broader implication concerning the distinction between contract law and tort law in the medical malpractice arena. Because the relationship between a doctor and a patient is largely contractual, the court may have intentionally or unintentionally established a “failed expectation” basis for a malpractice case. The court may have to clarify its opinion in the future.

G. *Williams v. Le*

Williams v. Le revisited the concept of superseding intervening causation in a medical malpractice action.²⁰¹ The plaintiff saw her physician for pain in her leg and was referred to the defendant’s practice for a Doppler ultrasound.²⁰² The defendant, a diagnostic radiologist, diagnosed the plaintiff with deep vein thrombosis, a blood clot in the leg that presents a risk of pulmonary embolism.²⁰³ The defendant attempted to contact the plaintiff’s primary care physician by phone, but never spoke to the physician or left a message, and ultimately ordered that a report

196. *Id.*

197. *Id.*

198. *Id.*

199. *See id.* at 308, 661 S.E.2d at 459 (majority opinion).

200. *Id.* at 310–11, 661 S.E.2d at 460 (Kinser, J., dissenting).

201. 276 Va. 161, 163, 662 S.E.2d 73, 75 (2008).

202. *Id.* at 163, 662 S.E.2d at 75.

203. *Id.* at 164, 662 S.E.2d at 75.

be sent by fax.²⁰⁴ The plaintiff's primary care physician did not see the report prior to the plaintiff's death from a pulmonary embolism.²⁰⁵ The defendant sought and received the following instruction at trial:

A superseding cause is an independent event, not reasonably foreseeable, that completely breaks the connection between the Defendant's negligent act and the alleged injury or death. A superseding cause breaks the chain of events so that the Defendant's original negligent act is not a proximate cause of the Plaintiff's injury in the slightest degree.²⁰⁶

The Supreme Court of Virginia, concluded that the trial court erred in granting this instruction.²⁰⁷ The court declared that an instruction may only be given if the evidence supports "the theory of the instruction."²⁰⁸ Specifically, the instruction is only appropriate if the alleged cause was the only cause of the injury, "without any contributing negligence by [the defendant] in the slightest degree."²⁰⁹ In this case, the court determined that the defendant's failure to contact the primary care physician contributed to the primary care physician's failure to read the report.²¹⁰

This case highlights the difficulty in obtaining a superseding and intervening cause instruction at the conclusion of trial. As the plaintiff's lawyer Stephanie Grana suggests, "[T]rial judges are going to be very careful about giving this instruction."²¹¹ Grana also notes that Virginia's Model Jury Instructions do not include the limitation "[r]arely given," but she suggests the editors may wish to add that warning in the future.²¹²

204. *Id.*

205. *Id.* at 165, 662 S.E.2d at 76.

206. *Id.* at 166, 662 S.E.2d at 76.

207. *Id.* at 167-68, 662 S.E.2d at 77.

208. *Id.* at 167, 662 S.E.2d at 77.

209. *Id.* (quoting *Atkinson v. Scheer*, 256 Va. 448, 454, 508 S.E.2d 68, 72 (1998)).

210. *Id.*

211. Peter Vieth, *Doctor on Hold: Radiologist Failed To Get Info to Primary Doc Before Death*, VA. LAW. WKLY., June 16, 2008, at 1.

212. *Id.*; see also VA. MODEL JURY INSTRUCTIONS—CIVIL, Jury Instr. No. 5.010 (Repl. Vol. 2008).

CONCLUSION

The once finite body of law in this practice area is changing. The predictable amendments to, and interpretation of, that body of law are no more. Expect activity in the General Assembly this year to an extent not seen for ten years. In addition, applying recent supreme court opinions to the practice of medical litigation will prove interesting—the impact of the cases will remain unknown for some time. The most important change could be the anticipated amendments to the cap on recovery, which will reveal itself soon enough. It will undoubtedly be an exciting time at the legislature for those who represent parties to medical malpractice litigation and make up the health care community in Virginia.
