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Civil Practice and Procedure

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CIVIL PRACTICE AND PROCEDURE

The Honorable Jane Marum Roush *

I. INTRODUCTION

This article summarizes the major developments in Virginia civil practice and procedure during the last two years. In particular, the decisions of the Supreme Court of Virginia from June 2007 through June 2009 are discussed, along with any significant changes to the Rules of the Supreme Court of Virginia during that same time period. Finally, the article addresses laws enacted by the Virginia General Assembly in its 2008 and 2009 Sessions.

II. SUPREME COURT OF VIRGINIA DECISIONS

A. *Public Access to Court Records*

In two cases, the Supreme Court of Virginia held that the public's right of access to court records outweighs countervailing policy considerations of conflicting statutes.[1]

In the first case, *Perreault v. Free Lance-Star*, the Supreme Court of Virginia held that the financial terms of a settlement of a wrongful death case that was reached after mediation must be made public over the objection of the parties, despite both the statute providing for confidentiality in mediation and the agreement of the parties that the settlement would be confidential.[2]

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1. *See* Lotz v. Commonwealth, 277 Va. 345, 351, 672 S.E.2d 833, 837 (2009) (holding that the public has the right of access to mental health evaluations introduced into evidence in a sexually violent predator hearing); Perreault v. Free Lance-Star, 276 Va. 375, 389, 666 S.E.2d 352, 359 (2008) (holding that the public has the right of access to court-approved compromise settlements of wrongful death claims achieved through mediation).

2. *Perreault*, 277 Va. at 386–89, 666 S.E.2d at 358–59.

In *Perreault*, four plaintiffs brought wrongful death suits against a pharmaceutical manufacturer, alleging that their decedents died as a result of improperly formulated or contaminated drugs used to stop the heart during surgery.[3] After mediation, the parties settled the cases.[4] The settlement agreements provided that the terms of the settlements, particularly the financial terms, would be confidential.[5] Under Virginia Code section 8.01-55, any wrongful death settlement must be approved by the court.[6] Initially, the trial court entertained an oral motion to approve the settlements and, after a hearing from which the press was barred, approved the settlements.[7] Several newspapers intervened in the case, arguing that the plaintiffs should be required to file written petitions for approval of the settlements and that any pleadings or orders in the case were public records under Virginia Code section 17.1-208.[8] The trial court ultimately ruled in favor of the newspapers and ordered the plaintiffs to file written petitions for approval of the settlements that included the financial terms of the settlements.[9] The trial court ruled that the petitions were public records subject to review by the press and the public.[10]

The supreme court affirmed, reasoning that Virginia Code section 8.01-55 requires that wrongful death cases may only be compromised with the consent of the circuit court after a written petition that discloses the terms, including the financial terms, of the settlement.[11] Further, Virginia Code section 17.1-208 provides that court records are public records.[12] Although Virginia Code section 8.01-581.22 specifies that mediation is generally confidential, there are exceptions to the presumption of confidentiality, including when disclosure is "provided by law or rule."[13] In this

3. *Id.* at 380 & n.2, 666 S.E.2d at 354 & n.2.

4. *Id.* at 380, 666 S.E.2d at 354.

5. *Id.* at 381, 666 S.E.2d at 354.

6. VA. CODE ANN. § 8.01-55 (Repl. Vol. 2007 & Cum. Supp. 2009).

7. *Perreault*, 276 Va. at 381, 666 S.E.2d at 354–55.

8. *Id.* at 381–82, 666 S.E.2d at 355. Section 17.1-208 of the Virginia Code states that "[e]xcept as otherwise provided by law, any records and papers of every circuit court shall be open to inspection by any person . . . ." VA. CODE ANN. § 17.1-208 (Cum. Supp. 2009).

9. *Perreault*, 276 Va. at 383, 666 S.E.2d at 356.

10. *See id.*

11. *Id.* at 385–86, 666 S.E.2d at 357–58.

12. *Id.* at 386–87, 666 S.E.2d at 358 (quoting VA. CODE ANN. § 17.1-208 (Cum. Supp. 2009)).

13. VA. CODE ANN. § 8.01-581.22(ix) (Repl. Vol. 2007 & Cum. Supp. 2009).

case, the specific provisions of the wrongful death statute requiring a petition that discloses the terms of the settlements "trump" the more general provisions of the mediation statute providing for confidentiality.[14] Finally, the supreme court ruled that the trial court did not abuse its discretion in refusing to redact the financial terms of the settlements from the court records.[15]

The second case that affirmed the primacy of the public's right of access to court records is *Lotz v. Commonwealth*.[16] In that case, the Supreme Court of Virginia signaled that its holding in *Perreault* was not limited to wrongful death cases.[17] The court in *Lotz* held that a mental health evaluation of a sexually violent predator prepared under Virginia Code section 37.2-910(B), although assumed to be a health record, was nonetheless a public record which should not be sealed without compelling reason.[18] The court reasoned:

> There is a rebuttable presumption of public access to judicial records in civil proceedings. Exhibits entered into evidence in a judicial proceeding that lead to the judgment constitute judicial records. In order to overcome the presumption of public access, the moving party bears the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order. Further, risks of damage to professional reputation, emotional damage, or financial harm, stated in the abstract, are not sufficient reasons for a court to seal judicial records.[19]

Read together, *Perreault* and *Lotz* signal an end to the practice of routinely sealing the record of a case when requested by counsel. Neither the confidentiality of a mediated settlement in *Perreault* nor the confidentiality of medical records in *Lotz* was deemed a sufficiently compelling reason to outweigh the public's right of access to judicial records.

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14. *Perreault*, 276 Va. at 389, 666 S.E.2d at 359.

15. *Id.* at 392, 666 S.E.2d at 361.

16. 277 Va. 345, 351, 672 S.E.2d 833, 837 (2009).

17. *See id.* at 351, 672 S.E.2d at 836–37.

18. *Id.* at 350–51, 672 S.E.2d at 836–37. Section 37.2-910(B) of the Virginia Code requires that the Commissioner provide the court a report evaluating a sexually violent predator's condition and recommending treatment. VA. CODE ANN. § 37.2-910(B) (Cum. Supp. 2009).

19. *Lotz*, 277 Va. at 351, 672 S.E.2d at 836–37 (internal citations and quotations omitted).

B. *Expert Witnesses*

Perhaps one of the most important cases that the Supreme Court of Virginia has decided in recent years in the area of expert testimony is *John Crane, Inc. v. Jones*.[20] In that wrongful death case, the supreme court held that the trial court properly excluded testimony of two expert witnesses for the defense when the substance of the experts' testimony had not been adequately disclosed prior to trial.[21]

Jones was a shipyard worker who died as a result of his exposure to asbestos.[22] His personal representative filed suit against John Crane, Inc., a manufacturer of asbestos-containing products sold to Jones's employer.[23] The trial court excluded testimony of two of Crane's expert witnesses because Crane had not disclosed the substance of their testimony in pre-trial discovery.[24] A jury awarded Jones $10.4 million in damages.[25]

The supreme court affirmed the trial court's exclusion of the expert testimony based on its interpretation of the requirements of Rule 4:1(b)(4)(A)(i).[26] That Rule 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.[27]

The trial judge had excluded two of Crane's expert witnesses from offering opinions not disclosed in Crane's designation of expert witnesses under Rule 4:1(b)(4)(A)(i).[28] Crane argued that the excluded opinions of the first witness were "well known" to Jones's estate because the estate had taken the expert's deposition.[29] Re-

20. 274 Va. 581, 650 S.E.2d 851 (2007).
21. *Id.* at 586, 592–93, 650 S.E.2d at 853, 856–57.
22. *Id.* at 585, 650 S.E.2d at 852.
23. *Id.* at 585–86, 650 S.E.2d at 852–53.
24. *Id.* at 591, 593, 650 S.E.2d at 856–57.
25. *Id.* at 586, 650 S.E.2d at 853.
26. *Id.* at 592, 593, 650 S.E.2d at 856–57.
27. VA. SUP. CT. R. 4:1(b)(4)(A)(i) (Repl. Vol. 2009).
28. *Crane*, 274 Va. at 591, 593, 650 S.E.2d at 856–57.
29. *Id.* at 592, 650 S.E.2d at 856.

jecting that argument, the supreme court affirmed the exclusion of the undisclosed opinions:

> [A] party is not relieved 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. Such a rule would impermissibly alter a party's burden to disclose and impose an affirmative burden on the non-disclosing party to ascertain the substance of the expert's testimony. We reject this reading of Rule 4:1(b)(4)(A)(i).[30]

The designation of a second expert referred to an attached report for the substance of his opinions, but the report was not in fact attached to the disclosure sent to the estate.[31] Crane argued that the estate was familiar with the second expert's opinions because the estate's counsel had cross-examined the expert "at [other] trial[s] about his reports going back to the '90s."[32] Crane also maintained "that the [e]state had failed to depose the [expert in this case] or to ask Crane for representative samples of [the expert's] testimony, either of which would have allowed the [e]state to ascertain the actual substance of the testimony."[33] Again, the supreme court affirmed the trial court's exclusion of the testimony:

> Rule 4:1(b)(4)(A)(i) requires that the substance of opinions to be rendered be disclosed. Here, while Crane did disclose the topic of [the second expert's] testimony, Crane did not disclose the substance of [the expert's] opinions in the disclosure or through [the expert's] report. Crane thus failed to comply with the Rule and the trial court did not err by excluding the testimony. As we stated when considering Crane's challenge to the trial court's ruling on the admissibility of [the first expert's] testimony, an opponent's ability to depose an expert or familiarity with such expert through prior litigation does not relieve a party from complying with the disclosure requirements of Rule 4:1(b)(4)(A)(i).[34]

Following *John Crane, Inc. v. Jones*, when designating expert testimony pursuant to Rule 4:1(b)(A)(i), diligent trial counsel will be very detailed in the disclosure of the specific opinions and facts about which the expert will testify and the grounds for each of the expert's opinions. The days of the bare-bones designation of the

30. *Id.*
31. *Id.* at 592–93, 650 S.E.2d at 857.
32. *Id.* at 593, 650 S.E.2d at 857.
33. *Id.*
34. *Id.* (citing VA. SUP. CT. R. 4:1(b)(4)(A)(i) (Repl. Vol. 2009)).

general topics on which an expert will opine have ended in Virginia.

C. *Election of Remedies*

In an important case resolving a split among the circuit courts of Virginia, the Supreme Court of Virginia ruled in *Centra Health, Inc. v. Mullins* that a plaintiff must elect between a wrongful death action and a survival action "only at a time when the record sufficiently establishes that the personal injuries and the death arose from the same cause."[35] In many cases, this may occur only after both theories of recovery are submitted to a jury and the jury settles the factual issue.[36]

In *Centra Health*, Mullins, age eighty-four, fell and broke his hip.[37] He was hospitalized and had surgery.[38] After the surgery, he was catheterized, developed a urinary tract infection, and died.[39] The administrator of Mullins's estate sued the hospital, alleging both a wrongful death and a survival action.[40] The hospital contested any liability to the administrator.[41] Prior to trial, the hospital moved that the administrator be compelled to elect between the causes of action for wrongful death or survival.[42] There was no dispute that wrongful death and survival are alternate, mutually exclusive actions; the only dispute was *when* the plaintiff must elect between the causes of action.[43] The hospital contended that the election must be made prior to trial, lest the jury be prejudiced by the evidence of damages in that there are different elements of damages for wrongful death and survival actions.[44] The administrator contended that, so long as the hospital was contesting proximate causation, the administrator should be able to proceed on both causes and have the issue of proximate causation

35. 277 Va. 59, 79, 670 S.E.2d 708, 718 (2009). For additional discussion of the *Centra Health* decision, see L. Steven Emmert, *Election of Remedies:* Centra Health v. Mullins, 44 U. RICH. L. REV. 149 (2009).

36. *See Centra Health*, 277 Va. at 79, 670 S.E.2d at 718.

37. *Id.* 277 at 64, 670 S.E.2d at 709.

38. *Id.*

39. *Id.*, 670 S.E.2d at 709–10.

40. *Id.*, 670 S.E.2d at 710.

41. *Id.*

42. *Id.* at 64–65, 670 S.E.2d at 710.

43. *Id.* at 65, 670 S.E.2d at 710.

44. *Id.* at 66, 670 S.E.2d at 711.

submitted to the jury.[45] The trial court denied the hospital's motion to compel and submitted both theories of recovery to the jury, with careful instructions that the jury could only find for the plaintiff under one of the causes of action.[46] The jury returned a verdict in favor of the administrator on the survival action for $325,000, and the hospital appealed.[47]

The supreme court affirmed the trial court's order that affirmed the jury's verdict.[48] The court reasoned that the election of remedies is required only at a time when the record sufficiently establishes that the personal injuries and the death arise from the same cause.[49] In this case, compelling an election prior to trial "would put the administrators in the untenable, and manifestly unjust, position of having to elect between two potentially viable claims, which [the hospital] was contesting on separate and independent grounds."[50] The court suggested that avoiding jury prejudice or confusion on the issue of the evidence of damages can best be handled by bifurcation:

> Though there can be but one recovery in these cases, we are not unmindful of [the hospital's] contention that in permitting a plaintiff to present evidence in support of a survival claim and a wrongful death claim when the issue of causation is disputed, a defendant may be subject to potential prejudice by the possibility that in a jury trial the jury could conflate the differing elements of damages from each claim in rendering a single verdict. We are of opinion, however, that a defendant can obviate this potential for prejudice by requesting that the trial be bifurcated into separate proceedings to determine liability and damages. Indeed, in a case where there is any doubt as to when compelling an election would be proper, bifurcation is the most practical means to assure that each party receives a fair opportunity to present their case to the jury without prejudice to the other. [51]

Although the trial in *Centra Health* was not bifurcated, the jury's verdict was allowed to stand because the trial judge was "painstaking" in his efforts to instruct the jury on how damages should

45. *Id.*
46. *Id.* at 66, 69, 670 S.E.2d at 711, 713.
47. *Id.* at 71–72, 670 S.E.2d at 713–14.
48. *Id.* at 82, 670 S.E.2d at 720.
49. *Id.* at 79, 670 S.E.2d at 718.
50. *Id.*
51. *Id.* at 78, 670 S.E.2d at 718 (citing Allstate Ins. Co. v. Wade, 265 Va. 383, 393, 579 S.E.2d 180, 185 (2003)).

be assessed depending on whether the jury found for the administrator on the wrongful death claim or the survival claim.[52]

D. *Continuances*

The Supreme Court of Virginia acknowledged in the case of *Haugen v. Shenandoah Valley Department of Social Services*, that it has applied widely varying legal standards when reviewing a circuit court's decision to grant or deny a motion for a continuance.[53] The supreme court took the opportunity to enunciate a single standard to be applied "[t]oday and in the future."[54]

In *Haugen*, the Department of Social Services sought to terminate the parental rights of Haugen and Pacheco.[55] Both Haugen, the mother, and Pacheco, the father, were incarcerated in federal prisons after they were convicted of drug offenses.[56] They participated in the hearing by telephone.[57] During the course of the hearing, each parent, for various reasons, was forced to terminate the telephone call.[58] The trial court denied the motions of both parents for a continuance and continued to hear evidence after the parents were no longer participating in the hearing.[59] The trial court terminated Haugen's and Pacheco's parental rights.[60] Only Haugen appealed.[61]

The supreme court reversed the decision to terminate the parental rights of Haugen, and announced a single standard for its review of a ruling granting or denying a request for a continuance:

> Today and in the future, when reviewing a circuit court's ruling to grant or deny a continuance, this Court will apply the following common law principles . . . . The decision to grant a motion for a continuance is within the sound discretion of the circuit court and must be considered in view of the circumstances unique to each case. The circuit court's ruling on a motion for a continuance will be rejected

52. *Id.* at 81, 670 S.E.2d at 719–20.
53. 274 Va. 27, 33–34, 645 S.E.2d 261, 264–65 (2007).
54. *Id.* at 34, 645 S.E.2d at 265.
55. *Id.* at 29, 645 S.E.2d at 262.
56. *Id.*
57. *Id.* at 29–30, 645 S.E.2d at 262.
58. *Id.* at 30, 645 S.E.2d at 262–63.
59. *Id.*
60. *Id.* at 30, 645 S.E.2d at 263.
61. *Id.* at 30–31, 645 S.E.2d at 263.

> on appeal only upon a showing of abuse of discretion *and* resulting prejudice to the movant . . . . [W]hen a circuit court's refusal to grant a continuance "seriously imperil[s] the just determination of the cause," the judgment must be reversed.[62]

Applying that standard, the supreme court held that the trial court abused its discretion in not granting Haugen's request for a continuance, particularly in light of the "'grave, drastic and irreversible'" effects of terminating parental rights to a child.[63]

E. *Extraordinary Writs*

In the case of *In re Commonwealth of Virginia*, the Supreme Court of Virginia reiterated that a writ of mandamus is indeed an extraordinary writ that is appropriate in very limited circumstances.[64] The court held that writs of mandamus and writs of prohibition are prospective only and cannot be used to reverse what is already done.[65]

In re Commonwealth of Virginia invoked the original jurisdiction of the Supreme Court of Virginia.[66] The case arose from the protracted capital murder prosecution of Daryl Atkins.[67] Atkins was first convicted of capital murder and sentenced to death in 1998.[68] The case was appealed to the Supreme Court of Virginia, and the court affirmed with respect to guilt, but reversed and remanded regarding the penalty phase.[69] On retrial, Atkins again was sentenced to death.[70] That sentence was affirmed by the Supreme Court of Virginia,[71] but reversed by the United States Supreme Court in the landmark case that held that the death penalty cannot be imposed on a defendant who was mentally retarded

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62. *Id.* at 34–35, 645 S.E.2d at 265 (quoting Myers v. Trice, 86 Va. 835, 842, 11 S.E. 428, 430 (1890)) (internal citations omitted).

63. *Id.* (quoting Lowe v. Dep't of Pub. Welfare of Richmond, 231 Va. 277, 280, 343 S.E.2d 70, 72 (1986)).

64. 278 Va. 1, 8, 677 S.E.2d 236, 238–39 (2009) (citing Gannon v. State Corp. Comm'n, 243 Va. 480, 482, 416 S.E.2d 446, 447 (1972)).

65. *Id.* at 10, 17, 677 S.E.2d at 239, 244 (quoting In re Dep't of Corrs., 222 Va. 454, 461, 281 S.E.2d 857, 861 (1981)).

66. *Id.* at 5, 677 S.E.2d at 237; *see* VA. CONST. art. VI, § 1; VA. CODE ANN. § 17.1-309 (Repl. Vol. 2003 & Cum. Supp. 2009).

67. *In re Commonwealth*, 278 Va. at 5–6, 677 S.E.2d at 237.

68. *Id.*

69. Atkins v. Commonwealth, 257 Va. 160, 180, 510 S.E.2d 445, 457 (1999).

70. Atkins v. Commonwealth, 260 Va. 375, 378–79, 534 S.E.2d 312, 314 (2000).

71. *Id.* at 379, 534 S.E.2d at 314.

at the time of the offense.[72] In the third trial, the jury found that Atkins was not mentally retarded and again sentenced him to death.[73] That conviction was reversed by the Supreme Court of Virginia.[74] The case was remanded to the trial court with directions to conduct a trial on the issue of whether Atkins was mentally retarded at the time of the offense.[75] Prior to the fourth trial, the defense alleged that the prosecution had violated its obligations under *Brady v. Maryland*[76] in failing to turn over exculpatory evidence to the defense.[77] The trial court agreed that there had been a material *Brady* violation and, as a remedy, sentenced Atkins to life in prison.[78] The prosecution sought a writ of mandamus and a writ of prohibition compelling the trial court to vacate its final order sentencing Atkins to life in prison and to conduct the hearing on the issue of Atkins's mental retardation.[79]

The Supreme Court of Virginia ruled that neither a writ of mandamus nor a writ of prohibition was proper under the facts of the case.[80] The court noted that:

> "A writ of mandamus is an extraordinary remedial process, which is not awarded as a matter of right but in the exercise of a sound judicial discretion. Due to the drastic character of the writ, the law has placed safeguards around it. Consideration should be had for the urgency which prompts an exercise of the discretion, the interests of the public and third persons, the results which would follow upon a refusal of the writ, as well as the promotion of substantial justice. In doubtful cases the writ will be denied, but [when] the right involved and the duty sought to be enforced are clear and certain and [when] there is no other available specific and adequate remedy the writ will issue."[81]

The court ruled that mandamus cannot be used to grant the Commonwealth a right to appeal the final order in a criminal

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72. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

73. Atkins v. Commonwealth, 272 Va. 144, 147, 631 S.E.2d 93, 94 (2006).

74. *Id.* at 148, 631 S.E.2d at 94.

75. *Id.*

76. 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt as to punishment, irrespective of the good or bad faith of the prosecution").

77. *In re* Commonwealth, 278 Va. 1, 7, 677 S.E.2d 236, 238 (2009).

78. *Id.* at 7–8, 677 S.E.2d at 238.

79. *See id.* at 8, 17, 677 S.E.2d at 238, 243.

80. *Id.* at 18, 677 S.E.2d at 244.

81. *Id.* at 8, 677 S.E.2d at 238–39 (quoting Gannon v. State Corp. Comm'n, 243 Va. 480, 482, 416 S.E.2d 446, 447 (1992).

case where the Commonwealth would otherwise have no right to appeal:

> "In relation to courts and judicial officers, [mandamus] cannot be made to perform the functions of a writ of error or appeal, or other legal proceeding to review or correct errors, or to anticipate and forestall judicial action. It may be appropriately used and is often used to compel courts to act [when] they refuse to act and ought to act, but not to direct and control the judicial discretion to be exercised in the performance of the act to be done; to compel courts to hear and decide where they have jurisdiction, but not to pre-determine the decision to be made; to require them to proceed to judgment, but not to fix and prescribe the judgment to be rendered."[82]

The supreme court ruled that mandamus "does not lie to compel an officer to undo what he has done in the exercise of his judgment or discretion" and cannot be used to "compel an officer to do what he had already determined ought not to be done."[83] Instead, mandamus is prospective only.[84]

Applying those principles to the facts of the case, the supreme court ruled that mandamus does not lie to compel the trial judge to hold a hearing on the issue of whether Atkins was mentally retarded.[85] The court held that "mandamus cannot be used by the Commonwealth or any other litigant to collaterally attack or vacate a final judgment entered by a circuit court upon the conclusion of a criminal proceeding."[86]

Similarly, the court held that a writ of prohibition did not lie under the facts of the case.[87] As its name suggests, the writ of prohibition "commands the person to whom it is directed not to do something which . . . he is about to do."[88] "If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect of a writ of

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82. *Id.* at 9–10, 677 S.E.2d at 239 (quoting Page v. Clopton, 1 Va. (30 Gratt.) 415, 418 (1878)).

83. *Id.* at 9, 677 S.E.2d at 239 (quoting Thurston v. Hudgins, 93 Va. 780, 784, 20 S.E.2d 966, 968 (1895)).

84. *Id.* (quoting Richlands Med. Ass'n v. Commonwealth, 230 Va. 384, 387, 337 S.E.2d 737, 740 (1985)).

85. *Id.* at 10, 677 S.E.2d at 239.

86. *Id.*

87. *Id.* at 17, 677 S.E.2d at 244.

88. *Id.*, 677 S.E.2d at 243 (quoting *In re* Dep't of Corrs., 222 Va. 454, 461, 281 S.E.2d 857, 861 (1981)).

prohibition is to suspend all action, and to prevent any further proceeding in the prohibited direction."[89]

F. *Local Rules*

In two cases, the Supreme Court of Virginia applied Virginia Code section 8.01-4[90] to reverse the trial court's application of a local rule that infringed on the substantive rights of a litigant.

In the first case, *Collins v. Shepherd*, the Supreme Court of Virginia invalidated a local rule that the circuit court of the City of Norfolk instituted to control its docket.[91] Because the local rule was invalid, an order dismissing a case with prejudice pursuant to the rule was "void ab initio and subject to challenge at any time."[92]

Collins brought an action in Norfolk Circuit Court against Shepherd for damages arising from Shepherd's alleged negligent operation of a motor vehicle.[93] After Collins failed to serve Shepherd within the required one year of filing,[94] the circuit court sua sponte notified Collins that the case would be dismissed unless Collins could show that he exercised due diligence to effect service.[95] The trial court was acting pursuant to its Local Rule 2(F)(3), a rule based roughly on Virginia Supreme Court Rule 3:5(e).[96] Collins failed to appear on the hearing date, and the case was dismissed with prejudice.[97] Five months later, Collins came forward and asked the circuit court to reinstate his case.[98] Ultimately, the trial court refused to vacate the dismissal order, and Collins's suit was dismissed with prejudice for failing to serve Shepherd within one year.[99]

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89. *Id.* (quoting *In re* Dep't of Corrs., 222 Va. at 461, 281 S.E.2d at 861 (1981)).

90. VA. CODE ANN. § 8.01-4 (Repl. Vol. 2007).

91. 274 Va. 390, 394, 402–03, 649 S.E.2d 672, 673, 678 (2007).

92. *Id.* at 403, 649 S.E.2d at 678.

93. *Id.* at 394, 649 S.E.2d at 673.

94. VA. CODE ANN. §§ 8.01-275.1, 8.01-277 (Repl. Vol. 2007) (prescribing the requirements and penalties for service of process); VA. SUP. CT. R. 3:5 (Repl. Vol. 2007) (describing the mechanics at service of process).

95. *Collins*, 274 Va. at 394, 649 S.E.2d at 673.

96. *See id.* (citing VA. SUP. CT. R. 3:5(e) (Repl. Vol. 2007).

97. *Id.*

98. *Id.* at 395, 649 S.E.2d at 673.

99. *Id.* at 397, 649 S.E.2d at 675.

The supreme court reversed and remanded.[100] Virginia Code section 8.01-4 authorizes circuit courts to adopt docket control measures so long as they do not "'abridge the substantive rights of the parties.'"[101] Norfolk's Local Rule 2(F)(3), authorizing the circuit court to dismiss sua sponte actions such as Collins's that have not been served within one year, exceeded the court's authority to control its docket under Virginia Code section 8.01-4.[102] Norfolk's local rule allowed for dismissal with prejudice when a plaintiff otherwise would have been able to nonsuit and refile.[103] Although the local rule was based on the supreme court's Rule 3:5, the supreme court's rule does not permit courts sua sponte to dismiss cases that have not been served within one year.[104] Instead, Rule 3:5 applies only when a defendant who has not been served within one year comes forward and asks for dismissal of the case.[105] Therefore, the local rule abridged Collins's substantive right to nonsuit and refile.[106] Because the local rule is invalid, the order dismissing Collins's action was void ab initio and was not subject to the twenty-one-day limitation period under Rule 1:1.[107] Collins was free to challenge the circuit court's dismissal of his action at any time.[108]

The supreme court observed that Virginia Code section 8.01-335 permits the circuit court to control its docket by discontinuing (rather than dismissing) cases after prolonged periods of inactivity.[109] In those instances, the plaintiff can move to have the case reinstated.[110] The supreme court also noted that Virginia Code section 8.01-335(D), which the General Assembly adopted in 2007, permits circuit courts to strike cases from their dockets and order them discontinued if there has been no service within one year.[111] The plaintiff must be given thirty days' advance notice of

100. *Id.* at 403, 649 S.E.2d at 678.

101. *Id.* at 399, 649 S.E.2d at 676 (quoting VA. CODE ANN. § 8.01-4 (Repl. Vol. 2007)).

102. *Id.*

103. *Id.*

104. *Id.* at 397–98, 649 S.E.2d at 675 (citing Gilbreath v. Brewster, 230 Va. 436, 440, 463 S.E.2d 836, 837 (1995)).

105. *See* VA. SUP. CT. R. 3:5 (Repl. Vol. 2009).

106. *Collins*, 274 Va. at 399, 649 S.E.2d at 676.

107. *Id.* at 402, 649 S.E.2d at 678 (citing VA. SUP. CT. R. 1:1 (Repl. Vol. 2007)).

108. *Id.* at 403, 649 S.E.2d at 678.

109. *Id.* at 400–01, 649 S.E.2d at 676–77 (quoting VA. CODE ANN. § 8.01-335 (Repl. Vol. 2007)).

110. *Id.* at 401, 649 S.E.2d at 677.

111. *Id.* at 401 n.7, 649 S.E.2d at 677 n.7 (quoting VA. CODE ANN. § 8.01-335(D) (Repl.

the proposed dismissal and must be afforded the opportunity to nonsuit before the entry of the discontinuance order.[112] The supreme court expressed no opinion about whether Norfolk's local rule would pass muster under Virginia Code section 8.01-335(D).[113]

In the second case concerning local rules, *Martin v. Duncan*, the Supreme Court of Virginia reversed the trial court's imposition, pursuant to a local rule, of the costs of the jury on a plaintiff who took a nonsuit as of right on the day of trial.[114] Martin sued Duncan for negligence in Chesapeake Circuit Court.[115] At trial, Martin moved for a nonsuit.[116] The trial court granted the nonsuit, but assessed Martin $540 for the costs of the jury, stating that assessing jury costs is "pretty standard here in this court."[117] Indeed, the trial court had a local rule that permitted assessing a party in a civil case with the costs of the jury if the clerk and jury administrator were not notified prior to the day of trial that the case was "not to be tried."[118]

The supreme court reversed, holding that Virginia Code section 8.01-380(C) limits those costs that may be assessed against a plaintiff such as Martin who takes a nonsuit as a matter of right within seven days of trial to "'reasonable witness fees and travel costs of expert witnesses scheduled to appear at trial.'"[119] The trial court may not impose additional limitations beyond those authorized by statute; otherwise, the party's absolute right to take a nonsuit would be eroded.[120] The trial court's local rule cannot be the basis to assess the costs of the jury on Martin.[121] Under Virginia Code section 8.01-4, a local rule cannot be enforced if it is "inconsistent with any statutory provision or has the affect of abridging substantive rights of persons before such court."[122]

Vol. 2007)).

112. *Id.*

113. *Id.*

114. 277 Va. 204, 206, 671 S.E.2d 151, 152 (2009).

115. *Id.* at 206, 671 S.E.2d at 152.

116. *Id.*

117. *Id.*

118. *Id.* at 206–07 n.2, 671 S.E.2d at 152 n.2.

119. *Id.* at 207, 671 S.E.2d at 153 (quoting VA. CODE ANN. § 8.01-380(C) (Repl. Vol. 2007 & Cum. Supp. 2009)).

120. *See id.* (quoting Janvier v. Arminio, 272 Va. 353, 365, 634 S.E.2d 754, 760 (2006)).

121. *Id.*

122. *Id.* at 208, 671 S.E.2d at 153 (quoting VA. CODE ANN. § 8.01-4 (Repl. Vol. 2007)).

Both *Collins v. Shepherd* and *Martin v. Duncan* indicate the Supreme Court of Virginia's aversion to any local rules that give a litigant fewer rights than he or she would enjoy under the Virginia Code or the Rules of the Supreme Court of Virginia.

G. *Summary Judgment*

The Supreme Court of Virginia has decided several cases in the last two years that illustrate that, unlike the federal courts, it is reluctant to approve of the grant of summary judgment. Although a rule of court allows for summary judgment,[123] the supreme court consistently holds that summary judgment is a drastic remedy which should only be granted in those rare circumstances in which no material facts are in dispute.[124]

The most recent of these cases is *Fultz v. Delhaize America, Inc.*, where the supreme court complained that "we are increasingly confronted with appeals of cases in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits" by granting summary judgment.[125] After reviewing the rulings of the trial court, the supreme court concluded that "[t]his is another such case."[126]

Fultz injured herself when she tripped over some metal bars bolted on either side of an ATM inside a grocery store.[127] The trial judge granted the grocery store summary judgment, ruling that the protective bars were "open and obvious," and thus Fultz was contributorily negligent as a matter of law.[128]

The supreme court reversed, holding that the trial judge impermissibly "short-circuited" the litigation process by granting

123. VA. SUP. CT. R. 3:20 (Repl. Vol. 2009).

124. Fultz v. Delhaize American, Inc., 278 Va. 84, 88, 677 S.E.2d 272, 274 (2009) (citing Stockbridge v. Germini Air Cargo, Inc., 269 Va. 609, 618, 611 S.E.2d 600, 604 (2005); Smith v. Smith, 254 Va. 99, 103, 487 S.E.2d 212, 215 (1997); Slone v. General Motors Corp., 249 Va. 520, 522 457 S.E.2d 51, 52 (1995)).

125. *Id.* at 88, 677 S.E.2d at 274 (citing Renner v. Stafford, 245 Va. 351, 352, 429 S.E.2d 218, 219 (1993); CaterCorp., Inc. v. Catering Concepts, Inc., 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993)).

126. *Id.*

127. *Id.* at 87, 677 S.E.2d at 273–74.

128. *Id.* at 88, 677 S.E.2d at 274.

summary judgment.[129] The question of "whether a plaintiff is guilty of contributory negligence is ordinarily a question of fact to be decided by the fact finder.'"[130] Even if the bars were open and obvious, "the plaintiff ha[d] the burden to show conditions outside herself which prevented her seeing the dangerous condition" or excused her failure to observe the dangerous condition.[131] "We are of opinion that reasonable minds could differ as to whether under the circumstances of this case, Fultz acted as a reasonable person would have acted for her own safety."[132] Therefore, the trial court erred in granting summary judgment to the defendant grocery store.[133]

In *Hyland v. Raytheon Technical Services Co.*, the Supreme Court of Virginia reversed summary judgment for a defendant in a defamation action.[134] Hyland alleged that she had been defamed by her former employer, Raytheon, in several statements it made about her job performance.[135] When the case was first tried, Hyland received a substantial award from the jury, but the verdict was reversed on appeal.[136] In the first appeal, the supreme court held that only two of Raytheon's statements about Hyland were factual statements and thus possibly defamatory.[137]

Prior to the second trial, Raytheon moved for summary judgment, arguing that the remaining two statements were indisputably true, and thus not defamatory.[138] The trial court parsed each of the separate factual allegations of the allegedly defamatory statements and held that they were true as a matter of law.[139] The trial court therefore granted summary judgment to Raytheon.[140]

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129. *See id.* (citing *Renner*, 245 Va. at 352, 429 S.E.2d at 219; *CaterCorp*, 246 Va. at 24, 631 S.E.2d at 279).

130. *Id.* at 89, 677 S.E.2d at 275 (quoting Moses v. Sw. Va. Transit Mgmt. Co., 273 Va. 672, 678, 643 S.E.2d 156, 159–60 (2007)).

131. *Id.* at 90, 677 S.E.2d at 275.

132. *Id.* at 91, 677 S.E.2d at 276.

133. *Id.*

134. *See* 277 Va. 40, 49, 670 S.E.2d 746, 752 (2009).

135. *Id.* at 42, 670 S.E.2d at 748.

136. *See id.* at 43, 670 S.E.2d at 748–49 (citing Raytheon Tech. Servs. Co. v. Hyland, 273 Va. 292, 641 S.E.2d 84 (2007)).

137. *Id.*

138. Hyland v. Raytheon Technical Servs. Co., 75 Va. Cir. 497, 500 (Cir. Ct. 2007) (Fairfax County).

139. *See id.* at 503–04.

140. *Id.* at 504.

The supreme court reversed the grant of summary judgment.[141] The court recited the general principle that factual statements may be defamatory and statements of opinion are not actionable.[142] "In determining whether a statement is one of fact or opinion, a court may not isolate one portion of the statement at issue from another portion of the statement."[143] The allegedly defamatory statement must be considered as a whole.[144] In granting summary judgment, the trial court "improperly limited its analysis to the separate factual portions of the alleged defamatory statements and excluded the necessary consideration of each statement as a whole, including any implications, inferences, or insinuations that reasonably could be drawn from each statement."[145] The determination of whether an allegedly defamatory statement is false is ordinarily a factual question to be resolved by the jury.[146] "Only if a plaintiff unequivocally has admitted the truth of an allegedly defamatory statement, including the fair inferences, implications, and insinuations that can be drawn from that statement, may the trial judge award summary judgment to the defendant on the basis that the statement is true."[147] The court concluded that:

> By awarding summary judgment to Raytheon in the absence of such admissions, the circuit court deprived Hyland of the opportunity to present evidence to a jury to establish the falsity of the allegedly defamatory statements. The circuit court's judgment also denied Hyland the right to have a jury consider each allegedly defamatory statement as a whole.[148]

Federal practitioners are sometimes surprised to learn that Virginia practice generally does not allow for the use of either depositions[149] or affidavits[150] to support a motion for summary judg-

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141. *Hyland*, 277 Va. at 49, 670 S.E.2d at 752.

142. *Id.* at 46, 47, 670 S.E.2d at 750 (citing Raytheon Tech. Servs. Co. v. Hyland, 273 Va. 292, 303, 641 S.E.2d 84, 90 (2007)).

143. *Hyland*, 277 Va. at 47, 670 S.E.2d at 751.

144. *Id.* (citing Gov't Micro Res., Inc. v. Jackson, 271 Va. 29, 40, 624 S.E.2d 63, 69 (2006)).

145. *Id.* at 48, 670 S.E.2d at 751.

146. *Id.*

147. *Id.* (citing Shutler v. Augusta Health Care for Women, 272 Va. 87, 91, 630 S.E.2d 313, 315 (2006); Stockbridge v. Gemini Air Cargo, Inc., 269 Va. 609, 618, 611 S.E.2d 600, 604 (2005)).

148. *Id.* at 49, 670 S.E.2d at 752.

149. VA. CODE ANN. §8.01-420 (Repl. Vol. 2007 & Cum. Supp. 2009); VA. SUP. CT. R. 3:20 (Repl. Vol. 2009).

150. *See* VA. SUP. CT. R. 3:20 (Repl. Vol. 2009); Stone v. Alley, 240 Va. 162, 163–64, 392

ment. In *Lloyd v. Kime*, the Supreme Court of Virginia ruled that a litigant may not use depositions in support of a motion in limine when the motion in limine is effectively a motion for summary judgment.[151]

Lloyd alleged that he was partially paralyzed as a result of a surgical procedure negligently performed by Dr. Kime.[152] Lloyd named as his sole expert Dr. Corkill, who was expected to testify as to the standard of care, Dr. Kime's deviation from the standard of care, and causation.[153] Dr. Kime moved in limine to exclude the testimony of Dr. Corkill because he did not meet the requirements of Virginia Code section 8.01-581.20.[154] After reviewing Dr. Corkill's deposition, as well as the depositions of Dr. Kime and his expert, the trial court excluded Dr. Corkill's testimony.[155] The trial court then awarded summary judgment to Dr. Kime because Lloyd was left without an expert.[156]

Under Virginia Supreme Court Rule 3:20, "no motion for summary judgment or to strike the evidence shall be sustained when based in whole or part upon any discovery depositions . . ." unless all parties agree.[157] The supreme court reasoned that "the motion in limine [was] functionally a motion for summary judgment."[158] Therefore, discovery deposition testimony could not be used in support of the motion in limine unless Lloyd consented or acquiesced to its use.[159] Although deposition testimony may not be used to support a motion that is the functional equivalent to a motion for summary judgment, the supreme court affirmed the trial court's exclusion of Dr. Corkill's testimony because Lloyd acquiesced to the use of the deposition by not voicing an objection.[160]

One cannot review the Supreme Court of Virginia's jurisprudence on summary judgment without concluding that it is far

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S.E.2d 486, 486–87 (1990). An exception to the general rule is found in VA. CODE ANN. § 8.01-696 (Repl. Vol. 2007), which expressly permits the use of affidavits in supporting summary judgment in a pro se prisoner civil action.

151. 275 Va. 98, 107, 654 S.E.2d 563, 568 (2008).

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

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

154. *Id.*; *see* VA. CODE ANN. § 8.01-581.20 (Cum. Supp. 2009).

155. *Lloyd*, 275 Va. at 105, 654 S.E.2d at 567.

156. *Id.*

157. *Id.* at 106, 654 S.E.2d at 568 (quoting VA. SUP. CT. R. 3:20 (Repl. Vol. 2008)).

158. *See id.* at 107, 654 S.E.2d at 568.

159. *Id.*

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

more difficult to be awarded summary judgment in Virginia state courts than in federal courts. The supreme court is loath to find a case in which the litigants have raised no dispute of material fact warranting a trial on the merits.

H. *Jurors and Juries*

Robert M. Seh Co. v. O'Donnell presents the not uncommon situation where, *after* the jury has been sworn, a juror expresses an opinion that would disqualify the juror from service on the jury.[161] Here, the Supreme Court of Virginia held that if a jury has been empanelled and the impartiality of a juror is brought into question, it is an abuse of the trial court's discretion to deny a motion for a mistrial if the movant establishes the probability of the juror's prejudice preventing a fair trial.[162]

The O'Donnells contracted with the Robert M. Seh Company for the installation of a Fox brand swimming pool at their residence.[163] After the O'Donnells learned that the company installed a Vyn-All liner instead of a Fox liner, they brought suit for violation of Virginia's Consumer Protection Act.[164] During voir dire, Juror Lyons disclosed that he sometimes helped his father-in-law install swimming pools.[165] No follow up questions were asked, and Juror Lyons was seated as a juror.[166] After opening statements, when Juror Lyons presumably learned more about the case, he disclosed that he knew from his father-in-law that Vyn-All pool liners are inferior.[167] Lyons related that he was now biased against the defense counsel, as Lyons felt that counsel "[did not] know what he [was] talking about" if he believed that Vyn-All liners were of good quality.[168] Juror Lyons acknowledged he had to base his verdict on the evidence in the case but he could not "erase" from his "brain" what he knew about the relative merits of

161. 277 Va. 599, 602, 675 S.E.2d 202, 204 (2009).

162. *See id.* at 604–05, 675 S.E.2d at 205–06 (citing Taylor v. Commonwealth, 25 Va. App. 12, 18, 486 S.E.2d 108, 111 (1997); Haddad v. Commonwealth, 279 Va. 325, 330, 329 S.E.2d 17, 20 (1985)).

163. *Id.* at 601, 675 S.E.2d at 203.

164. *Id.*, 675 S.E.2d at 203–04 (citing VA. CODE ANN. §§ 59.1-200 to 59.1-207 (Repl. Vol. 2006 & Cum. Supp. 2009)).

165. *Id.* at 602, 675 S.E.2d at 204.

166. *Id.*

167. *Id.*

168. *Id.*

the two liners.[169] The defense did not agree to proceed with six jurors and instead moved for a mistrial.[170] The trial court denied the motion for a mistrial.[171] The O'Donnells were ultimately awarded about $100,000 in damages, penalties, and attorneys' fees.[172]

The supreme court reversed, holding that the motion for a mistrial should have been granted.[173] A trial court's ruling denying a motion for a mistrial will be set aside on appeal only if the ruling constituted an abuse of discretion.[174] "[O]nce a jury has been empanelled and the impartiality of a juror is subsequently brought into question, it is an abuse of discretion to deny a motion for a mistrial if the proponent of the motion establishes the probability of prejudice such that the fairness of the trial is subject to question."[175] In this case, Juror Lyons never retracted his statements that he had a fixed opinion that Vyn-All liners were inferior to Fox liners and that the defense counsel "didn't know what he was talking about."[176] Thus, retaining Lyons on the jury presented a high probability of prejudice to the defendant pool company that would bring the fairness of the trial into question.[177]

I. *Jury Instructions*

The Supreme Court of Virginia disapproved of the jury instruction on the tort concept of "unavoidable accident," but left undisturbed the instruction on "sudden emergency" in the case of *Hancock-Underwood v. Knight*.[178] The supreme court ruled that the "unavoidable accident" jury instruction should no longer be given in any case.[179] It is now always error to grant that instruction.[180] The "sudden emergency" instruction should rarely be given.[181]

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169. *Id.* at 602–03, 675 S.E.2d at 204–05.
170. *Id.*
171. *Id.* at 603, 675 S.E.2d at 205.
172. *Id.* at 601, 675 S.E.2d at 204.
173. *Id.* at 605, 675 S.E.2d at 206.
174. *Id.* at 603, 675 S.E.2d at 205 (citing Westlake Properties v. Westlake Pointe Prop. Owners Ass'n, 273 Va. 107, 124 659 S.E.2d 257, 267 (2009)).
175. *Id.* at 605, 675 S.E.2d at 206.
176. *Id.*
177. *Id.*
178. 277 Va. 127, 137, 670 S.E.2d 720, 727 (2009).
179. *Id.* at 134, 670 S.E.2d at 724.
180. *Id.*
181. *Id.* at 137, 670 S.E.2d at 726 (citing Jones v. Ford Motor Co., 263 Va. 237, 263, 559

Hancock, while driving, suffered an "acute intracranial event" that caused him to lose consciousness and drift into oncoming traffic.[182] He struck Knight's vehicle, injuring Knight.[183] Hancock died, and Knight sued his personal representative.[184] At the conclusion of the jury trial, Hancock's personal representative sought both an "unavoidable accident" instruction and a "sudden emergency" instruction.[185] The trial judge denied both, and the jury returned a verdict in favor of Knight.[186]

The supreme court affirmed the trial court's decision to not instruct the jury on the concept of unavoidable accident.[187] The model instruction on unavoidable accident reads as follows: "An unavoidable accident is one which ordinary care and diligence could not have prevented or one which occurred in the absence of negligence by any party to this action."[188] The jury is usually instructed that if it finds that the accident was "unavoidable," there can be no award of damages to the plaintiff because the defendant was not negligent.[189] Previously, the supreme court has said that the unavoidable accident instruction should rarely be given because it is "apt to give a jury an 'easy way of avoiding instead of deciding the issue made by the evidence in the case.'"[190] Those states that disapprove of the instruction in all cases reason that the unavoidable accident instruction merely restates the law of negligence, serves no useful purpose, overemphasizes the defendant's case, and is apt to confuse or mislead the jury.[191]

In *Hancock-Underwood*, the supreme court reasoned that the concept sought to be addressed by the unavoidable accident instruction was adequately addressed by the typical issues instruction,[192] the finding instruction,[193] the definition of negligence,[194] the

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S.E.2d 592, 605 (2002)).

182. *Id.* at 129–130, 670 S.E.2d at 721–22.

183. *Id.* at 129, 670 S.E.2d at 721–22.

184. *Id.*

185. *Id.* at 130, 670 S.E.2d at 722.

186. *Id.*

187. *Id.* at 136, 670 S.E.2d at 725.

188. Va. Model Jury Instructions – Civil, Jury Instr. No. 4.018 (Repl. Vol. 2009) [hereinafter Instructions].

189. *See Hancock-Underwood*, 277 Va. at 134–35, 136, 670 S.E.2d at 724–25.

190. *Id.* at 136, 670 S.E.2d at 725 (quoting Chadorov v. Eley, 239 Va. 528, 531, 391 S.E.2d 68, 70 (1990)).

191. *Id.*

192. *See id.* at 136, 670 S.E.2d at 725; Instructions, *supra* note 188, No. 3.000.

definition of proximate cause,[195] and the definition of the burden of proof by a preponderance of the evidence.[196] "[W]e join those states and hold that it is error to grant an unavoidable accident instruction."[197]

Although the "sudden emergency" instruction should rarely be granted, it is not always error to grant such an instruction.[198] "A sudden emergency is an event or a combination of circumstances that calls for immediate action without giving time for the deliberate exercise of judgment."[199] If a driver is confronted with a sudden emergency and acts as a reasonable person would have acted under the circumstances, then he or she is not negligent.[200] The supreme court opined that the sudden emergency instruction, unlike the unavoidable accident instruction, does not merely restate the law of negligence: "It adds new considerations to the negligence equation. A person confronted with a sudden emergency must '*act[ ]* as an ordinarily prudent person would have done under the same or similar circumstances.' This additional requirement is not addressed in the general negligence instructions ordinarily given (as in this case)."[201]

The supreme court concluded that the trial judge in *Hancock-Underwood* did not err in refusing to grant the proffered sudden emergency instruction.[202] The evidence was that the defendant did not react to a sudden emergency.[203] He was unconscious.[204] Therefore, the instruction was not supported by the evidence in the

193. *See Hancock-Underwood*, 277 Va. at 135, 670 S.E.2d at 724, 725; Instructions, *supra* note 188, No. 3.050.

194. *See Hancock-Underwood*, 277 Va. at 135, 670 S.E.2d at 724–25; Instructions, *supra* note 188, No. 4.000.

195. *See Hancock-Underwood*, 277 Va. at 135, 670 S.E.2d at 725; Instructions, *supra* note 188, No. 5.000.

196. *See Hancock-Underwood*, 277 Va. at 135, 670 S.E.2d at 725; Instructions, *supra* note 188, Nos. 3.010, 3.100.

197. *Hancock-Underwood*, 277 Va. at 136, 670 S.E.2d at 725.

198. *Id.* at 137, 670 S.E.2d at 726 (quoting Jones v. Ford Motor Co., 263 Va. 237, 263, 559 S.E.2d 592, 605 (2002)).

199. *Id.* at 136, 670 S.E.2d at 726; Instructions, *supra* note 188, No. 7.000.

200. *Hancock-Underwood*, 277 Va. at 137, 670 S.E.2d at 726; *see* Instructions, *supra* note 188, No. 7.000.

201. *Hancock-Underwood*, 277 Va. at 137, 670 S.E.2d at 726 (quoting Vahdat v. Holland, 274 Va. 417, 421, 649 S.E.2d 691, 693 (2007)).

202. *Id.* at 138, 670 S.E.2d at 726.

203. *Id.*

204. *Id.*

case.[205] In an effort to offer guidance to the bench and bar, Justice Lemons suggested that it might have been proper for the jury to have been instructed that Hancock was not negligent if he was suddenly stricken by an unanticipated medical illness while driving, which rendered it impossible for him to control his automobile.[206]

The supreme court's view that the sudden emergency instruction "adds new considerations to the negligence equation" presents some problems.[207] Negligence is the failure to exercise ordinary care.[208] "Ordinary care is the care [that] a reasonable person would have used" under the circumstances to avoid injury.[209] "A person confronted with a sudden emergency must 'act [as] an ordinary prudent person would have done under the same or similar circumstances . . . .'"[210] It is difficult to discern any substantive difference between a person who is not negligent at all, and one who is not negligent because, when confronted with a sudden emergency, reacts as a reasonable person would have reacted in order to avoid injury.

J. *Finality of Consent Orders*

The Supreme Court of Virginia ruled that a consent order, after the expiration of twenty-one days, is a final order and an enforceable contract between the parties.[211] A court may not vary the terms of final consent orders any more than it may vary the terms of a contract entered into by the parties.[212] In *McLane v. Vereen*, the supreme court found that the trial court erred in

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205. *Id.* at 139, 670 S.E.2d at 727.

206. *See id.* at 138, 670 S.E.2d at 726–27 (citing Brinser v. Young, 208 Va. 525, 527, 158 S.E.2d 759, 761 (1968); Driver v. Broots, 176 Va. 317, 327, 105 S.E.2d 887, 892 (1940)).

207. *Id.* at 137, 670 S.E.2d at 726.

208. *Id.* at 135, 670 S.E.2d at 725.

209. *Id.*

210. *Id.* at 137, 670 S.E.2d at 726 (quoting Vahdat v. Holland, 274 Va. 417, 421, 649 S.E.2d 691, 693 (2007)).

211. McLane v. Vereen, 278 Va. 65, 73, 677 S.E.2d 294, 298–99 (2009) (citing VA. SUP. CT. R. 1:1 (Repl. Vol. 2009)).

212. *See id.* at 70–71, 677 S.E.2d at 297 (citing Comcast of Chesterfield County, Inc. v. Bd. of Supervisors, 277 Va. 293, 301, 672 S.E.2d 870, 873 (2009); Upper Occoquan Sewage Auth. v. Blake Constr. Co., 275 Va. 41, 60, 655 S.E.2d 10, 21 (2008); James v. James, 263 Va. 474, 481, 562 S.E.2d 133, 137 (2002); Daniels v. Truck & Equip. Corp., 205 Va. 579, 585, 139 S.E.2d 31, 35 (1964)).

awarding one party a final consent order less than the agreed-upon daily fine for the other party's non-compliance with the terms of the order.[213]

Vereen maintained excessive junk in his yard in Fairfax County.[214] He entered into a consent decree with the zoning administrator under which he agreed to clean up the yard by a date certain.[215] The order provided for a fine of $100 per day for every day after that date that the yard remained strewn with junk.[216] Vereen did not clean up his yard for 206 days beyond the date provided for in the consent decree.[217] The zoning administrator sought an order requiring Vereen to pay $20,600 in fines.[218] The trial court found that the requested fines were unreasonable and constituted an unenforceable penalty and imposed fines in the amount of $3,500.[219]

The supreme court reversed, ruling that the consent decree was a final order.[220] It "disposed of the entire matter before the court, gave all the contemplated relief, and left nothing to be done except the ministerial execution of the court's decree."[221] A consent decree is like a contract.[222] "When a consent decree is final . . . , it is enforceable in the same manner as any other court decree or order and may be enforced by the imposition of sanctions or by a contempt citation."[223] A consent decree that is final constitutes a judgment of the court, is conclusive, and "is not subject to collateral attack except on jurisdictional grounds or for fraud or collusion."[224] The terms of the consent decree between the County and Vereen were not subject to modification by the court after twenty-

213. *Id.* at 73, 677 S.E.2d at 299.

214. *Id.* at 67–68, 677 S.E.2d at 295–96.

215. *Id.* at 68, 677 S.E.2d at 296.

216. *Id.*

217. *See id.* at 69, 677 S.E.2d at 296.

218. *Id.*

219. *Id.*

220. *Id.* at 72, 677 S.E.2d at 298.

221. *Id.* (citing *Comcast of Chesterfield County*, Inc., 277 Va. at 301, 672 S.E.2d at 873; *Upper Occoquan Sewage Auth.*, 275 Va. at 60, 665 S.E.2d at 21; *Daniels*, 205 Va. at 585, 139 S.E.2d at 33).

222. *Id.* at 71, 677 S.E.2d at 297 (citing Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986)).

223. *Id.*, 677 S.E.2d at 298.

224. *Id.* at 71–72, 677 S.E.2d at 298 (citing Liberty Mut. Ins. Co. v. Eades, 248 Va. 205, 288 (1994); Culpeper Nat'l Bank v. Morris, 168 Va. 379, 385–87 (1957)).

one days.[225] Thus, the amount of the daily fines was not subject to attack on the grounds that it was unreasonable.[226] Final judgment was awarded to Fairfax County in the amount of $20,600.[227]

K. *Appellate Practice*

In the past two years, the Supreme Court of Virginia has decided a number of cases of interest to the appellate practitioner.

The first such case, *Commonwealth Transportation Commissioner v. Target Corp.*,[228] serves as a primer of common mistakes that result in an inadequate record for purposes of appeal. In affirming the circuit court's decision in this condemnation case, the supreme court ruled that it could not entertain the appellant's arguments because the appellant failed to make a proper proffer of excluded evidence at trial for purposes of appellate review, argued inconsistent positions at trial and on appeal, and attempted to raise arguments on appeal that had not been raised at trial.[229]

In *Target*, the transportation commissioner filed a petition for condemnation, taking real property interests owned by Target in order to construct a parkway.[230] Target filed an answer to the petition and claimed that it was entitled to just compensation for, among other things, the loss of visibility it suffered after the construction of the parkway.[231] The trial court confirmed the jury's report setting just compensation to Target for Target's loss of visibility at $3.3 million; the transportation commissioner appealed.[232]

The supreme court affirmed.[233] For each assignment of error considered, the transportation commissioner had either failed to proffer sufficient evidence at trial to allow for appellate review, argued inconsistent positions, raised the arguments for the first time on appeal, or had not asserted with specificity the error

225. *Id.* at 72, 677 S.E.2d at 298 (citing VA. SUP. CT. R. 1:1 (Repl. Vol. 2009)).

226. *Id.* at 73 (citing *Liberty Mut. Ins. Co.*, 248 Va. at 288, 448 S.E.2d at 633; *Culpeper Nat'l Bank*, 168 Va. at 385–87, 191 S.E.2d at 767–68).

227. *Id.* at 74, 677 S.E.2d at 299.

228. 274 Va. 341, 650 S.E.2d 92 (2007).

229. *Id.* at 348–52, 650 S.E.2d at 96–98.

230. *Id.* at 344, 650 S.E.2d at 94.

231. *Id.* at 345–46, 650 S.E.2d at 94–95.

232. *Id.* at 344, 650 S.E.2d at 94.

233. *Id.* at 353–54, 650 S.E.2d at 99.

made by the trial court.[234] The supreme court noted, "however, that [it did] not decide whether a landowner, whose real property is the subject of a condemnation proceeding, may recover damages for loss of visibility to the residue of the real property. This issue remains undecided in this Commonwealth."[235]

In a case of first impression, the Supreme Court of Virginia applied the Fugitive Disentitlement Doctrine to refuse to consider an appeal where the appellant was a fugitive in violation of the orders that were the subject of the appeal.[236] *Sasson v. Shenhar* arose in the context of an international custody dispute.[237] The supreme court applied the Fugitive Disentitlement Doctrine to refuse to consider the appeals of a father who, in violation of court orders, had absconded with his child.[238]

Sasson, the father, took the child to Spain contrary to the court's order.[239] The father was later found in contempt of court for failing to return the child to Virginia.[240] While still in violation of the trial court's orders, the father noted an appeal to the Court of Appeals of Virginia.[241] The court of appeals, applying the Fugitive Disentitlement Doctrine, refused to consider the merits of the appeal.[242]

The supreme court affirmed.[243] Under the Fugitive Disentitlement Doctrine, "'an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of [the] appeal.'"[244] Although never before applied in Virginia, the doctrine has wide acceptance in other states.[245] "[W]e hold that the Fugitive Disentitlement Doctrine may be applied in appropriate cases whenever a court of this Commonwealth in the exercise

234. *Id.* at 348–53, 650 S.E.2d at 96–98.

235. *Id.* at 353–54, 650 S.E.2d at 99.

236. Sasson v. Shenhar, 276 Va. 611, 622, 667 S.E.2d 555, 561 (2008) (quoting Moscona v. Shenhar, 50 Va. App. 238, 249, 649 S.E.2d 191, 196 (2007)).

237. *Id.* at 615, 667 S.E.2d at 556.

238. *Id.* at 618–20, 627–28, 667 S.E.2d at 558–59, 564.

239. *Id.* at 619–20, 667 S.E.2d at 559.

240. *Id.* at 621, 667 S.E.2d at 560.

241. *Id.*

242. *Id.* at 622, 667 S.E.2d at 560.

243. *Id.* at 629, 667 S.E.2d at 564.

244. *Id.* at 622, 667 S.E.2d at 561 (quoting Moscona v. Shenhar, 50 Va. App. 238, 249, 649 S.E.2d 191, 196 (2007)).

245. *See id.* at 622, 667 S.E.2d at 561 (quoting *Moscona*, 50 Va. App. at 249, 649 S.E.2d at 196).

of sound judicial discretion deems it necessary to protect the dignity and power of the court from abuse by a litigant."[246] The supreme court cautioned that denying a litigant access to the court is a severe sanction.[247] The Fugitive Disentitlement Doctrine should only be applied where the appellant is a fugitive, there is a nexus between the appeal and the appellant's status as a fugitive, and dismissal is necessary to effectuate the policy concerns underlying the doctrine.[248] The doctrine must be applied with restraint and only when it is "'a reasonable response to the problems and needs that provoke it.'"[249] Applying those principles to the facts of the *Sasson* case, the supreme court ruled that the Fugitive Disentitlement Doctrine was properly invoked by the court of appeals to dismiss the father's appeals.[250] The supreme court concurred with the court of appeals' observation that the father was "unwilling to submit to the jurisdiction of Virginia's courts unless he receives a judgment in his favor."[251]

In *Comcast of Chesterfield County, Inc. v. Board of Supervisors*, the Supreme Court of Virginia dismissed an appeal as improvidently granted because the order appealed from was neither final nor an appealable interlocutory order.[252]

Comcast challenged the county's tax assessment of its personal property.[253] It did not contest the county's valuation of the property, but rather objected to the county's classifying some of its assets as tangible personal property subject to taxation.[254] The trial court bifurcated the issue of classification from the issue of valuation and entered an order classifying the disputed property as tangible, and thus subject to taxation.[255] The trial court took under advisement the issue of whether it was still necessary for the

246. *Id.* at 623, 667 S.E.2d at 561.

247. *Id.*

248. *Id.* (citing Walsh v. Walsh, 221 F.3d 204, 215 (1st Cir. 2000); Magluta v. Samples, 162 F.3d 662, 554 (4th Cir. 1998); Atkinson v. Taylor, 277 F. Supp. 2d 382, 385 (D. Del. 2003)).

249. *Id.* (quoting Degen v. United States, 517 U.S. 820, 823–24 (1996)).

250. *Id.* at 623–28, 667 S.E.2d at 561–64.

251. *Id.* at 627, 667 S.E.2d at 564.

252. 277 Va. 293, 307, 672 S.E.2d 870, 877 (2009).

253. *Id.* at 296, 672 S.E.2d at 870.

254. *Id.* at 297, 672 S.E.2d at 871.

255. *Id.* at 298–99, 672 S.E.2d at 872.

court to determine the question of valuation.[256] In the meantime, Comcast appealed the order classifying the property as taxable.[257]

The supreme court dismissed the appeal as improvidently granted.[258] For the supreme court to have jurisdiction of Comcast's appeal, the order from which Comcast appealed must be either a final order or an interlocutory order from which an appeal is statutorily authorized.[259]

> We have described a final order as one "which disposes of the whole subject[,] gives all the relief that is contemplated, and leaves nothing to be done by the court . . . . On the other hand, every decree which leaves anything in the cause to be done by the court is interlocutory as between the parties remaining in the court."[260]

The order in *Comcast* clearly was not final.[261] At the time of the order, the circuit court was still considering whether there needed to be a determination of the valuation issues.[262]

Nor was the order in *Comcast* one in which an interlocutory appeal is permitted by statute.[263] Virginia Code section 8.01-670 permits a person to petition for an appeal to the supreme court if aggrieved by: "[A]ny judgment in a controversy concerning: [t]he right of . . . a county . . . to levy . . . taxes; or . . . [t]he construction of any statute, ordinance, or county proceeding imposing taxes; or . . . a final judgment in any other civil case."[264] The court rejected Comcast's argument that there is no need for a final order where the appeal concerns the right of a county to levy taxes or the construction of a county proceeding imposing taxes under Virginia Code sections 8.01-670(A)(1)(f) and (g).[265] When the General Assembly authorizes the appeal of interlocutory orders, it does so expressly and unambiguously.[266] In the absence of an express authorization in Virginia Code section 8.01-670(A)(1) allowing appeals of interlocutory orders in the types of controversies

256. *Id.* at 299, 672 S.E.2d at 872.
257. *Id.*
258. *Id.* at 307, 672 S.E.2d at 877.
259. *Id.* at 300, 672 S.E.2d at 873.
260. *Id.* at 301, 672 S.E.2d. at 873 (quoting Dearing v. Walter, 174 Va. 555, 561, 9 S.E.2d 336, 338 (1940)).
261. *Id.*, 672 S.E.2d at 873–74.
262. *Id.*
263. *Id.* at 306, 672 S.E.2d at 876.
264. VA. CODE ANN. § 8.01-670(A)(1)(f)–(g), (A)(3) (Repl. Vol. 2007 & Cum. Supp. 2009).
265. *Comcast*, 277 Va. at 302, 672 S.E.2d at 874.
266. *Id.* at 306, 672 S.E.2d at 876.

listed there, the supreme court refused to infer such authorization.[267] The court held that any appeal from one of the controversies listed in Virginia Code section 8.01-670(A)(1) must be from a final order.[268]

In *Seguin v. Northrop Grumman Systems Corp.*, the Supreme Court of Virginia ruled that an order compelling arbitration is not an appealable final order. [269] In that case, Seguin brought suit against her employer, alleging defamation in her work performance evaluation.[270] The employer, Northrop Grumman, filed a motion to compel arbitration, which the trial court granted.[271] Seguin appealed to the supreme court.[272]

Seguin's appeal was dismissed because the order compelling arbitration is not a final order.[273] Under Virginia Code section 8.01-581.016:

> An appeal may be taken from: (1) An order denying an application to compel arbitration . . . (2) An order granting an application to stay arbitration . . . (3) An order confirming or denying an award; (4) An order modifying or correcting an award; (5) An order vacating an award without directing a rehearing; or (6) A judgment or decree entered pursuant to the provisions of this article.[274]

The court noted that the statute "does not grant a right to appeal an order *granting* an application to compel arbitration."[275] The court in *Seguin* was forced to address contrary language in one of its earlier cases.[276] In *Amchem Products v. Asbestos Cases Plaintiffs*, the supreme court stated that "[Virginia] Code § 8.01-581.016 confers upon this [c]ourt jurisdiction to review a circuit court's order that denies *or compels* arbitration."[277] Because *Amchem* involved an appeal from a circuit court's order denying an application to compel arbitration, the supreme court reasoned that its statement in *Amchem*—that it had jurisdiction to review

267. *Id.*
268. *Id.*
269. 277 Va. 244, 249, 672 S.E.2d 877, 879 (2009).
270. *Id.* at 246, 672 S.E.2d at 877–78.
271. *Id.*, 672 S.E.2d at 878.
272. *Id.*
273. *Id.* at 248, 672 S.E.2d at 879.
274. VA. CODE ANN. § 8.01-581.016 (Repl. Vol. 2007 & Cum. Supp. 2009).
275. 277 Va. at 248, 672 S.E.2d at 879 (emphasis added).
276. *Id.*
277. 264 Va. 89, 96, 563 S.E.2d 739, 742–43 (2002) (emphasis added).

a circuit court's order that "denies or compels arbitration"—was dictum to the extent it included the words "or compels." [278] The supreme court concluded that *Amchem* did not circumvent the lack of an express right under Virginia Code section 8.01-581.016 to an appeal from an order compelling arbitration.[279]

The supreme court also held that the order in *Seguin* was not a final order within the meaning of Virginia Code section 8.01-670(A)(3).[280] The circuit court retained jurisdiction to modify, correct, or vacate the arbitration award.[281] Therefore, there was more for the circuit court to do other than ministerially superintend the execution of the order.[282]

L. *Appeals from District Courts to Circuit Courts*

The Supreme Court of Virginia decided two cases involving appeals of district court orders to the circuit court. In *Architectural Stone, LLC v. Wolcott Center, LLC*, the supreme court held that the district court's denial of a motion to set aside default judgment is not a final, appealable order under Virginia Code section 16.1-106, and the circuit court correctly dismissed such an appeal for lack of jurisdiction.[283] In *Architectural Stone*, the general district court granted a default judgment in favor of Wolcott and against Architectural Stone.[284] Several months later, Architectural Stone moved to set aside the default judgment, which was denied by the district court.[285] Architectural Stone filed a timely appeal to the circuit court, which ruled that the district court's order was not appealable.[286]

The supreme court agreed with the circuit court that the order denying the motion to set aside the default judgment was not appealable.[287] Only final orders may be appealed to the circuit court,

278. *Seguin*, 277 Va. at 248, 672 S.E.2d at 879.
279. *Id.*
280. *Id.* at 248–49, 672 S.E.2d at 879.
281. *Id.*
282. *See id.*
283. 284 Va. 519, 521–23, 649 S.E.2d 670, 671 (2007) (citing VA. CODE ANN. § 16.1-106 (Repl. Vol. 2003 & Cum. Supp. 2009)).
284. *Id.* at 521, 649 S.E.2d at 670.
285. *Id.*
286. *Id.*
287. *Id.* at 523, 649 S.E.2d at 671.

and final orders are those that "dispose[ ] of the merits" of a case.[288] An order denying a motion to set aside default judgment is like an order denying a motion for a new trial and does not dispose of the merits of the case.[289] The default judgment was a final order; the denial of the motion to set aside was not.[290]

In *Neighbors v. Commonwealth*, the Supreme Court of Virginia reversed the circuit court's determination that the general district court's denial of a writ of *coram nobis* is not appealable to the circuit court. [291] Because the dispute was non-monetary in nature, Virginia Code section 16.1-106, which gives circuit courts jurisdiction to hear appeals from a general district court's civil cases when the amount in controversy is greater than fifty dollars, did not apply.[292] Therefore, the circuit court had jurisdiction to hear the appeal under Virginia Code section 17.1-513.[293] The circuit correctly held, however, that a writ of *coram nobis* was not the proper vehicle for a criminal defendant to challenge his conviction for resisting arrest on the grounds that he was too medicated to enter a knowing and voluntary guilty plea.[294]

III. RULE CHANGES

A. *Admission of Foreign Attorneys Pro Hac Vice*

On July 1, 2007, the Supreme Court of Virginia rewrote Rule 1A:4 that governs out-of-state attorneys participating pro hac vice in cases pending before a Virginia tribunal.[295] An attorney who is a member in good standing of an out-of-state bar must now file a notarized application with the tribunal, accompanied by a non-refundable application fee of two hundred fifty dollars (payable to the Clerk of the Supreme Court of Virginia) for each case before

288. *See id.*

289. *See id.*

290. *Id.*

291. 274 Va. 503, 511, 650 S.E.2d 514, 518 (2007).

292. *Id.* at 511, 650 S.E.2d at 518 (citing City of Virginia Beach v. Siebert, 253 Va. 230, 251–54, 483 S.E.2d 214, 215–16 (1997)); *see* VA. CODE ANN. § 16.1-106 (Repl. Vol. 2003 & Cum. Supp. 2009).

293. *Neighbors*, 274 Va. at 511, 650 S.E.2d at 518; *see also* VA. CODE ANN. § 17.1-513 (Cum. Supp. 2009).

294. *Neighbors*, 274 Va. at 511–12, 650 S.E.2d at 518–19.

295. VA. SUP. CT. R. 1A:4 (Repl. Vol. 2009).

the tribunal in which the out-of-state lawyer desires to appear.[296] The out-of-state attorney must associate with local counsel who is an active member in good standing with the Virginia State Bar.[297] Local counsel must file a motion to associate the out-of-state attorney as counsel pro hac vice with the tribunal where the case is pending.[298] Whether to grant the motion is discretionary with the tribunal;[299] however, the tribunal "shall deny the motion if the out-of-state lawyer has been previously admitted *pro hac vice* before any tribunal or tribunals on Virginia in twelve (12) cases within the last twelve (12) months preceding the date of the current application."[300] The supreme court developed a form for use by out-of-state attorneys applying to be admitted pro hac vice to appear in a case before a Virginia tribunal.[301]

B. *Foreign Legal Consultants*

New Rule 1A:7 became effective on January 1, 2009.[302] It allows an attorney admitted to practice law in a foreign country to apply to the Virginia Board of Bar Examiners to be certified as a foreign legal consultant.[303] Once certified, the foreign legal consultant "may render legal services in the Commonwealth only with regard to matters involving the law of [the] foreign nation(s) in which the person is admitted to practice or international law."[304] Any foreign legal consultant certified pursuant to the Rule 1A:7 is subject to the Rules of Professional Conduct governing Virginia attorneys.[305]

C. *Admission to Virginia Bar Without Examination*

The Supreme Court of Virginia adopted regulations, effective December 1, 2008, to guide the Virginia Board of Bar Examiners in determining whether an attorney admitted to practice in

296. VA. SUP. CT. R. 1A:4(3)(a).
297. VA. SUP. CT. R. 1A:4(2).
298. VA. SUP. CT. R. 1A:4(3)(b).
299. VA. SUP. CT. R. 1A:4(5).
300. *Id.*
301. *See* VA. SUP. CT. R., Appx. of Forms for Part One A, Form 1 (Repl. Vol. 2009).
302. VA. SUP. CT. R. 1A:7.
303. *Id.*
304. VA. SUP. CT. R. 1A:7(d).
305. VA. SUP. CT. R. 1A:7(f).

another state or the District of Columbia should be admitted to the Virginia Bar without sitting for the bar examination.[306] The regulations provide guidance in such matters as determining whether the applicant has been engaged in the active practice of law for the requisite period, whether the applicant intends to practice full time in Virginia, whether the applicant is a person of honest demeanor and good moral character, and whether the person possesses the requisite fitness to perform the obligations and responsibilities of a practicing attorney.[307]

D. *Counterclaims*

Supreme Court of Virginia Rule 3:9 was amended effective July 1, 2008, to provide that a counterclaim may timely be filed up to twenty-one days after the court enters an order ruling on any demurrer, plea, motion to dismiss, or motion for a bill of particulars, or within such shorter time as the court may prescribe.[308]

E. *Jury Demand*

On July 1, 2008, Rule 3:21 was amended to provide that the court may, "for good cause shown," allow a jury trial where a party would otherwise have been deemed to have waived trial by jury for failing to serve and file a demand for a jury trial as provided in the rule.[309]

F. *Claims for Attorney's Fees*

On May 1, 2009, new Supreme Court of Virginia Rule 3:25 was added, governing a party's request for an award of attorney's fees.[310] The new rule does not apply to requests for attorney's fees as a sanction under Virginia Code section 8.01-271.1[311] or fees in domestic relations cases.[312] Under the rule, a party seeking an

306. *See* VA. SUP. CT. R. 1A:1, Regulations Governing Applications for Admission to the Virginia Bar Pursuant to the Rules of the Supreme Court of Virginia (Repl. Vol. 2009).
307. *Id.*
308. VA. SUP. CT. R. 3:9.
309. VA. SUP. CT. R. 3:21(d).
310. VA. SUP. CT. R. 3:25.
311. VA. SUP. CT. R. 3:25(A).
312. VA. SUP. CT. R. 3:25.

award of attorney's fees must make a demand for attorney's fees in the complaint, or in any counterclaim, cross-claim, third-party claim, or responsive pleading.[313] The demand must identify the basis for the party's request for attorney's fees.[314] Unless the court allows an amendment of the pleadings under Supreme Court of Virginia Rule 1:8, the failure of a party to file a demand constitutes a waiver of the claim for attorney's fees.[315] The court may establish a procedure for the adjudication of a claim for attorney's fees.[316]

G. *Discovery*

On January 1, 2009, the Supreme Court of Virginia amended Rules 4:1, 4:4, 4:8, 4:9, and 4:13 to provide for the discovery of electronically stored information. Rules 4:1(a) and 4:9 now provide that a party may request the production of electronically stored information.[317] Rule 4:4 was amended to state that the parties may enter into stipulations modifying the procedures set forth in the Rules for discovery of electronically stored information.[318] Under amended Rule 4:8(f), a party now has the option of responding to interrogatories by specifying the electronically stored information from which the answers may be ascertained if the burden of deriving the responses would be substantially the same for both parties.[319] That Rule adds that "[a] specification of electronically stored information may be made under this Rule if the information will be made available in a reasonably usable form or forms."[320] Rule 4:9(b)(iii) now provides that, if the requesting party does not specify the form for producing electronically stored information, or if the responding party objects to the form specified, electronically stored information may be produced in the form in which it is ordinarily maintained if it is reasonably usable in that form.[321] Rule 4:13 was amended to add to the matters that may be considered at a pretrial conference "provisions

313. VA. SUP. CT. R. 3:25(B).
314. *Id.*
315. VA. SUP. CT. R. 3:25(C).
316. VA. SUP. CT. R. 3:25(D).
317. VA. SUP. CT. R. 4:1(a), 4:9(a).
318. VA. SUP. CT. R. 4:4.
319. VA. SUP. CT. R. 4:8(f).
320. *Id.*
321. VA. SUP. CT. R. 4:9(b)(iii)(B)(2).

for disclosure or discovery of electronically stored information"[322] and "issues relating to the preservation of potentially discoverable information, including electronically stored information and information that may be located in sources that are believed not reasonably accessible because to [sic] undue burden or cost."[323]

Also effective January 1, 2009, Supreme Court of Virginia Rule 4:1 was amended to establish a procedure following the inadvertent disclosure of privileged trial preparation material.[324] Under new Rule 4:1(b)(6)(ii), if a party claims that a privileged document or electronically stored information has been produced, the party shall notify the receiving party of the claim and the basis for the assertion of privilege.[325] The receiving party, pending a resolution of the claim of privilege, must then sequester or destroy the material and take steps to retrieve the material if it has been disseminated to others.[326] Rule 4:13 was amended to add to the matters that may be considered at a pretrial conference any agreements the parties reach concerning inadvertently produced privileged trial preparation materials.[327]

On January 1, 2009, former Rule 4:9 was split into two rules: Rule 4:9 concerning production by *parties* of documents, electronically stored information and things, and entry on land for inspection,[328] and new Rule 4:9A, concerning production by *non-parties* of documents, electronically stored information and things, and entry on land for inspection.[329]

On July 1, 2008, Rule 4:5(a1)(iii) was added to specify the procedures for taking depositions outside of Virginia.[330]

IV. RECENT LEGISLATION

In 2008, the General Assembly enacted Virginia Code section 8.01-225.02.[331] That statute grants immunity to health care pro-

322. VA. SUP. CT. R. 4:13(9).
323. VA. SUP. CT. R. 4:13(8).
324. VA. SUP. CT. R. 4:1(b)(6)(ii).
325. *Id.*
326. *Id.*
327. VA. SUP. CT. R. 4:13(10).
328. VA. SUP CT. R. 4:9.
329. VA. SUP CT. R. 4:9A.
330. *See* VA. SUP. CT. R. 4:5(a1)(iii).
331. Act of Mar. 2, 2008, ch. 157, 2008 Va. Acts 224, 224 (codified at VA. CODE ANN. §

viders from liability for personal injury or wrongful death when the health care provider either delivers or withholds health care in response to a disaster that has been declared a state or local emergency and the heath care provider is not able to provide the standard of care because of a lack of resources attributable to the disaster.[332] The health care provider remains liable for gross negligence or willful misconduct.[333]

Virginia Code section 8.01-241 was amended in 2008 to provide that a deed of trust or mortgage is enforceable for ten years after its original maturity, rather than twenty years.[334] The ten-year period may be extended by the recordation of a form provided in Virginia Code section 8.01-241.1.[335] In 2009, the statute was further amended to provide for a transition period for deeds of trust and mortgages whose original maturity dates were between July 1, 1988, and July 1, 2000.[336]

The statute of limitations for negligent failure to diagnose a malignant tumor or cancer is, under the 2008 amendment to Virginia Code section 8.01-243, one year from the date that the diagnosis was communicated to the patient, if the failure to diagnose occurred on or after July 1, 2008.[337]

A lis pendens may be filed in an action to enforce a zoning violation under the 2008 amendments to Virginia Code section 8.01-268.[338]

Under the 2008 modifications to Virginia Code sections 8.01-271.1, 16.1-260 and 63.2-1901, certain non-lawyer employees of local departments of social services may sign and file pleadings related to support in the juvenile and domestic relations district courts.[339]

Virginia Code section 8.01-417 was amended in 2008 to allow for the disclosure of the limits of insurance coverage before the fil-

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8.01-225.02 (Cum. Supp. 2008)).

332. VA. CODE ANN. § 8.01-225.02 (Cum. Supp. 2009).

333. *See id.*

334. *Id.* § 8.01-241(A) (Cum. Supp. 2009).

335. *See id.* § 8.01-241(C) (Cum. Supp. 2009).

336. *See id.* § 8.01-241(B) (Cum. Supp. 2009).

337. *See id.* § 8.01-243(C)(3) (Cum. Supp. 2009).

338. *See id.* § 8.01-268(A) (Cum. Supp. 2009).

339. *Id.* § 8.01-271 (Cum. Supp. 2009), *id.* § 16.1-260 (Cum. Supp. 2009); *id.* § 63.2-1901 (Cum. Supp. 2009).

ing of a personal injury lawsuit arising from a motor vehicle accident.[340] An attorney or a pro se party may request that the insurer disclose the coverage limits.[341] The requesting party shall provide the insurer with the date of the accident, the name and last known address of the insured, any accident report, his or her medical records, and medical bills and documentation of lost wages.[342] If the lost wages and medical bills exceed $12,500, the insurer shall disclose the limits of coverage within thirty days.[343]

In the Medical Malpractice Act, the definition of "health care" was expanded in 2008 to include "professional services in nursing homes."[344] This amendment was apparently a legislative response to the case of *Alcoy v. Valley Nursing Homes, Inc.*, which held that nursing home services are not subject to the Medical Malpractice Act.[345]

In 2009, the General Assembly adopted the Uniform Interstate Depositions and Discovery Act.[346] The new act replaces the now-repealed Uniform Foreign Depositions Act.[347]

340. Act of Apr. 11, 1008, ch. 819, 2008 Va. Acts 1434, 1435 (codified at VA. CODE ANN. § 8.01-417(C) (Cum. Supp. 2009).

341. VA. CODE ANN. § 8.01-417(C) (Cum. Supp. 2009).

342. *Id.*

343. *Id.*

344. Act of Mar. 3, 2008, ch. 169, 2008 Va. Acts 244, 245 (codified as amended VA. CODE ANN. § 8.01-581.1 (Cum. Supp. 2009)).

345. 272 Va. 37, 43–44, 630 S.E.2d 301, 304 (2006).

346. Act of Mar. 30, 2009, ch. 701, 2009 Va. Acts ___ (codified at VA. CODE ANN. §§ 8.01-412.8 through 8.01-412.15 (Cum. Supp. 2009)).

347. VA. CODE ANN. §§ 8.01-411, 8.01-412, 8.01-412.1 (Repl. Vol. 2007) (repealed 2009).

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