

11-1-2016

Civil Practice and Procedure

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Recommended Citation

Christopher S. Dadak, *Civil Practice and Procedure*, 51 U. Rich. L. Rev. 7 (2016).
Available at: <https://scholarship.richmond.edu/lawreview/vol51/iss1/3>

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ARTICLES

CIVIL PRACTICE AND PROCEDURE

Christopher S. Dadak *

INTRODUCTION

Continuing in the rich vein of prior *Annual Surveys*, this article examines developments in Virginia civil procedure and practice in the past year.¹ The survey includes a discussion of the relevant decisions from the Supreme Court of Virginia, changes to applicable rules of practice or procedure, and new legislation, which will likely affect the practice of a civil practitioner in the Commonwealth of Virginia.

I. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Nonsuits and Contractual Statutes of Limitation*

This first discussed case shook the common understanding of the power of nonsuits. Most practitioners would have likely, upon questioning, guessed that a nonsuit tolled all statutes of limitations. However, the Supreme Court of Virginia held otherwise. As will be discussed in Part III.A, this decision and its significant impact was ultimately abrogated by statute.

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1. Due to the publishing schedule, the applicable “year” is roughly July 2015 through June 2016.

In March 2010, water pipes in the residence of Jennifer Ploutis burst and damaged the home and her belongings.² Ploutis had a homeowner insurance policy through Allstate.³ While Allstate made some payments, the parties ultimately disagreed as to the total cost of repairs to which Ploutis was entitled.⁴ The original complaint for breach of contract was filed on March 16, 2012.⁵ Ultimately, Ploutis nonsuited and the court entered the corresponding order on February 22, 2013.⁶ Ploutis then refiled her complaint on August 21, 2013.⁷

The Allstate policy in question was construed as a fire insurance policy under Title 38.2, Chapter 21 of the Virginia Code.⁸ As such it must include certain standard policy form provisions under the Virginia Code or a “simplified and readable policy of insurance” that is “in no respect less favorable to the insured.”⁹ The standard policy language states: “[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within two years next after inception of the loss.”¹⁰ Regardless of whether an insurance carrier chooses the specifically provided form provisions pursuant to Virginia Code section 38.2-2105(A) or a “simplified and readable policy” that is also allowed under Virginia Code section 38.2-2107, “a two-year limitations period is the minimum period allowed for fire insurance policies.”¹¹

The policy in question specifically provided:

No one may bring an action against us in any way related to the existence or amount of coverage, or the amount of loss for which the coverage is sought, under a coverage for which Section I Conditions applies, unless:

2. Allstate Prop. & Cas. Ins. Co. v. Ploutis, 290 Va. 266, 228, 776 S.E.2d 793, 794 (2015).

3. *Id.* at 228–29, 776 S.E.2d at 794.

4. *Id.* at 229, 776 S.E.2d at 794.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 230, 776 S.E.2d at 795.

9. *Id.* (citations omitted).

10. *Id.*

11. *Id.*

- a) there has been full compliance with all policy terms; and
- b) the action is commenced within two years after the inception¹² of loss or damage.

Allstate demurred to Ploutis's refiled complaint on the basis that more than two years had passed since the date of the loss.¹³ The circuit court overruled Allstate's demurrer and Allstate appealed.¹⁴

Relying on *Massie v. Blue Cross & Blue Shield of Virginia*, the Supreme Court of Virginia reversed the circuit court's decision.¹⁵ The crux of the issue, to the court, was whether the applicable code sections, particularly Virginia Code section 38.2-2015, constituted a "statute of limitations."¹⁶ The circuit court considered section 38.2-2015(A) to be "the Virginia statute of limitations for fire insurance policies," which would then include the tolling provisions pursuant to Virginia Code section 8.01-380.¹⁷ "The circuit court then reasoned that even if the insurer used the simplified and readable language permitted by Code § 38.2-2107, the tolling provision inherent in Code § 38.2-2105 would still apply since the policy language, without the tolling, would be less favorable to the insured."¹⁸

The Supreme Court of Virginia pointed out that "Code § 38.2-2105(A), by its own language, is not a statute of limitations but prescribes standard policy form provisions for fire insurance policies."¹⁹ The court further clarified that section 38.2-2015(A) does not serve as a bar to Ploutis's complaint or the basis of Allstate's demurrer, but rather the basis of the demurrer was "Ploutis' failure to comply with the terms of the insurance contract."²⁰ The use of "substantively" similar policy language as required by statute, did "not convert the contractual limitations period into a statute of limitations."²¹ "In short, neither Code § 38.2-2105 nor the contractual period of limitations provided in Allstate's policy is a

12. *Id.* at 231, 776 S.E.2d at 795.

13. *Id.*

14. *Id.*

15. *Id.* at 231-32, 776 S.E.2d at 796 (citing *Massie v. Blue Cross & Blue Shield of Va.*, 256 Va. 161, 165, 500 S.E.2d 509, 511 (1998)).

16. *Id.* at 232, 776 S.E.2d at 796.

17. *Id.*

18. *Id.* at 232 n.7, 776 S.E.2d at 796 n.7.

19. *Id.* at 232-33, 776 S.E.2d at 796.

20. *Id.* at 233, 776 S.E.2d at 796.

21. *Id.*

'statute of limitations' within the meaning of Code § 8.01-229(E)(3)" and "by incorporating a period of limitations into the terms and conditions of their contract, 'the parties chose to exclude the operation of the statute of limitations and . . . its exceptions.'"²² The insurance policy required that the action, with no exceptions, must be commenced within two years of the loss, and since the recommenced action was filed after two years since the loss, Ploutis' action was time-barred.²³

The implications of this decision were significant. Consider all the suits that are related to a contract, e.g. insurance or labor and employment suits. Once all these contracts contained a contractual statute of limitations, then the plaintiff would effectively be unable to nonsuit the action once the contractual statute of limitations had passed. As discussed in Part III.A, the General Assembly likely realized the significant impact and potential detrimental effect on a plaintiff's ability to bring and maintain an action and amended the nonsuit statute accordingly.²⁴

B. *Nonsuit and Misnomer*

In another case, decided in the same term as *Ploutis*, the Supreme Court of Virginia, in contrast, expanded the scope and power of nonsuits. In full disclosure, the author and his prior firm were involved in both the trial and appellate litigation of this matter.

On April 12, 2009, Linda Richmond ("Richmond") was injured in a motor-vehicle accident.²⁵ The other driver, Katherine Craft (at that time her maiden name and, after marriage, Katherine Volk ("Volk")), was operating a motor vehicle belonging to Jeanie Cornett ("Cornett").²⁶ As a permissive user, Volk was covered by Cornett's insurance policy.²⁷ On February 28, 2011, Richmond filed a complaint against "Katherine Cornett."²⁸ Richmond's counsel did not provide a copy of the Complaint to the carrier until April 13, 2011, which was more than two years after the acci-

22. *Id.* at 234, 776 S.E.2d at 797.

23. *Id.*

24. *See infra* notes 180–85 and accompanying text.

25. *Richmond v. Volk*, 291 Va. 60, 62, 781 S.E.2d 191, 192 (2016).

26. *Id.* at 62–63 n.1, 781 S.E.2d at 192 n.1.

27. *Id.* at 63, 781 S.E.2d at 192.

28. *Id.*

dent.²⁹ Richmond, via counsel, unsuccessfully attempted to settle the matter with the carrier and, in January 2012, requested service on “Katherine Cornett.”³⁰ However, Richmond’s counsel provided Cornett’s address as the address for service.³¹ On February 12, 2012, Volk filed a motion to quash service as it was invalid.³² Subsequent to that motion, Richmond nonsuited.³³ Roughly a month later, Richmond refiled her complaint naming “Katherine E. Volk, f/k/a Katherine Craft, a/k/a Katherine E. Cornett.”³⁴ Volk then filed a special plea in bar asserting that the statute of limitations barred Richmond’s claim.³⁵ The circuit court sustained the special plea, holding that Katherine Volk “is not the same person or entity as Katherine E. Cornett” and that Richmond’s complaint would not relate back under Virginia Code section 8.01-6.³⁶ Richmond appealed to the Supreme Court of Virginia.

The Supreme Court of Virginia first analyzed whether the case involved a misnomer or a misjoinder.³⁷ The parties, on appeal, had both argued under the analysis of a misnomer.³⁸ “The determination of whether an incorrectly named party is a misnomer or misjoinder is a question of law” and the court is “not bound by the parties’ agreement on this issue.”³⁹ “The key distinction between a misnomer and misjoinder is whether the incorrectly named party in the pleading is, in fact, a correct party who has been sufficiently identified in the pleadings.”⁴⁰ The complaint must be taken as a whole to determine how and if the plaintiff identifies a party.⁴¹ In this particular case, “the facts laid out in the 2011 complaint establish that the intended defendant was the driver of a specific vehicle that was in a specific location at a specific time and that

29. *Id.* at 62–63, 781 S.E.2d at 192. This fact is important in that Virginia Code section 8.01-6 requires that for an amendment to relate back, the party or its agent must have notice of the “institution of the action” within the statute of limitations. VA. CODE ANN. § 8.01-6 (Repl. Vol. 2015).

30. *Richmond*, 291 Va. at 63, 781 S.E.2d at 192.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 64, 781 S.E.2d at 193.

37. *Id.* at 64–65, 781 S.E.2d at 192.

38. *Id.* at 64, 781 S.E.2d at 193.

39. *Id.* at 64–65, 781 S.E.2d at 193.

40. *Id.* at 65, 781 S.E.2d at 193.

41. *Id.*

the driver of that vehicle committed a specific act.”⁴² According to the court, “Volk [was] the only person that fit[] this description, [and] it is readily apparent that she was the person against whom the action was intended to be brought.”⁴³ The court agreed with the parties that Richmond’s use of “Katherine Cornett” was a misnomer.⁴⁴

Volk argued that Virginia Code section 8.01-6 was the sole mechanism to have the (in effect) amended pleading relate back to the filing date of April 12, 2011.⁴⁵ Accordingly, Richmond’s “failure to correct the misnomer under Code § 8.01-6 prevent[ed] Code § 8.01-229(E) from tolling the statute of limitations.”⁴⁶ The court rejected the argument and analogized the reasoning to *Clark v. Butler Aviation-Washington National, Inc.*⁴⁷ In *Clark*, the plaintiff failed to serve the defendant within a year of filing suit as required under Rule 3:5(e).⁴⁸ The plaintiff nonsuited and re-filed against the same defendant.⁴⁹ The defendant successfully pleaded a special plea of statute of limitations and Rule 3:5(e).⁵⁰ On appeal, the Supreme Court of Virginia reversed.⁵¹ The court held that the tolling statute, service rule, and nonsuit statute were given the most effect—true to their intent—if the nonsuit statute essentially restarted the clock on the service rule.⁵² Analogously, the failure to timely serve someone prevents a court from entering an enforceable judgment against the defendant, just as “the failure to correct a misnomer under Code § 8.01-6 may” prevent the court from entering a proper judgment.⁵³ But that “failure . . . does not prevent the operation of Code § 8.01-229(E)(3) upon the taking of a nonsuit.”⁵⁴ Section 8.01-229(E) tolls the statute of limitations when the identity of the parties remains the

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 65–66, 781 S.E.2d at 194.

46. *Id.* at 66, 781 S.E.2d at 194.

47. *Id.* (citing *Clark v. Butler Aviation-Washington Nat’l, Inc.*, 238 Va. 506, 385 S.E.2d 847 (1989)).

48. *Clark*, 238 Va. at 508, 385 S.E.2d at 847 (at that time Rule 3:3(e)).

49. *Id.*

50. *Id.* (at that time Rule 3:3(e)).

51. *Id.* at 512, 385 S.E.2d at 850.

52. *Id.* at 511–12, 385 S.E.2d at 849–50.

53. *Richmond v. Volk*, 291 Va. 60, 66, 781 S.E.2d 191, 194 (2016).

54. *Id.* at 66–67, 781 S.E.2d at 194.

same.⁵⁵ “A misnomer . . . only speaks to the name of a party, not the identity of a party.”⁵⁶ However, when “the name of a party is changed in a subsequent action for the purpose of correcting a misnomer that existed in the initial action, there has been no change in the identity of the parties.”⁵⁷ Therefore, the court concluded that Virginia Code section 8.01-229(E) was satisfied, the statute of limitations had been tolled, and Richmond’s action should be allowed to proceed.⁵⁸

Justice Kelsey, joined by Justice Goodwyn and Justice McClanahan, authored a strong dissent to the majority’s opinion.⁵⁹ The dissent was short and to the point. The dissent did not find the reasoning in *Clark* relevant or analogous to the instant case, and thus not persuasive.⁶⁰ The dissent acknowledged that Richmond most likely intended to sue Volk, but it was simply not relevant to the analysis.⁶¹ Richmond had sued “Katherine Cornett” and, simply put, Cornett was not Volk.⁶² The nonsuit statute required that the identity of the parties remain the same. The dissent then pointed out that the language in Virginia Code section 8.01-6—“[an] amendment changing the party against whom a claim is asserted, whether to correct a misnomer or otherwise”—expressly contemplates that the correction of a misnomer changes the identity of a party.⁶³

This decision, as the dissent repeatedly points out, expands the power of a nonsuit. The scope of this expansion is currently unclear. Furthermore, this opinion greatly restricts the relevance of Virginia Code section 8.01-6. Instead of complying with the enumerated requirements of section 8.01-6, a plaintiff may now simply move for a nonsuit and refile against the correctly named defendant, as long as the identity of the defendant(s) was “sufficiently” described. In the instant case, the description and identity of the defendant was simple in terms of the applicable facts. It was obvious whom Richmond intended to sue. However,

55. *Id.* at 67, 781 S.E.2d at 194.

56. *Id.*

57. *Id.*

58. *Id.* at 67, 781 S.E.2d at 195.

59. *Id.* at 68, 781 S.E.2d at 195.

60. *Id.* at 71 n.8, 781 S.E.2d at 197 n.8.

61. *Id.* at 69, 781 S.E.2d at 195.

62. *Id.* at 68–69, 781 S.E.2d at 195.

63. *Id.* at 70, 781 S.E.2d at 196 (emphasis omitted).

one can imagine (and many practitioners will face) cases where the description could refer to multiple potential defendants and the plaintiff's intended defendant could be much harder to assess.

C. *Sanctions*

The Supreme Court of Virginia issued several opinions on sanctions. Sanctions, similar to malpractice, are the worst-case scenario for every practitioner and the source of many sleepless nights. However, practitioners can seek comfort in the fact that out of the three cases discussed below, the Supreme Court of Virginia reversed and dismissed the award of sanctions in two of them.

1. Refusing Additional Time to Answer

In this matter, the plaintiff, Environmental Specialist Inc. ("ESI") filed a complaint against multiple defendants, including Wells Fargo Bank Northwest, N.A., Trustee ("Wells Fargo").⁶⁴ ESI was seeking to enforce a mechanic's lien in the amount of \$24,449.30.⁶⁵ Wells Fargo was served through the Secretary of the Commonwealth and the accompanying certificate was filed with the court on October 30, 2013.⁶⁶ Counsel for Wells Fargo first received the complaint on November 21, 2013, the deadline for the answer.⁶⁷ Wells Fargo's counsel immediately contacted counsel for ESI and requested a short extension to file its responsive pleading.⁶⁸ Counsel for ESI refused the request.⁶⁹ Wells Fargo filed a motion for leave to file its answer on or before November 26, 2013, and in its relief also sought "fees and costs incurred with regard to the motion."⁷⁰ Some of the other defendants admitted to the lien amount and an order to that effect was entered on January 2, 2014.⁷¹ "Despite the entry of the [January 2, 2014] order, on January 6, 2014, ESI filed a motion for default judgment against

64. *Env't Specialist, Inc. v. Wells Fargo Bank Northwest, N.A.*, 291 Va. 111, 114, 782 S.E.2d 147, 148 (2016).

65. *Id.*

66. *Id.*

67. *Id.* at 114–15, 782 S.E.2d at 148.

68. *Id.* at 114, 782 S.E.2d at 148.

69. *Id.*

70. *Id.*

71. *Id.*

all the defendants, because none of the defendants had filed a responsive pleading within the 21-day period afforded by Rule 3:8.”⁷²

On February 3, 2014, the circuit court heard Wells Fargo’s motion for leave to file an answer out of time and ESI’s motion for default judgment.⁷³ The circuit court granted Wells Fargo’s motion and “ordered ESI’s counsel to reimburse Wells Fargo’s counsel \$1200 for ‘fees and costs’ incurred regarding the motion” within thirty days of the order.⁷⁴ Shortly thereafter, Wells Fargo (at this point the sole defendant) and ESI advised the circuit court that the matter had been resolved.⁷⁵ The circuit court entered a final order on February 18, 2014 that the January 2, 2014 order and judgment had been satisfied and the award of \$1200 in sanctions against ESI was “for its failure to voluntarily extend the time in which Wells Fargo might file its answer.”⁷⁶ The parties did not have a court reporter present at the hearing, and, thus, no transcript of the hearing was available for the Supreme Court of Virginia to review.⁷⁷ ESI submitted a written statement pursuant to Rule 5:11(e), which was not signed by the presiding trial judge, and to which Wells Fargo filed an objection.⁷⁸

In its analysis, the Supreme Court of Virginia went through a court’s inherent powers to discipline attorneys appearing before it. “A court’s inherent power to discipline an attorney practicing before it includes the power not only ‘to remove an attorney of record in a case,’ . . . but also ‘in a proper case to suspend or annul the license of an attorney practicing in the particular court.’”⁷⁹ However, the court emphasized that, as it had previously held, a court can financially discipline an attorney with fees or costs only pursuant to specific authority of a statute or rule.⁸⁰ “Absent the authority granted by a statute or rule, ‘a trial court’s inherent power to supervise the conduct of attorneys . . . does not include

72. *Id.* at 114–15, 782 S.E.2d at 148.

73. *Id.* at 115, 782 S.E.2d at 148.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 116, 782 S.E.2d at 149 (citations omitted).

80. *Id.* (citations omitted).

the power to impose as a sanction an award of attorneys' fees and costs to the opposing party."⁸¹

The circuit court had not cited any statute or rule pursuant to which it was awarding Wells Fargo its attorneys' fees and costs.⁸² The Supreme Court of Virginia could not find a statute or rule which supported such an award.⁸³ Wells Fargo argued that ESI's counsel was "unprofessional" in their refusal to extend the deadline and that "the sanctions award was clearly intended to educate Plaintiff's counsel as to the level of professionalism . . . expected of counsel, as well as to reimburse [Wells Fargo] for the unnecessary time and expense incurred" in having to argue its motion.⁸⁴ The Supreme Court of Virginia meticulously described the efforts of the profession of law, which is self-regulating, to promote and establish professionalism.⁸⁵ While the court acknowledged the importance of professionalism, "[i]t is important to recognize, however, that the principles of professionalism are aspirational, and, as we stated when this Court approved their adoption, they 'shall not serve as a basis for disciplinary action or for civil liability.'"⁸⁶

The court also emphasized that the principles of professionalism "recognize that conflicts may arise between an attorney's obligations to a client's best interests and the professional courtesy of agreeing to an opposing counsel's request for an extension of time."⁸⁷ In this case, the court noted that ESI had directed its counsel not to agree to the extension.⁸⁸ "There is a difference between behavior that appropriately honors an attorney's obligation to his client's best interest, behavior that falls short of aspirational standards, and behavior that is subject to discipline and/or sanctions."⁸⁹

The Supreme Court of Virginia did not consider, in these circumstances, ESI counsel's behavior to be unprofessional or uneth-

81. *Id.* (citations omitted).

82. *Id.* Furthermore, Wells Fargo in its motion did not cite any authority for its requested relief of fees and costs incurred. *Id.*

83. *Id.* at 116-17, 782 S.E.2d at 149.

84. *Id.* at 118, 782 S.E.2d at 150.

85. *Id.* at 118-20, 782 S.E.2d at 150-51.

86. *Id.* at 121, 782 S.E.2d at 151.

87. *Id.*

88. *Id.* at 121, 782 S.E.2d at 152.

89. *Id.*

ical, which would have supported discipline.⁹⁰ Furthermore, even if the conduct was sanctionable in substance, the trial court did not have the authority to impose monetary sanctions.⁹¹

2. Improper Purpose

The Supreme Court of Virginia affirmed the award of attorneys' fees in *Kambis v. Considine*. Mitchell Kambis ("Kambis"), Elegant Homes of Virginia ("Elegant Homes"), and John Rolfe Realty ("John Rolfe") appealed the trial court's award of sanctions to April Considine ("Considine"), Patricia Wolfe, and Villa Deste, LLC ("Villa Deste").⁹² At all relevant times, Kambis owned John Rolfe and Elegant Homes. For twelve years, 1999 through 2011, Kambis and Considine were in a romantic relationship.⁹³ In 2000, they formed, and were the sole members of, Villa Deste, a real estate development business.⁹⁴ Considine's mother, Patricia Wolfe, thereafter loaned money to Villa Deste for both the purchase of real estate and also the construction of a home where Kambis and Considine lived.⁹⁵ "By 2006, Villa Deste had acquired significant real estate holdings"⁹⁶

In December 2005, Kambis and Considine executed an "Assignment of Membership Interest" by which Kambis, "for value received," assigned all of his Interest in Villa Deste (and its assets) to Considine. Considine was now the sole owner and member of Villa Deste.⁹⁷ At some point after this assignment, their romantic relationship ended.⁹⁸ In 2009, Kambis, Elegant Homes, and John Rolfe ("Kambis Parties") filed suit against Considine, her mother Patricia Wolfe, and Villa Deste ("Considine Parties").⁹⁹ The Kambis parties also recorded a memorandum of lis pendens on the real property owned by Villa Deste, including the home where Kambis and Considine had lived together.¹⁰⁰ After the de-

90. *Id.*

91. *Id.*

92. *Kambis v. Considine*, 290 Va. 460, 462, 778 S.E.2d 117, 120 (2015).

93. *Id.* at 462, 778 S.E.2d at 118.

94. *Id.*

95. *Id.* at 463, 778 S.E.2d at 118.

96. *Id.*

97. *Id.* at 463, 778 S.E.2d at 118–19.

98. *Id.* at 463, 778 S.E.2d at 119.

99. *Id.*

100. *Id.*

defendants filed responsive pleadings demurring to the allegations, the Kambis parties sought and received leave to file an amended complaint.¹⁰¹ The Kambis parties “alleged nineteen claims against the Considine parties, including fraud, defamation, unjust enrichment, replevin, battery, enforcement of a mechanic’s lien, intentional infliction of emotional distress, and a number of derivative claims.”¹⁰² The Considine parties demurred, filed a special plea, and also moved for sanctions.¹⁰³ Following a hearing on the matter, the trial court “dismissed fourteen of the nineteen claims with prejudice.”¹⁰⁴ The circuit court also released the *lis pendens*.¹⁰⁵

In March 2013, the Kambis parties filed a third amended complaint “raising the claims that had not been dismissed previously, including claims for fraud, replevin, battery, intentional infliction of emotional distress, and unjust enrichment.”¹⁰⁶ Close to trial, the Kambis parties’ counsel withdrew.¹⁰⁷ Other issues and complications arose as to the trial and Kambis (individually) proceeding *pro se*, including a dispute whether Kambis’s fraud claim was dismissed with prejudice or without.¹⁰⁸ In January 2014, the Kambis parties recorded a new memorandum of *lis pendens* on the same properties as before and filed a motion to vacate the 2012 order releasing the *lis pendens*.¹⁰⁹

Although the circuit court vacated the 2012 order (and reinstated Kambis’ fraud claim), it heard argument on the Considine parties’ motion for sanctions.¹¹⁰ The Considine parties were seeking \$137,819.61 in attorney’s fees from Kambis and his original counsel and \$83,505.62 from Kambis individually.¹¹¹ Several weeks after the argument, the Kambis parties nonsuited all of their remaining claims.¹¹² Ten days later, the circuit court granted

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 464, 778 S.E.2d at 119. “After further demurrers, special pleas in bar, and motions for summary judgment were filed, the court subsequently dismissed the replevin claim.” *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 464–65, 778 S.E.2d at 119–20.

110. *Id.* at 465, 778 S.E.2d at 120.

111. *Id.*

112. *Id.*

the motion for sanctions and sanctioned the Kambis parties and their original counsel in the amount of \$64,319.38 and Kambis individually in the amount of \$84,541.61.¹¹³ Kambis appealed the sanctions.

Kambis's appeal focused on two arguments to reverse the award. First, Kambis argued that the "record demonstrate[d] that his fraud claim was well grounded in law and fact, as it had survived demurrers, special pleas in bar, and a motion for summary judgment."¹¹⁴ He also argued that sanctions were not appropriate or authorized under Virginia Code section 8.01-271.1 because "there is a distinction to be drawn between bringing an action or making a filing for the purpose of intimidating the opposing party and bringing an action or making a filing for an improper purpose."¹¹⁵

The Supreme Court of Virginia agreed with Kambis on the first argument, but rejected his argument regarding an improper purpose under section 8.01-271.1.¹¹⁶ "The trial court found that Kambis was pursuing his claims in a manner that demonstrated he was less interested in vindicating his legal rights and more interested in intimidating and injuring Considine."¹¹⁷ The court also listed several facts in the record that reflected Kambis's intent and specific knowledge of the expense of the litigation.¹¹⁸ The Supreme Court of Virginia strongly stated that "a claim brought for such vengeful and vindictive reasons is brought for an improper purpose under Code § 8.01-271.1."¹¹⁹ The court did clarify that all suits are "in some way, intimidating."¹²⁰ Intimidation as a "collateral effect" is not sanctionable, but when a pleading or suit is filed "primarily to intimidate the opposing party," then the action crosses the line into sanctionable conduct.¹²¹

113. *Id.*

114. *Id.* at 466, 778 S.E.2d at 120.

115. *Id.* A lawyer is in trouble when forced to argue that intimidating a party is not an improper purpose.

116. *Id.* at 467, 778 S.E.2d at 121.

117. *Id.* at 468, 778 S.E.2d at 121.

118. *See id.*

119. *Id.*

120. *Id.* at 469 n.3, 778 S.E.2d at 122 n.3.

121. *Id.*

3. Submitting Improper Jury Instructions

In *Ragland v. Soggin*, the Supreme Court of Virginia vacated the award of \$200 sanctions by the circuit court against defense counsel.¹²² The sanctions were based on improper jury instructions that were initially provided to the jury.

The plaintiff was the administrator of the estate of a decedent who had taken horse-riding lessons from an instructor.¹²³ The claim alleged that the instructor was “negligent in providing training and instruction . . . and in failing to select an appropriate horse for [the decedent] to ride.”¹²⁴ The defense’s theory of the cases centered on an interpretation of Virginia Code section 3.2-6203 that required that the alleged negligence be the “sole cause” of the alleged injury and in this case, death.¹²⁵ Defense counsel drafted jury instructions with that theory in mind and amended the typical issues and findings instructions to state “sole cause” instead of “a proximate cause.”¹²⁶

The circuit court rejected that interpretation and held that the statute did not require that the negligence be the sole cause, but merely a proximate cause.¹²⁷ “Accordingly, defense counsel revised the issues instruction to reflect the trial court’s ruling, but apparently neglected to revise the findings instruction.”¹²⁸ Plaintiff’s counsel and the circuit court “had an opportunity to review the findings instructions before the instructions were read to the jury,” but no one noticed that “sole cause” remained in the instruction.¹²⁹ The circuit court read the instructions to the jury and again no one noticed the incorrect language.¹³⁰ Before the written instructions were provided to the jury, plaintiff’s counsel then noticed the mistake and the parties “used correction fluid to cover up the word ‘sole’ and the phrase ‘a proximate cause’ was hand-written on the typed version of the findings instruction that was delivered to the jury.”¹³¹ The jury returned with a verdict in favor

122. *Ragland v. Soggin*, 291 Va. 282, 292, 784 S.E.2d 698, 703 (2016).

123. *Id.* at 284, 784 S.E.2d at 699.

124. *Id.*

125. *Id.*

126. *Id.*

127. *See id.*

128. *Id.*

129. *Id.* at 284–85, 784 S.E.2d at 699.

130. *Id.* at 285, 784 S.E.2d at 699.

131. *Id.*

of the defendant and the plaintiff filed a motion for judgment notwithstanding the verdict “assert[ing] that defense counsels’ misconduct in submitting the issues and findings instructions tainted the jury.”¹³² In their response, defense counsel explained how the instructions were originally drafted with their theory in mind and that the “failure to change the language in the findings instruction was inadvertent.”¹³³ The circuit court awarded sanctions and held that while “it was not a deliberate act to mislead the court . . . however, [it] does rise to the level of a sanctionable act.”¹³⁴ The trial court was “gravely concerned” as it was a “total misrepresentation of the law under any circumstance.”¹³⁵

The Supreme Court of Virginia referred to the previously discussed *Environmental Specialist, Inc. v. Wells Fargo Bank Northwest, N.A.*, decision and analogized, stating that “the trial court in this case failed to identify the authority under which it was sanctioning defense counsel.”¹³⁶ Similarly, as in *ESI*, the Supreme Court of Virginia could not find a Rule of Court or statute that would support awarding sanctions.¹³⁷ Criminal contempt under Virginia Code section 18.2-456 would not apply because “Virginia courts have required the element of intent in order to sustain a criminal contempt conviction.”¹³⁸ The court also analyzed the application of Virginia Code section 8.01-271.1 and found that it did apply as “[s]ubmitting a jury instruction to a trial court and asking that a particular instruction be given to a jury is the equivalent of making an oral motion to the court.”¹³⁹ However, the circuit court had found defense counsel’s actions to be “inadvertent” and since “there is nothing in Code § 8.01-271.1 that gives a trial judge authority to impose monetary sanctions on an attorney for . . . an inadvertent mistake,” the Supreme Court of Virginia reversed the circuit court’s award of sanctions.¹⁴⁰

132. *Id.* at 286, 784 S.E.2d at 700.

133. *Id.*

134. *Id.* at 287, 784 S.E.2d at 700.

135. *Id.* at 288, 784 S.E.2d at 700.

136. *Id.* at 289, 784 S.E.2d at 701 (citations omitted).

137. *Id.*

138. *Id.* at 290, 784 S.E.2d at 702.

139. *Id.* at 292, 784 S.E.2d at 703.

140. *Id.*

D. *Reinstating Case Under Virginia Code Section 8.01-335*

This particular Supreme Court of Virginia decision will be near and dear to the heart of every plaintiff's attorney who has had a case lie buried, and perhaps forgotten, in a dusty corner or cabinet. In *JSR Mechanical, Inc. v. Aireco Supply, Inc.*, the Supreme Court of Virginia analyzed what, if any, discretion a circuit court possesses in deciding a motion to reinstate a case that has been dismissed under Virginia Code section 8.01-335 for being inactive for more than three years.¹⁴¹

In July 2010, JSR Mechanical, Inc. ("JSR") filed suit against Aireco Supply, Inc. ("Aireco") for breach of contract and negligence.¹⁴² Aireco timely filed an answer in August 2010.¹⁴³ No further pleadings were filed by any party in 2010, 2011, 2012, or 2013.¹⁴⁴ In January 2014, "the circuit court entered a final order stating that the case had been pending for over three years with no proceedings and was therefore discontinued and stricken from the docket."¹⁴⁵ On January 23, 2015, eight days before the deadline, JSR filed its motion to reinstate the proceeding and explained its lack of activity.¹⁴⁶ The motion stated that Aireco had allowed someone to make unauthorized purchases using JSR's account.¹⁴⁷ That person was convicted of criminal charges in Maryland and ordered to pay \$35,000 in restitution to JSR.¹⁴⁸ Over time, it became apparent to JSR that the likelihood of actually recovering through restitution was minimal, if not impossible.¹⁴⁹ Thus, JSR filed to reinstate the case so that it could recover that amount from Aireco.

On January 30, 2015, the parties appeared and argued the motion to reinstate.¹⁵⁰ That same day, the circuit court ruled and entered an order denying the motion to reinstate as "just cause and sufficient grounds do not exist for granting [the] motion."¹⁵¹ JSR appealed the ruling.

141. 291 Va. 377, 786 S.E.2d 144 (2016).

142. *Id.* at 380, 786 S.E.2d at 145.

143. *Id.*

144. *Id.*

145. *Id.* at 380–81, 786 S.E.2d at 145.

146. *Id.* at 381, 786 S.E.2d at 145.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

The Supreme Court of Virginia's opinion included an interesting analysis of the sufficiency of a record for appellate review. In addition to the merits, Aireco opposed JSR's appeal on the grounds that JSR did not file a transcript or written statement as required under Rule 5:11.¹⁵² The court noted that Rule 5:11 is not jurisdictional and since the appeal was purely on a matter of law, as long as the manuscript record was sufficient, the lack of transcript or written statement was not necessarily fatal to JSR's appeal.¹⁵³ The court found that the Final Order reflected the only facts it needed to consider JSR's appeal: "that JSR met the timeliness and notice requirements explicitly prescribed in Code § 8.01-335(B)."¹⁵⁴

As to the meat of the appeal, whether a circuit court has discretion to deny a motion to reinstate that which has otherwise met the timeliness and notice requirements of section 8.01-335(B), the Supreme Court of Virginia focused more on what language the statute did not include and its legislative history.¹⁵⁵ The disputed portion of the statute reads: "[a]ny 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."¹⁵⁶

JSR and Aireco obviously had competing arguments as to the meaning and significance of "may" in that section. Aireco argued that "may," rather than "shall," signified that the circuit court had discretion in deciding the motion.¹⁵⁷ JSR argued that "may" simply reflected the reality that not all plaintiffs would file for reinstatement.¹⁵⁸ Given these competing interpretations and that the meaning of that portion was not plain in the context of the entire subsection, the court found the statute to be ambiguous.¹⁵⁹ Thus, the court had to "apply the interpretation that will carry

152. *Id.*

153. *Id.* at 381, 786 S.E.2d at 146.

154. *Id.* at 382, 786 S.E.2d at 146.

155. *Id.* at 380, 786 S.E.2d at 145.

156. VA. CODE ANN. § 8.01-335(B) (Repl. Vol. 2015).

157. *JSR Mechanical, Inc.*, 291 Va. at 382, 786 S.E.2d at 146.

158. *Id.* at 384, 786 S.E.2d at 147.

159. *Id.* The court did not include much analysis in its finding that the statute was ambiguous. *Id.* However, it is an important conclusion—and a key step in judicial statutory construction—and perhaps a signal that the court is expanding its willingness to consider statutes ambiguous and delve into the intent behind them and their legislative history.

out the legislative intent behind the statute.”¹⁶⁰ The court found two issues determinative in its analysis of the legislative intent. First, the court counted that “good cause” appeared forty-six times in Title 8.01, but the statute in dispute did not include the phrase even once.¹⁶¹ Second, and most importantly, the disputed portion used to include “for cause” but this language was deleted in 1999.¹⁶² The court found that the legislative history supported the interpretation that once a plaintiff complies with the timeliness and notice requirement, a circuit court has no discretion regarding the motion to reinstate and must grant it.¹⁶³

The deletion of “for cause” in 1999 certainly is instructive. However, as Aireco, and other critics, will point out, it is hard to reconcile the use of “may” (and how practitioners have become accustomed to interpreting its meaning) with the supreme court’s holding. After this decision, the circuit court must reinstate the case upon a timely motion and timely notice to the parties involved. Traditionally, practitioners, and judges as well, would have expected to see the use of “shall” if the result or action was mandatory. Furthermore, statutory construction may now be more difficult for circuit court judges and attorneys. Now if you see only “may” in a statute, you may need to check the legislative history to make sure that a “for cause” or other requirement was not previously included. It remains to be seen if other statutes that use only the phrase “may” will be interpreted differently in future cases or if this analysis will remain specific to the particular facts of this case, and the general preference that matters be litigated on their merits rather than dismissed on technicalities.

II. AMENDMENTS TO RULES OF COURT

A. *Compromise Offers and Conduct or Statements During Negotiations*

The court significantly amended Rule 2:408 of the Rules of the Supreme Court of Virginia in October 2015.¹⁶⁴ Although evidentiary in nature, this amendment will affect the daily practice of

160. *Id.* (quoting *Kozmina v. Commonwealth*, 281 Va. 347, 349–50, 706 S.E.2d 860, 862 (2011)).

161. *Id.*

162. *Id.* at 385, 786 S.E.2d at 148; *see also* Act of Mar. 28, 1999, ch. 652, 1999 Va. Acts 652 (codified as amended at VA. CODE ANN. § 8.01-335 (Cum. Supp. 1999)).

163. *JSR Mechanical, Inc.*, 291 Va. at 380, 786 S.E.2d at 145.

164. VA. SUP. CT. R. 2:408 (Supp. 2016).

all civil litigation practitioners. Previously the rule had stated that “[e]vidence of offers and responses concerning settlement or compromise of any claim which is disputed as to liability or amount is inadmissible regarding such issues.”¹⁶⁵ The rule did permit the admission of evidence as to “express admission of liability, or an admission concerning an independent fact pertinent to a question in issue.”¹⁶⁶ The rule has now been clarified to state that evidence of “furnishing, promising, or offering” or “attempting to compromise the claim” and “conduct or any statement made during compromise negotiations” is not admissible to “prove or disprove the validity or amount of a disputed claim, or to impeach by a prior inconsistent statement or by contradiction.”¹⁶⁷ The amended rule preserved the exception that such evidence may be admitted “for another purpose, such as proving a witness’s bias or prejudice, or negating a contention of undue delay.”¹⁶⁸ The amendment did add a subparagraph that expressly clarified that evidence pre-existing the negotiations, including pre-existing documents, are not rendered excludable “merely because such evidence was disclosed, produced, or discussed by a party during such negotiations.”¹⁶⁹ This amendment became effective on July 1, 2016.¹⁷⁰ The revised language fortifies protection afforded to statements and conduct in settlement negotiations, which should give practitioners increased comfort in candid and substantive settlement discussions.

B. *Attorney’s Fees and Costs on Appeal as to Domestic Relations*

In October 2015, Rule 5:35 was amended, and the attorney’s fees provision related to appeals to the Supreme Court of Virginia was clarified with respect to domestic relations and other family law proceedings.¹⁷¹ The rule had previously stated that once an appeal has been refused or dismissed, “any appellee who has received attorney’s fees and costs in the circuit court may make application in the circuit court for additional fees and costs incurred on appeal pursuant to Rule 1:1A.”¹⁷²

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. VA. SUP. CT. R. 5:35 (Supp. 2016).

172. *Id.*

The new rule includes a new subsection specific to family law proceedings. Under the new rule, in effect since January 1, 2016, if attorney's fees are authorized by relevant statute (Title 16.1, Title 20, or Title 63.2) then "a party may request an award of fees incurred in the appeal . . . by including a prayer for such recovery in the Opening Brief or the Reply Brief of Appellant, or in the Brief of Appellee."¹⁷³ Once that prayer has been made, "the Supreme Court may award to a party who has made such request, all of their attorney fees, or any part thereof, or remand the issue . . . for a determination thereof."¹⁷⁴ Interestingly, the rule specifies that the court may "include the fees incurred by such party in *pursuing fees* as awarded in the circuit court."¹⁷⁵

If the Supreme Court is determining the award of fees, then the court "shall not be limited to a consideration of whether a party's position on an issue was frivolous or lacked substantial merit but shall consider all the equities of the case."¹⁷⁶ If the issue is remanded to the circuit court, then the circuit court

shall consider all relevant factors, including but not limited to, the extent to which the party was a prevailing party on the issues, the nature of the issues involved, the time and labor involved, the financial resources of the parties, and the fee customarily charged in the locality for similar legal services.¹⁷⁷

C. *Incorporation of Facts or Argument from Prior Petitions*

In an order dated October 7, 2015 and effective immediately, the Supreme Court of Virginia amended rule 5:20 and codified long-standing practice before the court regarding petitions for a rehearing.¹⁷⁸ The amendment added subsection (e) which provides "[a]ttempts to incorporate facts or arguments from the petition for appeal or original jurisdiction petition are prohibited."¹⁷⁹ The long-standing practice before the court was not to include facts or arguments from prior petitions. However, some practitioners, particularly those with less experience before the Supreme Court of Virginia, may have succumbed to the temptation to incorporate

173. *Id.*

174. *Id.*

175. *Id.* (emphasis added).

176. *Id.*

177. *Id.*

178. VA. SUP. CT. R. 5:20 (Supp. 2016).

179. *Id.*

facts or arguments from the original petition in order to preserve valuable space for the most salient facts and arguments. The new rule expressly prohibits such attempts and provides written guidance as to what was previously an unwritten long-standing practice.

III. NEW LEGISLATION

A. *Nonsuit Tolls Contractual Statutes of Limitation*

As a direct response to the decision of *Allstate v. Ploutis*, the General Assembly passed House Bill 441, which specifically provided that the nonsuit statute applies to and tolls contractual statutes of limitations.¹⁸⁰ The Supreme Court of Virginia decided *Allstate v. Ploutis* on September 17, 2015.¹⁸¹ On January 7, 2016, House Delegate G. Manoli Loupassi introduced the bill.¹⁸² By February 24, 2016, the bill passed both the House and Senate.¹⁸³ On March 1, 2016, Governor Terry McAuliffe signed the bill and it became effective as of July 1, 2016.¹⁸⁴ The bill amended Virginia Code section 8.01-229(E) to read that that when a “plaintiff suffers a voluntary nonsuit . . . the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, *regardless of whether the statute of limitations is statutory or contractual.*”¹⁸⁵ The new statute directly abrogates *Allstate v. Ploutis*, and now a nonsuit tolls both statutory and contractual statutes of limitation.

B. *Landlord-Tenant: 120 Days to Hold Hearing on Final Rent and Damages*

Relevant for practitioners in residential landlord-tenant litigation, the General Assembly amended Virginia Code section 8.01-128 to increase the amount of time allowed between a hearing determining possession and the hearing determining final rent and

180. H.B. 441, Va. Gen. Assembly (Reg. Sess. 2016) (enacted as Act of Mar. 1, 2016, ch. 189, 2016 Va. Acts __, __).

181. 290 Va. 226, 776 S.E.2d 793 (2015).

182. H.B. 441, Va. Gen. Assembly (Reg. Sess. 2016).

183. Act of Mar. 1, 2016, ch. 189, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-229 (Supp. 2016)).

184. *Id.*

185. *Id.* (language in italics added in amendment).

damages.¹⁸⁶ In unlawful detainer actions, the Virginia Code permits a plaintiff to move the court to bifurcate the pending case between possession and damages.¹⁸⁷ The first hearing is solely to determine whether the plaintiff is entitled to possession of the premises in dispute.¹⁸⁸ The second hearing, if necessary, then determines the plaintiff's final rent and damages.¹⁸⁹ The practical purpose of this procedure is that it allows the plaintiff to capture damages that will almost always accrue after receiving possession—such as utilities, damage to premises, and additional rent—in one proceeding. Otherwise, a plaintiff would have to file a subsequent warrant in debt to capture any damages after the hearing. Previously, the Virginia Code required that the second hearing—which is solely as to final rent and damages—had to be held within ninety days of the hearing on possession.¹⁹⁰ As of July 1, 2016, a plaintiff is allowed up to 120 days between the two hearings, thereby increasing the potential period for capturing damages.¹⁹¹

C. General District Court Jurisdiction to Compel Arbitration

Alternative dispute resolution has greatly increased in use in the last several decades, particularly to avoid the high cost of litigation.¹⁹² Arbitration provisions in contracts, particularly for larger entities, are commonplace if not “stock” provisions (and ironically the subject of even greater litigation).¹⁹³ As a result, courts are now more often faced with defenses and disputes based on mandatory arbitration provisions. Thanks to House Bill 641 that was signed into law on March 1, 2016 and came into effect on July 1, 2016, general district courts in the Commonwealth now have jurisdiction to refer matters to arbitration.¹⁹⁴ The jurisdictional

186. Act of Mar. 7, 2016, ch. 281, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-128 (Supp. 2016)).

187. VA. CODE ANN. § 8.01-128 (Repl. Vol. 2015 & Supp. 2016).

188. *See id.*

189. *See id.*

190. VA. CODE ANN. § 8.01-128(B) (Repl. Vol. 2015).

191. Act of Mar. 7, 2016, ch. 281, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-128(B) (Supp. 2016)).

192. *See, e.g.,* Richard Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 963 (2000).

193. *See, e.g.,* Emily Farinacci, *In a Bind: Mandatory Arbitration Clauses in the Corporate Derivative Context*, 28 OHIO ST. J. DISP. RESOL. 737, 737–39 (2013).

194. H.B. 641, Va. Gen. Assembly (Reg. Sess. 2016); Act of Mar. 1, 2016, ch. 181, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-581.016 (Supp. 2016); *id.* §

limits naturally still apply, so the amount in controversy must be \$25,000 or less.¹⁹⁵ Previously, general district courts did not have the power to compel arbitration and would simply have to dismiss a case without prejudice and instruct (with no power to enforce) the parties to arbitrate. The general district court's order compelling arbitration can be appealed by either party to the circuit court for a de novo review.¹⁹⁶

D. *Statute of Limitations on Implanted Medical Devices*

The General Assembly also amended the accrual of a cause of action provisions in Virginia Code section 8.01-249 as to products liability cases involving implanted medical devices.¹⁹⁷ Section 8.01-249 now provides that in such actions against a defendant other than a health care provider, the cause of action shall accrue “when the person knew or should have known of the injury and *its causal connection to the device*.”¹⁹⁸ The change will give more time to plaintiffs whose cause of action otherwise would have accrued when the injury occurred.¹⁹⁹ This change mirrors the accrual language in section 8.01-249 regarding product liability actions involving implanted prosthetic devices for breast augmentation or reconstruction.²⁰⁰

E. *Substituted Service on Registered Agent*

The General Assembly increased the number of permissible methods of service as to registered agents of a corporation. The General Assembly, by Senate Bill 241, amended Virginia Code section 8.01-299 to include the following subsection: “[i]f the registered address of the corporation is a single-family residential dwelling, by substituted service on the registered agent of the

16.1-77 (Supp. 2016)).

195. Act of Mar. 1, 2016, ch. 181, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 16.1-77 (Supp. 2016)).

196. *Id.*

197. Act of Mar. 11, 2016, ch. 353, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-249 (Supp. 2016)).

198. *Id.* (emphasis added).

199. VA. CODE ANN. § 8.01-230 (Repl. Vol. 2015 & Supp. 2016) (“[T]he right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person.”).

200. VA. CODE ANN. § 8.01-249(7) (Repl. Vol. 2015).

corporation in the manner of subdivision 2 of § 8.01-296.²⁰¹ This will primarily affect small corporations where the registered agent is the owner or another individual and his or her residential address is on file with the state corporation commission (which may also be the mailing address for the business). Personal service on such individuals can be difficult. As of July 1, 2016, parties can use substituted service in such instances.²⁰² As a refresher, Virginia Code section 8.01-296(2) provides two methods of substituted service. Instead of personally serving the actual individual (in this case the registered agent), at the residential address a party can serve “any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of 16 years or older.”²⁰³ Alternatively, a party can “post[] a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode.”²⁰⁴

201. Act of Mar. 7, 2016, ch. 270, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-299 (Supp. 2016)).

202. *Id.*

203. VA. CODE ANN. § 8.01-296(2) (Repl. Vol. 2015).

204. *Id.*