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CIVIL PRACTICE AND PROCEDURE

*Christopher S. Dadak **

INTRODUCTION

This Article analyzes the past year of Supreme Court of Virginia opinions, revisions to the Virginia Code, and Rules of the Supreme Court of Virginia affecting Virginia civil procedure.¹ It is not fully comprehensive but does endeavor to highlight changes and relevant analysis regarding Virginia civil procedure. The summarized cases do not reflect all changes in Virginia jurisprudence on civil procedure and, at times, focus on emphasized reminders from the court on issues it analyzed. The Article first addresses opinions of the supreme court, then new legislation enacted during the 2019 General Assembly Session, and, finally, approved revisions to the Rules of the Supreme Court of Virginia.

I. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Craving Oyer*

The Supreme Court of Virginia issued an opinion that provided useful guidance on the use and application of motions craving oyer. A landowner in Alexandria appealed the “decision of the [Alexandria] City Council in a land-use case.”² Because the substance of the land-use issue is not necessary for the procedural analysis, the author provides only a brief factual summary. The landowner was

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1. Due to the publishing schedule, the relevant “year” is approximately July 2019 through July 2020.

2. *Byrne v. City of Alexandria*, ___ Va. ___, 842 S.E.2d 409, 410 (2020).

renovating property in an historic district that had a board of architectural review.³ His plans were all properly approved, but he neglected to include in any of his documentation that his work would entail the destruction of the existing fence in front of the property.⁴ He was issued a violation for “fail[ing] to obtain the approval prerequisite to the demolition and replacement of the fence.”⁵ The landowner submitted the plans for the replacement fence, and the plan was all approved except for the size of the gate. He requested eight-foot width but was only approved for six.⁶

The landowner appealed the architectural board’s restriction on the size of the gate to city council.⁷ The council held a public hearing on the issue and “unanimously affirmed the decision of the [architectural board].”⁸ The landowner appealed to the Alexandria City Circuit Court, alleging the decision was “arbitrary, capricious, contrary to law and constituted an abuse of discretion.”⁹ The city “filed a demurrer and a motion craving oyer of the legislative record that had been before the [council] when it made its decision.”¹⁰ The court granted the motion, reviewed the entire legislative record once it was filed, “issued a letter opinion sustaining the demurrer,” and then “entered a final order sustaining the demurrer without leave to amend and dismissing [the landowner’s] petition with prejudice.”¹¹ The landowner appealed on two assignments of error; the germane one to this article argued “that the circuit court erred in granting the City’s motion craving oyer.”¹² The supreme court granted the writ.¹³

The supreme court, as it often does, began with an historical analysis of the origins of such a motion. It noted that “[t]he word ‘oyer’ is of Norman French origin and means ‘to hear,’ which is particularly appropriate because the “motion . . . originated in the early years of the English common law when many litigants were

3. *Id.* at __, 842 S.E.2d at 410.

4. *Id.* at __, 842 S.E.2d at 410.

5. *Id.* at __, 842 S.E.2d at 410.

6. *Id.* at __, 842 S.E.2d at 411.

7. *Id.* at __, 842 S.E.2d at 411.

8. *Id.* at __, 842 S.E.2d at 411.

9. *Id.* at __, 842 S.E.2d at 411.

10. *Id.* at __, 842 S.E.2d at 411.

11. *Id.* at __, 842 S.E.2d at 411.

12. *Id.* at __, 842 S.E.2d at 411.

13. *Id.* at __, 842 S.E.2d at 411.

illiterate.”¹⁴ The motion would allow “a defendant, sued on a claim based on a written document, to have the document produced in court and read aloud to him.”¹⁵ The motion evolved over time, but not “in an orderly progression.”¹⁶ Originally, it only applied to “deeds, writs, bonds, letters of probate and administration and other ‘specialties’ (referring to documents under seal).”¹⁷ Throughout the nineteenth century, the supreme court expanded it to include documents related to recognizance, acts of the General Assembly, appellate record, arbitration award, criminal court pleas, and construction contracts.¹⁸

The landowner relied on language in *Langhorne v. Richmond Railway Co.*, where the supreme court noted “crav[ing] oyer of papers mentioned in a pleading applies, as a general rule, only to deeds and letters of probate and administration, not to other writings.”¹⁹ The supreme court noted that this sentence was dicta and “failed to take account of the cases . . . that had, for over a century, expanded the availability of oyer to obtain production of a much wider variety of documents than deeds and letters of probate and administration.”²⁰ Instead, the supreme court reaffirmed instead its holding in *Culpeper National Bank v. Morris*, and quoted its analysis with approval:

No intelligent construction of any writing or record can be made unless all essential parts of such paper or record are produced. A litigant has no right to put blinkers on the court and attempt to restrict its vision to only such parts of the record as the litigant thinks tend to support his view. When a court is asked to make a ruling on any paper or record, it is its duty to require the pleader to produce all material parts.²¹

14. *Id.* at __, 842 S.E.2d at 411.

15. *Id.* at __, 842 S.E.2d at 411 (first citing 3 WILLIAM BLACKSTONE, COMMENTARIES *299; and then citing 4 JOHN B. MINOR, INSTITUTES OF COMMON AND STATUTE LAW 732–33 (3d ed. 1893)).

16. *Id.* at __, 842 S.E.2d at 411.

17. *Id.* at __, 842 S.E.2d at 411 (first citing 3 WILLIAM BLACKSTONE, COMMENTARIES *299; and then citing *Specialty*, BLACK’S LAW DICTIONARY (4th ed. 1968)).

18. *Id.* at __, 842 S.E.2d at 411–12 (citations omitted).

19. *Id.* at __, 842 S.E.2d at 412 (internal quotation marks omitted) (quoting *Langhorne v. Richmond Ry. Co.*, 91 Va. 369, 372, 22 S.E. 159, 159 (1895)).

20. *Id.* at __, 842 S.E.2d at 412.

21. *Id.* at __, 842 S.E.2d at 412–13 (quoting *Culpeper Nat'l Bank v. Morris*, 168 Va. 379, 382–83, 191 S.E. 764, 765 (1937)).

The supreme court declined to put blinders on itself or future courts and affirmed the circuit court's granting of the motion craving oyer. This decision supports the strength and usefulness of motions craving oyer, particularly in contractual or land-use cases. As happened in this case (and for the purpose the supreme court noted the motion was created), motions craving oyer can streamline litigation and greatly reduce its expense.

B. *Tolling of Statute of Limitations*

The Supreme Court of Virginia ruled on an issue of first impression, whether Virginia Code section 8.01-229(D) can toll the statute of limitations for obstructive acts that occur prior to the accrual of the cause of action. The case also involved lawyer misconduct.

In 1987, Nelson Mackey ("Mackey") joined as a partner the firm of "Dodson, Pence, Viar, Young & Woodrum."²² In 1995, disagreements regarding compensation arose and Mackey left the firm.²³ The remaining partners formed a new firm of "Dodson, Pence, & Viar" but "[n]o formal winding up of the partnership or accounting of partnership assets occurred upon Mackey's departure."²⁴ The firm, before, during, and after Mackey's involvement, maintained health insurance through Trigon Health Care, Inc. ("Trigon").²⁵ "In 1997, Trigon demutualized and became a stock insurance company" during which process it "issued . . . shares in the name of Dodson, Pence, Viar, Woodrum, & Mackey even though the partnership purchasing insurance coverage at that time was Dodson, Pence, & Viar."²⁶ Over time and through subsequent mergers and stock-splits, the number of shares significantly increased and even earned "approximately \$20,000 cash in merger consideration."²⁷

"Pence passed away in 1999 and Dodson followed in 2001,"²⁸ both presumably unaware of the stocks and merger consideration. In 2002, Viar, who was already in poor health, wrote a letter to the bank to "inquire regarding 'some shares of Trigon stock registered

22. Mackey v. McDannald, __ Va. __, 842 S.E.2d 379, 382 (2020).

23. *Id.* at __, 842 S.E.2d at 382.

24. *Id.* at __, 842 S.E.2d at 382.

25. *Id.* at __, 842 S.E.2d at 382.

26. *Id.* at __, 842 S.E.2d at 382.

27. *Id.* at __, 842 S.E.2d at 382.

28. *Id.* at __, 842 S.E.2d at 382.

in the name of Dodson, Pence, Viar, Woodrum & Mackey, a law partnership dissolved years ago' that he learned may exist from a recent proxy statement."²⁹ In July 2002, the bank responded confirming the existence of the stock and providing an estimated value of around \$64,000.³⁰ Viar passed away that October without "further action" regarding the shares or merger consideration.³¹

Later in 2002, Viar's assistant "came across documents relating to the Trigon stock" and contacted Mackey, who came and picked up the documents, including Viar's communication with the bank.³² Mackey did not let the executors of his former partners' estates know of the stock; instead he "changed the mailing address for Dodson, Pence, Viar, Woodrum & Mackey to his residential address."³³

A former associate attorney of Viar assisted the executor of his estate on "various tax matters" related to the estate.³⁴ While he found Viar's letter to the bank, he did not find the bank's response confirming the existence of the stock and its value.³⁵ The former associate asked Mackey about the stock and indicated that he was helping the executor.³⁶ Mackey sent him an email indicating that replacement certificates, based on the number of shares, would only be worth \$1,413.81.³⁷ In late 2003, Mackey told Quinn³⁸ that he had "looked into it" and "[t]here was not enough money involved."³⁹ "Quinn understood this . . . as meaning that 'the stock had no value, and should really have been of no financial interest to [the executor].'"⁴⁰ Quinn, although admittedly having "enough information to look into the stock value himself," did not do so "because '[he] trusted Mr. Mackey'" and simply advised the executor of Mackey's indication that there was no value in the stock.⁴¹ Based

29. *Id.* at __, 842 S.E.2d at 382.

30. *Id.* at __, 842 S.E.2d at 382.

31. *Id.* at __, 842 S.E.2d at 382.

32. *Id.* at __, 842 S.E.2d at 382.

33. *Id.* at __, 842 S.E.2d at 382.

34. *Id.* at __, 842 S.E.2d at 382.

35. *Id.* at __, 842 S.E.2d at 382.

36. *Id.* at __, 842 S.E.2d at 382.

37. *Id.* at __, 842 S.E.2d at 383.

38. Mackey denied this exchange. *Id.* at __, 842 S.E.2d at 383.

39. *Id.* at __, 842 S.E.2d at 383.

40. *Id.* at __, 842 S.E.2d at 383.

41. *Id.* at __, 842 S.E.2d at 383.

on this information, the executor “made no efforts to collect the stock.”⁴² Quinn did not reach out to the estates of the other partners, Dodd and Pence.⁴³

In 2009, Mackey sent a letter “on ‘Dodson, Pence, Viar, Woodrum & Mackey’ letterhead” which he had “created that included his home address, phone number, and personal email address” and directed the stock transfer company “to ‘remit the merger consideration and net sales proceeds payable to Dodson Pence Viar Woodrum Mackey, G. Nelson Mackey, Jr.’ to his home address.”⁴⁴ Mackey deposited the money and did not inform the estates of his former partners of the proceeds.⁴⁵

In 2015, Quinn found and reviewed the letter from the bank to Viar confirming the stock and its value.⁴⁶ He then notified the executor of Viar’s estate and “attempted to contact Mackey to no avail.”⁴⁷ Quinn contacted the stock transfer company and was advised of the stock value and liquidation in 2009 by Mackey.⁴⁸ Quinn notified the other estates of the stock value and liquidation and all three estates proceeded to file suit against Mackey in November 2015.⁴⁹

The parties tried the matter in a bench trial and briefed the issue of statute of limitations in written closing statements submitted to the court.⁵⁰ Mackey argued that “no tolling occurred because the misrepresentation, if any, was made long before any act creating a cause of action occurred.”⁵¹ In a letter opinion, the circuit court held that Virginia Code section 8.01-229(D) “tolls the limitations period even if no cause of action has accrued at the time of the misrepresentation. . . .”⁵² The circuit court further held that Quinn reasonably relied on Mackey’s statements regarding the

42. *Id.* at __, 842 S.E.2d at 383.

43. *Id.* at __, 842 S.E.2d at 383.

44. *Id.* at __, 842 S.E.2d at 383.

45. *Id.* at __, 842 S.E.2d at 383.

46. *Id.* at __, 842 S.E.2d at 383.

47. *Id.* at __, 842 S.E.2d at 383.

48. *Id.* at __, 842 S.E.2d at 383.

49. *Id.* at __, 842 S.E.2d at 383.

50. *Id.* at __, 842 S.E.2d at 383.

51. *Id.* at __, 842 S.E.2d at 383.

52. *Id.* at __, 842 S.E.2d at 383.

stocks and that “Mackey concealed the stock from ‘each of its rightful owners. . . .’”⁵³ Mackey appealed to the Supreme Court of Virginia on the statute of limitations and whether plaintiffs provided the elements of conversion at trial. This Article addresses only the statute of limitations analysis.⁵⁴

“Mackey first argue[d] that Code § 8.01-229(D) does not apply to toll the statute of limitations in this case because—to the extent he committed an obstructive act—it occurred long before any cause of action accrued.”⁵⁵ The statute of limitations for conversion is five years⁵⁶ and “begins to run ‘from the date the injury is sustained in the case of . . . damage to property.’”⁵⁷ The conversion occurred in 2009 and the suit was filed six years later in 2015, so absent tolling of the limitations period the suit would plainly be time-barred.⁵⁸ Virginia Code section 8.01-229(D) tolls the limitations period “[w]hen the filing of an action is obstructed by a defendant’s . . . using any other direct or indirect means to obstruct the filing of an action. . . .”⁵⁹

The supreme court noted the unprecedented facts of this case and that “none of [its] cases have expressly held that an obstructive act prior to accrual can trigger Code § 8.01-229(D) tolling.”⁶⁰ The supreme court reviewed its prior cases analyzing the type of obstructive act that must occur to toll the statute. The act must be an affirmative act with the intent to obstruct filing, involve moral turpitude, and actually prevent the filing of the action.⁶¹ “Mere silence,” even if misleading or effective, is not sufficient.⁶² “From these authorities, it is apparent that the focus of Code § 8.01-229(D) is the *defendant’s intent, not the timing of the obstructive*

53. *Id.* at __, 842 S.E.2d at 384.

54. *Id.* at __, 842 S.E.2d at 384.

55. *Id.* at __, 842 S.E.2d at 384.

56. *Id.* at __, 842 S.E.2d at 384 (citing VA. CODE ANN. § 8.01-243(B) (Cum. Supp. 2020)).

57. *Id.* at __, 842 S.E.2d at 384 (quoting VA. CODE ANN. § 8.01-243(B) (Cum. Supp. 2020)).

58. *Id.* at __, 842 S.E.2d at 384.

59. *Id.* at __, 842 S.E.2d at 384–85 (quoting VA. CODE ANN. § 8.01-229(D) (Cum. Supp. 2020)).

60. *Id.* at __, 842 S.E.2d at 385.

61. *Id.* at __, 842 S.E.2d at 385 (first citing *Newman v. Walker*, 270 Va. 291, 298, 618 S.E.2d 336, 337 (2005); and then citing *Grimes v. Suzukawa*, 262 Va. 330, 332, 551 S.E.2d 644, 646 (2001)).

62. See *id.* at __, 842 S.E.2d at 385 (citing *Culpeper Nat'l Bank v. Tidewater Improvement Co.*, 119 Va. 73, 83–84, 89 S.E.2d 118, 121 (1916)).

*actions.*⁶³ Therefore, the supreme court held that section 8.01-229(D) “tolls the limitations period when a defendant’s obstructive acts occur before a cause of action accrues, provided the defendant intended those acts to prevent inquiry, or . . . hinder a discovery of the cause of action by the use of ordinary diligence.”⁶⁴

The supreme court ultimately found that Mackey’s statements to Quinn were sufficient to toll the statute of limitations for Viar’s estate.⁶⁵ However, because he had no interactions with the executors of the Dodson and Pence estates, their claims were time-barred.⁶⁶ The facts of this case, involving alleged misrepresentations by an attorney, certainly had equity leaning in favor of the estates—of which only one prevailed. The supreme court’s analysis as to timing of the acts being irrelevant makes sense and aims to prevent undesirable conduct. However, with dispositive focus on the intent of alleged obstructive acts, future decisions on this issue are likely to be highly fact-specific.

C. *Contractual Waiver of Statute of Limitations*

In 2006, “Foster and Wilson Building, LLC [(the ‘Company’)] executed a promissory note in favor of New South Federal Savings Bank [(the ‘Bank’)]” for a construction loan.⁶⁷ The owners of the Company later signed a written guaranty agreement (the “Contract”) with the Bank personally guaranteeing the promissory note and agreeing to “waive the benefit of any statute of limitations or other defenses affecting [its] liability” under the Contract.⁶⁸ As the reader can probably guess, the Company ended up defaulting on the promissory note.⁶⁹ The Bank issued a notice of default and payment demand to the owner on August 27, 2010.⁷⁰ The Bank’s assignee (the “Assignee”) filed suit on November 23, 2015, more than five years after the notice of default.⁷¹

63. *Id.* at __, 842 S.E.2d at 385 (emphasis added).

64. *Id.* at __, 842 S.E.2d at 386 (citation and internal quotation marks omitted).

65. *Id.* at __, 842 S.E.2d at 387.

66. *Id.* at __, 842 S.E.2d at 387.

67. Radiance Capital Receivables Fourteen, LLC v. Foster, 298 Va. 14, 18, 833 S.E.2d 867, 868 (2019).

68. *Id.* at 18, 833 S.E.2d at 868.

69. *Id.* at 18, 833 S.E.2d at 868.

70. *Id.* at 18, 833 S.E.2d at 868.

71. *Id.* at 18, 833 S.E.2d at 868.

In response to the suit, the owner filed a plea in bar asserting the statute of limitations.⁷² Specifically, the owners argued that their waiver of the statute of limitations defense “was unenforceable because it did not meet the specific requirements of Code § 8.01-232.”⁷³ The Assignee argued that the section only applied to promises not to plead the statute of limitations and not waivers such as the one in the guaranty, and further that “the failure to enforce the contractual waiver would ‘operate as fraud’ on [the Assignee].”⁷⁴ The circuit court sustained the plea in bar and dismissed the matter with prejudice, which the Assignee appealed to the Supreme Court of Virginia.⁷⁵

The supreme court began its analysis with the requirements of Virginia Code section 8.01-232. The statute voids written waivers of the statute of limitations defense only “when (i) it is made to avoid or defer litigation pending settlement of any case, (ii) it is not made contemporaneously with any other contract, and (iii) it is made for an additional term not longer than the applicable limitations period.”⁷⁶ The supreme court noted that the Contract did not meet any of the three requirements because the waiver was not made to avoid or defer litigation, was entered into contemporaneously, and had an indefinite, or permanent, term.⁷⁷

The supreme court did not find the Assignee’s attempt to distinguish between waivers and promises not to plead the statute of limitations persuasive. After all, “when a party intentionally relinquishes its known right to plead the statute of limitations through a contractual waiver, the party implicitly makes a promise that it will refrain from pleading the statute of limitations in the future.”⁷⁸ Furthermore, from a practical perspective, if such a distinction existed, “the parties to a contract could circumvent the requirements of that statute by simply characterizing a promise not [to] plead the statute of limitations as a contractual waiver[,]” rendering section 8.01-232 meaningless.⁷⁹

72. *Id.* at 18, 833 S.E.2d at 868.

73. *Id.* at 18–19, 833 S.E.2d at 868.

74. *Id.* at 19, 833 S.E.2d at 868.

75. *Id.* at 19, 833 S.E.2d at 868.

76. *Id.* at 20, 833 S.E.2d at 869.

77. *Id.* at 19, 833 S.E.2d at 869.

78. *Id.* at 21, 833 S.E.2d at 869.

79. *Id.* at 21, 833 S.E.2d at 869–70.

The supreme court then analyzed the Assignee's argument that a failure to waive the statute of limitations would operate as a fraud on the Assignee. As an initial matter, the "general rule [is] that 'fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events.'"⁸⁰ If the party to a contract "makes a promise that, when made, he has no intention of performing, that promise is considered a misrepresentation of present fact[—the state of mind—]and may form the basis for a claim of actual fraud."⁸¹ The supreme court held that when applied to a contractual waiver of statute of limitations, "if a party promises not to plead the statute of limitations without any present intention to be bound by that promise, the party may be estopped from pleading the statute of limitations in order to prevent the operation of a fraud on the promisee."⁸² However, the supreme court affirmed the circuit court's sustaining of the plea in bar because the Assignee's evidence and argument in this matter relied solely on the contractual waiver and failed to show the owners had "fraudulent intent to refuse to be bound by the statute of limitations waiver. . . ."⁸³

The requirements of Virginia Code section 8.01-232 set an incredibly high bar for the waiver of statute of limitations. The fraud exception to those requirements is also difficult to achieve. One must show that, at the time of signing the contract, the party had fraudulent intent to refuse to abide by the provision of the waiver. To prevail on the exception would likely require incriminating party admissions (through documents or testimony) to establish that subjective mindset existed at the time of signing.

D. *Wrongful Death and Claim Splitting*

The Supreme Court of Virginia analyzed an interesting scenario in which plaintiff filed suit in both Virginia and Kentucky, leading to issues involving remedy election, judicial estoppel, claim splitting, and double recovery. The case involved wrongful death and

80. *Id.* at 23, 833 S.E.2d at 871 (quoting *Soble v. Herman*, 175 Va. 489, 500, 9 S.E.2d 459, 464 (1940)).

81. *Id.* at 23–24, 833 S.E.2d at 871 (quoting *SuperValu, Inc. v. Johnson*, 276 Va. 356, 368, 666 S.E.2d 335, 342 (2008)).

82. *Id.* at 24, 833 S.E.2d at 871.

83. *Id.* at 24, 833 S.E.2d at 871.

personal injury claims against healthcare providers in Virginia and Kentucky.⁸⁴ In May, the decedent was seen in Virginia for nausea, vomiting, and abdominal pain.⁸⁵ She had an abdominal CT scan for pancreatic issues, specifically necrosis.⁸⁶ She was discharged four days later.⁸⁷ The decedent continued to suffer from symptoms and the next day was admitted to a hospital in Kentucky.⁸⁸ She was discharged, but returned a few days later and was transferred to another hospital.⁸⁹ The decedent needed multiple surgeries, suffered significant complications, and sadly passed away a couple months later.⁹⁰

In August 2014, the executor filed suit against the Kentucky healthcare providers “alleg[ing] claims for the decedent’s personal injury and wrongful death.”⁹¹ The executor voluntarily dismissed the wrongful death claim and ultimately settled and dismissed the Kentucky suit in July 2017 with prejudice.⁹²

Meanwhile, in August 2015, the executor filed suit against the Virginia healthcare providers in Virginia circuit court “alleging wrongful death under Code § 8.01-50 and a survival action for personal injury under Code § 8.01-25.”⁹³ The executor amended the complaint, removing one defendant and removing the personal injury claim.⁹⁴ The remaining defendants filed motions to dismiss, arguing that the Kentucky and Virginia suits “asserted the same injuries” and that the executor had “already elected his remedy when he recovered for personal injury to the decedent in Kentucky.”⁹⁵ The defendants also argued that the executor had impermissibly split his claims and that the Virginia suit was judicially estopped.⁹⁶

84. *Green v. Diagnostic Imaging Assocs., P.C.*, __ Va. __, 843 S.E.2d 371, 373 (2020).

85. *Id.* at __, 843 S.E.2d at 374.

86. *Id.* at __, 843 S.E.2d at 374.

87. *Id.* at __, 843 S.E.2d at 374.

88. *Id.* at __, 843 S.E.2d at 374.

89. *Id.* at __, 843 S.E.2d at 374.

90. *Id.* at __, 843 S.E.2d at 374.

91. *Id.* at __, 843 S.E.2d at 374.

92. *Id.* at __, 843 S.E.2d at 375.

93. *Id.* at __, 843 S.E.2d at 375.

94. *Id.* at __, 843 S.E.2d at 375.

95. *Id.* at __, 843 S.E.2d at 376.

96. *Id.* at __, 843 S.E.2d at 376.

The circuit court granted the motions to dismiss. The court held that Virginia Code section 8.01-56 “requires plaintiffs in Virginia ‘to make an election as to whether they want to recover for personal injury or wrongful death.’”⁹⁷ The court found that the executor elected his remedy by settling the Kentucky suit and “the mere acceptance of the recovery in Kentucky for the same injury does foreclose any later acceptance of a recovery in Virginia for the same injury.”⁹⁸ The court also agreed with the defendants that holding otherwise would allow claim-splitting and double recovery.⁹⁹ Finally, the court also held that the executor was judicially estopped from pursuing the Virginia suit.¹⁰⁰

In reviewing a motion to dismiss, the Supreme Court of Virginia, “if no evidence has been taken, . . . ‘treat[s] the factual allegations in the complaint as [it] do[es] on review of a demurrer.’”¹⁰¹ It “review[s] the circuit court’s decision to dismiss the complaint as well as any issues of statutory interpretation, *de novo*.”¹⁰²

The supreme court disagreed with the circuit court’s description of Virginia Code section 8.01-56 “as an election of remedy statute.”¹⁰³ Instead it held that the statute “plainly states that if the injured individual’s death resulted from the injury, the action for that injury must be pursued in a wrongful death suit” and does not give the plaintiff “the option of maintaining a personal injury action for a decedent’s injury if that injury resulted in the decedent’s death.”¹⁰⁴

“Accordingly, in the instant case, [the executor’s] ability to recover in Virginia for the personal injury or wrongful death of the decedent was not an ‘election’ [the executor] was required to make

97. *Id.* at __, 843 S.E.2d at 376.

98. *Id.* at __, 843 S.E.2d at 376.

99. *Id.* at __, 843 S.E.2d at 376.

100. *Id.* at __, 843 S.E.2d at 376.

101. *Id.* at __, 843 S.E.2d at 376 (quoting *Bragg v. Bd. of Supervisors*, 295 Va. 416, 423, 813 S.E.2d 331, 334 (2018)).

102. *Id.* at __, 843 S.E.2d at 376 (citation omitted).

103. *Id.* at __, 843 S.E.2d at 377.

104. *Id.* at __, 843 S.E.2d at 377.

under Code § 8.01-56.”¹⁰⁵ Nothing in that statute’s language prohibited the executor from settling a personal injury claim in Kentucky and pursuing a wrongful death claim in Virginia.¹⁰⁶

The Court also reversed the circuit court as to its holding on claim-splitting, double recovery, and judicial estoppel. The policy behind forbidding claim splitting was “protect[ing] a defendant from vexatious and costly litigation resulting from a multiplicity of suits on the same cause of action.”¹⁰⁷ However, this concern was inapplicable because the Virginia and Kentucky suits involved different defendants. While the supreme court did agree that the executor could not enjoy double recovery, it “was not a sufficient basis for dismissing [the executor’s] action; any alleged double recovery can be addressed by the circuit court.”¹⁰⁸ Judicial estoppel did not apply because, as mentioned above, the parties were not the same and because resolving a personal injury claim in Kentucky is not inconsistent with maintaining a wrongful death claim in Virginia.¹⁰⁹

II. NEW LEGISLATION

It was a busy and unusual session in the General Assembly with noteworthy changes in Virginia civil procedure.

A. Appeals from Courts Not of Record

The General Assembly amended Virginia Code section 16.1-196 regarding appeals from general district court.¹¹⁰ The statute clarifies that an appeal can also be taken “from any order entered or judgment rendered in a general district court that alters, amends,

105. *Id.* at __, 843 S.E.2d at 377–78.

106. *Id.* at __, 843 S.E.2d at 378. In fact, “Kentucky law allows the filing of a personal injury claim in addition to a wrongful death claim for the same injury.” *Id.* at __, 843 S.E.2d at 378 (citing KY. REV. STAT. ANN. § 411.133).

107. *Id.* at __, 843 S.E.2d at 378 (quoting Flora, Flora & Montague, Inc. v. Saunders, 235 Va. 306, 311, 367 S.E.2d 493, 495 (1988)).

108. *Id.* at __, 843 S.E.2d at 379.

109. *Id.* at __, 843 S.E.2d at 379.

110. Act of Apr. 10, 2020, ch. 1048, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 16.1-106 (Cum. Supp. 2020)).

overturns, or vacates any prior final order.”¹¹¹ The language is specific and seems clear that an order denying a motion or action to amend, overturn, or vacate a prior final order would not subject the prior final order to an appeal—so such attempts to “game” the finality of an order should not work. In another change, parties may now essentially “piggyback” on another party’s appeal of a final order or judgment in general district court. The new language states:

If any party timely [and properly] notices an appeal . . . , such notice of appeal shall be deemed a timely notice of appeal by any other party on a final order or judgment entered in the same or a related action arising from the same conduct, transaction, or occurrence as the underlying action.¹¹²

The “piggybacking” party must still “timely perfect their own respective appeal[] by giving a bond and the writ tax and costs.”¹¹³ This statute in effect overturns an amendment to the Rules of the Supreme Court of Virginia¹¹⁴ and court cases on the issue¹¹⁵ requiring and holding respectively that each party must timely note its own appeal.

From a practical perspective this amendment should ease stress on practitioners in tried general district court cases where parties are still exploring settlement and particularly in cases involving multiple defendants. Prior to this change, parties would have to weigh the odds of another party appealing and consider the need for pre-emptively filing their own appeal.

B. *Filing Copy of Return of Process*

Practitioners always welcome changes to make filing simpler, particularly when it involves allowing copies as opposed to originals. Virginia Code section 8.01-325 now requires the clerk to “accept a photocopy, facsimile, or other copy of the original proof of

111. VA. CODE ANN. § 16.1-106(A) (Cum. Supp. 2020).

112. *Id.* § 16.1-106(B) (Cum. Supp. 2020).

113. *Id.*

114. *See Order Amending Part Seven B, Rule 7:B12, Rules of Supreme Court of Virginia* (Nov. 1, 2019) (effective Jan. 1, 2020), http://www.courts.state.va.us/courts/scv/amendments/2019_1101_rule_7b_12.pdf [<https://perma.cc/MV3S-KLA2>].

115. *See Robert & Bertha Robinson Family, LLC v. Allen*, 295 Va. 130, 152, 810 S.E.2d 48, 60 (2018); *see also* Christopher Dadak, *Annual Survey of Virginia Law: Civil Practice and Procedure*, 53 U. RICH. L. REV. 11, 21–30 (2018) (discussing case and its holding that “piggyback” appeals are not allowed).

service” as long as “the proponent provides a statement that any such copy is a true copy of the original.”¹¹⁶ This change goes one step in the right direction.

C. *Notice of Termination of Tenancy*

There has been significant upheaval in landlord-tenant matters during the pandemic, which this article does not cover. From a procedural perspective, it is important to know that Virginia Code section 55.1-1202 now requires any notice of lease termination for a “tenant receiving tenant-based rental assistance” to include “on its first page, in type no smaller or less legible than that otherwise used in the body of the notice, the statewide legal aid telephone number and website address.”¹¹⁷ Make sure to update your lease termination forms accordingly.

D. *Board of Zoning Appeals Response*

Petitions for a writ of certiorari to circuit court appealing a board of zoning appeals decision are a creature of statute and fairly procedural in nature. Virginia Code section 15.2-2314 has been amended to specify that, upon service, “the board of zoning appeals shall have 21 days or as ordered by the court to respond.”¹¹⁸ This amended language is a bit confusing, as the board of zoning appeals is not considered a party to the action but “shall participate in the proceedings to the extent required by this section.”¹¹⁹ Local government practitioners must be wary of this new deadline.

E. *Newspaper Advertising for Planning District 23*

The General Assembly amended Virginia Code section 15.2-2204 to loosen publication requirements for localities in Planning District 23.¹²⁰ For those localities, if “the newspaper fails to publish the notice, such locality shall be deemed to have met the notice

116. VA. CODE ANN. § 8.01-325(C) (Cum. Supp. 2020).

117. *Id.* § 55.1-1202(D) (Cum. Supp. 2020).

118. *Id.* § 15.2-2314 (Cum. Supp. 2020).

119. *Id.*

120. Act of Mar. 2, 2020, ch. 22, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 15.2-2204(A) (Cum. Supp. 2020)).

requirements of this subsection so long as the notice was published in the next available edition of a newspaper having general circulation in the locality.”¹²¹ Planning District 23 encompasses the following localities: Gloucester County, Isle of Wight County, James City County, Southampton County, Surry County, York County, City of Chesapeake, City of Franklin, City of Hampton, City of Newport News, City of Norfolk, City of Poquoson, City of Portsmouth, City of Suffolk, City of Virginia Beach, and City of Williamsburg.¹²²

F. *Jurisdiction of Circuit Courts*

Following changes in the 2019 General Assembly session which amended Virginia Code sections 8.01-195.4 and 16.1-77,¹²³ the 2020 session of the General Assembly also amended Virginia Code section 17.1-513 (jurisdiction of circuit courts) to allow a plaintiff to move to decrease the ad damnum and transfer the matter to general district court.¹²⁴ This motion prevents the plaintiff from having to suffer a nonsuit or voluntary dismissal without prejudice and the “tolling of the applicable statutes of limitations governing the pending matter shall be unaffected by the transfer.”¹²⁵ The motion must be made at least ten days before trial and the plaintiff is still responsible for paying filing and other fees in general district court.¹²⁶ The author remains skeptical that these changes were necessary given that the plaintiff already enjoys the benefit of getting to choose the venue and always has the option of a nonsuit.¹²⁷ Furthermore, parties can always agree to proceed with a bench trial in front of a judge, instead of a full jury trial. However, this

121. VA. CODE ANN. § 15.2-2204(A) (Cum. Supp. 2020).

122. VA. ASS’N OF PLANNING DIST. COMM’NS, PLANNING DISTRICT COMMISSIONS 415–16, <https://www.commonwealth.virginia.gov/media/governorvirginiagov/secretary-of-the-commonwealth/pdf/bluebooks/2014/Planning-Districts.pdf> [https://perma.cc/X85N-32KZ].

123. Act of Mar. 22, 2020, ch. 787, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 8.01-195.4, 16.1-77 (Cum. Supp. 2020)) (allowing a plaintiff to amend the ad damnum and transfer a case between circuit court and general district court).

124. Act of Apr. 9, 2020, ch. 903, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 17.1-513 (Cum. Supp. 2020)).

125. VA. CODE ANN. § 17.1-513 (Cum. Supp. 2020).

126. *Id.*

127. See Christopher Dadak, *Annual Survey of Virginia Law: Civil Practice and Procedure*, 54 U. RICH. L. REV. 7, 24–26 (2019) (discussing last year’s changes).

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amendment should hopefully benefit cases that have stalled in circuit court and, for a variety of potential reasons, may not be worth the expense of further circuit court litigation.

G. *Signatures on Pleadings*

The General Assembly amended Virginia Code section 8.01-27.1 and increased restrictions as to signatures on pleadings.¹²⁸ The statute specifies that pleadings must be signed by the attorney of record “who is an active member in good standing of the Virginia State Bar.”¹²⁹ The statute clarifies that a “signature of a person other than counsel of record who is an active member in good standing of the Virginia State Bar . . . is not a valid signature.”¹³⁰ This change seems to forbid the practice of attorneys authorizing other individuals (generally other attorneys in their firm) to sign pleadings on their behalf. This change may be a bit cumbersome for lawyers during the COVID-19 pandemic, as lawyers may be working remotely and away from staff. However, in the long run this change should not be difficult for lawyers to comply with and is likely to be superseded by electronic signatures and e-filing anyway.

While the signature defect “renders the pleading, motion, or other paper voidable,” a party has twenty-one days to cure the defect once it has been “brought to the[ir] attention” and the cured pleading “shall be valid and relate back to the date it was originally served or filed.”¹³¹ So if you are stuck in a situation where you cannot sign a pleading, you are still better off authorizing someone else (although this is technically defective) than sending a non-original signature to the clerk’s office where it is likely to be rejected and not filed.

H. *Attorney Fees Paid from Court*

Virginia Code section 54.1-3933 has been amended regarding the notice required when an attorney wants to be compensated out

128. Act of Mar. 2, 2020, ch. 74, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 2020)).

129. VA. CODE ANN. § 8.01-271.1(A) (Cum. Supp. 2020).

130. *Id.*

131. *Id.* § 8.01-271.1(A), (G) (Cum. Supp. 2020).

of funds “under the control of the court.”¹³² The General Assembly deleted the language allowing such funds to be disbursed if “the parties are notified in writing that application *will be made* to the court for such decree or order.”¹³³ This deletion means attorneys must provide notice after filing the request and can no longer provide written notice prior to the filing.

I. *Interlocutory Appeals*

The General Assembly amended Virginia Code section 8.01-670.1, significantly increasing the viability of interlocutory appeals.¹³⁴ The statute now allows a party at any time prior to trial in circuit court to file a motion asking to “certify such order or decree for interlocutory appeal.”¹³⁵ The most significant change in reviewing such motions is that the requirement that the parties be in agreement for the interlocutory appeal has been deleted.¹³⁶ In practical terms that requirement seriously restricted the opportunity to seek an interlocutory appeal. Now, “[i]f the request for certification is opposed by any party, the parties may brief the motion in accordance with the Rules of the Supreme Court of Virginia.”¹³⁷ Additionally, a party now has fifteen days after the motion is granted to file the petition in the appropriate appellate court.¹³⁸

Interlocutory appeals for sovereign, absolute, or qualified immunity issues have been expanded to almost the status of a matter of right. If the circuit court grants or denies on a plea based on such immunity “that, if granted, would immunize the movant from compulsory participation in the proceeding, the order is eligible for *immediate appellate review*.”¹³⁹ Notably, instead of filing a motion with the circuit court for interlocutory appeal, one immediately

132. *Id.* § 54.1-3933 (Cum. Supp. 2020).

133. Act of Mar. 3, 2020, ch. 112, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 54.1-3933 (Cum. Supp. 2020)) (emphasis added).

134. Act of Apr. 9, 2020, ch. 907, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-670.1 (Cum. Supp. 2020)).

135. VA. CODE ANN. § 8.01-670.1(A) (Cum. Supp. 2020).

136. Ch. 907, 2020 Va. Acts at __ (codified as amended at VA. CODE ANN. § 8.01-670.1 (Cum. Supp. 2020)).

137. VA. CODE ANN. § 8.01-670.1(A) (Cum. Supp. 2020).

138. *Id.*

139. *Id.* § 8.01-670.1(B) (Cum. Supp. 2020) (emphasis added).

files a petition on this issue directly with the appellate court.¹⁴⁰ However, such an appeal does not stay the matter in circuit court unless “(i) the petition or appeal could be dispositive of the entire civil action or (ii) there exists good cause, other than the pending petition or appeal, to stay the proceedings.”¹⁴¹ Importantly, the failure to seek interlocutory appeal or the failure to succeed on such motion does not waive the appeal or prevent a party from appealing after a final order, “unless the order denying such interlocutory review provides for such preclusion.”¹⁴²

III. RULES OF THE SUPREME COURT OF VIRGINIA

There have been relevant amendments to the Rules of the Supreme Court of Virginia over the past year.

A. *Use of Depositions for Summary Judgment*

The Supreme Court of Virginia amended Rule 3:20 regarding summary judgment. The amendment added a sentence stating, “As further provided in subsection C of § 8.01-420, depositions and affidavits may be used to support or oppose a motion for summary judgment in any action where the only parties to the action are business entities and the amount at issue is \$50,000 or more.”¹⁴³ As the new language makes clear, it reflects the change in the Virginia Code allowing for the use of depositions for summary judgment in cases involving only businesses and with a value exceeding \$50,000.¹⁴⁴ The new rule now matches the statutory provision. Like the statute, the rule is a step in the right direction to streamline litigation and hopefully lower fees and expenses for parties involved. However, a friendly reminder that you may also use deposition transcripts to support a motion for summary judgment if the

140. *Id.*

141. *Id.* § 8.01-670.1(C) (Cum. Supp. 2020).

142. *Id.* § 8.01-670.1(D) (Cum. Supp. 2020).

143. VA. SUP. CT. R. 3:20 (Repl. Vol. 2020).

144. *Id.*

parties agree,¹⁴⁵ to dismiss a claim for punitive damages (except for driving while impaired),¹⁴⁶ or if the other side fails to object.¹⁴⁷

B. *Use of Depositions at Trial*

The Supreme Court of Virginia amended the uniform pretrial scheduling order regarding the designation of deposition testimony at trial.¹⁴⁸ The form now requires parties to designate deposition testimony at least thirty days before trial.¹⁴⁹ The order now specifies that it is “the obligation of the non-designating parties of any such designated deposition to file any objection or counter-designation within seven days after the proponent’s designation” and also “to bring any objections or other unresolved issues to the court for hearing no later than 5 days before the day of trial.”¹⁵⁰ Not only must the objecting party file its objection, but it must actually set the issue for hearing as opposed to just preserving objections via pleadings. This new language pushes back the timeline and allows—or rather forces—the parties (and most importantly the court) to streamline the issues for trial.

C. *Witness Testimony by Audio-Visual Means in Circuit Court Civil Cases*

Effective March 15, 2020,¹⁵¹ the supreme court enacted Rule 1:27, an entirely new rule allowing live video testimony at civil circuit court trials and providing the ground rules for such testimony.¹⁵² The rule applies to both party and nonparty witnesses,¹⁵³ and provides an inexhaustive list of factors for the court in considering a request for live video testimony at trial:

- (1) the age of the witness, and whether the witness has any disabilities or special needs that would affect the taking of testimony;

145. VA. CODE ANN. § 8.01-420(A) (Cum. Supp. 2020).

146. *Id.* § 8.01-420(B) (Cum. Supp. 2020).

147. See *Lloyd v. Kime*, 275 Va. 98, 107–08, 654 S.E. 563, 568–69 (2008).

148. R. 1:18 (App. 3) (Repl. Vol. 2020).

149. *Id.*

150. *Id.*

151. Given the unfortunate effect of the pandemic throughout the Commonwealth on litigation (and life in general of course), this rule was prescient.

152. VA. SUP. CT. R. 1:27 (Repl. Vol. 2020).

153. *Id.*

- (2) whether translation of the questions or answers may be required;
- (3) procedures available for the handling of exhibits;
- (4) mechanisms for making and ruling upon objections – both within and outside the hearing of the remote witness;
- (5) procedures for sidebar conferences between counsel and the court;
- (6) mechanisms for the witness to view counsel, the parties, the jury, and the judge;
- (7) practical issues, such as the size, number and location of video display screens at the remote location and in the courtroom or facility where the trial or hearing will take place;
- (8) whether there should be any requirements for camera angle or point of view, any picture-in-picture requirements, and/or camera movement;
- (9) how the statutorily required encryption of signal transmission will be attained;
- (10) creation of a record of such testimony; and
- (11) any necessary limitations or conditions upon persons who may be present in the location where the witness testifies, and whether those persons must be identified prior to the testimony of the witness.¹⁵⁴

The rule instructs that a court “should” allow for live video testimony at trial when the parties all agree, the witness is over 100 miles from the court, or with certain witnesses in the medical field whose duties prevent their attendance in person.¹⁵⁵ In other circumstances, a party can still seek leave of court for such remote testimony, but must move for the court’s permission at least sixty days prior to trial.¹⁵⁶ The other side has only ten days to file an objection, unless otherwise permitted by the court.¹⁵⁷ Interestingly, the rule contemplates the specific concern litigators have over video testimony at trial, namely, the jury’s ability to assess the credibility of the witness, favorably or unfavorably. It specifically instructs the court to “consider whether the ability to evaluate the credibility and demeanor of the person who would testify remotely is critical to the outcome of the proceeding and whether the non-moving party has demonstrated that face-to-face cross-examination is necessary because the . . . [testimony] may be determinative of the outcome.”¹⁵⁸

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

For nonparty witnesses, the moving party need only demonstrate good cause for allowing remote video testimony.¹⁵⁹ However, for parties and expert witnesses, the moving party must show “exceptional circumstances” to justify video testimony at trial.¹⁶⁰ As always, the testimony must be under oath.¹⁶¹ For witnesses outside of Virginia there are additional requirements. Before testimony from a witness who is outside of Virginia can be admitted, the witness must file a notarized consent form agreeing to provide testimony under an oath administered by someone in Virginia; “expressly agreeing to be subject to the penalties of perjury under Virginia law and subject to court orders by the Virginia judge regarding the testimony”; and “consenting to personal jurisdiction of the Virginia courts for enforcement of the perjury laws” and related orders from the judge in that particular case.¹⁶²

The rule provides that the party seeking to introduce live-video testimony at trial is responsible for all the costs and logistics of ensuring that it occurs.¹⁶³ Notably, a logistical or technical failure to ensure that the live-video testimony proceeds precludes the testimony and cannot be grounds for a continuance.¹⁶⁴ While remedies for issues outside the control of the parties¹⁶⁵ are “within the sound discretion of the presiding judge,” there is an obvious risk with live-video deposition testimony that truly requires practitioners to test the technology and set up thoroughly before the day of trial.¹⁶⁶

D. *Deposition Attendees, Procedure, and Objections*

Rule 4:5 has been amended to clarify procedural issues during discovery depositions. First, the rule now expressly provides that only the witness, the parties, counsel of record and relevant staff,

159. *Id.*

160. *Id.* However, since most practitioners would agree that having your client present at trial is paramount, it is hard to imagine seeking such permission absent such circumstances.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* Amusingly, the rule lists a very specific example, “Such as a power outage affecting the Virginia courtroom.” *Id.*

166. *See id.*

and those administering the deposition (court reporters, videographers, etc.) can attend the deposition.¹⁶⁷ If a party wants additional individuals present, she must “timely confer” with opposing counsel regarding such individuals.¹⁶⁸ The rule states, “[a] party seeking to exclude any person from attending a deposition—or seeking authorization for any person to attend a deposition—must move for an order in the discretion of the circuit court.”¹⁶⁹ This phrasing is a bit odd because it leads with the party seeking to exclude an individual, and it places the party seeking the additional attendee in a clause set off by em dashes. From a grammatical perspective, this puts greater weight, and thus responsibility, on the party seeking to exclude.¹⁷⁰ Because the rule sets the default permissible attendees, it would be clearer to expressly obligate the party seeking additional attendees (or seeking to exclude statutorily permitted attendees) to seek and receive court approval prior to the deposition. However, the author expects the courts to interpret this rule consistent with its intent.

Finally, the amendment covers a couple other procedural issues in depositions. To minimize disputes over who takes lead during a deposition, the rule now provides that unless agreed otherwise, the “examination . . . is begun by the party noticing the deposition.”¹⁷¹ The rule also now provides that objections are governed by rule 4:7, which essentially codifies long-standing practice that objections except for form are not waived if not made during the deposition.¹⁷²

167. VA. SUP. CT. R. 4:5 (b)(4) (Repl. Vol. 2020).

168. *Id.*

169. *Id.*

170. *Id.* Especially when you compare this language with the amendment to the uniform pre-trial scheduling order discussed *infra* specifying in unambiguous terms that the objecting party to designated depositions has the obligation to file the objection and set the hearing. See *infra* section III.B.

171. R. 4:5 (Repl. Vol. 2020).

172. *Id.* (citing R. 4:7 (Repl. Vol. 2020)).