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ARTICLES

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 impacting civil procedure here in the Commonwealth. On top of those changes, dealing with the pandemic certainly was a trying time for practitioners, the judiciary, and all those involved in the administration of justice and the law. The author appreciates the sacrifices made by all those individuals and sympathizes with all who lost a loved one in this time.

The Article first addresses opinions of the Supreme Court of Virginia, then new legislation enacted during the 2020 General Assembly Session, and finally the approved revisions to the Rules of the Supreme Court of Virginia.

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Due to the publishing schedule, the relevant “year” is approximately July 2020 through June 2021.

The author thanks the *Law Review* editors and staff who not only diligently worked on this Volume but successfully dealt with pandemic-related interruptions to their legal studies.

I. DECISIONS OF THE SUPREME COURT OF VIRGINIA

The Supreme Court of Virginia issued several noteworthy opinions affirming, clarifying, and affecting procedural quandaries practitioners face.

A. *Jurisdiction of Court After Nonsuit Order*

The finality of orders and its impact on the jurisdiction of a court pursuant to Rule 1:1 can be a merciless trap for the unwary or inattentive practitioner. In this case, a plaintiff in a medical malpractice case, after the Fauquier County Circuit Court excluded the testimony of his expert, nonsuited during trial.¹ The circuit court entered the nonsuit order on September 11, 2019, and the defense moved for its costs within two days.² In its motion the defense did not ask “that the court modify, vacate, or suspend the nonsuit order.”³ The circuit court heard and stated that it would grant the motion on October 1, 2019, twenty days after entry of the nonsuit order.⁴ However, the circuit court did not enter the order until November 5, 2019, “more than twenty-one days after [the] entry of the nonsuit order.”⁵ The plaintiff appealed the order awarding costs on the basis that the circuit court lacked jurisdiction pursuant to Rule 1:1.⁶

“Nonsuit orders are generally treated as final orders for purposes of Rule 1:1.”⁷ The supreme court relied heavily on *Wagner v. Shird* in its analysis.⁸ In *Wagner*, the Prince George County Circuit Court entered a final order and then entered an order suspending that order for thirty days while it considered a motion for remittitur.⁹ Just like in this case, the circuit court then orally stated that it would grant the remittitur motion but did not enter the order until more than thirty days had elapsed.¹⁰ The supreme court “concluded that the circuit court’s announcement from the bench that

1. *Kosko v. Ramser*, 299 Va. 684, 686, 857 S.E.2d 914, 914 (citing VA. SUP. CT. R. 1:1 (Repl. Vol. 2021)).

2. *Id.* at 686, 857 S.E.2d at 914.

3. *Id.* at 686, 857 S.E.2d at 914–15.

4. *Id.* at 686, 857 S.E.2d at 915.

5. *Id.* at 686, 857 S.E.2d at 915.

6. *Id.* at 686, 857 S.E.2d at 915.

7. *Id.* at 687, 857 S.E.2d at 915.

8. *Id.* at 687, 857 S.E.2d at 915.

9. 257 Va. 584, 586, 514 S.E.2d 613, 614 (1999).

10. *Id.* at 586, 514 S.E.2d at 614.

it would grant the motion for remittitur did not extend the length of the stay, and, further, when the court actually entered the written judgment order on April 21, 2019, the court lacked jurisdiction to do so,” which rendered the order a nullity.¹¹

The defendants, who had succeeded on the motion for their costs, argued that the nonsuit order was not final because 8.01-380(C) “allows the recovery of costs after the nonsuit is taken.”¹² They argued “the possibility of recovering costs means that the nonsuit order does not dispose of the entire action because something remains to be done, namely, the adjudication of a motion to recover costs.”¹³ The supreme court disagreed because “[u]nder the defendants’ logic, anytime a litigant seeks other kinds of recoverable costs, or for that matter files any post-trial motion, there would, by definition, remain something to be done.”¹⁴ “Once a final written order is entered, a trial court has twenty-one days to enter a new written order or to enter a written order modifying, suspending, or vacating the prior order to allow the court sufficient time to address the post-trial motion.”¹⁵

There are a couple practical pointers to take from this case. If you can, if you have any outstanding issues, do not agree to or prevent a final order from being entered in the first place. It is much easier if the clock does not start ticking. If a final order is entered, one must move to vacate, stay, or suspend the order within twenty-one days from its entry. Otherwise, Rule 1:1 irrevocably ends the court’s jurisdiction, and any orders entered more than twenty-one days after the order are a nullity.

B. *Collateral Estoppel from Out-of-State Guardianship Proceeding*

The Supreme Court of Virginia analyzed in a wills and trusts case whether collateral estoppel applied to the issue of mental competency.¹⁶ The facts paint a complex picture in terms of trusts and testamentary capacity, but this Article will focus on the collateral

11. *Kosko*, 299 Va. at 687, 857 S.E.2d at 915 (citing *Wagner*, 257 Va. at 587–88, 514 S.E.2d at 615).

12. *Id.* at 688, 857 S.E.2d at 916.

13. *Id.* at 688, 857 S.E.2d at 916.

14. *Id.* at 688–89, 857 S.E.2d at 916.

15. *Id.* at 689, 857 S.E.2d at 916.

16. *Plofchan v. Plofchan*, 299 Va. 534, 537, 855 S.E.2d 857, 859 (2021).

estoppel issue. Paula Plofchan (“Mrs. Plofchan”), living in Texas, executed a durable power of attorney (“POA”) appointing her husband as her attorney-in-fact and in the alternative her son Thomas Plofchan, Jr. (“Thomas”) as the attorney-in-fact.¹⁷ Her husband passed away in 2001, making Thomas the attorney-in-fact.¹⁸ In 2006, Mrs. Plofchan created the Paula G. Plofchan Revocable Trust (“Trust”) as both the grantor and the trustee.¹⁹ The Trust was to be “construed and administered” under Virginia law.²⁰ In 2013, Mrs. Plofchan moved to New York to live with her daughter Jennifer.²¹ In June 2014, Mrs. Plofchan was diagnosed with Alzheimer’s disease and in November 2016, resigned as trustee of the Trust.²² She named Elizabeth, a different daughter, and Thomas as cotrustees.²³ “Less than a week later, two doctors . . . signed certificates of incapacity stating that M[r]s. Plofchan was deemed incapacitated pursuant the terms of the Trust Agreement.”²⁴

In May 2018, Mrs. Plofchan executed a revocation of the POA and “petitioned the Supreme Court of Westchester County, New York, (the New York guardianship court) to appoint a guardian for her, pursuant to Article 81 of the New York Mental Hygiene Law.”²⁵ While the petition was pending, Mrs. Plofchan sent a letter to her children revoking the Trust.²⁶ The sides litigated the issue and the two doctors who had previously declared Mrs. Plofchan incapacitated revoked those earlier determinations.²⁷ The court proceedings took four days and Mrs. Plofchan “was present, ‘meaningfully participated,’ and was represented by a counsel of her choosing.”²⁸ “The court-appointed evaluator also testified and her report was admitted into evidence. She noted that M[r]s. Plofchan could not delineate her assets or expenses, but that M[r]s. Plofchan

17. *Id.* at 538, 855 S.E.2d at 859.

18. *Id.* at 538, 855 S.E.2d at 859.

19. *Id.* at 538, 855 S.E.2d at 860.

20. *Id.* at 538, 855 S.E.2d at 860.

21. *Id.* at 538, 855 S.E.2d at 860.

22. *Id.* at 538, 855 S.E.2d at 860.

23. *Id.* at 538, 855 S.E.2d at 860.

24. *Id.* at 539, 855 S.E.2d at 860.

25. *Id.* at 539, 855 S.E.2d at 860.

26. *Id.* at 540, 855 S.E.2d at 860.

27. *Id.* at 539, 855 S.E.2d at 860.

28. *Id.* at 540, 855 S.E.2d at 861.

felt she was being deprived of things she loved due to certain bills not being paid.”²⁹

In January 2019, the court ruled “denying M[r]s. Plofchan the relief she sought and dismissing the proceeding.”³⁰ “The New York guardianship court found that M[r]s. Plofchan was not an incapacitated person as the term is defined in Article 81 of the New York Hygiene Law, and declined to accept her consent to appoint a guardian.”³¹ Instead, the court noted “that while it was clear that M[r]s. Plofchan was unhappy with Thomas and Elizabeth’s management and felt a loss of control over her day-to-day decision-making, . . . there was no evidence of any fiduciary violations ‘sufficient to render the current advanced directives [including the POA and Trust] insufficient or unreliable.’”³²

In April 2019, “Thomas and Elizabeth, as co-trustees of the Trust, and Thomas as the attorney-in-fact for M[r]s. Plofchan, filed a complaint against M[r]s. Plofchan in the Circuit Court for Fairfax County” alleging “that M[r]s. Plofchan [was] incapacitated as it relates to financial matters, and that she had ineffectively attempted to revoke the POA and the Trust.”³³ The complaint sought monetary and injunctive relief.³⁴ In response, Mrs. Plofchan filed a plea in bar on the basis that collateral estoppel “barred the plaintiffs from relitigating the issue of her mental capacity because the New York guardianship court had made a factual finding that she was not an incapacitated person.”³⁵ The circuit court sustained the plea in bar and the cotrustees appealed.³⁶

On appeal the cotrustees argued that “the issue litigated in the New York guardianship proceeding and the issues in the current proceeding concerning M[r]s. Plofchan’s mental capacity [were] not the same” because the “standards to determine mental capacity are different in New York, Virginia, and Texas.”³⁷ In response, Mrs. Plofchan argued that “though the legal standards are different, the factual finding made by the New York guardianship court, that

29. *Id.* at 540, 855 S.E.2d at 861.

30. *Id.* at 540, 855 S.E.2d at 861.

31. *Id.* at 540, 855 S.E.2d at 861.

32. *Id.* at 540–41, 855 S.E.2d at 861.

33. *Id.* at 541, 855 S.E.2d at 861.

34. *Id.* at 541, 855 S.E.2d at 861–62.

35. *Id.* at 542, 855 S.E.2d at 862.

36. *Id.* at 542, 855 S.E.2d at 862.

37. *Id.* at 543, 855 S.E.2d at 862.

M[r]s. Plofchan was not an incapacitated person, meets the capacity requirements in Virginia and Texas.”³⁸

At the outset, the Supreme Court of Virginia reiterated that for collateral estoppel to apply, the party asserting it has the burden of establishing four elements: (1) privity of the parties, (2) the same issue of fact was litigated, (3) that same issue was essential to the prior judgment, and (4) “the prior proceeding must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied.”³⁹ The Supreme Court of Virginia found that Mrs. Plofchan could not establish the second element for two reasons.⁴⁰ “First, the New York guardianship court evaluated M[r]s. Plofchan’s mental capacity in terms of whether she needed a guardian appointed to protect her interests, applying a different standard than is applied when determining testamentary or contract capacity.”⁴¹ In addition, “the issue of whether M[r]s. Plofchan specifically had the capacity to revoke her Trust and POA was not actually litigated.”⁴² The Court specifically pointed out that the New York Mental Hygiene law under which the prior litigation ensued used a different “standard . . . from the New York standard for determining whether an individual had capacity to execute trust documents.”⁴³ Therefore, “[t]he determination of whether M[r]s. Plofchan had capacity to execute or revoke the POA and the Trust was not actually litigated in the New York guardianship proceeding.”⁴⁴ Because the same capacity issues “were not actually litigated in the New York guardianship proceeding . . . collateral estoppel does not preclude those [mental capacity] issues from being litigated in this case.”⁴⁵

This case illustrates the high burden a party faces to establish collateral estoppel. It truly needs to be the exact same issue with the exact same parties. And be particularly wary on relying on out-of-state proceedings for collateral estoppel in Virginia. The Court noted Virginia and New York standards on testamentary capacity are different, casting doubt on whether collateral estoppel would

38. *Id.* at 543, 855 S.E.2d at 862.

39. *Id.* at 543–44, 855 S.E.2d at 863.

40. *Id.* at 544, 855 S.E.2d at 863.

41. *Id.* at 544, 855 S.E.2d at 863.

42. *Id.* at 544, 855 S.E.2d at 863.

43. *Id.* at 544, 855 S.E.2d at 863.

44. *Id.* at 545, 855 S.E.2d at 863.

45. *Id.* at 546, 855 S.E.2d at 864.

have applied even if the New York court had applied its usual testamentary capacity standard and not New York Mental Hygiene law.⁴⁶ It takes detailed fact-specific analysis to assess whether a potential plea of collateral estoppel has a chance of success.

C. *Attorney's Fees for Breaching Covenant Not to Sue*

At some point, most, if not all, litigators daydream about not only winning but also recovering attorney's fees. As Virginia practitioners know, statutorily or contractually provided for attorney's fees are generally the only means for such recovery on state law claims. However, the Supreme Court of Virginia added an exception to that rule in its recent ruling on a covenant not to sue.

William Bolton and John McKinney “were partners in a business venture called Skyline Building Systems, L.L.C.” (“Skyline”).⁴⁷ Bolton ended up buying out McKinney fairly quickly, but McKinney “stayed on as an employee.”⁴⁸ After McKinney was fired, he “brought several lawsuits against Skyline and Bolton, causing Skyline to lose its financing and go out of business.”⁴⁹ Sadly, “Bolton filed for bankruptcy shortly thereafter, with McKinney listed as a creditor.”⁵⁰ “During the bankruptcy proceedings,” the parties settled and entered into a mutual release of claims.⁵¹ Bolton paid McKinney \$25,000, and McKinney “relinquished all rights to sue the Boltons.”⁵² “The recitals stated: ‘It is the intention of the parties that . . . there be no more litigation among the parties or claims asserted by any of them against the others.’”⁵³ The settlement agreement also included a mandatory arbitration provision.⁵⁴ As the reader can likely guess, “[l]ess than a year after entering into the settlement agreement, McKinney breached the covenant not to sue by suing Bolton twice in state court and once in federal court

46. *Id.* at 544–45, 855 S.E.2d at 863–64.

47. *Bolton v. McKinney*, 299 Va. 550, 552, 855 S.E.2d 853, 854 (2021).

48. *Id.* at 552, 855 S.E.2d at 854.

49. *Id.* at 552, 855 S.E.2d at 854.

50. *Id.* at 552, 855 S.E.2d at 854.

51. *Id.* at 552, 855 S.E.2d at 854.

52. *Id.* at 552, 855 S.E.2d at 854–55.

53. *Id.* at 552, 855 S.E.2d at 855.

54. *Id.* at 552, 855 S.E.2d at 855.

for claims relating to his time at Skyline.”⁵⁵ All three lawsuits were dismissed.⁵⁶

In response, Bolton then filed suit in Rockingham County Circuit Court seeking \$80,000 in attorney’s fees incurred defending the three lawsuits and “an injunction to prevent McKinney from pursuing further actions.”⁵⁷ McKinney first moved to dismiss on the basis that the mandatory arbitration provision controlled.⁵⁸ The circuit court denied that motion holding that “McKinney had waived the right to enforce the arbitration clause by filing multiple lawsuits against Bolton.”⁵⁹ The circuit court then granted partial summary judgment in Bolton’s favor on liability regarding breach of contract but ultimately ruled that it could not award damages (the attorney’s fees) because there was no statutory basis and the settlement agreement was “silent on whether fees should be awarded if the case was resolved at trial.”⁶⁰ Bolton appealed to the Supreme Court of Virginia.

“Virginia follows the American rule on attorney’s fees, under which ‘generally, absent a specific contractual or statutory provision to the contrary, attorney’s fees are not recoverable by a prevailing litigant from the losing litigant.’”⁶¹ However, attorney’s fees for a breach of a covenant not to sue was a matter of first impression and the court compared two different approaches by other jurisdictions. “Jurisdictions that do not allow for the award of attorney’s fees in this circumstance reason that the parties can provide for attorney’s fees in the contract if they so choose.”⁶² Other jurisdictions carve out an exception to the American rule for “those cases in which attorney fees are not awarded to the successful litigant in the case at hand, but rather are the subject of the lawsuit itself.”⁶³

55. *Id.* at 553, 855 S.E.2d at 855.

56. *Id.* at 553, 855 S.E.2d at 855.

57. *Id.* at 553, 855 S.E.2d at 855.

58. *Id.* at 553, 855 S.E.2d at 855.

59. *Id.* at 553, 855 S.E.2d at 855.

60. *Id.* at 553, 855 S.E.2d at 855. Apparently, it only provided for attorney’s fees for a prevailing party in arbitration. *Id.* at 556, 855 S.E.2d at 857.

61. *Id.* at 554, 855 S.E.2d at 855 (citations omitted).

62. *Id.* at 555, 855 S.E.2d at 856 (first citing *Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 1002, 1008 (2d Cir. 1966); then citing *Bunnett v. Smallwood*, 793 P.2d 157, 161 (Colo. 1990); and then citing *Dodge v. United Servs. Auto. Ass’n*, 417 A.2d 969, 976 (Me. 1980)).

63. *Id.* at 555, 855 S.E.2d at 856 (first citing *Zuniga v. United Can Co.*, 812 F.2d 443, 454 (9th Cir. 1987); then citing *Anchor Motor Freight, Inc. v. Int’l Brotherhood of Teamsters Local Union No. 377*, 700 F.2d 1067, 1072 (6th Cir. 1983); and then citing *Paper, Allied*,

The Court quoted with approval the New Hampshire Supreme Court:

When a party requests attorney's fees and costs in defending the action as consequential damages for breach of a covenant not to sue, this request does not seek an award of attorney's fees within the meaning of the American Rule. Rather, under these circumstances, attorney's fees and costs help to put the non-breaching party in the position it would have been in had the breach not occurred.⁶⁴

The New Hampshire court further explained that "the lawsuit itself is the object that the bargain intended to prohibit."⁶⁵ The Supreme Court of Virginia agreed and held that allowing for attorney's fees in a breach of a covenant not to sue "compensates the injured party for its loss and puts it back in the same position in which it would have been had the other party adhered to its promise."⁶⁶ The Court further affirmed the circuit court's determination that McKinney had "waived his right to enforce the arbitration provision by bringing numerous lawsuits."⁶⁷

The Court emphasized that it did "not overrule the general rule in Virginia law that attorney's fees are not recoverable as damages."⁶⁸ While it insists this analysis is limited to a breach of a covenant not to sue, the logic could slowly lead to an expansion of attorney's fees for other claims.⁶⁹ It is worth noting that Bolton had multiple alternative means of securing his fees. First, he could have included in the settlement agreement a broader attorney's fees provision. Second, it is unclear why he did not remove the prior lawsuits to arbitration where he should have recovered attorney's fees. Lastly, he could have moved for sanctions in the prior lawsuits as they appear to have lacked a good faith basis. If courts were more willing to sanction frivolous claims, then the Supreme Court of Virginia would not have had to expand the grounds for recovering attorney's fees. Awarding fees in this case certainly was

Chem. & Energy Workers Int'l Union, Local 5-508 v. Slurry Explosive Corp., 107 F. Supp. 2d 1311, 1331 (D. Kan. 2000)).

64. *Id.* at 555–56, 855 S.E.2d at 856 (quoting *Pro Done, Inc. v. Basham*, 172 N.H. 138, 210 A.3d 192, 203 (N.H. 2019)).

65. *Pro Done*, 210 A.3d at 202.

66. *Bolton*, 299 Va. at 556, 855 S.E.2d at 857.

67. *Id.* at 556, 855 S.E.2d at 857.

68. *Id.* at 557, 855 S.E.2d at 857.

69. After all, litigation and attorney's fees are a foreseeable consequence of most, if not all, material breaches of contract.

the equitable result, but perhaps it could have been achieved without a change in Virginia law on the recovery of attorney's fees.

D. *Appeals by Persons Who Were Not Parties*

In an adoption case, the Supreme Court of Virginia clarified who and how may attack orders as void ab initio due to lack of subject matter jurisdiction.⁷⁰ In 2013, Elizabeth Quinn who had a child from a previous relationship, married James LeRoy Quinn.⁷¹ Elizabeth's mother is Michelina Bonanno.⁷² The next year, in 2014, a court awarded joint legal custody of the child to Elizabeth and Michelina, physical custody to Elizabeth, and a visitation schedule to Michelina.⁷³ Unfortunately, Elizabeth passed away in October 2018.

A couple months later, James "filed a petition for adoption."⁷⁴ Due to the undisputed "lack of visitation or contact" from the child's biological father, James argued that he did not need the biological father's consent to the adoption.⁷⁵ As to Michelina, James argued that her consent was also unnecessary "because she was not a parent of the child and grandparents have no parental rights."⁷⁶

The circuit court, by entered order, referred to the Department of Social Services ("DSS") for an investigation pursuant to Virginia Code section 63.2-1208.⁷⁷ DSS attempted to contact Michelina several times but were ultimately only able to "exchange[] . . . voicemail messages."⁷⁸ DSS sent a certified letter to Michelina, "which was signed for" eventually.⁷⁹ "After interviewing James and the child, the social worker reported favorably on their relationship and recommended that the [circuit] court enter a final order of adoption without an interlocutory order and probationary period under [Virginia] Code [section] 63.2-1210."⁸⁰ DSS filed a

70. *Bonanno v. Quinn*, 299 Va. 722, 858 S.E.2d 181 (2021).

71. *Id.* at 727, 858 S.E.2d at 182.

72. *Id.* at 727, 858 S.E.2d at 182.

73. *Id.* at 727, 858 S.E.2d at 182.

74. *Id.* at 727, 858 S.E.2d at 182.

75. *Id.* at 727, 858 S.E.2d at 182–83.

76. *Id.* at 727, 858 S.E.2d at 183.

77. *Id.* at 727, 858 S.E.2d at 183.

78. *Id.* at 727, 858 S.E.2d at 183.

79. *Id.* at 727, 858 S.E.2d at 183.

80. *Id.* at 727, 858 S.E.2d at 183.

supplemental memorandum regarding a phone call with Michelina where she “denied knowledge of James’s petition to adopt the child and denied consent to the adoption.”⁸¹ The memorandum also summarized Michelina’s concerns that she had also provided over email.⁸² Several weeks later on April 30, 2019, the “court entered a final order of adoption” which, on May 21, 2019, James forwarded to Michelina via e-mail.⁸³

On May 30, 2019, Michelina filed a notice of appeal to the Court of Appeals of Virginia and simultaneously in circuit court filed “a motion to unseal the proceeding and to vacate and set aside the final order” as well as a motion to stay the order.⁸⁴ In addition to arguing the merits in the motion, Michelina argued that the final order “was void due to fraud upon the court and lack of notice to a legal custodian.”⁸⁵ “Alternatively, she argued that the court retained jurisdiction to alter the order within six months under [Virginia] Code [section] 63.2-1216.”⁸⁶ Later in July, she “filed another motion asserting that the order was void ab initio on the ground that James had not fulfilled the procedural requirements for a step-parent adoption as required by [section] 63.2-1214.”⁸⁷

Michelina continued her attack on the adoption order in both the court of appeals and circuit court. She filed her petition with the court of appeals and requested a hearing in circuit court on her motions.⁸⁸ The circuit court issued a letter opinion stating it “may consider whether an earlier order is void ab initio after the 21-day period provided by Rule 1:1 has elapsed, [but] in this case [Michelina’s] appeal . . . divested the circuit court of jurisdiction in the matter.”⁸⁹ James filed a motion to dismiss her appeal on the basis that she “had not filed a motion to intervene in the adoption proceeding below” despite having “actual and constructive notice as a result of the Department of Social Services’ attempts to contact

81. *Id.* at 727, 858 S.E.2d at 183.

82. *Id.* at 727, 858 S.E.2d at 183.

83. *Id.* at 727, 858 S.E.2d at 183. The court noted this email was sent after 4:00 PM. *Id.* at 727, 858 S.E.2d at 183. Perhaps the timing of waiting twenty-one days was not coincidental to the Court.

84. *Id.* at 727–28, 858 S.E.2d at 183.

85. *Id.* at 728, 858 S.E.2d at 183.

86. *Id.* at 728, 858 S.E.2d at 183.

87. *Id.* at 728, 858 S.E.2d at 183.

88. *Id.* at 728, 858 S.E.2d at 183.

89. *Id.* at 728, 858 S.E.2d at 183.

her.”⁹⁰ Therefore, according to James she did not have standing to appeal as she was a nonparty.⁹¹ The circuit court then entered an order denying Michelina a hearing “for the reasons stated in its letter opinion” which prompted Michelina to file a second notice of appeal (based on that order as opposed to the adoption order).⁹² “The [c]ourt of [a]ppeals consolidated the two appeals.”⁹³ “[T]he [c]ourt of [a]ppeals granted James’ motion and dismissed the appeals . . . because [Michelina] had neither moved to intervene nor entered an appearance before entry of the final order” making her a nonparty and “lack[ing] standing to appeal.”⁹⁴ Michelina appealed.⁹⁵

Michelina first argued that the court of appeals erred in holding “that she was not a party to the proceeding below.”⁹⁶ The Supreme Court of Virginia began its analysis on the use of “party” in the applicable statutory language: “[a]ny aggrieved party may appeal to the [c]ourt of [a]ppeals.”⁹⁷ To the Court, “[t]he dispositive issue is the meaning of the word ‘party.’”⁹⁸ It noted that “‘party’ is not merely a synonym of ‘person.’”⁹⁹ Furthermore, the General Assembly has separately used both “party aggrieved” or “aggrieved party” versus “person aggrieved” or “aggrieved person” in a significant number of statutes.¹⁰⁰ Pointing to examples from different statutes the court “illustrate[d] that the General Assembly knows the difference between persons and parties.”¹⁰¹

However, “that only a ‘party’ may appeal to the [c]ourt of [a]ppeals [was] only the first step in [their] analysis” and next the Court analyzed “what kind of ‘party’ the General Assembly meant.”¹⁰² The Court stated that, generally, a “party” meant “a

90. *Id.* at 728, 858 S.E.2d at 183.

91. *Id.* at 728, 858 S.E.2d at 183.

92. *Id.* at 728, 858 S.E.2d at 183.

93. *Id.* at 728, 858 S.E.2d at 183.

94. *Id.* at 728, 858 S.E.2d at 183–84.

95. *Id.* at 729, 858 S.E.2d at 184.

96. *Id.* at 729, 858 S.E.2d at 184.

97. *Id.* at 729, 858 S.E.2d at 184 (emphasis omitted) (quoting VA. CODE ANN. § 17.1-405 (Repl. Vol. 2020)).

98. *Id.* at 729, 858 S.E.2d at 184.

99. *Id.* at 729, 858 S.E.2d at 184. Notably, later in its opinion, the court “expressly reject[ed] the general legal definition that equates the terms ‘aggrieved party’ and ‘person aggrieved.’” *Id.* at 739 n.1, 858 S.E.2d at 190 n.1.

100. *Id.* at 729, 858 S.E.2d at 183.

101. *Id.* at 730, 858 S.E.2d at 184.

102. *Id.* at 730, 858 S.E.2d at 184.

party to the lawsuit.”¹⁰³ The Court further acknowledged that “[t]here are other, specific meanings of [a] ‘party’ . . . that include . . . those who could be joined, those who should be joined, or those who must be joined, but who have not been joined yet.”¹⁰⁴ However, pointing to *Wingfield v. Crenshaw*, the Court held “that the General Assembly did not intend the word ‘party’ in [Virginia] Code [section] 17.1-405 to include those who might, should, or must be joined as parties, but rather to include only those who actually have been so joined.”¹⁰⁵ That case’s syllabus stated “an appeal is not allowable ‘in behalf of a person, *who may be interested*, but whose name does not appear as party, in the record of the court from which the appeal is taken.”¹⁰⁶ The Court, therefore, conclusively held “that the term ‘aggrieved party’ in [section] 17.1-405 . . . confers standing to bring an appeal to the [c]ourt of [a]ppeals only on those who were litigants joined in the [lower court] proceeding. . . .”¹⁰⁷

The Court went on to explicitly clarify several procedural issues that provide guidance for future cases. First, the Court’s holding on standing did not and does not prevent a litigant from filing a motion to intervene in a matter and becoming a party.¹⁰⁸ If that motion is granted, then obviously as discussed above, the litigant becomes a party and has full standing and rights of appeal as any other party. If the Court denies the motion to intervene, then the litigant may appeal that denial of becoming a party, but not the merits of the case itself.¹⁰⁹

The Court also clarified that a notice of appeal only divests the lower court of jurisdiction once the twenty-one days (or other applicable timeline) passes.¹¹⁰ “[T]he lower court retains jurisdiction to do acts it is expressly empowered to do by statutes or the Rules

103. *Id.* at 730, 858 S.E.2d at 184 (quoting *Party*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

104. *Id.* at 730, 858 S.E.2d at 185.

105. *Id.* at 731, 858 S.E.2d at 185; 13 Va. (3 Hen. & M.) 245, 258–59 (1808) (Fleming, J., seriatim opinion).

106. *Bonanno*, 299 Va. at 731, 858 S.E.2d at 185 (quoting *Wingfield*, 13 Va. at 245).

107. *Id.* at 732, 858 S.E.2d at 185 (emphasis omitted).

108. *Id.* at 732, 858 S.E.2d at 185.

109. *Id.* at 732, 858 S.E.2d at 185–86. “However, an appeal from the denial of a motion for leave to intervene brings only the subject of the motion and whether it should have been granted, not the merits of the case, before the appellate court.” *Id.* at 732, 858 S.E.2d at 186 (citing *Mattaponi Indian Tribe v. Va. Marine Res. Comm’n*, 45 Va. App. 208, 214 n.3, 609 S.E.2d 619, 622 (2005)).

110. *Id.* at 733–34, 858 S.E.2d at 186.

of this Court within the periods of time provided for doing.”¹¹¹ So the circuit court was correct in that it did not have jurisdiction to hear Michelina’s motions, but on the basis that more than twenty-one days had elapsed from the order, not simply because Michelina had also filed a notice of appeal.¹¹²

Finally, the Court explained how void ab initio (or at least arguably void) orders may be attacked or declared as void. Michelina strongly argued in reliance on language from the Court’s opinion in *Virginian-Pilot Media Cos. v. Dow Jones & Co.*:

[Void ab initio orders] are absolute nullities, and may be impeached directly or collaterally by *all persons*, anywhere at any time, or in any manner; and may be declared void by every court in which they are called in question. . . . The point may be raised at any time, in any manner, before any court, or by the court itself.¹¹³

The Court noted that opinion was “limited . . . to judgments challenged as void for lack of subject-matter jurisdiction.”¹¹⁴ Importantly, the appellant in that case “had followed a valid method to bring the appeal: it had filed a motion to intervene in the circuit court, which denied the motion, and then appealed from the denial.”¹¹⁵ The Court distinguished *Virginian-Pilot* from Michelina’s appeal in the following ways: the Court in this case for instance, had the “power to adjudicate adoption petitions under [Virginia] Code [sections] 17.1-513 and 63.2-1201” and Michelina “did not file a motion to intervene.”¹¹⁶ The Court “still further . . . declar[ed] that the language . . . that orders void even for lack of subject-matter jurisdiction may be challenged ‘by all persons, anywhere, at any time, or in any manner,’ is a rhetorical flourish that does not accurately state the law.”¹¹⁷ “Consequently, [the Court] strongly discourage[s] litigants from invoking that language in future proceedings.”¹¹⁸

111. *Id.* at 733, 858 S.E.2d at 186.

112. *Id.* at 734, 858 S.E.2d at 186.

113. 280 Va. 464, 469–70, 698 S.E.2d 900, 903 (2010) (emphasis added).

114. *Bonanno v. Quinn*, 299 Va. at 734, 858 S.E.2d at 187 (citation omitted).

115. *Id.* at 735, 858 S.E.2d at 187 (citation omitted).

116. *Id.* at 735, 858 S.E.2d at 187. “[C]ircuit courts have subject-matter jurisdiction to adjudicate adoptions, so there is nothing more for us to decide on that question.” *Id.* at 735, 858 S.E.2d at 187.

117. *Id.* at 736, 858 S.E.2d at 188 (quoting *Barnes v. Am. Fertilizer*, 144 Va. 692, 704, 130 S.E.2d 902, 906 (1925)). The author would still advise litigants to refrain from describing any other Supreme Court of Virginia analysis as a “rhetorical flourish.”

118. *Id.* at 738, 858 S.E.2d at 189.

The Court concluded with specific guidance on how to challenge an order that is void ab initio absent a motion to intervene. One “may take the risk of putting it to the test by violating it” when proceedings to enforce it are instituted “raise the argument that [the order] is void and a nullity in defense.”¹¹⁹ The risk is “if the defense subsequently proves unsuccessful, he or she would then face the consequences of disobedience.”¹²⁰ A less risky option is to file “an action seeking a declaratory judgment” or a motion to vacate.¹²¹ The Court noted that the twenty-one-day timeline in Rule 1:1 “does not apply to a motion to vacate or set aside a judgment on the ground that it was void ab initio when the motion was filed by a party to the proceeding in which the putative judgment was entered.”¹²²

This case captures the importance of a solid understanding of civil procedure. Michelina could have attacked the adoption order in a myriad of ways. Unfortunately, she chose a path that did not give her a chance to attack the merits of the case.

E. *Inviting Error Doctrine*

An eminent domain case serves as a useful reminder that a party cannot invite error and hope to prevail on that issue. A business “owned 44.048 acres of land in Fluvanna County” of which the Virginia Department of Transportation (“VDOT”) condemned 0.166 of an acre in fee simple, 0.103 of an acre for a permanent drainage easement, and 0.0443 of an acre in temporary construction easements.¹²³ The merits of the condemnation case are not germane to the procedural issue. The parties could not agree on the value of the take and proceeded to trial.¹²⁴ After trial before commissioners, there was a majority award (three commissioners) and minority award (two commissioners), with minority award being roughly half of the majority award.¹²⁵ Both awards were identical as to the fee simple acquisition, drainage easement, and temporary

119. *Id.* at 737, 858 S.E.2d at 188.

120. *Id.* at 737, 858 S.E.2d at 188.

121. *Id.* at 737, 858 S.E.2d at 188.

122. *Id.* at 737, 858 S.E.2d at 188.

123. *Palmyra Assocs., L.L.C. v. Comm’r Highways*, 299 Va. 377, 379–80, 851 S.E.2d 743, 744 (2020).

124. *See id.* at 380–81, 851 S.E.2d at 744–50.

125. *Id.* at 381, 851 S.E.2d at 745.

easement (the “take”) but varied significantly on the damage to the residue.¹²⁶

VDOT filed post-trial motions seeking to strike the landowner’s testimony on the damage to the residue.¹²⁷ The Fluvanna County Circuit Court agreed that the “testimony should be stricken” and “stated that it would ‘entertain argument’ by counsel ‘as to whether the Court should . . . confirm the award of the take only, or grant a new trial.’”¹²⁸ Counsel for the landowner stated that it “did not agree on the court’s ruling striking the testimony, [but] ‘both sides agree to the first of the 2 options [the court] gave [them].’”¹²⁹ The landowner appealed and one of its assignments of error was that “the trial court erred in putting the parties on terms of either the court confirming the value of the take or ordering a new trial.”¹³⁰

However, the court noted that the landowner “did not object at that time that the trial court was ‘putting it on terms,’ but rather ‘it agreed that the circuit court should confirm the award rather than grant a new trial.’”¹³¹ Pursuant to the invited error doctrine, a litigant cannot approbate and reprobate: “that is ‘invit[ing] error as the [litigant] . . . did here, and then [attempting to take] advantage of the situation by his own wrong.’”¹³²

Litigation and trials are difficult, stressful, and time-sensitive endeavors. However, if you disagree with a court’s action (and it is important enough for a potential appeal), one must disagree or object on the record. Otherwise, either waiver or invited error doctrine will likely apply and bar the appeal.

II. NEW LEGISLATION

The General Assembly has made several seismic changes to the Virginia court system with an impact on litigation in the commonwealth.

126. *Id.* at 381, 851 S.E.2d at 745.

127. *Id.* at 381–82, 851 S.E.2d at 745–46.

128. *Id.* at 382, 851 S.E.2d at 746.

129. *Id.* at 382, 851 S.E.2d at 746.

130. *Id.* at 386, 851 S.E.2d at 748.

131. *Id.* at 387, 851 S.E.2d at 748.

132. *Id.* at 387, 851 S.E.2d at 748 (quoting *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 367, 585 S.E.2d 578, 581 (2003)).

A. *Expansion of the Court of Appeals*

As most know by now, the General Assembly significantly expanded the jurisdiction of the Court of Appeals of Virginia.¹³³ This is certainly the largest shakeup of Virginia appellate procedure, jurisdiction, and the judiciary in decades. However, except for the size of the court, the effective date of this seismic change was delayed to January 1, 2022.¹³⁴ Parties in the commonwealth will have an appeal *as a matter of right* to the court of appeals in any civil case.¹³⁵ There are other significant changes, but because none of these changes are in effect as of the time of publication, this article will limit its discussion to this jurisdictional change. Providing an appeal as a matter of right to every civil case certainly on its face prolongs the potential timeline or life of a lawsuit, and therefore the associated fees and costs. No longer is a jury verdict the most likely final decision. The data from the first couple years following expansion will be fascinating. Will deep-pocket defendants (or desperate plaintiffs who received nothing) appeal every case with an evidentiary close call? Will parties be more willing to try cases knowing that they always have an appeal? One would assume that parties will test the court of appeals in large volume at first and only adjust when trends emerge.¹³⁶ Only one thing is certain: at some point a lawyer will be thrilled that this new matter-of-right appeal exists when victory is snatched from the jaws of defeat at trial and that same lawyer will feel the exact opposite when that same court takes away a favorable jury verdict.

B. *Expansion of Jurisdictional Limits of General District Court*

The General Assembly was not done in its changes to the judicial system. It also increased the jurisdictional limits of the general district courts from \$25,000 to \$50,000 for personal injury and wrongful death claims.¹³⁷ This change should significantly increase

133. Act of Mar. 31, 2021, ch. 489, 2021 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 8.01-626, 15.2-2656, -3221) (Cum. Supp. 2021)).

134. *Id.* Practitioners may have noticed the ongoing search and applications to fill the judicial vacancies.

135. § 17.1-405 (Cum Supp. 2021). There are limited exceptions such as actions before the State Corporation Commission and other corporate administrative issues. § 17.1-406 (Cum. Supp. 2021).

136. It is worthwhile to note that the Court of Appeals can summarily affirm without oral argument. VA. SUP. CT. R. 5A:27. (Repl. Vol. 2021).

137. Act of Mar. 18, 2021, ch. 199, 2021 Va. Acts __, __ (codified as amended at §§ 8.01-195.4, 16.1-77, 16.1-107 (Cum. Supp. 2021)).

caseloads in general district courts for such claims. The speed and low cost of general district courts certainly should be appealing for the plaintiffs.

However, it will be interesting to see if the plaintiffs are dissuaded from filing cases with a value between \$25,000 and \$50,000 because not only will there be an appeal as a matter of right to circuit court (de novo on appeal) but, as discussed above, there will be, as of January 1, 2022, an appeal as a matter of right to the court of appeals should the plaintiff prevail again. The option added a couple of years ago¹³⁸ to switch between general district court and circuit court along with this jurisdictional change certainly increases litigation options and strategies for the plaintiffs.

Hopefully this jurisdictional change works as intended and these cases are tried and disposed of in general district court, providing efficiency and finality to parties and decreasing the caseload for circuit courts.

C. *Access to Criminal Files and Incident Information Under the Virginia Freedom of Information Act*

Documents related to a criminal investigation or incident that are not ongoing are now required to be produced pursuant to the Virginia Freedom of Information Act.¹³⁹ The new statute defines ongoing as “a case in which the prosecution has not been finally adjudicated, the investigation continues to gather evidence for a possible future criminal case, and such case would be jeopardized by the premature release of evidence.”¹⁴⁰ The statute defines criminal investigative files as “any documents and information, including complaints, court orders, memoranda, notes, initial incident reports, filings through any incident-based reporting system, diagrams, maps, photographs, correspondence, reports, witness statements, or evidence.”¹⁴¹ The statute now specifies the circumstances for exemptions:

1. Would interfere with a particular ongoing criminal investigation or proceeding in a particularly identifiable manner;

138. Act of Mar. 22, 2019, ch. 787, 2019 Va. Acts 1842, 1843 (codified as amended at §§ 8.01-195.4, 16.1-77 (Cum. Supp. 2021)).

139. § 2.2-3706.1 (Cum. Supp. 2021).

140. *Id.* § 2.2-3706.1(A) (Cum. Supp. 2021).

141. *Id.* § 2.2-3706.1(B)(2) (Cum. Supp. 2021). Before only criminal incident reports, not the criminal investigative file, were subject to disclosure. *Compare id.* § 2.2-3706 (Repl. Vol. 2017), *with id.* § 2.2-3706.1(B)(2) (Cum. Supp. 2021).

2. Would deprive a person of a right to a fair trial or an impartial adjudication;
3. Would constitute an unwarranted invasion of personal privacy;
4. Would disclose (i) the identity of a confidential source or (ii) in the case of a record compiled by a law-enforcement agency in the course of a criminal investigation, information furnished only by a confidential source;
5. Would disclose law-enforcement investigative techniques and procedures, if such disclosure could reasonably be expected to risk circumvention of the law; or
6. Would endanger the life or physical safety of any individual.¹⁴²

These are specific exemptions, but they still leave a fair amount of discretion, particularly the sixth one. Unless there is a strong basis for one of these exemptions to apply, criminal incident reports and investigative files must be turned over when requested. Consequently, third-party subpoenas for such criminal incident reports or investigative files will have to be honored now as well.

D. *Limitations on Enforcement of Judgments*

The General Assembly lowered the limitations period for the enforcement of a judgement from twenty to ten years.¹⁴³ The new statute does still allow extensions. “The limitation [period] . . . may be extended by the recordation of a certificate . . . in the clerk’s office in which such judgment lien is recorded and executed by either the judgment lien creditor or by his duly authorized attorney-in-fact or agent.”¹⁴⁴ Of course, the judgment creditor must record the certificate prior to the expiration of the limitations period.¹⁴⁵ The statute provides a form that the judgment creditor must use for filing.¹⁴⁶ The statute provides that the judgment creditor can record ten year extensions only twice.¹⁴⁷ The prior statute had a twenty-year limitations period which could be extended once for another twenty-year term.¹⁴⁸ Therefore the total amount of time has decreased from forty years to thirty years. This change lowers the period for enforcing a judgment and increases the “effort” required from a judgment creditor to enforce its judgment. That is

142. *Id.* § 2.2-3706.1(C)(1)–(6) (Cum. Supp. 2021).

143. Act of Mar. 31, 2021, ch. 486, 2021 Va. Acts __, __ (codified at § 8.01-251 (Cum. Supp. 2021)).

144. § 8.01-251(B) (Cum. Supp. 2021).

145. *Id.*

146. *Id.* § 8.01-251(G) (Cum. Supp. 2021).

147. *Id.* § 8.01-251(B) (Cum. Supp. 2021).

148. *Id.* § 8.01-251 (Cum. Supp. 2021).

consistent with the recent trend of increasing protections for debtors.

E. *Res Judicata in Workers' Compensation*

The General Assembly enacted a new statute that preserves all workers' compensation claims not "expressly adjudicate[d]" by an order of the Commission.¹⁴⁹ Pursuant to this new statute, res judicata, waiver, abandonment, or dismissal do not apply unless the order specifically addresses the claim.¹⁵⁰ This statute codifies (and protects) the general approach and understanding by claimant attorneys.

III. RULES OF THE SUPREME COURT OF VIRGINIA

There have been several changes to the Rules of the Supreme Court of Virginia over the past year.

A. *Electronic Filing in the Supreme Court of Virginia*

Technology comes for us all, even the Supreme Court of Virginia. Electronic filing is now the standard with the Supreme Court of Virginia.¹⁵¹ Now, with limited exceptions, all documents must be filed electronically in PDF format.¹⁵² In terms of documents, the appellate record is exempt if it is not available in digital form.¹⁵³ In terms of parties, only pro se prisoners and "litigant[s] who ha[ve] been granted leave by the Court to file documents in paper form" are exempt from the e-filing requirement.¹⁵⁴ When e-filing any pleading or document, the party must serve via e-mail on the same date and certify on the pleading the date and e-mail of service.¹⁵⁵ Parties exempt from e-filing continue to serve pleadings by mail or other manners consistent with Rule 1:12.¹⁵⁶

149. Act of Mar. 31, 2021, ch. 515, 2021 Va. Acts __, __ (codified at § 65.2-706.2 (Cum. Supp. 2021)).

150. § 65.2-706.2 (Cum. Supp. 2021).

151. VA. SUP. CT. R. 5:1B (Repl. Vol. 2021).

152. R. 5:1B(b) (Repl. Vol. 2021).

153. R. 5:1B(a) (Repl. Vol. 2021).

154. R. 5:1B(b) (Repl. Vol. 2021).

155. R. 5:1B(c) (Repl. Vol. 2021).

156. *Id.*

Acknowledging the reality that technical issues arise, the Rules provide specific guidance when that occurs. If unable to file due to such a glitch:

[C]ounsel must provide to the clerk of this Court on the next business day all documentation that exists demonstrating the attempt to electronically file the document in the VACES system, any error message received in response to the attempt, documentation that the document was later successfully resubmitted, and a motion requesting that the Court accept the resubmitted document.¹⁵⁷

It is imperative therefore that practitioners document their efforts and should document what appears on their screen: either via screenshot or taking a picture of the screen with another device. In the event the filing system is unavailable in “the last filing hours of a business day, the office of the clerk of the Court is deemed to have been closed on that day solely with respect to that attempted filing and the provisions of Virginia Code [section] 1-210(B) and (C) apply to that particular attempted filing.”¹⁵⁸ E-filed pleadings may be “digitally signed using the conventional electronic signature ‘s/,’”¹⁵⁹ matching the practice in federal court. In a pleasant surprise, if you are filing in paper form, you only need to file the original, copies are no longer required.¹⁶⁰

The adoption of e-filing led to changes across a host of Rules for the sake of consistency. However, those changes generally mirror the substance discussed above.¹⁶¹ Notably, these e-filing procedures now apply to the (expanding) court of appeals as well.¹⁶²

B. *Petitions for Rehearing and Rehearing En Banc*

The Supreme Court of Virginia significantly simplified the rules regarding petitions for a rehearing and petitioners for a rehearing en banc for the court of appeals. Now simply “[a]ny party seeking a rehearing of a decision or order of [a panel of] this Court finally disposing of a case must, within 14 days following such decision or order, file a petition for rehearing.”¹⁶³ The procedure for a

157. R. 5:1B(d) (Repl. Vol. 2021).

158. *Id.*

159. R. 5:1B(f) (Repl. Vol. 2021).

160. R. 5:1B(e) (Repl. Vol. 2021).

161. *See, e.g.*, R. 5:5–5:6 (Repl. Vol. 2021).

162. R. 5A:1 (Repl. Vol. 2021).

163. R. 5A:33 (Repl. Vol. 2021).

rehearing en banc is the same.¹⁶⁴ Responses to such motions are still not allowed.¹⁶⁵ However, now the court of appeals must rehear the matter within twenty days of the order granting the rehearing.¹⁶⁶

C. Appeal by One Party in Courts Not-of-Record

The Supreme Court of Virginia amended Rule 7B:12 to make it conform with Virginia Code section 16.1-106(B).¹⁶⁷ The new rule (and the statute) provides that a timely filed notice of appeal “by one party from a judgment . . . of the general district court is deemed a timely notice of appeal by any other party.”¹⁶⁸ However, that mutuality only applies to the notice. Each party must still then perfect its appeal separately.¹⁶⁹ This is certainly a welcome change for practitioners. Prior to this rule (and statutory change), in any general district court proceeding involving claims by multiple parties, a party risked that the other party would appeal its claim and leave that as the sole issue in circuit court.¹⁷⁰ For example, let’s say a defendant files a counterclaim and the court dismissed both the plaintiff’s original claim and the defendant’s counterclaim. In that scenario, the defendant could note its appeal on the last day, and if the plaintiff (who was willing to move from litigation) did not appeal, then only the counterclaim survived in circuit court. Under the new rule, parties have an opportunity to preserve all claims to the circuit court.

D. Deposition Transcripts to be Used at Eminent Domain Trial

The Supreme Court of Virginia amended the uniform pretrial scheduling order for eminent domain proceedings. Specifically, the order now states that counsel “must confer and attempt to identify and resolve all issues regarding the use of depositions at trial.”¹⁷¹ Counsel must exchange designations of non-party depositions at least thirty days before trial.¹⁷² The order allows the thirty-day

164. R. 5A:34 (Repl. Vol. 2021).

165. R. 5A:33–34 (Repl. Vol. 2021).

166. R. 5A:34 (Repl. Vol. 2021).

167. R. 7B:12 (Repl. Vol. 2021).

168. R. 7B:12(A) (Repl. Vol. 2021).

169. R. 7B:12(B) (Repl. Vol. 2021).

170. Compare R. 7B:12(A) (Repl. Vol. 2021), with R. 7B:12(A) (Repl. Vol. 2021).

171. R. 1 app. 3, at XI (Repl. Vol. 2021).

172. *Id.*

deadline to be amended by good cause or agreement of counsel.¹⁷³ The non-designating party must file its objections or counter-designation within seven days of the designation.¹⁷⁴ “Further, it becomes the obligation of the non-designating parties to bring any objections or other unresolved issues to the court for hearing no later than 5 days before the day of trial.”¹⁷⁵ The rule clarifies expectations and should help streamline issues before trial.

173. *Id.*

174. *Id.*

175. *Id.*