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Civil Practice and Procedure

Christopher S. Dadak

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CIVIL PRACTICE AND PROCEDURE

*Christopher S. Dadak **

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INTRODUCTION

This Article’s focus and analysis encompasses the past year of Supreme Court of Virginia opinions, legislation, and revisions to the Rules of the Supreme Court of Virginia affecting Virginia civil procedure.¹ This Article is not meant to be all-encompassing, but does endeavor to capture the highlights of changes or analysis regarding Virginia civil procedure. The opinions discussed throughout this Article do not all reflect changes in Virginia jurisprudence on civil procedure, but also address clarifications or reminders from the court on certain issues it has deemed worthy of addressing (and that practitioners continue to raise). The Article first addresses opinions of the supreme court, then new legislation enacted during the 2018 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. *Confessed Judgments*

In November 2008, Hunter Mill West, L.C. (“HMW”) “executed a deed of trust note . . . in the original principal amount of \$1,000,000, payable to BDC Capital, Inc.” (“BDC”).² Full payment of the note was due by November 19, 2009.³ The regular interest rate for the note was 14% annually, which in the case of a default increased to 24%.⁴ The note had “a clause appointing an attorney in fact for HMW and permitting that attorney to confess judgment against HMW for the unpaid balance[,] . . . plus interest, court costs, expenses, and reasonable attorney’s fees.”⁵ It also “included a clause providing for compound interest.”⁶ Furthermore, “any judgment entered against HMW would bear interest

1. Due to the publishing schedule, the relevant “year” is approximately June 2018 through June 2019.

2. *Catjen, LLC v. Hunter Mill West, L.C.*, 295 Va. 625, 627, 817 S.E.2d 139, 140 (2018).

3. *Id.* at 628, 817 S.E.2d at 140.

4. *Id.* at 628, 817 S.E.2d at 140.

5. *Id.* at 628, 817 S.E.2d at 140.

6. *Id.* at 628, 817 S.E.2d at 140.

at the highest rate of interest being paid . . . on the date of the judgment.”⁷

As the reader can likely guess, HMW did not repay the note and in September 2010, received a notice of default from BDC.⁸ HMW then filed for Chapter 11 bankruptcy, during which BDC filed a claim for the outstanding balance.⁹ The parties “disagreed as to when the interest rate increased to 24%” with BDC claiming it “occurred on the date of maturity” whereas HMW posited it “occurred when BDC sent the notice of default.”¹⁰ “Neither party appeared to dispute the fact that the interest continued to compound monthly after the [n]ote matured.”¹¹ The bankruptcy court entered an order with interest calculated pursuant to HMW’s position and though “HMW’s bankruptcy petition was ultimately dismissed, the [order] was preserved and remained binding.”¹²

On August 11, 2016, BDC’s successor-in-interest, Catjen, LLC (“Catjen”), through an attorney-in-fact, “confessed judgment against HMW” for the outstanding amount “plus costs and reasonable attorney’s fees.”¹³ Just under a month later, HMW “moved to set aside the confessed judgment” on four distinct grounds.¹⁴ It also requested a bill of particulars and to “set the matter on the Court’s docket for trial.”¹⁵ At the hearing on its motion, HMW “abandoned three of the bases . . . in its motion and limited its argument to whether” the interest was correctly calculated “by compounding [it] . . . after the date of maturity.”¹⁶ HMW argued after maturity, “only simple interest applied.”¹⁷ Meanwhile, Catjen argued “that the interest [was] contractual[,] . . . an incident of the debt,” and continued to apply “until the debt was paid.”¹⁸ “After considering the parties’ arguments, the trial court denied HMW’s motion to set aside.”¹⁹

7. *Id.* at 628, 817 S.E.2d at 140.

8. *Id.* at 628, 817 S.E.2d at 140.

9. *Id.* at 628, 817 S.E.2d at 140.

10. *Id.* at 628, 817 S.E.2d at 140.

11. *Id.* at 628–29, 817 S.E.2d at 140.

12. *Id.* at 629, 817 S.E.2d at 140–41.

13. *Id.* at 629, 817 S.E.2d at 141.

14. *Id.* at 629, 817 S.E.2d at 141.

15. *Id.* at 629, 817 S.E.2d at 141.

16. *Id.* at 629, 817 S.E.2d at 141.

17. *Id.* at 629–30, 817 S.E.2d at 141.

18. *Id.* at 630, 817 S.E.2d at 141.

19. *Id.* at 630, 817 S.E.2d at 141.

HMW filed a motion to reconsider again on the basis of incorrectly compounding the interest. It argued that the “extraordinary difference in the amounts . . . clearly raised an adequate defense to the confessed judgment.”²⁰ Finally, it requested that the court vacate the order denying its motion and hear argument again or that it “enter a remittitur order reducing the confessed judgment amount” to what HMW calculated.²¹ The trial court granted HMW’s motion, indicated it would use HMW’s calculated amount, entered an order granting it, and “continued the matter for entry of [an] order regarding interest.”²² After motions and argument regarding a nonsuit and supplements to the record,²³ “[t]he trial court then entered an order awarding Catjen \$1,101,171.75 based on HMW’s calculations.”²⁴ Catjen appealed.

In its first (and main) assignment of error, Catjen argued that Virginia Code section 8.01-433 “does not permit a trial court to enter a modified confessed judgment over the objection of the party seeking the judgment.”²⁵ The supreme court examined “the nature of a confessed judgment.”²⁶ It noted its history, holding that it is “an extraordinary remedy that permits a creditor to obtain an enforceable judgment against a debtor without the need to file suit or to establish any fact other than the existence of a valid instrument permitting the creditor to direct an attorney-in-fact to confess the judgment.”²⁷ Notably, “[a] fundamental requirement to the entry of a confessed judgment is that the creditor must agree to the amount of the confessed judgment.”²⁸ However, there is a “limited exception to the finality of a confessed judgment.”²⁹ A debtor can move to set it aside “on any ground which would have been adequate defense or setoff in an action at law instituted up-

20. *Id.* at 630, 817 S.E.2d at 141 (internal quotation marks omitted).

21. *Id.* at 630, 817 S.E.2d at 141 (internal quotation marks omitted). Both sides had competing amounts throughout the litigation, however the precise amounts are not germane to the procedural issues analyzed by the Supreme Court of Virginia.

22. *Id.* at 630, 817 S.E.2d at 141 (internal quotation marks omitted).

23. *Id.* at 630–31, 817 S.E.2d at 141–42. Neither are relevant to the court’s analysis of confessed judgments.

24. *Id.* at 631, 817 S.E.2d at 142.

25. *Id.* at 632, 817 S.E.2d at 142.

26. *Id.* at 632, 817 S.E.2d at 142.

27. *Id.* at 632, 817 S.E.2d at 142 (quoting *Safrin v. Travaini Pumps USA, Inc.*, 269 Va. 412, 419, 611 S.E.2d 352, 356 (2005)).

28. *Id.* at 632, 817 S.E.2d at 142.

29. *Id.* at 632, 817 S.E.2d at 143.

on the judgment creditor's note."³⁰ If such motion is granted, the statute provides that "the case shall be placed on the trial docket of the court, and . . . be the same as if an action at law had been instituted."³¹ Under the "plain language of the statute," the "only issue to be determined [by the trial court] is whether the judgment debtor's pleadings assert a facially adequate defense or set-off."³² In other words, once HMW asserted a facially plausible defense, Catjen was entitled to a full trial on the merits.³³

B. *Default Judgment and General Appearances*

Brooks & Co. General Contractors, Inc. ("Brooks") "leased office and warehouse space to Plastic Lumber & Outdoor, LLC ("Plastic Lumber")."³⁴ "Colin McCulley personally guaranteed Plastic Lumber's lease obligations."³⁵ When Plastic Lumber failed to pay, Brooks filed suit against it and McCulley "for unpaid rent, utilities, late fees, interest, and attorney fees and costs."³⁶ Brooks obtained posted service on McCulley.³⁷ Neither party responded to Brooks's complaint.³⁸ Brooks requested and received default judgment against the defendants.³⁹ About a month later, Brooks, through the circuit court clerk, summonsed McCulley "to appear before a commissioner in chancery . . . to answer debtor's interrogatories."⁴⁰

The commissioner, pursuant to a request from McCulley's counsel, continued the interrogatories to a later date.⁴¹ Before the rescheduled debtor's interrogatories date, McCulley moved the Richmond City Circuit Court to vacate the default judgment as void because Brooks "had failed to properly serve the complaint, thereby depriving the circuit court of personal jurisdiction over

30. *Id.* at 633, 817 S.E.2d at 143 (quoting VA. CODE ANN. § 8.01-433 (Repl. Vol. 2015)).

31. *Id.* at 633, 817 S.E.2d at 143 (quoting VA. CODE ANN. § 8.01-433 (Repl. Vol. 2015)).

32. *Id.* at 633, 817 S.E.2d at 143.

33. *Id.* at 634-35, 817 S.E.2d at 144.

34. *McCulley v. Brooks & Co. Gen. Contractors, Inc.*, 295 Va. 583, 586, 816 S.E.2d 270, 271 (2018).

35. *Id.* at 586, 816 S.E.2d at 271.

36. *Id.* at 586, 816 S.E.2d at 271.

37. *Id.* at 586, 816 S.E.2d at 271.

38. *Id.* at 587, 816 S.E.2d at 271.

39. *Id.* at 587, 816 S.E.2d at 271.

40. *Id.* at 587, 816 S.E.2d at 271.

41. *Id.* at 587, 816 S.E.2d at 271.

McCulley.”⁴² The motion in its heading and conclusion stated that McCulley was making a “special appearance for the sole purpose of contesting this Court’s exercise of personal jurisdiction over him.”⁴³ McCulley’s and Brooks’s counsel communicated and disagreed on whether the debtor’s interrogatories should be stayed while McCulley’s motion was pending.⁴⁴

The circuit court then heard McCulley’s motion and “ruled that the ‘initial service’ of process on him ‘was defective’ but that ‘McCulley waived any objection to this defect in service by making a general appearance in this case through his post-judgment participation in Debtor’s Interrogatories.’”⁴⁵ McCulley appealed and because Brooks “concede[d] that it failed to certify that it had satisfied the mailing requirement of Code § 8.01-296(2)(b)[.] [t]he only issue before [the supreme court] [was] whether McCulley waived his right to challenge the default judgment as void *ab initio* by participating in the debtor’s-interrogatory proceedings.”⁴⁶

The supreme court analyzed the issue under the principles of waiver by general appearance and ratification by equitable estoppel. The supreme court began by discussing its prior analysis of personal jurisdiction. “The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.”⁴⁷ The court specifically distinguished that such judgments are void *ab initio* as opposed to ones that are simply voidable.⁴⁸ The court went on to state that while it has “held many times that a party making a general appearance *prior* to the entry of a final judgment waives any objection to the service of process,” it has “never held . . . that a general appearance *after* the entry of a final judgment retroactively waives an objection to the court’s failure to obtain personal jurisdiction *prior* to the entry of the void judgment.”⁴⁹ After all, “[j]ust as medicine may cure a sick man of a fatal disease but not revive him after his burial, a liti-

42. *Id.* at 587, 816 S.E.2d at 271–72.

43. *Id.* at 587, 816 S.E.2d at 272.

44. *Id.* at 587–88, 816 S.E.2d at 272.

45. *Id.* at 588, 816 S.E.2d at 272 (quoting Joint Appendix at 95, *McCulley*, 295 Va. 583, 816 S.E.2d 270 (2018) (No. 171117)).

46. *Id.* at 588, 816 S.E.2d at 272.

47. *Id.* at 589, 816 S.E.2d at 273 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969)).

48. *Id.* at 589, 816 S.E.2d at 273.

49. *Id.* at 589–90, 816 S.E.2d at 273.

gant can ‘cure’ the absence of personal jurisdiction by making a general appearance prior to final judgment but cannot resurrect a void judgement thereafter.”⁵⁰ The supreme court agreed with other courts and held that “a general appearance after the entry of a final judgment that is void ab initio because of the absence of personal jurisdiction does not, by itself, convert the prior void judgment into a valid one.”⁵¹ The court then analyzed whether McCulley had forfeited his right to challenge the judgment. It stated:

[A] challenge to an “invalid” default judgment, raised for the first time after entry of the judgment, should be denied if (1) the challenger “had actual notice of the judgment” and ratified it by manifesting “an intention to treat the judgment as valid,” *and* (2) granting relief from the judgment “would impair another person’s substantial interest of reliance on the judgment.”⁵²

The issue is analyzed through the lens of equitable estoppel. “[T]he theory is not that a void judgment has somehow become valid[;] . . . rather, as a result of the parties’ conduct in connection with the judgment the judgment debtor is held estopped to assert that invalidity.”⁵³ However, the court did not “expressly adopt or reject the Restatement’s view . . . because neither of its two prerequisites is present in this case.”⁵⁴ The court found that McCulley’s actions and communications regarding the debtor’s interrogatories “did not *manifest* an intention to accept the validity of the default judgment” nor did it appear that setting aside the default judgment “would impair another person’s substantial interest of reliance on the judgment.”⁵⁵ Specifically, there was “no partial enforcement of the void judgment, no sale of debtor assets . . . , no seizure of bank accounts[,] and [t]he contest appear[ed] to be entirely limited to the original parties.”⁵⁶ The supreme court reversed the trial court’s ruling and vacated the default judgment.⁵⁷

Interestingly, Justice McCullough’s concurrence raised an area of concern for practitioners. He noted that the majority opinion

50. *Id.* at 590, 816 S.E.2d at 273.

51. *Id.* at 590–91, 816 S.E.2d at 274.

52. *Id.* at 591, 816 S.E.2d at 274 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 66 (AM. LAW INST. 1982)).

53. *Id.* at 592, 816 S.E.2d at 275 (quoting *Katter v. Ark. La. Gas Co.*, 765 F.2d 730, 734 n.8 (8th Cir. 1985)).

54. *Id.* at 593, 816 S.E.2d at 275.

55. *Id.* at 593–95, 816 S.E.2d at 275–76 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 66 (AM. LAW INST. 1982)).

56. *Id.* at 595, 816 S.E.2d at 276.

57. *Id.* at 595, 816 S.E.2d at 276.

“does not address, much less resolve, whether an appearance made prior to the entry of judgment before someone who is not a judge constitutes a general appearance that waives any defect in personal jurisdiction.”⁵⁸ He noted the “variety of institutional actors [that] perform valuable functions that assist the courts” such as “clerks of court, mediators, commissioners of accounts, and commissioners in chancery.”⁵⁹ He concluded that “[a] future case will have to answer th[e] question” of whether “appearing before a person who is assisting the court in the dispatch of judicial business constitutes a general appearance that waives defects in personal jurisdiction.”⁶⁰

The court declined to give explicit future guidance on the main issues. It has made clear that just a general appearance will not cure personal jurisdiction defects *after* a judgment. However, it declined to adopt the Second Restatement of Judgments’ factors in determining an equitable estoppel of or forfeit of waiving the defect. It also declined to further specify acts that constitute a general appearance. Practitioners should be sure to explicitly and unambiguously note a special appearance if there are any personal jurisdiction issues. They should also be careful to limit any action or communication with third parties (prior to judgment) to minimize the risk of making a general appearance.⁶¹

C. Jurisdiction of Juvenile & Domestic Relations Court on Withdrawn Appeal

The court handled a case purely focused on the procedural effect on the jurisdiction of Juvenile & Domestic Relations (“J&DR”) courts. James Spear (“Spear”) and Nawara Omary (“Omary”) divorced in 2010.⁶² The Fairfax County Circuit Court entered a final divorce order, by incorporating a written agreement by the parties, providing that Spear pay Omary child support.⁶³ Later the Department of Social Services, Division of Child Support Enforcement (“DCSE”), moved to “reopen the case, inter-

58. *Id.* at 595, 816 S.E.2d at 277 (McCullough, J., concurring).

59. *Id.* at 595–96, 816 S.E.2d at 277 (McCullough, J., concurring).

60. *Id.* at 596, 816 S.E.2d at 277 (McCullough, J., concurring).

61. Unless one wants to be the “future case” that Justice McCullough predicts.

62. *Spear v. Omary*, 297 Va. 251, 251, 825 S.E.2d 288, 288 (2019).

63. *Id.* at 251, 825 S.E.2d at 288.

vene in the matter, and transfer the case to J[&]DR court.”⁶⁴ The circuit court granted the motion and ordered “that the establishment, modification and enforcement of child support and maintenance shall be transferred forthwith to the J[&]DR court.”⁶⁵

A couple years later, “Spear noted an appeal to the circuit court” because his motion to modify child support due to a material change was denied.⁶⁶ However, he withdrew his appeal and the circuit court’s order provided, “in its entirety, ‘Defendant JAMES B. SPEAR, JR. hereby withdraws his appeal in the above captioned matter; it is therefore ORDERED AND ADJUDGED, that the appeal in the above captioned matter is hereby withdrawn.’”⁶⁷

After another couple years, DCSE this time moved the J&DR court to modify the child support pursuant to a material change in circumstances.⁶⁸ This time, the J&DR court “granted the motion and [significantly] reduced Spear’s child support obligation.”⁶⁹ Omary appealed to the circuit court on the basis that the J&DR court “never possessed jurisdiction to enter the [order].”⁷⁰ The circuit court granted her appeal and vacated the order which meant that Spear was obligated to pay the original higher child support.⁷¹

The parties agreed that Virginia Code section 16.1-106.1(F) controlled the issue; however, its interpretation was the main issue.⁷² The section provides that “when a party withdraws an appeal from the J[&]DR court, ‘unless the circuit court orders that the case remain in the circuit court, the case shall be remanded to the J[&]DR court for purposes of enforcement and future modifications and shall be subject to all the requirements of § 16.1-297.’”⁷³ The court found that language unambiguous (and not meaningfully impacted by section 16.1-297) in holding that sec-

64. *Id.* at 251, 825 S.E.2d at 288.

65. *Id.* at 251–52, 825 S.E.2d at 288–89.

66. *Id.* at 251, 825 S.E.2d at 289.

67. *Id.* at 251–52, 825 S.E.2d at 289 (quoting Joint Appendix at 21, *Spear*, 297 Va. 251, 825 S.E.2d 288 (2019) (No. 180224)).

68. *Id.* at 252, 825 S.E.2d at 289.

69. *Id.* at 252, 825 S.E.2d at 289.

70. *Id.* at 252, 825 S.E.2d at 289.

71. *Id.* at 252, 825 S.E.2d at 289.

72. *See id.* at 252–53, 825 S.E.2d at 289.

73. *Id.* at 252, 825 S.E.2d at 289 (quoting VA. CODE ANN. § 16.1-106(F) (Repl. Vol. 2015)).

tion 16.1-106.1(F) “does not require a circuit court to expressly remand a matter to the J[&]DR court upon a withdrawn appeal.”⁷⁴ Because section 16.1-106.1(F) “operates to remand the case by operation of law[,] . . . when the circuit court failed to expressly retain jurisdiction, [the section] operated to remand the case.”⁷⁵ The supreme court reversed and remanded the case to the circuit court.⁷⁶

Justice Kelsey and Justice McClanahan dissented.⁷⁷ The dissent disagreed with the majority’s holding that “because the remand was supposed to happen, it did happen.”⁷⁸ “To be sure, the reason that appellate courts expressly order remands is because remands do not happen automatically.”⁷⁹ The justices focused on the grammatical structure of the key sentence in the section. They noted that “[s]hall be remanded’ is a passive-voice verb . . . [and] a transitive verb.”⁸⁰ “This grammatic structure . . . requires an actor (the circuit court), to perform the action (remanding) upon the subject of the sentence (the case).”⁸¹ The section omitted the actor (circuit court), but that did “not mean that the remand occurs automatically.”⁸² Simply put, a “case cannot remand itself.”⁸³

Unlike the majority, the dissent found two other applicable statutes useful to its interpretation. Pursuant to Virginia Code section 16.1-297, “the circuit court [must] file a copy of its ‘judgment’ with the J[&]DR court within 21 days after the entry of a ‘final judgment upon an appeal from the J[&]DR court.’”⁸⁴ Meanwhile Virginia Code section 16.1-106.1(C) “directs the circuit court to ‘enter an order disposing of the case in accordance with the judgment or order entered in the district court.’”⁸⁵ The dissent found that the circuit court in this case failed to perform all “the

74. *Id.* at 253, 825 S.E.2d at 289.

75. *Id.* at 253, 825 S.E.2d at 289.

76. *Id.* at 253, 825 S.E.2d at 289.

77. *Id.* at 253, 825 S.E.2d at 290 (Kelsey, J. & McClanahan, J., dissenting).

78. *Id.* at 254, 825 S.E.2d at 290.

79. *Id.* at 254, 825 S.E.2d at 290.

80. *Id.* at 254, 825 S.E.2d at 290.

81. *Id.* at 254–55, 825 S.E.2d at 290.

82. *Id.* at 255, 825 S.E.2d at 290.

83. *Id.* at 255, 825 S.E.2d at 290.

84. *Id.* at 255, 825 S.E.2d at 291 (quoting VA. CODE ANN. § 16.1-297 (Repl. Vol. 2015)).

85. *Id.* at 255, 825 S.E.2d at 291 (quoting VA. CODE ANN. § 16.1-106.1(C) (Repl. Vol. 2015)).

requirements listed in the governing statutes.”⁸⁶ The dissent concluded that the remand (just one of the requirements) could not automatically occur.⁸⁷

Both opinions are powerful in their simplicity and they underscore the importance (and complexity) of procedural aspects of appeals between lower courts. However, the dissent’s conclusion does raise unanswered practical issues in terms of next steps. Spear had filed an “uncontested withdrawal request in the circuit court.”⁸⁸ Would the dissent’s conclusion simply require Spear to submit a final order that explicitly complied with statutory requirements and would the circuit court have the discretion to enter a different order?⁸⁹ The majority’s opinion appears to favor substance over form and provides an expeditious solution to the issue. This case is a useful reminder that even when the other side “withdraws” an appeal, one should not be distracted by the victory but still closely read the proposed order and verify that all results and effects are to your client’s favor (or at least as you intend).

D. *Personal Jurisdiction*

Personal jurisdiction again arose as an issue before the Supreme Court of Virginia in a dispute involving probate matters and a defendant residing in Canada. Victoria Lynn Mercer (“Mercer”) filed suit in Loudoun County against Lori-Belle MacKinnon (“MacKinnon”), a Canadian citizen and resident.⁹⁰ “Mercer [was] the daughter of Clifton Wood [(“Clifton”)] and the step-daughter of Eleanor Grace Wood” (“Eleanor”), who were a couple.⁹¹ MacKinnon was Eleanor’s niece.⁹²

In 2014, Mercer took care of Eleanor and Clifton who, at the time, resided in Virginia.⁹³ At the end of the year, MacKinnon came to Virginia and took Eleanor back to Canada “while Mercer

86. *Id.* at 256, 825 S.E.2d at 291.

87. *Id.* at 256, 825 S.E.2d at 291.

88. *Id.* at 256, 825 S.E.2d at 291.

89. For example, specifically retaining jurisdiction of the matter.

90. *Mercer v. MacKinnon*, 297 Va. 157, 159–60, 823 S.E.2d 252, 253–54 (2019).

91. *Id.* at 159–60, 823 S.E.2d at 253.

92. *Id.* at 159, 823 S.E.2d at 253.

93. *Id.* at 159, 823 S.E.2d at 253.

was occupied with settling Clifton in a nursing home facility.”⁹⁴ Before leaving Virginia, MacKinnon had Clifton endorse a new power of attorney making MacKinnon Eleanor’s new attorney-in-fact.⁹⁵ MacKinnon quickly “used this power of attorney to remove Clifton’s name from one or more bank accounts that had been jointly held by Eleanor and Clifton,” which allowed MacKinnon to take “control of Eleanor’s retirement accounts.”⁹⁶ She also named herself as “the death beneficiary on at least one of the couple’s bank accounts.”⁹⁷

Subsequently, MacKinnon and Mercer separately “filed petitions with the Prince William County Circuit Court seeking to be appointed as the guardian and conservator for Eleanor.”⁹⁸ During the litigation, “Mercer and MacKinnon were required to provide regular accountings to a guardian *ad litem* appointed by the [circuit court].”⁹⁹ “MacKinnon never challenged the [circuit court’s] jurisdiction . . . and appeared in that court regularly, by counsel and in person.”¹⁰⁰

Following the conclusion of that litigation, “Mercer filed a complaint in the Circuit Court of Loudoun County against MacKinnon” where she “alleged that MacKinnon had illegally used assets from accounts belonging to Eleanor and Clifton to fund . . . litigation in Canada.”¹⁰¹ In response, MacKinnon argued that the court did not have personal jurisdiction over her pursuant to the Virginia Long-Arm Statute.¹⁰² Mercer disagreed and advanced several arguments in response, including that the court had personal jurisdiction pursuant to Virginia Code section 8.01-328(A)(1) and (A)(3) and “because MacKinnon had voluntarily subjected herself to the jurisdiction of Virginia through her actions in the Prince William County Court.”¹⁰³ At the hearing, the circuit court in agreeing with MacKinnon “indicated that Code section 8.01-328.1(A)(4) constituted the only viable ground for personal jurisdiction over MacKinnon, but . . . concluded that the facts did not

94. *Id.* at 159, 823 S.E.2d at 253.

95. *Id.* at 159, 823 S.E.2d at 253.

96. *Id.* at 159–60, 823 S.E.2d at 253.

97. *Id.* at 160, 823 S.E.2d at 253.

98. *Id.* at 160, 823 S.E.2d at 253.

99. *Id.* at 160, 823 S.E.2d at 253–54.

100. *Id.* at 160, 823 S.E.2d at 254.

101. *Id.* at 160, 823 S.E.2d at 254.

102. *Id.* at 160, 823 S.E.2d at 254.

103. *Id.* at 161, 823 S.E.2d at 254.

support a finding that MacKinnon engaged in a ‘persistent course of conduct in Virginia.’”¹⁰⁴ Mercer appealed but only on the grounds that the circuit court erred in finding that “MacKinnon did not engage in a ‘persistent course of conduct’ in the forum jurisdiction” and abandoned all of her other arguments at the circuit court.¹⁰⁵

Virginia Code section 8.01-328.1(A)(4) grants a court personal jurisdiction for a cause of action arising from the person’s “[c]ausing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct.”¹⁰⁶ The definition of “persistent course of conduct” was an issue of first impression for the court.¹⁰⁷ It turned to persuasive authority for relevant analysis. It found the analysis in *Willis v. Semmes, Bowen & Semmes* to be particularly illustrative.¹⁰⁸ “At a minimum, the plaintiff must prove that the defendant maintained some sort of ongoing interactions with the forum state.”¹⁰⁹ In *Willis*, a Maryland law firm “had represented the plaintiff in a Virginia bankruptcy action.”¹¹⁰ The plaintiff attempted to sue the law firm for conversion of a note in Maryland.¹¹¹ The court held “that ‘while the defendants’ actions in Virginia during the bankruptcy proceeding satisfied the first three subsections of Virginia’s long arm statute, this limited, discrete quantum of activity does not amount to ‘persistent conduct’ in this state within the meaning of the statute.”¹¹²

In this matter, “MacKinnon’s pre-litigation contact with Virginia consisted of traveling to Virginia, having certain legal documents drawn up, . . . returning with her aunt to Canada[,] . . . [and] litigating a single case.”¹¹³ These contacts “did not ‘exist for

104. *Id.* at 161, 823 S.E.2d at 254 (quoting VA. CODE ANN. § 8.01-328.1(A)(4) (Repl. Vol. 2015 & Cum. Supp. 2019)).

105. *Id.* at 161, 823 S.E.2d at 254. The reason for abandoning other provisions of the long-arm statute is unclear. *Id.* at 161, 823 S.E.2d at 254.

106. VA. CODE ANN. § 8.01-328.1(A)(4) (Repl. Vol. 2015 & Cum. Supp. 2019)).

107. *See Mercer*, 297 Va. at 163, 823 S.E.2d at 255.

108. *Id.* at 162–63, 823 S.E.2d at 255 (citing *Willis v. Semmes, Bowen, & Semmes*, 441 F. Supp. 1235, 1242 (E.D. Va. 1977)).

109. *Id.* at 162, 823 S.E.2d at 255 (quoting *Willis*, 441 F. Supp. at 1242).

110. *Id.* at 163, 823 S.E.2d at 255 (citing *Willis*, 441 F. Supp. at 1240–41).

111. *Id.* at 163, 823 S.E.2d at 255 (citing *Willis*, 441 F. Supp. at 1240).

112. *Id.* at 163, 823 S.E.2d at 255 (alteration in original) (quoting *Willis*, 441 F. Supp. at 1242).

113. *Id.* at 164, 823 S.E.2d at 256.

a long or longer than usual time or continuously,’ and they were not ‘enduring’ or ‘lingering.’”¹¹⁴ The supreme court directly analogized to *Willis* and found that “MacKinnon’s contacts with Virginia constituted a ‘limited, discrete quantum of activity.’”¹¹⁵

As law students can attest, long-arm statute analysis, particularly “persistent conduct,” is highly fact-specific. However, this case has several useful lessons. First, if you have other arguments for personal jurisdiction other than “persistent conduct,” make sure to maintain and preserve those arguments. Second, a useful line seems to be whether the defendant has contacts with the state of some regularity and outside of any actions related to the lawsuit. MacKinnon’s contacts with Virginia were not minimal, but they were undeniably discrete by being limited to actions directly tied to the lawsuit.

E. *Eminent Domain Final Order*

The Supreme Court of Virginia addressed how the finality of orders can be different in eminent domain proceedings. A landowner appealed from an “order distributing funds held by the circuit court in th[e] condemnation proceeding.”¹¹⁶ However, his appeal was filed more than thirty days after the “order confirming the jury’s award of just compensation” and the condemnor, Town of Culpeper (“Town”), argued it was untimely because pursuant to Virginia Code section 25.1-239 that order was a “final order for purposes of appeal.”¹¹⁷

The supreme court began by noting the “unique framework by which courts conduct condemnation proceedings,” which “are two-stage.”¹¹⁸ Because of the two-stage framework, the statutes related to condemnation proceedings are quite specific. The Virginia Code “provides that ‘the order confirming, altering or modifying the report of just compensation shall be final . . . [and] any party aggrieved thereby may apply for an appeal to the Supreme

114. *Id.* at 164, 823 S.E.2d at 256 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1996)).

115. *Id.* at 164–65, 823 S.E.2d at 256 (quoting *Willis*, 441 F. Supp. at 1242).

116. *Dwyer v. Town of Culpeper*, 297 Va. 204, 204, 825 S.E.2d 79, 79 (2019).

117. *Id.* at 204, 825 S.E.2d at 79.

118. *Id.* at 204, 825 S.E.2d at 79–80 (quoting *Williams v. Fairfax Cty. Redevelopment & Hous. Auth.*, 227 Va. 309, 313, 315 S.E.2d 202, 204 (1984)).

Court.”¹¹⁹ The statutes could not have been clearer to the court.¹²⁰

The landowner’s argument focused on the fact that the Culpeper County Circuit Court “specifically retained jurisdiction” in its order.¹²¹ However, this argument was unpersuasive due to the condemnation framework where “[t]he first stage addresses the confirmation, alteration or modification of the report of just compensation” and the “second stage deals with the distribution of the funds paid into circuit court.”¹²² Critically (and fatally for the landowner), “[e]ach proceeding is separate and distinct and *each provides for an appeal* from any decision rendered therein.”¹²³ The circuit court only retained jurisdiction to accomplish the second stage of the proceeding, which did not affect the finality of its first stage determination.¹²⁴ The supreme court dismissed the appeal as untimely.¹²⁵

F. *Commencement of Thirty-Day Appeal Timeline*

The Supreme Court of Virginia clarified when the thirty-day timeline to appeal begins in orders granting leave to file an amended complaint. In perhaps a welcome respite to the reader, the underlying facts of this case are not relevant to the analysis. A plaintiff filed a lawsuit against a hospital for a variety of claims.¹²⁶ The defendant hospital filed demurrers, which were sustained.¹²⁷ The Roanoke City Circuit Court, by order dated October 25, 2016, sustained the demurrers and granted the plaintiff leave to file an amended complaint within twenty-one days.¹²⁸ The order stated that if the plaintiff did not timely file the amended complaint, “the case is dismissed with prejudice.”¹²⁹ The

119. *Id.* at 204–05, 825 S.E.2d at 80 (quoting VA. CODE ANN. §§ 25.1-239(A)–(B) (Repl. Vol. 2016)).

120. *Id.* at 205, 825 S.E.2d at 80.

121. *Id.* at 205, 825 S.E.2d at 80.

122. *Id.* at 205, 825 S.E.2d at 80 (citing VA. CODE ANN. §§ 25.1-239 to -241 (Repl. Vol. 2016)).

123. *Id.* at 205, 825 S.E.2d at 80 (emphasis added).

124. *See id.* at 206, 825 S.E.2d at 80.

125. *Id.* at 206, 825 S.E.2d at 81.

126. *Parker v. Carilion Clinic*, No. 170132, 2018 Va. LEXIS 211, at *1 (Nov. 1, 2018).

127. *Id.*

128. *Id.* at *4.

129. *Id.* (quoting Joint Appendix at 80, *Parker*, No. 170132, 2018 LEXIS 211 (Va. Nov. 1, 2018)).

plaintiff never filed an amended complaint “but instead filed a notice of appeal on December 2, 2016.”¹³⁰ The defendant argued that the notice was untimely.¹³¹

Specifically, the defendant asserted “that Rule 1:1’s definition of when such an order is *entered* controls for the purpose of the 30-day deadline that Rule 5:9(a) imposes.”¹³² Rule 5:9(a) states “[n]o appeal shall be allowed unless, within 30 days after the entry of final judgment[,] . . . counsel for the appellant files with the clerk of the trial court a notice of appeal.”¹³³ The Court noted it had previously held in *Norris v. Mitchell* that a similar order did “not become final until the time for amendment lapses.”¹³⁴ The analysis in *Norris* was helpful to the court, because it established that in such orders “there is no dismissal if the plaintiff files the amended complaint before the deadline and the order thus never becomes final.”¹³⁵ This is critical because “the commencement of the 30-day period for filing a notice of appeal requires ‘the entry of [a] *final* judgment.’”¹³⁶ Therefore, “an order must be *both* entered *and* final before the 30-day period for filing a notice of appeal commences.”¹³⁷ The supreme court found that the appeal was timely.¹³⁸

While the procedural aspect of this case is straightforward, there is some uncertainty whether its conclusion still holds true. The court relied in its analysis on its precedent where it “decisively h[e]ld that an order merely sustaining a demurrer without dismissing the case is not final.”¹³⁹ As discussed *infra* Part III.C, subsequent to this matter, the Rules of the Supreme Court were amended to state that “[a]n order sustaining a demurrer . . . is sufficient to dispose of the claim(s) or cause(s) of action . . . even if [it] does not expressly dismiss the [matter].”¹⁴⁰ Until the issue is clarified with the new Rule in place, the safest practice would be

130. *Id.*

131. *Id.*

132. *Id.* at *5.

133. *Id.* (quoting VA. SUP. CT. R. 5:9(a) (Repl. Vol. 2019)).

134. *Id.* (citing *Norris v. Mitchell*, 255 Va. 235, 239–40, 495 S.E.2d 809, 811–12 (1998)).

135. *Id.* at *6 (citing *Norris*, 255 Va. at 239, 495 S.E.2d at 811).

136. *Id.* at *7 (citing VA. SUP. CT. R. 5:9(a) (Repl. Vol. 2019)).

137. *Id.*

138. *Id.* The rest of the court’s opinion dealt with the merits of the matter and demurrers, which are not relevant to the procedural aspect.

139. *Id.*

140. VA. SUP. CT. R. 1:1(c) (Repl. Vol. 2019).

to file a notice of appeal within thirty days of the order and not within thirty days of when the deadline to file an amended complaint passed.

II. NEW LEGISLATION

It has been a busy session in the General Assembly with several particularly noteworthy changes.

A. *Motions to Amend Claim Amount and Transfer Jurisdiction*

In probably the biggest legislative change related to civil procedure, the Virginia Code was amended to allow a plaintiff to move to amend the ad damnum and then—if applicable and requested—the court must transfer the suit to the court that has jurisdiction over the amended amount.¹⁴¹ Virginia Code section 8.01-195.4 now provides that:

While a matter is pending in a general district court or a circuit court, upon motion of the plaintiff seeking to increase or decrease the amount of the claim, the court shall order transfer of the matter to the general district court or circuit court that has jurisdiction over the amended amount of the claim without requiring that the case first be dismissed or that the plaintiff suffer a nonsuit, and the tolling of the applicable statutes of limitations governing the pending matter shall be unaffected by the transfer. Where such a matter is pending, if the plaintiff is seeking to increase or decrease the amount of the claim to an amount wherein the general district court and the circuit court would have concurrent jurisdiction, the court shall transfer the matter to either the general district court or the circuit court, as directed by the plaintiff, provided that such court otherwise has jurisdiction over the matter.¹⁴²

Meanwhile Virginia Code section 16.1-77, establishing jurisdiction of general district court, now states:

While a matter is pending in a general district court, upon motion of the plaintiff seeking to increase the amount of the claim, the court shall order transfer of the matter to the circuit court that has jurisdiction over the amended amount of the claim without requiring that the case first be dismissed or that the plaintiff suffer a nonsuit, and

141. Act of Mar. 22, 2019, ch. 787, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 8.01-195.4, 16.1-77 (Cum. Supp. 2019)).

142. VA. CODE ANN. § 8.01-195.4 (Cum. Supp. 2019).

the tolling of the applicable statutes of limitations governing the pending matter shall be unaffected by the transfer.¹⁴³

In practical terms, a suit pending in circuit court can now be amended to seek \$25,000 or less and transferred to general district court without requiring a nonsuit or dismissal without prejudice.¹⁴⁴ Meanwhile, a suit pending in general district court can be amended to seek over \$25,000, and the suit will be transferred to circuit court without requiring a nonsuit or dismissal without prejudice.¹⁴⁵ Once the transfer is entered and fees paid, the “clerk shall process the claim as if it were a new civil action.”¹⁴⁶

There are certain restrictions and requirements. In either case, the motion cannot be less than ten days before trial and the moving party must pay all applicable fees, including a filing fee, to the court where the case has been transferred.¹⁴⁷ It is the plaintiff’s responsibility to “prepare and present the order of transfer to the transferring court for entry,” and then suit can be removed from the original court’s docket.¹⁴⁸

This is a surprising change because the problems it fixes are minor, while the unintended consequences can be significant. One can certainly imagine scenarios where plaintiff’s counsel does not realize the realistic value of a case until it is already pending. However, the plaintiff already has the advantage of choosing the forum. Second, the plaintiff has the extraordinarily powerful ability to nonsuit a matter—a mulligan in litigation, if you will.¹⁴⁹ Therefore, a plaintiff already had the ability to move a case from general district court to circuit court or vice versa via a nonsuit.

Meanwhile, there is a world of issues this change has likely created. First, there is no specified limit on the number of these motions and the court is statutorily mandated to grant one. An easy method to abuse this new power would be to transfer a case from circuit court to general district court and then back to circuit court. These moves could result in a—by all practical terms—nonsuit while still maintaining the right to an official nonsuit.

143. *Id.* § 16.1-77 (Cum. Supp. 2019).

144. *See id.* § 8.01-195.4 (Cum. Supp. 2019).

145. *See id.* § 16.1-77 (Cum. Supp. 2019).

146. *See id.* §§ 8.01-195.4, 16.1-77 (Cum. Supp. 2019).

147. *Id.*

148. *Id.*

149. *Id.* § 8.01-380 (Repl. Vol. 2015).

Another area of potential abuse lies in a plaintiff filing a lawsuit in circuit court and “parking” it there for years before transferring it down to general district court. Because the transferred suit is treated as a “new civil action,” it appears this would allow a plaintiff to circumvent the requirement to serve process within a year of filing.¹⁵⁰

This change certainly provides greater flexibility to plaintiffs. However, if the areas of potential abuse are not addressed, the cure may be worse than the disease.

B. Use of Depositions and Affidavits in Motions for Summary Judgment

The General Assembly amended Virginia Code section 8.01-420 by adding Subsection (C).¹⁵¹ The new subsection provides in relevant part that “discovery depositions under Rule 4:5 and affidavits may be used in support of or in opposition to a motion for summary judgment in any action when the only parties to the action are business entities and the amount at issue is \$50,000 or more.”¹⁵² This change will have a significant impact particularly on commercial litigation. The inability to use deposition transcripts or affidavits is a significant procedural difference between litigating in state court as opposed to federal court. This change should significantly streamline the litigation of affected cases and, hopefully, decrease the expense of litigation.¹⁵³ Perhaps, if this change is a success, it will lead to additional expansions of the ability to use summary judgment in Virginia courts.

C. Statute of Limitations on Unsigned Contracts

The General Assembly amended Virginia Code section 8.01-246 to clarify the statute of limitations applicable to written but un-

150. *Id.* § 8.01-195.4 (Repl. Vol. 2015). Normally a plaintiff would have to use a nonsuit when faced with a motion to dismiss for untimely or defective service. *See id.* § 8.01-277(B) (Repl. Vol. 2015).

151. Act of Feb. 13, 2019, ch. 10, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-420 (Cum. Supp. 2019)).

152. VA. CODE ANN. § 8.01-420(C) (Cum. Supp. 2019).

153. However, there remains a tension between this expansion and the generally disfavored nature of summary judgment in Virginia. *See, e.g.,* Slone v. Gen. Motors Corp., 249 Va. 520, 522, 457 S.E.2d 51, 52 (1995) (describing summary judgment as a “drastic remedy”).

signed contracts.¹⁵⁴ Virginia Code section 8.01-246 now provides that any action on a “contract that is not otherwise specified and that is in writing and not signed by the party to be charged, or by his agent” shall be brought within three years.¹⁵⁵ This eliminates ambiguity for contracts that did not fall in the written and signed contract provisions under subsection (2) and the “unwritten contract, express or implied” provision under subsection (4).¹⁵⁶

D. *Waiver of Process and Determination of Indigency in No-Fault Divorce Actions*

The General Assembly made several relatively small but impactful changes to procedures regarding no-fault divorces. Virginia Code section 17.1-606 now specifies that there shall be a presumption that “a person who is a current recipient of a state or federally funded public assistance program for the indigent shall not be subject to fees and costs.”¹⁵⁷ The person must “certify to the receipt of such benefits under oath.”¹⁵⁸ This change should streamline the process to allow such individuals to simply file an affidavit to their receipt of state or federal public assistance.

Additionally, the General Assembly amended Virginia Code sections 20-99.1:1 and 20-106 to significantly simplify the process for no-fault divorces where a defendant executes a waiver of service.¹⁵⁹ Section 20-99.1:1 now provides that in

a suit for a no-fault divorce . . . any such waiver may occur within a reasonable time prior to or after the suit is filed, provided that a copy of the complaint is attached to such waiver, or is otherwise provided to the defendant, and the final decree of divorce as proposed by the complainant is signed by the defendant.¹⁶⁰

The use of waivers of service for no-fault divorces is not a novelty, particularly to legal aid or pro bono attorneys. Furthermore, this new provision does require that the defendant receive a copy of

154. Act of Mar. 5, 2019, ch. 241, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-246 (Cum. Supp. 2019)).

155. VA. CODE ANN. § 8.01-246(4) (Cum. Supp. 2019).

156. *Id.* § 8.01-246(2), (4) (Cum. Supp. 2019).

157. *Id.* § 17.1-606(B) (Cum. Supp. 2019).

158. *Id.*

159. Act of Feb. 22, 2019, ch. 133, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 20-99.1:1, -106 (Cum. Supp. 2019)).

160. VA. CODE ANN. § 20-99.1:1 (Cum. Supp. 2019).

the complaint and sign the final decree of divorce.¹⁶¹ However, the amended language in Virginia Code section 20-106 reveals the efficiency of this new provision. Section 20-106 now allows “the plaintiff or his attorney [to] take and file, as applicable, the complaint, the affidavits or depositions, any other associated documents, and the proposed decree contemporaneously, and a divorce may be granted solely on those documents where the defendant has waived service and, where applicable, notice.”¹⁶² In practical terms, practitioners can now prepare the pleadings in one meeting and then file them in one fell swoop. Previously a practitioner would typically need significantly more steps: file the complaint and indigency pleadings; secure a waiver of service and notice; file the waiver; take the necessary depositions or affidavits; and finally file the depositions or affidavits along with the final decree.

E. *Fact-Finding by Juvenile & Domestic Relations Court*

The jurisdiction of J&DR courts has slightly increased in Virginia. Pursuant to Virginia Code section 16.1-241(A)(1), J&DR courts can now “[m]ak[e] specific findings of fact required by state or federal law to enable a child to apply for or receive a state or federal benefit.”¹⁶³

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. *Limited Scope Appearances*

Through amendments to Rule 1:5, the Supreme Court of Virginia created a pilot project to allow attorneys to make limited scope appearances.¹⁶⁴ Rule 1:5 now allows legal aid attorneys¹⁶⁵ to

161. *Id.*

162. *Id.* § 20-106 (Cum. Supp. 2019).

163. *Id.* § 16.1-241(A)(1) (Cum. Supp. 2019).

164. VA. SUP. CT. R. 1:5(f) (Repl. Vol. 2019). Currently the pilot program is set to expire on January 1, 2022. *See* R. 1:5(f)(5) (Repl. Vol. 2019). Additionally, the rule specifies that it does apply to nor affect “another attorney appear[ing] in lieu of counsel of record for a particular proceeding or docket call,” i.e., local counsel or docket call coverage. R. 1:5A(f)(6) (Repl. Vol. 2019).

serve notice of a limited appearance in a matter.¹⁶⁶ The legal aid attorney must include in his notice that he has “a written agreement that the attorney will make a limited scope appearance in such action . . . and . . . specify[] the matters, hearings, or issues on which the attorney will appear for the party.”¹⁶⁷ Other attorneys may make a limited appearance only with leave of court, provided that they also comply with the requirements of a written agreement and identifications of the specific matters, hearings, or issues they are handling.¹⁶⁸ Throughout the duration of the limited appearance, the other parties are to serve all documents on both the limited attorney and her client, “who shall be considered an unrepresented party.”¹⁶⁹

There are several provisions regarding how the limited appearance can end. If the client endorses the attorney’s declaration “that counsel’s obligations under the limited scope appearance agreement have been satisfied,” then the attorney can file “a notice of completion of limited scope appearance” with at least seven days’ notice to her client.¹⁷⁰ If the client “cannot or will not” endorse the declaration, the attorney must file a motion to terminate the limited appearance and “afford seven days for objection.”¹⁷¹ If the client files an objection, the court may hold a hearing on the issue, but either way it must determine if “the attorney’s obligations under the notice of limited scope appearance have been met” to grant the motion.¹⁷² Finally, if there is no other counsel replacing the limited appearance attorney, then the notice of completion must provide “the address and telephone number of the [client] for use in subsequent mailings or service of papers and notices.”¹⁷³

This pilot program hopefully increases the flexibility of legal aid programs, their pro bono attorneys, and attorneys in general who want to help individuals in certain areas, but for a myriad of legitimate reasons cannot undertake representing the individual through the entire matter.

165. Direct employees or attorneys representing a client pro bono pursuant to a referral from legal aid. R. 1:5A(f)(1) (Repl. Vol. 2019).

166. *Id.*

167. *Id.*

168. R. 1:5(f)(2) (Repl. Vol. 2019).

169. R. 1:5(f)(3) (Repl. Vol. 2019).

170. R. 1:5(f)(4)(A) (Repl. Vol. 2019).

171. R. 1:5(f)(4)(B) (Repl. Vol. 2019).

172. *Id.*

173. R. 1:5(f)(4)(C) (Repl. Vol. 2019).

B. *Citation of Supplemental Authorities*

A minor change to Rule 5:6A specifies that supplemental authority to the supreme court must be filed with the clerk's office.¹⁷⁴ The amendment forbids filing a letter with such authority "directly with any Justice."¹⁷⁵ While mainly a codification of existing practice among appellate practitioners, this revision makes the procedure clear to less-seasoned practitioners and unrepresented parties.

C. *Finality of Orders*

The supreme court has significantly expanded Rule 1:1 addressing final orders, orders on demurrers, orders on summary judgment, and orders on motions to strike. The rule now specifies that a "judgment, order or decree is final if it disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done by the court except [its] ministerial execution."¹⁷⁶ The rule then, in separate subsections, provides that orders sustaining or granting demurrers, pleas in bar, and motions for summary judgment are "sufficient to dispose of the claim(s) or cause(s) of action . . . even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue" or "enter judgment for the moving party."¹⁷⁷ However, an order on a motion to strike that merely grants the motion but does not "enter[] summary judgment or partial summary judgment or dismiss[] the claim(s) or cause(s) of action at issue,"¹⁷⁸ is insufficient to dispose of the claim(s) or cause(s) of action at issue. This rule provides useful clarity in a common area of concern to attorneys and an unnecessary source of litigation.

174. R. 5:6A (Repl. Vol. 2019).

175. *Id.*

176. R. 1:1(b) (Repl. Vol. 2019).

177. R. 1:1(c)–(d) (Repl. Vol. 2019).

178. R. 1:1(e) (Repl. Vol. 2019).