

# University of Richmond Law Review

---

Volume 57  
Issue 1 *Annual Survey*

Article 6

---

11-1-2022

## Civil Practice and Procedure

Christopher S. Dadak

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [Civil Procedure Commons](#), [Courts Commons](#), [Judges Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Christopher S. Dadak, *Civil Practice and Procedure*, 57 U. Rich. L. Rev. 37 (2022).  
Available at: <https://scholarship.richmond.edu/lawreview/vol57/iss1/6>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# CIVIL PRACTICE AND PROCEDURE

*Christopher S. Dadak* \*

## TABLE OF CONTENTS

INTRODUCTION .....	39
I. DECISIONS OF THE SUPREME COURT OF VIRGINIA .....	39
A. <i>Nonsuiting After a Misnomer</i> .....	39
B. <i>Case Mooted on Appeal</i> .....	43
C. <i>Failure to Name Necessary Party in BZA Appeal</i> .....	44
D. <i>Personal Jurisdiction Through Order of             Publication</i> .....	46
II. NEW LEGISLATION.....	53
A. <i>Supreme Court of Virginia Jurisdiction over             Injunctions and Immunity</i> .....	53
B. <i>Medical Bills and Statements</i> .....	54
C. <i>Cause of Action for Dissemination of Intimate             Images</i> .....	55
D. <i>Promises Not to Plead Statute of Limitations</i> .....	56
E. <i>Nonsuits Following Appeal from General             District Court</i> .....	56
III. RULES OF THE SUPREME COURT OF VIRGINIA.....	57
A. <i>Final Pre-Trial Conference</i> .....	57
B. <i>Rule 4:5(b)(6) Depositions</i> .....	57

---

\* Principal, Guynn, Waddell, Carroll, & Lockaby, P.C., Salem, Virginia. J.D., 2012, University of Richmond School of Law; B.A., 2008, Washington and Lee University. The author thanks the *University of Richmond Law Review* editors for their diligence and patience in verifying the citations and quotations, reviewing, and editing this Article into its final form.

C. <i>Limited Scope Appearances</i> .....	58
D. <i>Extensions for Good Cause</i> .....	58
E. <i>Recovery of Appellate Attorney Fees</i> .....	58

## INTRODUCTION

This Article discusses Supreme Court of Virginia opinions and revisions to the Code of Virginia and Rules of the Supreme Court of Virginia impacting civil procedure here in the Commonwealth over the last year.\*\*

The Article first addresses opinions of the supreme court, then new legislation enacted during the 2021 General Assembly Session, and finally, approved revisions to the Rules of the Supreme Court of Virginia.\*\*\*

### I. DECISIONS OF THE SUPREME COURT OF VIRGINIA

The Supreme Court of Virginia issued several noteworthy opinions on topics specific to civil practice and procedure. These opinions are important due to either new analysis from the court or how the court highlights what it considers to be important topics that require a reminder for practitioners.

#### A. *Nonsuiting After a Misnomer*

The Supreme Court of Virginia has again dealt with a plaintiff failing to name the right party. Identifying the proper parties is the first step in any action, and the failure to do so can quickly complicate what would otherwise be considered routine personal injury lawsuits.

In a case from February 2019, the plaintiff filed an action in Brunswick County Circuit Court “for personal injuries received as a result of a fall caused by a defective dock at a lake resort that occurred on June 25, 2017.”<sup>1</sup> She named “Company X, Inc., a Virginia Corporation, purportedly doing business as The Club Lake Gaston Resorts, a/k/a The Club, a/k/a Lake Gaston Resort” as the only defendant.<sup>2</sup> “After learning that she had erred in naming the defendant, the plaintiff non-suited the case on February 10,

---

\*\* Due to the publishing schedule, the relevant “year” is approximately July 2021 through June 2022.

\*\*\* 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.

1. *Edwards v. Omni Int’l Servs.*, \_\_ Va. \_\_, \_\_, 872 S.E.2d 428, 429 (2022).

2. *Id.*

2020.”<sup>3</sup> She refiled in March 2020 “against Omni International Services, Inc. (“Omni”), a foreign corporation, alleging the same facts regarding her injuries.”<sup>4</sup> Omni filed a plea in bar asserting that the statute of limitations had run and her action was therefore time-barred.<sup>5</sup> The plaintiff meanwhile argued that under Supreme Court of Virginia precedent, she had cured the misnomer from the original action through the refiled action that correctly named Omni as the defendant.<sup>6</sup>

Omni proffered the following evidence on its plea in bar: (1) “it had been the sole owner and operator of the Lake Gaston Resort since its inception and the record owner of the land on which it was situated”; (2) “Company X was a completely different corporate entity that was defunct at the time of the hearing and that the two corporations did not share any staff, employees or bank accounts”; and (3) “the only relationship between the two was that Omni served as registered agent for Company X and that Company X had done some marketing and ‘web site work’ for Omni at some time in the past.”<sup>7</sup> The plaintiff accepted Omni’s proffers.<sup>8</sup>

“The circuit court held that Omni and Company X were two separate and distinct entities rather than a single defendant originally misnamed.”<sup>9</sup> As a result, the refiled action naming Omni as the defendant “did not relate back to the date of the original filing against Company X.”<sup>10</sup> The circuit court thus sustained the plea in bar.<sup>11</sup> The plaintiff appealed.<sup>12</sup>

The supreme court began its analysis with a brief discussion to decide whether a misnomer or misjoinder occurred.<sup>13</sup> It quickly noted that “the undisputed evidence before the circuit court was that Omni was the sole owner of the Lake Gaston Resort since its inception and the sole operator of the business carried on there. It therefore had a duty to take reasonable steps to protect the plain-

---

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* (first citing *Richmond v. Volk*, 291 Va. 60, 781 S.E.2d 191 (2016); then citing *Hampton v. Meyer*, 299 Va. 121, 847 S.E.2d 287 (2020)).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

tiff . . . .”<sup>14</sup> The court held that a misnomer applied: “As the record owner of the premises at the time of the plaintiff’s alleged injury, Omni was, therefore, an entity ‘against whom the action could or was intended to be brought.’”<sup>15</sup>

The court then tackled the thorny issue of how the plaintiff could or was supposed to fix her misnomer.<sup>16</sup> It started its analysis by observing that she had two options: she could “move to amend [her] pleading pursuant to Code § 8.01-6” or “[a]lternatively, [s]he [could] nonsuit the case and file a new action correctly naming the defendant, as permitted by our decisions in *Volk* and *Hampton*.”<sup>17</sup> The rest of the analysis in essence overrules *Volk* and *Hampton* while painstakingly claiming to simply distinguish from those two cases.<sup>18</sup> The court sidelines *Volk* and *Hampton* as “applying only to cases in which there is no issue of the timeliness of defendant’s notice of the facts on which the plaintiff’s claim is based.”<sup>19</sup>

The court went on to note that “Code § 8.01-229(E) applies to nonsuits generally [while] Code § 8.01-6 is more narrowly focused, applying only to the correction of misnomers.”<sup>20</sup> “[W]hen one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, . . . where they conflict, the latter prevails.”<sup>21</sup> Because the General Assembly had not amended nor repealed section 8.01-6, the court “conclude[d] that there was no legislative intent to impair the protective preconditions that section provides to a newly added defendant when a plaintiff corrects a misnomer, whether by amending the complaint or by taking a nonsuit and filing a new complaint against the correctly named defendant.”<sup>22</sup> The court held that upon “refiling . . . the complaint changing the name of the defendant, the

---

14. *Id.* .

15. *Id.*

16. *Id.*

17. *Id.* at \_\_\_, 872 S.E.2d at 429–30; *Richmond v. Volk*, 291 Va. 60, 781 S.E.2d 191 (2016); *Hampton v. Meyer*, 299 Va. 121, 847 S.E.2d 287 (2020).

18. *Edwards*, \_\_ Va. at \_\_\_, 872 S.E.2d at 430.

19. *Id.*

20. *Id.*

21. *Id.* (quoting *Va. Nat’l Bank v. Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)).

22. *Id.*

plaintiff had the burden of showing that each of the four protective preconditions of Code § 8.01-6 has been satisfied.”<sup>23</sup>

In this case, the court found that the plaintiff could not satisfy the statutory requirements.<sup>24</sup> “[T]he plaintiff’s second filing (against Omni) was made more than eight months outside the applicable two-year limitation period.”<sup>25</sup> “The plaintiff also failed to show that Omni would not be prejudiced in maintaining a defense on the merits.”<sup>26</sup> The court affirmed the circuit court’s judgment in favor of Omni.<sup>27</sup>

The court’s distinctions between the present case and *Volk* are tenuous. It states that *Volk* applies only when timeliness of notice to a defendant is not an issue.<sup>28</sup> However, under the undisputed facts of *Volk*, the defendant in that case also did not have notice of the claim within the statute of limitations.<sup>29</sup> The accident in that case occurred on April 12, 2009.<sup>30</sup> But the defendant was not made aware of the lawsuit until February 7, 2012, nearly three years after the accident.<sup>31</sup> Even if one were to consider the insurer to be sufficiently analogous to the defendant, the insurer in *Volk* was not aware of the lawsuit until April 13, 2011, at the earliest (outside the statute of limitations).<sup>32</sup>

However, more importantly (and more confusingly) the court in *Volk* specifically held that section 8.01-6 does not apply to refiled actions after a nonsuit.<sup>33</sup> Because “[t]he taking of a nonsuit . . . puts an end to the original action, . . . there is no ‘original pleading’ to relate back to for the purposes of Code § 8.01-6.”<sup>34</sup> Based on that analysis, the court in *Volk* did not consider whether the plaintiff

---

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* In the author’s opinion, this case gets the right result and begins to reign in the damage from *Volk* and *Hampton*. In full disclosure, the author was involved in the circuit court proceedings in *Volk*. The court should have explicitly overruled *Volk* and *Hampton* as it would have made the analysis cleaner and provided better guidance for future cases.

28. *Id.*

29. *See Volk*, 291 Va. 60, 62–64, 781 S.E.2d 191, 192–93.

30. *Id.* at 62, 781 S.E.2d at 192.

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

32. *See id.*

33. *Id.* at 71, 781 S.E.2d at 197.

34. *Id.* at 67, 781 S.E.2d at 194 (citation omitted).

met the requirements to relate back under Code of Virginia section 8.01-6.<sup>35</sup>

The court's turnabout in *Omni* and its application of section 8.01-6 to a nonsuited lawsuit should be construed as a practical overruling of *Volk* and *Hampton*. Section 8.01-6 has four requirements for an amended pleading to relate back:

[T]he claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, (ii) within the limitations period prescribed for commencing the action against the party to be brought in by the amendment, that party or its agent received notice of the institution of the action, (iii) that party will not be prejudiced in maintaining a defense on the merits, and (iv) that party knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against that party.<sup>36</sup>

Notice of the lawsuit during the statute of limitations period is simply one of the statutory requirements (and usually the one most at issue). But it should not be the sole distinction between whether the entire statute applies or not. This is a topic on which the Supreme Court of Virginia has issued several opinions within a fairly short time frame. Given the confusing guidance, one should expect to see another case arise on this topic soon.

## B. *Case Mooted on Appeal*

The Supreme Court of Virginia reviewed and reaffirmed how to handle cases on appeal that are now moot.

A property owner had a deed of dedication for an easement across the neighbor's property.<sup>37</sup> The Shenandoah County Circuit Court interpreted the deed to allow the property owner to extend a paved driveway in the easement.<sup>38</sup> The neighbors appealed the circuit court's decision.<sup>39</sup> While the appeal was pending, the property owner sold the subject property and therefore moved to dismiss the appeal as moot and to vacate the judgment.<sup>40</sup>

---

35. *See id.*

36. VA. CODE ANN. § 8.01-6 (2015).

37. *Godlove v. Rothstein*, 300 Va. 437, 438–39, 867 S.E.2d 771, 772 (2022).

38. *Id.*

39. *Id.*

40. *Id.* at 439, 867 S.E.2d at 772.



The supreme court briefly noted its history in not issuing decisions on moot issues.<sup>41</sup> “Because [appellee] no longer owns or uses the property that is the subject of this appeal, there is no longer any live controversy for this Court to resolve, nor do the parties have any legally cognizable interest in the outcome of this now moot appeal.”<sup>42</sup> The court also approved the request to vacate the circuit court’s judgment because “the manner in which a case becomes moot affects vacatur.”<sup>43</sup> “When a prevailing party voluntarily and unilaterally moots a case, preventing an appellant from obtaining appellate review, vacatur of lower court judgments is generally appropriate.”<sup>44</sup>

The neighbors, as appellants, “request[ed] that th[e] Court tax costs against [appellee] in the amount of \$2,916.90 for the preparation, filing, and service of their petition, briefs, and appendix.”<sup>45</sup> “[A]ny permissible recovery of costs is purely statutory.”<sup>46</sup> Virginia statutes provide that a substantially prevailing party in the Supreme Court of Virginia may recover its costs.<sup>47</sup> “A ‘substantially prevailing’ party is one that ‘prevails on all the claims of [his] case.’”<sup>48</sup> The court noted that it has repeatedly held that when an issue becomes moot there can be no recovery of costs because “neither party can be said to have substantially prevailed on the appeal.”<sup>49</sup> There is an exception “in cases in which a non-prevailing party has a contractual right to an award of costs.”<sup>50</sup> This exception did not apply in this case.<sup>51</sup>

### C. *Failure to Name Necessary Party in BZA Appeal*

A set of City of Roanoke residents in an unincorporated neighborhood association “complained to the Zoning Administrator that [a company] was violating the zoning ordinance by operating a

---

41. *See id.*

42. *Id.*

43. *Id.* at 439–40, 867 S.E.2d at 772–73.

44. *Id.* at 439, 867 S.E.2d at 772 (quoting *Bd. of Supervisors v. Ratcliff*, 298 Va. 622, 623, 842 S.E.2d 377, 379 (2020)).

45. *Id.* at 440, 867 S.E.2d at 773.

46. *Id.*

47. *Id.* (quoting VA. CODE ANN. § 17.1-604 (2020)).

48. *Id.* (quoting KENT SINCLAIR & LEIGH B. MIDDLEDITCH, JR., *VIRGINIA CIVIL PROCEDURE* 409 (7th ed. 2020)).

49. *Id.* (quoting *Ficklen v. City of Danville*, 146 Va. 426, 436, 131 S.E. 689, 692 (1926)).

50. *Id.*

51. *Id.*

halfway house in their neighborhood.”<sup>52</sup> The Zoning Administrator did not agree and the residents appealed to the Board of Zoning Appeals (“BZA”).<sup>53</sup> “After considering the matter, the BZA affirmed the Zoning Administrator’s decision.”<sup>54</sup> The residents “then filed a petition for a writ of certiorari in the Roanoke City Circuit Court, which named ‘Roanoke City,’ the BZA, [the applicant, and the landowner] as necessary parties.”<sup>55</sup> Each of the respondents then filed a motion to dismiss “for failing to name the Roanoke City Council . . . as a party within 30 days of the BZA’s decision.”<sup>56</sup> The residents “filed a motion seeking to correct what [they] considered to be a misnomer . . . argu[ing] that [they] had intended to name the Council as a party, not the City.”<sup>57</sup>

The circuit court granted the motions to dismiss.<sup>58</sup> “The circuit court explained that a locality is a distinct entity from its governing body and, therefore, ‘Roanoke City and the City of Roanoke are not misnomers for the City Council for the City of Roanoke.’”<sup>59</sup> The circuit court held “that it lacked discretion to permit the residents to amend [their] petition to include the Council as a party.”<sup>60</sup>

The Supreme Court of Virginia began its analysis reviewing the statutory scheme and its precedent for such BZA appeals.<sup>61</sup> “[A] party seeking review of a board of zoning appeals decision is required to name ‘[t]he governing body’ of a locality as a ‘necessary part[y] to the proceedings in the circuit court.’”<sup>62</sup> The court has also consistently held that a “failure to name the governing body as a necessary party within the 30-day window contemplated by Code § 15.2-2314 remains a defect and, when timely raised . . . requires dismissal of the petition.”<sup>63</sup> It noted that a locality and its governing body are distinct legal entities and not interchangeable

---

52. *Marsh v. Roanoke City*, \_\_ Va. \_\_, \_\_, 873 S.E.2d 86, 87 (2022).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at \_\_, 873 S.E. 2d at 87–88.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (quoting VA. CODE ANN. § 15.2-2314 (Cum. Supp. 2022)).

63. *Id.* at \_\_, 873 S.E.2d at 88 (quoting *Boasso Am. Corp. v. Zoning Adm’r of Chesapeake*, 293 Va. 203, 210, 796 S.E.2d 545, 549 (2017) (emphasis in original)).

terms.<sup>64</sup> “Thus, the governing body of the locality must be specifically identified in the petition.”<sup>65</sup>

The court was not persuaded by the residents’ argument that since “Roanoke City” is a non-entity, the references to it must be construed as a misnomer and properly interpreted to refer to the Council.<sup>66</sup> It stated that the petition’s inconsistent references to “Roanoke City” and “City of Roanoke” undercut that argument.<sup>67</sup> Furthermore, because the petition did not refer to the Council at all, it held that “Roanoke City” was a misnomer for “City of Roanoke.”<sup>68</sup> “Accordingly, Code § 8.01-6 ha[d] no application in this case.”<sup>69</sup> The court affirmed the circuit court’s dismissal of the petition.<sup>70</sup>

This case underscores the danger in cases with strict technical requirements and short time frames. In appealing a BZA decision, one has thirty days to file a petition for a writ of certiorari.<sup>71</sup> There are three necessary parties that must be named in that time frame: the governing body, the applicant, and the landowner.<sup>72</sup> For practitioners who do not deal consistently in local government issues, it is easy to mistakenly refer to a locality instead of its governing body. While colloquially those terms are often interchangeable, legally they are not. Notably, the court in this instant case did not rule whether section 8.01-6 applies to a petition under section 15.2-2314.<sup>73</sup> Therefore, there is a chance that petitions that seemingly reference a governing body—but actually name the locality—can ultimately relate back under section 8.01-6 and survive dismissal.

#### D. *Personal Jurisdiction Through Order of Publication*

“Erin Marie Coster Evans [(“Erin”)] and James August Evans, Jr., [(“James”)] were married in Virginia in 1999” and had three children.<sup>74</sup> The couple ultimately separated in 2004 while they both

---

64. *Id.* (citing *Miller v. Highland County*, 274 Va. 355, 364, 650 S.E.2d 532, 535 (2007)).

65. *Id.* (citing *Boasso Am. Corp.*, 293 Va. at 209, 796 S.E.2d at 548).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. VA. CODE ANN. § 15.2-2314 (Cum. Supp. 2022).

72. *Id.*

73. *Marsh*, \_\_ Va. at \_\_, 873 S.E.2d at 86.

74. *Evans v. Evans*, 300 Va. 134, 139, 860 S.E.2d 381, 383 (2021).

lived in Virginia Beach.<sup>75</sup> “[T]he [couple] executed a property settlement agreement in Virginia Beach that contained a provision requiring [James] to pay child support in the amount of \$1,000 per month, beginning on July 1, 2005.”<sup>76</sup>

Erin eventually moved to Martinsville, Virginia, “the county seat of Henry County.”<sup>77</sup> She then filed for divorce in Henry County Circuit Court in December 2005.<sup>78</sup> She alleged that her last contact with James was in November 2005 but she did not specify the manner of that contact.<sup>79</sup> She further alleged that James’s last known residence was in Virginia Beach while her current residence was in Henry County.<sup>80</sup> Erin moved for an order of publication and submitted “an affidavit stating that [James] could not be found and that she had used due diligence to locate him.”<sup>81</sup> “In a later deposition submitted to the divorce court,” Erin noted that “she had used her ‘best efforts to try to locate’ him, but the only [actual] effort . . . mentioned was her calling his family members.”<sup>82</sup> She “did not specifically allege, however, that [James] had been purposefully evading service of process or had absconded from the jurisdiction to avoid being served by her.”<sup>83</sup>

The clerk of court issued an order of publication pursuant to section 8.01-316(A)(1)(b).<sup>84</sup> The notice was posted on “the front door of the courthouse for the Henry County Circuit Court and published . . . in a local newspaper, the *Martinsville Bulletin*, for four weeks.”<sup>85</sup> “The order included a space for certifying that it had been ‘mailed to the defendant’” which remained blank because there was no address on file for James.<sup>86</sup> “Nothing in the record suggests that [James] or any of his family members lived in Henry County . . . [n]or . . . that he had any reason to be at the courthouse of the Henry County Circuit Court.”<sup>87</sup> The *Martinsville Bulletin* pub-

---

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 139, 860 S.E.2d at 383–84.

84. *Id.* at 139, 860 S.E.2d at 384.

85. *Id.* at 140, 860 S.E.2d at 384.

86. *Id.*

87. *Id.*

lished the notice on January 5, 12, 19, and 26, 2006, with the notice advising James “to appear in court by February 24, 2006.”<sup>88</sup> James did not appear and on March 16, 2006 the court “entered a final divorce decree, which stated that the ‘Court doth Ratify, Confirm, Approve and Incorporate’ the parties’ 2005 property settlement agreement.”<sup>89</sup> Holding that “process had been served by order of publication and that [James] had ‘otherwise failed to answer the pleadings or appear . . . ,” the court also ordered James to pay the \$1,000 per month child support.<sup>90</sup>

Years later in 2019, James, via special appearance, filed a motion to reopen the case.<sup>91</sup> Specifically, he asked the court to void the judgment because it “had only acquired in rem jurisdiction over the proceeding . . . [but] never obtained personal jurisdiction over him, and thus, the in personam award of child support was void ab initio.”<sup>92</sup> Erin countered that the court did have personal jurisdiction over James pursuant to two subsections of the long-arm statute, Code of Virginia section 8.01-328.1(A)(8) and subsection (9), because he had executed an agreement in Virginia to pay child support to a domiciliary of Virginia, had fathered children in Virginia, and had maintained a matrimonial domicile in Virginia at the time of the parties’ separation.<sup>93</sup>

The circuit court found James’s argument persuasive and found that the original court “did not have personal jurisdiction over him when it issued the final divorce decree in 2006” and that the child support judgment “was thus void ab initio.”<sup>94</sup> Erin “appealed to the Court of Appeals, arguing in relevant part that the divorce court had personal jurisdiction under Code § 8.01-328.1(A)(8) and (A)(9) of the long-arm statute.”<sup>95</sup> The Court of Appeals of Virginia affirmed the circuit court’s ruling that it did not have in personam jurisdiction over James and held that those long-arm statute provisions did not apply.<sup>96</sup>

---

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 140, 860 S.E.2d at 384.

92. *Id.*

93. *Id.* at 140–41, 860 S.E.2d at 384.

94. *Id.* at 141, 860 S.E.2d at 384.

95. *Id.*

96. *Id.*

The court first noted the parties' agreement "that one is not bound by a judgment in personam resulting from litigation . . . to which he has not been made a party by service of process."<sup>97</sup> The crux of the case was "the efficacy of [Erin's] service by order of publication as a means of obtaining in personam jurisdiction."<sup>98</sup>

The court then thoroughly analyzed the legal history of service of process and jurisdiction and as it applied to the factual details of the case.<sup>99</sup> It began by noting that in cases of divorce or annulment "process may be served in any manner authorized under § 8.01-296 or 8.01-320."<sup>100</sup> "Code § 8.01-296 provides the general rules for service of process and allows for notice by an order of publication only if a party cannot effectuate service on the defendant by personal delivery (under subsection 1) or by substituted service (under subsection 2)."<sup>101</sup> Meanwhile, "Code § 8.01-320(A) authorizes personal service of process on a 'nonresident person outside the Commonwealth.'"<sup>102</sup> It specifies "when the long-arm statute applies, personal service on an out-of-state defendant 'shall have the same effect as personal service on the nonresident within Virginia' . . . [b]ut when [it] does not apply, the out-of-state personal service 'shall have the same effect, and no other, as an order of publication.'"<sup>103</sup> Finally, "Code § 20-104 also authorizes the entry of an order of publication upon the filing of an affidavit verifying 'that the defendant is not a resident of the Commonwealth of Virginia, or that diligence has been used by or on behalf of the plaintiff to ascertain [the defendant's location] without effect.'"<sup>104</sup>

The court went on to emphasize that "service of process by order of publication . . . is the 'lowest quality of notice,' and thus, 'it will usually support only in rem jurisdiction or the in rem aspects of quasi in rem proceedings.'"<sup>105</sup> It noted that it was withholding ruling on "whether evidence of willful evasion of service would allow

---

97. *Id.* at 141, 860 S.E.2d at 385 (citing *McCulley v. Brooks & Co. Gen. Contractors, Inc.*, 295 Va. 583, 589, 816 S.E.2d 270, 272 (2018)).

98. *Id.* at 142, 860 S.E.2d at 385.

99. *See id.* at 142–45, 860 S.E.2d at 385–87.

100. *Id.* at 142, 860 S.E.2d at 385 (citing VA. CODE ANN. §§ 8.01-296, -320 (2015)).

101. *Id.* (citing VA. CODE ANN. § 8.01-296 (2015)).

102. *Id.* (citing VA. CODE ANN. § 8.01-320 (2015)).

103. *Id.* (quoting VA. CODE ANN. § 8.01-320 (2015)).

104. *Id.* 385 (quoting VA. CODE ANN. § 20-104 (2016)).

105. *Id.* (citations omitted).

for an exception to that general rule.”<sup>106</sup> “Whatever the jurisdictional implications of orders of publication, courts eschew any pretense that they are a reliable method of providing actual notice when the publication is made entirely by newspapers.”<sup>107</sup>

The court then analyzed the *in rem* versus *in personam* aspects of divorce cases and child support judgments.<sup>108</sup> “[C]ourts have traditionally treated a divorce case seeking only to terminate the marriage as a type of *in rem* proceeding, which does not require a court to obtain personal jurisdiction over the defendant.”<sup>109</sup> The notice requirements for a divorce proceeding are less restrictive under this view.<sup>110</sup> “Because of this rule, courts must distinguish between an order ending the marriage and an *in personam* award of spousal or child support.”<sup>111</sup> Thus, a court may have jurisdiction to enter a divorce decree but not to award spousal or child support.<sup>112</sup>

On appeal to the Supreme Court of Virginia, Erin argued that “the divorce court had personal jurisdiction over [James] under three provisions of the long-arm statute.”<sup>113</sup> The court noted that it did not matter whether the long-arm statute applies to residents.<sup>114</sup> “The first question [the court] . . . answer[ed] . . . then, [wa]s whether [Erin] properly used service by order of publication to obtain long-arm personal jurisdiction over [James].”<sup>115</sup>

Erin argued that the order of publication was proper pursuant to the “general service-of-process section of the long-arm statute, Code § 8.01-329, which incorporates by reference Chapter 8 of Title 8.01, which, in turn, includes another service-of-process statute, Code § 8.01-296.”<sup>116</sup> Slowly going through those statutes, the court

---

106. *Id.* at 143, 860 S.E.2d at 386. (“Even so, it should be rare indeed for a court to presume that such chicanery is truly happening merely because a claimant summarily states that she tried but failed to locate the defendant.”).

107. *Id.*

108. *Id.* at 144, 860 S.E.2d at 386–87.

109. *Id.* at 144, 860 S.E.2d at 386.

110. *See id.* (citations omitted).

111. *Id.* (citations omitted).

112. *Id.*

113. *Id.* at 145, 860 S.E.2d at 387. Erin also argued that “Code § 20-109.1 authorized the divorce court to enforce the property settlement agreement (including its support obligation) even though jurisdiction had been obtained by order of publication.” *Id.* Because the Court ultimately found Erin had waived the second argument, this article only discusses her first argument. *Id.* at 151, 860 S.E.2d at 390.

114. *Id.* at 146, 860 S.E.2d at 387.

115. *Id.*

116. *Id.* at 146, 860 S.E.2d at 387–88.

pointed out that “Code § 8.01-296(3) authorizes service by order of publication only when personal and substituted service are unavailable.”<sup>117</sup> Substituted service is generally delivering to other authorized individuals at the residence or posted service at the residence.<sup>118</sup> Finally, there is also “a form of substituted service that, if complied with, validates an assertion of personal jurisdiction.”<sup>119</sup> Under certain circumstances, the Secretary of the Commonwealth can serve as a statutory agent for purposes of service.<sup>120</sup> In order to serve the Secretary as a Virginia resident, one must “submit an affidavit disclosing the defendant’s last-known address” and certify that:

Process has been delivered to the sheriff or to a disinterested person as permitted by § 8.01-293 for execution and, if the sheriff or disinterested person was unable to execute such service, that the person seeking service has made a bona fide attempt to determine the actual place of abode or location of the person to be served.<sup>121</sup>

The court found that the long-arm statute does not allow “that constructive service by order of publication . . . be used in preference to the long-arm statute’s own substituted-service provision.”<sup>122</sup> Rather, “the legislative intent [of these service of process statutes] is unmistakable.”<sup>123</sup> “Service of process under Virginia statutes involves a cascading series of efforts designed to provide due process by ensuring that the method of notice be ‘reasonably calculated to reach the intended recipient’ and ‘be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.’”<sup>124</sup> And by cascading, the court specifically meant that “statutory hierarchies of methods of service — *primus* personal, *deinde* substituted, *deinde* constructive — are best understood not as ‘alternatives *but successive methods*,’ ranging from most effective notice to least effective.”<sup>125</sup> “In practical terms, this sequencing means the more likely methods of achieving due process (personal service and substituted service) must be reasonably

---

117. *Id.* at 146, 860 S.E.2d at 388 (citing VA. CODE ANN. § 8.01-296(3) (2015)).

118. *Id.* at 146–47, 860 S.E.2d at 388 (citing VA. CODE ANN. § 8.01-296(3) (2015)).

119. *Id.* at 147, 860 S.E.2d at 388.

120. *Id.*

121. *Id.* (citing VA. CODE ANN. § 8.01-396(B) (2015)).

122. *Id.*

123. *Id.*

124. *Id.* (quoting *Jones v. Flowers*, 547 U.S. 220, 226, 229 (2006)).

125. *Id.* (quoting W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 3.02[3][d][ii][B] at 3-9 (5th ed. 2017)) (emphasis added).



attempted before the least likely method (constructive notice) can be used, if at all, *as a last resort*.”<sup>126</sup>

Orders of publication do not create in personam jurisdiction “without a convincing showing that there was no realistic ‘ability to get the better service.’”<sup>127</sup>

The court then examined whether Erin diligently attempted to serve James and found that she did not.<sup>128</sup> The court noted that Erin did not attempt to serve the Secretary of the Commonwealth, did not provide a last known-address for James (despite noting a last marital home in the Complaint), and did not attempt personal service.<sup>129</sup> Instead, her “first and only attempt at service was constructive service by order of publication.”<sup>130</sup> The court then listed even more facts that gave it “little confidence of [the order’s] efficacy”: the failure to provide a last known address for James; publishing the notice in the *Martinsville Bulletin* with nothing to indicate that James or anyone in his family would read a newspaper in Henry County; that she communicated with James a month prior to the filing with no explanation of the manner of the communication (and presumably why it could not be repeated); and the lack of evidence or allegation that James was purposefully avoiding service.<sup>131</sup>

The court narrowly tailored its holding to “only address [Erin’s] argument that the long-arm statute authorized an in personam award against [James], a resident defendant, in a divorce case initiated by service through order of publication.”<sup>132</sup> The court rejected that argument because the “ineffectual method of constructive service by order of publication . . . reveal[ed] a lack of due diligence rendering the entire exercise inferior to the substituted-service option available under the long-arm statute.”<sup>133</sup> The court affirmed the circuit court’s ruling that the child support award was void ab initio.<sup>134</sup>

---

126. *Id.* at 148, 860 S.E.2d at 388 (emphasis added).

127. *Id.* (quoting *Washburn v. Angle Hardware Co.*, 144 Va. 508, 514, 132 S.E. 310, 312 (1926)).

128. *Id.* at 148–49, 860 S.E.2d at 388–89.

129. *Id.* at 149, 860 S.E.2d at 389.

130. *Id.*

131. *Id.*

132. *Id.* at 150, 860 S.E.2d at 390.

133. *Id.*

134. *Id.* at 152, 860 S.E.2d at 390.

While the court was careful to stress that its holding is tied to the facts of this case, the court still provided strong guidance for when service of process is an issue for in personam claims. Parties should not rely on orders of publication without clear evidence that all other forms of service have been diligently pursued and failed.

## II. NEW LEGISLATION

The General Assembly has enacted a fair number of legislative changes with an impact on civil procedure in the Commonwealth. Some, like the expanded Court of Appeals, should continue to generate legislation in the upcoming years.

### A. *Supreme Court of Virginia Jurisdiction Over Injunctions and Immunity*

The General Assembly significantly expanded the jurisdiction of the Court of Appeals of Virginia.<sup>135</sup> Now it is working through some of those changes. In addition, the General Assembly restored original jurisdiction of the Supreme Court of Virginia in a couple of areas.

The General Assembly revised Code of Virginia section 8.01-626 to, once again, provide that the Supreme Court of Virginia reviews appeals of trial court decisions regarding temporary and permanent injunctions.<sup>136</sup> It removed all references to the court of appeals in that section,<sup>137</sup> but kept the same applicable timelines.<sup>138</sup> “An aggrieved party [needs to] file [the] petition for review with the clerk of the Supreme Court [of Virginia] within 15 days of the circuit court’s order.”<sup>139</sup> A three-justice panel still serves for the initial review.<sup>140</sup> However, the supreme court does have the authority to appoint more than three justices for the review.<sup>141</sup>

---

135. 2021 Va. Acts, Spec. Sess. I, ch. 489 (codified at VA CODE ANN. §§ 8.01-675.5, -675.6 (Cum. Supp. 2021)).

136. 2022 Va. Acts ch. 307 (codified as amended at VA. CODE ANN. § 8.01-626 (Cum. Supp. 2022)).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

The General Assembly also amended section 8.01-675.5 regarding interlocutory appeals of sovereign immunity issues.<sup>142</sup> It removed the references to the court of appeals and re-inserted references to the supreme court.<sup>143</sup> A party has fifteen days to file a petition for interlocutory review of a circuit court order granting (or denying) immunity that “would immunize the movant from compulsory participation in the proceeding.”<sup>144</sup> However, the interlocutory appeal still does not “stay proceedings in the circuit court unless the circuit court or appellate court orders such a stay.”<sup>145</sup> A party’s failure to file an interlocutory appeal does not preclude appellate review of a later final order.<sup>146</sup>

The courts and parties will adjust to and navigate the practical effects of the changes to the court of appeals. As these changes show, some tinkering will take place to adjust the judicial workload and efficiency.

### B. *Medical Bills and Statements*

The General Assembly has also attempted to streamline the introduction of medical bill and record evidence in general district cases and cases appealed to circuit court. These changes clarify and should make it simpler to introduce such evidence.

The legislature amended Code of Virginia section 8.01-413.01 by adding a definition of “bill” as “any statement of charges, an invoice, or any other form prepared by a health care provider or its agent, or third-party agent, identifying the costs of health care services provided.”<sup>147</sup> It also removed the requirement that the plaintiff must provide testimony “explaining the circumstances surrounding his receipt of the bill.”<sup>148</sup>

The General Assembly also expanded the language in section 16.1-88.2. It added “statement” to the section and now allows for the introduction of a “report or statement” from treating and

---

142. 2022 Va. Acts ch. 307 (codified as amended at VA. CODE ANN. § 8.01-675.5 (Cum. Supp. 2022)).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. 2022 Va. Acts ch. 470 (codified as amended at VA. CODE ANN. § 8.01-413.01 (Cum. Supp. 2022)).

148. *Id.*

examining providers.<sup>149</sup> The section allows “either party” to introduce such evidence<sup>150</sup> but, in practical terms, a plaintiff is much more likely to take advantage of this expanded language. It is much harder for a defendant to get a report or statement from a plaintiff’s treating or examining provider.<sup>151</sup> The section still requires that a party give ten days’ notice of its intent to introduce such evidence and the statement must be accompanied by (or contained within) a records custodian affidavit or a sworn declaration confirming that: (1) the provider examined the plaintiff; (2) the “information contained in the report or statement is true and accurate and fully descriptive as to the nature and extent of the injury”; and (3) the identified cost are “true and accurate.”<sup>152</sup>

Defense attorneys will have to be prepared to address plaintiffs’ increased use of medical reports and statements in general district cases. These reports or statements are almost certain to mirror expert witness disclosures in circuit court cases and include causation opinions.

### C. *Cause of Action for Dissemination of Intimate Images*

The General Assembly created an entire new cause of action. Individuals now have a civil remedy for the receipt of unwelcome sexually explicit pictures or video.

The legislature defined “[i]ntimate image” as “a photograph, film, video, recording, digital picture, or other visual reproduction of a person 18 years of age or older who is in a state of undress so as to expose the human male or female genitals.”<sup>153</sup> Anyone who digitally receives an intimate image who had not consented to receiving such images or “ha[d] expressly forbidden the receipt of such material” has a trespass claim.<sup>154</sup> In addition to injunctive relief, the plaintiff may recover “actual damages or \$500, whichever is greater, in addition to reasonable attorney fees and costs.”<sup>155</sup>

---

149. 2022 Va. Acts ch. 470 (codified as amended at VA. CODE ANN. § 16.1-88.2 (Cum. Supp. 2022)).

150. VA. CODE ANN. § 16.1-882 (Cum. Supp. 2022).

151. Joseph Regalia & V. Andrew Cass, *Navigating the Law of Defense Counsel Ex Parte Interviews of Treating Physicians*, 31 J. CONTEMP. HEALTH L. & POLY 35, 38 (2015).

152. 2022 Va. Acts ch. 470.

153. 2022 Va. Acts ch. 523 (codified at VA. CODE ANN. § 8.01-46.2. (Cum. Supp. 2022)).

154. VA. CODE ANN. § 8.01-46.2(B) (Cum. Supp. 2022).

155. *Id.*

“Venue for an action under this section may lie in the jurisdiction where the intimate image is transmitted from or where the intimate image is received or possessed by the plaintiff.”<sup>156</sup>

#### D. *Promises Not to Plead Statute of Limitations*

Drafting an enforceable promise not to plead the statute of limitations as a defense is now simpler. The General Assembly pared down the requirements for such an agreement.

The legislature made several amendments to Code of Virginia section 8.01-232. First, it clarified that the promise must be “made to avoid or defer litigation pending settlement of any cause of action that has accrued in favor of the promisee against the promisor.”<sup>157</sup> It also removed the requirement that the written promise “not [be] made contemporaneously with any other contract.”<sup>158</sup> It did require that the promise be “signed by the promisor or his agent.”<sup>159</sup> The beneficiary of this promise must “commence[] an action asserting such cause of action within the earlier of (a) the applicable limitations period running from the date the written promise is made or (b) any shorter time as may be provided in the written promise.”<sup>160</sup>

#### E. *Nonsuits Following Appeal from General District Court*

The General Assembly clarified that plaintiffs may nonsuit general district appeals pending in circuit court. It amended Code of Virginia section 8.01-380 to state that “a party may suffer a nonsuit as otherwise set forth in this section, and such nonsuit shall annul the judgment of the general district court.”<sup>161</sup> Of course, the party must first “timely perfect[] . . . an appeal from a judgment of a general district court.”<sup>162</sup>

---

156. *Id.* § 8.01-46.2(D) (Cum. Supp. 2022).

157. 2022 Va. Acts ch. 477 (codified as amended at VA. CODE ANN. § 8.01-232 (Cum. Supp. 2022)).

158. *Id.*

159. *Id.*

160. *Id.*

161. 2022 Va. Acts ch. 206 (codified as amended at VA. CODE ANN. § 8.01-380 (Cum. Supp. 2022)).

162. *Id.*

### 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. *Final Pre-Trial Conference*

Trial attorneys may be familiar with formal pretrial conferences in federal court. However, they are not always as consistent in state court. The Rules have been amended to address that, at least in more complex cases. Rule 1:19 now requires that in cases “set for trial for five days or more, upon request of any counsel of record, made at least 45 days before trial, the court *must schedule* a final pretrial conference within an appropriate time before commencement of trial.”<sup>163</sup> The Rule does give the court discretion to choose whether the conference is in person, via video, or by conference call.<sup>164</sup>

#### B. *Rule 4:5(b)(6) Depositions*

The Supreme Court of Virginia clarified the Rule known as the corporate representative deposition. With the addition of the language of “or other entity,” Rule 4:5(b)(6) applies to any organization, not including individual people.<sup>165</sup> The Rule now requires a meet and confer.<sup>166</sup> “Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination.”<sup>167</sup> If serving a nonparty, one must notify the “organization of its duty to make this designation and to confer with the serving party.”<sup>168</sup> Finally, one must not only “designate with reasonable particularity the matters on which examination is requested” but also “describe” it.<sup>169</sup>

---

163. VA. SUP. CT. R. 1:19 (2022) (emphasis added).

164. *Id.*

165. VA. SUP. CT. R. 4:5(b)(6) (2022).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

### C. *Limited Scope Appearances*

The Supreme Court of Virginia had previously authorized a pilot program regarding limited scope appearances by attorneys, generally from legal aid organizations or acting pro bono.<sup>170</sup> At minimum, the attorney had to file a notice “stating that the attorney and the party have a written agreement that the attorney will make a limited scope appearance in such action” and “specifying the matters, hearings, or issues on which the attorney will appear for the party.”<sup>171</sup> The supreme court has not changed the substance of this program. It has extended it through December 31, 2023, and allows any limited scope appearance that starts prior to that date to “be completed in accordance with” the Rule.<sup>172</sup>

### D. *Extensions for Good Cause*

The Supreme Court of Virginia revised appellate deadlines to be consistent with one another. In order to receive extensions of time, parties must file motions for good cause. The court amended Rules 5:5, 5:17, and 5A:3 by replacing language referencing the “ends of justice” and inserting “on motion for good cause shown.”<sup>173</sup> This phrase was also added to Rules 5:24 and 5A:17.<sup>174</sup> These amendments cover deadlines for filing notice of appeal, a petition for review, a petition for hearing, filing the appeal bond or letter of credit, and a petition for rehearing en banc.<sup>175</sup>

### E. *Recovery of Appellate Attorney Fees*

A prevailing appellee who had obtained a judgment for fees or costs in circuit court now has a clear path to recover their appellate attorney fees. Within thirty days of the final appellate judgment, the prevailing appellee must “make application in the circuit court

---

170. VA. SUP. CT. R.1:5(f) (2022).

171. *Id.*

172. *Id.*

173. Order Amending Rules 5:5, 5:17, 5:24, 5A:3, and 5A:17, Rules of Supreme Court of Virginia (May 2, 2022) (effective May 2, 2022), [https://www.vacourts.gov/courts/scv/amendments/rules\\_5\\_5\\_5\\_17\\_5\\_24\\_5a\\_3\\_and\\_5a\\_17.pdf](https://www.vacourts.gov/courts/scv/amendments/rules_5_5_5_17_5_24_5a_3_and_5a_17.pdf) [<https://perma.cc/4KSL-CPX6>]; VA. SUP. CT. R. 5:5, 5:17, 5A:3 (2021) (amended 2022) (including references to “ends of justice”), <https://web.archive.org/web/20211209135539/https://www.vacourts.gov/courts/scv/rulesofcourt.pdf> [<https://perma.cc/EJ77-6MYP>].

174. Order Amending Rules 5:5, 5:17, 5:24, 5A:3, and 5A:17, *supra* note 173.

175. VA. SUP. CT. R. 5:5, 5:17, 5:24, 5A:3, 5A:17 (2022).

in which judgment was entered for attorney fees, costs or both incurred on appeal.”<sup>176</sup> It “may be made in the same case from which the appeal was taken, which case will be reinstated on the circuit court docket upon the filing of the application.”<sup>177</sup> For the purposes of this rule, a “‘final appellate judgment’ . . . means the issuance of the mandate by the appellate court or, in cases in which no mandate issues, the final judgment or order of the appellate court disposing of the matter.”<sup>178</sup> This rule does not preclude “the exercise of any other right or remedy for the recovery of attorney fees or costs, by separate suit or action, or otherwise.”<sup>179</sup>

---

176. VA. SUP. CT. R. 1:1A(a) (2022).

177. *Id.*

178. *Id.*

179. VA. SUP. CT. R. 1:1A(b) (2022).