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## Annual Survey of Virginia Law: Civil Practice and Procedure

David D. Hopper

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## CIVIL PRACTICE AND PROCEDURE

*David D. Hopper\**

### I. INTRODUCTION

Virginia courts and the General Assembly have effected a number of changes in civil practice and procedure during the past year. This article focuses on some significant developments of interest to the general litigation attorney. Matters affecting real property and juvenile and domestic relations are treated elsewhere in this volume.

### II. RECENT DECISIONS OF THE SUPREME COURT OF VIRGINIA

#### A. *Res Judicata and Collateral Estoppel*

In *Transdullles Center, Inc. v. Sharma*,<sup>1</sup> the Supreme Court of Virginia explicitly rejected the position of the Restatement (Second) of Judgments<sup>2</sup> and federal court decisions<sup>3</sup> that a default judgment may not be used as the basis for a finding of collateral estoppel. *Transdullles* involved a tenant who had allowed a judgment by default to be entered in a general district court action for wrongful detainer in which the landlord had also recovered delinquent rent. In a subsequent action, the tenant was precluded from contesting his liability for additional rent due under the lease. The supreme court reasoned that, although application of collateral estoppel requires that the issue in question actually have been litigated in a prior pro-

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\* Director, Mezzullo & McCandlish, P.C., Richmond, Virginia. A.B., 1983, *magna cum laude*, Harvard University; J.D., 1989, Order of the Coif, University of Virginia.

1. 252 Va. 20, 472 S.E.2d 274 (1996).

2. Section 27 cmt. e (1982).

3. *E.g.*, *United States v. Ringley*, 750 F. Supp. 750 (W.D. Va. 1990), *aff'd*, 985 F.2d 185 (4th Cir. 1993).

ceeding,<sup>4</sup> "Virginia law does not support a blanket exemption from the application of collateral estoppel in the case of a default judgment."<sup>5</sup> In the case under consideration, the plaintiff in the first action had presented evidence at the *ex parte* hearing in district court. That *ex parte* presentation of evidence was sufficient to make the issue of the tenant's liability under the lease one that was "actually litigated" for collateral estoppel purposes.<sup>6</sup>

The supreme court used the presentation of evidence by the plaintiff in *Transdulses* to distinguish its holding from that in *Horton v. Morrison*,<sup>7</sup> in which the supreme court held that a default judgment in a negligence action could not be the basis for application of collateral estoppel because "no issues relating to . . . negligence were actually litigated when the court entered a default judgment. . . ."<sup>8</sup>

In *Waterfront Marine Construction, Inc. v. North End 49ers Sandbridge Bulkhead Groups A, B, and C*,<sup>9</sup> the supreme court addressed the issue of whether an arbitration award could bar a subsequent arbitration proceeding under the doctrine of res judicata.<sup>10</sup> Although the parties did not dispute the fact that the doctrine could bar a subsequent arbitration proceeding—and thus the supreme court's discussion of the issue was dicta—the case makes clear that there is no rational reason why the doctrine should not apply to decisions reached by arbitration.

The supreme court went on to decide that, in the absence of a clear agreement to the contrary, the issue of whether the doctrine of res judicata should apply to bar a subsequent arbitration is not itself arbitrable.<sup>11</sup> In *Waterfront*, the contractual

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4. See *Angstadt v. Atlantic Mut. Ins. Co.*, 249 Va. 444, 446, 457 S.E.2d 86, 87 (1995); *Bates v. Devers*, 214 Va. 667, 671, 202 S.E.2d 917, 921 (1974).

5. *Transdulses*, 252 Va. at 23, 472 S.E.2d at 276.

6. *Id.*

7. 248 Va. 304, 448 S.E.2d 629 (1994).

8. *Transdulses*, 252 Va. at 25, 472 S.E.2d at 277.

9. 251 Va. 417, 468 S.E.2d 894 (1996).

10. Because the parties made no distinction in their argument between a confirmed arbitration award and an unconfirmed award, the supreme court assumed, without deciding, that "an unconfirmed arbitration award is treated in the same manner as a confirmed award for purposes of *res judicata* analysis." *Id.* at 431, 468 S.E.2d at 901.

11. *Id.* at 432-33, 468 S.E.2d at 903.

arbitration provision was a typical agreement to arbitrate any controversy or claim "arising out of or relating to the Contract or the breach thereof."<sup>12</sup> The supreme court explained that the parties' dispute over the application of a plea of *res judicata* arose from or was related to "satisfying the elements of this common law doctrine" and was not related to the terms of the parties' contract.<sup>13</sup>

The supreme court also noted that "an arbitration panel is not generally bound by legal principles, does not have to explain or justify its decision, and the decision is not reviewed for legal errors."<sup>14</sup> Consequently, allowing an arbitration panel to resolve a plea of *res judicata* would tend to "defeat[] the purpose of the judicially created doctrine—to bring an end to the substantive controversy and to protect the parties from re-litigating previously decided matters."<sup>15</sup>

In *Reed v. Liverman*,<sup>16</sup> the supreme court held that where a case was settled and an order was entered dismissing the litigation "with prejudice," that order barred a subsequent action because the order had been circulated to counsel prior to entry and there was no evidence that the wording of the order was inadvertent.<sup>17</sup>

### B. *Making a Record*

In a pair of cases decided on the same day, the Supreme Court of Virginia reminded trial lawyers of the importance of properly preserving objections concerning jury instructions. *King v. Sowers*<sup>18</sup> was a medical malpractice case in which the plaintiff objected to an instruction at trial on the ground that it was inapplicable under the facts of the case.<sup>19</sup> On appeal, the plaintiff argued that the instruction was not only inapplicable under the facts adduced at trial but also that it contained an

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12. *Id.* at 421, 468 S.E.2d at 896.

13. *Id.* at 432-33, 468 S.E.2d at 903.

14. *Id.* at 433, 468 S.E.2d at 903.

15. *Id.*

16. 250 Va. 97, 458 S.E.2d 446 (1995).

17. *Id.* at 100, 458 S.E.2d at 447.

18. 252 Va. 71, 471 S.E.2d 481 (1996).

19. *Id.* at 77, 471 S.E.2d at 484.

incorrect statement of the law.<sup>20</sup> Although the supreme court agreed that the instruction misstated the law, it held that "the instruction became the law of the case because the objection at trial did not challenge the legal content of the instruction."<sup>21</sup> Because the objection the plaintiff had raised at trial was not well founded, the trial court's judgment was affirmed.<sup>22</sup>

*Morgen Industries, Inc. v. Vaughan*<sup>23</sup> was a products liability case in which the defendant manufacturer complained of the trial court's refusal to grant certain instructions. The supreme court agreed with the plaintiff-appellee that the manufacturer was procedurally barred from raising any issue concerning the instructions because the record failed to show that the manufacturer had made the arguments below that it then sought to raise on appeal.<sup>24</sup> The manufacturer thus ran afoul of Virginia Supreme Court Rule 5:25, which provides that "[e]rror will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."<sup>25</sup>

At trial, the circuit court considered the jury instructions outside the presence of the court reporter. Consequently, on appeal, the court was "presented only with the instructions marked 'refused' by the trial court, along with citations to various cases at the bottom of the refused instructions."<sup>26</sup> Because "[a] case can often be cited for numerous propositions, and the trial court is not required to determine *sua sponte* what argument a party may be entitled to make under a given case," the presence of citations at the bottom of the refused instructions was insufficient to preserve the manufacturer's objections for appeal.<sup>27</sup>

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20. *Id.*

21. *Id.* (citing *Medical Ctr. Hosps. v. Sharpless*, 229 Va. 496, 498, 331 S.E.2d 405, 406 (1985); *Norfolk & Portsmouth R.R. v. Barker*, 221 Va. 924, 928, 275 S.E.2d 613, 615 (1981)).

22. *Id.* at 78, 471 S.E.2d at 484.

23. 252 Va. 60, 471 S.E.2d 489 (1996).

24. *Id.* at 67-68, 471 S.E.2d at 493.

25. VA. SUP. CT. R. 5:25.

26. *Morgen*, 252 Va. at 68, 471 S.E.2d at 494.

27. *Id.*

Taken together, these two cases make certain the importance of preserving a clear, comprehensive record concerning arguments over instructions in the trial court.

### C. Evidence

#### 1. Expert Opinions

In *David A. Parker Enterprises, Inc. v. Templeton*,<sup>28</sup> a divided Supreme Court of Virginia continued to wrestle with the boundaries of acceptable expert testimony. The plaintiff alleged that he was injured when struck by a rotating propeller on an outboard motor being operated by the defendant's employee.<sup>29</sup> The employee denied that the boat's engine was in gear when the accident occurred.<sup>30</sup> Over the defendant's objection, one of plaintiff's physicians was allowed to testify that the plaintiff's injuries "were caused by 'a rotating prop[eller]'" and another treating physician was allowed to opine that the injuries were caused by "a propeller [that was] in motion."<sup>31</sup> This testimony bolstered the plaintiff's theory that the employee had been negligent in operating the boat in plaintiff's vicinity while the engine was in gear.

On appeal, the supreme court held that

the doctors' opinion that the boat's propeller was rotating clearly invaded the province of the jury on this vital issue because the jury was equally as capable as were the doctors of reaching an intelligent and informed opinion and of drawing its own conclusions from the facts and circumstances of the case.<sup>32</sup>

In a dissenting opinion, Justice Keenan, joined by Justice Lacy, pointed out that the testimony should have been admissible under Virginia Code section 8.01-401.3(B), which states that "[n]o expert . . . witness while testifying in a civil proceeding shall be prohibited from expressing an otherwise admissible

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28. 251 Va. 235, 467 S.E.2d 488 (1996).

29. *Id.* at 236, 467 S.E.2d at 489.

30. *Id.*

31. *Id.* at 237, 467 S.E.2d at 489-90.

32. *Id.* at 237-38, 467 S.E.2d at 489-90.

opinion or conclusion as to any matter of fact solely because that fact is the ultimate issue or critical to the resolution of the case."<sup>33</sup> The supreme court's majority opinion does not cite to or discuss this statute.

In *CSX Transportation, Inc. v. Casale*,<sup>34</sup> the Supreme Court of Virginia held that an expert economist's testimony concerning a plaintiff's future lost income was improperly admitted. The testimony was based on the invalid assumption that the plaintiff would either never work again or would be able to work at only a minimum wage job.<sup>35</sup> Although several physicians testified to the plaintiff's continued physical impairment and a vocational rehabilitation expert testified that the plaintiff would be limited to sedentary employment at the minimum wage, the plaintiff's own testimony was that he was employed by CSX at the time of trial and was planning to report for work in a new, skilled position on the Monday following conclusion of the trial.<sup>36</sup>

The supreme court therefore applied the rule of *Massie v. Firmstone*<sup>37</sup> and held that the plaintiff was bound by his own testimony, which showed that the lost income testimony was based on an invalid assumption.<sup>38</sup> The court explained that Virginia Code section 8.01-401.1, which allows an expert to express an opinion without initially disclosing its basis, "does not . . . relieve the court from its responsibility, when proper objection is made, to determine whether the factors required to be included in formulating the opinion were actually utilized."<sup>39</sup> Because the opinion was based on an assumption inconsistent with the plaintiff's own testimony, "the question before the trial court was one of the admissibility of evidence, not its weight—a strictly legal question."<sup>40</sup>

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33. *Id.* 238-39, 467 S.E.2d at 490-91 (Keenan, J., dissenting) (quoting VA. CODE ANN. § 8.01-401.3(B) (Cum. Supp. 1996)).

34. 250 Va. 359, 463 S.E.2d 445 (1995).

35. *Id.* at 362, 463 S.E.2d at 447.

36. *Id.* at 363-64, 463 S.E.2d at 448.

37. 134 Va. 450, 462, 114 S.E. 652, 656 (1922).

38. *Casale*, 250 Va. at 364, 463 S.E.2d at 448.

39. *Id.* at 365-66, 463 S.E.2d at 449 (quoting *Swiney v. Overby*, 237 Va. 231, 233, 377 S.E.2d 372, 374 (1989)).

40. *Id.* at 367, 463 S.E.2d at 450.

## 2. Spoliation

In *Gentry v. Toyota Motor Corp.*,<sup>41</sup> the Supreme Court of Virginia considered the circumstances under which a party may be sanctioned for spoliation of evidence by that party's expert. The case involved claims arising out of an accident that occurred when one of the plaintiffs lost control of her Toyota truck and crashed into a ravine. The plaintiffs' attorney hired a self-styled sudden acceleration expert who, without receiving authorization from anyone, used a hacksaw to cut into the truck's instrument panel and remove a temperature control cable.<sup>42</sup> After a hearing at which Toyota's expert testified that the plaintiffs' expert's conduct had prevented him from evaluating whether the temperature control cable had been involved in causing the accident, the plaintiffs moved to amend their motion for judgment to allege a new cause of the accident based on the anticipated opinion of a new expert.<sup>43</sup> That new opinion attributed the cause of the crash to a carburetor problem unrelated to the temperature control cable.<sup>44</sup> Toyota's expert acknowledged that his evaluation of the plaintiffs' new theory was not affected by anything the plaintiffs' first expert had done to the vehicle.<sup>45</sup>

Nevertheless, the trial court granted Toyota's motion to dismiss based on the first expert's spoliation of evidence.<sup>46</sup> On appeal, the Supreme Court of Virginia applied the abuse of discretion standard appropriate for reviewing the propriety of sanctions awarded under Virginia Code section 8.01-271.1.<sup>47</sup> The supreme court held that, because neither plaintiffs nor their counsel acted in bad faith, and because the first expert's conduct did not prejudice Toyota, the trial court had abused its discretion in dismissing the plaintiffs' action.

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41. 252 Va. 30, 471 S.E.2d 485 (1996).

42. *Id.* at 31-32, 471 S.E.2d at 486.

43. *Id.* at 32-33, 471 S.E.2d at 487.

44. *Id.* at 33, 471 S.E.2d at 487.

45. *Id.*

46. *Id.*, 471 S.E.2d at 488.

47. *Id.* at 34, 471 S.E.2d at 488 (citing *Oxenham v. Johnson*, 241 Va. 281, 287, 402 S.E.2d 1, 4 (1991)).



### 3. Written Summaries of Evidence

In *Norfolk & Western Railway Co. v. Puryear*,<sup>48</sup> the plaintiff attempted to recover for hearing loss he claimed to have sustained while working on the defendant's locomotives over a number of years. In support of his claims, the plaintiff introduced into evidence a written summary of his testimony concerning the amount of time that he had spent on locomotives which he and his expert regarded as excessively noisy.<sup>49</sup> The plaintiff also introduced a chart summarizing the expert's testimony about his calculations of the plaintiff's periods of exposure to the excessively noisy locomotives.<sup>50</sup>

The Supreme Court of Virginia held that it was reversible error to have admitted these two summaries "of favorable parts of oral testimony upon a contested issue."<sup>51</sup> In so holding, the supreme court distinguished its earlier decision in *Petersen v. Neme*<sup>52</sup> on the ground that the assignment of error in that case had related only to whether the plaintiff's testimony and a summary of that testimony were admissible to prove causation.<sup>53</sup> The supreme court explained that it had not decided in *Petersen* "whether the plaintiff's summary of her testimony was admissible as an exhibit."<sup>54</sup>

The supreme court in *Puryear* also distinguished its holding from those of *Marefield Meadows, Inc. v. Lorenz*<sup>55</sup> and *Avocet Development Corp. v. McLean Bank*,<sup>56</sup> both of which "approved the introduction of exhibits that summarized voluminous documentary evidence that was not in dispute."<sup>57</sup>

The supreme court explained that if it allowed the introduction of summary charts, "jury trials could become a battle of charts and summaries of oral testimony, shifting the jury's

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48. 250 Va. 559, 463 S.E.2d 442 (1995).

49. *Id.* at 561-62, 463 S.E.2d at 443.

50. *Id.* at 562, 463 S.E.2d at 443.

51. *Id.*, 463 S.E.2d at 444.

52. 222 Va. 477, 281 S.E.2d 869 (1981).

53. *Puryear*, 250 Va. at 562, 463 S.E.2d at 444.

54. *Id.*

55. 245 Va. 255, 264, 427 S.E.2d 363, 368 (1993).

56. 234 Va. 658, 667, 364 S.E.2d 757, 762 (1988).

57. *Puryear*, 250 Va. at 562, 463 S.E.2d at 444.

attention away from traditional considerations of each witness's credibility and the jury's obligation to decide the case based on its collective recollection of all the evidence."<sup>58</sup>

#### 4. Evidence of Criminal Conviction

In *Godbolt v. Brawley*,<sup>59</sup> the Supreme Court of Virginia further refined the body of law surrounding the circumstances under which proof of a prior criminal conviction may be introduced in a civil trial arising out of the same conduct as that leading to the criminal conviction. As a general rule, "a judgment of conviction or acquittal . . . does not establish in a subsequent civil action the truth of the facts on which it was rendered . . . and such judgment of conviction or acquittal is not admissible in evidence."<sup>60</sup> An exception to that rule exists "when a plaintiff attempts to recover for a harm that is the *direct* result of his or her own criminal conduct, and the dispositive issue in the civil action is the precise issue that the criminal conviction addressed."<sup>61</sup>

In *Godbolt*, the plaintiff had been convicted of simple assault in connection with an incident in which he was shot by an off-duty sheriff's deputy who was working as a security guard at a nightclub.<sup>62</sup> The supreme court held that Godbolt's illegal activity "was not the direct cause of his injury."<sup>63</sup> The direct cause, the supreme court held, was the security guard's use of deadly force.<sup>64</sup> Consequently, even though the plaintiff's assaultive behavior led to the fight that escalated into the shooting in

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58. *Id.* at 563, 463 S.E.2d at 444.

59. 250 Va. 467, 463 S.E.2d 657 (1995).

60. *Id.* at 470, 463 S.E.2d at 659 (quoting *Smith v. New Dixie Lines*, 201 Va. 466, 472, 111 S.E.2d 434, 438 (1959)).

61. *Id.* at 471, 463 S.E.2d at 660; see *Zysk v. Zysk*, 239 Va. 32, 404 S.E.2d 721 (1990) (holding that woman could not recover from partner for sexually transmitted disease contracted during illegal, premarital intercourse); *Miller v. Bennett*, 190 Va. 162, 56 S.E.2d 217 (1949) (finding that estate of woman who died during illegal abortion could not recover from doctor who performed procedure); *Eagle, Star & British Dominion Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927) (holding that arsonist could not recover insurance proceeds for building he burned).

62. *Godbolt*, 250 Va. at 469, 463 S.E.2d at 658-59.

63. *Id.* at 472, 463 S.E.2d at 660.

64. *Id.*

which plaintiff was wounded, it was error to bar his recovery on the basis of his criminal conviction.<sup>65</sup>

#### D. *Service of Process*

In a pair of cases, the Supreme Court of Virginia clarified the application of Virginia Supreme Court Rule 3:3, which states, in relevant part: "No judgment shall be entered against a defendant who was served with process more than one year after the commencement of the action against him unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on him."<sup>66</sup>

In *Gilbreath v. Brewster*,<sup>67</sup> the supreme court held that dismissal of an action for lack of timely service was a dismissal with prejudice.<sup>68</sup> The supreme court rejected the argument that the dismissal should be without prejudice because a dismissal under Rule 3:3 was not a determination of the merits.<sup>69</sup> The supreme court also rejected the argument that a dismissal with prejudice under Rule 3:3 would conflict with Virginia Code section 8.01-229(E)(1), which tolls the statute of limitations for the pendency of an action that is terminated "without determining the merits."<sup>70</sup> The supreme court explained that the tolling statute applied "only when [a] claim can be refiled following a dismissal."<sup>71</sup> Because a dismissal with prejudice under Rule 3:3 affects "only the viability of the claim," such a dismissal does not conflict with the tolling statute.<sup>72</sup>

The supreme court reasoned that because "dismissal under [Rule 3:3] requires a determination that the plaintiff did not

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65. *Id.*

66. VA. SUP. CT. R. 3:13(C).

67. 250 Va. 436, 463 S.E.2d 836 (1995).

68. *Id.* at 439, 463 S.E.2d at 837. The supreme court noted that although it had directed that a dismissal for failure to make timely service be with prejudice in *Dennis v. Jones*, 240 Va. 12, 20, 393 S.E.2d 390, 394 (1990), "the nature of the dismissal" was not at issue in that case. *Gilbreath*, 250 Va. at 439 n.1, 463 S.E.2d at 837 n.1.

69. *Gilbreath*, 250 Va. at 440, 463 S.E.2d at 837.

70. *Id.* (quoting VA. CODE ANN. § 8.01-229(E)(1) (Repl. Vol. 1992 & Cum. Supp. 1995)).

71. *Id.*

72. *Id.*, 463 S.E.2d at 838.

use due diligence in attempting to secure service," dismissal without prejudice "would condone the plaintiff's lack of diligent prosecution."<sup>73</sup> The supreme court was also concerned that if dismissal were without prejudice, "the tolling provisions of [Virginia] Code [section] 8.01-229(E)(1) could be invoked, allowing repeated filings which effectively nullify the statute of limitations and potentially allow harassment of the defendant."<sup>74</sup>

In *Frey v. Jefferson Homebuilders, Inc.*,<sup>75</sup> the supreme court held that the provisions of Rule 3:3 regarding service within one year were subject to the statutory extension of time provided by Virginia Code section 1-13.3:1, which states:

When the last day fixed by statute, or by rule of the Supreme Court of Virginia . . . for any paper to be served, delivered or filed, or for any other act to be done in the course of judicial proceedings falls on a Saturday, Sunday, [or] legal holiday, . . . the paper may be served, delivered, or filed and the act may be done on the next day that is not a Saturday, Sunday, or legal holiday. . . .<sup>76</sup>

#### E. Nonsuits

In *Conner v. Rose*,<sup>77</sup> a plaintiff who initially filed an action in a general district court and took a nonsuit, refiled the action in circuit court and sought damages in the refiled suit in excess of the general district court's jurisdictional limits. On the defendant's motion, the trial court transferred the refiled action to general district court.<sup>78</sup> In holding that the plaintiff may create a situation in which she could bring her refiled suit in circuit court simply by increasing her ad damnum to exceed the general district court's jurisdictional limit of \$10,000, the Supreme Court of Virginia found clear and unambiguous language

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73. *Id.* at 441, 463 S.E.2d at 838.

74. *Id.* (citing W. HAMILTON BRYSON, HANDBOOK ON VIRGINIA CIVIL PROCEDURE, 99-100 (2d ed. 1989); LEIGH B. MIDDLEDITCH, JR. & KENT SINCLAIR, VIRGINIA CIVIL PROCEDURE § 7.12, at 375-79 (2d ed. 1992)).

75. 251 Va. 375, 467 S.E.2d 788 (1996).

76. *Id.* at 378, 467 S.E.2d at 790 (quoting VA. CODE ANN. § 1-13.3:1 (Repl. Vol. 1995)).

77. 252 Va. 57, 471 S.E.2d 478 (1996).

78. *Id.* at 58, 471 S.E.2d at 478.

in Virginia Code section 8.01-380(A), which provides that "[a]fter a nonsuit no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction."<sup>79</sup>

#### F. *Statutes of Limitation*

In *Harris v. DiMattina*,<sup>80</sup> the Supreme Court of Virginia considered the effects of certain 1993 amendments to the medical malpractice claims procedure on two plaintiffs whose actions had been dismissed as untimely. Effective July 1, 1993, Virginia Code section 8.01-581.2 was amended to delete the requirement that a notice of claim be served prior to instituting a malpractice action against a health care provider.<sup>81</sup> Also effective July 1, 1993, section 8.01-581.9 was repealed, thereby eliminating any tolling provision associated with the giving of a notice of claim pursuant to Virginia Code section 8.01-581.2.<sup>82</sup>

Appellant Heather Harris ("Harris") alleged that she suffered damages from medical malpractice on July 15, 1991. On July 13, 1993, Harris sent a notice of claim pursuant to former Virginia Code section 8.01-581.2 to the potential defendants.<sup>83</sup> No one requested a medical malpractice review panel, and Harris filed her motion for judgment on October 26, 1993. The trial court dismissed the action as untimely under the two-year statute of limitations imposed by Virginia Code section 8.01-243(A).<sup>84</sup>

Robert E. Cumberland ("Cumberland") alleged that he was injured during surgery on November 27, 1990 and during follow-up care that continued through January 9, 1991.<sup>85</sup> Cumberland filed a notice of claim on December 2, 1992, and

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79. *Id.*, 471 S.E.2d at 478-79 (quoting VA. CODE ANN. § 8.01-380(A) (Repl. Vol. 1992 & Cum. Supp. 1996)).

80. 250 Va. 306, 462 S.E.2d 338 (1995).

81. Act of Apr. 7, 1993, ch. 928, 1993 Va. Acts, 1419 (codified at VA. CODE ANN. § 8.01-581.2 (Cum. Supp. 1993)).

82. Act of Apr. 7, 1993, ch. 928, 1993 Va. Acts, 1419.

83. 250 Va. at 310, 462 S.E.2d at 339.

84. VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1992 & Cum. Supp. 1996).

85. *Harris*, 250 Va. at 311, 462 S.E.2d at 339.

certain potential defendants requested a medical malpractice review panel, which held a hearing and rendered its opinion on September 10, 1993.<sup>86</sup> On November 4, 1993, Cumberland filed his motion for judgment, which was dismissed as barred by the statute of limitations.

To resolve the issues raised by Harris and Cumberland on appeal, the supreme court first held that former Virginia Code sections 8.01-581.2 and -581.9, as well as the provision repealing 8.01-581.9, "are procedural in nature, since they control only the method of obtaining redress or enforcement of rights and do not involve the creation of duties, rights, and obligations."<sup>87</sup> Accordingly, "neither plaintiff acquired any vested right in these statutes at the time their causes of action accrued."<sup>88</sup>

After determining that the statutes in question were "procedural" in nature, the supreme court addressed the effect of Virginia Code section 1-16, which states, in relevant part:

No new law shall be construed to repeal a former law, as to . . . any right accrued, or claim arising under the former law, or in any way whatever to affect . . . any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. . . .<sup>89</sup>

Because the changed statutes were procedural, "the changes did not operate to repeal or in any way affect any act done, any right accrued, or any claim arising under the former law."<sup>90</sup> Moreover, the proceedings in the trial court "conformed to the terms of the 1993 enactments," which were in effect at the time the actions were dismissed as barred by the statute of limitations.<sup>91</sup>

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86. *Id.*, 462 S.E.2d at 340.

87. *Id.* at 312, 462 S.E.2d at 340 (citing *Shiflet v. Eller*, 228 Va. 115, 120, 319 S.E.2d 750, 753-54 (1984)).

88. *Id.* (citing *Fletcher v. Tarasidis*, 219 Va. 658, 661, 250 S.E.2d 739, 740 (1979); *Hurdle v. Prinz*, 218 Va. 134, 139, 235 S.E.2d 354, 357 (1977); *Phipps v. Sutherland*, 201 Va. 448, 453, 111 S.E.2d 422, 426 (1959)).

89. VA. CODE ANN. § 1-16 (Repl. Vol. 1995 & Cum. Supp. 1996).

90. *Harris*, 250 Va. at 313, 462 S.E.2d at 341.

91. *Id.*

The supreme court considered the effect of Virginia Code section 8.01-1, which provides, in relevant part:

[A]ll provisions of this title shall apply to causes of action which arose prior to the effective date of any such provisions; provided, however, that the applicable law in effect on the day before the effective date of the particular provisions shall apply if in the opinion of the court any particular provision (i) may materially change the substantive rights of a party (as distinguished from the procedural aspects of the remedy) or (ii) may cause the miscarriage of justice.<sup>92</sup>

The supreme court opined that the statute gave the trial court "discretionary authority to apply the law that was in effect on the day before the statutory changes occurred."<sup>93</sup> The supreme court therefore reviewed the trial court's refusal to apply section 8.01-1 under an abuse of discretion standard.<sup>94</sup>

In Harris' case, the supreme court held that no miscarriage of justice existed because Harris "could have filed a motion for judgment instead of a notice of claim on July 13, 1993, a date within the original two-year limitation period."<sup>95</sup> In contrast, the supreme court held that the dismissal of Cumberland's action constituted a "miscarriage of justice" within the meaning of 8.01-1 because, at the time Cumberland gave his notice of claim, former section 8.01-581.2 prohibited him from filing suit until after the applicable statutory waiting period had expired.<sup>96</sup> The supreme court majority ignored the defendant's reasoning that Cumberland had not been prejudiced by the change in the law because the change allowed Cumberland to file his motion for judgment at any time within the remaining limitations period after July 1, 1993, regardless of whether the medical review proceeding were still pending.<sup>97</sup>

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92. VA. CODE ANN. § 8.01-1 (Repl. Vol. 1992 & Cum. Supp. 1996).

93. *Harris*, 250 Va. at 314, 462 S.E.2d at 341.

94. *Id.*

95. *Id.* at 316, 462 S.E.2d at 342.

96. *Id.* at 317, 462 S.E.2d at 343.

97. *Id.* at 319-20, 462 S.E.2d at 344 (Lacy, J., dissenting).

## G. *Validity of Judgments*

### 1. Full Faith and Credit

In *Orchard Management Co. v. Soto*,<sup>98</sup> the Supreme Court of Virginia considered whether default judgments for breach of contract, entered in a Puerto Rican court against seven Virginia apple growers ("the Growers") in favor of thirty-three migrant farm workers ("the Workers"), should be given full faith and credit in Virginia. The Growers argued that the Puerto Rican court lacked *in personam* jurisdiction over them and thus that the default judgment was not entitled to full faith and credit.<sup>99</sup> The supreme court found that the Growers' attempts to secure workers from Puerto Rico, including the filing of certain forms related to securing migrant labor and the use of the Puerto Rican Labor Department to recruit and screen workers, constituted sufficient "minimum contacts" with Puerto Rico to establish jurisdiction.<sup>100</sup>

### 2. Collateral Attack

In *Parrish v. Jessee*,<sup>101</sup> the Supreme Court of Virginia evaluated the power of a circuit court to revisit issues decided by another circuit court in connection with a court-approved settlement of an action on behalf of a person under a disability. After Douglas Parrish ("Douglas") was severely injured in an automobile accident, the Circuit Court of Goochland County appointed Sandra Parrish ("Parrish"), Douglas' wife, as his guardian. In that capacity, Parrish filed suit in the Circuit Court of the City of Richmond to recover damages on Douglas' behalf. The parties to that suit reached a compromise, which was submitted to the Richmond court for approval pursuant to Virginia Code section 8.01-424.<sup>102</sup>

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98. 250 Va. 343, 463 S.E.2d 839 (1995).

99. *Id.* at 350, 463 S.E.2d at 843.

100. *Id.* at 355-57, 463 S.E.2d at 846-47 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

101. 250 Va. 514, 464 S.E.2d 141 (1995).

102. VA. CODE ANN. § 8.01-424 (Cum. Supp. 1996).



After Douglas' sister, E. Ann Jessee ("Jessee"), was substituted as Douglas' guardian, she instituted a proceeding in the Circuit Court of Goochland County to vacate as void that portion of the approved settlement agreement that provided for payment of settlement proceeds to persons other than Douglas.<sup>103</sup> The Goochland court held that the designation of payees other than Douglas was improper under Virginia Code section 8.01-424. On appeal, Parrish challenged the Goochland court's jurisdiction to set aside provisions of the settlement agreement approved by the Richmond court.<sup>104</sup>

The supreme court held that the Richmond court's alleged misapplication of section 8.01-424 rendered its order approving settlement voidable, but not void.<sup>105</sup> The supreme court explained that "[t]he validity of a judgment based upon a challenge to the application of a statute raises a question of trial error, and not a question of jurisdiction."<sup>106</sup>

The supreme court did hold, however, that the Goochland court's control over Douglas' estate, derived from its power to appoint and supervise guardians,<sup>107</sup> authorized the Goochland court to direct that payments made for Douglas' benefit under the settlement agreement be paid directly to the Goochland court.<sup>108</sup>

## H. Immunity

### 1. Charitable Immunity

In *Moore v. Warren*,<sup>109</sup> the Supreme Court of Virginia held that a volunteer driver for the American Red Cross was entitled to raise a plea of charitable immunity in defense of an action to recover for injuries sustained by a patient being transported by the volunteer. The supreme court reasoned that the rationale

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103. *Parrish*, 250 Va. at 520, 464 S.E.2d at 145.

104. *Id.*

105. *Id.* at 522, 464 S.E.2d at 146.

106. *Id.* at 521, 464 S.E.2d at 145-46 (citing *Pfaster v. Town of Berryville*, 157 Va. 859, 864, 161 S.E. 58, 60 (1931)).

107. See VA. CODE ANN. § 37.1-132 (Repl. Vol. 1996).

108. *Parrish*, 250 Va. at 523, 464 S.E.2d at 146-47.

109. 250 Va. 421, 463 S.E.2d 459 (1995).

for the doctrine of charitable immunity in Virginia—to encourage charitable activities—militated the extension of the immunity to charitable volunteers.<sup>110</sup> “If the charity’s servants and agents are not under the umbrella of immunity given the institution itself and they are exposed to negligence actions by the charity’s beneficiaries, the ‘good work’ of the charity will be adversely impacted.”<sup>111</sup> In reaching this conclusion, the supreme court maintained that its resolution of the issue was “not an expansion” of the doctrine of charitable immunity but merely “another instance of defining its contours.”<sup>112</sup>

## 2. Statutory Immunity in Connection with Maintenance of Recreational Property

In *City of Virginia Beach v. Flippen*,<sup>113</sup> the Supreme Court of Virginia considered whether a municipality with responsibility for maintaining a public stairway providing beach access could invoke the protection of Virginia Code section 29.1-509, which states:

A landowner shall owe no duty of care to keep land or premises safe for entry or use by others for . . . recreational use. . . . No landowner shall be required to give any warning of hazardous conditions or uses of, structures on, or activities on such land or premises to any person entering on the land or premises for such purposes. . . .<sup>114</sup>

The statute defines “landowner” to include any “person in control of land or premises.”<sup>115</sup> The supreme court looked to the “clear legislative intent” of the statute—“to encourage the opening of private land to public recreational use”—and concluded that there was no reason not to include a municipal corporation within the meaning of “person” under the statute.<sup>116</sup>

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110. *Id.* at 423, 463 S.E.2d at 460.

111. *Id.*

112. *Id.* at 425, 463 S.E.2d at 461.

113. 251 Va. 358, 467 S.E.2d 471 (1996).

114. VA. CODE ANN. § 29.1-509(B) (Cum. Supp. 1996).

115. VA. CODE ANN. § 29.1-509(A) (Cum. Supp. 1996).

116. *Flippen*, 251 Va. at 362, 467 S.E.2d at 473.

## I. *Virginia Tort Claims Act*

In *Halberstam v. Commonwealth*,<sup>117</sup> the Supreme Court of Virginia upheld a trial court's dismissal of a slip-and-fall action because the plaintiff failed to comply with the notice provisions of the Virginia Tort Claims Act, which states:

Every claim cognizable against the Commonwealth . . . shall be forever barred unless the claimant or his agent, attorney or representative has filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable. . . . The claimant or his agent, attorney or representative shall, in a claim cognizable against the Commonwealth, mail the notice of claim via the United States Postal Service by certified mail, return receipt requested, addressed to the Director of the Division of Risk Management of the Attorney General in Richmond.<sup>118</sup>

In *Halberstam*, the plaintiff was injured when she tripped on a pothole in a parking lot at George Mason University. A March 14, 1994 certified letter from her counsel to the Division of Risk Management stated that Halberstam, a student at George Mason University, had been injured on October 5, 1993 "in the school parking lot" when a defect in the asphalt caused her to fall.<sup>119</sup>

The supreme court held that Halberstam's claim was barred because the March 14 notice did not "specify the location of the injury."<sup>120</sup> Because George Mason University has more than one parking lot, the court felt that the notice's "lack of detail [was], in essence, no notice at all."<sup>121</sup> The supreme court also held that additional detail supplied in other correspondence could not salvage Halberstam's claim because only the March 14 letter "was sent to an official designated in the statute and

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117. 251 Va. 248, 467 S.E.2d 783 (1996).

118. VA. CODE ANN. § 8.01-195.6 (Repl. Vol. 1992).

119. *Halberstam*, 251 Va. at 249-50, 467 S.E.2d at 784.

120. *Id.* at 251, 467 S.E.2d at 785.

121. *Id.*

in the manner prescribed by the statute, certified mail with a return receipt requested."<sup>122</sup>

The supreme court's holding leaves open the question of precisely what level of detail would have satisfied the notice statute's requirements. If Halberstam's notice had indicated in which parking lot the injury had occurred, but had failed to designate which particular parking space was involved, would the notice have adequately described the "place" where the accident occurred? The supreme court's ruling provides no guidance on that question.

### III. RECENT LEGISLATION AFFECTING CIVIL PRACTICE

The General Assembly enacted a number of measures during its 1996 session which affect civil litigation in state courts.<sup>123</sup> For ease of reference, the discussion of these enactments is classified below by subject matter.

#### A. *Amendments to Pleadings*

The General Assembly has amended the Virginia Code to allow amendments to pleadings to relate back to the date of original filing for statute of limitations purposes if: (i) the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading, (ii) the amending party was reasonably diligent in asserting the amended claim or defense; and (iii) parties opposing the amendment will not be substantially prejudiced in litigating on the merits as a result of the timing of the amendment.<sup>124</sup> The new statute does not apply to eminent domain or mechanics' lien claims or defenses.<sup>125</sup> In a related provision, the statute governing amendment of pleadings to change the names of parties was broadened to include changing the names of parties for reasons other than misnomer.<sup>126</sup>

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122. *Id.* at 252, 467 S.E.2d at 785.

123. Unless otherwise indicated, all provisions became effective on July 1, 1996.

124. VA. CODE ANN. § 8.01-6.1 (Cum. Supp. 1996).

125. *Id.*

126. VA. CODE ANN. § 8.01-6 (Cum. Supp. 1996).

### B. *Accrual of Rights of Action*

In a change recommended by the Boyd-Graves Conference, the statute governing accrual of actions was amended to establish that, as had been the case for actions for injury to the person, actions for damage to property accrue when the injury occurs, rather than when the duty in question is breached.<sup>127</sup>

### C. *Service of Process*

The statute governing service of process was amended to make clear that private process servers may serve process without first obtaining authorization from the court.<sup>128</sup> More importantly, statutory changes now permit private process servers to serve writs of execution and garnishments.<sup>129</sup> This change should greatly facilitate collection efforts, where it is often prejudicial to the creditor to wait for normal service by the sheriff.

The statutes governing the manner of making returns on service of process were amended to provide that process servers must include their names, addresses, and phone numbers on their returns and must make return to the clerk's office within seventy-two hours of service, excepting Saturdays, Sundays, and legal holidays.<sup>130</sup>

### D. *Evidence*

#### 1. *Judicial Records*

The General Assembly has abolished the requirement that foreign court records be authenticated by both the clerk of the foreign court and a judge of that court in order to be received as prima facie evidence in Virginia courts. The statute now requires only authentication by the foreign court's clerk.<sup>131</sup>

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127. VA. CODE ANN. § 8.01-230 (Cum. Supp. 1996).

128. VA. CODE ANN. § 8.01-293 (Cum. Supp. 1996).

129. VA. CODE ANN. §§ 8.01-466, -511 (Repl. Vol. 1992 & Cum. Supp. 1996).

130. VA. CODE ANN. § 8.01-325 (Cum. Supp. 1996).

131. VA. CODE ANN. § 8.01-389 (Cum. Supp. 1996).

Additionally, a new enactment provides that an official records custodian's affidavit stating "that after a diligent search, no record or entry of such record is found to exist among the records in his office is admissible as evidence that his office has no such record or entry."<sup>132</sup>

The statute creating a presumption as to the reasonableness and authenticity of medical bills introduced into evidence was broadened to apply to such bills introduced in actions for medical expense benefits payable under motor vehicle insurance policies.<sup>133</sup> Likewise, a statutory amendment now allows use of medical records in evidence, upon sworn statement of the custodian, under certain circumstances in general district court actions involving disputes with health care providers.<sup>134</sup> The statute had previously applied only to personal injury actions and disputes with insurance companies.<sup>135</sup>

#### E. *Docketing of Judgments and Recordation of Other Papers*

The statute governing the docketing of judgments was amended to require that all judgments docketed on and after July 1, 1996 must include *inter alia* the full names of all parties and the dates of birth of all persons against whom the judgment was rendered, together with the case numbers of the actions in which the judgments were rendered.<sup>136</sup>

The statute governing recordings in the clerk's office now provides that the clerk may refuse to accept for filing or recordation any writing that does not contain on the first page of any document drafted in the Commonwealth "an entry showing the name of either the person or entity who drafted the instrument. . . ."<sup>137</sup>

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132. VA. CODE ANN. § 8132.12.01-390(B) (Cum. Supp. 1996).

133. VA. CODE ANN. § 8.01-413.01 (Cum. Supp. 1996).

134. VA. CODE ANN. § 16.1-88.2 (Repl. Vol. 1996).

135. VA. CODE ANN. § 16.1-88.2 (Cum. Supp. 1995).

136. VA. CODE ANN. § 8.01-449 (Cum. Supp. 1996).

137. VA. CODE ANN. § 17-59 (Repl. Vol. 1996).

