

## CIVIL PRACTICE AND PROCEDURE

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### I. INTRODUCTION

This article surveys recent significant developments in Virginia civil practice and procedure. Specifically, the article discusses opinions of the Supreme Court of Virginia from June 2009 through April 2010 addressing civil procedure; significant amendments to the Rules of the Supreme Court of Virginia made during the same period; and legislation enacted by the Virginia General Assembly during its 2010 session relating to civil practice.

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

#### A. *Expert Testimony*

The Supreme Court of Virginia recently decided several cases addressing matters of expert testimony.<sup>1</sup> In *Hollingsworth v. Norfolk Southern Railway Co.*, the court held that podiatrists are not qualified to provide expert opinions on the cause of physical injury.<sup>2</sup> In *Hollingsworth*, a case brought under the Federal Employers' Liability Act,<sup>3</sup> a railroad employee alleged that his job required him to walk on large ballast set on the bed of the railroad track and that this caused injury to his feet and ankles.<sup>4</sup> In sup-

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1. See *Boyce v. Commonwealth*, 279 Va. 644, 691 S.E.2d 782 (2010); *Lawrence v. Commonwealth*, 279 Va. 490, 689 S.E.2d 748 (2010); *Hollingsworth v. Norfolk S. Ry. Co.*, 279 Va. 360, 689 S.E.2d 651 (2010); *Graham v. Cook*, 278 Va. 233, 682 S.E.2d 535 (2009).

2. *Hollingsworth*, 279 Va. at 368–69, 689 S.E.2d at 656.

3. 45 U.S.C. §§ 51–60 (2006).

4. *Hollingsworth*, 279 Va. at 363, 689 S.E.2d at 652. “Ballast is rock laid on the

port of his cause, the plaintiff employee identified two licensed podiatrists as his expert witnesses.<sup>5</sup> The podiatrists were designated to testify that they had treated the plaintiff for a foot condition and that the injuries they treated were caused by his walking on irregular surfaces such as the railroad ballast.<sup>6</sup>

In response to the plaintiff's expert designation, the railroad filed motions in limine to exclude the podiatrists because they were not medical doctors and therefore could not opine as to the cause of the plaintiff's alleged foot injuries.<sup>7</sup> The trial court granted the motions and subsequently granted summary judgment in favor of the railroad on the grounds that the plaintiff could not prove his case, because the time for designating experts had passed and he did not have a witness to testify as to the cause of his injuries.<sup>8</sup> In affirming the trial court's decision, the court noted that it has "repeatedly held that only a medical doctor is qualified to testify about the cause of a human physical injury."<sup>9</sup> The court also pointed out the distinction drawn by the General Assembly between the practice of medicine and the practice of podiatry.<sup>10</sup> According to the language of Virginia Code section 54.1-2900 in effect at the time of the court's decision, the practice of medicine is defined as "the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method," whereas the practice of podiatry is defined as "the medical, mechanical and surgical treatment of the ailments of the human foot and ankle."<sup>11</sup> In light of these statutory definitions, the court found that "while both medical doctors and podiatrists may engage in the treatment of a physical injury to the human foot and ankle, only a medical doctor may engage in the diagnosis of that injury so as to qualify to render an expert opinion regarding the causation of that in-

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roadbed at a railroad track for the purpose of providing foundation and facilitating drainage." *Id.* at 363 n.1, 689 S.E.2d at 652 n.1 (citation omitted).

5. *Id.* at 363, 689 S.E.2d at 652.

6. *Id.*

7. *Id.*

8. *Id.*, 689 S.E.2d at 652-53.

9. *Id.* at 364, 369, 689 S.E.2d at 653, 656.

10. *Id.* at 366, 689 S.E.2d at 654.

11. VA. CODE ANN. § 54.1-2900 (Repl. Vol. 2009). As discussed *infra*, the statutory definition of the practice of podiatry was subsequently amended to eliminate the distinction cited by the court. See Act of Apr. 13, 2010, ch. 725, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 54.1-2900) (Supp. 2010)).

jury.”<sup>12</sup> As a result, the court upheld the exclusion of the podiatrists from testifying as to the cause of the plaintiff’s injuries.<sup>13</sup> In response to *Hollingsworth*, the 2010 General Assembly passed legislation to add “diagnosis” to the definition of the practice of podiatry.<sup>14</sup> Thus, the *Hollingsworth* result has been effectively abrogated by statute.

In two cases arising out of civil commitment proceedings under the Sexually Violent Predator Act,<sup>15</sup> the Supreme Court of Virginia addressed the ability of an expert witness to testify on the basis of hearsay. In *Lawrence v. Commonwealth*, the Commonwealth presented testimony from a licensed clinical psychologist that included details from police reports about certain unadjudicated allegations of sexual misconduct on the part of the defendant, and the defendant objected on the grounds that the information was hearsay and that any probative value was outweighed by undue prejudice.<sup>16</sup> The defendant also objected to the psychologist’s written psychological evaluation on the ground that it was based on the police reports containing unadjudicated allegations of misconduct.<sup>17</sup> In response, the Commonwealth contended that expert witnesses are allowed to rely upon hearsay under Virginia Code section 8.01-401.1 and that, in any event, the statements regarding the information contained in the police report were not being offered for their truth but to show the basis for the expert’s opinion.<sup>18</sup> The trial court overruled the defendant’s objections to the expert’s testimony but did give the jury the following limiting instruction: “Testimony regarding allegations of behavior contained in police reports for which the Respondent has not been convicted was not offered or is not offered to

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12. *Hollingsworth*, 279 Va. at 366, 689 S.E.2d at 654.

13. *Id.* at 368–69, 689 S.E.2d at 656.

14. See ch. 725, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 54.1-2900 (Supp. 2010)).

15. §§ 37.2-900 to -920 (Repl. Vol. 2005 & Cum. Supp. 2010).

16. 279 Va. 490, 493–94, 689 S.E.2d 748, 750 (2010).

17. *Id.* at 494, 689 S.E.2d at 750.

18. *Id.* Virginia Code section 8.01-401.1 states as follows in relevant part:

In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.

§ 8.01-401.1 (Repl. Vol. 2007 & Cum. Supp. 2010).

prove that the behavior actually occurred, but only as the basis for the expert's opinion."<sup>19</sup> The supreme court reversed, ruling that the psychologist's testimony "did not have an adequate factual foundation to the extent it was dependent upon assuming the truth of the hearsay allegations concerning [the defendant's] past sexual misconduct."<sup>20</sup> According to the court, because of the dependence upon the truth of the hearsay statements regarding the defendant's past, the expert's opinions "were speculative and unreliable as a matter of law."<sup>21</sup>

In the subsequent decision of *Boyce v. Commonwealth*, however, the supreme court upheld the opinion testimony of a mental health expert based in part on a criminal charge of taking indecent liberties with a child that had been dismissed by nolle prosequi.<sup>22</sup> The witness explained that his opinion that the defendant met the criteria of a sexually violent predator was based on the "totality of the evidence . . . includ[ing] a review of Boyce's criminal history, convictions as well as dismissed charges for sexual offenses, an interview with Boyce, and various risk assessments."<sup>23</sup> In distinguishing *Lawrence*, the court stated that the mental health professional in question "did not base his opinion on the inference that Boyce committed the offense dismissed by nolle prosequi."<sup>24</sup>

In *Graham v. Cook*, the Supreme Court of Virginia addressed the admissibility of certain testimony provided by a plaintiff's treating physicians in a medical malpractice case.<sup>25</sup> The plaintiff in *Graham* underwent surgery to repair a fractured hip, which entailed the installation of a reconstruction plate secured by several screws.<sup>26</sup> Following the surgery, the plaintiff continued to suffer pain in his hip and returned to his physician for follow-up treatment and X-rays.<sup>27</sup> The plaintiff later sued for medical malpractice.<sup>28</sup> A fundamental issue for the medical malpractice claim

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19. *Lawrence*, 279 Va. at 494, 689 S.E.2d at 750 (internal quotation marks omitted).

20. *Id.* at 499, 689 S.E.2d at 753.

21. *Id.*

22. 279 Va. 647, 651, 691 S.E.2d 782, 783–84, 786 (2010).

23. *Id.* at 647–48, 691 S.E.2d at 786.

24. *Id.* at 651, 691 S.E.2d at 786.

25. 278 Va. 233, 237, 682 S.E.2d 535, 537 (2009).

26. *Id.*

27. *Id.*

28. *Id.* at 238, 682 S.E.2d at 537.

was whether the plaintiff's condition was caused by one of the screws that had been inserted during the surgery or by a condition known as avascular necrosis (bone death due to lack of blood supply) unrelated to the screws.<sup>29</sup>

In support of his defense that it was avascular necrosis and not the screws inserted that caused the plaintiff's alleged injuries, the defendant physician introduced deposition testimony from certain other physicians who had treated the plaintiff.<sup>30</sup> Testimony from two of the plaintiff's treating radiologists, who read from their written reports, included statements that (1) "[t]he possibility of avascular necrosis is not excluded," (2) "avascular necrosis cannot be excluded," (3) "[the b]ony defect now seen involving the anterior aspect of the femoral head [is] associated with . . . demineralization suggesting fracture and avascular necrosis," and (4) "[t]his raises the suspicion for avascular necrosis."<sup>31</sup> The plaintiff objected to these statements, contending that avascular necrosis is a medical diagnosis and the radiologists had not testified to this condition with the requisite reasonable degree of medical probability required by Virginia Code section 8.01-399(B).<sup>32</sup> In upholding the trial court's admission of the radiologists' testimony, the supreme court concluded that the doctors had not testified as to a diagnosis but instead had given testimony that was "factual in nature and related the physicians' impressions and conclusions formed when treating" the plaintiff.<sup>33</sup> According to the court, the statements were not diagnoses "because the statements did not purport to identify specifically the cause of [the plaintiff's] health condition based on his signs and symptoms."<sup>34</sup>

The defendant also submitted the deposition testimony of a surgeon who had performed a procedure on the plaintiff's hip, who testified among other things that "he 'did not see any gouging of the femoral head from any hardware,' and that [the plaintiff] 'clearly had Stage III avascular necrosis as his major prob-

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29. *Id.*

30. *Id.* at 238–39, 682 S.E.2d at 537–38.

31. *Id.* at 239–40, 682 S.E.2d at 538 (emphasis omitted).

32. *Id.* at 239, 682 S.E.2d at 538. Virginia Code section 8.01-399(B) states as follows: "Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial." VA. CODE ANN. § 8.01-399(B) (Cum. Supp. 2010).

33. *Graham*, 278 Va. at 244, 682 S.E.2d at 541.

34. *Id.* at 245, 682 S.E.2d at 541.

lem.”<sup>35</sup> The plaintiff again challenged the introduction of both statements as expressing expert medical opinions that were not stated within a reasonable degree of medical probability.<sup>36</sup> As to the first statement, the supreme court again ruled that the doctor’s testimony was essentially factual and based on his own observations during treatment, and not a diagnosis that needed to comply with Virginia Code section 8.01-399(B).<sup>37</sup> As to the second statement, however, the court concluded that the doctor had stated a diagnosis, so the issue was whether the diagnosis had been made with a reasonable degree of medical probability.<sup>38</sup> In upholding the admission of the diagnosis, the court pointed to an opening colloquy of defendant’s counsel during the deposition in which the witness was instructed that “some of my questions may or may not require medical opinion, and if your answer does include medical opinion, I would ask you only give such opinion if you hold it within a reasonable degree of medical probability.”<sup>39</sup> Although the plaintiff contended that this “prefatory exchange” failed to provide a sufficient foundation to admit the doctor’s diagnosis, the supreme court noted that plaintiff’s counsel failed to object to the form of the questions eliciting the diagnosis at the time of the deposition and ruled that the plaintiff therefore lost the opportunity to raise those objections at trial according to Rule 4:7(d)(3)(B).<sup>40</sup>

Of additional interest to Virginia civil practitioners, the supreme court ruled that it was unable to review the trial court’s limitation of the plaintiff’s cross-examination of one of the defendant’s witnesses on the grounds that the issue had not been preserved for appeal.<sup>41</sup> The supreme court reminded practitioners, “When trial testimony is excluded before it is delivered, an appellate court lacks a basis for reviewing a circuit court’s evidentiary

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35. *Id.*

36. *Id.* at 238, 682 S.E.2d at 537–38.

37. *Id.* at 245, 682 S.E.2d at 541.

38. *Id.* at 245–46, 682 S.E.2d at 542.

39. *Id.* at 246, 682 S.E.2d at 542 (internal quotation marks omitted).

40. *Id.* at 246–47, 682 S.E.2d at 542. Rule 4:7(d)(3)(B) states as follows: “Errors and irregularities occurring at the oral examination . . . in the form of the questions or answers . . . and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.” VA. SUP. CT. R. pt. 4, R. 4:7(d)(3)(B) (Repl. Vol. 2010).

41. *Graham*, 278 Va. at 248–49, 682 S.E.2d at 543.

ruling unless the record reflects a proper proffer.”<sup>42</sup> Because the plaintiff had not proffered the anticipated testimony that would have been elicited on cross-examination, the court ruled that it could not determine whether the trial court’s ruling prejudiced the plaintiff.<sup>43</sup>

In addition, the plaintiff challenged the trial court’s decision that his counsel could not, during closing argument, point the jurors to X-rays that had been admitted into evidence and invite them to engage in comparisons of the X-rays.<sup>44</sup> In upholding the trial court’s ruling, the supreme court noted, “Although counsel for a party generally has wide latitude in making closing arguments, counsel may not argue as evidence in the case matters that do not appear in the record.”<sup>45</sup> The court then concluded that in asking the jury to compare the X-rays, plaintiff’s counsel was effectively calling for the jury to conclude that the defect in the femoral head stopped expanding after the screw installed by the defendant was removed.<sup>46</sup> Such a conclusion could not be drawn by the jury from the X-rays themselves without expert testimony on the subject.<sup>47</sup>

#### B. *Suits by Administrators and Executors of Estates*

In *Hawthorne v. Van Marter*, the Supreme Court of Virginia held that the administrators of an estate did not have the ability to file a pro se appeal.<sup>48</sup> The *Hawthorne* case involved an automobile accident in which a Roanoke County police vehicle driven by an officer struck another vehicle, killing the driver and injuring a passenger.<sup>49</sup> The officer filed a plea in bar on the grounds that sovereign immunity barred the plaintiffs’ claims of ordinary negligence.<sup>50</sup> The plea was sustained by the trial court, which also denied the plaintiffs’ motion to reconsider the ruling.<sup>51</sup> At trial, the

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42. *Id.* at 249, 682 S.E.2d at 543.

43. *Id.*, 682 S.E.2d at 544.

44. *Id.*

45. *Id.*

46. *Id.* at 250, 682 S.E.2d at 544.

47. *Id.* (citation omitted).

48. 279 Va. 566, 576, 692 S.E.2d 226, 233 (2010) (citing *Kone v. Wilson*, 272 Va. 59, 62–63, 630 S.E.2d 744, 746 (2006)).

49. *Id.* at 571, 692 S.E.2d at 230.

50. *Id.*

51. *Id.* at 572–73, 692 S.E.2d at 230–31.

jury rendered a verdict in favor of the officer, and the court entered final judgment in accordance with the jury's verdict.<sup>52</sup>

The officer moved to dismiss the appeal of the estate of the deceased driver because the appeal had been filed by the administrators of the estate in a pro se capacity.<sup>53</sup> Noting that the administrators could "act only in a representative capacity for the beneficiaries of the Hawthorne Estate" and therefore could not file an appeal in a pro se capacity because they "were not the true parties in interest," the Supreme Court of Virginia granted the motion to dismiss.<sup>54</sup> In so ruling, the court also noted that the notice of appeal filed on behalf of the passenger co-plaintiff did not perfect the appeal as to the estate.<sup>55</sup> Although the rules provide for a single notice of appeal to be filed on behalf of all parties when two or more cases have been tried together, in the instant matter the parties had filed separate notices of appeal, and the co-plaintiff's notice did not purport to be filed on behalf of the estate.<sup>56</sup>

In *Idoux v. Estate of Helou*, the Supreme Court of Virginia addressed issues regarding tolling of the statute of limitations and the proper party in actions involving an estate.<sup>57</sup> The *Helou* case began when Thomas Idoux filed a pro se warrant in debt in the general district court against Raja Helou to seek damages for Helou's alleged negligence in connection with an automobile accident.<sup>58</sup> Helou had died prior to the filing of the warrant in debt and the general district court dismissed the action without prejudice because Idoux had named a deceased defendant.<sup>59</sup> Months later, Idoux filed a negligence action in the circuit court against the "Estate of Raja Alexander Helou."<sup>60</sup> Idoux later served the complaint on the estate's personal representative after the limitations period had expired.<sup>61</sup> The estate responded by filing "a plea in bar asserting that the Estate [was not] a proper party to this

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52. *Id.* at 574, 692 S.E.2d at 232.

53. *Id.*

54. *Id.* at 576, 692 S.E.2d at 232-33.

55. *Id.* at 575, 692 S.E.2d at 232.

56. *Id.* (applying VA. SUP. CT. R. pt. 5, R. 5:9(c) (Repl. Vol. 2010)).

57. 279 Va. 548, 551, 691 S.E.2d 773, 774-75 (2010).

58. *Id.*, 691 S.E.2d at 774.

59. *Id.*, 691 S.E.2d at 774-75.

60. *Id.*, 691 S.E.2d at 775 (internal quotation marks omitted).

61. *Id.*



action, that the complaint could not be amended to substitute the personal representative [as the proper defendant], and that the applicable statute of limitations had expired.”<sup>62</sup> The trial court sustained the plea and dismissed the case.<sup>63</sup>

On appeal, Idoux contended that the statute of limitations was tolled under Virginia Code section 8.01-6.2(B) when he mistakenly filed his action against the estate.<sup>64</sup> This section of the Virginia Code provides:

In the event that suit is filed against the estate of a decedent, and filed within the applicable statute of limitations, naming the proper name of estate of the deceased and service is effected or attempted on an individual or individuals as executor, administrator or other officers of the estate, such filing tolls the statute of limitations for said claim in the event the executor, administrator or other officers of the estate are unable to legally receive service at the time service was attempted, or defend suit because their authority as executor, administrator or other officer of the estate excludes defending said actions, or their duties as executor, administrator or other officer of the estate had expired at the time of service or during the time of defending said action.<sup>65</sup>

In rejecting Idoux’s argument that the limitations period was tolled, the supreme court emphasized the general rules that: (1) in order to toll the statute of limitations a suit must be filed against a proper party, and (2) an action against an estate is a nullity which cannot toll the limitations period.<sup>66</sup> The supreme court characterized Virginia Code section 8.01-6.2(B) as creating statutory exceptions to these general rules and focused on whether Idoux’s complaint qualified for the statutory exception invoked when an administrator or executor is legally unable to receive service at the time attempted.<sup>67</sup> The court held that section 8.01-6.2(B) did not apply to Idoux’s claim because the personal representative of the Helou estate had qualified and was legally able to receive service of an action filed with the proper name before the expiration of the statute of limitations.<sup>68</sup>

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62. *Id.*

63. *Id.*

64. *Id.* at 552, 691 S.E.2d at 775.

65. VA. CODE ANN. § 8.01-6.2(B) (Repl. Vol. 2007).

66. *Idoux*, 279 Va. at 553, 691 S.E.2d at 776 (quoting *Swann v. Marks*, 252 Va. 181, 184, 476 S.E.2d 170, 171–72 (1996)).

67. *Id.* at 553–54, 691 S.E.2d at 776 (citation omitted).

68. *Id.* at 554–55, 691 S.E.2d at 776 (citing *James v. Peyton*, 277 Va. 443, 453 n.3, 674

Idoux also contended that Virginia Code section 8.01-229(B)(2) entitled him to amend his suit to include the personal representative as a defendant.<sup>69</sup> This section states:

Death of person against whom personal action may be brought.—

a. If a person against whom a personal action may be brought dies before the commencement of such action and before the expiration of the limitation period for commencement thereof then a claim may be filed against the decedent's estate or an action may be commenced against the decedent's personal representative before the expiration of the applicable limitation period or within one year after the qualification of such personal representative, whichever occurs later.

b. If a person against whom a personal action may be brought dies before suit papers naming such person as defendant have been filed with the court, then such suit papers may be amended to substitute the decedent's personal representative as party defendant before the expiration of the applicable limitation period or within two years after the date such suit papers were filed with the court, whichever occurs later, and such suit papers shall be taken as properly filed.<sup>70</sup>

The supreme court rejected Idoux's argument and held that section 8.01-229(B)(2) did not save his claim because Idoux never filed an action against the personal representative prior to the expiration of the statute of limitations or within one year from the date of the personal representative's qualification.<sup>71</sup> The court also noted that Idoux's warrant in debt was dismissed rather than amended; thus, section 8.01-229(B)(2) was not applicable.<sup>72</sup>

In *Antisdel v. Ashby*, the Supreme Court of Virginia addressed the issue of whether an administrator of an estate who had been appointed solely for the purpose of bringing a wrongful death action had standing to assert survival claims on behalf of the estate.<sup>73</sup> The court held that the administrator lacked standing.<sup>74</sup> In *Antisdel*, a suicide victim's mother sought and achieved confirmation as the administrator of her son's estate "for purposes established under Code of Virginia section 8.01-50 et seq."<sup>75</sup> Prior to

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S.E.2d 864, 868 n.3 (2009)).

69. *Id.* at 555, 691 S.E.2d at 776–77.

70. § 8.01-229(B)(2) (Repl. Vol. 2007 & Cum. Supp. 2010).

71. *Idoux*, 279 Va. at 556–57, 691 S.E.2d at 777–78.

72. *Id.* at 556, 691 S.E.2d at 777.

73. 279 Va. 42, 45, 688 S.E.2d 163, 165 (2010).

74. *Id.* at 49, 688 S.E.2d at 167.

75. *Id.* at 45, 688 S.E.2d at 165. Virginia Code section 8.01-50 provides the mechanism under which wrongful death claims must be brought. § 8.01-50 (Repl. Vol. 2007 & Cum. Supp. 2010).

seeking her appointment order, the administrator had filed a wrongful death claim against certain doctors who had treated her son and against the manufacturers and distributors of medications prescribed to him for acne treatment and anxiety-like symptoms.<sup>76</sup> The complaint was later amended to add survival claims for personal injuries suffered by her son during his lifetime.<sup>77</sup> After nonsuiting the action, as well as a subsequent action alleging the same claims, the administrator filed a third complaint raising only survival claims for personal injuries due to certain alleged side effects and interactions of her son's prescription medications.<sup>78</sup> The defendants filed pleas in bar, which were granted by the trial court on the ground that the administrator lacked standing to bring the survival claims because the appointment order provided only for the initiation of a wrongful death action.<sup>79</sup>

On appeal, the administrator argued that under Virginia Code section 64.1-75.1 the clerk may appoint an administrator for purposes of bringing both survival and wrongful death claims; therefore, the clerk lacked authority to limit the administrator's appointment to the ability to only bring a wrongful death claim.<sup>80</sup> The supreme court rejected this argument, reasoning that nothing in section 64.1-75.1 required the clerk to authorize the administrator to bring both types of actions contemplated under the statute when the request had only been made for a wrongful death claim.<sup>81</sup>

The court also held that the trial court did not err in refusing to reform the appointment order *nunc pro tunc* to allow the administrator to pursue a survival action.<sup>82</sup> The court noted that the purpose of *nunc pro tunc* orders "is to correct mistakes or omissions in the record so that the record properly reflects the events

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76. *Antisdel*, 279 Va. at 45–46, 688 S.E.2d at 165.

77. *Id.* at 46, 688 S.E.2d at 165.

78. *Id.*

79. *Id.*

80. *Id.* at 46–47, 688 S.E.2d at 165.

81. *Id.* at 49, 688 S.E.2d at 167. The court also noted that the ability of an administrator to be appointed solely for the purpose of bringing a wrongful death claim was confirmed by Virginia Code section 26.12.2, which exempts a personal representative appointed for the sole purpose of bringing a wrongful death claim from the requirements of inventory and settlement filing otherwise applicable to estate administrators. *Id.* at 50, 688 S.E.2d at 167.

82. *Id.* at 50, 688 S.E.2d at 168.

that actually took place.”<sup>83</sup> Because the clerk’s order appointing the administrator accurately reflected the application made by the administrator, the court ruled that entry of a nunc pro tunc order “would have created a fiction, establishing the granting of a fiduciary power that never existed.”<sup>84</sup>

### C. *Preservation of Objections for Appeal*

The issue of preservation of objections for appeal was addressed in detail by the Supreme Court of Virginia in two separate civil cases.<sup>85</sup> In *Johnson v. Hart*, a legal malpractice action brought by the testamentary beneficiary to a decedent’s estate, the trial court ruled that the testamentary beneficiary lacked standing to bring an action against the attorney for her deceased mother’s estate.<sup>86</sup> In a motion for summary judgment, the defendant attorney contended that the beneficiary could not bring a malpractice claim because any attorney-client relationship was between himself and the estate.<sup>87</sup> In response, the beneficiary contended that Virginia Code section 8.01-13 permitted her, as a beneficial owner of the estate, to sue in her individual capacity for malpractice.<sup>88</sup> The trial court granted summary judgment to the attorney, stating in its letter opinion that while section 8.01-13 would appear to allow the plaintiff, as beneficiary of the estate, to bring a malpractice claim, that provision should not act to override the policy against malpractice suits by strangers to the attorney-client relationship.<sup>89</sup> Counsel for the beneficiary endorsed the order memorializing the trial court’s decision “[s]een and ob-

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83. *Id.* at 50–51, 688 S.E.2d at 168 (citation omitted).

84. *Id.* at 51, 688 S.E.2d at 168.

85. See *Johnson v. Hart*, 279 Va. 617, 624, 692 S.E.2d 239, 243 (2010); *United Leasing Corp. v. Lehner Family Bus. Trust*, 279 Va. 510, 513, 689 S.E.2d 670, 671 (2010).

86. 279 Va. at 619–20, 625–26, 692 S.E.2d at 240–41, 244.

87. *Id.* at 620, 622, 692 S.E.2d at 241.

88. *Id.* at 622, 692 S.E.2d at 242. According to Virginia Code section 8.01-13, the “assignee or beneficial owner of any bond, note, writing or other chose in action . . . may maintain thereon in his own name any action which the original obligee, payee, or contracting party might have brought.” VA. CODE ANN. § 8.01-13 (Repl. Vol. 2007 & Cum. Supp. 2010). The beneficiary conceded that Virginia law prohibits assignment of a legal malpractice claim, but contended that she could nevertheless bring such a claim as a beneficial owner. *Johnson*, 279 Va. at 622, 692 S.E.2d at 242.

89. 279 Va. at 622, 692 S.E.2d at 242.

jected to,” and the defendant’s attorney endorsed the order “[s]een and consented to.”<sup>90</sup>

The beneficiary appealed the trial court’s decision that she lacked standing to bring a malpractice claim, and the defendant cross-appealed on the issue of the court’s application of section 8.01-13.<sup>91</sup> On appeal, the beneficiary argued that the defendant had waived his objections to the portions of the court’s ruling that she was a beneficial owner of the malpractice claim under section 8.01-13 by virtue of his having endorsed the dismissal order “seen and consented to.”<sup>92</sup> The court rejected this position, ruling that “the context of [the defendant’s] endorsement, as the prevailing party, indicates that he consented to the trial court’s order granting his motion for summary judgment.”<sup>93</sup> Regarding the trial court’s decision on whether the plaintiff was a beneficial owner of the action, the supreme court ruled that the defendant had clearly stated his opposition to that position in his memoranda filed in support of his summary judgment motion “and cannot be deemed to have abandoned this position by acquiescing in a summary judgment order in his favor.”<sup>94</sup>

On the substantive standing issue, the supreme court also ruled that section 8.01-13 “does not permit beneficial ownership of a cause of action for legal malpractice.”<sup>95</sup> In reaching this conclusion, the court emphasized that a claim for legal malpractice requires first and foremost an attorney-client relationship, which is the basis for the prohibition on assignment of legal malpractice claims.<sup>96</sup> Because no attorney-client relationship existed between the attorney and the beneficiary in her individual capacity, she lacked standing to bring the claim.<sup>97</sup>

In *United Leasing Corp. v. Lehner Family Business Trust*, the supreme court addressed the preservation of objections when re-

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90. *Id.* at 623, 692 S.E.2d at 242 (alterations in original) (internal quotation marks omitted).

91. *Id.*

92. *Id.*

93. *Id.* at 624, 692 S.E.2d at 243.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 626, 692 S.E.2d at 244 (citing *Ayyildiz v. Kidd*, 220 Va. 1080, 1086, 266 S.E.2d 108, 112–13 (1980)).

newing a motion to strike at the conclusion of trial.<sup>98</sup> *United Leasing* involved a breach of contract claim brought by a trust pursuant to an alleged assignment of the cause of action to the trust.<sup>99</sup> At the conclusion of the plaintiff's evidence the defendant moved to strike on the grounds of failure to prove an assignment of the cause of action and failure to prove breach of contract.<sup>100</sup> The trial court overruled the motion, and the defendant put on additional evidence in support of its defense, including testimony from two witnesses.<sup>101</sup> At the close of all the evidence, the defendant renewed its motion to strike and presented an argument focused on the plaintiff's lack of evidence concerning damages but omitted mention of the previously argued position that the plaintiff had failed to prove a valid assignment.<sup>102</sup> The court overruled the renewed motion to strike as well as other post-trial motions and entered judgment against the defendant based on the jury's verdict.<sup>103</sup>

On appeal, the defendant assigned error to the trial court's denial of its motion to strike, contending that the evidence did not establish a valid assignment of the claim to the trust.<sup>104</sup> In response, the plaintiff argued—and the supreme court agreed—that the defendant was barred from pursuing the assignment argument on appeal because it had failed to include that issue in its renewed motion to strike at the conclusion of the evidence.<sup>105</sup> In arriving at its conclusion, the court noted that “[w]hen a defendant chooses to introduce evidence [in support of its] defense, [it] demonstrates by [its] conduct the intent to abandon the argument that the [plaintiff] failed to meet its burden through the evidence presented in its case-in-chief.”<sup>106</sup> As a result, the defendant has an obligation to fully inform the court of the grounds upon which it relies in making any new motion to strike at the conclusion of all the evidence.<sup>107</sup> Because the defendant was required to identify

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98. 279 Va. 510, 513, 689 S.E.2d 670, 671 (2010).

99. *Id.*

100. *Id.* at 514–15, 689 S.E.2d at 672.

101. *Id.* at 515, 689 S.E.2d at 672.

102. *Id.* at 515–16, 689 S.E.2d at 672–73.

103. *Id.* at 516, 689 S.E.2d at 673.

104. *Id.*

105. *Id.* at 516, 520, 689 S.E.2d at 673, 675.

106. *Id.* at 517–18, 689 S.E.2d at 674 (quoting *Graham v. Cook*, 278 Va. 233, 248, 682 S.E.2d 535, 543 (2009)) (internal quotation marks omitted).

107. *Id.* at 518, 689 S.E.2d at 674. The supreme court also noted that, because it came

the grounds upon which it based its motion to strike at the conclusion of the evidence and failed to do so, the court held that the issue of validity of the assignment was not preserved for purposes of appeal under Rule 5:25.<sup>108</sup>

#### D. *Nonsuits*

In *City of Suffolk v. Lummis Gin Co.*, the Supreme Court of Virginia addressed whether the nonsuit in question was a second nonsuit for which attorney fees and costs could be awarded under Code section 8.01-380(B) or was a first nonsuit of right for which there could be no such award.<sup>109</sup> In addition, the court addressed whether the trial court's order granting the nonsuit was a final order for purposes of Rule 1:1.<sup>110</sup> In *Lummis Gin Co.*, the City of Suffolk ("City"), seeking to sell certain parcels of land located within city bounds in order to satisfy liens for delinquent real estate taxes, brought a suit against numerous alleged property owners.<sup>111</sup> The City filed a motion for a nonsuit so "that th[e] action [would] stand dismissed as to the defendant, Lummis Gin Co., without prejudice to the bringing of another action."<sup>112</sup> The City later brought another action seeking to satisfy all delinquent taxes on the same parcel that had been identified in the first suit as belonging to Lummis Gin Company.<sup>113</sup> The City named the Lummis Gin Company and other individuals as defendants in the second suit, but the only defendants who responded to the later suit were a group of individuals identified as the Baker heirs.<sup>114</sup> When the City submitted a proposed nonsuit order for the second suit during a hearing, the Baker heirs contended that the City was making a request for a second nonsuit and asked the court to award them attorney fees and costs.<sup>115</sup> In addressing the issue,

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after additional evidence had been presented, the defendant's renewed motion to strike was in reality a new motion. *Id.*; see also VA. CODE ANN. § 8.01-384(A) (Repl. Vol. 2007 & Cum. Supp. 2010) (providing that a party "make[ ] known to the court the action which he desires the court to take or his objections to the actions of the court and his grounds therefor").

108. *United Leasing*, 279 Va. at 520, 689 S.E.2d at 675.

109. 278 Va. 270, 273, 683 S.E.2d 549, 550 (2009).

110. *Id.*

111. *Id.*

112. *Id.* (internal quotation marks omitted).

113. *Id.*, 683 S.E.2d at 551.

114. *Id.*

115. *Id.* at 273-74, 683 S.E.2d at 551.

the trial court stated at the hearing that it would enter the nonsuit order and retain the case on the docket for purposes of considering the issues of fees and costs and whether it was a first or second nonsuit.<sup>116</sup> That same day, the trial court entered an order granting the nonsuit and further ordering that the “suit shall remain on the docket for the Court to determine issues concerning attorney fees, costs and expenses incurred by [the Baker heirs].”<sup>117</sup>

The parties subsequently briefed their positions and appeared again before the court for argument approximately six months after the entry of the nonsuit order in question.<sup>118</sup> On the nonsuit issue, the City contended that the nonsuit in the earlier case was only as to Lummis Gin Company and so the subsequent nonsuit was a first nonsuit as to the Baker heirs, who were not named as parties to the initial proceeding.<sup>119</sup> The City further argued that the nonsuit order in question was a final order for purposes of Rule 1:1 and that the court had lost jurisdiction to determine the issue of fees and costs because more than twenty-one days had passed since the order was entered.<sup>120</sup> The trial court disagreed with the City on both counts and entered a “Final Order” in favor of the Baker heirs for their fees and costs, ruling that the case presented a second nonsuit and denying the City’s request for a ruling that the court had lost jurisdiction under Rule 1:1.<sup>121</sup>

On appeal, as to the nonsuit issue, the supreme court ruled that the Baker heirs were not parties to the first proceeding and therefore focused on whether the second proceeding was the same cause of action as the first for purposes of Virginia Code section 8.01-380,<sup>122</sup> which allows that “one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right.”<sup>123</sup> The court then ruled that the second action necessarily involved the satisfaction of different delinquent taxes than the first case and so was not the same cause of action.<sup>124</sup> As a

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116. *Id.* at 274, 683 S.E.2d at 551.

117. *Id.* (internal quotation marks omitted).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 274–75, 683 S.E.2d at 551.

122. *Id.* at 275–76, 683 S.E.2d at 552.

123. VA. CODE ANN. § 8.01-380(B) (Repl. Vol. 2007 & Cum. Supp. 2010).

124. *Lummis Gin Co.*, 278 Va. at 276, 683 S.E.2d at 552.



result, the City had an absolute right to nonsuit the second case and the trial court had no ability to award fees and costs.<sup>125</sup>

While its holding on the nonsuit issue resolved the appeal, the court also took the opportunity to address the finality of the nonsuit order for purposes of Rule 1:1.<sup>126</sup> On that subject, the court pointed to prior precedent that a nonsuit order is subject to Rule 1:1 and stated that the trial court therefore had only twenty-one days to address the issue of fees and costs before it lost jurisdiction to do so, despite the language in the order that the case would remain on the docket so that the issue could be determined.<sup>127</sup> As more than twenty-one days had passed since the date of the nonsuit order, the court's subsequent "final order" awarding the Baker heirs their fees and costs was a "nullity."<sup>128</sup>

#### E. *Final Orders*

The Supreme Court of Virginia also addressed the finality of orders in *Hutchins v. Talbert*, this time in the context of the deadline for noting an appeal.<sup>129</sup> The order in question was an order denying a motion to set aside the verdict.<sup>130</sup> In this medical malpractice case, the jury awarded a verdict in favor of the plaintiff for \$4 million, which was reduced by the trial court to \$885,000 to account for an earlier settlement with a co-defendant and the limit set on malpractice damages under Virginia Code sections 8.01-35.1 and 8.01-581.15.<sup>131</sup> This judgment was memorialized in an order dated April 25, 2008, entitled "Final Order," concluding with the statement "AND THIS CAUSE IS ENDED."<sup>132</sup> That same day, however, the trial court also entered an order labeled "Suspending Order," stating that the final order was suspended for fourteen days, thus tolling the running of the twenty-one day period under Rule 1:1 and allowing a total of thirty-five days for entry of an amended final order.<sup>133</sup>

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125. *Id.*

126. *Id.*

127. *Id.* at 276–77, 683 S.E.2d at 552–53 (citations omitted).

128. *Id.* at 277, 683 S.E.2d at 553.

129. 278 Va. 650, 652, 685 S.E.2d 658, 659 (2009).

130. *Id.*

131. *Id.* (citations omitted).

132. *Id.*

133. *Id.*

The defendant subsequently filed a motion to set aside the verdict, which the trial court denied by an order dated May 28, 2008 that only addressed the motion and did not refer to the final order.<sup>134</sup> No additional orders were entered by the trial court.<sup>135</sup> The defendant filed his notice of appeal on June 19, 2008, and the plaintiff filed a motion to dismiss the appeal, contending that the trial court's final judgment order ended on May 9, 2008 and was not thereafter amended, vacated, or suspended.<sup>136</sup> The plaintiff argued that the defendant was therefore required by Rule 5:9 to file a notice of appeal within thirty days of May 9, 2008; thus, the June 19 filing was untimely.<sup>137</sup> The defendant responded to the motion by contending that, because he had filed a post-trial motion, which was ruled upon while the trial court still had jurisdiction, the thirty-day period under Rule 5:9 began on May 28—the date of the trial court's order denying the motion to set aside the verdict—and his appeal was therefore timely.<sup>138</sup>

In granting the plaintiff's motion to dismiss the appeal, the supreme court began by noting that the thirty-day period under Rule 5:9 for filing a notice of appeal begins upon "the entry of final judgment."<sup>139</sup> The court also emphasized that under Rule 5:5, "[t]he time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the trial court pursuant to Rule 1:1," which the trial court's subsequent order denying the defendant's motion to set aside the verdict did not do.<sup>140</sup> In analyzing when the time for filing the notice of appeal began to run, the court held that the trial court had properly suspended its final judgment for a period of fourteen days through its suspending order, and that the fourteen-day period was self-executing and expired on May 9, 2008, thus beginning the thirty-day filing period under Rule 5:9.<sup>141</sup> Ac-

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134. *Id.* at 652–53, 685 S.E.2d at 659.

135. *Id.* at 653, 685 S.E.2d at 659.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 653–55, 685 S.E.2d at 659–30 (quoting VA. SUP. CT. R. pt. 5, R. 5.9(a) (Repl. Vol. 2010)).

140. *Id.* at 653–54, 685 S.E.2d at 660 (quoting VA. SUP. CT. R. pt. 5, R. 5:5(a) (Repl. Vol. 2010)).

141. *Id.* at 654, 685 S.E.2d at 660.

ording to the court, because the notice was not filed within thirty days of May 9, it was untimely, and the appeal was dismissed.<sup>142</sup>

#### F. *Trial Transcripts and Written Statements of Fact*

In a case of particular significance for indigent parties seeking to see their case all the way through from a general district court trial to appeal, the Supreme Court of Virginia held in *Shapiro v. Younkin* that a circuit court erred in dismissing an appeal from general district court for the plaintiff's failure to obtain a court reporter for the proceeding.<sup>143</sup> The plaintiff in *Shapiro* filed a suit pro se in general district court over a landlord-tenant dispute, and the suit was dismissed.<sup>144</sup> The plaintiff, again proceeding pro se, appealed the general district court's ruling to the circuit court, and the case was set for trial.<sup>145</sup> On the day of the circuit court trial, the court dismissed the plaintiff's case with prejudice based on his noncompliance with a local court rule that required a court reporter to be present at the trial of all civil matters, unless the requirement is waived upon approval of the court prior to the trial date.<sup>146</sup>

The plaintiff had admittedly not sought prior approval to waive the requirement of a court reporter, but did so before the trial began on the grounds of indigence.<sup>147</sup> The trial court denied the request, finding the plaintiff possessed sufficient funds to pay for a court reporter and "that there was a high likelihood of appeal by the non-prevailing party and . . . a statement of facts would be insufficient for appeal."<sup>148</sup> Later that day, following the dismissal of his case, the plaintiff submitted to the court a proposed written statement of facts for purposes of his appeal to the supreme court.<sup>149</sup> The trial court refused to certify the proposed statement and instead wrote directly on the proposed statement that the

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142. *Id.* at 655, 685 S.E.2d at 660.

143. 279 Va. 256, 266–67, 688 S.E.2d 157, 163 (2010).

144. *Id.* at 259, 688 S.E.2d at 159.

145. *Id.*

146. *Id.* at 260, 688 S.E.2d at 159.

147. *Id.*

148. *Id.* (internal quotation marks omitted).

149. *Id.* at 261, 688 S.E.2d at 159.

case was dismissed on procedural grounds and that thus no statement of facts should be necessary for an appeal.<sup>150</sup>

On appeal, the plaintiff argued, and the supreme court agreed, that the trial court had violated Virginia Code section 17.1-128 and Rule 5:11 by dismissing the case for lack of a court reporter and rejecting the plaintiff's proposed statement of facts.<sup>151</sup> Section 17.1-128 provides that "[t]he failure to secure the services of a reporter, or the failure to have the case reported or recorded for any other reason, shall not affect the proceeding or trial."<sup>152</sup> Rule 5:11, which addresses transcripts and written statements of fact, provides that a written statement of fact becomes part of the record when "signed by the trial judge and filed in the office of the clerk."<sup>153</sup> The rule further provides that "[t]he judge may sign the statement forthwith upon its presentation to him if it is signed by counsel for all parties, but if objection is made to the accuracy or completeness of the statement, it shall be signed in accordance with subsection (d) of this Rule."<sup>154</sup> According to subsection (d) of Rule 5:11, upon proper notice of objection to a proposed statement of facts, the trial court *shall* "(1) overrule the objections; or (2) make any corrections the he deems necessary; or (3) include any accurate additions to make the record complete; or (4) certify the manner in which the record is incomplete; and (5) sign the transcript or written statement."<sup>155</sup> As to Rule 5:11, the supreme court ruled that the trial court's annotations of the proposed written statement did not comply with the rule and that, at a minimum, the court should have signed the statement and certified the manner in which the record was incomplete.<sup>156</sup> In summarizing the grounds for its reversal of the trial court's judgment and remand for a trial on the merits, the supreme court issued the following rebuke to the trial court:

We take this opportunity to emphasize that in the absence of a written transcript, when a litigant has taken all available measures to provide the circuit court with an accurate and complete record of the proceedings, and the trial judge nevertheless is unable to create a

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150. *Id.*, 688 S.E.2d at 159–60.

151. *Id.* at 261–62, 688 S.E.2d at 160.

152. VA. CODE ANN. § 17.1-128 (Repl. Vol. 2010).

153. VA. SUP. CT. R. pt. 5, R. 5:11(c)(2) (Repl. Vol. 2010).

154. *Id.*

155. *Id.* R. 5:11(d) (Repl. Vol. 2010) (emphasis added).

156. *Shapiro*, 279 Va. at 266, 688 S.E.2d at 162.

complete written statement for purposes of appeal after consultation with all parties, the proper remedy is to order a new trial . . . . A circuit court is not authorized to dismiss a case based solely on a litigant's failure to obtain the services of a court reporter, and later to refuse to certify the litigant's proposed statement of facts because it is inaccurate.<sup>157</sup>

### G. *Juror Challenges*

In *Roberts v. CSX Transportation, Inc.*, the Supreme Court of Virginia addressed a trial court's failure to strike for cause a potential juror who was a stockholder of the defendant corporation, thereby forcing the plaintiff to use a peremptory challenge to remove the individual from the panel.<sup>158</sup> The *Roberts* case involved the trial of a personal injury claim brought by an employee of a railroad company.<sup>159</sup> During voir dire regarding matters that might reveal bias, a potential juror revealed that he had been a shareholder of the railroad for approximately thirty years, although he also stated in response to follow-up questions from the court that he did not actively participate in annual meetings of the company and did not feel his status as a stockholder would affect his ability to be impartial.<sup>160</sup> The plaintiff moved that the potential juror be stricken for cause due to his status as a long-time shareholder, but the trial court denied the motion.<sup>161</sup> The plaintiff subsequently used one of his peremptory challenges to remove the stockholder from the panel.<sup>162</sup> Following the trial and the jury's verdict, the plaintiff moved for a new trial, inter alia, on the ground that the court erred by refusing to remove the stockholder juror for cause, and the court denied the motion.<sup>163</sup>

In reversing the trial court's decision and remanding for a new trial, the supreme court stated that being a stockholder in a company that is a party to the suit is a *per se* disqualifier for service on the jury.<sup>164</sup> The court then held that it is "prejudicial error in the civil context when a trial court forces a party to use a peremp-

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157. *Id.*, 688 S.E.2d at 162–63 (internal citations omitted).

158. 279 Va. 111, 114, 688 S.E.2d 178, 180 (2010).

159. *Id.*

160. *Id.* at 115, 688 S.E.2d at 180.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 116–17, 122, 688 S.E.2d at 181, 184–85.

tory strike afforded under Code § 8.01-359 to remove a venireperson who is not 'free from exception' and should have been struck for cause."<sup>165</sup> According to the court, the trial court's error in ruling on the motion to strike the potential juror for cause was not rendered harmless by the plaintiff's removal of the individual through the peremptory strike process because the plaintiff "was entitled, as a matter of law, to have a panel free from exception upon which to exercise his peremptory strikes."<sup>166</sup>

#### H. *Dead Man's Statute*

The application of Virginia's "Dead Man's Statute" was the issue in the Supreme Court of Virginia's decision in *Virginia Home for Boys and Girls v. Phillips*.<sup>167</sup> The statute provides as follows:

In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.<sup>168</sup>

The question of the application of the Dead Man's Statute in *Phillips* arose out of a dispute between a devisee under a will and a relative of the testator over an alleged oral agreement regarding the disposition of a farm.<sup>169</sup> The plaintiff alleged that he had entered into an oral agreement with his uncle and his uncle's wife whereby he would receive the assets of their estate upon their deaths in exchange for, among other things, his agreement to move to their property and work on the farm.<sup>170</sup> The plaintiff contended that this oral agreement was made during a conversation around his uncle's kitchen table at which only the parties were present.<sup>171</sup> Contrary to the agreement alleged by the plaintiff, however, the uncle died leaving all his property to his wife, and

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165. *Id.* at 117, 688 S.E.2d at 181 (citations omitted).

166. *Id.* at 118, 688 S.E.2d at 182. In reaching this conclusion, the court conducted a choice of law analysis to determine that Virginia, rather than federal, law governed as to the issue of error in regard to failure to strike the potential juror for cause. *See id.* at 118-22, 688 S.E.2d at 182-84.

167. 279 Va. 279, 282, 688 S.E.2d 284, 285 (2010).

168. VA. CODE ANN. § 8.01-397 (Repl. Vol. 2007 & Cum. Supp. 2010).

169. 279 Va. at 282-84, 688 S.E.2d at 285-86.

170. *Id.* at 282-83, 688 S.E.2d at 285-86.

171. *Id.*

upon her death, she left all of her property to the Virginia Home for Boys and Girls (“Home”).<sup>172</sup> The trial court awarded the property to the plaintiff, and the Home appealed.<sup>173</sup>

On appeal, the Home contended that the Dead Man’s Statute barred the plaintiff’s claim because the record was “devoid of any evidence, aside from the testimony of [the plaintiff] himself, that the 1977 kitchen-table conference ever took place, that any oral agreement was ever made, or, if such an agreement was made, what its terms and conditions were.”<sup>174</sup> Addressing the statute’s requirement of corroboration, the court noted that such corroboration may be demonstrated by circumstantial evidence, but stated that the one essential requirement is that the “evidence, to be corroborative, must be independent of the surviving witness. It must not depend upon his credibility or upon circumstances under his control.”<sup>175</sup> Because the record revealed no evidence of the oral agreement that was independent of the plaintiff’s testimony, the court held that the plaintiff failed to meet his burden under the Dead Man’s Statute to prove the existence of the oral agreement to leave him the property in question.<sup>176</sup>

### I. *Arbitration Awards*

In *Cotton Creek Circles, L.L.C. v. San Luis Valley Water Co.*, the Supreme Court of Virginia once again affirmed the sanctity of arbitration awards and emphasized the limited grounds upon which a court may overturn them.<sup>177</sup> The *Cotton Creek* case involved the alleged violation of a non-compete clause contained within the operating agreement of an L.L.C., which also contained an agreement to arbitrate “ANY DISPUTE WITH RESPECT TO THIS AGREEMENT.”<sup>178</sup> Following a ruling by the arbitration panel that the non-compete clause had not been

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172. *Id.* at 283–84, 688 S.E.2d at 286.

173. *Id.* at 284, 688 S.E.2d at 286.

174. *Id.*, 688 S.E.2d at 287.

175. *Id.* at 286, 688 S.E.2d at 287–88.

176. *Id.* at 286–87, 688 S.E.2d at 288. In so holding, the court also ruled that the plaintiff had failed to satisfy the Statute of Frauds through proof of part performance of an oral agreement. *Id.* at 287, 688 S.E.2d at 288; see VA. CODE ANN. § 11-2(6) (Repl. Vol. 2006 & Cum. Supp. 2010) (providing that any contract for the sale or lease of real estate for more than one year must satisfy statute of frauds).

177. 279 Va. 320, 689 S.E.2d 675 (2010).

178. *Id.* at 322–23, 689 S.E.2d at 677.

breached, the losing party filed a motion, which was denied by the circuit court, to vacate the award pursuant to section 10(a)(4) of the Federal Arbitration Act<sup>179</sup> (“FAA”) on the grounds that the panel had exceeded its powers by ignoring the unambiguous terms of the non-compete clause.<sup>180</sup> In affirming the trial court’s decision to confirm the arbitration panel’s award, the supreme court noted that under the FAA, “arbitrators do not exceed their powers if they misinterpret a contract or make errors of law.”<sup>181</sup> The court then noted that the record revealed that the arbitrators had interpreted the non-compete clause, and that the grounds for vacatur under the FAA do not allow a court to overturn an arbitrator’s award merely based on a party’s disagreement with the arbitrator’s decision or an arbitrator’s mistaken interpretation of a contract.<sup>182</sup>

#### J. *Declaratory Judgment*

In *Bell v. Saunders*, the Supreme Court of Virginia reversed a trial court’s order sustaining a demurrer to a complaint for declaratory judgment and, in so doing, provided guidance as to the pleading standards for such actions.<sup>183</sup> *Bell* involved a claim for declaratory judgment filed by the beneficiaries of two separate wills who were seeking guidance regarding the proper interpretation of the wills.<sup>184</sup> The defendant was an attorney who served as executor and trustee under one of the wills and who allegedly drafted the other will.<sup>185</sup> Plaintiffs’ complaint set forth certain provisions of the first will regarding payment of income from the trust estate and alleged, inter alia, that the defendant had failed to make requested income payments and had stated that he did not believe he had to disburse any of the estate at that time.<sup>186</sup> As to the second will, the complaint alleged that, although the defendant had not qualified as executor, he had drafted the will and had taken an active role in obtaining the property of the decedent but had refused to provide an accounting to one of the plaintiff

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179. 9 U.S.C. § 10(a)(4) (2006).

180. *Cotton Creek*, 279 Va. at 323, 689 S.E.2d at 677.

181. *Id.* at 325, 689 S.E.2d at 678 (citations omitted).

182. *Id.*

183. 278 Va. 49, 677 S.E.2d 39 (2009).

184. *Id.* at 51–53, 677 S.E.2d at 40.

185. *Id.* at 51–52, 677 S.E.2d at 40.

186. *Id.* at 52, 677 S.E.2d at 40.



beneficiaries.<sup>187</sup> Defendant demurred on the grounds that the complaint failed to state a cause of action, failed to state a case of actual controversy, and failed to state facts upon which relief could be granted.<sup>188</sup> The trial court sustained the demurrer, and the plaintiff appealed.<sup>189</sup>

As to the complaint of the beneficiary of the first will, the supreme court reversed the trial court, holding that the complaint had sufficiently stated a claim for declaratory judgment.<sup>190</sup> The court ruled that “Code § 8.01-184 clearly . . . confers upon a circuit court in cases of actual controversy the power to issue a declaratory judgment . . . [as to] the interpretation of a will” and that the complaint had “pled a justiciable controversy which includes specific adverse claims based on present facts that are ripe for adjudication.”<sup>191</sup> Regarding the complaint of the beneficiary under the second will, however, the supreme court upheld the trial court’s dismissal because the complaint had pled that the defendant was not qualified as executor, which meant that he could not exercise the powers of an executor and provide the requested accounting.<sup>192</sup> As a result, the complaint “failed to plead the existence of an actual controversy.”<sup>193</sup>

#### K. *Sovereign Immunity*

The case of *Ligon v. County of Goochland* presented the Supreme Court of Virginia with a question of first impression—whether the doctrine of sovereign immunity barred a claim against a county by a former employee under the whistleblower provision of the Fraud Against Taxpayers Act (“FATA”).<sup>194</sup> The plaintiff in *Ligon* brought suit against the County of Goochland (“County”) under FATA’s whistleblower protections, alleging that he had been terminated because he had opposed certain allegedly fraudulent actions by his supervisor.<sup>195</sup> The County filed a demur-

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187. *Id.*

188. *Id.* at 53, 677 S.E.2d at 40.

189. *Id.*

190. *Id.* at 55, 677 S.E.2d at 42.

191. *Id.*

192. *Id.* at 55–56, 677 S.E.2d at 42.

193. *Id.* at 56, 677 S.E.2d at 42.

194. 279 Va. 312, 314, 689 S.E.2d 666, 667 (2010); VA. CODE ANN. § 8.01-216.8 (Repl. Vol. 2007 & Cum. Supp. 2010).

195. 279 Va. at 314, 689 S.E.2d at 667.

rer on the ground, inter alia, that the claim was barred by the doctrine of sovereign immunity, which the circuit court sustained.<sup>196</sup> On appeal, the plaintiff argued that the doctrine of sovereign immunity, while barring common law tort claims, was not applicable to his statutory claim for retaliatory discharge, as the FATA protects “[a]ny employee.”<sup>197</sup>

In response, the County contended that the doctrine of sovereign immunity bars all claims against the Commonwealth and its political subdivisions unless the immunity is expressly waived by statute, and the FATA contains no such waiver.<sup>198</sup> The supreme court agreed with the County, holding that the County was protected by sovereign immunity from the plaintiff’s retaliatory discharge claim absent an express waiver set forth in the FATA.<sup>199</sup> In ruling that the “any employee” language in the statute did not function as an express waiver of immunity, the court noted that nothing in the language of the FATA “specifically states that employees of the Commonwealth and its political subdivisions may sue their employers for retaliatory discharge under the statute.”<sup>200</sup> In reaching its conclusion, the court emphasized that its decision was in keeping with previous decisions in which the court had declined to construe general statutory language as announcements of waiver of sovereign immunity.<sup>201</sup>

#### L. *Judicial Estoppel*

Among a number of issues decided by the Supreme Court of Virginia in *Virginia Electric and Power Co. v. Norfolk Southern Railway Co.* was whether certain affirmative defenses were appropriately stricken by the trial court on the grounds of judicial estoppel.<sup>202</sup> The case involved a dispute between power companies and a railroad over a coal transportation agreement (“CTA”).<sup>203</sup> The power companies filed a complaint for declaratory judgment seeking interpretation of the CTA and specific performance

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196. *Id.* at 315, 689 S.E.2d at 668.

197. *Id.*; § 8.01-216.8 (Repl. Vol. 2007 & Cum. Supp. 2010).

198. *Ligon*, 279 Va. at 316, 689 S.E.2d at 668.

199. *Id.* at 316, 318, 689 S.E.2d at 668–69.

200. *Id.* at 319, 689 S.E.2d at 670.

201. *Id.* (citations omitted).

202. 278 Va. 444, 461, 683 S.E.2d 517, 527 (2009).

203. *Id.* at 450, 683 S.E.2d at 520.

thereof, and the railroad filed a cross-bill for declaratory judgment, specific performance, and breach of contract, with the primary issue in dispute being the appropriate cost adjustment factor for rates to be applied under the agreement.<sup>204</sup>

In the proceeding to adjudicate their complaint for a declaratory judgment interpreting the CTA, the power companies contended that the CTA was the contract agreed upon by the parties, that it contained the agreed cost adjustment ratio, and that the contract was not amended to change the ratio.<sup>205</sup> In response to the railroad's cross-bill, however, the power companies raised the affirmative defenses of waiver and estoppel and made allegations that the trial court construed as assertions of law, and not fact, arguments concerning amendment to the CTA.<sup>206</sup> The trial court struck the affirmative defenses on the grounds of judicial estoppel, which "prevents a party from assuming successive positions in the course of a suit or series of suits with regard to the same fact or set of facts if those facts are inconsistent or mutually contradictory."<sup>207</sup>

On appeal, the power companies presented several arguments in support of their position that they were not judicially estopped from raising the defenses. First, the companies contended that the assertion regarding amendment of the CTA was one of law and not of fact.<sup>208</sup> The supreme court rejected this argument out of hand, noting that under its case law "the issue of contract amendment is a finding of fact, not of law."<sup>209</sup> The power companies then contended that judicial estoppel should not apply because no judgment was rendered in their favor based on their factual assertions and, in any event, there was no prejudice to the railroad since it ultimately prevailed in its interpretation of the CTA.<sup>210</sup> As to the contention that a favorable judgment was required to invoke judicial estoppel, the court noted that its prior precedent did not support such a requirement and that "application of the doctrine requires only that the prior inconsistent factual position must have been relied upon by the court in reaching

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204. *Id.* at 453–54, 683 S.E.2d at 522.

205. *Id.* at 462, 683 S.E.2d at 527.

206. *Id.* at 455, 463, 683 S.E.2d at 523, 527–28.

207. *Id.* at 461–62, 683 S.E.2d at 527 (citations omitted).

208. *Id.* at 463, 683 S.E.2d at 527–28.

209. *Id.*, 683 S.E.2d at 528 (citations omitted).

210. *Id.* at 463, 465, 683 S.E.2d at 528–29.

its decision.”<sup>211</sup> The court also rejected the prejudice argument, noting that neither Virginia nor Supreme Court of the United States’ precedent has made a showing of prejudice a prerequisite for judicial estoppel.<sup>212</sup> Because the elements of judicial estoppel had been met, the supreme court upheld the trial court’s decision to strike the power companies’ affirmative defenses.<sup>213</sup>

### M. *Frivolous Pleadings*

In *Weatherbee v. Virginia State Bar ex rel. Fourth District—Section I Committee*, a case arising out of an attorney disciplinary proceeding, the Supreme Court of Virginia provided a reminder to Virginia attorneys of the dangers of filing a pleading without conducting appropriate due diligence.<sup>214</sup> *Weatherbee* involved an attorney who filed a malpractice suit on behalf of a client who had undergone a surgical procedure at Warren Memorial Hospital in Warren County.<sup>215</sup> The suit named a number of defendants, including a Dr. Ward P. Vaughan.<sup>216</sup> The problem, however, was that “Dr. Vaughan had no involvement whatsoever” in the plaintiff’s surgery or medical care.<sup>217</sup> Indeed, when the surgery was performed, Dr. Vaughan was not even a member of the Warren Memorial Hospital medical staff and had no privileges to perform medical procedures at the facility.<sup>218</sup> This mistake on the part of the attorney had real and unfortunate consequences for Dr. Vaughan, as he “lost patients and [ ] was subject to ridicule and scorn,” including being named in a local radio broadcast that aired the fact that he had been sued for medical malpractice once every hour for a full day.<sup>219</sup>

The attorney admitted that he never contacted Dr. Vaughan to ascertain whether he had participated in the surgery prior to filing the suit.<sup>220</sup> When questioned by the State Bar Investigator as to why he named Dr. Vaughan in the lawsuit, the attorney ex-

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211. *Id.* at 463–65, 683 S.E.2d at 528–29.

212. *Id.* at 466, 683 S.E.2d at 529.

213. *Id.*

214. 279 Va. 303, 689 S.E.2d 753 (2010).

215. *Id.* at 307, 689 S.E.2d at 755.

216. *Id.*

217. *Id.* at 307, 689 S.E.2d at 755.

218. *Id.*

219. *Id.* at 308, 689 S.E.2d at 756.

220. *Id.* at 307, 689 S.E.2d at 755.

plained that he had obtained a report regarding his client's surgery that indicated that a "Bob Vaughan" assisted the doctor who actually performed the surgery.<sup>221</sup> The attorney also consulted the Virginia Board of Medicine website, which listed fifteen physicians with the last name "Vaughan" licensed to practice in Virginia, only three of whom specialized in obstetrics and gynecology.<sup>222</sup> As two of these three were women whose practices were located outside Virginia, the attorney "erroneously deduced that the remaining physician, Dr. Ward P. Vaughan, who practiced obstetrics and gynecology in Winchester, Virginia, was the individual identified as 'Bob Vaughan' in the operative report."<sup>223</sup>

According to the supreme court, the record demonstrated clearly and convincingly that the attorney had filed a frivolous action against Dr. Vaughan because it had no basis in law or fact.<sup>224</sup> In reaching this conclusion, the court also emphasized that the attorney never attempted to obtain his client's authorization to acquire Dr. Vaughan's medical records related to her, which would have revealed that Dr. Vaughan had no involvement in the subject of the suit.<sup>225</sup>

### III. AMENDMENTS TO RULES OF COURT

#### A. *Appellate Practice*

Perhaps the most significant recent changes to the Rules of Supreme Court of Virginia ("Rules"), especially for appellate practitioners, were adopted by an order of April 30, 2010, effective July 1, 2010, whereby the Supreme Court of Virginia amended and re-codified Part Five and Part Five A, which govern practice before the Supreme Court of Virginia and Court of Appeals of Virginia, respectively.<sup>226</sup> These rule changes arose out of the work of the Appellate Rules Advisory Committee ("Advisory Committee"), established in 2005 by Chief Justice Hassell and chaired by Jus-

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221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 310, 689 S.E.2d at 756 (applying VA. SUP. CT. R. pt. 6, § II, R. 3.1 (Repl. Vol. 2010)).

225. *Id.* at 309, 689 S.E.2d at 756.

226. Order Amending Part Five and Part Five A, Rules of Supreme Court of Virginia (Apr. 30, 2010) (effective July 1, 2010), available at [http://courts.state.va.us/courts/scv/amendments/2010\\_0430\\_part\\_five\\_and\\_part\\_five\\_a.pdf](http://courts.state.va.us/courts/scv/amendments/2010_0430_part_five_and_part_five_a.pdf).

tice Lemons.<sup>227</sup> The goals for the revision were to promote fairness and efficiency, to make the rules more user-friendly, to reflect technological advances, such as electronic filing, and to harmonize the rules of the supreme court with those of the court of appeals.<sup>228</sup> According to Professor Kent Sinclair, who was a member of the Advisory Committee, “Substantive changes were made to many of the rules and almost all of the rules have had some revision made to their form. This includes changing the titles to more accurately reflect the information contained in the rules, and incorporating the use of headings for each paragraph.”<sup>229</sup>

### B. *Discovery Following Demurrer*

By an order dated February 26, 2010 and made effective on May 3, 2010, the Supreme Court of Virginia amended Rule 4:1(d), which addresses the timing and sequence of discovery.<sup>230</sup> The amendment provides that discovery shall continue after the filing of a demurrer, plea, or other dispositive motion and while such filings are awaiting decision, unless the court exercises its discretion to order suspension of discovery on some or all of the issues in the action.<sup>231</sup>

### C. *Uniform Interstate Depositions and Discovery Act*

Through its order dated June 1, 2009, effective July 1, 2009, the supreme court amended Rules 4:5 and 4:9 to reference the Uniform Interstate Depositions and Discovery Act, which had been adopted by the General Assembly in March 2009.<sup>232</sup> The court amended Rule 4:5(a1) by adding subsection (iv), which pro-

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227. See Memorandum from Kent Sinclair, Professor, Univ. of Va. Sch. of Law to Va. State Bar (May 5, 2010), available at <http://www.vsb.org/docs/SCV-appellate-rules-05-05-10.pdf>.

228. *Id.*

229. *Id.* Professor Sinclair’s memo also provides a summary highlighting several of the specific improvements arising from the rule changes. See *id.*

230. VA. SUP. CT. R. pt. 4, R. 4:1(d) (Repl. Vol. 2010).

231. *Id.* R. 4:1(d)(2) (Repl. Vol. 2010).

232. *Id.* R. 4:5 (to be codified at VA. SUP. CT. R. pt. 4, R. 4:5), available at [http://www.courts.state.va.us/courts/SCV/amendments/2009\\_0601\\_4\\_5\\_4\\_9\\_5\\_7b\\_8\\_3\\_rule.pdf](http://www.courts.state.va.us/courts/SCV/amendments/2009_0601_4_5_4_9_5_7b_8_3_rule.pdf); *Id.* R. 4:9 (to be codified at VA. SUP. CT. R. pt. 4, R. 4:9), available at [http://www.courts.state.va.us/courts/SCV/amendments/2009\\_0601\\_4\\_5\\_4\\_9\\_5\\_7b\\_8\\_3\\_rule.pdf](http://www.courts.state.va.us/courts/SCV/amendments/2009_0601_4_5_4_9_5_7b_8_3_rule.pdf); Act of Mar. 30, 2009, ch. 701, 2009 Va. Acts 1493, 1493–94 (codified as amended at VA. CODE ANN. § 8.01-412.8 to -412.15 (Cum. Supp. 2009)).

vides that “[d]epositions and related documentary production sought in Virginia pursuant to a subpoena issued under authority of a foreign jurisdiction shall be subject to the provisions of the Uniform Interstate Depositions and Discovery Act, Virginia Code §§ 8.01-412.8 through 8.01-412.15.”<sup>233</sup> The court similarly amended Rule 4:9 to state that the production of documents and electronically stored information in Virginia pursuant to a foreign-issued subpoena shall be subject to the Uniform Interstate Depositions and Discovery Act.<sup>234</sup>

#### D. *Uniform Pretrial Scheduling Order*

Also included in the Supreme Court of Virginia’s order dated February 26, 2010 and made effective on May 3, 2010, was an amendment to the Uniform Pretrial Scheduling Order (“Uniform Order”).<sup>235</sup> The amendment added a provision to Section XI of the Uniform Order, governing deposition transcripts to be used at trial.<sup>236</sup> Whereas the Uniform Order previously set no specific deadline for designating portions of non-party depositions to be used at trial,<sup>237</sup> the amended Uniform Order provides that “designations of portions of non-party depositions, other than for rebuttal or impeachment, shall be exchanged no later than 15 days before trial, except for good cause shown or by agreement of counsel.”<sup>238</sup> Under the amended provision, following designation, it remains the opponent’s obligation to bring any objection or other unresolved issues to the court’s attention prior to trial; however, the amended provision requires that the opponent also counter-designate any additional portions of the transcript at least five days before the hearing on objections.<sup>239</sup>

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233. Pt. 4, R. 4:5(a1)(iv) (Repl. Vol. 2010).

234. *Id.* R. 4:9(b)(iv) (Repl. Vol. 2010).

235. *See id.* pt. 1, R. 1:18(B) app. of forms § 3 (Repl. Vol. 2010).

236. *Id.*

237. *Id.* R. 1:18(B) app. of forms § 3 (Repl. Vol. 2009).

238. *Id.* R. 1:18(B) app. of forms § 3 (Repl. Vol. 2010). This deadline does apply to depositions for use at trial taken after the close of discovery pursuant to Paragraph II of the Uniform Order. *See id.*

239. *Id.*

### E. *Administrative Process Act Appeals*

The supreme court's order dated February 26, 2010, effective May 3, 2010, also amended Part Two A of the Rules, governing appeals pursuant to the Administrative Process Act.<sup>240</sup> The court ordered both substantive and stylistic changes to all existing sections of Part Two A and added a new section governing small business challenges.<sup>241</sup> As to the substantive changes, the court amended Rule 2A:1 to state that "[e]very agency may designate some individual to perform the function of 'agency secretary,'" and, if no such individual is designated, the term "agency secretary" shall mean "the executive officer of the agency."<sup>242</sup> Rule 2A:1 was also amended to provide that in agency case decisions disposing of a license, permit or other benefit, "the applicant, licensee or permittee shall be a necessary party" to the appeal.<sup>243</sup> The court ordered that Rule 2A:2, governing notices of appeal, be amended with regard to the thirty-day time period for filing the notice to provide that "[i]n the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party."<sup>244</sup>

Rule 2A:3 was amended in several ways. Subsection (a) was clarified to provide that if the transcript of a formal hearing was taken down in writing, then the transcript shall be delivered with the notice of appeal or within thirty days thereafter; but if the hearing testimony was not taken down in writing, then a statement of the testimony in narrative form shall be so delivered.<sup>245</sup> Subsection (b) was amended to state that "[t]he agency secretary shall prepare and certify the record as soon as possible after the notice of appeal and transcript or statement of testimony is filed and served."<sup>246</sup> Furthermore, that subsection has been amended to provide that

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240. Order Amending Part Two A, Appeals Pursuant to the Administrative Process Act (Feb. 26, 2010), *available at* [http://www.courts.state.va.us/courts/scv/amendments/2010\\_0226\\_appendixrules2a\\_4\\_1.pdf](http://www.courts.state.va.us/courts/scv/amendments/2010_0226_appendixrules2a_4_1.pdf).

241. *See id.*

242. Pt. 2A, R. 2A:1 (Repl. Vol. 2010).

243. *Id.*

244. *Id.* R. 2A:2 (Repl. Vol. 2010).

245. *Id.* R. 2A:3(a) (Repl. Vol. 2010).

246. *Id.* R. 2A:3(b) (Repl. Vol. 2010).



[o]nce the court has entered an order overruling any motions, demurrers and other pleas filed by the agency, or if none have been filed within the time provided by Rule 3:8 for the filing of a response to the process served under Rule 2A:4, the agency secretary shall, as soon as practicable or within such time as the court may order, transmit the record to the clerk of the court named in the notice of appeal.<sup>247</sup>

The court also added a new subsection (d) to address certification and filing of records determined to be so voluminous that it would be unduly burdensome to file the entire record.<sup>248</sup> Subsection (d) provides a mechanism under which the agency may file a motion for leave to file an index to such a record.<sup>249</sup>

The court amended Rule 2A:4, regarding petitions for appeal, to require that within the thirty days after the filing of the notice of appeal, the appellant shall file its petition for appeal with the circuit court, which

shall include within such 30-day period both the payment of all fees and the taking of all steps provided in Rule 3:2, 3:3, and 3:4 to cause a copy of the petition for appeal to be served (as in a civil action) on the agency secretary and on every other party.<sup>250</sup>

The court extensively revised Rule 2A:5, which governs further proceedings after the filing of the petition for appeal.<sup>251</sup> Rule 2A:5 now provides that further proceedings in an administrative appeal shall be governed by Part Three of the Rules, which addresses procedure for civil actions generally.<sup>252</sup> That coverage, however, is subject to several enumerated exceptions, including that (1) no appeal or issue shall be referred to a commissioner in chancery; (2) the discovery provisions of Part Four of the Rules shall not apply to administrative appeals and no depositions may be taken absent order of court; (3) once any motions, demurrers, or other pleas filed by the agency have been ruled upon the appeal shall be deemed submitted and no answer or further pleadings are required except by order of court; (4) when the case is submitted and the record filed the court shall establish by order a schedule for briefing and argument on the issues raised in the pe-

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247. *Id.*

248. *Id.* R. 2A:3(d) (Repl. Vol. 2010).

249. *Id.*

250. *Id.* R. 2A:4(a) (Repl. Vol. 2010).

251. *See id.* R. 2A:5 (Repl. Vol. 2010).

252. *Id.*; *see generally id.* pt. 3 (Repl. Vol. 2010).

tition; and (5) the court shall dispose of the appeal by an order consistent with its authority under Virginia Code sections 2.2-4029 and -4030.<sup>253</sup>

The court also added a new section addressing small business appeals.<sup>254</sup> The new rule provides that in addition to the other remedies established in Part Two A, any small business as defined in Virginia Code section 2.2-4007.1(A) that “is adversely affected or aggrieved by final agency regulatory action as described [in Virginia Code section 2.2-4027] may seek judicial review for the limited purpose of appealing the issue of compliance with the requirements of §§ 2.2-4007.04 and 2.2-4007.1.”<sup>255</sup> Any such appeal shall be initiated by filing a notice of appeal pursuant to Rule 2A:2 within one year of the date of the contested final agency action.<sup>256</sup>

#### IV. NEW LEGISLATION

##### A. *Disclosure of Jury Panel*

Through Chapter 799 of the 2010 Acts of Assembly, the General Assembly lengthened the time that lawyers will have to review the list of potential jurors prior to trial.<sup>257</sup> The legislation changes the time period set forth in Virginia Code section 8.01-353 for the clerk to make available to counsel a copy of the jury panel to be used for the trial.<sup>258</sup> Before, the clerk had been required to make the panel list available at least forty-eight hours before trial, and the new law increases this period to three business days.<sup>259</sup> This will provide counsel additional time to review the list and investigate potential jurors prior to trial.

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253. *Id.* pt. 2A, R. 2A:3 (Repl. Vol. 2010).

254. *See id.* R. 2A:6 (Repl. Vol. 2010).

255. *Id.*

256. *Id.*

257. Act of Apr. 21, 2010, ch. 799, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-353 (Cum. Supp. 2010)).

258. *Id.*

259. Compare VA. CODE ANN. § 8.01-353(A) (Cum. Supp. 2009), *with id.* (Cum. Supp. 2010).

### B. *Court Fees*

Chapter 343 of the 2010 Acts of Assembly attempts to account for the effect of inflation on certain dollar-based provisions in the Virginia Code by increasing the amounts of certain costs, jurisdictional amounts, potential attorney fee awards, and potential damages set forth in the Code.<sup>260</sup> The Code provisions affected are section 6.1-118.1 (recovery of costs in actions for bad checks),<sup>261</sup> section 8.01-66 (damages for loss of vehicle use),<sup>262</sup> section 8.01-66.2 (lien against person whose negligence causes injury),<sup>263</sup> section 8.01-416 (affidavit regarding damages to a vehicle),<sup>264</sup> section 8.01-504 (penalty for service of notice of lien when no judgment exists),<sup>265</sup> section 8.01-682 (damages awarded appellee),<sup>266</sup> section 15.2-1716 (reimbursement of expenses incurred responding to DUI incidents),<sup>267</sup> section 16.1-105 (attachments),<sup>268</sup> section 17.1-605 (reproducing brief and appendix),<sup>269</sup> section 19.2-69 (civil action for unlawful interception),<sup>270</sup> section 21-186 (appeal from action fixing fees),<sup>271</sup> section 38.2-807 (attorney fees),<sup>272</sup> section 43-3 (mechanic's lien),<sup>273</sup> section 43-24 (liens of employees, suppliers, etc),<sup>274</sup> and section 46.2-364 (definitions).<sup>275</sup>

### C. *Expert Witnesses—Podiatry*

In response to the Supreme Court of Virginia's decision in *Hollingsworth v. Norfolk Southern Railway Co.*, in which the court upheld the exclusion of podiatrists as expert witnesses on the

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260. Act of Apr. 10, 2010, ch. 343, 2010 Va. Acts \_\_\_ (codified as amended in scattered sections of VA. CODE ANN.).

261. VA. CODE ANN. § 6.1-118.1 (Interim Supp. 2010).

262. *Id.* § 8.01-66 (Cum. Supp. 2010).

263. *Id.* § 8.01-66.2 (Cum. Supp. 2010).

264. *Id.* § 8.01-416 (Cum. Supp. 2010).

265. *Id.* § 8.01-504 (Cum. Supp. 2010).

266. *Id.* § 8.01-682 (Cum. Supp. 2010).

267. *Id.* § 15.2-1716 (Cum. Supp. 2010).

268. *Id.* § 16.1-105 (Repl. Vol. 2010).

269. *Id.* § 17.1-605 (Repl. Vol. 2010).

270. *Id.* § 19.2-69 (Cum. Supp. 2010).

271. *Id.* § 21-186 (Cum. Supp. 2010).

272. *Id.* § 38.2-807 (Cum. Supp. 2010).

273. *Id.* § 43-3 (Cum. Supp. 2010).

274. *Id.* § 43-24 (Cum. Supp. 2010).

275. *Id.* § 46.2-364 (Repl. Vol. 2010).

cause of a foot injury,<sup>276</sup> the General Assembly modified the Virginia Code's definition of the practice of podiatry and also added a new Code section limiting the ability of podiatrists to testify as expert witnesses against a doctor of medicine or osteopathic medicine in a malpractice proceeding.<sup>277</sup> The definition of the practice of podiatry, modified to specifically include the "prevention, *diagnosis*, treatment, and cure or alleviation of physical conditions, diseases, pain, or infirmities of the human foot or ankle" effectively abrogates the portion of the *Hollingsworth* decision which held that a podiatrist could not testify about the cause of a foot injury because the practice of podiatry did not include diagnosis.<sup>278</sup> The Act does, however, specifically provide that a podiatrist "shall not be permitted to testify as an expert witness against" a defendant medical doctor or osteopath in connection with any medical malpractice proceeding, either in court or before a medical malpractice review panel.<sup>279</sup>

#### D. *Electronic Filing*

The General Assembly passed legislation in 2010 to allow electronic filing in both circuit courts and general district courts. Chapter 760 of the 2010 Acts of Assembly amends certain existing Code provisions and adds new sections of the Code to allow clerks to establish and operate electronic filing systems in circuit courts.<sup>280</sup> The Act allows, inter alia, for documents to be filed in electronic form pursuant to applicable rules of court and for an official electronic stamp to satisfy requirements for certain court documents needing to be stamped or affixed with a seal by the clerk.<sup>281</sup> The Act does, however, maintain that its provisions are not applicable to documents specified by statutes governing the "execution of wills, codicils, testamentary trusts, premarital

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276. 279 Va. 360, 366–67, 689 S.E.2d at 654–55 (2010).

277. See Act of Apr. 13, 2010, ch. 725, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 54.1-2900 (Cum. Supp. 2010); codified at *id.* § 8.01-401.2:1 (Cum. Supp. 2010)).

278. *Id.* (emphasis added); *Hollingsworth*, 279 Va. at 366–67, 689 S.E.2d at 654–55.

279. Act of Apr. 13, 2010, ch. 725, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 54.1-2900 (Cum. Supp. 2010); codified at *id.* § 8.01-401.2:1 (Cum. Supp. 2010)).

280. See Act of Apr. 13, 2010, ch. 760, 2010 Va. Acts \_\_\_ (codified in scattered sections of VA. CODE ANN. tits. 16.1, 17.1 (Repl. Vol. 2010); codified at *id.* § 8.01-271.01 (Cum. Supp. 2010); *id.* § 17.1-258.6 (Repl. Vol. 2010)).

281. VA. CODE ANN. §§ 17.1-258.4(C), -258.6 (Repl. Vol. 2010).

agreements, and negotiable instruments.”<sup>282</sup> As to general district courts, Chapter 622 of the 2010 Acts of Assembly provides that such courts “shall accept case data in an electronic format for any civil action filed.”<sup>283</sup> The use of electronic transfer is at the plaintiff’s option and if that option is used, the party must “comply with the security and data configuration standards established by the Office of the Executive Secretary of the Supreme Court” of Virginia.<sup>284</sup> The Act also provides that if electronic transfer is used, “the plaintiff or the plaintiff’s attorney shall be responsible for filing with the clerk of the general district court the paper copies of any pleading for the proper processing of such civil actions as otherwise required by law.”<sup>285</sup>

*E. Waiver of Attorney-Client Privilege and Work Product Protection*

Through Chapter 350 of the 2010 Acts of Assembly, the General Assembly clarified the law governing a number of important issues regarding the disclosure of information protected by the attorney-client privilege and work product doctrine. On the topic of “subject-matter” waiver, which has long been a fear of practitioners who realize during the course of discovery that a privileged communication has been inadvertently disclosed,<sup>286</sup> the Act provides that when disclosure of protected information operates as a waiver of the privilege or protection, the waiver will extend to undisclosed communication and information only in the limited situation where: (1) the waiver is intentional; (2) the disclosed and undisclosed information concern the same subject matter; and (3) the disclosed and undisclosed information, in fairness, ought to be considered together.<sup>287</sup> As to inadvertent disclosure of protected information, the Act provides that such disclosure will not operate as a waiver if the disclosure was inadvertent, reasonable steps were taken to prevent disclosure, and reasonable steps

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282. *Id.* § 17.1-258.6(A) (Repl. Vol. 2010).

283. Act of Apr. 11, 2010, ch. 622, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 16.1-79.1) (Repl. Vol. 2010)).

284. § 16.1-79.1 (Repl. Vol. 2010)).

285. *Id.*

286. See Act of Apr. 10, 2010, ch. 350, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 8.01-420.7 (Cum. Supp. 2010)).

287. § 8.01-420.7(A) (Cum. Supp. 2010).

were taken to correct the error.<sup>288</sup> The Act also addresses agreements between the parties regarding disclosure of privileged information and provides that such agreements are binding only on the parties to the agreement unless the agreement is memorialized in a court order.<sup>289</sup>

#### F. *Privileged Communications—Health Care*

Virginia Code section 8.01-581.17 provides that certain communications and information regarding certain medical review committees are privileged from discovery absent a court order.<sup>290</sup> In Chapter 196 of the 2010 Acts of Assembly, the General Assembly provided that the exchange of such privileged information between “committees, boards, groups, commissions, or other entities” that function primarily to review, evaluate, and recommend action regarding health care does not constitute a waiver of the privilege established in the Code for such information.<sup>291</sup>

#### G. *Claims against Counties*

In its 2010 session the General Assembly modified certain provisions of the Code governing claims against counties.<sup>292</sup> The legislation provides that no claim against a county can be denied unless the attorney representing the county has served written notice, by certified mail, upon the complaining party or his agent of the date on which the county’s governing body will consider the claim.<sup>293</sup> The Act also sets the amount of bond or letter of credit required to appeal a disallowed claim against a county at \$250.<sup>294</sup> Furthermore, the Act provides that the decision of a county’s governing body to disallow a claim is not a bar to pursuing a court action founded on such a claim if, inter alia, the governing body

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288. *Id.* § 8.01-420.7(B) (Cum. Supp. 2010).

289. *Id.* § 8.01-420.7(D) (Cum. Supp. 2010).

290. *Id.* § 8.01-581.17(B) (Cum. Supp. 2010).

291. Act of Apr. 7, 2010, ch. 196, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-581.17(F) (Cum. Supp. 2010)); *see also* § 8.01-581.16 (Repl. Vol. 2007 & Cum. Supp. 2010) (establishing civil immunity for members of or consultants to medical boards or committees).

292. *See* Act of Apr. 12, 2010, ch. 668, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 15.2-1245 to -1247 (Cum. Supp. 2010)).

293. § 15.2-1245(A) (Cum. Supp. 2010).

294. *Id.* § 15.2-1246 (Cum. Supp. 2010).

fails to act on the claim within ninety days of the date the claim is received by the governing body or its clerk, unless such time period is extended by agreement between the claimant and the county.<sup>295</sup>

#### H. *Security for Appeals*

In Chapter 494 of the Acts of Assembly, the legislature enacted several amendments to Virginia Code section 8.01-676.1, which governs security for appeals.<sup>296</sup> The Act enables the courts to impose additional requirements on security for appeals in addition to simply increasing the amount of security required.<sup>297</sup> In addition, the Act provides the security can be modified for good cause shown.<sup>298</sup> The Act further allows for any motion for or objection to the modification of security for appeal to be made to the appellate court or to the court whose decision is being appealed at any time until the appellate court takes action on any similar motion.<sup>299</sup> Lastly, the Act alters the practice of review of security for supreme court appeals by allowing such review to be conducted by an individual justice, as opposed to a panel of justices.<sup>300</sup>

Regarding appeals of general district court decisions to the circuit court, the General Assembly amended Code section 16.1-107 to add an additional category of cases for which an indigent person must post an appeal bond.<sup>301</sup> As a result of this legislation, indigent plaintiffs who bring civil cases for “unlawful detainer against a former owner based upon a foreclosure against that owner” must post an appeal bond within thirty days of the date of judgment.<sup>302</sup>

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295. *Id.* § 15.2-1247 (Cum. Supp. 2010).

296. *See* Act of Apr. 11, 2010, ch. 494, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-676.1 (Cum. Supp. 2010)).

297. § 8.01-676.1(C) (Cum. Supp. 2010).

298. *Id.* § 8.01-676.1(E) (Cum. Supp. 2010).

299. *Id.*

300. *Id.* § 8.01-676.1(Q) (Cum. Supp. 2010).

301. *See* Act of Apr. 8, 2010, ch. 267, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 16.1-107 (Repl. Vol. 2010)).

302. § 16.1-107 (Repl. Vol. 2010).

### I. *Computation of Time*

The General Assembly added a new provision to Virginia Code section 1-210, governing computation of time.<sup>303</sup> According to the amended statute, when an act of the General Assembly or a local governing body, court order, or administrative regulation or order requires an act to be performed or an action filed on a Saturday, Sunday, legal holiday, or any day on which the state or local government office when the action to be performed or the action filed is closed, the act may be performed or the action filed on the next business day that is not a Saturday, Sunday, legal holiday, or day on which the state or local government office where the action to be performed or the action filed is closed.<sup>304</sup>

### J. *Freedom of Information Act*

The General Assembly amended the provision of the Virginia Freedom of Information Act (“FOIA”) governing enforcement proceedings to clarify that a petition to enforce FOIA rights may be brought in the name of the person whose FOIA rights were allegedly denied, notwithstanding the fact that the “request for public records was made by the person’s attorney in [a] representative capacity.”<sup>305</sup>

### K. *Attorney-Issued Subpoenas*

In amending Virginia Code section 8.01-407, governing attorney issued summonses, the General Assembly eliminated the prohibition on attorney-issued summonses with respect to proceedings for the issuance of a protective order.<sup>306</sup>

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303. Act of Mar. 9, 2010, ch. 96, 2010 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 1-210 (Cum. Supp. 2010)).

304. § 1-210(E) (Cum. Supp. 2010).

305. Act of Apr. 9, 2010, ch. 299, 2010 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 2.2-3713 (Cum. Supp. 2010)).

306. Act of Apr. 9, 2010, ch. 302, 2010 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 8.01-407 (Cum. Supp. 2010)).



### L. *Judicial Emergency*

Chapter 757 of the 2010 Acts of Assembly provides a procedure under which the Supreme Court of Virginia may order the declaration of a judicial emergency “when a disaster . . . substantially endangers or impedes the operation of a court, the ability of individuals to avail themselves of the court,” or the ability of litigants to access the court to meet applicable deadlines.<sup>307</sup>

### M. *Fiduciary Suits*

The General Assembly added a new section to the Virginia Code specifying the manner in which a suit by or against a fiduciary must be styled and mandating the amendment of any pleading filed that does not conform to the new statutory requirements.<sup>308</sup> According to the Act, in any action that must be prosecuted or defended by a fiduciary—“including a personal representative, trustee, conservator, or guardian”—the style of the case shall be set forth substantially in the following format: “(Name of fiduciary), (type of fiduciary relationship), (Name of the subject of the fiduciary relationship).”<sup>309</sup> The Act, which was approved on April 11, 2010, states that its provisions shall apply to any action or suit pending on the Act’s effective date.<sup>310</sup> The Act further provides that if a pleading does not conform to its requirements but otherwise identifies the proper parties, the pleading must be amended on motion of any party or the court and “[s]uch amendment relates back to the date of the original pleading.”<sup>311</sup>

### N. *Use of Commissioners in Condemnation Cases*

The General Assembly amended several sections of the Virginia Code and added additional sections in order to reinstate the ability of landowners to choose between commissioners and a jury

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307. Act of Apr. 13, 2010, ch. 957, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 17.1-330-331 (Repl. Vol. 2010)).

308. Act of Apr. 11, 2010, ch. 437, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. 8.01-6.3 (Cum. Supp. 2010)).

309. § 8.01-6.3(A) (Cum. Supp. 2010).

310. Ch. 437, 2010 Va. Acts \_\_\_.

311. *Id.*

to hear a condemnation case.<sup>312</sup> The Act also provides for equal pay for condemnation jurors and jurors in regular cases.<sup>313</sup> The Act's provisions apply to actions filed on or after July 1, 2010.<sup>314</sup>

*O. Disclosure of Insurance Policy Limits Prior to Wrongful Death Claim*

Chapter 435 of the 2010 Acts of Assembly provides the ability of an attorney or personal representative of an estate of a decedent who died from a motor vehicle accident to request in writing, prior to filing a suit for wrongful death, that the insurer disclose the limits of any motor vehicle liability insurance policy or any personal injury liability insurance policy that may apply to the claim.<sup>315</sup> The party making the request must provide the insurer with "the date of the . . . accident, the name and last known address of the alleged tortfeasor, a copy of the accident report, if any, and the claim number, if available."<sup>316</sup> The requesting party must also provide the insurer with the decedent's death certificate, the certificate of qualification as personal representative, the names and relationships of any statutory beneficiaries of the decedent, medical bills supporting any claim for damages and "a description of the source, amount, and payment history of the claimed income loss for each beneficiary."<sup>317</sup> The insurer must respond in writing to the request within thirty days of receipt, and disclosure of the policy limits does not constitute an admission of liability, nor does it make the policy information admissible at trial.<sup>318</sup>

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312. See Act of Apr. 21, 2010, ch. 835, 2010 Va. Acts \_\_\_\_ (codified as amended in scattered sections of VA. CODE ANN. tits. 8.01, 25.1, 62.1 (Cum. Supp. 2010); codified at VA. CODE ANN. §§ 25.1-227.1 to -227.2 (Cum. Supp. 2010)).

313. § 25.1-235 (Cum. Supp. 2010); see *id.* § 17.1-618 (Repl. Vol. 2010) (setting forth compensation and reimbursement amounts for jurors and jury commissioners).

314. Ch. 835, 2010 Va. Acts \_\_\_\_.

315. Act of Apr. 11, 2010, ch. 435, 2010 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 8.01-417 (Cum. Supp. 2010)).

316. § 8.01-417(C) (Cum. Supp. 2010).

317. *Id.* § 8.01-417(D) (Cum. Supp. 2010).

318. *Id.* § 8.01-417(C) (Cum. Supp. 2010).

### P. *Space Flight Liability and Immunity*

The General Assembly repealed a previous act creating a sunset for the Space Flight Immunity Act.<sup>319</sup> The Space Flight Immunity Act had been set to expire on July 1, 2013.<sup>320</sup>

### Q. *Landlord-Tenant*

By Chapter 550 of the 2010 Acts of Assembly, the legislature modified and added certain Code provisions regarding landlord-tenant matters.<sup>321</sup> As to issues of procedure, the Act provides, *inter alia*, that the judgment rate of interest “shall be the judgment rate of interest in effect at the time of entry of the judgment on any amounts for which judgment is entered.”<sup>322</sup> The Act also provides that if a plaintiff in an unlawful detainer action chooses to receive a judgment for possession of the property, the judge shall, unless requested or ruled otherwise, “hear evidence as to the issue of possession on the initial court date and shall hear evidence on the final rent and damages at the hearing set on the continuance date.”<sup>323</sup>

### R. *Notice of Lien on Financial Institutions*

The General Assembly amended certain provisions of the Virginia Code regarding service of notices of liens on financial institutions.<sup>324</sup> According to the Act, any judgment creditor who serves notice of a lien on a financial institution must, within five business days of service, mail a copy of the notice of lien, along with a notice of exemptions and claim for exemption form, to the debtor at his last known address.<sup>325</sup> The judgment creditor must also file a certification with the court that the notices have been mailed to

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319. Act of Apr. 11, 2010, ch. 491, 2010 Va. Acts \_\_\_ (repealing VA. CODE ANN. § 8.01-227.10 note (Repl. Vol. 2007)).

320. §§ 8.01-227.8 to -227.10 (Repl. Vol. 2007).

321. See Act of Apr. 11, 2010, ch. 550, 2010 Acts \_\_\_ (codified as amended in scattered sections of VA. CODE ANN.; codified at *id.* § 16.1-79.1 (Cum. Supp. 2010)).

322. § 6.1-330.54 (Interim Supp. 2010).

323. *Id.* § 8.01-128(B) (Cum. Supp. 2010).

324. See Act of Apr. 12, 2010, ch. 673, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 8.01-502.1, -512.4 (Cum. Supp. 2010)).

325. § 8.01-502.1(B) (Cum. Supp. 2010).

the debtor.<sup>326</sup> If the judgment creditor fails to comply with these requirements, the creditor will be liable to the debtor for no more than \$100 in damages unless the creditor proves the failure to comply was not willful.<sup>327</sup>

S. *Service by Publication*

Through Chapter 827 of the 2010 Acts of Assembly, the General Assembly amended section 8.01-316 of the Virginia Code, which governs service of process by publication.<sup>328</sup> Section 8.01-316 allows publication orders in certain cases to be entered by the clerk but provides that only the court may enter the publication order in certain other cases.<sup>329</sup> Section 8.01-316 now provides that any publication orders “not properly entered, but processed by a clerk prior to July 1, 2010, shall be deemed to have been properly entered.”<sup>330</sup>

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326. *Id.*

327. *Id.*

328. Act of Apr. 21, 2010, ch. 827, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-316 (Cum. Supp. 2010)).

329. *See* § 8.01-316(A)(3) (Cum. Supp. 2010).

330. *Id.*