

## CIVIL PRACTICE AND PROCEDURE

*Andrew P. Sherrod* \*

### I. INTRODUCTION

This article surveys recent and significant developments in Virginia civil practice and procedure. Specifically, the article discusses selected opinions of the Supreme Court of Virginia from September 2011 through June 2012, addressing new or meaningful civil procedure topics; significant amendments to the Rules of the Supreme Court of Virginia concerning procedural issues during the same period; and legislation enacted by the Virginia General Assembly during the 2012 session that relates to civil practice.

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

#### A. *Nonsuits*

In *Laws v. McIlroy*, the Supreme Court of Virginia addressed the interpretation of Virginia Code section 8.01-229(E)(3), which sets forth the tolling rule for applying the statute of limitations in nonsuited cases.<sup>1</sup> In *Laws*, an auto accident case,<sup>2</sup> the plaintiffs submitted nonsuit orders to the circuit court on January 8, 2010, which were rejected due to a lack of endorsement but were re-submitted fully endorsed on January 28 and entered by the circuit court on February 4, 2010.<sup>3</sup> On January 19, following submission of the original nonsuit orders but prior to their eventual entry by the court, the plaintiffs filed second identical suits in the

---

\* Principal, Hirschler Fleischer, P.C., Richmond, Virginia. J.D., 2000, University of North Carolina at Chapel Hill School of Law; B.A., 1996, Hampden-Sydney College.

1. 283 Va. 594, 599, 724 S.E.2d 699, 702 (2012) (quoting VA. CODE ANN. § 8.01-229(E)(3) (Repl. Vol. 2007 & Supp. 2012)).

2. *Id.* at 596, 724 S.E.2d at 700.

3. *See id.* at 597, 724 S.E.2d at 701.

same court.<sup>4</sup> The defendants sought dismissal as to the second suits on the grounds that they were time-barred and that the tolling provisions in section 8.01-229(E)(3) did not apply.<sup>5</sup> The trial court agreed.<sup>6</sup>

On appeal, while conceding that the suits were brought past the two-year statute of limitations,<sup>7</sup> the plaintiffs contended that the dismissals were improper because the suits were filed within six months of the nonsuit and, therefore, were timely under the tolling provision of section 8.01-229(E)(3),<sup>8</sup> which states in relevant part:

If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action *within six months from the date of the order entered by the court*, or within the original period of limitation, or within the limitation period as provided by subdivision B 1, whichever period is longer.<sup>9</sup>

The plaintiffs argued that because the statute does not say “*following*” or “*after*” the nonsuit order but rather “*within*” six months of the order, the second suits were timely under the statute.<sup>10</sup> Agreeing with this argument, the supreme court also highlighted the language of the statute allowing a plaintiff to “*recommence*” the action within six months “*from*” the date of the order.<sup>11</sup> According to the court, the word “*from*” indicates a “starting point” but does not require that the point be forward in time as opposed to backward.<sup>12</sup> As a result, the supreme court found that the plain language of the statute allowed for the filing within six months either before or after the nonsuit order and reversed the decision of the trial court.<sup>13</sup>

In a lengthy dissent joined by Chief Justice Kinser and Justice McClanahan, Justice Millett criticized the majority for amending

---

4. *Id.*

5. *Id.* at 597–98, 724 S.E.2d at 701.

6. *See id.* at 598, 724 S.E.2d at 701.

7. *Id.* at 597–98, 724 S.E.2d at 701.

8. *See id.* at 600, 724 S.E.2d at 702.

9. VA. CODE ANN. § 8.01-229(E)(3) (Repl. Vol. 2007 & Supp. 2012) (emphasis added).

10. 283 Va. at 600, 724 S.E.2d at 702.

11. *Id.* (quoting VA. CODE ANN. § 8.01-229(E)(3)) (internal quotation marks omitted).

12. 283 Va. at 601, 724 S.E.2d at 703 (internal quotation marks omitted).

13. *Id.* at 603, 724 S.E.2d at 704.

the statute through a strained interpretation to avoid an apparently unfair result.<sup>14</sup> In Justice Millette's interpretation of the provision, the General Assembly meant for section 8.01-229(E)(3) to apply to situations where a plaintiff files a second action after—not before—the entry of the order nonsuiting the first case.<sup>15</sup> Nevertheless, unless and until the General Assembly addresses the issues through an amendment to the provision, litigants will be able to take advantage of the six-month tolling window either before or after the nonsuit order is entered.<sup>16</sup>

### B. Evidence

A number of recent decisions of the Supreme Court of Virginia have touched upon evidentiary issues. In *Arnold v. Wallace*, the supreme court addressed the applicability of the hearsay rule's business records exception to medical records that contain opinions.<sup>17</sup> At the trial of the auto accident case,<sup>18</sup> the defendant introduced the plaintiff's medical records through her treating physician, who testified that they were records regularly kept in the normal course of his practice.<sup>19</sup> Plaintiff's counsel objected to the introduction of the records containing medical observations regarding the plaintiff on the ground of lack of "business records foundation."<sup>20</sup>

On appeal, the plaintiff contended that the trial court erred by admitting the records because the defendant had not established the elements of the business records exception to the hearsay rule—in particular the requirement that the records contain factual statements and not medical opinion.<sup>21</sup> In rejecting the plaintiff's argument, the supreme court noted that it is not required that "the party offering a document for admission under the business records exception establish that all of the entries therein are factual in nature and contain no opinions."<sup>22</sup> Thus, while the

---

14. *See id.* at 607, 724 S.E.2d at 706 (Millette, J., dissenting).

15. *Id.* at 608, 724 S.E.2d at 707.

16. *See id.* at 603, 724 S.E.2d at 704 (citing VA. CODE ANN. § 8.01-229(E)(3)).

17. *See* 283 Va. 709, 713–14, 725 S.E.2d 539, 541–42 (2012).

18. *Id.* at 709, 725 S.E.2d at 539.

19. *Id.* at 712, 725 S.E.2d at 541.

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

21. *Id.* at 713, 725 S.E.2d at 541.

22. *Id.* at 714, 725 S.E.2d at 542.

plaintiff may have had a valid objection to the admission of the medical opinions contained within the records pursuant to a prior decision of the court, the plaintiff's "foundation" objection was not sufficient to apprise the trial court of that basis for objection and therefore waived pursuant to Rule 5:25.<sup>23</sup>

The *Arnold* decision also addressed an expert issue. As a second assignment of error, the plaintiff objected to the trial court's allowing the defendant to put on an expert witness who was a member of the same medical practice group as another doctor the plaintiff had consulted as potential expert.<sup>24</sup> During voir dire examination, the defendant's expert testified that the doctor the plaintiff had consulted did not share any confidential information with him but instead simply provided the medical records and a copy of his expert designation.<sup>25</sup> The medical records contained some handwritten notes, but the expert testified that he did not know whose notes they were, and there was no showing that the notes contained any confidential information provided by the plaintiff.<sup>26</sup> The supreme court noted that it was the plaintiff's burden to show that the previous physician had revealed confidential information to the expert the plaintiff sought to disqualify.<sup>27</sup> As no such showing was made, the court held that the trial court did not abuse its discretion in allowing the testimony.<sup>28</sup>

The Supreme Court of Virginia also addressed the applicability of the hearsay rule to prior consistent statements in two cases decided on the same day.<sup>29</sup> In *Ruhlin v. Samaan*, a personal injury case,<sup>30</sup> there was a question whether the plaintiff had experienced

---

23. *Id.* (internal quotation marks omitted). The court agreed with the defendant that pursuant to *Neely v. Johnson*, the presence of an opinion within the business record was an independent ground for objection. *Id.*; see also *Neely v. Johnson*, 215 Va. 565, 572, 211 S.E.2d 100, 106 (1975). As that aspect of the objection was not raised sufficiently at trial, it was waived. *Arnold*, 283 Va. at 714, 725 S.E.2d at 542; see also VA. SUP. CT. R. pt. 5, R. 5:25 (Repl. Vol. 2012) ("No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable [the supreme court] to attain the ends of justice.").

24. *Arnold*, 283 Va. at 715, 725 S.E.2d at 542.

25. *Id.*, 725 S.E.2d at 543.

26. *Id.*

27. *Id.* at 716, 725 S.E.2d at 543.

28. *Id.*

29. See *Ruhlin v. Samaan*, 282 Va. 371, 380–81, 718 S.E.2d 447, 451–52 (2011); *Anderson v. Commonwealth*, 282 Va. 457, 463–65, 717 S.E.2d 623, 626–27 (2011).

30. 282 Va. at 374, 717 S.E.2d at 448.

shoulder pain prior to the car accident in question.<sup>31</sup> When cross-examined about inconsistent statements given in a recorded telephone interview with the defendant insurance company, the plaintiff did not recall certain details of the conversation.<sup>32</sup> The defendant then used the transcript of the recorded conversation to refresh his recollection over the objection of plaintiff's counsel.<sup>33</sup> Following cross-examination, the plaintiff called his wife to testify regarding prior consistent statements he made regarding his injuries in the accident by contending that such testimony was appropriate to "rebut the defense's allegation of recent fabrication,"<sup>34</sup> but the trial court sustained the defendant's objection.<sup>35</sup>

On appeal, the plaintiff argued that the use of the recorded transcript ran afoul of Virginia Code section 8.01-404, which limits the use of prior inconsistent statements to contradict witnesses in personal injury suits.<sup>36</sup> Disagreeing with the plaintiff, the court held that the witness could be properly cross-examined on the content of the oral statements made during the telephone conversation so long as the writing itself was not used to impeach the witness.<sup>37</sup> The court found that the written transcript had not been used to impeach the witness but rather to refresh the witness's recollection about the conversation and thus was not improper under section 8.02-404.<sup>38</sup> Significantly, the defendant's counsel "did not introduce the transcript into evidence, quote it in open court, or even identify it to the jury."<sup>39</sup>

On the subject of prior consistent statements, the court noted that they are inadmissible hearsay if offered for the truth of the matter asserted but can be admitted in certain limited circumstances for rehabilitating a witness.<sup>40</sup> The plaintiff contended that

---

31. *Id.* at 375, 718 S.E.2d at 448.

32. *Id.* at 375–76, 718 S.E.2d at 448–49.

33. *Id.* at 376, 718 S.E.2d at 449.

34. *Id.* at 377, 718 S.E.2d at 449.

35. *Id.*

36. *Id.* at 377–78, 718 S.E.2d at 450.

37. *See id.* at 380, 718 S.E.2d at 451.

38. *Id.*; *see also* Burns v. Gagnon, 283 Va. 657, 681, 727 S.E.2d 634, 648–49 (2012) (quoting *Ruhlin* and finding trial court did not abuse discretion in admitting deposition testimony during which the witness's recollection was refreshed by reference to an affidavit she previously signed).

39. 282 Va. at 379–80, 718 S.E.2d at 451.

40. *Id.* at 380, 718 S.E.2d at 451 (citing Faison v. Hudson, 243 Va. 397, 404, 417 S.E.2d 305, 309 (1992)).

the statements were admissible to rebut the allegation of “recent fabrication” elicited by the cross-examination.<sup>41</sup> The court, however, observed that the defendant “did not allege that [the plaintiff] had crafted a new story at trial, but rather that [the plaintiff] had been inconsistent with his story all along.”<sup>42</sup> Thus, while the cross-examination regarding plaintiff’s prior inconsistent statements may have called into question his veracity, it was not appropriate to use prior consistent statements for rehabilitation.<sup>43</sup>

In *Anderson v. Commonwealth*, a criminal case involving an alleged sexual assault, the supreme court provided additional guidance on the admissibility of prior consistent statements.<sup>44</sup> The victim in *Anderson* provided inconsistent statements regarding whether she had seen—as opposed to heard—a gun she believed had been held to her head during the assault.<sup>45</sup> At trial, the defense put on evidence of her statement that she “saw a gun” in order to impeach her testimony through a prior inconsistent statement.<sup>46</sup> Over the defense’s objection, the prosecution then put on testimony regarding the victim’s prior consistent statements regarding having heard a “click” that sounded like a gun.<sup>47</sup>

In upholding the decision to admit the evidence,<sup>48</sup> the supreme court explained that there are two exceptions to the general rule excluding prior consistent statements.<sup>49</sup> The first is when a witness’s credibility is attacked in a way that suggests “a motive to falsify his testimony, such as bias, interest, corruption or relationship to a party or a cause, or that his testimony at trial is a ‘recent fabrication’ designed to serve such a motive.”<sup>50</sup> Under the first exception, as discussed in the *Ruhlin* case,<sup>51</sup> the “prior consistent statement, to be admissible, *must have been made before the motive to falsify existed.*”<sup>52</sup> The second exception arises when

---

41. See *id.* at 381, 718 S.E.2d at 452 (internal quotation marks omitted).

42. *Id.*

43. *Id.* at 382, 718 S.E.2d at 452.

44. See 282 Va. 457, 460–61, 717 S.E.2d 623, 624 (2011).

45. *Id.* at 461–63, 717 S.E.2d at 624–25.

46. See *id.* at 462–63, 717 S.E.2d at 625 (internal quotation marks omitted).

47. *Id.* at 463, 717 S.E.2d at 625–26 (internal quotation marks omitted).

48. *Id.*, 717 S.E.2d at 626.

49. *Id.* at 463–64, 717 S.E.2d at 626 (citing *Faison v. Hudson*, 243 Va. 397, 404, 417 S.E.2d 305, 309 (1992)).

50. *Id.* at 464, 717 S.E.2d at 626.

51. See *Ruhlin v. Samaan*, 282 Va. 371, 381, 718 S.E.2d 447, 452 (2011).

52. *Anderson*, 282 Va. at 464, 717 S.E.2d at 626 (citing *Ruhlin*, 282 Va. at 380–81, 718

the “opposing party has attempted to impeach the witness by offering a prior inconsistent statement made by the witness.”<sup>53</sup> According to the court, the rationale behind the second exception is that the fact finder “is entitled to consider both the fact that [the witness] uttered consistent statements, along with inconsistent statements, and the circumstances in which each was made, in determining the weight to be given to [the witness’s] testimony.”<sup>54</sup> The court stressed that the second exception has never been subject to the condition that the prior consistent statement be made when the witness had no motive to falsify his testimony.<sup>55</sup> Considering that the defense attempted to impeach the victim with her prior inconsistent statements, the court held that the trial court properly allowed the testimony regarding her prior consistent statements.<sup>56</sup>

### C. Sanctions

The Supreme Court of Virginia has recently discussed a variety of sanctions that can arise in litigation. The case of *Northern Virginia Real Estate, Inc. v. Martins* provided the supreme court with another opportunity to address issues of retention of jurisdiction under Rule 1:1, as well as the apportionment of liability for sanctions under Virginia Code section 8.01-271.1.<sup>57</sup> The case arose out of a dispute over a listing agreement,<sup>58</sup> and plaintiffs brought claims for tortious interference, business conspiracy, and defamation.<sup>59</sup> In response to the plaintiffs’ second amended complaint, two of the defendants put forth affirmative defenses regarding both the absence of a contract between the plaintiffs and the owner of the subject property as well as a lack of a reasonable business expectancy to support the tortious interference claim and sought a reply under Rule 3:11 and Rule 1:4(e).<sup>60</sup> As the

---

S.E.2d at 451–52).

53. *Id.* (citing *Ruhlin*, 282 Va. at 380–81, 718 S.E.2d at 451–52).

54. *Id.* at 464–65, 717 S.E.2d at 626.

55. *Id.* at 465, 717 S.E.2d at 627.

56. *See id.* at 466, 717 S.E.2d at 627 (citing *Creasy v. Commonwealth*, 9 Va. App. 470, 474, 389 S.E.2d 316, 318 (1990)).

57. 283 Va. 86, 101, 720 S.E.2d 121, 128 (2012).

58. *Id.* at 94–95, 720 S.E.2d at 124.

59. *Id.* at 94, 720 S.E.2d at 124.

60. *Id.* at 97, 720 S.E.2d at 126. According to Rule 3:11, “If a pleading, motion or affirmative defense sets up new matter and contains words expressly requesting a reply, the adverse party shall within 21 days file a reply admitting or denying such new matter.” VA.

plaintiffs failed to reply to the affirmative defenses as requested, they were deemed admitted prior to the trial.<sup>61</sup>

At trial, plaintiffs' case suffered from additional admissions by one of the plaintiffs on the witness stand, as well as a lack of proof regarding certain allegations made in the pleadings.<sup>62</sup> Predictably, the defendants moved to strike at the close of the plaintiffs' evidence.<sup>63</sup> Prior to a ruling on the defendants' motion to strike, plaintiffs moved to nonsuit.<sup>64</sup> The trial court granted the motion for nonsuit, and the defendants stated their intention to seek sanctions.<sup>65</sup> The court then suspended the nonsuit order until further order of court so that the parties could be heard on motions.<sup>66</sup> Subsequently, the defendants followed through on their motion for sanctions against the plaintiffs under section 8.01-271.1.<sup>67</sup> Finding that the plaintiffs' claims were filed out of a "vindictive" desire to injure competitors, that the claims lacked a factual basis, and that the plaintiffs had pressed the tortious interference claim at trial despite the court's "devastating ruling" that they had admitted an absence of contract and expectancy by failing to reply to the affirmative defense on the subject, the trial court granted the defendants' motion and awarded sanctions against both the plaintiffs and their counsel.<sup>68</sup>

On appeal the plaintiffs argued that the trial court lacked jurisdiction to award sanctions because more than twenty-one days had passed since the entry of the nonsuit order.<sup>69</sup> As to the Rule 1:1 issue, the supreme court cited its previous decision in *Super Fresh Food Markets of Virginia, Inc. v. Ruffin*,<sup>70</sup> which held that a circuit court may avoid the application of the twenty-one day rule by including specific language in the order to indicate that it re-

---

SUP. CT. R. pt. 3, R. 3:11 (Repl. Vol. 2012). Rule 1:4(e) provides that "[a]n allegation of fact in a pleading that is not denied by the adverse party's pleading, when the adverse party is required by these Rules to file such pleading, is deemed to be admitted." *Id.* R. 1:4 (Repl. Vol. 2012).

61. 283 Va. at 97, 729 S.E.2d at 126.

62. *Id.* at 97-98, 720 S.E.2d at 126-27.

63. *Id.* at 98, 720 S.E.2d at 127.

64. *Id.*

65. *Id.*

66. *Id.* at 98-99, 720 S.E.2d at 127.

67. *Id.* at 99, 770 S.E.2d at 127.

68. *Id.* at 99-100, 107, 720 S.E.2d at 127, 131.

69. *Id.* at 103, 720 S.E.2d at 129.

70. 263 Va. 555, 561 S.E.2d 734 (2002).



tains jurisdiction to address matters still pending.<sup>71</sup> Finding that the trial court had properly suspended the nonsuit order so that the issue of sanctions could be considered, the supreme court rejected the Rule 1:1 argument.<sup>72</sup>

On the issue of the propriety of the sanctions themselves, the court held that the trial court did not abuse its discretion in imposing them against both the plaintiffs and their attorneys.<sup>73</sup> The defendants also contested the joint and several liability on the sanctions award by arguing that the trial court should have apportioned the award between the defendants and their attorneys based on relative fault.<sup>74</sup> In rejecting that argument, the supreme court noted that the trial court properly found both the plaintiffs and their counsel to be culpable, and in the absence of any evidence to demonstrate the proper allocation of fault between them, joint and several liability was appropriate.<sup>75</sup>

In *Nolte v. MT Technology Enterprises, LLC*, a case arising out of a contentious business dispute,<sup>76</sup> the Supreme Court of Virginia addressed the propriety of sanctions for discovery abuse.<sup>77</sup> As a sanction for the repeated failure of several defendants to comply with discovery requests and the court's orders compelling discovery, the trial court prohibited certain defendants from opposing the plaintiff's claims and from introducing any evidence to support the defenses defendants had raised in their pleading and granted a default judgment against another defendant who, among other things, had refused to appear for his deposition.<sup>78</sup>

In reviewing the trial court's sanctions order for abuse of discretion, the supreme court noted that Rule 4:12(b)(2) allows a court to impose sanctions "as are just" to address the failure to obey a discovery order, including "[a]n order refusing to allow the disobedient party to support or oppose designated claims or *de-*

---

71. 283 Va. at 104, 720 S.E.2d at 130 (quoting 263 Va. at 563–64, 561 S.E.2d at 739).

72. *Id.* at 105, 720 S.E.2d at 130.

73. *Id.* at 107, 720 S.E.2d at 131.

74. *Id.* at 101, 720 S.E.2d at 128.

75. *Id.* at 114, 116, 720 S.E.2d at 135–36. Recognizing that concerns over the attorney-client privilege may lead to a reluctance to put on evidence of relative fault between a party and its attorney, the court noted that in such situations it would be appropriate for the lawyer to withdraw from the representation and for the party and lawyer to retain separate counsel to pursue the argument. *Id.* at 115, 720 S.E.2d at 136.

76. 284 Va. 80, 83–85, 726 S.E.2d 339, 341–42 (2012).

77. *Id.* at 92, 726 S.E.2d at 347.

78. *Id.* at 93–95, 726 S.E.2d at 346–48.

*fenses*, or prohibiting him from introducing designated matters in evidence” or “[a]n order . . . rendering a judgment by default against the disobedient party.”<sup>79</sup> The court then ruled that the trial court’s choice of sanctions was not impermissible under the rule and was supported by the evidence before it.<sup>80</sup> The supreme court did, however, take issue with the scope of the trial court’s application of the awarded sanction.<sup>81</sup> Specifically, the supreme court found it “too harsh” and an abuse of discretion for the trial court to forbid the defendants from cross-examining witnesses and from putting on any evidence regarding the amount of damages sought by the plaintiffs.<sup>82</sup> The court remanded the case for additional proceedings on damages.<sup>83</sup>

---

79. *Id.* at 93, 726 S.E.2d at 346–47 (third alteration in original) (quoting VA. SUP. CT. R. pt. 5, R. 4:12(b)(2) (Repl. Vol. 2012)) (internal quotation marks omitted). Rule 4:12(b)(2) states as follows:

If a party or an officer, director, or managing agent of a party or a person designated under Rule 4:5(b)(6) or 4:6(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this Rule or Rule 4:10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 4:10(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

R. 4:12(b)(2) (Repl. Vol. 2012).

80. 284 Va. at 94, 726 S.E.2d at 347.

81. *Id.* at 94–95, 726 S.E.2d at 347–48.

82. *Id.* at 95, 726 S.E.2d at 347–48.

83. *Id.* at 98, 726 S.E.2d at 349.

The Supreme Court of Virginia held in *Landrum v. Chippenham and Johnston-Willis Hospitals, Inc.* that the trial court did not abuse its discretion in excluding the testimony of a party's expert witness in a medical malpractice case for failure to comply with the court's orders regarding expert disclosure.<sup>84</sup> The plaintiff, represented by a lead counsel who was an out-of-state attorney admitted pro hac vice, failed to provide a complete expert disclosure under Rule 4:1(b)(4)(A)(i) according to the court's pretrial scheduling order.<sup>85</sup> Following the defendant hospital's motion to exclude the plaintiff's expert and motion for summary judgment based on this deficiency,<sup>86</sup> the out-of-state counsel submitted an expert report but failed to supplement his expert interrogatory answer.<sup>87</sup> At the hearing on the defendant's motion, the trial court granted the plaintiff additional time to supplement the designation to conform with Rule 4:1(b)(4)(A)(i).<sup>88</sup> A day before the court-ordered deadline, the plaintiff's out-of-state counsel filed an expert designation that was not signed by local counsel in accordance with Rule 1A:4(2).<sup>89</sup> The defendant hospital again moved to exclude the expert and for summary judgment.<sup>90</sup> Shortly before the hearing on the defendant's second motion, the plaintiff refiled the supplemental designation with local counsel's signature.<sup>91</sup> The trial court granted the defendant's motion to exclude and motion for summary judgment, noting the series of late filings and the court's clear instructions that the supplemental designation had to be filed properly.<sup>92</sup>

---

84. 282 Va. 346, 349, 717 S.E.2d 134, 138 (2011).

85. *Id.* at 349–50, 117 S.E.2d at 135. According to Rule 4:1(b)(4)(A), a party: may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

VA. SUP. CT. R. pt. 5, R.4:1(b)(4)(A)(i) (Repl. Vol. 2012).

86. 282 Va. at 350, 717 S.E.2d at 135.

87. *Id.*

88. *Id.*

89. *Id.* at 350–51, 717 S.E.2d at 136. Rule 1A:4(2) states in relevant part that “[a]ny pleading or other paper required to be served (whether relating to discovery or otherwise) shall be invalid unless it is signed by local counsel.” VA. SUP. CT. R. pt. 1A, R. 1A:4(2) (Repl. Vol. 2012).

90. 282 Va. at 351, 717 S.E.2d at 136.

91. *See id.*

92. *Id.* at 351–52, 717 S.E.2d at 136.

On appeal, the plaintiff contended that the trial court abused its discretion in excluding the expert because Rule 4:1(g) states that if a discovery response is not signed it “shall be stricken unless it is signed promptly after the omission is called to the attention” of the responding party, and the supplemental designation was refiled with local counsel’s signature shortly after the plaintiff raised the matter.<sup>93</sup> The supreme court rejected that argument, noting that Rule 4:1(g) was not applicable because the original designation was signed by counsel of record (the out-of-state attorney), but the designation was simply without legal effect because it was not signed by local counsel.<sup>94</sup> Thus, the trial court’s order on supplementation of the expert disclosure was disobeyed, and the infraction could not be corrected by a refile.<sup>95</sup>

Plaintiff’s next argument was that the court abused its discretion by excluding the expert because the plaintiff did not suffer prejudice by virtue of the Rule 1A:4 violation.<sup>96</sup> The court held that prejudice was irrelevant because the trial court excluded the expert for failure to comply with its pretrial order—not for violating Rule 1A:4.<sup>97</sup> According to the court, Rule 4:12(b)(2) provides a trial court with the authority to sanction a party for failure to obey a discovery order, and nothing in the rule requires a finding of prejudice prior to imposing the sanction.<sup>98</sup> Thus, the court held that the trial court had properly considered the matter and did not abuse its discretion in excluding the expert.<sup>99</sup> It is also important to note that in assessing abuse of discretion, the supreme court expressly adopted a definition that had been conceived by the Court of Appeals for the Eighth Circuit as follows:

An abuse of discretion . . . can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.<sup>100</sup>

---

93. *Id.* at 353, 717 S.E.2d at 137 (quoting VA. SUP. CT. R. pt. 4, R. 4:1(g) (Repl. Vol. 2012)) (internal quotation marks omitted).

94. *Id.* at 354–55, 717 S.E.2d at 137–38.

95. *Id.* at 355, 717 S.E.2d at 138.

96. *Id.*

97. *Id.*

98. *Id.* (quoting VA. SUP. CT. R. pt. 4, R. 4:12(b)(2) (Repl. Vol. 2012)).

99. *Id.* at 355–56, 717 S. E.2d at 138–39.

100. *Id.* at 352–53, 717 S.E.2d at 137 (alteration in original) (quoting *Kern v. TXO*

#### D. “Due Diligence” in Service of Process

In *Bowman v. Concepcion*, the Supreme Court of Virginia addressed the requirement under Virginia Code section 8.01-275.1 to effect service on a defendant within twelve months of filing suit, whether the twelve-month period was subject to extension for good cause, and whether the plaintiff had exercised due diligence in arranging for service.<sup>101</sup> *Bowman* involved a medical malpractice claim timely filed on February 5, 2009.<sup>102</sup> On February 5, 2010, plaintiff’s counsel filed a motion requesting an extension until July 1, 2010, for “good cause,” which was heard by the circuit court in an ex parte proceeding and granted in an order entered that same day.<sup>103</sup> The plaintiff thereafter served the defendant physician on March 30, 2010.<sup>104</sup> The defendant moved to dismiss under section 8.01-275.1 on the grounds that he had not been served within twelve months of filing and that the plaintiff could not show that she had exercised due diligence to have timely service made.<sup>105</sup> The defendant also argued that the extension order was void, or at least voidable, and the court applied the wrong standard by addressing “good cause” rather than “due diligence.”<sup>106</sup>

In response to the motion to dismiss, the plaintiff explained that the suit had been filed to preserve the statute of limitations, but at the time of filing, she had not obtained the medical certification required by Virginia Code section 8.01-20.1 and that, although she diligently had sought an expert to review the medical records and provide the requisite certification, she had not been

---

Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984)) (internal quotation marks omitted).

101. See 283 Va. 552, 555–56, 722 S.E.2d 260, 262 (2012). Section 8.01-275.1 states as follows:

Service of process in an action or suit within twelve months of commencement of the action or suit against a defendant shall be timely as to that defendant. Service of process on a defendant more than twelve months after the suit or action was commenced shall be timely upon a finding by the court that the plaintiff exercised due diligence to have timely service made on the defendant.

VA. CODE ANN. § 8.01-275.1 (Repl. Vol. 2007 & Cum. Supp. 2012).

102. 283 Va. at 556, 722 S.E.2d at 262.

103. See *id.* (internal quotation marks omitted).

104. *Id.*

105. *Id.* at 556–57, 722 S.E.2d at 262–63.

106. See *id.* at 557, 722 S.E.2d at 263 (internal quotation marks omitted).

able to do so prior to the twelve-month deadline.<sup>107</sup> It was not disputed that the plaintiff did not attempt to serve the defendant physician during the twelve months even though he resided in the jurisdiction the entire time.<sup>108</sup> The trial court granted the motion to dismiss and ruled that the extension order was void because the court did not address the issue of due diligence, and there was no other statutory authority for an extension.<sup>109</sup> The trial court further noted that due diligence pertains to efforts to have the defendant served, not to obtain a medical report.<sup>110</sup>

On appeal, the supreme court reviewed the language of section 8.01-20.1 and Rule 3:5(e)<sup>111</sup> and agreed with the circuit court that “no statutory authority exists that would permit a court to grant prospectively an extension of time beyond one year from commencement of an action for service of process on a defendant.”<sup>112</sup> The court, however, held that the extension order was not void for that reason but instead was improper because it failed to address the due diligence issue.<sup>113</sup> On that point, the court held that the effort expended by the plaintiff to obtain the medical certification was not “due diligence” to obtain service of process.<sup>114</sup> In so hold-

---

107. *See id.* at 557, 564, 722 S.E.2d at 263, 267. Virginia Code section 8.01-20.1 states as follows in relevant part:

Every motion for judgment, counter claim, or third party claim in a medical malpractice action, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness . . . a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. . . .

. . . If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant as required under this section, the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice.

VA. CODE ANN. § 8.01-20.1 (Repl. Vol. 2007 & Cum. Supp. 2012). Rule 3:5(e) of the supreme court further states that “[n]o order, judgment or decree shall be entered against a defendant who was served with process more than one year after the institution of the action against that defendant unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on that defendant.” VA. SUP. CT. R. pt. 3, R. 3:5 (Repl. Vol. 2012).

108. *See Bowman*, 283 Va. at 556–58, 722 S.E.2d at 262–64.

109. *See id.* at 558–59, 722 S.E.2d at 263–64.

110. *Id.* at 558, 722 S.E.2d at 263.

111. *See id.* at 559, 722 S.E.2d at 264.

112. *Id.* at 561, 722 S.E.2d at 265.

113. *See id.*

114. *Id.* at 563, 722 S.E.2d at 266.

ing, the court noted that the plaintiff was not without procedural remedy to address her inability to obtain the medical certification, as “she could have taken a nonsuit as a matter of right.”<sup>115</sup>

### E. *Closing Argument*

The matter of *Wakole v. Barber* provided the Supreme Court of Virginia with an opportunity to address the boundaries of arguing for itemized damages at closing.<sup>116</sup> In this personal injury lawsuit, the plaintiff provided evidence of roughly \$5000 in medical expenses resulting from an auto accident.<sup>117</sup> The plaintiff also presented evidence related to her pain, suffering, and inconvenience.<sup>118</sup> During closing argument, plaintiff’s attorney argued for a total of \$50,000 in damages and presented a chart to aid the jury in its damages calculation—including medical bills, inconvenience, future medical expenses, and pain and suffering.<sup>119</sup> The jury awarded \$30,000.<sup>120</sup>

On appeal, the defendant argued that the trial court erred by allowing the chart to be presented during closing<sup>121</sup> and that doing so ran afoul of the court’s previous decision in *Certified T.V. & Appliance Co. v. Harrington*, which held that “allowing plaintiff’s counsel to make an argument to the jury based upon a ‘daily or other fixed basis’ would permit the plaintiff to present that which is not in evidence and invade the province of the jury.”<sup>122</sup> Reviewing the *Certified T.V.* decision, the court explained that

[t]he danger against which the Court sought to guard was an argument placed before the jury that was not based on the evidence and further was based on a flawed premise that pain and suffering is constant from individual to individual and the degree of pain is the same daily.<sup>123</sup>

---

115. *Id.* at 564, 722 S.E.2d at 267.

116. 283 Va. 488, 490, 722 S.E.2d 238, 239 (2012).

117. *Id.* at 491, 722 S.E.2d at 239.

118. *See id.*

119. *Id.* at 492, 722 S.E.2d at 240.

120. *Id.*

121. *Id.*

122. *Id.* (quoting *Certified T.V. & Appliance Co. v. Harrington*, 201 Va. 109, 115, 109 S.E.2d 126, 131 (1959)).

123. *Id.* at 493–94, 722 S.E.2d at 241 (citing *Certified T.V.*, 201 Va. at 115, 109 S.E.2d at 131).

The supreme court distinguished *Certified T.V.*, however, stating that counsel's argument in the instant matter did not assign a per diem rate for non-economic damages but rather assigned a total amount to each category.<sup>124</sup> The court then held that

as long as there is evidence to support an award of non-economic damages, plaintiff is allowed to break the lump sum amount into its component parts and argue a 'fixed amount' for each element of damages claimed as long as the amount is not based on a per diem or other fixed basis.<sup>125</sup>

In reaching this conclusion, the court also rejected the defendant's argument that allowing for such argument would violate Virginia Code section 8.01-379.1, noting that nothing in the statute requires argument for the total damages amount to be in one lump sum.<sup>126</sup>

#### F. *Preservation of Error*

Recently, the Supreme Court of Virginia addressed preservation of error in a number of cases. In *Galumbeck v. Lopez*,<sup>127</sup> during the trial of a wrongful death claim,<sup>128</sup> the trial court, over the defendant doctor's objection, disallowed the use of a surgical log offered into evidence by the doctor.<sup>129</sup> On appeal, the supreme court refused to consider the defendant's substantive arguments regarding the admissibility of the log<sup>130</sup> and held that the defendant had waived the arguments by failing to present a sufficient record to permit review.<sup>131</sup> The defendant was not able to present an adequate record because his counsel's objections were made in a sidebar conference off the record.<sup>132</sup> Although the defendant later submitted a proffer on the record, that submission was made after court had adjourned for the day and outside the presence of opposing counsel.<sup>133</sup> In holding that the proffer was inadequate to

---

124. *Id.* at 493–94, 722 S.E.2d at 241.

125. *Id.* at 494, 722 S.E.2d at 241.

126. *Id.* at 490–91, 495, 722 S.E.2d at 239, 242.

127. 283 Va. 500, 722 S.E.2d 551 (2012).

128. *Id.* at 503, 722 S.E.2d at 553.

129. *See id.* at 503–04, 722 S.E.2d at 553.

130. *See id.* at 507, 722 S.E.2d at 554.

131. *Id.*

132. *Id.* at 508, 722 S.E.2d at 555.

133. *Id.*



preserve the error,<sup>134</sup> the court noted that there was no mutual stipulation or acquiescence by the opposing party.<sup>135</sup>

As to another evidentiary ruling regarding the board certification status of a doctor in the defendant's practice, the court again found the defendant had not preserved the issue.<sup>136</sup> Although the defendant had put the matter before the court in a pretrial motion in limine, he did not seek a ruling on the motion,<sup>137</sup> and when the evidence was introduced at trial, he made his objection off the record in a sidebar conference.<sup>138</sup>

The supreme court also addressed preservation of error in *Brandon v. Cox*.<sup>139</sup> In this landlord-tenant case arising out of a disputed security deposit,<sup>140</sup> the court ruled that the tenant failed to preserve her argument for appeal and therefore waived it.<sup>141</sup> The tenant originally filed a warrant in debt against her landlords over the security deposit and lost in general district court.<sup>142</sup> She also lost the subsequent appeal of that ruling to the circuit court.<sup>143</sup> Following the circuit court decision, the tenant filed a motion for reconsideration and a supporting memorandum in which she made all of the arguments that she later made on appeal to the supreme court.<sup>144</sup> She failed, however, to seek a ruling on the motion from the trial court before pursuing the appeal.<sup>145</sup>

In addressing whether the tenant had preserved her arguments, the court noted that Virginia Code section 8.01-384(A) and Rule 3:25 "have been interpreted to mean that [a] party must state the grounds for an objection so that the trial judge may understand the precise question or questions he is called upon to de-

---

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 508–09, 722 S.E.2d at 555.

138. *Id.* at 509, 722 S.E.2d at 555–56. The *Galumbeck* court also addressed whether it was an error for the trial court to fail to grant a mistrial for certain alleged juror misconduct. *See id.* at 506, 722 S.E.2d at 554. In holding that there was no error, the court stated that a juror is presumed to be impartial and that the defendant had not met his burden to prove prejudicial misconduct. *Id.* at 506–07, 722 S.E.2d at 554.

139. 284 Va. 251, 253, 726 S.E.2d 298, 299 (2012).

140. *See id.* at 254, 726 S.E.2d at 299.

141. *Id.* at 256–57, 726 S.E.2d at 301.

142. *See id.* at 254, 726 S.E.2d at 299.

143. *Id.*

144. *Id.*

145. *Id.*, 726 S.E.2d at 299–300.

cide.”<sup>146</sup> The court held that the tenant failed to preserve her arguments in the trial record.<sup>147</sup> Furthermore, in a matter of first impression, the court decided “whether merely filing a motion in the clerk’s office of a circuit court properly preserves a litigant’s argument for appeal when the record fails to reflect that the trial court had the opportunity to rule upon that motion.”<sup>148</sup> According to the court, because the preservation rules are designed “to ensure that the trial court has the opportunity to rule upon an argument [being appealed], the record must affirmatively demonstrate that the trial court was made aware of the argument.”<sup>149</sup> Because the record failed to demonstrate that the motion for reconsideration was brought to the trial court’s attention, the arguments contained within the motion were waived.<sup>150</sup>

### G. *Relief from Default Judgment*

In *Specialty Hospitals of Washington, LLC v. Rappahannock Goodwill Industries, Inc.*, the Supreme Court of Virginia evaluated whether a trial court abused its discretion in denying a motion for relief from default judgment under Rule 3:19(d)(1).<sup>151</sup> Specialty Hospitals, a foreign corporation, was served properly through the secretary of the Commonwealth but failed to file any response to the complaint.<sup>152</sup> Rappahannock Goodwill subsequently moved for default judgment, which the trial court granted.<sup>153</sup> Only then, within twenty-one days of the default judgment order, did Spe-

---

146. *Id.* at 255, 726 S.E.2d at 300 (alteration in original) (quoting *Scialdone v. Commonwealth*, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010)) (internal quotations omitted).

147. *Id.* at 257, 726 S.E.2d at 301.

148. *Id.* at 256, 726 S.E.2d at 301.

149. *Id.*

150. *Id.* at 256–57, 726 S.E.2d at 301.

151. 283 Va. 348, 351, 722 S.E.2d 557, 557 (2012). Rule 3:19(d)(1) states as follows:

During the period provided by Rule 1:1 for the modification, vacation or suspension of a judgment, the court may by written order relieve a defendant of a default judgment after consideration of the extent and causes of the defendant’s delay in tendering a responsive pleading, whether service of process and actual notice of the claim were timely provided to the defendant, and the effect of the delay upon the plaintiff. Relief from default may be conditioned by the court upon the defendant reimbursing any extra costs and fees, including attorney’s fees, incurred by the plaintiff solely as a result of the delay in the filing of a responsive pleading by the defendant.

VA. SUP. CT. R. pt. 3, R. 3:19(d)(1) (Repl. Vol. 2012).

152. *Id.* at 351–52, 722 S.E.2d at 558.

153. *Id.* at 352, 722 S.E.2d at 558.

cialty appear by filing a motion under Rule 3:19(d)(1) to set aside the judgment—claiming that service was defective and that it was not the proper defendant.<sup>154</sup> Following an ore tenus hearing, the trial court denied Specialty’s motion finding that service was proper and that Specialty failed to submit any reasonable excuse or cause for its failure to file a timely response.<sup>155</sup> On appeal, Specialty argued that the trial court erred by failing to consider all of the factors set forth in Rule 3:19(d)(1) for setting aside default judgment and by failing to make a specific finding of actual notice of the suit on the part of the defendant.<sup>156</sup> The supreme court rejected Specialty’s assertion and held that a finding of actual notice was not required under the rule.<sup>157</sup> The court further declined to impose a requirement that the trial court set out specific findings regarding each of the factors in Rule 3:19(d)(1).<sup>158</sup>

#### H. *Tolling of Statute of Limitations*

Responding to certified questions from the Court of Appeals for the Second Circuit, in *Casey v. Merck & Co.*, the supreme court addressed whether Virginia’s statute of limitations applicable to product liability actions tolled by virtue of a pending putative class action in a foreign jurisdiction<sup>159</sup> The court first made clear that “there is no authority in Virginia jurisprudence for the equitable tolling of a statute of limitations based upon the pendency of a putative class action in another jurisdiction.”<sup>160</sup> Next the court addressed whether tolling could occur by virtue of section 8.01-229(E)(1),<sup>161</sup> which provides that

if any action is commenced within the prescribed limitation period and for any cause abates or is dismissed without determining the merits, the time such action is pending shall not be computed as part of the period within which such action may be brought, and another action may be brought within the remaining period.<sup>162</sup>

---

154. *Id.*

155. *See id.* at 352–53, 722 S.E.2d at 558–59.

156. *Id.* at 354, 722 S.E.2d at 559.

157. *Id.* at 356, 722 S.E.2d at 560.

158. *Id.* at 357, 722 S.E.2d at 561.

159. 283 Va. 411, 414–15, 722 S.E.2d 842, 844 (2012).

160. *Id.* at 461, 722 S.E.2d at 845.

161. *Id.*

162. VA. CODE ANN. § 8.01-229(E)(1) (Repl. Vol. 2007 & Cum. Supp. 2012).

While recognizing that tolling under section 8.01-229(E)(1) can be triggered by the filing of a case in a foreign jurisdiction, the court explained that “the subsequently filed action must be filed by the same party in interest on the same cause of action in the same right.”<sup>163</sup> In the case to which the questions pertain, the plaintiffs were not named plaintiffs in the putative class action but instead were merely members of the putative class.<sup>164</sup> According to the supreme court, “In essence, to toll the statute of limitations, the plaintiff in the first suit must have legal standing to assert the rights that are at issue in the second lawsuit.”<sup>165</sup> Because there was no identity of parties between the putative class action and the subsequent suit, tolling under section 8.01-229(E)(1) did not apply.<sup>166</sup>

### I. *Jury Instructions on Standing*

The case of *Cattano v. Bragg* primarily involved the question of whether a minority shareholder in a two-shareholder corporation had standing to bring a derivative suit under Virginia Code section 13.1-672.1 on behalf of the company against his fellow shareholder.<sup>167</sup> At issue was whether the minority shareholder “fairly and adequately represent[ed] the interests of the corporation as required by [statute].”<sup>168</sup> Among other things, the majority shareholder contended that the trial court erred by failing to place the issue of standing before the jury.<sup>169</sup> The supreme court, however, noted that it “has never held that an issue of standing must be

---

163. 283 Va. at 417, 722 S.E.2d at 845.

164. *Id.*, 722 S.E.2d at 845–46.

165. *Id.* at 418, 722 S.E.2d at 846.

166. *See id.* at 419, 722 S.E.2d at 846.

167. *See* 283 Va. 638, 643, 727 S.E.2d 625, 626 (2012).

168. *Id.* at 643, 727 S.E.2d at 627. Under section 13.1-672.1(A), a shareholder shall not commence or maintain a derivative proceeding unless the shareholder:

1. Was a shareholder of the corporation at the time of the act or omission complained of;
2. Became a shareholder through transfer by operation of law from one who was a shareholder at that time; or
3. Became a shareholder before public disclosure and without knowledge of the act or omission complained of; and
4. Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

VA. CODE ANN. § 13.1-672.1(A) (Repl. Vol. 2012).

169. 283 Va. at 649, 727 S.E.2d at 630.

placed before a jury, and we do not rule on the issue now.”<sup>170</sup> Instead, the court focused on whether there was any factual dispute to be resolved.<sup>171</sup> Finding that the facts pertaining to the issue of fair and adequate representation were undisputed, the court upheld the trial court’s decision not to issue a jury instruction on the matter of standing.<sup>172</sup>

#### J. *Use of Depositions at Trial*

The case of *Burns v. Gagnon*, which primarily addressed substantive issues of liability and immunity on the part of a school vice-principal for injuries sustained by a student in a fight that occurred on school grounds,<sup>173</sup> also dealt with a procedural issue of the admissibility of deposition testimony at trial.<sup>174</sup> In a previous iteration of the litigation, which was brought by the plaintiff against the vice-principal and the school board but subsequently nonsuited, a student who had informed the vice-principal that a potential fight was brewing was deposed.<sup>175</sup> At the trial of the instant case, the former student’s deposition was introduced under Rule 4:7 over the plaintiff’s objection because the witness was unavailable at the time due to military service.<sup>176</sup> On appeal, the plaintiff contended that the deposition should not have been admitted because, among other things, the parties to the two cases were different.<sup>177</sup> The supreme court rejected this argument, noting that the same parties (plaintiff and vice-principal) were present in the two cases, and “it did not matter that the other parties changed.”<sup>178</sup> Thus, the trial court did not abuse its discretion in allowing the deposition to be used at the trial.<sup>179</sup>

---

170. *Id.*

171. *See id.*

172. *Id.*

173. *See* 283 Va. 657, 663, 727 S.E.2d 634, 638–39 (2012).

174. *Id.*, 727 S.E.2d at 639.

175. *Id.* at 665–66 & n.3, 177 S.E.2d at 640 & n.3.

176. *See id.* at 680, 727 S.E.2d at 648.

177. *Id.* at 679, 727 S.E.2d at 647.

178. *Id.* at 680, 727 S.E.2d at 648.

179. *Id.*

### K. *Offsetting Damages*

In *Askew v. Collins*, the Supreme Court of Virginia addressed damages offsets under Virginia Code section 8.01-35.1.<sup>180</sup> The plaintiff in *Askew* sued a newspaper, a city, and a city employee for defamation and conspiracy.<sup>181</sup> During the litigation, the plaintiff settled with the city and the newspaper, leaving Askew as the sole remaining defendant at trial.<sup>182</sup> The jury returned a verdict in favor of the plaintiff, and Askew requested that the trial court reduce the judgment by the amount the plaintiff already had received from settling with the co-defendants.<sup>183</sup> The trial court denied the request.<sup>184</sup> On appeal, Askew argued that the trial court erred by failing to apply section 8.01-35.1 to reduce the judgment.<sup>185</sup> The supreme court found the argument to be without merit, for section 8.01-35.1 applies to cases where settlement is made by one of two or more persons liable for the “*same injury*,” whereas the injury for which Askew was found liable was the result of a separate and earlier incident of defamation than that of which the settling defendants were accused.<sup>186</sup>

---

180. See 283 Va. 482, 484, 722 S.E.2d 249, 250 (2012). Section 8.01-35.1 states as follows in relevant part:

A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable for the same injury to a person or property, or the same wrongful death:

1. It shall not discharge any other person from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other person or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. In determining the amount of consideration given for a covenant not to sue or release for a settlement which consists in whole or in part of future payment or payments, the court shall consider expert or other evidence as to the present value of the settlement consisting in whole or in part of future payment or payments. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered . . . .

VA. CODE ANN. § 8.01-35.1 (Repl. Vol. 2007 & Cum. Supp. 2012).

181. 283 Va. at 484, 722 S.E.2d at 250.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 485, 722 S.E.2d at 251.

186. *Id.* at 487, 722 S.E.2d at 251–52 (quoting VA. CODE ANN. § 8.01-35.1(A)(1) (Repl. Vol. 2007 & Cum. Supp. 2012)) (internal quotation marks omitted).

### L. *Necessary Parties*

In *Siska Revocable Trust v. Milestone Development, LLC*, the Supreme Court of Virginia held that “the necessary party doctrine does not implicate subject matter jurisdiction.”<sup>187</sup> The *Siska* case involved a derivative action stemming from a dispute between members of a limited liability company (“LLC”).<sup>188</sup> At issue in the trial court was whether the plaintiff member had standing to sue on behalf of the LLC.<sup>189</sup> Because the trial court found that the plaintiff trust could not adequately represent the interests of the other members due to longstanding antagonism between the parties,<sup>190</sup> the complaint was dismissed.<sup>191</sup> On appeal, one of the defendants contended that the plaintiff had failed to name a necessary party and that the appeal should be dismissed accordingly.<sup>192</sup> On the issue of subject matter jurisdiction, the supreme court held that “the necessary party doctrine does not implicate subject matter jurisdiction,” thereby effectively overruling the case of *Atkisson v. Wexford Associates*, in which the supreme court previously had held that a judgment made without the presence of a necessary party was “absolutely void.”<sup>193</sup> To the contrary, the court held that “Rule 3:12 was intended to govern the exercise of trial court discretion in dealing with cases where a necessary party has not been joined.”<sup>194</sup> Nevertheless, the court went on to hold that the LLC was a necessary party to the suit that had not been joined.<sup>195</sup>

### M. *Requests for Admission/Attorney Fees*

In *Piney Meeting House Investments, Inc. v. Hart*, a case involving a claim for interference with an easement,<sup>196</sup> the Supreme Court of Virginia rejected an application of Rule 4:11’s attorney

---

187. 282 Va. 169, 181, 715 S.E.2d 21, 27 (2011).

188. *See id.* at 172–73, 715 S.E.2d at 22.

189. *See id.*, 715 S.E.2d at 22–23.

190. *Id.* at 172–73, 715 S.E.2d at 23.

191. *Id.* at 173, 715 S.E.2d at 23.

192. *Id.*

193. *Id.* at 176, 181, 715 S.E.2d at 25, 27 (citing *Atkisson v. Wexford Assocs.*, 254 Va. 449, 456, 493 S.E.2d 524, 528 (1997)).

194. *Id.* at 179, 715 S.E.2d at 26–27.

195. *Id.* at 182, 715 S.E.2d at 28.

196. 284 Va. 187, 190, 726 S.E.2d 319, 321 (2012).

fee provision that would have created a massive loophole in the well-established “American Rule” regarding attorney fee awards in Virginia.<sup>197</sup> In *Hart*, the plaintiff propounded a request for admission as follows: “Admit that you have no defenses to the Plaintiff’s claims.”<sup>198</sup> The defendant denied the request and the matter proceeded to a hearing before a commissioner in chancery who ruled in favor of the plaintiff.<sup>199</sup> Upon review of the commissioner’s findings, the circuit court held that the plaintiff was entitled to attorney fees under Rules 4:11(a) and 4:12(c) due to the denial of the request for admission.<sup>200</sup> On appeal the supreme court reversed, holding that the request for admission was not a proper discovery request, and, therefore, the defendant had good reason for its failure to admit the request.<sup>201</sup> As a result, Rule 4:12(c) did not require a fee award.<sup>202</sup> In reversing the trial court, the supreme court also noted that adopting the plaintiff’s position “would render the American Rule of attorney’s fees defunct in many contested proceedings when the requesting party ultimately prevailed on the merits of a case.”<sup>203</sup>

### III. AMENDMENTS TO RULES OF COURT

#### A. *Adoption of the Virginia Rules of Evidence*

By far the most significant and certainly the most eagerly anticipated rules change this year was the adoption of the Virginia

---

197. *See id.* at 196–97, 726 S.E.2d at 324–25 (quoting VA. SUP. CT. R. pt. 4, R. 4:12(c) (Repl. Vol. 2012)). According to Rule 4:12(c):

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 4:11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney’s fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 4:11(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

R. 4:12(c) (Repl. Vol. 2012).

198. 284 Va. at 192, 726 S.E.2d at 322 (internal quotation marks omitted).

199. *See id.* at 191–92, 726 S.E.2d at 321–22.

200. *Id.* at 192, 726 S.E.2d at 322.

201. *Id.* at 197, 726 S.E.2d at 325 (citing R. 4:12(c) (Repl. Vol. 2012)).

202. *See id.*

203. *Id.*



Rules of Evidence. Through an order dated June 1, 2012, effective July 1, 2012, the Supreme Court of Virginia adopted a comprehensive set of evidentiary rules, thus bringing Virginia in line with the vast majority of other states in the country that have adopted rules of evidence.<sup>204</sup> A discussion of all the specific rules is well beyond the scope of this article, but civil practitioners should be aware that the Rules are now in place and state the law of evidence in Virginia. The Rules of Evidence are found in part two of the Rules of the Supreme Court of Virginia.<sup>205</sup> Conveniently, the Rules generally follow the numbering of the Federal Rules of Evidence.<sup>206</sup> Although the practical courtroom impact remains to be seen, no substantive changes in Virginia evidence law were intended by the adoption of the Rules. According to Rule 2:102, the Rules “are adopted to implement established principles under the common law and not to change any established case law rendered prior to the adoption of the Rules.”<sup>207</sup> Pre-adoption cases may be considered in interpreting the Rules.<sup>208</sup>

### B. *Petition for Rehearing*

By order dated April 13, 2012, and effective June 13, 2012, the Supreme Court of Virginia also substantially revised subsection (f) of Rule 5:37 regarding procedures following the granting of a petition for rehearing.<sup>209</sup> The amendment to the Rule streamlines the process following the granting of a petition by making further briefing and oral argument discretionary.<sup>210</sup> Previously, when a

---

204. Order Amending Part Two, Rules of the Supreme Court of Virginia (June 1, 2012) (effective July 1, 2012), *available at* [www.courts.state.va.us/courts/scv/amendments/2012\\_0601\\_Part\\_2\\_updated\\_2012\\_0618.pdf](http://www.courts.state.va.us/courts/scv/amendments/2012_0601_Part_2_updated_2012_0618.pdf); *see also* Act of Apr. 9, 2012, ch. 688, 2012 Va. Acts \_\_\_ (“[T]he Rules of Evidence shall be applicable in all proceedings held on or after the effective date of this act in any civil action or criminal case pending on that date or commenced thereafter . . . [i]n the event of any conflict between any enactment of the General Assembly and any rule contained in the Rules of Evidence, the enactment of the General Assembly shall control”) (codified as amended at VA. CODE ANN. § 8.01-3 (Cum. Supp. 2012)).

205. VA. SUP. CT. R. pt. 2 (Repl. Vol. 2012).

206. *Compare, e.g.*, FED. R. EVID. 401 (Definition of “relevant evidence”), *and* FED. R. EVID. 802 (Hearsay Rule), *with* VA. SUP. CT. R. pt. 2, R. 2:401 (Repl. Vol. 2012) (Definition of “Relevant Evidence”), *and id.* R. 2:802 (Repl. Vol. 2012) (Hearsay Rule).

207. VA. SUP. CT. R. pt. 2, R. 2:102 (Repl. Vol. 2012).

208. *Id.*

209. Ordering Amending Rule 5:37, Rules of the Supreme Court of Virginia (Apr. 13, 2012) (effective June 13, 2012), *available at* [www.courts.state.va.us/courts/scv/amendments\\_tracked/rule\\_5\\_37\\_interlineated.pdf](http://www.courts.state.va.us/courts/scv/amendments_tracked/rule_5_37_interlineated.pdf).

210. R. 5:37 (Repl. Vol. 2012).

rehearing was granted, the respondent was permitted to file a response brief and the matter was set for expedited oral argument.<sup>211</sup> Now, the court “will determine whether any additional briefing or argument is necessary” following the granting of the rehearing.<sup>212</sup> If the court decides to entertain additional briefing, the court may direct the respondents to file a brief.<sup>213</sup> After review of the petition and respondent’s brief, the court then “may set oral argument on the petition for rehearing at the next available session of the Court. Otherwise, the Court will issue a ruling on the rehearing without further briefing or oral argument.”<sup>214</sup>

### C. *Notice of Appeal from Court of Appeals*

Rule 5:14, governing notices of appeal in appeals to the Supreme Court of Virginia from the Court of Appeals of Virginia, was amended effective March 1, 2012, to state that “[i]f a party is granted a delayed appeal from the Court of Appeals, and has previously filed a notice of appeal with the Court of Appeals, no new notice of appeal will be required.”<sup>215</sup> The Rule also was amended to speak of filing a notice of appeal in the passive voice (“a notice of appeal is filed”)<sup>216</sup> to eliminate the language regarding filing of the notice by counsel (“counsel file”),<sup>217</sup> presumably to account for pro se appeals.

## IV. NEW LEGISLATION

### A. *Injunctions*

The 2012 General Assembly amended Virginia Code sections 8.01-630 and 8.01-631 to subject only temporary injunctions—rather than both temporary and permanent injunctions as be-

---

211. See R. 5:37(f) (Repl. Vol. 2011), amended by R. 5:37(f) (Repl. Vol. 2012) (amending order dated Apr. 13, 2012).

212. *Id.* R. 5:37(f) (Repl. Vol. 2012).

213. *Id.*

214. *Id.*

215. Order Amending Rule 5:14, Rules of the Supreme Court of Virginia (Dec. 22, 2011) (effective Mar. 1, 2012), available at [www.courts.state.va.us/courtgs/scv/amendments\\_tracked/december2011\\_order.pdf](http://www.courts.state.va.us/courtgs/scv/amendments_tracked/december2011_order.pdf).

216. *Id.*

217. *Id.*

fore—to the potential of having to post a court-ordered bond.<sup>218</sup> The amendment to section 8.01-631 does, however, allow that, when “an appeal is taken from an interlocutory order or final judgment granting, dissolving, or denying a permanent injunction, and while the appeal is pending, the trial court . . . may suspend, modify, restore, or grant an injunction” while the appeal is pending upon terms such as posting a bond.<sup>219</sup>

### B. *School Records as Evidence*

Through amendment to Virginia Code section 8.01-390.1, the legislature greatly expanded the admissibility of school records. Whereas the statute previously had addressed the admissibility of school records “relating to attendance, transcripts or grades” in matters “involving the custody of that minor or the termination of parental rights of that minor’s parents,” with the omission of that limiting language,<sup>220</sup> the General Assembly amended the statute to allow for the admissibility of a minor’s school records that are “material and otherwise admissible . . . in any matter,” provided that the records are authenticated by the custodian as being true and accurate copies.<sup>221</sup>

### C. *Garnishments*

The 2012 General Assembly amended Virginia Code section 8.01-511 to provide that costs incurred by a judgment creditor after entry of the judgment that are paid to a clerk, sheriff, or process server (which shall not exceed that charged by the sheriff) are chargeable against the judgment debtor unless chargeable to the creditor under Virginia Code section 8.01-475.<sup>222</sup> Such previous costs of the creditor may be included in the garnishment

---

218. Act of Mar. 6, 2012, ch. 77, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 8.01-630, -631, and -676.1 (Cum. Supp. 2012)). Section 8.01-676.1 also was amended to state that its terms for security for appeals apply to injunction bonds under section 8.01-631. *Id.*

219. *Id.*

220. VA. CODE ANN. § 8.01-390.1 (Cum. Supp. 2011).

221. Act of Apr. 4, 2012, ch. 499, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-390.1 (Cum. Supp. 2012)).

222. Act of Mar. 30, 2012, ch. 409, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-511 (Cum. Supp. 2012)); Act of Mar. 6, 2012, ch. 127, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-511 (Cum. Supp. 2012)).

summons.<sup>223</sup> The General Assembly also corrected the form of garnishment summons to state that the homestead exemption “may not be claimed in certain cases such as payment of spousal or child support.”<sup>224</sup> The notice previously addressed payment of rent or services of a laborer or mechanic.<sup>225</sup> Lastly, the General Assembly amended section 8.01-511 of the code to provide that if the debtor does not reside in the jurisdiction where the judgment was entered, the creditor may institute garnishment proceedings in the city or county where the debtor does reside, and the court of that jurisdiction may issue an execution upon the judgment, provided the creditor files an abstract of judgment, pays the requisite fees, and files any release or satisfaction of judgment both in the judgment court and the execution court.<sup>226</sup> In addition, the General Assembly also amended the statute to allow for a garnishment to be issued without the debtor’s Social Security number upon a representation by the creditor that a good faith, but unsuccessful effort, was made to secure the number.<sup>227</sup>

#### D. *Confession of Judgment*

The General Assembly amended Virginia Code section 8.01-435 to allow for the appointment of substitute attorneys-in-fact for purposes of confessing judgment on a note or bond.<sup>228</sup> The substitute must be specifically named in an instrument that is recorded in the clerk’s office where the judgment is to be confessed according to the note or bond.<sup>229</sup> If the instrument lacks a notice to inform the debtor that a substitute attorney-in-fact may be appointed, the person appointing the substitute must send notice of the appointment to the debtor’s last known address by certified mail within ten days of the recording of the substitution.<sup>230</sup>

---

223. Ch. 409, 2012 Va. Acts; ch. 127, 2012 Va. Acts \_\_\_\_.

224. Act of Feb. 28, 2012, ch. 23, 2012 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 8.01-512.4 (Cum. Supp. 2012)).

225. VA. CODE ANN. § 8.01-512.4 (Cum. Supp. 2011).

226. Act of Mar. 13, 2012, ch. 251, 2012 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 8.01-511 (Cum. Supp. 2012)).

227. *Id.*

228. Act of February 28, 2012, ch. 31, 2012 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 8.01-435 (Cum. Supp. 2012)).

229. *Id.*

230. *Id.*

### E. *Lease Copies in Unlawful Detainer Actions*

Through chapter 788 of the Acts of Assembly, the General Assembly made a number of amendments to various statutes pertaining to landlord-tenant law.<sup>231</sup> Of interest procedurally, Virginia Code section 8.01-126 was amended to state that a plaintiff in an unlawful detainer case may submit into evidence a copy or print-out of the original lease, as long as the plaintiff provides an affidavit or sworn testimony that the document submitted is a true and accurate copy of the original.<sup>232</sup>

### F. *Court Distribution of Funds*

Through chapter 43 of the 2012 Acts of Assembly, the General Assembly amended Virginia Code section 8.01-601 to increase from \$15,000 to \$25,000 the amount that may be paid into the circuit court and which the court may pay out in accordance with the statute.<sup>233</sup> The same increase also was applied to the threshold for certain fiduciary accountings.<sup>234</sup>

### G. *Appellee Damages*

The General Assembly amended Virginia Code section 8.01-682 to clarify that damages in the form of interest to be awarded to an appellee in the case of an affirmation of a judgment runs from the date of filing the notice of appeal to the date the court issues its mandate.<sup>235</sup> The end of the interest period previously had been triggered on “affirmance.”<sup>236</sup>

### H. *Exemption for Jury Service*

The General Assembly amended Virginia Code section 8.01-341.1 to add members of the armed services or the diplomatic

---

231. See Act of Apr. 18, 2012, ch. 788, 2012 Va. Acts \_\_\_\_ (codified as amended in scattered sections of VA. CODE ANN.).

232. *Id.*

233. Act of Mar. 1, 2012, ch. 43, 2012 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 8.01-606 (Cum. Supp. 2012)).

234. *Id.*

235. Act of Mar. 1, 2012, ch. 58, 2012 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 8.01-682 (Cum. Supp. 2012)).

236. *Id.*

service of the United States who will be serving outside of the United States to the list of individuals who may be exempted from jury service upon request.<sup>237</sup>

---

237. Act of Mar. 6, 2012, ch. 98, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-341.1 (Cum. Supp. 2012)).