

# ARTICLES

## CIVIL PRACTICE AND PROCEDURE

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### I. INTRODUCTION

This article surveys recent significant developments in Virginia civil practice and procedure. The article discusses opinions of the Supreme Court of Virginia from June 2012 through June 2013 addressing 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 its 2013 session that relates to civil practice.

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

#### A. *Evidence*

The Supreme Court of Virginia has recently issued a number of opinions discussing various issues related to evidence. In *Allied Concrete Co. v. Lester*, the court tackled the question of whether misconduct by the plaintiff and his attorney, specifically the spoliation of Facebook evidence, necessitated a new trial.<sup>1</sup> This highly publicized case arose out of a car accident that occurred in Albemarle County, Virginia when William Sprouse, an employee of

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1. 285 Va. 295, 301, 736 S.E.2d 699, 701-02 (2013).

Allied Concrete Company (“Allied”), lost control of his vehicle, causing it to tip over and land on the vehicle occupied by Isaiah Lester, killing Lester’s wife.<sup>2</sup> Lester, as administrator and beneficiary of his wife’s estate, filed a complaint against both Allied and Sprouse for the wrongful death of his wife and for his own personal injuries.<sup>3</sup>

At trial, a jury awarded Lester over \$8 million.<sup>4</sup> Allied subsequently filed multiple post-trial motions, including a motion for sanctions against Lester and his attorney.<sup>5</sup> The motion for sanctions alleged that Lester had conspired with his attorney to intentionally and improperly destroy evidence related to Lester’s Facebook account and that Lester had provided false information and testimony related to his Facebook page.<sup>6</sup> Allied argued that an e-mail from the attorney’s paralegal to Lester instructing Lester to “clean up” his Facebook page, as well as the attorney’s later representation that Lester did not have a Facebook page, constituted deception, misconduct, and spoliation of evidence.<sup>7</sup> Allied also filed a motion in the alternative seeking a new trial.<sup>8</sup> After extensive discovery and hearings on the post-trial motions, including the motion for sanctions, the trial court sanctioned the attorney \$542,000 and Lester \$180,000 to cover Allied’s attorney’s fees and costs in addressing and defending against the misconduct.<sup>9</sup>

On appeal, Allied argued that the trial court erred in denying its motion for a retrial, claiming that the entire trial had been tainted by the unethical and dishonest conduct of Lester and his attorney.<sup>10</sup> The supreme court disagreed, holding that because Allied was fully aware of the misconduct prior to trial, all of the spoliation evidence had been presented to the jury, the jury had been properly instructed, and the trial court did not err in refusing to grant a retrial.<sup>11</sup> The court went on to say that the record demonstrated that Allied received a fair trial on the merits, as the trial

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2. *Id.* at 300, 736 S.E.2d at 701.

3. *Id.*

4. *Id.* at 301, 736 S.E.2d at 701.

5. *Id.*

6. *Id.*, 736 S.E.2d at 701–02.

7. *Id.* at 301–02, 736 S.E.2d at 702. The attorney instructed the paralegal to tell Lester to “clean up” his Facebook page. *Id.* at 302, 736 S.E.2d at 702.

8. *See id.* at 301, 736 S.E.2d at 702.

9. *Id.* at 303, 736 S.E.2d at 703.

10. *Id.* at 306–07, 736 S.E.2d at 705.

11. *Id.* at 306–08, 736 S.E.2d at 705.

court took significant steps to mitigate the effects of the misconduct.<sup>12</sup> Thus, the supreme court concluded that the trial court did not abuse its discretion in refusing to grant a retrial.<sup>13</sup>

In *21st Century Systems, Inc. v. Perot Systems Government Services, Inc.*, the Supreme Court of Virginia considered whether the evidence introduced at trial was sufficient to support the award of damages.<sup>14</sup> The action arose when Perot Government Services, Inc. (“Perot”) brought suit against former employees, asserting conspiracy, violation of Virginia’s Uniform Trade Secret Act, and other claims based upon the defendants’ alleged attempt to destroy and steal Perot’s business by unfairly and improperly using Perot’s confidential and proprietary information.<sup>15</sup> Perot sought damages to compensate for the loss of revenue and profits associated with the business misappropriated by the defendants, for the forensic investigation conducted to determine the extent to which Perot’s confidential files and trade secrets had been compromised, and for the loss of goodwill.<sup>16</sup> Prior to trial, the defendants moved to strike the testimony of Perot’s designated expert on the basis that the expert’s opinions concerned matters that were within the ordinary knowledge of the jury and thus did not assist the jury in understanding the facts.<sup>17</sup> Alternatively, the defendants argued that the expert’s opinions were speculative and uncertain and thus, precluded.<sup>18</sup> The trial court denied the defendants’ motion to strike.<sup>19</sup>

During the trial, the expert testified as to how he valued Perot’s lost goodwill, as well as how he estimated Perot’s lost profits.<sup>20</sup> At the close of Perot’s case-in-chief, the defendants again

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12. *Id.* at 307–08, 736 S.E.2d at 705. On appeal, Allied also argued that the trial court had erred in denying its motion for a mistrial on the grounds that one of the jurors had failed to answer a voir dire question honestly. *Id.* at 308, 736 S.E.2d at 706. In considering whether the juror’s silence following a question about her relationship with the attorney’s law firm amounted to a dishonest response to a material question, the court determined that her response was not dishonest. *Id.* at 308–10, 736 S.E.2d at 706–07. Thus, the supreme court affirmed the decision of the trial court on that ground as well. *See id.* at 310, 736 S.E.2d at 707.

13. *Id.* at 313, 736 S.E.2d at 709.

14. 284 Va. 32, 40–41, 726 S.E.2d 236, 240 (2012).

15. *Id.* at 36, 726 S.E.2d at 238.

16. *Id.*

17. *Id.* at 37, 726 S.E.2d at 238.

18. *Id.*

19. *Id.* at 38, 726 S.E.2d at 239.

20. *See id.* at 37–38, 726 S.E.2d at 238–39.

moved to strike the expert's testimony, relying on the same arguments they had made before trial.<sup>21</sup> The trial court denied the motion.<sup>22</sup> The jury returned a verdict in favor of Perot on all claims and awarded Perot both compensatory and punitive damages.<sup>23</sup> Following the verdict, the defendants moved to set aside the verdict and strike the counts or, in the alternative, for mistrial or remittitur, arguing that Perot had failed to prove its damages by using a proper method or factual foundation and that Perot had received duplicative damages.<sup>24</sup>

On appeal, the Supreme Court of Virginia evaluated the sufficiency of the evidence of goodwill damages, holding that Perot had failed to demonstrate that it had actually lost any goodwill.<sup>25</sup> In valuing Perot's goodwill, the expert had looked to the sale price of Perot's parent corporation when it was sold during the pendency of the litigation, as well as the value of the parent corporation's identifiable assets.<sup>26</sup> The court held that this evidence was insufficient to demonstrate that Perot itself had actually lost any goodwill.<sup>27</sup> Rather than consider a comparable sale of part of Perot's own business, the expert focused only on the sale price and assets of Perot's parent corporation, which was not affected in any way by the defendants' actions.<sup>28</sup> Comparable sales information was essential to support an award of lost goodwill damages, and thus, the trial court abused its discretion when it denied the defendants' motions to strike and erred when it refused to set aside the award of damages relating to Perot's lost goodwill.<sup>29</sup>

In *Funkhouser v. Ford Motor Co.*, the Supreme Court of Virginia discussed the substantial similarity test in determining the admissibility of evidence.<sup>30</sup> The plaintiff brought a products liability

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21. *Id.* at 38, 726 S.E.2d at 239.

22. *Id.*

23. *Id.* at 39–40, 726 S.E.2d at 239–40.

24. *Id.* at 40, 726 S.E.2d at 240.

25. *Id.* at 46, 726 S.E.2d at 243.

26. *Id.* at 44–45, 726 S.E.2d at 242–43. The expert valued Perot's goodwill by using figures reported to the Securities and Exchange Commission following the sale of Perot's parent corporation, namely: (1) the actual sale price of the parent; (2) the value of the parent's identifiable assets; and (3) the purchaser's valuation of the goodwill attributable to Perot as the parent's public sector. *Id.*, 726 S.E.2d at 242.

27. *Id.* at 45, 726 S.E.2d at 242.

28. *Id.* at 44–45, 726 S.E.2d at 242–43.

29. *Id.* at 46, 726 S.E.2d at 243.

30. 285 Va. 272, 281–84, 736 S.E.2d 309, 313–15 (2013).

ity action against Ford Motor Company (“Ford”) after his daughter died from burns suffered when the family’s Ford Windstar caught fire.<sup>31</sup> On appeal, the issue before the supreme court was whether the circuit court erred in excluding evidence of seven other Ford Windstar fires and in ruling that the plaintiff’s expert witnesses could not rely on the excluded evidence.<sup>32</sup>

In affirming the decision of the circuit court, the supreme court held that the evidence of the other Ford Windstar fires failed the substantial similarity test because the plaintiff was unable to identify the cause of the other fires and because the plaintiff could not rule out all other possible causes of those fires.<sup>33</sup> Because the plaintiff could not demonstrate that the other fires were caused by the same or similar defect, the evidence was inadmissible.<sup>34</sup>

The court went on to address the plaintiff’s alternative argument that the circuit court erred in ruling that his experts could not rely upon the evidence of the prior fires in their testimony regarding how a reasonable automobile manufacturer would react to those fires.<sup>35</sup> The supreme court affirmed the circuit court on this point as well, holding that an expert “cannot offer opinion testimony based on evidence that fails the substantial similarity test.”<sup>36</sup> The court explained, “To hold otherwise would be to allow an expert to offer an opinion based on speculative or otherwise irrelevant evidence.”<sup>37</sup> In this case, the court found that there were too many “missing variables” to permit expert testimony based upon the other Ford Windstar fires.<sup>38</sup>

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31. *Id.* at 275, 736 S.E.2d at 311.

32. *Id.*

33. *Id.* at 283–85, 736 S.E.2d at 315–16.

34. *Id.* at 283–84, 736 S.E.2d at 315.

35. *Id.* at 284–85, 736 S.E.2d at 315–16. In making this argument, the plaintiff relied upon Virginia Code section 8.01-401.1, which states, in pertinent part: “The facts, circumstances or data relied upon by [an expert] 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.” VA. CODE ANN. § 8.01-401.1 (Cum. Supp. 2013); *Funkhouser*, 285 Va. at 284, 736 S.E.2d at 315.

36. *Funkhouser*, 285 Va. at 285, 736 S.E.2d at 316.

37. *Id.*

38. *Id.*

## B. *Nonsuits*

In *Inova Health Care Services v. Kebaish*, the Supreme Court of Virginia affirmed the trial court's decision to allow the plaintiff to take a nonsuit on the second day of the jury trial.<sup>39</sup> Adel Kebaish, an orthopedic/spine surgeon, had entered into a Professional Services Agreement with Inova Fairfax Hospital to provide on-call trauma services on a non-exclusive basis.<sup>40</sup> Dr. Kebaish later filed a nine-count complaint against multiple defendants, including Inova Health Care Services ("Inova"), which set forth allegations of defamation, breach of contract, tortious interference, common law conspiracy, statutory conspiracy, wrongful termination, and unjust enrichment.<sup>41</sup> Two of the individual defendants were officers in the United States Army and were alleged by Dr. Kebaish to have acted in their individual capacities and outside the scope of their respective employments.<sup>42</sup> As a result, the United States Attorney removed the case to the United States District Court for the Eastern District of Virginia.<sup>43</sup> The federal district court then granted Dr. Kebaish leave to amend his complaint.<sup>44</sup> The amended complaint did not name either of the Army officers as defendants but did seek to recover the same damages as the initial complaint.<sup>45</sup> Dr. Kebaish later filed a Notice of Voluntary Dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) prior to Inova filing an answer to the amended complaint.<sup>46</sup>

Next, Dr. Kebaish filed a complaint against Inova in the Circuit Court of Fairfax County.<sup>47</sup> The case proceeded to trial and on the second day, Dr. Kebaish informed the trial court that he wished to nonsuit the case.<sup>48</sup> Inova objected, arguing that a voluntary dismissal under Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure in federal court was equivalent to a nonsuit under Virginia Code section 8.01-380(B).<sup>49</sup> The trial court overruled

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39. 284 Va. 336, 342, 346, 732 S.E.2d 703, 706, 708 (2012).

40. *Id.* at 339, 732 S.E.2d at 704.

41. *Id.* at 339–40, 732 S.E.2d at 704–05.

42. *Id.* at 340, 732 S.E.2d at 705.

43. *Id.*

44. *Id.*

45. *Id.* at 340–41, 732 S.E.2d at 705.

46. *Id.* at 341, 732 S.E.2d at 705.

47. *Id.*

48. *Id.* at 342, 732 S.E.2d at 706.

49. *Id.*

Inova's objection and permitted Dr. Kebaish to take a nonsuit as a matter of right.<sup>50</sup>

On appeal, the Supreme Court of Virginia agreed with the circuit court's ruling: "Although a voluntarily dismissal and a nonsuit provide a plaintiff with a similar procedural right, the exercise of that right varies significantly."<sup>51</sup> The court explained that, in federal procedure, a voluntary dismissal as a matter of right is available only if exercised at the outset of the proceeding, whereas use of a nonsuit under Virginia Code section 8.01-380(A) may be exercised much later in the case—even at trial.<sup>52</sup> Accordingly, the right to take a nonsuit in a Virginia state court is much more expansive than the right to a federal voluntary dismissal.<sup>53</sup> The court found no support for Inova's contention that a voluntary dismissal in federal court was the equivalent of a nonsuit.<sup>54</sup> Rather, the court explained that a nonsuit "is only the functional equivalent to a voluntary dismissal to the extent that both a nonsuit and a voluntary dismissal provide a plaintiff with a method to voluntarily dismiss the suit up until a specified time in the proceeding."<sup>55</sup> Thus, the supreme court held the trial court did not err in permitting Dr. Kebaish to take a nonsuit.<sup>56</sup>

### C. Tolling of the Statute of Limitations

In *McKinney v. Virginia Surgical Associates, P.C.*, the Supreme Court of Virginia interpreted the tolling provision of Virginia Code section 8.01-229(E)(3) as it affects the running of the statute of limitations after a nonsuit.<sup>57</sup> *McKinney* arose out of the death of Gene L. McKinney following abdominal surgery performed by physicians at Virginia Surgical Associates, P.C. ("Virginia Surgical Associates").<sup>58</sup> Prior to his death, the decedent filed a medical malpractice action against Virginia Surgical Associates.<sup>59</sup> The case was converted to a wrongful death proceeding upon his

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50. *Id.*

51. *Id.* at 345, 732 S.E.2d at 707.

52. *Id.*

53. *Id.*

54. *Id.* at 345–46, 732 S.E.2d at 707–08.

55. *Id.* at 346, 732 S.E.2d at 708.

56. *Id.*

57. 284 Va. 455, 457, 732 S.E.2d 27, 28 (2012).

58. *Id.* at 458, 732 S.E.2d at 28.

59. *Id.*

death.<sup>60</sup> The decedent's widow, Geneva L. McKinney, as administrator of the decedent's estate, was substituted as plaintiff.<sup>61</sup> After conducting discovery, McKinney concluded that there was insufficient evidence to prove that the defendant's negligence was the cause of her husband's death.<sup>62</sup> As a result, she took a voluntary nonsuit of the wrongful death action.<sup>63</sup>

Less than two months later, McKinney filed, in the same court against the same defendant, a survival action for personal injuries suffered by the decedent arising out of the same alleged negligence pursuant to Virginia Code section 8.01-25.<sup>64</sup> The defendant filed a plea in bar, asserting that the two-year statute of limitations applicable to actions for personal injury prescribed by Virginia Code section 8.01-243(A) barred the plaintiff's action.<sup>65</sup> The circuit court sustained the plea and dismissed the case.<sup>66</sup>

On appeal, the supreme court held that the circuit court erred in holding that the "survival action is a different cause of action than the wrongful death action" and is therefore not saved by the tolling provision of section 8.01-229(E)(3).<sup>67</sup> According to the court, there was only ever a single cause of action: the defendant's alleged medical malpractice resulting in injury to the decedent.<sup>68</sup> From this cause of action arose two rights of action: (1) the decedent's right to bring an action for personal injury during his lifetime, which survived to be carried on by his personal representative after his death, and (2) the personal representative's right to bring an action for wrongful death.<sup>69</sup> Because the plaintiff's survival action was timely brought within six months after entry of

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 461, 732 S.E.2d at 30.

68. *Id.* at 460-61, 732 S.E.2d at 29-30.

69. *Id.* at 460, 732 S.E.2d at 29.



the order granting nonsuit, the judgment of the circuit court was reversed.<sup>70</sup>

#### D. *Accrual of a Cause of Action*

Responding to a certified question from the United States Court of Appeals for the Third Circuit in *Kiser v. A.W. Chesterton Co.*, the Supreme Court of Virginia addressed whether, under Virginia Code section 8.01-249(4), a plaintiff's cause of action for damages due to latent mesothelioma is deemed to accrue at the time of the mesothelioma diagnosis or, decades earlier, when the plaintiff was diagnosed with an independent, non-malignant asbestos-related disease.<sup>71</sup> The certified question focused specifically on section 8.01-249(4), the statute governing when a cause of action is deemed to accrue.<sup>72</sup> As a general rule, a statute of limitations commences to run when injury is incurred as a result of a wrongful act.<sup>73</sup> Under the common law indivisible cause of action rule, a wrongful act generally gives rise to only a single indivisible cause of action.<sup>74</sup> The court found that subsection four to Virginia Code section 8.01-249 did not abrogate the common law indivisible cause of action principle.<sup>75</sup> Instead, it created a discovery accrual rule for asbestos exposure actions.<sup>76</sup> Therefore, in response to the certified question, the supreme court answered that a cause of action for personal injury based on exposure to asbestos accrues upon the first diagnosis by a physician of any of the specified diseases or some other disabling asbestos-related injury or disease.<sup>77</sup>

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70. *Id.* at 461, 732 S.E.2d at 30.

71. 285 Va. 12, 17, 736 S.E.2d 910, 913 (2013).

72. *Id.* at 17, 736 S.E.2d at 913. Virginia Code section 8.01-249(4) provides that a cause of action shall accrue:

In actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma, or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician. However, no such action may be brought more than two years after the death of such person.

VA. CODE ANN. § 8.01-249(4) (Cum. Supp. 2013).

73. *Kiser*, 285 Va. at 22, 736 S.E.2d at 916.

74. *Id.* at 21, 736 S.E.2d at 916.

75. *Id.* at 17, 736 S.E.2d at 913.

76. *Id.* at 28, 736 S.E.2d at 920.

77. *Id.* at 29, 736 S.E.2d at 920.

### E. *Res Judicata*

In *Caperton v. A.T. Massey Coal Co.*, the Supreme Court of Virginia considered the application of the doctrine of res judicata.<sup>78</sup> *Caperton* arose out of a longtime controversy between Hugh M. Caperton, Donald Blankenship, and their respective companies.<sup>79</sup> The procedural history of the case is long and complicated, involving fifteen years of litigation in the circuit courts of both Virginia and West Virginia, as well as proceedings in the United States District Court for the Southern District of West Virginia.<sup>80</sup> Caperton's first suit against one of Blankenship's companies for breach of contract was litigated in the Circuit Court of Buchanan County, Virginia.<sup>81</sup> The case before the supreme court was Caperton's second Virginia action against a Blankenship company, which was also filed in Buchanan County Circuit Court.<sup>82</sup> The complaint set forth allegations of tortious interference with existing and prospective contractual and business relations.<sup>83</sup>

Comparing Caperton's first Virginia action to his second, the circuit court concluded that all four elements of res judicata existed and thus sustained the defendant's plea of res judicata.<sup>84</sup> On appeal, however, the Supreme Court of Virginia found that the evidence from the second Virginia action was different from the proof necessary to support the claim in the first Virginia action and thus reversed the judgment of the circuit court.<sup>85</sup> Important-

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78. 285 Va. 537, 539, 740 S.E.2d 1, 1 (2013).

79. *Id.*

80. *Id.*

81. *Id.*, 740 S.E.2d at 1–2.

82. *Id.* at 540, 740 S.E.2d at 2.

83. *Id.* at 547, 740 S.E.2d at 6. Similar tort claims were initially brought against Massey in the Circuit Court of Boone County, West Virginia, where a jury awarded the plaintiffs approximately \$50,000,000. *Id.* at 545–46, 740 S.E.2d at 5. After the verdict, a lengthy appeal process ensued. *Id.* On its third consideration, the Supreme Court of Appeals of West Virginia determined that a forum selection clause in an agreement between the parties required that suit be brought in Virginia. *Id.* at 547, 740 S.E.2d at 6.

84. *Id.* at 548, 740 S.E.2d at 7. Massey alleged, and the circuit court agreed, that the “[p]laintiffs ‘could have brought their tort and contract claims together in the First Virginia Action but chose not to do so.’” *Id.* at 547, 740 S.E.2d at 6. The parties agreed that the law of res judicata as it existed in 1998, the time of the first Virginia action, governed the supreme court's analysis. *Id.* at 549, 740 S.E.2d at 7. Prior to the adoption of Rule 1:6, the law of res judicata in Virginia consisted of the following four elements: “(1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made.” *Id.* (quoting *Smith v. Ware*, 244 Va. 374, 376, 421 S.E.2d 444, 445 (1992)).

85. *Id.* at 551, 555, 740 S.E.2d at 8, 10.

ly, the court found that the first and second Virginia actions involved different causes of action and that it was “abundantly clear” that the first Virginia action for breach of contract shared no elements with the plaintiffs’ claims of tortious interference and fraudulent misrepresentation in the second Virginia action.<sup>86</sup> Because the evidence required to sustain each action was different, res judicata could not operate to bar the plaintiffs’ second Virginia action.<sup>87</sup>

#### F. *Burden of Proof Under the Slayer Statute*

As a matter of first impression, the Supreme Court of Virginia held in *Osman v. Osman* that the burden of proof for determining whether the act of murder had been committed, for purposes of interpreting the slayer statute, is by a preponderance of evidence.<sup>88</sup> In *Osman*, the plaintiffs filed suit seeking a declaratory judgment that the victim’s son, who had been found not guilty by reason of insanity for her murder, was a “slayer” within the meaning of Virginia’s slayer statute.<sup>89</sup> The circuit court held that although Osman was found not guilty by reason of insanity, he was still a slayer under Virginia Code section 55-401 and therefore could not share in the proceeds from his mother’s estate.<sup>90</sup>

In its opinion, the supreme court described the two ways by which a person may be declared a slayer: (1) when he is convicted of murder or voluntary manslaughter of the decedent; or (2) if a

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86. *Id.* at 552–53, 740 S.E.2d at 9. The supreme court reaffirmed that “[t]he test to determine whether claims are part of a single cause of action is whether the same evidence is necessary to prove each claim.” *Id.* at 550, 740 S.E.2d at 8 (quoting *Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d 563, 567 (1987)).

87. *Id.* at 554–55, 740 S.E.2d at 10.

88. 285 Va. 384, 387–90, 737 S.E.2d 876, 877–79 (2012). Virginia’s slayer statute prevents an individual meeting the definition of a slayer from benefiting in any way from the death of a decedent if the slayer has committed voluntary manslaughter or the murder of the decedent. See VA. CODE ANN. §§ 64.2-2500 to -2501 (Repl. Vol. 2012). The *Osman* opinion refers to Virginia’s slayer statute codified in Virginia Code sections 54-401 and 54-402. See *Osman*, 285 Va. at 387, 737 S.E.2d at 877; see also VA. CODE ANN. §§ 54-401 to -402 (Cum. Supp. 2011). The slayer statute codified in sections 54-401 to -402 was repealed by the General Assembly on April 4, 2012 and recodified generally at Virginia Code sections 64.2-2500 and 64.2-2501, effective Oct. 1, 2012. Act of Apr. 4, 2012, ch. 614, 2012 Va. Acts 1167, 1307–08, 1313 (codified at VA. CODE ANN. §§ 64.2-2500 to -2501).

89. *Osman*, 285 Va. at 387–88, 737 S.E.2d at 877–78; see VA. CODE ANN. § 55-401 (Cum. Supp. 2011); see also VA. CODE ANN. § 55-401 (Repl. Vol. 2012); VA. CODE ANN. § 64.2-2501 (Repl. Vol. 2012).

90. *Osman*, 285 Va. at 388–89, 737 S.E.2d at 878.

court determines, by a preponderance of evidence, that he committed the offense of murder or voluntary manslaughter.<sup>91</sup> Of course, a criminal “offense” must be proven beyond a reasonable doubt; thus, the court noted that the slayer statute itself is seemingly internally inconsistent in that it provides that murder or voluntary manslaughter may be proven by a preponderance of evidence.<sup>92</sup>

To resolve this issue of statutory construction, the court looked to guidance from Virginia Code section 55-414, which provides that the chapter “shall be construed broadly in order to effect the policy of this Commonwealth that no person shall be allowed to profit by his wrong, wherever committed.”<sup>93</sup> The court also highlighted the purpose of this chapter of the code, which is to prevent a person from profiting from his own wrong.<sup>94</sup> Giving effect to legislative intention and state policy, the court interpreted the slayer statute as requiring proof by a preponderance of evidence of the element of either murder or voluntarily manslaughter.<sup>95</sup>

In an effort to resolve any confusion caused by the language of the slayer statute, the court also clarified that, in considering whether a person is a slayer under Virginia Code section 55-401, it is only necessary to consider civil intent, not criminal intent (*mens rea*).<sup>96</sup> In the civil context, intent requires only that a person intended his actions—he need not know that his actions were wrongful.<sup>97</sup> In this case, because it had been stipulated at trial that Osman intended to kill his mother, under the civil burden of proof by a preponderance of the evidence, the evidence was sufficient to prove the elements of murder for purposes of the slayer statute.<sup>98</sup>

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91. *Id.* at 389–90, 737 S.E.2d at 879.

92. *Id.* at 390, 737 S.E.2d at 879.

93. *Id.* (quoting VA. CODE ANN. § 55-414(A) (Cum. Supp. 2011) (current version at VA. CODE ANN. § 64.2-2511 (Repl. Vol. 2012))).

94. *Id.* (citing VA. CODE ANN. § 55-414(A) (Cum. Supp. 2011) (current version at VA. CODE ANN. § 64.2-2511 (Repl. Vol. 2012))).

95. *Id.*

96. *Id.* at 391, 737 S.E.2d at 880.

97. *Id.*

98. *Id.* at 392, 737 S.E.2d at 880.

### G. *Justiciable Controversy*

In the past year, the Supreme Court of Virginia has issued multiple opinions discussing whether a justiciable controversy exists in a declaratory judgment action. *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Board of Supervisors* involved two declaratory judgment actions brought by operators of various fitness clubs (“Fitness Clubs”) in the Charlottesville area.<sup>99</sup> Believing they had been improperly excluded from bidding on the City of Charlottesville’s (“City”) proposed lease of property for a non-profit recreation facility, the Fitness Clubs sought to challenge the lease of public property by the City to the Piedmont Family YMCA (“YMCA”) and the use agreement governing the leased property entered into between the City, Albemarle County, and the YMCA.<sup>100</sup> In their declaratory judgment action against the Albemarle County Board of Supervisors (“Board”), the Fitness Clubs alleged that the Board’s award under the use agreement to the YMCA was improper because the construction and operation of the YMCA would be partially funded by a capital contribution from the county.<sup>101</sup> In their action against the City, the Fitness Clubs alleged that they were excluded from bidding on the lease because the City Council had improperly limited the bids it would accept to those that would provide for the construction of a non-profit fitness and recreation center and because it allowed a non-profit organization to lease city land for nominal rent.<sup>102</sup> According to the supreme court, none of these claims presented a justiciable controversy.<sup>103</sup>

The decision hinged upon the established principle that the declaratory judgment statutes cannot be used to mount a third-party challenge to a governmental action when such a challenge is not otherwise authorized by statute.<sup>104</sup> In other words, the Fit-

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99. 285 Va. 87, 93, 737 S.E.2d 1, 4 (2013).

100. *Id.* at 93, 105, 737 S.E.2d at 4, 10.

101. *Id.* at 94–95, 737 S.E.2d at 4–5. According to the Fitness Clubs, the Board should have complied with the Virginia Public Procurement Act, VA. CODE ANN. §§ 2.2-4300, et seq., by either issuing a “Request for Proposals” or an “Invitation to Bid.” *Id.* at 95, 737 S.E.2d at 5. The Fitness Clubs argued that by not doing so and by awarding the use agreement to the YMCA, the Board effectively disqualified the Fitness Clubs as prospective bidders. *Id.* The supreme court disagreed, finding that the Board did not exclude any person or organization from bidding. *Id.* at 105, 737 S.E.2d at 11.

102. *Id.* at 94–97, 105, 737 S.E.2d at 4–6, 11.

103. *Id.* at 106, 737 S.E.2d at 11.

104. *Id.* at 100, 737 S.E.2d at 8 (quoting *Miller v. Highland Cnty.*, 274 Va. 355, 371–72,

ness Clubs could not use the declaratory judgment statute to make an end-run around Virginia Code section 15.2-953, which provides no right of action to a third party to challenge a locality's appropriation.<sup>105</sup> Essentially, the Fitness Clubs were attempting to create "greater rights than those which they previously possessed" by challenging governmental action in a manner not authorized by statute and by trying to create rights that they did not have under the Virginia Public Procurement Act.<sup>106</sup> The court also held that without the YMCA as a party defendant, the Fitness Clubs' declaratory judgment action seeking to prevent payment under the use agreement could not be "sufficiently conclusive."<sup>107</sup> For these reasons, the supreme court ruled that the circuit courts did not have authority to exercise jurisdiction in the declaratory judgment actions.<sup>108</sup>

The issue of justiciable controversy also came before the court in *Daniels v. Mobley*.<sup>109</sup> In *Daniels*, the Supreme Court of Virginia considered, sua sponte, whether a requisite justiciable controversy existed under the declaratory judgment statute.<sup>110</sup> Charles Daniels filed a declaratory judgment action in the City of Portsmouth Circuit Court to determine whether the game of Texas Hold 'Em constituted illegal gambling under Virginia Code section 18.2-325.<sup>111</sup> Daniels had been hosting Texas Hold 'Em games and tournaments at the Poker Palace but had closed his estab-

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650 S.E.2d 532, 540 (2007)).

105. *Id.* Virginia Code section 15.2-953 is titled "Donations to charitable institutions and associations, volunteer and nonprofit organizations, chambers of commerce, etc." VA. CODE ANN. § 15.2-953 (Repl. Vol. 2012 & Cum. Supp. 2013). Notably, the Fitness Clubs did not institute these actions for the benefit of the taxpayers of Albemarle County. See *Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 109–10, 737 S.E.2d at 13–14 (Kisner, J., concurring).

106. *Id.* at 101, 737 S.E.2d at 8 (quoting *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970)).

107. *Id.* at 103, 737 S.E.2d at 10 (quoting *Erie Ins. Grp. v. Hughes*, 240 Va. 165, 170, 393 S.E.2d 210, 212 (1990)).

108. *Id.* at 97, 737 S.E.2d at 6.

109. 285 Va. 402, 405, 737 S.E.2d 895, 897 (2013).

110. *Id.*; see VA. CODE ANN. § 8.01-184 (Repl. Vol. 2007 & Cum. Supp. 2013).

111. *Id.* at 406, 737 S.E.2d at 897.

"*Illegal gambling*" means the making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this Commonwealth. VA. CODE ANN. § 18.2-325(1) (Repl. Vol. 2009).

ishment in order to avoid prosecution after he received a letter from the Commonwealth's Attorney for the City of Portsmouth stating that he could face prosecution for illegal gambling.<sup>112</sup>

Once again, the supreme court explained the well-settled law that a circuit court cannot acquire jurisdiction over a declaratory judgment action unless the proceeding involves an actual adjudication of rights.<sup>113</sup> The court found that Daniels's request for a declaration that Texas Hold 'Em is not illegal gambling amounted to a request for "a declaration that a generalized activity does not violate a particular statute" and that his request concerned an adjudication of facts rather than an adjudication of rights.<sup>114</sup> Further, the court held that declaratory relief was inappropriate to restrain enforcement of a criminal prosecution.<sup>115</sup>

#### H. *Standing*

In *Friends of the Rappahannock v. Caroline County Board of Supervisors*, the Supreme Court of Virginia discussed standing to challenge a land use decision by a local governing body.<sup>116</sup> The plaintiffs, Friends of the Rappahannock, several local landowners, and a lessee, filed a complaint for declaratory judgment in Caroline County Circuit Court challenging a special exception permit issued by the Caroline County Board of Supervisors ("Board") to Black Marsh Farm, Inc. and Vulcan Construction Materials, L.P. (collectively, "Black Marsh") that approved use of a tract of land adjacent to the Rappahannock River for a sand and gravel mining operation.<sup>117</sup> In response to the complaint, the Board filed a demurrer and Black Marsh filed a motion to dismiss

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112. *Daniels*, 285 Va. at 405–06, 737 S.E.2d at 897. After receipt of the letter, Daniels filed the declaratory judgment action to determine if Texas Hold 'Em constituted illegal gambling. *Id.* at 406, 737 S.E.2d at 897. During the one-day bench trial, the circuit court granted the defendant's motion to strike, finding that Texas Hold 'Em constituted illegal gambling and thus violated Virginia Code section 18.2-328. *Id.* at 406, 737 S.E.2d at 897; see also VA. CODE ANN. § 18.2-328 (Repl. Vol. 2009).

113. *Daniels*, 285 Va. at 408, 737 S.E.2d at 898 (citing *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty. Bd. of Supervisors*, 285 Va. 87, 98, 737 S.E.2d 1, 6 (2013)).

114. *Id.* at 408–09, 737 S.E.2d at 899.

115. *Id.* at 410, 737 S.E.2d at 900 (citing *State ex rel. Edmisten v. Tucker*, 323 S.E.2d 294, 309 (N.C. 1984)). Finally, even if Daniels's declaratory judgment action had requested a declaration of his rights, the supreme court found that such declaration would be barred by sovereign immunity. *Id.* at 411–12, 737 S.E.2d at 900.

116. 286 Va. 38, 41, 743 S.E.2d 132, 133 (2013).

117. *Id.* at 41–42, 743 S.E.2d at 133.

arguing that the individual complainants lacked standing to bring the suit because they failed to show that they were aggrieved parties, as required by Virginia Code section 15.2-2314.<sup>118</sup> According to the defendants, the plaintiffs' alleged injuries were based on speculative grievances and the facts, as pled, were insufficient to establish standing.<sup>119</sup> The circuit court agreed, finding that the complainants lacked standing.<sup>120</sup>

Citing its *Charlottesville Area Fitness Club Operators* decision, the supreme court reiterated the general principle that a complainant must establish a justiciable controversy by alleging facts demonstrating an actual controversy.<sup>121</sup> The court noted that the plaintiffs claimed no ownership interest in the subject property.<sup>122</sup> As such, they could have standing to file a declaratory judgment action challenging the land use decision only if they could satisfy a two-step test.<sup>123</sup> First, "the complainant must own or occupy 'real property within or in close proximity to the property that is the subject of' the land use determination."<sup>124</sup> Second, "the complainant must allege facts demonstrating a particularized harm to 'some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.'"<sup>125</sup>

Applying this test, the supreme court assumed that the individual complainants all held property interests sufficiently close

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118. *Id.* at 43, 743 S.E.2d at 134. Virginia Code section 15.2-2314 provides:

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition . . . specifying the grounds on which aggrieved within 30 days after the final decision of the board.

VA. CODE ANN. § 15.2-2314 (Repl. Vol. 2012).

119. *Friends of the Rappahannock*, 286 Va. at 43, 743 S.E.2d at 134. Friends of the Rappahannock alleged that Black Marsh's use of the river would negatively impact the water quality and would interfere with the river's scenic beauty. *Id.* at 42–43, 743 S.E.2d at 133–34. The individual complainants asserted that the potential for land disturbance, noise, and industrial activity at the site would interfere with their quiet enjoyment of the area and the right-of-way to the river. *Id.*

120. *Id.*

121. *Id.* at 45–46, 743 S.E.2d at 135–36 (citing *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty. Bd. of Supervisors*, 285 Va. 87, 98, 737 S.E.2d 1, 6 (2013)).

122. *Id.* at 48–49, 743 S.E.2d at 137.

123. *Id.* at 48, 743 S.E.2d at 137.

124. *Id.* (citing *Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals*, 231 Va. 415, 420, 344 S.E.2d 899, 903 (1986)).

125. *Id.* at 48–49, 743 S.E.2d at 137 (citing *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 687, 709 S.E.2d 150, 155 (2011)).



to the property but held that they had failed to allege sufficient facts showing that they suffered harm different than that suffered by the public generally.<sup>126</sup> The court declined to infer that the proposed mining operation would cause actual harm to the complainants in the absence of facts showing that the particular use of the site for sand and gravel mining would cause the loss of some personal or property right belonging to the complainants.<sup>127</sup> The *Friends of the Rappahannock* decision confirmed that “proximity alone is insufficient to plead a ‘justiciable interest’ in a declaratory judgment action appealing a land use decision.”<sup>128</sup> To have standing, a complainant “must also allege sufficient facts showing harm to some personal or proprietary right different than that suffered by the public generally.”<sup>129</sup>

### I. Presumptions

*Kiddell v. Labowitz*, a case concerning a will contest involving a dispute over testamentary capacity, raised the question of whether the jury should have been instructed as to the existence of the presumption of testamentary capacity.<sup>130</sup> In *Kiddell*, two beneficiaries under a will, Laurie and LeAnn Kiddell (collectively, “Kiddell”) filed a complaint against Kenneth E. Labowitz, the executor of the decedent’s estate, and two other beneficiaries.<sup>131</sup> According to the plaintiffs, the decedent had lacked testamentary capacity when she executed a second will.<sup>132</sup>

At the close of Kiddell’s case-in-chief, Labowitz moved to strike the evidence, arguing that Kiddell had failed to overcome the presumption of testamentary capacity by a preponderance of evidence.<sup>133</sup> At the close of all the evidence, Kiddell moved to strike, contending that Labowitz’s evidence was insufficient to prove that the decedent had testamentary capacity when she executed her second will.<sup>134</sup> The circuit court denied both motions and al-

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126. *Id.* at 49, 743 S.E.2d at 137.

127. *Id.* at 49–50, 743 S.E.2d at 138.

128. *Id.* at 50, 743 S.E.2d at 138.

129. *Id.*

130. 284 Va. 611, 615, 733 S.E.2d 622, 624 (2012).

131. *Id.* at 616, 733 S.E.2d at 624.

132. *Id.*, 733 S.E.2d at 624–25.

133. *Id.* at 618–19, 733 S.E.2d at 626.

134. *Id.* at 619–21, 733 S.E.2d at 626–29.

lowed the case to go to the jury.<sup>135</sup> Over Kiddell's objection, the circuit court granted two jury instructions that enabled the jury to consider the existence of the presumption of testamentary capacity.<sup>136</sup> The jury returned a verdict in favor of Labowitz.<sup>137</sup>

On appeal, Kiddell contended that it was reversible error for the trial court to instruct the jury on the presumption of testamentary capacity because the presumption disappeared when the trial court determined that Kiddell had presented evidence to rebut it.<sup>138</sup> The Supreme Court of Virginia disagreed, finding that the presumption does not necessarily disappear in the face of evidence to the contrary.<sup>139</sup> As the court explained, it is well established that in a will contest, "the proponent of the will is entitled to a presumption that testamentary capacity existed by proving compliance with all statutory requirements for the valid execution of a will."<sup>140</sup> Although the trial court acknowledged that evidence on the question of testamentary capacity had been presented, the trial court did not rule that the presumption had been rebutted—only that Kiddell's evidence could potentially rebut the presumption.<sup>141</sup> The presumption, however, was left in place for consideration by the jury.<sup>142</sup>

In considering whether the instructions to the jury were appropriate, the supreme court first noted that the trial court did not actually rule that the presumption was rebutted.<sup>143</sup> Further, by denying the motion to strike, the trial court implicitly found that the evidence presented by Kiddell, if accepted by the jury as true and given sufficient weight, could rebut the presumption of testamentary capacity.<sup>144</sup> Therefore, the supreme court held that the

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135. *Id.* at 619, 733 S.E.2d at 626.

136. *Id.*

137. *Id.* at 621, 733 S.E.2d at 627.

138. *Id.*

139. *Id.* at 627, 733 S.E.2d at 631.

140. *Id.* at 622, 733 S.E.2d at 628 (quoting *Gibbs v. Gibbs*, 239 Va. 197, 200, 387 S.E.2d 499, 501 (1990)).

141. *Id.* at 626–27, 733 S.E.2d at 630.

142. *Id.* at 627, 733 S.E.2d at 630. The supreme court stated, "Given the necessary role of the presumption in the factual determinations, the presumption does not disappear unless, as a matter of law, no rational finder of fact could find that the presumption had not been rebutted." *Id.*, 733 S.E.2d at 630–31.

143. *Id.* at 626, 733 S.E.2d at 630.

144. *Id.*

circuit court did not err in granting the jury instructions as to testamentary capacity.<sup>145</sup>

### J. *Remittitur*

The issue of remittitur was brought before the Supreme Court of Virginia in *Hale v. Maersk Line Ltd.*, a case arising from the alleged sexual assault of the plaintiff by Korean police during authorized shore leave.<sup>146</sup> The plaintiff, a seaman, brought suit against his former employer, Maersk Line Limited (“Maersk”), seeking compensatory and punitive damages.<sup>147</sup> The case went to trial on the plaintiff’s claims for maintenance and cure, a Jones Act claim for negligence, and a claim based on the unseaworthiness of the vessel.<sup>148</sup> The jury returned a verdict awarding the plaintiff \$20,000,000 in compensatory damages and \$5,000,000 in punitive damages.<sup>149</sup> The defendant then moved to set aside the verdict and for a new trial, asserting that the award of compensatory damages was excessive.<sup>150</sup> The circuit court agreed that the jury verdict was excessive and ultimately set aside the punitive damages award and remitted the compensatory damages award to \$2,000,000.<sup>151</sup> Both parties appealed.<sup>152</sup>

On appeal, the plaintiff argued, among other things, that the circuit court erroneously ordered remittitur and that the jury’s verdict should be reinstated because it was supported by the record.<sup>153</sup> Maersk contended that the circuit court abused its discretion when, after finding that the jury’s verdict resulted from an unfair trial, it ordered remittitur instead of a new trial on the merits.<sup>154</sup> According to Maersk, the jury was improperly instructed on a legally invalid theory of liability because the evidence did

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145. *Id.* at 630, 733 S.E.2d at 632.

146. 284 Va. 358, 364, 732 S.E.2d 8, 11–12 (2012).

147. *Id.* at 364, 732 S.E.2d at 11.

148. *Id.* at 364–65, 732 S.E.2d at 12.

149. *Id.* at 365, 732 S.E.2d at 12.

150. *Id.*

151. *Id.* at 366, 732 S.E.2d at 13.

152. *Id.*

153. *Id.* at 371, 376, 732 S.E.2d at 15–16, 18.

154. *Id.* at 376, 732 S.E.2d at 18.

not warrant both compensatory and punitive damages for denial of maintenance and cure.<sup>155</sup>

In discussing whether the circuit court erred in remitting the verdict, the supreme court cited to Virginia Code section 8.01-383.1(A), which provides authority for a circuit court to remit a jury verdict:

In any action at law in which the trial court shall require a plaintiff to remit a part of his recovery, as ascertained by the verdict of a jury, or else submit to a new trial, such plaintiff may remit and accept judgment of the court thereon for the reduced sum under protest, but, notwithstanding such remittitur and acceptance, if under protest, the judgment of the court in requiring him to remit may be reviewed by the Supreme Court . . . .<sup>156</sup>

The court explained that “[a]lthough a circuit court may order remittitur to remedy an excessive verdict, it may not use remittitur to remedy an unfair trial of liability issues.”<sup>157</sup> The court ruled that the order of remittitur did not correct the fact that the circuit court erred by instructing the jury on the plaintiff’s maintenance and cure claim for compensatory and punitive damages, as evidenced by the jury’s award of punitive damages.<sup>158</sup>

#### K. *Due Diligence in Service of Process*

The issue of sufficiency of service of process came before the Supreme Court of Virginia in *Virginia Polytechnic Institute & State University v. Prosper Financial, Inc.*, when the court was tasked with determining whether the trial court erred in setting aside a default judgment in an action filed pursuant to Virginia Code section 8.01-428(D).<sup>159</sup> Virginia Polytechnic Institute and State University (“VPI”) and Prosper Financial, Inc. (“Prosper”) had entered into a research contract that provided that any notices required to be given to Prosper under the contract should be addressed to P.O. Box 331916, Miami, Florida 33233-1916.<sup>160</sup> The contract also stated that Prosper had offices located at 4801 Al-

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155. *Id.*

156. *Id.*, 732 S.E.2d at 18–19 (quoting VA. CODE ANN. § 8.01-383.1(A) (Repl. Vol. 2007 & Cum. Supp. 2013)).

157. *Id.* at 377, 732 S.E.2d at 19.

158. *Id.* at 377–78, 732 S.E.2d at 19–20.

159. 284 Va. 474, 477–78, 732 S.E.2d 246, 247–48 (2012).

160. *Id.* at 477–78, 732 S.E.2d at 248.

hambra Circle, Coral Gables, Florida 33146.<sup>161</sup> In 2010, VPI filed a breach of contract action in the Circuit Court of Montgomery County, Virginia.<sup>162</sup> The court stated that because “Prosper was a Florida corporation, VPI sought to effect service of process through the company’s statutory agent, the Secretary of the Commonwealth.”<sup>163</sup> In its affidavit for service of process on the Secretary of the Commonwealth, VPI listed the Miami post office box address contained in the notice provision of the contract as Prosper’s last known address.<sup>164</sup> The Secretary of the Commonwealth then filed a Certificate of Compliance certifying that the complaint and summons had been sent by certified mail, return receipt requested, to Prosper at the post office box address.<sup>165</sup> Prosper did not file responsive pleadings and, on VPI’s motion, the trial court entered a default judgment against Prosper.<sup>166</sup>

In its motion to vacate the default judgment order, Prosper argued that the default judgment was void or voidable for failure to comply with the requirements for service of process established by Virginia Code section 8.01-329.<sup>167</sup> According to Prosper, the affidavit to the Secretary of the Commonwealth for substituted service was defective because it identified as Prosper’s last known address only one of the two addresses contained in the contract.<sup>168</sup> Prosper contended that identification of both addresses was required under section 8.01-329(B), which mandates the exercise of due diligence in locating the party to be served.<sup>169</sup> The trial court set aside the default judgment, agreeing that VPI owed a duty to try to serve Prosper at both addresses.<sup>170</sup> The supreme court, however, reversed that decision, finding that the evidence demonstrated that the address VPI identified on the affidavit required by section 8.01-329(B) was reasonably calculated to provide notice to Prosper of the pending litigation, as that was the address the

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161. *Id.*

162. *Id.* at 478, 732 S.E.2d at 248.

163. *Id.*; see VA. CODE ANN. § 8.01-301(3) (Cum. Supp. 2013); VA. CODE ANN. § 8.01-329(A) (Cum. Supp. 2013).

164. *Prosper Fin., Inc.*, 284 Va. at 478, 732 S.E.2d at 248.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*; see also VA. CODE ANN. § 8.01-329(B) (Cum. Supp. 2013).

170. *Prosper Fin., Inc.*, 284 Va. at 479, 732 S.E.2d at 248.

parties had previously used to exchange correspondence.<sup>171</sup> Because the relevant requirements of section 8.01-329(B) were met, the court held that service was complete and actual notice of the proceeding was not required.<sup>172</sup> Thus, the final judgment against Prosper was reinstated.<sup>173</sup>

#### L. *Preservation of Error*

In *Brandon v. Cox*, the Supreme Court of Virginia held, as a matter of first impression, that the act of filing a motion for reconsideration did not properly preserve an argument raised in a motion for appellate review.<sup>174</sup> The appellant was a tenant in property owned by Cox and managed by Horner & Newell, Inc. (“Horner”).<sup>175</sup> When the tenant prematurely terminated her lease, Cox retained her security deposit even though the tenant did not owe any back rent and did not owe money for any damage to the property.<sup>176</sup> The tenant filed a warrant in debt against Cox and Horner to recover her security deposit.<sup>177</sup> The general district court ruled in favor of the defendants, and the tenant appealed to the circuit court.<sup>178</sup> After the circuit court also found in favor of the defendants, the tenant filed a motion for reconsideration and memorandum in support thereof in which she made the argument that she subsequently made on appeal.<sup>179</sup> Nothing in the record indicated that the trial court ever considered or ruled on the tenant’s motion for reconsideration.<sup>180</sup>

Applying Virginia Code section 8.01-384(A) and Rule 5:25 of the Supreme Court of Virginia, the supreme court held that the tenant had two opportunities to preserve her argument for appeal, yet failed to do so on either occasion.<sup>181</sup> Neither the tenant’s

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171. *Id.* at 482–83, 732 S.E.2d at 250.

172. *Id.* (citing *Basile v. Am. Filler Serv., Inc.*, 231 Va. 34, 38, 340 S.E.2d 800, 802 (1986)).

173. *Id.* at 484, 732 S.E.2d at 251.

174. 284 Va. 251, 255–56, 736 S.E.2d 695, 697 (2012).

175. *Id.* at 253, 736 S.E.2d at 695.

176. *Id.*

177. *Id.*

178. *Id.*, 736 S.E.2d 695–96.

179. *Id.* at 253–54, 736 S.E.2d at 696.

180. *Id.* at 254, 736 S.E.2d at 696.

181. *Id.* at 254–56, 736 S.E.2d at 696–97. Rule 5:25 states:

No ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal unless

written statement of facts nor the order entered by the circuit court after trial indicated what argument was made to the trial court or how the trial court ruled.<sup>182</sup> The tenant's second opportunity to preserve her argument was through her motion for reconsideration, yet there is no evidence in the record that she requested or received a ruling on that motion.<sup>183</sup> Because the supreme court could not confirm that the trial court was ever made aware of the motion for reconsideration, the case could not be heard by the supreme court upon the same record upon which it was heard in the trial court.<sup>184</sup> As a result, the supreme court affirmed the judgment of the trial court.<sup>185</sup>

As Justice Mims explained in his dissenting opinion, this ruling is a marked change from the court's prior holding that a written post-trial motion for reconsideration is sufficient to preserve an argument for appeal.<sup>186</sup> The holding in *Brandon v. Cox* makes clear that the filing of a motion for reconsideration alone, without evidence that the motion was ever ruled on, is inadequate to properly preserve an argument for appeal.<sup>187</sup>

### M. Appeal Bonds

In *Henderson v. Ayres & Hartnett, P.C.*, the Supreme Court of Virginia considered, among other questions, whether the circuit court erred in refusing to suspend execution of a judgment order pending appeal in accordance with Virginia Code section 8.01-676.1(C), which sets forth the security required for such a suspension.<sup>188</sup> The plaintiff, Thomas Henderson, had retained the law

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an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.

VA. SUP. CT. R. 5:25 (Repl. Vol. 2013).

182. *Brandon*, 284 Va. at 254, 736 S.E.2d at 696.

183. *Id.* at 255, 736 S.E.2d at 697.

184. *Id.* at 256, 736 S.E.2d at 697.

185. *Id.* at 257, 736 S.E.2d at 698.

186. *Id.* (Mims, J., dissenting) (citing *Majorana v. Crown Cen. Petroleum Corp.*, 260 Va. 521, 525, 539 S.E.2d 426, 428 (2000)).

187. *Id.* at 256, 736 S.E.2d at 697.

188. 285 Va. 556, 559, 740 S.E.2d 518, 519 (2013).

An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall . . . file an appeal bond or irrevocable letter of credit conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence

firm of Ayres & Hartnett, P.C. (“Ayres & Harnett”) as his counsel in two cases filed against him by his brother relating to Henderson’s administration of the family’s trusts and estates.<sup>189</sup> Henderson and his brother settled the cases on the eve of trial, agreeing that Henderson would sell certain real property belonging to the decedent and would allow his siblings to recover from the proceeds of the sale the funds that Henderson owed them.<sup>190</sup> A buyer entered into a contract to purchase the property, and the settlement statement at closing specified that a seller’s expense of \$130,000 in attorney’s fees to Ayres & Hartnett would be paid out of Henderson’s share of the proceeds.<sup>191</sup> Henderson disputed the inclusion and amount of attorney’s fees in the settlement statement, but rather than jeopardize the sale of the property, all parties agreed to go forward with the closing.<sup>192</sup> The \$130,000 in attorney’s fees was paid into the court for future distribution.<sup>193</sup> Over Henderson’s objections, the circuit court found that Ayres & Hartnett’s fees were reasonable and ordered that the fees be distributed to Ayres & Hartnett.<sup>194</sup> Subsequently, Henderson moved for the suspension of the execution of the award pending appeal.<sup>195</sup> The circuit court denied this motion and ordered the immediate distribution of the fees.<sup>196</sup>

The supreme court noted that whether the trial court erred in refusing to suspend execution of the judgment was a question of statutory interpretation.<sup>197</sup> The supreme court first explained that the circuit court’s order for disbursement of the proceeds from the sale to Ayres & Harnett “was a judgment according to Code § 8.01-669.”<sup>198</sup> Consequently, the court found that section 8.01-

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of such suspension, and . . . execution shall be suspended upon the filing of such security and the timely prosecution of such appeal. Such security shall be continuing and additional security shall not be necessary except as to any additional amount which may be added or to any additional requirement which may be imposed by the courts.

VA. CODE ANN. § 8.01-676.1(C) (Cum. Supp. 2013).

189. *Henderson*, 285 Va. at 559, 740 S.E.2d 519.

190. *Id.*

191. *Id.* at 560, 740 S.E.2d at 519.

192. *Id.*

193. *Id.*

194. *Id.*, 740 S.E.2d at 520.

195. *Id.*

196. *Id.*

197. *Id.* at 561, 740 S.E.2d at 520 (quoting *Brown v. Commonwealth*, 284 Va. 538, 542, 733 S.E.2d 638, 640 (2012)).

198. *Id.* at 562, 740 S.E.2d at 520. Virginia Code section 8.01-669 defines “judgment” to



676.1(C) applied to the disbursement order.<sup>199</sup> As the court had previously explained, the purpose of section 8.01-676.1(C) “is to secure payment of the full judgment amount and all damages incurred as a result of the suspension.”<sup>200</sup> Payment of a lesser amount would only “undermine the security of the judgment to which a prevailing party is entitled in the event that an appellant does not succeed on appeal.”<sup>201</sup>

Henderson requested that the court continue to hold the funds pending an appeal and set an appeal bond that would adequately cover any potential damages that might be incurred because of the suspension, such as loss of interest on the \$130,000 and costs assessed against Henderson.<sup>202</sup> The circuit court’s decision to deny this request, according to the supreme court, was an error.<sup>203</sup> The supreme court held that “[t]he circuit court erred in not setting a bond adequate to satisfy all damages resulting from suspending execution of the judgment as required by Code § 8.01-676.1(C).”<sup>204</sup> However, the court found this error to be harmless because the circuit court’s award to Ayres & Hartnett was proper.<sup>205</sup>

#### N. *Pleading Affirmative Defenses*

In *New Dimensions, Inc. v. Tarquini*, the Virginia Supreme Court addressed whether the circuit court erred in holding that the four defenses set forth in the federal Equal Pay Act (“EPA”) are affirmative defenses that are waived if not pled.<sup>206</sup> *New Dimensions, Inc.* involved a female former employee, Catherine Tarquini, who brought suit against her former employer, New Dimensions, Inc. (“NDI”), for violating the Equal Pay Act, among other things.<sup>207</sup> In its answer, NDI denied Tarquini’s allegation that it had violated the EPA, but NDI did not affirmatively plead

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include “a decree, order, finding, or award.” VA. CODE ANN. § 8.01-669 (Repl. Vol. 2007).

199. *Henderson*, 285 Va. at 562, 740 S.E.2d at 520.

200. *Id.* (citing *Tauber v. Commonwealth*, 263 Va. 520, 545, 562 S.E.2d 118, 132 (2002)).

201. *Id.*

202. *Id.*, 740 S.E.2d at 521.

203. *Id.*

204. *Id.*

205. *Id.* at 565, 740 S.E.2d at 523.

206. 286 Va. 28, 31, 743 S.E.2d 267, 268 (2013); *see* 29 U.S.C. § 206(d)(1) (2006).

207. *Id.*

the defenses articulated in the statute.<sup>208</sup> During discovery, NDI disclosed information regarding its seniority and merit-based compensation system in an effort to explain why Tarquini was paid less than other employees, both male and female, who held the same job.<sup>209</sup> Just before trial, Tarquini filed a motion in limine to exclude such evidence in defense of the EPA claim on the basis that NDI had not pled any affirmative defense to the claim.<sup>210</sup> The circuit court granted the motion in limine and denied NDI's motion for reconsideration.<sup>211</sup> At the conclusion of the three-day bench trial, the court awarded Tarquini damages on her EPA claim.<sup>212</sup> Based upon its earlier ruling on the motion in limine, the court refused to consider NDI's defenses to the EPA claim.<sup>213</sup>

On appeal, NDI argued that the circuit court erred in granting Tarquini's motion in limine and in preventing NDI from presenting evidence of its gender-neutral compensation system at trial.<sup>214</sup> NDI contended that it was not required to plead this affirmative defense expressly because the EPA specifically sets forth such a compensation system as a defense.<sup>215</sup> Interestingly, this case required the court to apply the reverse-*Erie* doctrine.<sup>216</sup> Because it was a federal statutory action brought in state court, the court applied federal substantive law and then had to determine whether Virginia procedural law governed the procedural aspects of the case.<sup>217</sup> Finding that the Virginia rules concerning the pleading of affirmative defenses were not expressly preempted by federal statute and that the application of Virginia pleading standards to the EPA affirmative defenses would not lead to a substantial difference in outcomes, the court decided to apply Virginia procedural law concerning the pleading of affirmative defenses in EPA actions brought in Virginia.<sup>218</sup>

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 32, 743 S.E.2d at 269.

215. *Id.*

216. *Id.* at 34, 743 S.E.2d at 270.

217. *Id.*

218. *Id.* at 35, 743 S.E.2d at 270–71.

After noting the general rule that affirmative defenses must be pled in order to be relied upon at trial, the supreme court went on to explain that, unlike traditional affirmative defenses, the EPA affirmative defenses are specifically listed in the statute that creates the cause of action.<sup>219</sup> Also, unlike traditional affirmative defenses, which are not necessarily apparent from the allegations pled and can be unrelated to the elements of the cause of action, the EPA defenses pose little risk of surprise.<sup>220</sup> In fact, the plaintiff is put on notice of the assertion of an affirmative defense when the defendant generally denies that a pay differential is based on gender.<sup>221</sup> The supreme court reversed the judgment of the circuit court, finding that because the four statutory defenses under the EPA are express exceptions contained within the statute that creates the cause of action, and because there is little risk of surprise or prejudice, Virginia procedural law does not require that such affirmative defenses be pled.<sup>222</sup>

#### O. *Judicial Privilege*

In *Mansfield v. Bernabei*, the Supreme Court of Virginia considered, in a defamation case, whether the doctrine of absolute judicial privilege applies to communications made before the filing of an action.<sup>223</sup> *Mansfield* involved a defamation suit for statements made in a draft complaint.<sup>224</sup> After his termination from Horizon House, a residential condominium in Arlington, Virginia, Michael A. Ford filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) alleging that he had been discriminated against on the basis of his race.<sup>225</sup> James M. Mansfield, counsel to Horizon House, allegedly wrote a letter containing defamatory statements about Ford to the Horizon House board.<sup>226</sup> Ford, who was represented by Bernabei & Wachtel, PLLC (“Bernabei & Wachtel”), then sent a demand letter and a draft complaint marked “Draft—For Settlement Purposes Only” to numerous individuals and entities naming Mansfield as a de-

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219. *Id.* at 36, 743 S.E.2d at 271.

220. *Id.* at 36–37, 743 S.E.2d at 271.

221. *Id.*

222. *Id.* at 37, 743 S.E.2d at 271–72.

223. 284 Va. 116, 118–19, 727 S.E.2d 69, 71 (2012).

224. *Id.* at 119, 727 S.E.2d at 71.

225. *Id.* at 118–19, 727 S.E.2d at 71.

226. *Id.* at 119, 727 S.E.2d at 71.

fendant.<sup>227</sup> After Ford did not receive a response to his settlement proposal, he filed a complaint in the United States District Court for the Eastern District of Virginia.<sup>228</sup> Subsequently, Mansfield filed a complaint in Fairfax County Circuit Court alleging that he was defamed by statements made in Bernabei & Wachtel's draft complaint.<sup>229</sup> The defendants demurred, arguing that the statements made in the draft complaint were privileged.<sup>230</sup> Mansfield, however, argued that there was no judicial privilege because there was no pending judicial proceeding when the draft complaint was communicated.<sup>231</sup> The circuit court sustained the demurrers and ruled that absolute or judicial privilege applied to the communications contained in the draft complaint.<sup>232</sup> The supreme court affirmed this ruling.<sup>233</sup>

Applying the law of absolute judicial privilege to communications preliminary to proposed judicial proceedings, the court articulated the following requirements: (1) the court must examine whether the statement was made preliminary to a proposed proceeding; (2) the court must examine whether the statement was related to a proceeding contemplated in good faith and under serious consideration, and (3) the court must examine whether the communication was disclosed to interested persons.<sup>234</sup> In this case, the supreme court determined that all requirements had been met and therefore the court did not err in finding that absolute privilege attached to the draft complaint.<sup>235</sup>

### III. AMENDMENTS TO RULES OF COURT

#### A. *Voir Dire*

Rule 3:22A, titled "Examination of Prospective Trial Jurors (Voir Dire)," is newly added to the Rules of the Supreme Court of

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227. *Id.*

228. *Id.* The complaint that was filed was substantially similar to the draft complaint. *Id.*

229. *Id.*

230. *Id.*, 727 S.E.2d at 71–72.

231. *Id.*, 727 S.E.2d at 72.

232. *Id.* at 119–20, 727 S.E.2d at 72. The court limited the judicial privilege "only to interested parties in good faith for the purpose of attempting to settle the underlying dispute preliminary to a proposed judicial proceeding." *Id.*

233. *Id.* at 126, 727 S.E.2d at 75.

234. *Id.* at 125, 727 S.E.2d at 75.

235. *Id.* at 126, 727 S.E.2d at 75.

Virginia.<sup>236</sup> The rule sets forth certain questions that the court is to ask prospective jurors, as well as the procedure for excusing a prospective juror on a challenge for cause.<sup>237</sup> Importantly, the rule also gives counsel the right to ask questions to any prospective juror relevant to the juror's qualifications as an impartial juror.<sup>238</sup> Rule 3:22A is set forth below, in its entirety:

(a) *Examination*—After the prospective jurors are sworn on the voir dire, the court shall question them individually or collectively to determine whether anyone:

- (1) Is related by blood, adoption, or marriage to the accused or to the Plaintiff or Defendant;
- (2) Is an officer, director, agent or employee of the Plaintiff or Defendant;
- (3) Has any interest in the trial or the outcome of the case;
- (4) Has acquired any information about the case or the parties from the news media or other sources and, if so, whether such information would affect the juror's impartiality in the case;
- (5) Has expressed or formed any opinion about the case;
- (6) Has a bias or prejudice against the Plaintiff or Defendant; or
- (7) Has any reason to believe the juror might not give a fair and impartial trial to the Plaintiff and Defendant based solely on the law and the evidence.

Thereafter, the court, and counsel as of right, may examine on oath the venire, and any prospective juror, and ask questions relevant to the qualifications as an impartial juror. A party objecting to a juror may introduce competent evidence in [sic] support of the objection.

(b) *Challenge for Cause*—The court, on its own motion or following a challenge for cause, may excuse a prospective juror if it appears the juror is not qualified, and another shall be drawn or called and placed in the juror's stead for the trial of that case.<sup>239</sup>

## B. *Virginia Rules of Evidence*

Rule 2:706 of the Virginia Rules of Evidence, concerning the use of learned treatises with experts, has been amended to conform to the General Assembly's amendment to Virginia Code section 8.01-401.1.<sup>240</sup> Rule 2:706 now provides, in pertinent part:

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236. VA. SUP. CT. R. 3:22A (Repl. Vol. 2013).

237. *Id.*

238. *Id.*

239. *Id.*

240. Order Amending VA. SUP. CT. R. 2:706 (June 21, 2013) (effective July 1, 2013), available at [http://www.courts.state.va.us/courts/scv/amendments/2013\\_0621\\_rules\\_2\\_706\\_2\\_804\\_3\\_20\\_4\\_7.pdf](http://www.courts.state.va.us/courts/scv/amendments/2013_0621_rules_2_706_2_804_3_20_4_7.pdf); see VA. CODE ANN. § 8.01-401.1 (Cum. Supp. 2013).

If the statements [contained in published treatises] are to be introduced through an expert witness upon direct examination, copies of the specific statements shall be designated as literature to be introduced during direct examination and provided to opposing parties 30 days prior to trial unless otherwise ordered by the court.<sup>241</sup>

The amendment to the rule also adds the following sentence:

If a statement has been designated by a party in accordance with and satisfies the requirements of this rule, the expert witness called by that party need not have relied on the statement at the time of forming his opinion in order to read the statement into evidence during direct examination at trial.<sup>242</sup>

Rule 2:804 of the Virginia Rules of Evidence, concerning hearsay exceptions applicable where the declarant is unavailable, has also been amended to include a discussion of corroboration by business records.<sup>243</sup> The rule now includes the following language:

For the purposes of this section, and in addition to corroboration by any other competent evidence, an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party. If authentication of the business record is not admitted in a request for admission, such business record shall be authenticated by a person other than the author of the entry who is not an adverse or interested party whose conduct is at issue in the allegations of the complaint.<sup>244</sup>

### C. *Depositions*

Rule 4:5, discussing depositions, has undergone only a slight change, presumably to address “speaking” objections. The rule now clarifies that “[a]ny objection must be stated concisely in a nonargumentative and nonsuggestive manner.”<sup>245</sup> However, the amendment does not change the fact that evidence objected to is taken subject to the objections.<sup>246</sup>

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241. Order Amending VA. SUP. CT. R. 2:706 (June 21, 2013) (effective July 1, 2013), available at [http://www.courts.state.va.us/courts/scv/amendments/2013\\_0621\\_rules\\_2\\_706\\_2\\_804\\_3\\_20\\_4\\_7.pdf](http://www.courts.state.va.us/courts/scv/amendments/2013_0621_rules_2_706_2_804_3_20_4_7.pdf).

242. *Id.*

243. Order Amending VA. SUP. CT. R. 2:804 (June 21, 2013) (effective July 1, 2013), available at [http://www.courts.state.va.us/courts/scv/amendments/2013\\_0621\\_rules\\_2\\_706\\_2\\_804\\_3\\_20\\_4\\_7.pdf](http://www.courts.state.va.us/courts/scv/amendments/2013_0621_rules_2_706_2_804_3_20_4_7.pdf).

244. *Id.*

245. VA. SUP. CT. R. 4:5(6) (Repl. Vol. 2013).

246. *Id.*

Rule 4:7 regarding the use of depositions in court proceedings has also been amended recently. Subsection (e) now reads: “No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any depositions under Rule 4:5, unless such use of depositions is permitted by § 8.01-420.”<sup>247</sup> Rule 3:20 discussing summary judgment has undergone a similar addition of a reference to section 8.01-420.<sup>248</sup>

#### D. *General Provisions as to Pleadings*

Rule 1:4, setting forth the general provisions as to pleadings, has undergone a minor change. Effective January 1, 2013, the rule was amended to require additional attorney identifying and contact information.<sup>249</sup> Specifically, the rule now requires that every pleading, motion, or other paper served or filed contain at the foot the Virginia State Bar number and any e-mail address of the counsel of record submitting it, along with counsel’s office address, telephone number, and facsimile number.<sup>250</sup>

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247. Order Amending VA. SUP. CT. R. 4:7 (June 21, 2013) (effective July 1, 2013), *available* at [http://www.courts.state.va.us/courts/scv/amendments/2013\\_0621\\_rules\\_2\\_706\\_2\\_804\\_3\\_20\\_4\\_7.pdf](http://www.courts.state.va.us/courts/scv/amendments/2013_0621_rules_2_706_2_804_3_20_4_7.pdf).

248. VA. SUP. CT. R. 3:20 (Repl. Vol. 2013). Virginia Code section 8.01-420, which was rewritten by the General Assembly in 2013, now reads:

A. Except as provided in subsection B, no motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used. Notwithstanding the foregoing, requests for admissions for which the responses are submitted in support of a motion for summary judgment may be based in whole or in part upon any discovery depositions under Rule 4:5 and may include admitted facts learned or referenced in such a deposition, provided that any such request for admission shall not reference the deposition or require the party to admit that the deponent gave specific testimony.

B. Notwithstanding the provisions of subsection A, a motion for summary judgment seeking dismissal of any claim or demand for punitive damages may be sustained, as to the punitive damages claim or demand only, when based in whole or in part upon any discovery depositions under Rule 4:5. However, such a motion may not be based upon discovery depositions under Rule 4:5 with respect to any claim or demand for punitive damages based on the operation of a motor vehicle by a person while under the influence of alcohol, any narcotic drug, or any other self-administered intoxicant or drug.

VA. CODE ANN. § 8.01-420 (Cum. Supp. 2013).

249. VA. SUP. CT. R. 1:4 (Repl. Vol. 2013).

250. *Id.*

### E. *Electronic Filing and Service*

Effective January 1, 2013, multiple rules have been amended to provide more detailed information regarding electronic filing, which is becoming more and more prevalent in Virginia courts. The rule governing electronic filing and service, Rule 1:17, underwent some significant changes.<sup>251</sup> First, the system operational standards have been amended to allow remote electronic access to documents submitted in an electronically filed case to “active members of the Virginia State Bar and their authorized agents, who have complied with the registration requirements to use the electronic filing system.”<sup>252</sup> This language replaces the portion of the rule that gave electronic access to “counsel of record, including parties appearing *pro se*.”<sup>253</sup>

Subsection (d)(5) of Rule 1:17, which discusses the procedures for filing using the E-Filing Portal, has also been amended to clarify when a document is deemed filed. As amended, the rule states:

[A]n electronic document . . . shall be deemed filed on the date that it is received in the E-Filing Portal without regard to whether the filing occurred within or outside of standard business hours. If the electronic document is received in the E-Filing Portal on a Saturday, Sunday, legal holiday, or any day or part of a day on which the clerk’s office is closed as authorized by an act of the General Assembly, then such document shall be deemed filed on the next day that is not a Saturday, Sunday, legal holiday, or day or part of a day on which the clerk’s office is closed.<sup>254</sup>

Subsection (d)(7), regarding a clerk’s notice of defects in a filing, striking documents, and court orders, has also been substantially changed. In the case of an incorrect or missing fee under the amended rule, the clerk of court is now authorized to immediately process payment of the correct fee if the filing party has previously provided a credit or payment account.<sup>255</sup> Alternatively, if processing by the clerk of the proper payment through a credit or payment account is not feasible, the clerk will send an electronic notice to the filing party and all other parties who have ap-

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251. VA. SUP. CT. R. 1:17 (Repl. Vol. 2013).

252. R. 1:17(c)(5) (Repl. Vol. 2013).

253. Compare *id.*, with R. 1:17(c)(5) (Repl. Vol. 2012).

254. R. 1:17(d)(5) (Repl. Vol. 2013).

255. R. 1:17(d)(7)(i)(A) (Repl. Vol. 2013).



peared in the case.<sup>256</sup> Similarly, if counsel files a document in the wrong case or docket number, the amended rule directs the clerk to notify the filing party as soon as practicable.<sup>257</sup> Copies of all notices transmitted by the clerk under subpart (d)(7), as well as copies of any documents that were stricken, are to be retained by the clerk in the permanent electronic case file.<sup>258</sup> Subsection (d)(7) no longer instructs the clerk to transmit a notice of hearing for the judge to consider an order striking a defective electronically filed document.

Rule 3:3, governing the filing of pleadings, has also seen a minor edit to the subsection discussing electronic filing. Amended subsection (b)(1) now requires that if a civil action is designated as an electronically filed case upon consent of all parties, “[s]uch designation shall be made promptly, complying with all filing and procedural requirements for making such designations as may be prescribed by such circuit court.”<sup>259</sup>

In an electronically filed case, the plaintiff must still “furnish paper copies to the clerk as provided in [Rule 3:4].”<sup>260</sup> A new subsection, (c)(2), has been added to Rule 3:4 to address the requirement of additional copies in electronically filed cases. The new subsection states:

Additionally, in an Electronically Filed Case, if the clerk has been provided by the plaintiff with a credit or payment account through which to obtain payment of fees for duplication of required copies of filings, the clerk shall promptly prepare additional copies of the pleading as needed, and process payment through such credit or payment account; or, if processing by the clerk of the proper payment for duplication of additional copies of the pleading through a credit or payment account authorized by the filing party is not feasible, the clerk shall proceed as provided in subpart (c)(1) of this Rule.<sup>261</sup>

## F. *Taxable Costs*

Rule 5:35, which governs attorney’s fees, costs, and notarized bills of costs in the Supreme Court of Virginia, as well as Rule

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256. R. 1:17(d)(7)(i)(B) (Repl. Vol. 2013).

257. R. 1:17(d)(7)(ii) (Repl. Vol. 2013). The rule provides that notice may be given “through the E-Filing system, by telephone, or by other effective means.” *Id.*

258. R. 1:17(d)(7)(iii) (Repl. Vol. 2013).

259. R. 3:3(b)(1) (Repl. Vol. 2013).

260. R. 3:4(a) (Repl. Vol. 2013).

261. R. 3:4(c)(2) (Repl. Vol. 2013).

5A:30, discussing costs and notarized bills of costs in the Courts of Appeals, were both amended effective January 1, 2013, to state that costs incurred in the preparation of transcripts may be taxable in the court.<sup>262</sup> Both rules now include a citation to Virginia Code section 17.1-128, which provides that “[a] transcript of the record, when required by any party, shall be paid for by such party. The court on appeal may provide that such cost may, in civil cases, be reimbursed to the party prevailing.”<sup>263</sup>

### G. *Inmate Filing*

By order dated December 14, 2012, and effective January 1, 2013, the Supreme Court of Virginia revised Rule 5:5 regarding inmate filing to include a more descriptive definition of “institution.”<sup>264</sup> Prior to the amendment, the rule referenced only inmates confined to “an institution,” without clarifying what that term meant.<sup>265</sup> As amended, the rule applies to an “individual confined in an institution, including a prison, jail, or the Virginia Center for Behavioral Rehabilitation.”<sup>266</sup>

## IV. NEW LEGISLATION

### A. *Evidence*

By enacting H.B. 1477, the 2013 General Assembly amended the Virginia Deadman’s Statute, to state that, in addition to corroboration by any other competent evidence, “an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party.”<sup>267</sup> The statute now speaks to authentication of the business record: “If authentication of the business record is not admitted in a request for admission, such business record shall be authenticated by a person other than the

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262. VA. SUP. CT. R. 5:35(c) (Repl. Vol. 2013); VA. SUP. CT. R. 5A:30(b) (Repl. Vol. 2013).

263. VA. CODE ANN. § 17.1-128 (Repl. Vol. 2010); R. 5:35(c) (Repl. Vol. 2013); R. 5A:30B (Repl. Vol. 2013).

264. See VA. SUP. CT. R. 5:5(d) (Repl. Vol. 2013).

265. R. 5:5 (Repl. Vol. 2012).

266. R. 5:5(d) (Repl. Vol. 2013).

267. Act of Mar. 5, 2013, ch. 161, 2013 Va. Acts \_\_\_\_, \_\_ (codified as amended at VA. CODE ANN. § 8.01-397 (Cum. Supp. 2013)).

author of the entry who is not an adverse or interested party whose conduct is at issue in the allegations of the complaint.”<sup>268</sup>

The 2013 General Assembly also amended and reenacted Virginia Code section 16.1-88.2, relating to evidence of medical reports or records. The amendment clarifies when records of bills of a hospital or other medical facility may be admitted. Pursuant to the amendment, records or bills shall be admitted if

- (i) the party intending to present evidence by the use of records or bills gives the opposing party or parties a copy of the records or bills and written notice of such intention 10 days in advance of trial and
- (ii) attached to the records or bills is a sworn statement of the custodian thereof that the same is a true and accurate copy of the records or bills of such hospital or other medical facility.<sup>269</sup>

With this amendment, medical records and bills are now treated in much the same manner as medical reports—they may be introduced into evidence in the same manner and notice of intention to present them must be given to the opposing party before trial.<sup>270</sup>

#### B. *Expert Witnesses*

By amending Virginia Code sections 8.01-20.1, -50.1 and 16.1-83.1, the 2013 General Assembly has provided an alternative method of expert witness certification for the court: in camera review.<sup>271</sup> The amendments provide that in medical malpractice actions, “[t]he court, upon good cause shown, may conduct an in camera review of the certifying expert opinion obtained by the plaintiff as the court may deem appropriate.”<sup>272</sup>

Another change related to expert witnesses is the 2013 General Assembly’s amendment to section 8.01-401.1, discussing opinion testimony by experts. The amendment adds the following language:

If a statement has been designated by a party in accordance with and satisfies the requirements of this section, the expert witness

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268. VA. CODE ANN. § 8.01-397 (Cum. Supp. 2013).

269. Act of Mar. 12, 2013, ch. 145, 2013 Va. Acts \_\_\_\_, \_\_\_\_ (codified as amended at VA. CODE ANN. § 16.1-88.2 (Cum. Supp. 2013)).

270. VA. CODE ANN. § 16.1-882 (Cum. Supp. 2013).

271. Act of Mar. 12, 2013, ch. 65, 2013 Va. Acts \_\_\_\_, \_\_\_\_ (codified as amended at VA. CODE ANN. §§ 8:01-20.1, -50.1, 16.1-83.1 (Cum. Supp. 2013)).

272. *Id.*

called by that party need not have relied on the statement at the time of forming his opinion in order to read the statement into evidence during direct examination at trial.<sup>273</sup>

### C. *Service of Process*

The 2013 General Assembly made several changes to how service of process is made on non-residents and foreign corporations. First, in addition to substituted service in accordance with Virginia Code section 8.01-329, foreign corporations may now be personally served with process outside of Virginia in accordance with Virginia Code section 8.01-320.<sup>274</sup> Second, service of process on either the Commissioner of the Department of Motor Vehicles or the Secretary of the Commonwealth is now effective on the date service is made on the Commissioner or the Secretary.<sup>275</sup> Finally, the amendment to section 8.01-329 clarifies that service of process or notice on the Secretary of the Commonwealth shall be effective on the date when service is made on the Secretary, and it is the duty of the Secretary to provide a receipt to the party seeking service if service was accomplished using a method that does not provide a return of service.<sup>276</sup>

### D. *Venue*

With regard to venue in civil cases, the 2013 General Assembly amended Virginia Code section 8.01-262 to provide that Category B permissible venue exists where a defendant that is not an individual has its “principal office or principal place of business.”<sup>277</sup> Accordingly, permissible venue no longer exists where a corporation’s mayor, rector, president, or other chief officer resides.<sup>278</sup> The amendment also provides that permissible venue exists where a defendant regularly conducts substantial business activity, adding a new requirement that there must be a “practical nexus to

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273. Act of Mar. 14, 2013, ch. 379, Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-401.1 (Cum. Supp. 2013)).

274. Act of Mar. 6, 2013, ch. 113, Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-301 (Cum. Supp. 2013)).

275. Ch. 113, 2013 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. §§ 8.01-310, -329 (Cum. Supp. 2013)).

276. *Id.* (codified as amended at VA. CODE ANN. § 8.01-329 (Cum. Supp. 2013)).

277. Act of Mar. 5, 2013, ch. 71, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-262 (Cum. Supp. 2013)).

278. VA. CODE ANN. § 8.01-262 (Cum. Supp. 2013).

the forum including, but not limited to, the location of fact witnesses, plaintiffs, or other evidence to the action.”<sup>279</sup>

#### E. *Use of Depositions*

The 2013 General Assembly amended Virginia Code section 8.01-420 to allow that

requests for admissions for which the responses are submitted in support of a motion for summary judgment may be based in whole or in part upon any discovery depositions under Rule 4:5 and may include admitted facts learned or referenced in such a deposition, provided that any such request for admission shall not reference the deposition or require the party to admit that the deponent gave specific testimony.<sup>280</sup>

The amendment also adds a new subpart B, which states:

Notwithstanding the provisions of subsection A, a motion for summary judgment seeking dismissal of any claim or demand for punitive damages may be sustained, as to the punitive damages claim or demand only, when based in whole or in part upon any discovery depositions under Rule 4:5. However, such a motion may not be based upon discovery depositions under Rule 4:5 with respect to any claim or demand for punitive damages based on the operation of a motor vehicle by a person while under the influence of alcohol, any narcotic drug, or any other self-administered intoxicant or drug.<sup>281</sup>

#### F. *Nonsuit*

Virginia Code section 8.01-380 provides:

If notice to take a nonsuit of right is given to the opposing party within seven days of trial or during trial, the court in its discretion may assess against the nonsuiting party reasonable witness fees and travel costs of expert witnesses scheduled to appear at trial, which are actually incurred by the opposing party, solely by reason of the failure [of the nonsuiting party] to give notice at least seven days prior to trial.<sup>282</sup>

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279. See VA. CODE ANN. § 8.01-262(3) (Cum. Supp. 2013).

280. Act of Mar. 5, 2013, ch. 76, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-420 (Cum. Supp. 2013)).

281. *Id.*

282. VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013).

The 2013 General Assembly's amendment details what is required to prove the reasonableness of the costs. Subsection C now includes the following language:

Invoices, receipts, or confirmation of payment shall be admissible to prove reasonableness without the need to offer testimony to support the authenticity or reasonableness of such documents, and may, in the court's discretion, satisfy the reasonableness requirement under this subsection. Nothing herein shall preclude any party from offering additional evidence or testimony to support or rebut the reasonableness requirement.<sup>283</sup>

### G. *Statute of Limitations*

The 2013 General Assembly amended Virginia Code sections 8.01-36 and -243, which relate to actions to recover expenses for an infant's injury. The amendment to Virginia Code section 8.01-36 adds subsection B:

For causes of action that accrue on or after July 1, 2013, the past and future expenses of curing or attempting to cure an infant of personal injuries proximately caused by a tort-feasor are damages recoverable by an infant in a cause of action against the tort-feasor and, if applicable to the infant's cause of action, are subject to the limitation on damages in § 8.01-581.15. Any parent or guardian of such infant who has paid for or is personally obligated to pay for past or future expenses to cure or attempt to cure the infant shall have a lien and right of reimbursement against any recovery by the infant up to the amount the parent or guardian has actually paid or is personally obligated to pay. The right to reimbursement of any parent or guardian shall accrue upon the first tender of funds of any recovery from a tort-feasor to the infant. Court approval of the infant settlement shall release party defendants from all claims for past or future expenses of curing or attempting to cure the infant.

Nothing in this section shall relieve a parent of the obligation to pay for the medical expenses of curing or attempting to cure the infant as such obligation exists under current law.<sup>284</sup>

The amendment to Virginia Code section 8.01-243 simply provides that “[a]n infant's claim for medical expenses pursuant to subsection B of § 8.01-36 accruing on or after July 1, 2013, shall be governed by the applicable statute of limitations that applies to the infant's cause of action.”<sup>285</sup>

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283. VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013).

284. Act of Mar. 20, 2013, ch. 551, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-36 (Cum. Supp. 2013)).

285. VA. CODE ANN. § 8:01-243 (Cum. Supp. 2013).