HEALTH CARE LAW

Sean P. Byrne *
Garrett Hooe **

INTRODUCTION

It has been several years since the *Annual Survey of Virginia Law* published a comprehensive Health Care Law update.[1] In that time, health care reform has taken center stage on the national level with the implementation of the Affordable Care Act and related federal legislation. Here in the Commonwealth, we have seen incremental change in the health care law landscape, both in case decisions from the Supreme Court of Virginia impacting medical malpractice jurisprudence, and in a host of reform measures and legislative changes from the General Assembly. It is beyond the scope of this article to detail *every* change in this complex and fast-changing area of law, but noteworthy developments are highlighted here in an effort to inform the health law practitioner.

I. JUDICIAL DEVELOPMENTS

Over the last five years, the Supreme Court of Virginia has weighed in on several important health care issues in the Com-

* Director, Hancock, Daniel, Johnson & Nagle, P.C., Richmond, Virginia. J.D., 1997, University of Richmond School of Law; B.A., 1993, University of Richmond. Mr. Byrne's practice concentrates on medical malpractice defense and health care risk management advice. He is also an assistant adjunct professor at the University of Richmond School of Law.

** Associate, Hancock, Daniel, Johnson & Nagle, P.C., Richmond, Virginia. J.D., 2012, University of Richmond School of Law; B.A., 2006, James Madison University. Mr. Hooe's practice concentrates on medical malpractice defense in trial and appellate courts.

The authors wish to thank and recognize Timothy Patterson, J.D. Candidate 2015, University of Richmond School of Law, for his able assistance with research and drafting.

1. *See generally* Kathleen M. McCauley & Kristri L. VanderLaan, *Annual Survey of Virginia Law: Health Care Law*, 44 U. RICH. L. REV. 473 (2009) (the most recent such Health Care Law update).

monwealth. The Virginia Medical Malpractice Act[2] continues to define the operation of medical negligence cases, and in *Simpson v. Roberts*, the court addressed the issue of determining when fetuses are "patients" under the Act.[3] Statute of limitations issues also came before the court on a couple of occasions. In one particularly notable case, *Chalifoux v. Radiology Associates of Richmond*, the court expanded the continuing treatment rule by finding that even seemingly isolated instances of treatment may be part of a continuous course that tolls the statute of limitations.[4] *McKinney v. Virginia Surgical Associates* addressed how the statute of limitations affects personal injury and wrongful death suits.[5] On an issue of importance to corporate health care law, the court decided *Lewis-Gale Medical Center, LLC v. Alldredge*, which addressed whether hospitals are at risk of tortious interference when they express dissatisfaction about employees provided by third party staffing agencies.[6]

Several cases provide guidance in the area of pleading and practice. *INOVA Health Care Services v. Kebaish* explained a distinction in voluntary dismissal statutes between state and federal courts that will be of importance in medical malpractice cases,[7] *Weatherbee v. Virginia State Bar* addressed ethical considerations concerning the adequacy of pre-suit investigation,[8] and *Landrum v. Chippenham & Johnston-Willis Hospitals, Inc.* offered an insightful articulation of the abuse of discretion standard of review.[9] In the area of expert testimony, the court decided *Hollingsworth v. Norfolk Southern Railway Co.*, which more narrowly defined what types of health care providers could testify to causation in medical malpractice cases.[10]

In *Cashion v. Smith*, the court addressed the qualified privilege that normally protects conversations between health care providers and explained defamation in the context of those conversa-

2. VA. CODE ANN. §§ 8.01-581.1 to -581.20:1 (Repl. Vol. 2007 & Cum. Supp. 2013).
3. 287 Va. 34, 40, 752 S.E.2d 801, 803 (2014).
4. 281 Va. 690, 694, 701, 708 S.E.2d 834, 839–40 (2011).
5. 284 Va. 455, 460, 732 S.E.2d 27, 29 (2012).
6. 282 Va. 141, 153, 710 S.E.2d 716, 722 (2011).
7. 284 Va. 336, 339, 732 S.E.2d 703, 704 (2012).
8. 279 Va. 303, 309, 689 S.E.2d 753, 756 (2010).
9. 282 Va. 346, 352–53, 717 S.E.2d 134, 137 (2011) (quoting Kern v. TXO Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984)).
10. 279 Va. 360, 366, 689 S.E.2d 651, 654 (2010).

tions.[11] Looking ahead at anticipated developments, just prior to this publishing, the court in *Temple v. Mary Washington Hospital, Inc.* failed to reach the issue of the discoverability of hospital policies and procedures as well as metadata associated with medical records.[12]

A. *Medical Malpractice Act*

1. *Simpson v. Roberts*

Simpson v. Roberts considered whether and when fetuses are considered "patients," as that term is defined by the Virginia Medical Malpractice Act (the "Act").[13] A "patient" is defined as "any natural person who receives or should have received health care from a licensed health care provider."[14] Whether an individual is a patient is important because, among other reasons, only treatment of patients is protected by the statutory damages cap.[15]

In this case, Marissa Simpson brought a medical malpractice suit regarding permanent injuries she sustained *in utero*, allegedly because of a procedure performed on her mother before birth.[16] After developing gestational diabetes, Simpson's mother was referred to Dr. Roberts, who performed an amniocentesis to determine if Simpson's lungs were mature enough to induce early labor.[17] Dr. Roberts ceased his care following that procedure, and Simpson was delivered later that day with damaged kidneys and cerebral palsy.[18] She alleged that these injuries were caused by negligent performance of the amniocentesis.[19] After a $7 million jury verdict, the circuit court reduced her award to $1.4 million, pursuant to Virginia's medical malpractice cap.[20]

---

11. 286 Va. 327, 337–39, 749 S.E.2d 526, 532–33 (2013).
12. No. 131754, 2014 Va. LEXIS 114, at *5, *9–10 (Sept. 12, 2014).
13. VA. CODE ANN. §§ 8.01-581.1 to -581.20:1 (Repl. Vol. 2007 & Cum. Supp. 2013); 287 Va. 34, 40, 752 S.E.2d 801, 803 (2014).
14. VA. CODE ANN. § 8.01-581.1 (Cum. Supp. 2013).
15. *See id.* § 8.01-581.15 (Cum. Supp. 2013).
16. *See Simpson*, 287 Va. at 39, 752 S.E.2d at 802.
17. *Id.*
18. *Id.*
19. *Id.* at 38–39, 752 S.E.2d at 802.
20. *Id.* at 39, 752 S.E.2d at 802–03; *see* VA. CODE ANN. § 8.01-581.15 (Cum. Supp. 2013).

Simpson alleged that the Act's damages cap did not apply to her because at the time of injury, she had not yet been born and was therefore not yet a "patient" under the Act.[21] The Supreme Court of Virginia disagreed.[22] The court instead solidified its prior rulings in *Kalafut v. Gruver*[23] and *Bulala v. Boyd*,[24] which articulated the so-called "conditional liability rule." This doctrine states that "[a] tortfeasor who causes harm to an unborn child is subject to liability to the child, or to the child's estate, for the harm to the child, *if the child is born alive*."[25] Fetuses are considered to be a part of their mothers until birth, but at the time they are born alive (even if alive only momentarily), they obtain standing to bring suit not only for injuries subsequent to birth, but for those prior to delivery as well.[26] Simpson attempted to distinguish her case by arguing that Dr. Roberts never intended to treat *her*—only her mother—and therefore she could not have been a patient.[27] Again, the supreme court disagreed, turning to principles of statutory interpretation to suggest that the Act intended to broadly cover all physicians providing treatment with the "security blanket" of the damages cap.[28]

The court's opinions in *Bulala* and *Kalafut* established that a fetus may bring a claim if born alive, and *Simpson* removes any doubt about the malpractice cap's applicability in those instances where an injury occurs *in utero*. But being born alive also makes the child a "patient" under the Act, which means that treating health care providers are protected by the Act, including the statutory damages cap, even though the child "patient" was not yet born when the alleged negligent act occurred.[29]

21. *Simpson*, 287 Va. at 38, 752 S.E.2d at 802.

22. *Id.* at 44, 752 S.E.2d at 805.

23. 239 Va. 278, 283–84, 389 S.E.2d 681, 684 (1990).

24. 239 Va. 218, 229, 389 S.E.2d 670, 675–76 (1990).

25. *Kalafut*, 239 Va. at 283–84, 389 S.E.2d at 684 (citing RESTATEMENT (SECOND) OF TORTS § 869(1) (1979) (emphasis added)).

26. *See Simpson*, 287 Va. at 43–44, 752 S.E.2d at 805.

27. *Id.* at 43, 752 S.E.2d at 805.

28. *See id.* at 41, 752 S.E.2d at 804.

29. *See also* VA. CODE ANN. § 8.01-50(B) (Cum. Supp. 2013) (creating a wrongful death cause of action for the natural mother of a fetus that dies).

B. *Statute of Limitations*

1. *Chalifoux v. Radiology Associates of Richmond*

Chalifoux v. Radiology Associates of Richmond is a noteworthy case decided by the Supreme Court of Virginia because it seems to mark an expansion of the continuing treatment exception to the statute of limitations. That doctrine, an exception to the ordinary application of the statute of limitations in medical negligence cases,[30] delays the commencement of the two-year limitations period where there is a "continuous and substantially uninterrupted course of examination."[31] The application of the exception to specific factual circumstances has led to several noteworthy case decisions over the years.[32] Here, the court applied the continuing treatment exception to a radiology defendant that did not consider itself to have had a continuous and uninterrupted course of treatment with the referenced patient.[33]

Chalifoux received radiology scans conducted by Radiology Associates of Richmond on six occasions over the course of approximately three years for intermittent head pain.[34] Radiologists detected no abnormalities until the final examination, when one radiologist noted an anomaly that was, in retrospect, viewable on previous scans.[35] The last allegedly negligent examination occurred on February 16, 2004, the final examination occurred on October 22, 2005, and Chalifoux filed suit just shy of two years after the final examination, on October 12, 2007.[36] Because the circuit court found that the examinations were "single, isolated acts"

30. *See id*. § 8.01-243(A) (Cum. Supp. 2014); Hawks v. DeHart, 206 Va. 810, 813, 146 S.E.2d 187, 189 (1966) (establishing that the statute of limitations begins to run when the plaintiff is injured, not when the plaintiff discovers the injury).

31. Farley v. Goode, 219 Va. 969, 976, 252 S.E.2d 594, 599 (1979).

32. *See, e.g.*, Justice v. Natvig, 238 Va. 178, 179–80, 182, 381 S.E.2d 8, 9–10 (1989) (holding that eight years of non-negligent treatment following an allegedly negligent operation tolled the statute of limitations); Grubbs v. Rawls, 235 Va. 607, 609, 613, 369 S.E.2d 683, 684, 687 (1988) (finding that the statute of limitations commenced on the final day of a continuous course of gastroenterological treatment); *Farley*, 219 Va. at 976, 252 S.E.2d at 599 (holding that continuous dental treatment over the course of four years tolled the statute of limitations).

33. Chalifoux v. Radiology Assocs. of Richmond, 281 Va. 690, 694, 708 S.E.2d 834, 836 (2011).

34. *See id.* at 700, 708 S.E.2d at 839–40.

35. *Id.* at 694, 708 S.E.2d at 836.

36. *Id.* at 693–94, 708 S.E.2d at 835–36.

and suit was filed more than two years after the last allegedly negligent examination, it dismissed Chalifoux's case as being filed after the expiration of the applicable statute of limitations.[37]

The supreme court reversed and found that there was a continuous and uninterrupted course of treatment that tolled the commencement of the statute of limitations until the treatment course had concluded.[38] The court reached its holding for three primary reasons: (1) each radiology examination related to the same or similar symptoms as previous studies; (2) there was evidence that Radiology Associates was aware of Chalifoux's ongoing symptoms because all the studies were kept in one file under Chalifoux's name; and (3) radiologists frequently review previous examinations, especially when they relate to the same symptoms.[39] *Chalifoux* arguably expanded the common law understanding of what constitutes "continuous treatment" sufficient to prolong the commencement of the applicable statute of limitations.

2. *McKinney v. Virginia Surgical Associates*

McKinney v. Virginia Surgical Associates articulated the distinction between *causes* of action and *rights* of action in the context of a nonsuit. In *McKinney*, the plaintiff decedent filed a medical malpractice case, but died while the case was pending.[40] The widow of the plaintiff decedent, as administrator of decedent's estate, converted the pending personal injury action to one for wrongful death.[41] She claimed that the death was a result of the defendant's negligence that was the subject of the case originally, but then nonsuited the wrongful death case following discovery.[42] Within the nonsuit statute's six-month re-filing window,[43] but after the lapse of the initial two-year limitations period, McKinney filed a personal injury action based on the same alleged negli-

37. *Id.* at 695–96, 708 S.E.2d at 837.

38. *Id.* at 701, 708 S.E.2d at 840. *But see id.* at 701–02, 708 S.E.2d at 840–41 (Russell, J., dissenting) (questioning whether the radiology examinations could legitimately be considered "treatment").

39. *See id.* at 700–01, 708 S.E.2d at 839–40.

40. McKinney v. Va. Surgical Assocs., 284 Va. 455, 458, 732 S.E.2d 27, 28 (2012).

41. *Id.*

42. *Id.*

43. VA. CODE ANN. § 8.01-229(E)(3) (Repl. Vol. 2007 & Cum. Supp. 2013).

gence as her nonsuited wrongful death action.[44] The defendant challenged the timeliness of the filing.[45]

The Supreme Court of Virginia held that the *cause* of action in the case was the defendant's alleged medical malpractice, out of which arose two *rights* of action: (1) the decedent's right to bring a personal injury action, which survived to be carried on by his personal representative after his death; and (2) the personal representative's right to bring a wrongful death action.[46] The plaintiff's nonsuit in the wrongful death case applied to the cause of action as a whole, which, therefore, enabled her to re-file either of her rights of action within the six-month window after nonsuit.[47] *McKinney* helps to clarify the distinction between *cause* of action and *right* of action.

C. *Corporate*

1. *Lewis-Gale Medical Center v. Alldredge*

Lewis-Gale Medical Center v. Alldredge addressed the rights of hospitals with regard to third party staffing agencies by clarifying the test for tortious interference in at-will employment contracts. Dr. Alldredge was an at-will employee of a physician staffing company which had an at-will employment contract with Lewis-Gale Medical Center to staff its Emergency Department.[48] Dr. Alldredge was working at Lewis-Gale when relations soured between the two.[49] Lewis-Gale expressed concern about Dr. Alldredge to the physician staffing company, which subsequently fired her to preserve its relationship with Lewis-Gale.[50] Dr. Alldredge then brought suit against Lewis-Gale for tortiously interfering in her employment contract with the staffing company.[51]

In Virginia, proving tortious interference by a third party requires: (1) the existence of a valid contractual relationship; (2)

44. *McKinney*, 284 Va. at 458, 732 S.E.2d at 28.
45. *Id.*
46. *Id.* at 460, 732 S.E.2d at 29.
47. *See id.* at 461, 732 S.E.2d at 30.
48. *See* 282 Va. 141, 145, 710 S.E.2d 716, 717 (2011).
49. *See id.* at 145–46, 710 S.E.2d at 717–18.
50. *See id.* at 146–47, 710 S.E.2d at 718–19.
51. *Id.* at 147, 710 S.E.2d at 719.

third party knowledge of the relationship; (3) intentional interference inducing or causing a breach or termination of the relationship; and (4) resultant damage to the party whose relationship was disrupted.[52] But when a contract is terminable at will, a plaintiff must additionally prove that the defendant employed "improper methods" in its interference, which usually means illegal or independently tortious activity.[53]

In *Alldredge*, the Supreme Court of Virginia explained that even when a third party intentionally interferes in a contract for its own interest, tort liability does not automatically result.[54] The plaintiff must prove that the third party's actions were illegal or fell so far outside the bounds of normal business practice—"rough-and-tumble" as it may sometimes be—as to be improper.[55] Lewis-Gale's efforts to remove what it viewed as a troublesome employee were not "improper" and, therefore; did not tortiously interfere with the contract that employee had with her staffing company employer.[56] *Alldredge* reinforces the burden of proof for tortious interference, and may lessen certain concerns for businesses contracting with outside staffing companies by protecting more direct involvement in personnel decisions.

D. *Pleading and Practice*

1. *INOVA Health Care Services v. Kebaish*

INOVA Health Care Services v. Kebaish held that a voluntary dismissal in federal court is not equivalent to a nonsuit in Virginia state court—a finding that could impact medical malpractice cases or other complex health care lawsuits in Virginia, where the nonsuit statute is often invoked at some point in the life of the case.[57] Virginia Code section 8.01-380 provides one chance for

52. Chaves v. Johnson, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985) (citing Calbom v. Knudtzon, 396 P.2d 148, 150–51 (Wash. 1964)).

53. Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 559, 708 S.E.2d 867, 870 (2011).

54. *Alldredge*, 282 Va. at 153, 710 S.E.2d at 722.

55. *Id.*; *see also* Williams v. Dominion Tech. Partners, LLC, 265 Va. 280, 290, 576 S.E.2d 752, 758 (2003) ("[T]he law will not provide relief to every 'disgruntled player in the rough-and-tumble world comprising the competitive marketplace.'").

56. *Alldredge*, 282 Va. at 153, 710 S.E.2d at 722.

57. 284 Va. 336, 346, 732 S.E.2d 703, 708 (2012); *see, e.g.*, McKinney v. Va. Surgical Assocs., 284 Va. 455, 457–58, 732 S.E.2d 27, 28 (2012); Bowman v. Concepcion, 283 Va.

plaintiffs to dismiss their case and have an opportunity to re-file it within six months.[58] Similarly,[59] Rule 41 of the Federal Rules of Civil Procedure allows plaintiffs to voluntarily dismiss their case one time without prejudice.[60]

Dr. Kebaish filed a lawsuit that was litigated in federal court against INOVA following an employment dispute and termination.[61] He voluntarily dismissed the federal suit pursuant to Rule 41 before re-filing it in state court and attempting to use a nonsuit at the state court trial in accordance with section 8.01-380.[62] INOVA contended that Dr. Kebaish had already taken his nonsuit when he voluntarily dismissed his federal case.[63] The supreme court disagreed.[64]

The court noted that although Virginia nonsuit and federal voluntary dismissal rights are procedurally similar, the exercise of each varies significantly, with the nonsuit right being much more expansive.[65] It also insisted that "the term 'nonsuit' identifies a specific practice used in Virginia civil procedure" that is not related to the federal right of voluntary dismissal.[66] With the statute of limitations extensions that are attendant to these provisions, this application of law could result in situations where multiple dismissals of different types serve to prolong litigation.

2. *Weatherbee v. Virginia State Bar*

The Supreme Court of Virginia's decision in *Weatherbee v. Virginia State Bar* can be read as a caution regarding the perils of insufficient pre-suit investigation and the requirements of Rule

552, 560, 722 S.E.2d 260, 264 (2012); Johnston Mem'l Hosp. v. Bazemore, 277 Va. 308, 310, 672 S.E.2d 858, 859 (2009); Hicks v. Mellis, 275 Va. 213, 216, 657 S.E.2d 142, 143 (2008).

58. VA. CODE ANN. § 8.01-380 (Cum. Supp. 2014); *see also id.* § 8.01-229(E)(3) (Repl. Vol. 2007 & Cum. Supp. 2014).

59. Or not so similarly. *See infra* notes 65–66 and accompanying text.

60. FED. R. CIV. P. 41(a)(1).

61. The case was initially filed in state court, but immediately removed to federal court. *Kebaish*, 284 Va. at 339–40, 732 S.E.2d at 704–05.

62. *Id.* at 341 & n.4, 732 S.E.2d at 705 & n.4.

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

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

65. *See id.* at 345, 732 S.E.2d at 707.

66. *Id.* at 346, 732 S.E.2d at 708 (quoting Welding, Inc. v. Bland Cnty. Serv. Auth., 261 Va. 218, 223–24, 541 S.E.2d 909, 912 (2001)).

3.1 of the Model Rules of Professional Conduct. The Rule provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ."[67] The court previously defined "frivolous" in part as "*having no basis in law or fact*."[68]

When Mr. Weatherbee filed suit on behalf of his client and alleged that Dr. Vaughan committed medical malpractice, he did so without contacting Dr. Vaughan to ask whether the plaintiff had been his patient or requesting medical records.[69] As it turned out, Dr. Vaughan never saw the plaintiff as a patient, and had no privileges at the hospital at the time the plaintiff was treated.[70] While Weatherbee claimed to have deduced that Dr. Vaughan was involved based on some preliminary Board of Medicine website research, he made demonstrably false claims on the face of his complaint.[71]

The requirement of adequate pre-suit investigation to avoid frivolous filing is not new, but this case sheds fresh light on what exactly that requirement entails in the medical negligence context to avoid ethical violations.

3. *Landrum v. Chippenham & Johnston-Willis Hospitals, Inc.*

The circuit court in *Landrum v. Chippenham & Johnston-Willis Hospitals, Inc.* properly excluded the plaintiff's expert witnesses when *pro hac vice* out-of-state counsel failed to comply with the applicable pretrial order. After defendants, through interrogatories, requested identification of the plaintiff's experts, out-of-state counsel submitted an expert designation containing only the names of the experts without "the substance of the facts and opinions . . . and a summary of the grounds for each opinion" as required by Rule 4:1 of the Rules of the Supreme Court of Virginia.[72] When given an opportunity to correct the error, counsel then submitted a supplemental designation that failed to include

67. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2014).

68. Byrd v. Byrd, 232 Va. 115, 120, 348 S.E.2d 262, 265 (1986).

69. *See* Weatherbee v. Va. State Bar, 279 Va. 303, 307, 689 S.E.2d 753, 755 (2010).

70. *Id.*

71. *See id.*

72. VA. SUP. CT. R. 4:1 (2014); *see* Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 349–50, 717 S.E.2d 134, 135 (2011).

the signature of local counsel, as required by Rule 1A:4(2).[73] The circuit court then excluded the expert witnesses and entered summary judgment for defendants.[74]

The Supreme Court of Virginia held that the circuit court's decision to sanction the plaintiff by excluding her experts was not an abuse of discretion.[75] It also found that the plaintiff's failure to obtain local counsel's signature could not be amended because the lack of signature made the original supplemental designation an invalid instrument.[76] The court also stated that prejudice to the opposing party is not a consideration in the Rule's enforcement.[77] *Landrum* is not only a reminder of the importance of observing local rules when serving as *pro hac vice* counsel, but a warning to even Virginia lawyers that state courts are willing to enforce pretrial orders and that errors may not always be amendable. This message applies to all practice areas, but perhaps especially to the health law context where—as in *Landrum*—dismissal of a critical expert may result in summary judgment.

Landrum is noteworthy for another reason extending beyond the medical malpractice context. In arriving at its decision, the supreme court defined the abuse of discretion standard, often used during appellate review of a circuit court's decision.[78] The supreme court embraced the United States Court of Appeals for the Eighth Circuit's explanation for what constitutes an abuse of discretion:

> An abuse of discretion . . . can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.[79]

---

73. *Landrum*, 282 Va. at 350–51, 717 S.E.2d at 136; *see* R. 1A:4(2).

74. *Landrum*, 282 Va. at 351–52, 717 S.E.2d at 136.

75. *Id.* at 352, 355–56, 717 S.E.2d at 136–39.

76. *Id.* at 355, 717 S.E.2d at 138; *see also* Wellmore Coal Corp. v. Harman Mining Corp., 264 Va. 279, 283, 568 S.E.2d 671, 673 (2002) (holding that legally invalid documents cannot be amended to gain compliance with the rules because "an amendment presupposes a valid instrument as its object").

77. *Landrum*, 282 Va. at 355, 717 S.E.2d at 138.

78. *Id.* at 352–53, 717 S.E.2d at 137 (quoting Kern v. TXO Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984)).

79. *Id.*

The court has heartily adopted this rule as the standard bearer when reviewing cases for an abuse of discretion. In just under three years since the *Landrum* opinion, the above principle has been cited numerous times.[80]

E. *Expert Testimony*

1. *Hollingsworth v. Norfolk Southern Railway*

In *Hollingsworth v. Norfolk Southern Railway*, the Supreme Court of Virginia declined to make an exception for podiatrists to the general rule that only medical doctors may testify to the cause of a human physical injury.[81] This general rule stemmed from the Virginia Code's edict that only medical doctors were qualified to diagnose, and the supreme court's finding in *Combs v. Norfolk & Western Railway* that the ability to diagnose is a required element of determining the causation of human injury.[82] The court has made exceptions in rare instances where *non-physical* injuries were at issue. For example, licensed clinical social workers, though not medical doctors, may testify to the cause of Post-Traumatic Stress Disorder.[83]

Hollingsworth is significant for denying this kind of an exception to podiatrists. Hollingsworth sued his employer for foot injuries allegedly sustained during the course of his employment.[84] He designated two podiatrists to testify not only to the treatment that followed the injury, but to what caused the injury as well.[85] In finding that the podiatrists were not qualified to testify as to causation, the supreme court returned to the emphasis on the ability to diagnose discussed in *Combs*.[86] The scope of practice of podiatry under the Virginia Code—unlike that of the practice of medicine—included only the ability to *treat*, not *diagnose*, and be-

80. *See, e.g.*, Dang v. Commonwealth, 287 Va. 132, 146–47, 752 S.E.2d 885, 893 (2014); Manchester Oaks Homeowners Ass'n v. Batt, 284 Va. 409, 426, 732 S.E.2d 690, 700–01 (2012).

81. 279 Va. 360, 368, 689 S.E.2d 651, 655 (2010).

82. VA. CODE ANN. § 54.1-2900 (Repl. Vol. 2009); Combs v. Norfolk & W. Ry. Co., 256 Va. 490, 496–97, 507 S.E.2d 355, 358–59 (1998).

83. Conley v. Commonwealth, 273 Va. 554, 563, 643 S.E.2d 131, 136 (2007).

84. *Hollingsworth*, 279 Va. at 363, 689 S.E.2d at 652.

85. *Id.*

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

cause the injuries at issue were physical, the other limited exceptions did not apply.[87]

The general landscape remained unchanged after *Hollingsworth*,[88] but the case makes a meaningful distinction between physical and non-physical human injuries. This distinction explains with greater clarity why only medical doctors are permitted to testify to causation in most cases. By drawing this distinction, the case also considerably limits the possibility of further exceptions to the general rule.[89]

F. *Defamation and Qualified Privilege*

1. *Cashion v. Smith*

Comments by health care providers about the competence of a colleague may support a claim for defamation, depending on what is said. *Cashion v. Smith* delved into the nuances courts consider in making this determination. Immediately following a surgery in which the patient died, the surgeon, Dr. Smith, accused the anesthesiologist, Dr. Cashion, of not making a sufficient effort to save the patient and even accused him of intentionally withholding lifesaving efforts.[90] Dr. Smith additionally accused Dr. Cashion of "euthaniz[ing] [his] patient."[91]

The Supreme Court of Virginia parsed the language Dr. Smith used to determine which statements were potentially defamatory

---

87. VA. CODE ANN. § 54.1-2900 (Repl. Vol. 2009).

88. Ultimately, the General Assembly added the term "diagnosis" to the definition of "practice of podiatry," but left the holding of *Hollingsworth* intact by simultaneously amending another section of the Virginia Code. *See* Act of Apr. 13, 2010, ch. 725, 2010 Va. Acts 1312, 1312–13 (codified at VA. CODE ANN. § 8.01-401.2:1 (Supp. 2014); codified as amended at *id.* § 54.1-2900 (Supp. 2014)) (redefining podiatrists as practicing medicine, yet prohibiting them from testifying as experts against a doctor of medicine in a medical malpractice case).

89. *But see* Act of Mar. 31, 2014, ch. 391, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 8.01-401.2 (Cum. Supp. 2014)) (creating a legislative exception allowing chiropractor or physician assistants to provide expert testimony in personal injury cases regarding etiology, diagnosis, prognosis, treatment, treatment plan, and disability).

90. *See* Cashion v. Smith, 286 Va. 327, 332, 749 S.E.2d 526, 528–29 (2013) (listing the statements made, which included: "He could have made it with better resuscitation." "This was a very poor effort." "You didn't really try." "You gave up on him." "You determined from the beginning that he wasn't going to make it and purposefully didn't resuscitate him.").

91. *Id.* at 332, 749 S.E.2d at 529.

statements capable of being proven true or false, and which were non-defamatory statements that were mere opinion.[92] It found that statements like "[t]his was a very poor effort" and "[y]ou didn't really try" were subjective and viewpoint-dependent, whereas statements like "[the patient] could have made it with better resuscitation" and "[y]ou determined from the beginning that he wasn't going to make it and purposefully didn't resuscitate him" were capable of being proven true or false, and thus possibly defamatory.[93] Although "rhetorical hyperbole" is not defamatory under Virginia law, the court found that in the context in which it was said, the "euthanasia" statement could be understood as an actual, demonstrably true or false allegation.[94]

Statements between health care providers concerning patient care are generally entitled to a qualified privilege because they are "communications between persons on a subject in which the persons have an interest or duty," but that privilege can be lost if statements are made with malice.[95] Malice, however, is a question of fact for the jury, and may be established based on any one of five factors articulated in previous cases.[96] When conversations get heated among health care providers, they should be wary of the possibility that they are subjecting themselves to defamation liability and potentially losing their qualified privilege. *Cashion* articulates the analysis that applies to different types of statements.

92. *See id.* at 336–37, 749 S.E.2d at 531–32.

93. *Id.*

94. *Id.* at 339–40, 749 S.E.2d at 533 (finding that statements characterized as rhetorical hyperbole are those from which "no reasonable inference could be drawn that the individual identified in the statements, as a matter of fact, engaged in the conduct described.") (citing Yeagle v. Collegiate Times, 255 Va. 293, 295–96, 497 S.E.2d 136, 137 (1998)).

95. *See id.* at 337–38, 749 S.E.2d at 532 (elaborating that the qualified privilege "may be defeated if the plaintiff proves that the defamatory statement was made maliciously") (quoting Larimore v. Blaylock, 259 Va. 568, 572, 528 S.E.2d 119, 121 (2000)).

96. *Id.* at 338–39, 749 S.E.2d at 532–33 (citing Raytheon Technical Servs. Co. v. Hyland, 273 Va. 292, 301, 641 S.E.2d 84, 89–90 (2007)); *Larimore*, 259 Va. at 575, 528 S.E.2d at 122; Preston v. Land, 220 Va. 118, 120–21, 255 S.E.2d 509, 511 (1979); Story v. Norfolk-Portsmouth Newspapers, Inc., 202 Va. 588, 591, 118 S.E.2d 668, 670 (1961); Chalkley v. Atl. Coast Line R.R. Co., 150 Va. 301, 325, 143 S.E. 631, 637–38 (1928)).

G. *Discovery*

1. *Temple v. Mary Washington Hospital, Inc.*

Just prior to this publication, the Supreme Court of Virginia decided this case. Due to the resolution of a threshold procedural issue, the court did not reach a substantive question of wide interest: whether hospital policies and procedures and medical record metadata are discoverable after the General Assembly's 2011 amendments to Virginia Code section 8.01-581.17.[97] In a previous lawsuit on the same cause of action, the circuit court denied Ms. Temple's motion to compel production of both hospital policies and medical record metadata, after which she nonsuited and then re-filed her case.[98]

Hospital policies and procedures have long been the subject of discovery disputes in medical malpractice litigation, with some circuit courts finding them to be discoverable and others holding them to be privileged or otherwise beyond the scope of permissible discovery.[99] In 2006, the supreme court's decision in *Riverside Hospital Inc. v. Johnson* hinted that a hospital's policies and procedures might, under certain circumstances, be offered to establish the standard of care.[100]

In 2011, the General Assembly passed amendments that protect the "findings, conclusions, [and] recommendations . . . of any medical staff committee."[101] This provision does not, however, shield from discovery any "factual information regarding specific

97. The court held that a discovery ruling in a nonsuited case that is not expressly incorporated in a subsequently filed case cannot be appealed in the new case, and therefore did not reach the merits. Temple v. Mary Washington Hosp., Inc., No. 131754, 2014 Va. LEXIS 114, at *9–10 (Sept. 12, 2014).

98. *Id* at *2–4.

99. *Compare* Day v. Med. Facilities of Am., Inc., 59 Va. Cir. 378, 378-80 (2002) (City of Salem) (sustaining the motion to compel production of policies and procedures on the grounds that the statute was not all-inclusive and the requested items were not subject to privilege), *and* Bradburn v. Rockingham Mem'l Hosp., 45 Va. Cir. 356, 363 (1998) (Rockingham County) (holding that the hospital's policies, procedures, and practice manuals were discoverable), *with* Mangano v. Kavanaugh, 30 Va. Cir. 66, 68 (1993) (Loudoun County) (finding that "all communications originating from or provided to such medical committees" are protected from discovery), *and* Leslie v. Alexander, 14 Va. Cir. 127, 127 (1988) (City of Alexandria) (sustaining the objection to Plaintiff's Request for Production of the hospital's policies and procedures on privilege grounds).

100. *See* 272 Va. 518, 529–30, 636 S.E.2d 416, 422 (2006).

101. VA. CODE ANN. § 8.01-581.17(C) (Cum. Supp. 2013).

patient health care or treatment."[102] The court in *Temple* did not yet have to decide whether the policies and procedures at issue there were merely part of the facts of the case or privileged recommendations of a hospital committee focused on quality assurance. It therefore falls to a future supreme court to decide this issue and consider whether the discoverability of medical records includes electronic metadata, such as user access records.[103]

II. LEGISLATIVE AND ADMINISTRATIVE LAW DEVELOPMENTS

The past three General Assembly sessions were quite active, with 2876 pieces of legislation introduced in the 2012 session,[104] 2575 in the 2013 session,[105] and 2888 in the 2014 session.[106] If each bill were just four pages long, the combined 8339 proposed laws could be connected end-to-end to make a banner that would touch the ground if hung from an airplane at 30,000 feet.[107] Most recently, the 2014 General Assembly session concluded without a budget, which commentators projected to approach (or exceed) $96 billion for the next two years.[108] Governor McAuliffe subsequently called for a special session to pass a budget, although as of early May, the General Assembly had not reached an agreement.[109] The central impediment to passing a budget concerns Medicaid ex-

102. *Id.* § 8.01-581.17(B) (Cum. Supp. 2013).

103. *See also* H.B. 490, Va. Gen. Assembly (Reg. Sess. 2014) (attempting to legislate the discoverability of metadata).

104. *2012 Session*, *Session Statistics*, VA.'S LEGIS. INFO. SYS., http://lis.virginia.gov/cgi-bin/legp604.exe?121+oth+STA (last visited Oct. 10, 2014).

105. *2013 Session*, *Session Statistics*, VA.'S LEGIS. INFO. SYS., http://lis.virginia.gov/cgi-bin/legp604.exe?131+oth+STA (last visited Oct. 10, 2014).

106. *2014 Session*, *Session Statistics*, VA.'S LEGIS. INFO. SYS., http://lis.virginia.gov/cgi-bin/legp604.exe?141+oth+STA (last visited Oct. 10, 2014).

107. For the mathematically inclined, 8339 proposed laws times four pages times eleven inches equals 365,916 inches, divided by twelve inches equals 30,576.33 feet. If the bills were printed on legal-sized paper instead of letter-sized, the calculation comes to 38,915.33 feet instead.

108. Ginger Whitaker, *General Assembly Adjourns Without Va. Budget*, WAVY.COM (Mar. 10, 2014, 5:45 AM), http://wavy.com/2014/03/10/general-assembly-adjourns-without-va-budget/. Relatedly, *The Richmond Times-Dispatch* reported that the state's budget shortfall could exceed $1 billion between 2014 and 2016. Michael Martz, *State's Budget Shortfall Could Exceed $1 Billion*, RICH. TIMES-DISPATCH (May 28, 2014), http://www.timesdispatch.com/news/local/government-politics/state-s-budget-shortfall-could-exceed-billion/article_53fb7ee6-e6c0-11e3-9fb0-0017a43b2370.html.

109. Whitaker, *supra* note 108; Nick Dutton & Joe St. George, *Will McAuliffe Bypass General Assembly in Budget Battle?*, WTVR.COM (May 4, 2014, 7:36 PM), http://wtvr.com/2014/05/04/will-mcauliffe-bypass-general-assembly-in-budget/.

pansion.[110] On May 1, 2014, *The Washington Post* reported that Governor McAuliffe was considering expanding health care coverage for the poor without the General Assembly's approval.[111] Whether this strategy affects passage of the state budget is a question separate from whether the state government remains fractured and contentious among party lines. Like it has been before, health care remains a focus in the Commonwealth.[112] Summaries of those enactments from 2012, 2013, and 2014, are likely to be of particular interest to health law practitioners and are included below.

A. *2012 Session*

1. Mammograms and Breast Density

In 2012, the General Assembly required the Board of Health to establish guidelines requiring licensed facilities providing mammography services to include information on breast density in mammogram letters sent to patients.[113] Additionally, in letters sent to patients having dense breast tissue, facilities and doctors must include a notice containing information about potential effects of dense breast tissue on mammograms.[114] Virginia became the third state in the country to enact such a law.[115] According to the Virginia Hospital Center, dense breasts "do not necessarily place a woman in a high-risk category" for cancer, and the law's stipulation regarding information sharing appears designed to

110. Dutton & St. George*, supra* note 109.

111. Laura Vozzella, *McAuliffe Explores Whether He Can Expand Medicaid Coverage Without Legislature's Okay*, WASH. POST (May 1, 2014) http://www.washingtonpost.com/local/virginia-politics/mcauliffe-explores-whether-he-can-expand-medicaid-coverage-without-legislatures-okay/2014/05/01/8ff591f2-d090-11e3-b812-0c92213941f4_story.html.

112. *See* Sean P. Byrne & Paul Walkinshaw, *Annual Survey of Virginia Law: Health Care Law*, 42 U. RICH. L. REV. 441, 472–73 (2007) (articulating the importance of health care law during the 2007 General Assembly Session).

113. Act of Feb. 28, 2012, ch. 6, 2012 Va. Acts 15, 15 (currently codified at VA. CODE ANN. § 32.1-229 (Cum. Supp. 2014)).

114. VA. CODE ANN. § 32.1-229 (Cum. Supp. 2014).

115. *Next Steps After "Dense Breast" Notification*, VA. HOSP. CTR., http://www.virginiahospitalcenter.com/Portal/Next_Steps_After_Dense_Breast_Notifica.aspx?flush=true (last visited Oct. 10, 2014).

ensure identified patients are provided with notification and direction for follow-up consultation.[116]

2. Home Care Organizations

Title 42 U.S.C. § 1320a-7b imposes criminal penalties for acts involving federal health care programs, including penalties for false representation of material facts on benefit or payment applications, and illegal kickbacks.[117] The General Assembly amended Virginia Code section 32.1-162.9 to preclude individuals who have been sanctioned under 42 U.S.C. § 1320a-7b from obtaining a license to establish or operate a home care organization in the Commonwealth.[118] Only a little over a year after the law was passed, three Virginia home care providers were indicted for their efforts in fraudulently obtaining $1.3 million of Medicaid payments in 2013.[119] Presumably, this law will prevent these individuals from obtaining a future license to operate a home care facility.

3. Who May Perform Surgery

The 2012 General Assembly added Virginia Code section 54.1-2400.01:1, which is among the longest statutes in the Virginia Code in terms of numerals, to define "surgery" to mean the "structural alteration of the human body by the incision or cutting into of tissue for the purpose of diagnostic or therapeutic treatment of conditions or disease processes by any instrument causing localized alteration or transposition of live human tissue . . . ."[120] The statute further states that surgery does not include removal of superficial foreign bodies from the human body,

116. *Id.* The most recent version of the statute clarifies that "DENSE BREAST TISSUE IS VERY COMMON AND IS NOT ABNORMAL. . . . THIS INFORMATION IS GIVEN TO YOU TO RAISE YOUR AWARENESS." VA. CODE ANN § 32.1-229 (Cum. Supp. 2014).

117. 42 U.S.C. § 1320a-7b (2012).

118. Act of Mar. 7, 2012, ch. 139, 2012 Va. Acts 201, 201 (currently codified at VA. CODE ANN. § 32.1-162.9) (Cum. Supp. 2014)).

119. Alyssa Gerace, *Virginia Home Care Owners Indicted for $1.3 Million Fraud*, HOME HEALTH CARE NEWS (Nov. 7, 2013), http://homehealthcarenews.com/2013/11/virginia-home-care-owners-indicted-for-1-3-million-fraud/.

120. Act of Feb. 28, 2012, ch. 15, 2012 Va. Acts 22, 22 (codified at VA. CODE ANN. § 54.1-2400.01:1(A) (Repl. Vol. 2013)).

punctures, injections, dry needling, acupuncture, or removal of dead tissue."[121]

The statute specifies who may perform surgery and requires that a person meet one of the following six criteria before they can structurally alter a patient:

> (i) [be] licensed by the Board of Medicine as a doctor of medicine, osteopathy, or podiatry; (ii) [be] licensed by the Board of Dentistry as a doctor of dentistry; (iii) [be] jointly licensed by the Boards of Medicine and Nursing as a nurse practitioner; (iv) [be] a physician assistant acting under the supervision of a doctor of medicine, osteopathy, or podiatry; (v) [be] a licensed midwife in the performance of episiotomies during childbirth; or (vi) [be] acting pursuant to the orders and under the appropriate supervision of a licensed doctor of medicine, osteopathy, podiatry, or dentistry.[122]

4. Nurse Practitioners as Part of a Health Care Team

There are many settings where nurse practitioners appear to provide care independent of in-person supervision; for example, home health care nurses often implement orders from physicians located at hospitals while treating a patient at his or her home. The General Assembly's 2012 amendments to Virginia Code section 54.1-2957(B) appear to end doubts regarding whether a nurse may operate autonomously from a physician by requiring that nurse practitioners practice as part of a patient care team.[123] A patient care team is "a multidisciplinary team of health care providers actively functioning as a unit with the management and leadership of one or more patient care team physicians for the purpose of providing and delivering health care to a patient or group of patients."[124] Nurse practitioners must also collaborate and consult with a patient care team physician.[125] Collaboration must be shown through either a written or electronic practice agreement.[126]

---

121. VA. CODE ANN. § 54.1-2400.01:1(A) (Repl. Vol. 2013).
122. *Id.* § 54.1-2400.01:1(B) (Repl. Vol. 2013).
123. Act of Mar. 10, 2012, ch. 213, 2012 Va. Acts 345, 350 (codified as amended at VA. CODE ANN. § 54.1-2957(B) (Repl. Vol. 2013)).
124. VA. CODE ANN. § 54.1-2900 (Supp. 2014).
125. *Id.* § 54.1-2957(B) (Repl. Vol. 2013).
126. *Id.*

Fittingly, this legislation was the result of two years of teamwork between the Medical Society of Virginia and the Virginia Council of Nurse Practitioners.[127] The effect of the law reaches beyond the Commonwealth, too, as American Medical Association ("AMA") President Peter W. Carmel, M.D., noted in April 2012: "The AMA encourages other states to consider following Virginia's innovative approach as a way to ensure that patients have the best possible access to quality health care."[128] Others in the industry believe the law allows for greater flexibility and use of resources between physicians and nurse practitioners.[129]

5. Certificate of Public Need, Nursing Home Beds

The General Assembly charged several Virginia entities with reviewing procedures related to applications for relocation of nursing home beds under a 2012 law.[130]

6. Community-Based Care Providers

Providers of community-based continuing care ("CBCC") must now be registered with the State Corporation Commission (the "SCC") as a continuing care provider and also file a statement regarding the provider's CBCC status.[131] CBCCs are programs providing or committing to provide a range of services to a person, other than someone related by blood or marriage, under an agreement effective for more than a year.[132] This includes services provided in an individual's home.[133] CBCCs often provide services to individuals aged sixty and older.[134] Registration with the SCC

127. Carolyne Krupa, *Virginia Law Promotes Team-Based Care By Doctors and Nurse Practitioners*, AMEDNEWS.COM (Apr. 23, 2012), http://www.amednews.com/article/20120423/profession/304239960/4/.

128. *Id.*

129. *See id.*

130. Act of Mar. 21, 2012, ch. 301, 2012 Va. Acts 512, 512–13 (currently codified at VA. CODE ANN. §§ 32.1-102.3:5 to -102.3:6 (Cum. Supp. 2014)) (repealing licensure requirements but changing the entities to review procedures).

131. VA. CODE ANN. §§ 38.2-4918 to -4919(A) (Repl. Vol. 2014).

132. *Id.* § 38.2-4918 (Repl. Vol. 2014).

133. *Id.*

134. *See, e.g.*, *About Us*, CHOOSEHOME, http://www.riversideonline.com/choosehome/about-us.cfm (last visited Oct. 10, 2014).

permits the Commonwealth to more clearly delineate those organizations which provide CBCC care, and those that do not.

7. State Board of Health Guidelines for Cleanup of Drug Labs

"Meth Lab Explodes in Museum District," proclaimed the *NBC News 12* headline on November 20, 2011, reporting a story seemingly straight out of the *Breaking Bad* television series.[135] Fifty-one-year-old Jeff Prillaman resided in a Grove Avenue apartment in Richmond, and was badly burned as a result of an explosion and fire caused by his attempts to produce methamphetamine.[136] Prillaman entered a plea deal and received two and a half years in jail.[137] During its 2012 session, the General Assembly added section 32.1-11.7 to the Virginia Code to require the State Board of Health to establish guidelines for the cleanup "of residential property formerly used as a clandestine methamphetamine laboratory."[138] These guidelines outline health concerns related to the manufacture of methamphetamine, detail its contaminants, and describe procedures for cleanup and disposal of harmful chemicals created by the manufacturing process.[139]

8. Hospital Discharge Procedures

The provision of health care services to patients does not necessarily begin and end while at a health care facility. While physicians and care providers regularly made efforts to ensure that patients had proper information about signs and symptoms of future illness, for example, the Virginia legislature had never codified such a requirement until 2012. The 2012 General Assembly

135. *Meth Lab Explodes in Museum District*, WWBT NBC12 (Nov. 20, 2011, 5:23 PM), www.nbc12.com/story/16086885/meth-lab-explodes-in-museum-district.com. *Breaking Bad* follows the protagonist's "transformation from mild family man to a kingpin of the drug trade." *Breaking Bad—About*, AMC, http://www.amctv.com/shows/breaking-bad/about (last visited Oct. 10, 2014).

136. *See Meth Lab Explodes in Museum District*, *supra* note 135.

137. Phil Newsome, *Man Suspected of Running Meth Lab in Richmond Goes to Court*, WWBT NBC12 (Jan. 11, 2013, 7:24 AM), http://www.wlox.com/story/20561685/man-suspected-of-running-meth-lab-in-richmond-goes-to-court.com.

138. Act of Apr. 18, 2012, ch. 778, 2012 Va. Acts 1668, 1668 (currently codified at VA. CODE ANN. § 32.1-11.7 (Cum. Supp. 2014)).

139. VA. DEP'T OF HEALTH, GUIDELINES FOR CLEANUP OF RESIDENTIAL PROPERTY USED TO MANUFACTURE METHAMPHETAMINE (2013), *available at* http://www.vdh.virginia.gov/methguidelines/documents/pdf/VDH%20Guidelines%20for%20Meth%20Cleanup.pdf.

added section 32.1-137.02 to the Virginia Code, under which hospitals in the Commonwealth must "inform and educate the patient, and his family when it is involved in decision making or ongoing care, about his follow-up care, treatment, and services."[140]

B. *2013 Session*

1. Criminal History Information

The State Board of Health requires that a prospective volunteer or employee of an emergency medical services agency provide fingerprints and certain personal information so that the individual's materials can be run against a state and national criminal history record check.[141] Historically, the Virginia Office of the Emergency Medical Services had difficulties obtaining the necessary equipment for the implementation of Federal Bureau of Investigation background checks.[142] This delay persisted through fall 2013.[143]

2. Eating Disorders

In an effort to raise awareness regarding eating disorders, the General Assembly enacted Virginia Code section 22.1-273.2, which requires each school board to provide parents of schoolchildren in grades five through twelve with educational information on eating disorders.[144] Scholarship concerning the effect of eating disorders on young individuals has grown in the past decade and a half. For instance, in a 1999 study of eleven- to sixteen-year-old African-American and Caucasian girls, researchers found significant inverse associations between increased parental education and various factors of harmful disorder outlooks, such as "drive for thinness."[145] In other words, the better parents were educated,

140. Act of Mar. 8, 2012, ch. 180, 2012 Va. Acts 291, 291 (currently codified at VA. CODE ANN. § 32.1-137.02 (Cum. Supp. 2014)).

141. VA. CODE ANN. § 32.1-111.5(E) (Cum. Supp. 2014).

142. Michael Berg, *Implementation of FBI Background Checks Delayed*, EMS BULL. 6 (2013), https://www.vdh.virginia.gov/OEMS/EMSBulletin/Fall2013.pdf.

143. *Id*.

144. Act of Mar. 25, 2013, ch. 715, 2013 Va. Acts 1293, 1293 (currently codified at VA. CODE. ANN. § 22.1-273.2 (Cum. Supp. 2014)).

145. *See* Ruth H. Striegel-Moore et al., *Eating Disorder Symptoms in a Cohort of 11 to 16-Year-Old Black and White Girls*, 27 INT'L J. EATING DISORDERS 49, 56 (2000).

the less likely it was that their daughters would drive to achieve a waifish figure. It therefore seems reasonable to think that increased parental education could improve future health outcomes in children and young adults.

3. Zoning and Temporary Health Care Structures

While health law and zoning law do not often intersect, Virginia Code section 15.2-2292.1 provides that a married couple may reside in a "temporary family health care structure."[146] As *The Washington Post* described it, a temporary family health care structure is "an apartment equipped like a hospital room that can be set up in your backyard."[147] The newspaper calls these units "granny pods" that "have arrived on the market as the nation prepares for a wave of graying baby boomers to retire."[148] The consequence of the amendment, among others, is that the law now permits two individuals—rather than a "person"—to live in a temporary family health care structure when one individual is mentally or physically impaired, "and the other requires assistance with one or more activities of daily living . . . ."[149]

4. Medical Malpractice—Expert Witness Certification

In 2013, the General Assembly revised Virginia Code section 8.01-20.1 to permit a circuit court to conduct an in camera review of the certifying expert opinion obtained by the plaintiff.[150] Under the statute, "[i]f the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a [medical malpractice] defendant as required under this section, the court shall impose sanctions according to the provi-

146. VA. CODE ANN. § 15.2-2292.1(B) (Cum. Supp. 2014).

147. *MedCottage Offers New Elder Care Option*, WASH. POST (Nov. 27, 2012), http://www.washingtonpost.com/posttv/medcottage-offers-new-elder-care-option/2012/11/27/d0956030-38ab-11e2-9258-ac7c78d5c680_video.html; *see also* Fredrick Kunkle, *Pioneering the Granny Pod: Fairfax County Family Adapts to High-Tech Dwelling that Could Change Elder Care*, WASH. POST (Nov. 25, 2012), http://www.washingtonpost.com/local/dc-politics/pioneering-the-granny-pod-fairfax-county-family-adapts-to-high-tech-dwelling-that-could-change-elder-care/2012/11/25/4d9ccb44-1e18-11e2-ba31-3083ca97c314_story.html (describing the dwelling as "essentially a portable hospital room").

148. Kunkle, *supra* note 147.

149. VA. CODE ANN. § 15.2-2292.1(B) (Cum. Supp. 2014).

150. Act of Mar. 20, 2013, ch. 610, 2013 Va. Acts 1086, 1086–87 (currently codified at VA. CODE ANN. §§ 8.01-20.1, -50.1 (Cum. Supp. 2014), 16.1-83.1 (Cum. Supp. 2014)).

sions of section 8.01-271.1 and may dismiss the case with prejudice."[151] Circuit courts have construed this language as enabling a review and determination whether a particular case requires an expert certification,[152] and the General Assembly's revision of the statute further supports this interpretation since a court can review a plaintiff's expert certification in camera.

5. Medical Malpractice and Proposed Statute of Limitations

Delegate Jennifer McClellan's 2013 proposal to amend Virginia Code section 8.01-243's statute of limitations in cases of cancer did not pass in the General Assembly.[153] Specifically, her amendment proposed that "[i]n a claim *where negligence is a proximate cause of a* failure to diagnose *or a delay in the diagnosis of* a malignant tumor or cancer," the two-year limitations period on personal injury would be extended one year from the date a health care provider communicates a cancer diagnosis.[154] In Delegate McClellan's own words, "[a]s drafted, the bill is too broad, and I asked that it be tabled to spend more time getting the language right. I will reintroduce this bill [in 2014]."[155]

Delegate McClellan's intentions seem to be well placed when considered alongside the Supreme Court of Virginia's ruling in *Howell v. Sobhan*, where the court explained that "[i]n a medical malpractice case, as in other types of negligence actions, the plaintiff must prove not only that the defendant violated the applicable standard of care *and was therefore negligent*, but also that the defendant's negligent acts were a proximate cause of the injury."[156] On the other hand, Delegate McClellan's proposed language—"where *negligence is a proximate cause* of [the breach]"—appears to create the odd circumstance that one could be negligent but not liable for an action in negligence. As the court stated in *Blue Ridge Service Corp. v. Saxon Shoes, Inc.*, "[t]he elements of an action in negligence are a legal duty on the part of the de-

151. *Id.* This text was present before the 2013 amendment. *Id.*

152. *See, e.g.*, Order of Suffolk City Circuit Court, No. 13-1020 (Va. Cir. Ct. Apr. 30, 2014) (City of Suffolk).

153. *See* H.B. 1874, Va. Gen. Assembly (Reg. Sess. 2013).

154. *Id.*

155. Jennifer McClellan, *My 2013 Legislation*, HOUSE OF DELEGATES, http://www.jennifermcclellan.com/page/my-2013-legislation (last visited Oct. 10, 2014).

156. 278 Va. 278, 283, 682 S.E.2d 938, 941 (2009) (emphasis added).

fendant, breach of that duty, *and a showing that such breach was the proximate cause of injury*, resulting in damage to the plaintiff."[157]

6. Practitioners, Suspension or Revocation of License by Health Regulatory Board

The General Assembly's 2013 addition of Virginia Code section 54.1-2408.3 addressed an apparent loophole in the ability of health practitioners to continue practicing even when their license is suspended. This statute now explicitly prohibits a practitioner or entity whose license is suspended or revoked by a health regulatory board of the Virginia Department of Health Professions from practicing in Virginia, pending appeal of the particular board's order.[158]

7. Emergency Medical Services and Policy Development

The General Assembly directed the Board of Health to charge the State Emergency Medical Services Advisory Board ("SEMSAB") with developing and implementing certain policies related to statewide emergency medical services.[159] These include notifying an emergency medical services provider of the appeals process when he has received an adverse decision on his ability to provide those services in the future.[160] SEMSAB must also implement standard operating procedures for the purposes of developing protocols for basic life support services provided by emergency medical personnel.[161] Finally, the statute also attempts to make training materials and education more homogenous by requiring the Board of Health to review educational initiatives in cooperation with the SEMSAB.[162]

157. 271 Va. 206, 218, 624 S.E.2d 55, 62 (2006) (citing Trimyer v. Norfolk Tallow Co., 192 Va. 776, 780, 66 S.E.2d 441, 443 (1951)) (emphasis added).

158. Act of Mar. 6, 2013, ch. 115, 2013 Va. Acts 178, 179 (currently codified at VA. CODE ANN. § 54.1-2408.3 (Repl. Vol. 2013)).

159. Act of Mar. 16, 2013, ch. 429, 2013 Va. Acts 710, 711.

160. *Id.*

161. *Id.*

162. *See id.*

8. Disclosure of Information Regarding Lyme Disease

In apparent anticipation of reporting by the Centers for Disease Control and Prevention that Lyme disease is infecting many more individuals in the country than previously believed,[163] the General Assembly passed Virginia Code section 54.1-2963.2.[164] This statute requires that physicians ordering Lyme disease testing for patients provide written notice about the disease.[165] The notice cautions against the clandestine nature of the illness in all capital letters: "IF YOU ARE TESTED FOR LYME DISEASE, AND THE RESULTS ARE NEGATIVE, THIS DOES NOT NECESSARILY MEAN YOU DO NOT HAVE LYME DISEASE."[166] It then encourages these patients to maintain contact with physicians regarding possible symptoms and additional treatment.[167] Equally important for physicians, subsection (B) gives providers immunity from civil liability "for the provision of the written information required by this section" unless the doctor is grossly negligent or engages in willful misconduct.[168] For a brief moment in fall 2012, Lyme disease (and Lyme disease litigation) was even an issue in former Massachusetts Governor Mitt Romney's presidential campaign.[169] Whether Governor Romney's focus on Lyme disease in northern Virginia helped precipitate this law is unknown, but the bill was introduced by Barbara J. Comstock (Republican) of McLean,[170] and the majority of patrons were sourced

163. *Press Release, CDC Provides Estimate of Americans Diagnosed with Lyme Disease Each Year*, U.S. DEP'T HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 19, 2013), http://www.cdc.gov/media/releases/2013/p0819-lyme-disease.html.

164. Act of Mar. 12, 2013, ch. 215, 2013 Va. Acts 376, 376 (currently codified at VA. CODE ANN. § 54.1-2963.2 (Repl. Vol. 2013)).

165. VA. CODE ANN. § 54.1-2963.2(A) (Repl. Vol. 2013).

166. *Id.*

167. *Id.*

168. *Id.* § 54.1-2963.2(B) (Repl. Vol. 2013).

169. *See* Dorothy Kupcha Leland, *Touched by Lyme: Romney's Mailer Tangles Lyme Disease with Partisan Politics*, LYMEDISEASE.ORG (Oct. 1, 2012), http://lymedisease.org/news/touchedbylyme/romney-lyme-mailer.html (cataloguing responses from various news outlets from a Lyme-disease awareness perspective); *see also* Michael Specter, *Mitt Romney Versus Lyme Disease and Science*, NEW YORKER (Oct. 1, 2012), http://www.newyorker.com/online/blogs/newsdesk/2012/10/mitt-romney-versus-lyme-disease-and-science.html ("Just when it looked like Mitt Romney might ignore scientific issues this fall, he vowed, in a flyer he sent out last week, to 'get control' of the 'massive epidemic' of chronic Lyme disease 'wreaking havoc' on the residents of northern Virginia.").

170. H.B. 1933, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 12, 2013, ch. 215, 2013 Va. Acts 376).

from other northern Virginia locations such as Lansdowne, South Riding, Herndon, Centreville, and Leesburg.[171]

9. Voluntary Electronic Monitoring in Nursing Homes

House Bill 2130, signed into law by Governor McDonnell on March 21, 2013, required the Board of Health to issue regulations controlling the implementation of voluntary electronic monitoring in the rooms of residents at nursing homes.[172] Policies concerning this issue have existed since at least 2004.[173] Among other things, these policies allow residents the right to refuse electronic monitoring. In addition, nursing home facilities must have procedures established to obtain the documented consent of the resident prior to any installation of monitoring equipment. Further, these policies state that a nursing home

> may require the resident, resident's family, or legal representative to be responsible *for all aspects of the operation of the monitoring equipment*, including the removal and replacement of tapes, and for firewall protections to prevent images that would violate obscenity laws from being inadvertently shown on the Internet.[174]

Notwithstanding, the integrity of firewall protections, while an admirable goal, may be elusive in practice for a resident and his or her family members due to the sophistication of electronic security issues in present-day society.

C. *2014 Session*

1. Disposition of Dead Bodies

Virginia Code section 32.1-309.2 provides that where the next of kin of a deceased individual fails or refuses to claim the deceased person's body within ten days, the locality's attorney must request an order authorizing the person or institution having initial custody of the body to transfer custody of the body to a funer-

---

171. *Id.*
172. Act. of Mar. 21, 2013, ch. 674, 2013 Va. Acts 1222, 1222.
173. *See* VA. DEP'T OF HEALTH, OFF. OF LICENSURE & CERTIFICATION, ELECTRONIC MONITORING OF RESIDENTS' ROOMS 1 (2004), *available at* http://www.vdh.state.va.us/OLC/Laws/documents/NursingHomes/Electronic%20Monitoring.pdf.
174. *Id.* at 1, 3 (emphasis added).

al service establishment.[175] This statute also immunizes persons and institutions for any claims "resulting from acceptance and disposition" of the body in accordance with the statute, unless he or she acts in bad faith or with malicious intent.[176] It remains a Class 1 misdemeanor for anyone to dispose of a dead body on private property without permission of the landowner or on public property.[177]

2. Payment for Medical Services

Virginia Code section 65.2-605 modifies the obligations employers have to employees for payment of medical expenses under the current workers' compensation scheme.[178] The statute now limits employers to pecuniary liability of no more than twenty percent of reimbursement for nurse practitioners or physician assistants serving as assistants-at-surgery during a medical procedure on an eligible injured employee.[179] This statute also limits to fifty percent the amount an employer must pay to an assistant surgeon in the same specialty as a primary surgeon during an eligible employee's surgery.[180]

3. Surgical Technologists and Assistants

For three years, Senator George L. Barker attempted to pass a bill concerning when individuals could use the title "registered surgical technologist" or "registered surgical assistant."[181] He eventually succeeded in 2014.[182] The law provides that a person cannot use the above titles unless registered with the Board of Medicine.[183] In turn, the Board must register those health professionals who have credentials from the National Board of Surgical

175. VA. CODE ANN. § 32.1-309.2(A) (Cum. Supp. 2014).
176. *Id.* § 32.1-309.2(G) (Cum. Supp. 2014).
177. *Id.* § 18.2-323.01 (Repl. Vol. 2014).
178. *Id.* § 65.2-605 (Supp. 2014).
179. *Id.* § 65.2-605(B)(1) (Supp. 2014).
180. *Id.* § 65.2-605(B)(2) (Supp. 2014).
181. *See* S.B. 328, Va. Gen. Assembly (Reg. Sess. 2014) (enacted as Act of Apr. 3, 2014, ch. 531, 2014 Va. Acts ___ (codified at VA. CODE ANN. §§ 54.1-2956.12 to -2956.13 (Supp. 2014))); S.B. 313, Va. Gen. Assembly (Reg. Sess. 2013).
182. *See* Ch. 531, 2014 Va. Acts ___ (codified at VA. CODE ANN. §§ 54.1-2956.12, -2956.13 (Supp. 2014)).
183. VA. CODE ANN. §§ 54.1-2956.12(A), 54.1-2956.13(A) (Supp. 2014).

Technology and Surgical Assisting, have successfully completed a technologist or assistant (respectively) training program as part of that person's service with the armed forces of the United States, or have practiced as a technologist or assistant at any time in the six months prior to July 1, 2014, provided that individual registers with the Board by July 1, 2015.[184]

4. Active Duty Military Health Care Providers

On the topic of the armed forces, the General Assembly amended Virginia Code section 54.1-2901 to clarify that active duty military health care providers offering health services at a public or private health care facility under official military orders are exempt from the state's licensure requirements.[185]

5. Civil Immunity for Certain Health Care Providers

In the 2014 session, the General Assembly extended protection from civil liability to members of and consultants to two types of health-related boards and committees.[186] The first is one established under a national accrediting organization granted authority by the Centers for Medicare and Medicaid Services to assure compliance with Medicare, and the second is one approved by state or local associations representing licensed health care providers.[187] Importantly, civil immunity extends only to acts or omissions performed as part of a member or consultant's duties on these committees.[188]

6. Expert Witness Testimony from Physician Assistant

The General Assembly amended Virginia Code section 8.01-401.2 to allow a physician assistant to testify as an expert witness "as to etiology, diagnosis, prognosis, treatment, treatment

184. *Id.* §§ 54.1-2956.12(B), -2956.13(B) (Supp. 2014).
185. Act of Feb. 20, 2014, ch. 8, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN § 54.1-2901 (Supp. 2014)).
186. Act of Feb. 27, 2014, ch. 17, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 8.01-581.16 (Cum. Supp. 2014)).
187. VA. CODE ANN. § 8.01-581.16 (Cum. Supp. 2014).
188. *Id.*

plan, and disability" of a patient in a medical malpractice case.[189] The amendment also provides that physician assistants cannot testify as experts against physicians in medical malpractice actions with respect to standard of care and causation issues.[190]

7. Physician Assistants as Health Care Providers

If physician assistants can serve as expert witnesses on matters of diagnosis and treatment of a patient, then they should also be defined as "health care providers" for purposes of medical malpractice. Effective July 1, 2014, Delegate John M. O'Bannon, III's legislation does just that.[191] As amended in section 8.01-581.1, physician assistants are now formally subject to medical malpractice laws in the Commonwealth of Virginia.[192]

8. Testimony by Health Care Provider from Outside the Commonwealth

The General Assembly passed legislation allowing plaintiffs in a personal injury suit in general district court to offer evidence of their injury, treatment, and cost through reports created by out-of-state health care providers.[193] This legislation affords plaintiffs greater evidentiary latitude, to be sure, but they must still proffer information from the health care provider—whether out-of-state or in-state—that he or she was treated by the health care provider and that the information and costs in the report are accurate.[194]

189. Act of Mar. 31, 2014, ch. 391, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 8.01-401.2 (Cum. Supp. 2014)) (emphasis removed).

190. *Id.*

191. Act of Mar. 3, 2014, ch. 89, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 8.01-581.1 (Cum. Supp. 2014)); H.B. 1134, Va. Gen. Assembly (Reg. Sess. 2014).

192. Notably, this did not stop the plaintiffs from alleging negligence against these providers for their care and treatment in the past. *See, e.g.*, Moolchandani v. Sentara Hosp., 68 Va. Cir. 293, 294 (2005) (Norfolk City).

193. Act of Feb. 27, 2014, ch. 25, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 16.1-88.2 (Cum. Supp. 2014)).

194. *Id.*

9. Discovery of Metadata

Legislation introduced, but tabled, by Delegate Albo during the General Assembly's 2014 session offers an interesting corollary to the *Temple* case, discussed previously.[195] House Bill 490 would have required health care providers to produce to a patient "metadata" of the patient's electronic medical record when requested by the patient's attorney.[196] The bill attempted to wrangle a clear definition for "metadata," although in describing metadata as "data about data" it implicitly conceded the imprecision of the targeted information.[197] The amendment to Virginia Code section 8.01-413 would include as metadata audit trails, "order and results detail sheets showing further details on individual audit trail line items," and "other data that certifies how, when, where, and by whom" electronic information has been created, viewed, edited, or accessed.[198] A future iteration of this bill likely awaits the General Assembly's consideration in 2015 should the Supreme Court of Virginia either decline to address the metadata issue in *Temple*, or rule contrary to Delegate Albo's current definition.

10. Statute of Limitations for Falsifying Patient Records

The General Assembly amended Virginia Code section 19.2-8 to increase the statute of limitations for prosecuting the misdemeanor offense of falsifying patient records with the intent to defraud from one year to three years.[199] The amendment specifically states that actions "shall be commenced within three years of the commission of the offense," rather than the date from which the fraud is discovered.[200] Before the amendment, prosecution for record falsification had to occur "within one year next after there was cause therefor," which does not appear to specify an exception for misdemeanors having a fraudulent element.[201] So, was the

195. *See supra* notes 97–103 and accompanying text.
196. H.B. 490, Va. Gen. Assembly (Reg. Sess. 2014).
197. *See id.*
198. *Id.*
199. Act of Mar. 5, 2014, ch. 169, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 19.2-8 (Cum. Supp. 2014)).
200. *Id.*
201. *Id.*

change in the law prompted by prosecutors missing the statute of limitations as a result of record falsification discovered *after* a year? Unfortunately, a Lexis search at the time of this publishing revealed no recent cases citing section 18.2-260.1—the law criminalizing falsification of patient records.[202]

11. Tolling of Statute of Limitations after Nonsuit

In the same vein as Virginia Code section 19.2-8, the General Assembly amended section 8.01-380 to provide that a plaintiff may recommence his or her action within six months after suffering a voluntary nonsuit.[203] This legislation is not so much a change in the current law as it is a convenient cross-reference for litigants seeking to determine the effect of a nonsuit on the statute of limitations when reading section 8.01-380. Previously, the law did not explicitly direct parties to section 8.01-229, the provision controlling application of the statute of limitations after a nonsuit.[204] Now, it does.

12. Minor Prohibitions: E-Cigarettes, Dextromethorphan

According to Bloomberg Industries, sales of electronic cigarettes (or "e-cigarettes") could approach $1.5 billion in the United States this year.[205] E-cigarettes heat liquid nicotine into a vapor, allowing for a user to inhale and disperse a cloud resembling cigarette smoke.[206] In May 2014, an anti-tobacco organization's study concluded that much of the $39 million in advertising spent by e-cigarette makers targeted potential youth customers.[207] Responding to this and other concerns from commentators, the General Assembly passed legislation prohibiting the sale of e-cigarettes to

---

202. *See* VA. CODE ANN. § 18.2-260.1 (Repl. Vol. 2014).

203. Act of Mar. 3, 2014, ch. 86, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 8.01-380 (Cum. Supp. 2014)).

204. *Id.*

205. Megan McArdle, *E-Cigarettes: A $1.5 Billion Industry Braces for FDA Regulation*, BUS. WK. (Feb. 6, 2014), *available at* http://www.businessweek.com/articles/2014-02-06/e-cigarettes-fda-regulation-looms-for-1-dot-5-billion-industry.

206. Lowell Dale, *What Are Electronic Cigarettes? Are They Safer Than Conventional Cigarettes?*, MAYO CLINIC (Dec. 1, 2011), http://www.mayoclinic.org/healthy-living/quit-smoking/expert-answers/electronic-cigarettes/faq-20057776.

207. Maggie Fox, *E-Cigarette Makers Going After Youth, Report Finds*, NBC NEWS (May 1, 2014, 8:54 AM), http://www.nbcnews.com/health/kids-health/e-cigarette-makers-going-after-youth-report-finds-n94166.

minors and their possession thereof.[208]

Concern over the health of minors is not limited to e-cigarettes, of course. The General Assembly also enacted Virginia Code sections 18.2-265.19 to 18.2-265.21, which prohibit the sale of dextromethorphan—or Robitussin and other similar cough suppressant products—to those under eighteen years old.[209] At $25, the civil penalty for violating the law is a relative slap on the wrist for pharmacies, employees, and minors drawing an allowance.[210] However, these two pieces of health-related legislation demonstrate the relative agility of the General Assembly to address emerging health issues that concern individuals other than the voting eligible population (and, for all but a handful of lawmakers who voted against the bills, afford those running for reelection with strong "protect the children" credentials).

CONCLUSION

With the Affordable Care Act remaining divisive and a recent legislative battle over potential Medicaid expansion, health care law remains at the forefront of our national and state-wide political debate. Going forward we can expect to see an active court addressing procedural and evidentiary issues in medical negligence litigation, and an active General Assembly making incremental changes in this complex area of law.

208. *See* Act of Mar. 27, 2014, ch. 357, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 18.2-371.2 (Repl. Vol. 2014)).

209. Act of Mar. 3, 2014, ch. 101, 2014 Va. Acts ___, ___ (codified at VA. CODE ANN. §§ 18.2-265.19 to -265.21 (Repl. Vol. 2014)).

210. *See* VA. CODE ANN. § 18.2-265.20(D) (Repl. Vol. 2014).