CIVIL PRACTICE AND PROCEDURE

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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 2014 through June 2015 addressing noteworthy civil procedure topics, 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 2015 session that relates to civil practice.

I. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Fees for Filing Civil Actions*

The procedural decision of the past year that has garnered by far the most attention and discussion is the Supreme Court of Virginia's unpublished order in *Landini v. Bil-Jax, Inc.*,[1] popularly known as the "two dollars short case." The case involved a filing just prior to the expiration of the statute of limitations where the filing fee tendered was literally "two dollars short" due to a recent increase in the court's library fee.[2] Rules 3:2 and 3:3 of the Supreme Court of Virginia state that an action is deemed commenced—and thus the statute of limitations tolled—when a com-

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1. No. 140591 (Va. Jan. 30, 2015) (unpublished order).

2. *Id.* at 1–2.

plaint is tendered to the clerk.[3] The Rules go on to state that the clerk "shall receive and file all pleadings when tendered . . . ."[4]

In *Landini*, plaintiff's counsel timely filed the complaint with the clerk, but the check accompanying the filing was deficient by two dollars.[5] The clerk held the papers for six days and did not stamp them as "filed."[6] On the sixth day—which coincidentally was the final day of the statute of limitations period—the clerk notified plaintiff's counsel of the omission.[7] No mention was made that the papers had not been stamped as "filed."[8] A check for the two dollar deficiency was mailed to the court and the action was stamped as "filed" upon receipt of the check but, unfortunately, after the limitations period had expired.[9]

The Supreme Court of Virginia's analysis is rather short but turns on an interpretation of Virginia Code section 17.1-275.[10] Subsection (A)(13) lists the fees for filing civil actions and concludes with the statement: "The fees prescribed above shall be collected upon the filing of papers for the commencement of civil actions."[11] The particular arrearage involved had to do with the library fee, and some of the opinion is unique to interpreting whether under the statute the library fee is "prescribed above" since it is mentioned in section 17.1-275(D).[12] However, the larger takeaway from this case is that, contrary to what many thought was clearly specified in Rules 3:2 and 3:3, an action is not necessarily "filed" upon tendering a complaint to the clerk.[13] Curiously, the Order does not even mention these rules.[14]

The court revisited the subject in *Alexandria Redevelopment & Housing Authority v. Walker*.[15] In this case, the Alexandria Redevelopment and Housing Authority ("ARHA") had filed its Notice

3. VA. SUP. CT. R. 3:2, 3:3 (Repl. Vol. 2015).
4. R. 3:3 (Repl. Vol. 2015).
5. *Landini*, No. 140591, at 1.
6. *See id.*
7. *Id.*
8. *See id.*
9. *Id.* at 1–2.
10. *Id.* at 2.
11. VA. CODE ANN. § 17.1-275(A)(13) (Cum. Supp. 2015).
12. *See Landini*, No. 140591, at 2–3.
13. *See id.* at 3.
14. *See id.* at 1–3.
15. 289 Va. __, 772 S.E.2d 297 (2015).

of Appeal via commercial courier.[16] The package was dispatched for overnight delivery the day before the expiration of the thirty-day deadline.[17] The courier, however, delivered the package to the record room, where it sat overnight.[18] The next day—one day after the deadline—the clerk stamped the notice of appeal as "filed."[19] Thus, the issue was whether ARHA had timely noted its appeal.[20]

Holding the Notice of Appeal timely "filed," notwithstanding the clerk's error, and citing to Rule 3:3, Justice Kelsey wrote: "When not filed electronically, a pleading is filed when it is physically delivered to the clerk of court."[21] In case the meaning of the above was not clear, Justice Kelsey went on to quote from *Milton v. United States*, to the effect that "filed" when applied to court proceedings is a term of art with a "well understood meaning" and entails "merely the depositing of the instrument with the custodian for the purpose of being filed . . . ."[22]

The implication of the foregoing discussion is that in *Landini*, the clerk should have received and stamped in the complaint as "filed," notwithstanding the deficiency in the filing fee. The reference in Professor W. Hamilton Bryson's treatise, which Justice Kelsey cites with approval, states this proposition expressly.[23] However, the only mention of *Landini* in the opinion is in a footnote that reads: "This appeal does not require us to address whether, and to what extent, the failure to tender certain fees renders a physically delivered pleading incapable of being filed."[24] Thus, practitioners are left to guess whether the court was signaling that *Landini* would not be followed in future cases. Clarity

16. *Id.* at __, 772 S.E.2d at 299.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at __, 772 S.E.2d at 300–01 (citing VA. SUP. CT. R. 3.3 (Repl. Vol. 2015) ("The clerk shall receive and file all pleadings when tendered . . . .")); Mears v. Mears, 206 Va. 444, 446, 143 S.E.2d 889, 890 (1965) (holding that a paper "is 'filed' when delivered to the clerk by the agent selected by counsel"); W. HAMILTON BRYSON, VIRGINIA CIVIL PROCEDURE § 6:01, at 6-3 (4th ed. 2005).

22. *Walker*, 289 Va. at __, 772 S.E.2d at 300 (quoting Milton v. United States, 105 F.2d 253, 255 (5th Cir. 1939)).

23. *Id.* (citing W. HAMILTON BRYSON, VIRGINIA CIVIL PROCEDURE § 6:01, at 6-3 (4th ed. 2005)).

24. *Id.* at __, 772 S.E.2d at 301 n.8.

will likely come in the form of legislative action as major bar groups are already lining up to advocate for a curative amendment to Virginia Code section 17.1-245.

B. *Nonsuits*

In its opinion in *Temple v. Mary Washington Hospital, Inc.*, the Supreme Court of Virginia considered whether the discovery rulings made by the circuit court in a prior, nonsuited action were properly before the court on appeal.[25] Jo Ann Knighten Temple, Administrator of the Estate of Ellis Ethelbert Temple ("decedent"), filed a complaint which alleged wrongful death and medical malpractice against Mary Washington Hospital and other defendants involved in the emergency treatment of the decedent, who had arrived at the hospital complaining of shortness of breath and chest pain and who died approximately four hours later of a heart attack.[26]

During the course of pretrial discovery, disputes arose concerning the hospital's refusal to produce certain information.[27] Specifically, the hospital refused to produce its policies and procedures related to the management, care, and treatment of patients presenting with conditions requiring cardiac monitoring.[28] The hospital also refused to produce information regarding its electronic charting system.[29] Both of these discovery requests by Temple were the subject of a motion to compel, which the trial court denied on the basis that the hospital's "policies and procedures were not relevant, would not lead to discoverable evidence, and were privileged."[30] Regarding Temple's request for electronic data, the trial court found that all relevant documents had already been disclosed.[31]

Temple later filed a second motion to compel in which she asked the trial court to order the hospital to produce certain la-

25. 288 Va. 134, 137, 762 S.E.2d 751, 752 (2014).
26. *Id.*
27. *Id.*
28. *Id.*
29. *See id.*
30. *Id.*
31. *Id.*

boratory documents.[32] The hospital responded that a document previously produced was the only document responsive to that request.[33] The trial court denied the motion to compel.[34]

Temple took a voluntary nonsuit pursuant to Virginia Code section 8.01-380 before the case went to trial.[35] "Temple then filed a new complaint in the same court and against the same defendants, alleging the same cause of action."[36] Subsequently, "the trial court entered an agreed order to incorporate the discovery conducted and taken in the [original] action."[37] The case went to trial, and a jury returned a verdict for the defense.[38] Temple then filed a motion for a new trial and to reconsider certain evidentiary rulings, including the rulings on the motions to compel.[39] The trial court denied the motion for a new trial.[40]

On appeal, the supreme court considered the effect of the nonsuit on the trial court's discovery rulings.[41] The defendants argued that Temple could not appeal the discovery rulings in the original action because the agreed order only incorporated the "discovery conducted and taken" in the prior action, not the motions, objections, rulings, and order from the original action.[42] Thus, according to the defendants, those rulings were not a part of the later-filed action and therefore were not properly before the court on appeal.[43] Temple responded that the agreed order incorporating "all discovery conducted and taken" was clearly intended to include "all of the parties' motions and objections, as well as the trial court's rulings related to the discovery disputes."[44] Temple also argued that the parties' comments at a hearing in the later-filed action demonstrated their understanding that they were to be

32. *Id*. at 137–38, 762 S.E.2d at 752.
33. *Id*. at 138, 762 S.E.2d at 752.
34. *Id*.
35. *Id*., 762 S.E.2d at 753.
36. *Id*.
37. *Id*. Specifically, the order stated, "All discovery conducted and taken in the previous action that the Plaintiff brought against the Defendants . . . is hereby incorporated into the instant action." *Id*.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Id*. at 138–39, 762 S.E.2d at 753.
42. *Id*. at 139, 762 S.E.2d at 753.
43. *Id*.
44. *Id*.

bound by all arguments and rulings from the nonsuited action.[45] The supreme court disagreed.[46]

Interpreting section 8.01-380,[47] the court explained that a refiled action after a nonsuit is a completely new action.[48] Once Temple chose to exercise her right to take a voluntary nonsuit, it was as if the original action had never been filed.[49] Thus, for any aspect of the nonsuited action to be incorporated into the later-filed case, an order had to explicitly permit it.[50] In this case, the court held that "motions, objections, and trial court orders do not constitute discovery."[51] The trial court's order incorporating "all discovery conducted and taken" included the interrogatories, depositions, documents, and requests for admissions, but did not include the motions to compel, objections, transcripts of hearings, or the trial court's rulings on the motions.[52] Because the order did not explicitly incorporate these motions, objections, and rulings, following the nonsuit, it was as if those motions, objections, and rulings had never existed.[53] Accordingly, the court could not reach the merits of Temple's assignments of error.[54]

In *Anheuser-Busch Companies, Inc. v. Cantrell*, the Supreme Court of Virginia again considered the nonsuit statute, specifically, the question: when is an action "submitted to the court for decision" within the meaning of the nonsuit statute, section 8.01-380(A)?[55] After working as a boiler tender at Anheuser-Busch for

45. *Id.*

46. *Id.* at 139–41, 762 S.E.2d at 753–54.

47. VA. CODE ANN. § 8.01-380 (Repl. Vol. 2015) ("A party shall not be allowed to suffer a nonsuit . . . unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision.").

48. *Temple*, 288 Va. at 139, 762 S.E.2d at 753.

49. *Id.* at 140, 762 S.E.2d at 754.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 140–41, 762 S.E.2d at 754. The court also held that because a trial court speaks only through its written orders and that such orders are presumed to reflect accurately what transpired, the parties' comments at a hearing regarding their understanding of the order could not be considered on appeal. *Id.*

54. *Id.* at 141, 762 S.E.2d at 754.

55. *See* 289 Va. __, __, 770 S.E.2d 499, 500 (2015). The nonsuit statute states, in pertinent part:

> A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion

eighteen years, Garland Cantrell was diagnosed with mesothelioma.[56] Cantrell filed an amended complaint against seventeen defendants who owned the premises where he had worked, alleging that their negligence proximately caused his illness.[57] The defendants filed demurrers to the amended complaint, which Cantrell opposed.[58] After the demurrers were fully briefed and a hearing conducted, the circuit court informed the parties "that it would take the demurrers under advisement."[59]

Several weeks later, the circuit court notified the parties that "its decision would be forthcoming."[60] The next day, Cantrell filed a complaint in the Circuit Court of the City of Newport News against all but four of the remaining defendants in the Norfolk case, alleging substantially similar claims.[61] "The day after filing his complaint in Newport News, Cantrell moved to nonsuit the amended complaint pending in Norfolk" under Virginia Code section 8.01-380.[62] The defendants in the Norfolk proceeding opposed the nonsuit motion, arguing that the claims pending there had been "submitted to the court for decision" within the meaning of section 8.01-380(A).[63] The circuit court disagreed and granted Cantrell's motion for nonsuit, at which point the defendants appealed.[64]

The supreme court explained that pursuant to section 8.01-380(A), "[a] party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding,

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> to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision. After a nonsuit no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause is shown for proceeding in another court, or when such new proceeding is instituted in a federal court. If after a nonsuit an improper venue is chosen, the court shall not dismiss the matter but shall transfer it to the proper venue upon motion of any party.

VA. CODE ANN. § 8.01-380(A) (Repl. Vol. 2015).

56. *Cantrell*, 289 Va. at __, 770 S.E.2d at 499 (2015).
57. *Id*. at __, 770 S.E.2d at 499–500.
58. *Id*. at __, 770 S.E.2d at 500.
59. *Id*.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.

unless he does so . . . before the action has been submitted to the court for decision."[65] In an earlier decision, the court had determined that an action is "submitted to the court for decision" when it "is in the hands of the trial judge for final disposition, either on a dispositive motion or upon the merits."[66]

The Supreme Court of Virginia has previously established that a demurrer is a dispositive motion,[67] and so in this case, the court ruled that the defendants' demurrer, as well as their pleas in bar and motions to dismiss, were all dispositive pleadings that precluded a nonsuit under section 8.01-380(A).[68] Thus, the court held that the circuit court erred in granting Cantrell's nonsuit motion after the parties had completed their briefing and argument on the demurrers.[69] As neither the parties nor the court anticipated any further proceedings on the demurrers, those pleadings were committed to the court for its ruling.[70]

C. *Evidence*

The sufficiency of the plaintiffs' evidence was the central issue on appeal in *Owens v. DRS Automotive Fantomworks, Inc.*—a case that concerned the repair and renovation of an antique automobile.[71] Richard L. Owens and his wife, Cynthia M. Owens, hired DRS Automotive Fantomworks, Inc. and its owner, Daniel R. Short, to repair and restore their 1960 Ford Thunderbird.[72] The parties did not enter into a written contract, but Short estimated that the project could be completed for approximately $40,000.[73]

Short advised the Owenses that the most economical way to find replacement parts for the Thunderbird would be to purchase

65. *Id.* (quoting VA. CODE ANN. § 8.01-380(A) (Repl. Vol. 2015)).

66. *Id.* (quoting Bio-Medical Applications of Va., Inc. v. Coston, 272 Va. 489, 493–94, 634 S.E.2d 349, 351 (2006)).

67. Wells v. Lorcom House Condominiums' Council of Co-Owners, 237 Va. 247, 252, 377 S.E.2d 381, 384 (1989).

68. *See Cantrell*, 289 Va. at __, 770 S.E.2d at 500; *see also* Virginia Marine Res. Comm'n v. Clark, 281 Va. 679, 685 n.3, 709 S.E.2d 150, 154 n.3 (2011) (describing demurrers as dispositive motions).

69. *Cantrell*, 289 Va. at __, 770 S.E.2d at 500.

70. *Id.*

71. 288 Va. 489, 764 S.E.2d 256 (2014).

72. *Id.* at 492, 764 S.E.2d at 257.

73. *Id.* at 492–93, 764 S.E.2d at 257.

a "donor car" with a compatible engine.[74] The plaintiffs testified that Short told them that a donor car could likely be purchased at auction for "a few thousand dollars."[75] Short then located a 2001 Ford Crown Victoria Police Interceptor for sale by Lieutenant Alexander Theiss near his shop.[76] Theiss had advertised the Interceptor on the internet for $2000, but at trial, Short testified that he never saw this advertisement.[77] Short and Theiss negotiated a price of $6000 for the Interceptor.[78]

Short had previously provided the Owenses with written notice of the terms upon which he conducted his business.[79] Included in those terms was the condition that a 25% markup would be charged for parts purchased for the work.[80] On the list of anticipated costs for parts and labor that Short gave to the Owenses, he stated the cost for the purchase of the Interceptor was $7200, including the markup.[81] After receiving this list, the Owenses made a second installment payment to Short, followed by frequent visits to the DRS shop to discuss the continuing work and to request additional repairs.[82]

The amicable relationship between the parties quickly deteriorated when Short received a letter from Mrs. Owens demanding documentation of all costs for parts and labor; identification of all suppliers; and other information pertinent to the project.[83] Short suspended the work on the Thunderbird and offered two opportunities for the Owenses to have the vehicle inspected, but they responded by filing a complaint in circuit court alleging breach of contract, violation of the Virginia Consumer Protection Act ("VCPA"), fraud, and detinue.[84]

74. *Id.* at 493, 764 S.E.2d at 257.
75. *Id.* at 493, 764 S.E.2d at 258.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 494, 764 S.E.2d at 258.
80. *Id.* The Owenses did not object to these terms. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 494, 764 S.E.2d at 258–59. The detinue claim was later dismissed and thus was not at issue on appeal. *Id.* at 494 n.2, 764 S.E.2d at 259 n.2.

The case went to a three-day jury trial.[85] "At the conclusion of the plaintiffs' case, the defendants moved the court to strike the plaintiffs' evidence as to all counts."[86] "The court granted the motion as to the fraud and VCPA counts and overruled it as to the count for breach of contract."[87] The defendants renewed their motion to strike after presenting their evidence, but the court denied the motion.[88] The jury returned a verdict for the defendants, and the plaintiff appealed.[89]

The plaintiffs assigned three errors on appeal: (1) that the trial court erred in striking the evidence based on a finding that two witnesses were "believable" and "credible"; (2) that the trial court erred in striking the evidence on the VCPA claim by ruling that a VCPA claim requires proof of fraud; and (3) that the trial court erred by striking the VCPA claim because the evidence was sufficient to show a violation of the VCPA.[90]

With regard to the first assignment of error, the court determined that the key issue was whether the defendants had actually paid $6000 for the Interceptor, or if they had paid a lesser amount, as argued by the plaintiffs.[91] Importantly, the only witnesses who had any knowledge of the Interceptor purchase were Short and Theiss, who both testified that the purchase price was $6000.[92] Theiss was called as a witness by the plaintiffs and as such, the plaintiffs were bound by his uncontradicted testimony.[93] At the conclusion of the trial, the only evidence before the jury regarding the purchase price of the Interceptor was that $6000 had been paid.[94] Although the trial court judge may have remarked that the testimony of Short and Theiss was credible and believable, these comments were simply indicative of the fact that their testimony had not been refuted and was not, on its face, unwor-

85. *Id.* at 494, 764 S.E.2d at 259.
86. *Id.*
87. *Id.*
88. *Id.* at 495, 764 S.E.2d at 259.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 495–96, 764 S.E.2d at 259–60.
94. *Id.* at 496, 764 S.E.2d at 260.

thy of belief.[95] The Supreme Court of Virginia determined that the trial court did not err in striking the evidence.[96]

The court considered the second and third assignments of error together, and, adhering to the rules of statutory construction, interpreted the VCPA as providing a remedy for more than simply fraud.[97] Unlike proof of fraud, the VCPA does not require the consumer to prove in every case "that misrepresentations were made knowingly or with the intent to deceive."[98] Applying this broad interpretation of the VCPA, the court held that the Owenses had "failed to produce evidence of misrepresentations concerning the purchase price of the Interceptor."[99] Further, even if certain statements by Short could be construed as misrepresentations, the Owenses had offered no evidence of any loss that they suffered from reliance upon those statements.[100] In sum, the Owenses' evidence had failed to meet the requirements of Virginia Code section 59.1-204(A).[101]

In *Ramsey v. Commissioner of Highways*, an eminent domain case concerning the valuation of certain property located in the city of Virginia Beach, the Supreme Court of Virginia considered the admissibility of a pre-settlement appraisal of a property's fair market value.[102]

In 2009, the Commissioner of Highways sought to acquire a portion of the Ramseys' property in order to make road improvements to Route 264.[103] Before making an offer, the Commissioner ordered an appraisal of the property as set forth in Virginia Code sections 25.1-204 and -417.[104] Thomas M. Savage conducted the appraisal and valued the entire property before acquisition at $500,000.[105] Savage opined that just compensation for the to-be-acquired portion of the property was $246,292.[106] The Commis-

95. *Id.* at 497, 764 S.E.2d at 260.
96. *Id.*
97. *Id.*
98. *Id.*
99. *See id.* at 498, 764 S.E.2d at 260–61.
100. *Id.* at 498, 764 S.E.2d at 261.
101. *Id.*
102. 289 Va. __, 770 S.E.2d 487 (2015).
103. *Id.* at __, 770 S.E.2d at 488.
104. *Id.*
105. *Id.*
106. *Id.*

sioner then attempted, unsuccessfully, to purchase the property directly from the Ramseys.[107]

Shortly thereafter, the Commissioner filed a Certificate of Take with the trial court certifying that he had deposited $248,707—the estimated fair value of the property to be acquired—with the clerk of court.[108] The Ramseys withdrew the money from the clerk of court.[109] Subsequently, the Commissioner filed a Petition in Condemnation, requiring an order confirming that the title to the desired portion of property be vested in the Commonwealth, and asking that a jury determine the value of the property.[110]

The Commissioner then hired Lawrence J. Colorito, Jr. to conduct a second appraisal.[111] At trial, Colorito testified as an expert witness and asserted that the market value of the Ramseys' property was $250,000, and that just compensation for the acquired portion was $92,127.[112] During the trial, the Ramseys sought to have Savage's initial appraisal admitted into evidence.[113] The trial court denied admission of the Savage appraisal on the basis that it was an offer to settle.[114] The jury found just compensation for the Ramseys' property to be $234,032 and the trial court later issued a final order confirming that title in the relevant portion of the property vested in the Commonwealth.[115]

On appeal, the Ramseys argued that the trial court erred in refusing to admit oral and written evidence of the property value as determined by Savage's appraisal.[116] According to the Ramseys, the trial court erroneously treated the Savage appraisal as part of the Commissioner's offer, when in fact the appraisal was completed before any offer was made to purchase the property.[117] The court considered this issue to be not just a question of the admissibility of evidence, but also a matter of statutory construction.[118]

107. *Id.*
108. *See id.*
109. *Id.*
110. *See id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at __, 770 S.E.2d at 489.
115. *Id.*
116. *Id.*
117. *Id.*
118. *See id.*

The court explained that in an eminent domain proceeding, a condemnor must make "a bona fide but ineffectual effort to purchase from the owner the property to be condemned."[119] Importantly, "*[b]efore initiating negotiations* for real property, the state agency shall establish an amount which it believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established."[120] Pursuant to section 25.1-417(A)(2), "[r]eal property shall be appraised before the initiation of negotiations . . . ."[121]

Because the Ramseys were given the Savage appraisal before any offer to purchase was made, the court held that the Savage appraisal was admissible into evidence as pre-condemnation party admissions by the Commissioner.[122] Consistent with the language of section 25.1-417(A)(2), the Savage appraisal was a fair market value determination prepared "before the initiation of negotiations," and thus should not have been excluded.[123] The court went on to hold that Savage's pre-settlement appraisal was relevant evidence that was not unfairly prejudicial, and had probative value in furthering the purpose of the eminent domain procedure—which is to fully and justly compensate landowners for the value of their property.[124] Accordingly, the trial court erred in finding that the Savage appraisal was an offer to settle and, as such, was inadmissible at trial.[125]

D. *Default Judgment*

Sauder v. Ferguson involved an appeal from the final order of the circuit court denying a motion to set aside default judgment.[126] After Susan M. Sauder and Dennie Lee Ferguson, Jr. were involved in a car accident, Ferguson's insurer, Progressive Gulf Insurance Company, filed a declaratory judgment action seeking a ruling that it was not obligated to provide coverage for the acci-

119. *Id.* (quoting VA. CODE ANN. § 25.1-204(A) (Cum. Supp. 2015)).
120. *Id.* (quoting VA. CODE ANN. § 25.1-204(E)(1) (Cum. Supp. 2015)).
121. VA. CODE ANN. § 25.1-417(A)(2) (Cum. Supp. 2015).
122. *Ramsey*, 289 Va. at __, 770 S.E.2d at 489–91.
123. *Id.* at __, 770 S.E.2d at 490 (quoting VA. CODE ANN. § 25.1-417(A)(2) (Cum. Supp. 2015)).
124. *Id.* at __, 770 S.E.2d at 490.
125. *Id.* at __, 770 S.E.2d at 491.
126. 289 Va. __, 771 S.E.2d 664 (2015).

dent.[127] The named defendants included Sauder, Ferguson, and Rockingham Casualty Company—the insurer from whom Sauder had purchased an uninsured motorist policy.[128]

While the declaratory judgment action was pending, Ferguson testified in a deposition that he was living with his mother in Harrisonburg, Virginia, at the time of the accident.[129] Ferguson again testified that he was living with his mother at the trial of the declaratory judgment action.[130] "At the conclusion of the trial, the circuit court ruled that Ferguson was an uninsured motorist at the time of the accident."[131] Thus, Rockingham Casualty's uninsured motorist policy would provide coverage for the first $100,000 of any judgment that Sauder was legally entitled to recover against Ferguson for damages relating to the accident.[132]

Predictably, Sauder filed a complaint against Ferguson seeking damages arising from the accident.[133] Sauder served Ferguson by posting at the address listed on the police report—not the address given by Ferguson at deposition and at trial.[134] After receiving no response to the complaint, Sauder then filed a motion for entry of default judgment against Ferguson.[135] Sauder served the motion, notice of motion, and proposed order on Ferguson by delivery to his mother at his mother's address.[136] When Ferguson failed to appear at the hearing, the circuit court entered default judgment.[137] Ferguson was personally served with the order entering judgment by default.[138]

The circuit court then set a bench trial on damages, which resulted in an order awarding Sauder $300,000 in damages.[139] The order also provided that "Rockingham Mutual is liable for its con-

127. *Id*. at __, 771 S.E.2d at 666.
128. *Id*.
129. *Id*.
130. *Id*.
131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*.
135. *Id*.
136. *Id*. at __, 771 S.E.2d at 667.
137. *Id*.
138. *Id*.
139. Ferguson did not appear at this trial. *Id*.

tractual portion of Ms. Sauder's Uninsured Motorist Policy."[140] Rockingham Mutual then "filed a complaint for declaratory judgment seeking a determination that Sauder was not legally entitled to collect the judgment . . . because Ferguson was never served with the summons or complaint and Rockingham Casualty was never served as required by Code § 38.2-2206(F)."[141] "Thereafter . . . Sauder filed a motion to set aside the default judgment pursuant to Code § 8.01-428(A)."[142] Because there "existed some question" as to whether Ferguson was validly served with process, Sauder requested that the circuit court enter an order setting aside the default judgment "out of an abundance of caution."[143] Upon consideration of the evidence—which included testimony from Ferguson that he was never served with a complaint or summons—and the arguments of counsel, "the circuit court denied Sauder's motion to set aside the default judgment."[144]

On appeal, the Supreme Court of Virginia explained that the decision of whether to set aside a judgment by default is well within the discretion of the circuit court.[145] The court next considered Sauder's argument that the circuit court abused its discretion in refusing to set aside a default judgment that was void for lack of personal service of Ferguson.[146] Importantly, the circuit court never reached the issue of whether the judgment was void.[147] "Instead, it ruled that the facts did not justify the relief sought by Sauder."[148] Specifically, the record showed that "Sauder had knowledge of Ferguson's correct address when she attempted to serve the complaint and summons on him at a prior address."[149] When questions about the validity of the service were raised,

140. *Id*.

141. *Id*. Sauder had served Rockingham Mutual by personal service on its registered agent, instead of Rockingham Casualty. *Id*. at __, 771 S.E.2d at 666. However, both Rockingham Mutual and Rockingham Casualty had the same registered agent. *Id*. at __, 771 S.E.2d at 667.

142. *Id*. at __, 771 S.E.2d at 667.

143. *Id*.

144. *Id*. at __, 771 S.E.2d at 668.

145. *Id*.; *see* VA. CODE ANN. § 8.01-428(A) (Repl. Vol. 2015) (stating that "the court *may* set aside a judgment by default . . . .") (emphasis added); VA. SUP. CT. R. 3:19(d)(1) (Repl. Vol. 2015) (stating that the court *may* relieve a defendant of a default judgment during the 21-day period provided by Rule 1:1) (emphasis added).

146. *Sauder*, 289 Va. at __, 771 S.E.2d at 669–70.

147. *Id*. at __, 771 S.E.2d at 670.

148. *Id*.

149. *Id*. at __, 771 S.E.2d at 671.

Sauder used Ferguson's correct address for service of additional pleadings.[150] Sauder then "proceeded to seek and obtain a default judgment asserting valid service of the complaint and summons."[151] Ultimately, "she obtained a final judgment awarding the full amount of damages she claimed."[152] As the circuit court observed, Sauder was "the architect of [her] own misfortune," and so the judgment of the circuit court was affirmed.[153]

E. *Necessary Parties*

The appeal in *Synchronized Construction Services, Inc. v. Prav Lodging, LLC*,[154] is the first of three cases recently decided by the Supreme Court of Virginia discussing necessary parties. This case required the court to address the meeting of two different areas of law: mechanic's lien enforcement actions and necessary party jurisprudence.[155] The key question before the court was "whether a general contractor, who has no pecuniary interest in the bond posted to release the real estate subject to a subcontractor's mechanic's lien, is a necessary party to a subcontractor's mechanic's lien enforcement action."[156]

Prav Lodging, LLC entered into a contract with Paris Development Group, LLC to serve as construction manager for the construction of a hotel on real estate previously acquired by Prav.[157] As construction manager, Paris had the authority to enter into agreements with subcontractors in order to accomplish the work.[158] "Paris entered into several such subcontracts, including a subcontract with Synchronized Construction Services, Inc."[159]

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* (quoting Landcraft Co. v. Kincaid, 220 Va. 865, 874, 263 S.E.2d 419, 425 (1980)).
154. 288 Va. 356, 764 S.E.2d 61 (2014).
155. *Id.* at 363, 764 S.E.2d at 64.
156. *Id.* at 360, 764 S.E.2d at 63.
157. *Id.* at 361, 764 S.E.2d at 63.
158. *Id.*
159. *Id.*

Shortly after the project was declared "substantially complete," "Synchronized recorded a mechanic's lien for unpaid work . . . in the amount of $208,250.80."[160] Subsequently, "Synchronized filed a complaint to enforce its mechanic's lien in the Circuit Court of Orange County, naming Prav, Paris, [Virginia Community Bank ("VCB")], and numerous other subcontractors as defendants."[161] "In its complaint, Synchronized asserted a claim . . . that Paris breached its contract with Synchronized by failing to make all payments due to Synchronized under their subcontract."[162]

Paris did not enter an appearance in the case due to the fact that it no longer existed—the company was dissolved the day after Synchronized had recorded its mechanic's lien.[163] Prav and another defendant then "filed an application to post a bond in the amount of $237,906.80 in accordance with Code § 43-70."[164] When the circuit court granted this application, the real estate that had been subject to the mechanic's lien was released.[165]

Prav then "filed a motion to dismiss the entire complaint on the basis that Synchronized failed to timely serve numerous defendants."[166] "[T]he circuit court held that Synchronized 'failed to exercise due diligence' to serve Paris within one year of the date of the filing of the complaint, and therefore dismissed Synchronized's breach of contract claim against Paris."[167] The circuit court did not, however, dismiss Synchronized's mechanic's lien claim.[168]

"Later, VCB filed a motion to dismiss the mechanic's lien claim on the basis that Synchronized failed to timely serve Paris, who, as the construction manager, was a necessary party to the mechanic's lien enforcement action."[169] The circuit court agreed that Paris was, in fact, a necessary party and therefore dismissed Synchronized's mechanic's lien claim with prejudice.[170]

160. *Id.*
161. *Id.*
162. *Id.* at 361, 764 S.E.2d at 63–64.
163. *Id.* at 361, 764 S.E.2d at 64.
164. *Id.*
165. *Id.*
166. *Id.* at 362, 764 S.E.2d at 64.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*

The discussion section of the court's opinion begins with a recitation of the well-established fact that a mechanic's lien is "'a creature of the statute' allowing for its creation," and so in order to perfect a mechanic's lien, a party must strictly comply with the statutory requirements.[171] A mechanic's lien enforcement action "must name all necessary parties within the time set forth by Code § 43-17," but the Code does not explicitly state which parties are necessary parties to a mechanic's lien enforcement action.[172] To answer this question, the court relied upon its definition of "necessary party" in *Asch v. Friends of Mt. Vernon Yacht Club*.[173] Significantly, "[a] mechanic's lien enforcement action seeks to enforce the mechanic's lien 'against the property bound thereby.'"[174] And so, a necessary party in such a case is "any party who has a real property interest in the real estate subject to the mechanic's lien."[175] The court explained that "the focus is on which parties actually have a relevant interest in the real property."[176] "Just because a party may be generally 'interested' in the mechanic's lien enforcement action . . . does not mean that the party is necessary to the proceedings."[177]

Whether bond is posted impacts the necessary party analysis.[178]

> If no bond has been posted the inquiry turns upon which parties have a real property interest in the real estate subject to the mechanic's lien, but when a bond is posted the inquiry focuses upon which parties have a pecuniary interest in the bond itself which is

171. *Id.* at 363, 764 S.E.2d at 64–65 (quoting Shenandoah Valley R.R. Co. v. Miller, 80 Va. 821, 826 (1885)).

172. *Id.* at 363, 764 S.E.2d at 65 (quoting Glasser & Glasser, PLC v. Jack Bays, Inc., 285 Va. 358, 369, 741 S.E.2d 599, 605 (2013)).

173. *Id.* at 364, 764 S.E. 2d at 65 (citing Asch v. Friends of Mt. Vernon Yacht Club, 251 Va. 89, 90–91, 465 S.E.2d 817, 818 (1996)).

> Where an individual is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit.

Asch, 251 Va. at 90–91, 465 S.E.2d at 818.

174. *Synchronized*, 288 Va. at 364, 764 S.E.2d at 65 (quoting VA. CODE ANN. § 43-22 (Repl. Vol. 2013 & Cum. Supp. 2015)).

175. *Id.*

176. *Id.* at 365, 764 S.E.2d at 65.

177. *Id.* at 365, 764 S.E.2d at 65–66.

178. *Id.* at 365, 764 S.E.2d at 66.

> "likely either to be defeated or diminished" by the plaintiff's "claim against the bond."[179]

The supreme court then addressed certain points raised by the circuit court, but emphasized that "concerns regarding which parties might be vital to proving the plaintiff's case are not relevant to the necessary party analysis."[180] Rather, the goal of the necessary party doctrine is "to ensure that all parties central to a dispute can have their interests resolved."[181] If a party's only relationship to a mechanic's lien enforcement action is his status as a party to a contract, then he or she "has only a general pecuniary interest in the outcome of a mechanic's lien enforcement action."[182] "[S]uch a general, tangential interest is insufficient to elevate a party to necessary party status."[183]

Applying these principles, the court then considered whether Paris was a necessary party.[184] Notably, Paris was "neither the principal nor the surety on the bond," and it had "no ability to be awarded a judgment to be paid out from the bond."[185] Although Paris acquired a mechanic's lien on the real estate by virtue of the fact that it provided services for the construction of the hotel, Paris failed to perfect its mechanic's lien.[186] Therefore, the Supreme Court of Virginia held that the circuit court could "render 'complete relief' in Synchronized's mechanic's lien enforcement action, even in Paris' absence, because Paris' lack of a pecuniary interest in the posted bond mean[t] that there [was] no monetary claim upon which the circuit court could award judgment in favor of Paris . . . ."[187] "Paris, as the general contractor, [was] a proper party but not a necessary party to [the] subcontractor's mechanic's lien enforcement action."[188] Thus, the circuit court's judgment was reversed and remanded.[189]

179. *Id.* (quoting George W. Kane, Inc. v. Nuscope, Inc., 243 Va. 503, 509, 416 S.E.2d 701, 705 (1992)).
180. *Id.* at 366, 764 S.E.2d at 66.
181. *Id*. at 366, 764 S.E.2d at 67.
182. *Id*. at 367, 764 S.E.2d at 67.
183. *Id*.
184. *Id*. at 368, 764 S.E.2d at 67.
185. *Id*.
186. *Id*. at 368, 764 S.E.2d at 68.
187. *Id*. at 368–69, 764 S.E.2d at 68.
188. *Id*. at 369, 764 S.E.2d at 68.
189. *Id*.

The issue of necessary parties arose again in *Frace v. Johnson*.[190] In May 2013, a Fairfax County Code Compliance Investigator responded to multiple anonymous complaints concerning the property of Sheila E. Frace.[191] The investigator subsequently issued a Notice of Violation.[192] Frace contested the Notice of Violation in a hearing before the Board of Zoning Appeals of Fairfax County ("BZA"), but the BZA upheld the violation determination of the Zoning Administrator.[193] Frace then filed a petition for writ of certiorari in the Circuit Court of Fairfax County pursuant to Virginia Code section 15.2-2314, which allows a person "aggrieved by any decision of the board of zoning appeals" to seek judicial review in the appropriate circuit court within thirty days of the BZA's final decision.[194] Although the style of Frace's petition referenced the decision of the BZA, she did not name the Board of Supervisors, or any other party, in her petition.[195] "[T]he Zoning Administrator filed a motion to dismiss, arguing that Code § 15.2-2314 made the Board of Supervisors a necessary party to the proceeding."[196] The circuit court agreed, stating that section 15.2-2314 is "crystal clear that the governing body is a necessary party to the proceeding."[197]

On appeal, Frace asserted that the circuit court erred because she had styled the petition precisely as required by section 15.2-2314 and that she should have been permitted to add the Board of Supervisors as a party to the proceeding even after the thirty-day statutory period had run.[198]

The court explained that section 15.2-2314 prescribes the proper styling of the petition and explicitly requires the inclusion of the board of supervisors of a county as a necessary party to the proceedings.[199] The court concluded that compliance with the styl-

190. 289 Va. 198, 768 S.E.2d 427 (2015).
191. *Id.* at 198, 768 S.E.2d at 428.
192. *Id.*
193. *Id.*
194. *Id.* (quoting VA. CODE ANN. § 15.2-2314 (Cum. Supp. 2015)).
195. *Id.*
196. *Id.* at 199, 768 S.E.2d at 428.
197. *Id.*
198. *Id.* at 199, 768 S.E.2d at 428–29.
199. *Id.* at 200–02, 768 S.E.2d at 429–30. Section 15.2-2314 also clearly signals that boards of zoning appeals are not necessary parties to certiorari proceedings. *See* VA. CODE ANN. § 15.2-2314 (Cum. Supp. 2015). Rather, the governing body with an interest in de-

ing requirement, alone, is not sufficient to obtain judicial review under section 15.2-2314.[200] The aggrieved party must also name the governing body as a necessary party in the body of the petition.[201]

Most recently, a discussion of necessary parties appeared in the Supreme Court of Virginia's opinion in *Marble Technologies, Inc. v. Mallon*, which primarily dealt with whether an easement across certain waterfront property in Hampton was static in location (in which case it was now under water) or moved in relation to the high water line.[202] However, as the easement in issue was created in 1936 and involved numerous parcels, a substantial issue was presented in simply collecting all the parties in interest before the court.[203] The opinion recites that leave was granted on numerous occasions and trial continued at least once to permit joinder of additional parties.[204] The defendant sought an additional continuance to permit joinder of additional parties.[205] This request was refused and the trial proceeded notwithstanding that the parties stipulated that not all successors in interest to the original conveyance had been joined.[206]

On appeal, the defendant assigned as error the trial court's decision to proceed in the absence of all necessary parties.[207] The Supreme Court of Virginia acknowledged that as a general proposition, "[a]ll persons interested in the subject matter of a suit and to be affected by its results are necessary parties" and "[g]enerally, a court should only decide a case on its merits if all necessary parties are before it."[208] However, the supreme court went on to state that failure to join all necessary parties does not

fending zoning ordinances is the Board of Supervisors. *Frace*, 289 Va. at 201, 768 S.E.2d at 429–30. Moreover, the thirty-day filing requirement is a statutory prerequisite to ensure that the proper parties have notice and an opportunity to protect their interests before a circuit court may exercise its subject matter jurisdiction. *Frace*, 289 Va. at 201–02, 768 S.E.2d at 430.

200. *Frace*, 289 Va. at 202, 768 S.E.2d at 430.

201. *Id.*

202. 289 Va. __, 773 S.E.2d 155 (2015).

203. *See id.* at __, 773 S.E.2d at 156–57.

204. *Id.*

205. *Id.* at __, 773 S.E.2d at 157.

206. *Id.*

207. *Id.*

208. *Id.* (quoting Michael E. Siska Revocable Trust v. Milestone Dev., LLC, 282 Va. 169, 173, 715 S.E.2d 21, 23 (2011)).

implicate the subject matter jurisdiction of the court and, importantly, that the decision to proceed without joinder of all necessary parties will be reviewed on an abuse-of-discretion basis.[209] Noting the numerous instances of leave having been granted to permit joinder of additional parties, the numerous parties before the court, and that it would be "practically impossible" to join all parties potentially affected, the supreme court found that the lower court did not abuse its discretion.[210]

F. *Jurisdiction*

Jurisdiction was the first of two central issues discussed in the court's opinion in *DRHI, Inc. v. Hanback*, an action brought by the purchaser, DRHI, Inc., against the vendor, William W. Hanback, Jr., for specific performance of a land purchase agreement.[211] DRHI alleged that Hanback had received a better offer from a third party and, for that reason, had refused to confirm in writing that he would honor the purchase contract and sell the property to DRHI.[212]

In his answer and grounds of defense, Hanback admitted to entering into the land purchase contract with DRHI, "but he argued that DRHI failed to perform certain terms of the contract," rendering it void.[213] The trial court entered a decree (the "Order") which provided, in part:

> At the time of settlement, DRHI, Inc. shall pay to Mr. Hanback $400,000 minus the $10,000 already paid, and . . . at the time any subdivision plans submitted by DRHI, Inc. for the development of the property sold by Mr. Hanback are approved by the City of Fairfax, in the event that the plans submitted by DRHI, Inc. permit the construction of six or more individual residences, DRHI, Inc. shall pay to Mr. Hanback $70,000 for the sixth lot and $70,000 for each additional approved lot.[214]

More than eight years later, Hanback filed a petition for rule to show cause, in which he asserted that "after closing on his property in 2004, DRHI purchased an adjoining property and de-

209. *Id.*
210. *Id.*
211. 288 Va. 249, 765 S.E.2d 9 (2014).
212. *Id.* at 249, 765 S.E.2d at 10.
213. *Id.*
214. *Id.* at 249–50, 765 S.E.2d at 10.

signed an integrated development plan combining the two parcels" and creating fifteen lots.[215] In his petition, Hanback asserted that as soon as he became aware of this development, he contacted DRHI and requested the $70,000 per lot that was owed to him pursuant to the Order.[216] When DRHI refused to pay, Hanback asked the trial court to issue the rule to show cause and hold DRHI in contempt of court.[217] After an evidentiary hearing and further proceedings on the show cause, the circuit court entered an order finding DRHI in contempt of the Order.[218] Further, the court entered judgment against DRHI in the amount of $350,000—the outstanding amount owed under the Order.[219]

DRHI filed a notice of appeal to both the Court of Appeals of Virginia and to the Supreme Court of Virginia.[220] One of the central questions posed in both appeals was whether the Order requiring "that DRHI pay Hanback $350,000 constituted a monetary judgment, a civil contempt fine, or both."[221] Because the answer to this question was not immediately apparent, the court determined that in the interests of judicial economy it would grant DRHI's petition for appeal to the Supreme Court of Virginia and certify the case before the Court of Appeals of Virginia pursuant to Virginia Code sections 17.1-409(A) and -409(B)(2).[222]

As the court explained, the power to certify an appeal from the court of appeals lies within the discretion of the supreme court.[223] Although the court rarely exercises this discretion, when it does so, the effect of the certification is to transfer jurisdiction to the supreme court over the entire case, regardless of the outcome on the merits.[224]

The second issue considered by the court in this case was "whether the trial court abused its discretion when it held DRHI in contempt and awarded the compensatory fine to Hanback."[225]

215. *Id*. at 250, 765 S.E.2d at 10.
216. *Id*.
217. *Id*.
218. *Id*.
219. *Id*. at 251, 765 S.E.2d at 11.
220. *Id*.
221. *Id*. at 253, 765 S.E.2d at 11–12.
222. *Id*. at 253, 765 S.E.2d at 12.
223. *Id.* at 254, 765 S.E.2d at 12.
224. *Id*.
225. *Id*.

The Court ruled that the Order "was not an enforceable judgment in favor of Hanback, and no finite amount of damages was identified."[226] Rather, the additional amount DRHI might owe to Hanback was contingent upon numerous factors that, at the time of the entry of the Order, had not yet occurred.[227]

Citing to a line of cases previously decided by the court addressing contempt proceedings, the court clarified that contempt only lies "for disobedience of what is decreed, not for what may be decreed."[228] Further, in order for a person to be held in contempt for violating a court order, the order must be in definite terms and the command must be expressed (not implied).[229] Because the Order "did not contain definite terms as to the total amount DRHI was required to pay and when such payment was due, DRHI could not be held in contempt for failing" to comply with the Order.[230] Accordingly, the court reversed the judgment of the circuit court.[231]

The issue of jurisdiction arose again in *City of Danville v. Tate*, a case involving an action by the City against a retired firefighter, O. Ryland Tate, seeking recovery of Tate's sick leave pay.[232] Tate had worked as a firefighter for the City for thirty-nine years when he suffered a heart attack that left him unable to return to his job.[233] When Tate retired, the City paid him the equivalent of his full wages in the form of sick leave pay totaling approximately $40,000.[234] Under the City's retirement system, Tate elected to use the balance of his accrued sick leave to obtain an extra year of credit towards his retirement.[235] "With this election, the City eliminated Tate's sick leave balance as provided for under its policies."[236]

226. *Id.* at 255, 765 S.E.2d at 13.

227. *Id.*

228. *Id.* (quoting Petrosinelli v. PETA, 273 Va. 700, 706–07, 643 S.E.2d 151, 154 (2007)).

229. *Id.* (citing *Petrosinelli*, 273 Va. at 707, 643 S.E.2d at 154–55).

230. *Id.*

231. *Id.*

232. 289 Va. 1, 766 S.E.2d 900 (2015).

233. *Id.* at 1, 766 S.E.2d at 901.

234. *Id.*

235. *Id.*

236. *Id.*

In addition, before retiring, Tate filed a workers' compensation claim seeking indemnity benefits based upon his heart attack-related disability.[237] "[T]he City paid indemnity benefits to Tate for his six-month period of disability pursuant to a Virginia Workers' Compensation Commission . . . award."[238] Notably, "the City did not request from the Commission a credit under Code § 65.2-520 against this award for the sick leave payments that the City made to Tate during the same disability period."[239]

Upon realizing that Tate had been paid twice, the City filed an action against Tate seeking recovering of his sick leave pay.[240] The City alleged that "Tate was not entitled to receive both sick leave pay and workers' compensation indemnity benefits for the same disability period."[241] After conducting an evidentiary hearing, the circuit court concluded that it did not have jurisdiction to decide the City's claim, and thus it dismissed the complaint.[242]

On appeal, the City argued that the circuit court erred because the court did, in fact, have jurisdiction to decide the claim.[243] While the Supreme Court of Virginia agreed with the City's jurisdictional argument, it disagreed on the merits.[244]

The court explained that under the Virginia Workers' Compensation Act, the Commission may decide whether to credit an employer's sick leave pay.[245] However, the Commission's jurisdiction is limited to only those issues directly relating to the right of an employee to workers' compensation for a work-related injury.[246] While section 65.2-520 authorizes an employer to request a credit, it does not mandate that the employer do so.[247] Thus, in a case

237. *Id.*

238. *Id.* at 1, 766 S.E.2d at 901–02.

239. *Id.* at 1, 766 S.E.2d at 902. Virginia Code section 65.2-520 provides, in pertinent part: "Any payments made by the employer to the injured employee during the period of his disability . . . which by the terms of this title were not due and payable when made, may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation . . ." VA. CODE ANN. § 65.2-520 (Repl. Vol. 2012 & Cum. Supp. 2015).

240. *Tate*, 289 Va. at 2, 766 S.E.2d at 902.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 2–3, 766 S.E.2d at 902 (citing Hartford Fire Ins. Co. v. Tucker, 3 Va. App. 116, 120, 348 S.E.2d 416, 418 (1986)).

247. *Id.* at 3, 766 S.E.2d at 902.

such as this where the employer did not request a credit, section 65.2-520 is simply not triggered.[248] As a result, "[t]he Commission had no jurisdiction to decide this dispute . . . ."[249]

Nevertheless, the supreme court ruled that the circuit court reached the right result in dismissing the City's complaint because the City did not have authority to recover sick leave pay from Tate.[250] Rather, the recovery authorized by the pertinent ordinance and regulations relates to a claim by the City against an employee's workers' compensation benefits.[251] Here, the City was "seeking to recover Tate's sick leave payments, not his workers' compensation payments."[252] Thus, the supreme court affirmed the judgment of the circuit court.[253]

G. *Sanctions*

The supreme court's opinion in *EE Mart F.C., L.L.C. v. Delyon* addresses a dispute surrounding the circuit court's calculation of attorney's fees.[254] EE Mart F.C., L.L.C. owned and operated a grocery store in Merrifield, Virginia.[255] Suzanne Delyon is the former chief financial officer of EE Mart and owner of multiple other limited liability companies.[256]

EE Mart brought an action against Delyon and her other LLCs alleging wrongful conversion, among other claims.[257] All of the claims related to insurance proceeds paid by Traveler's Insurance Company to Delyon.[258] "On the eve of trial, EE Mart nonsuited the case."[259] Shortly thereafter, "EE Mart brought an action against Traveler's in the Circuit Court of Carroll County, Maryland . . . related to Traveler's payment of the insurance proceeds to

248. *Id.*
249. *Id.* at 3, 766 S.E.2d at 903.
250. *Id.*
251. *Id.* at 4, 766 S.E.2d at 903.
252. *Id.*
253. *Id.*
254. 289 Va. 282, 768 S.E.2d 430 (2015).
255. *Id.* at 284, 768 S.E.2d at 431.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

Delyon."[260] Traveler's removed the case to federal court, but it was eventually transferred back to the circuit court in Maryland.[261]

Delyon and the other LLCs then filed an action in Fairfax County Circuit Court "seeking to enjoin EE Mart from proceeding with the Maryland [a]ction and seeking [a] declaratory judgment that the Maryland [a]ction was without merit."[262] "EE Mart filed a counterclaim against Deylon and the [o]ther LLCs, reasserting the same claims it had pled in [its] [o]riginal [a]ction."[263] "In their answer to the counterclaim, Delyon and the other LLCs sought sanctions under Code § 8.01-271.1 on the [basis] that the assertions in the counterclaim were frivolous and based on false statements."[264]

When EE Mart failed to file exhibit and witness lists and did not participate in pretrial activities, the circuit court determined that EE Mart had abandoned its counterclaim.[265] The court then entered an order dismissing the counterclaim, finding it to be "frivolous and without support in law or fact."[266] Given this ruling, Delyon and the other LLCs made an oral motion for sanctions against EE Mart, claiming that the original action and the Maryland action, in addition to the counterclaim, were frivolous.[267] "[T]hey sought the total amount of attorney's fees that they had expended in defending against" all three cases.[268] "Relying on Code § 8.01-271.1, the trial court granted the motion and awarded $25,550 in attorney's fees."[269] EE Mart, with new counsel, filed a motion for reconsideration which was denied by the circuit court.[270] An appeal to the supreme court followed.[271]

On appeal, EE Mart argued that the trial court's decision to award $25,550 in attorney's fees was an abuse of discretion because "the sanctions award included attorney's fees that Delyon

260. *Id.*
261. *Id.* at 284, 768 S.E.2d at 431–32.
262. *Id.* at 284, 768 S.E.2d at 432.
263. *Id.*
264. *Id.* at 284–85, 768 S.E.2d at 432.
265. *Id.* at 285, 768 S.E.2d at 432.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*

and the [o]ther LLCs had incurred in suits that pre-dated the filing of the [p]resent [a]ction or were tried in other jurisdictions."[272] In other words, EE Mart argued that the circuit court had "exceeded the bounds of its jurisdiction."[273] Of significance is the fact that EE Mart did not assign error to the fact that sanctions were awarded—it only assigned error to the calculation of the attorney's fees.[274]

Interpreting section 8.01-271.1, the supreme court held that the trial court erred in its calculation of the attorney's fees it could award as a sanction.[275] The "authority to award sanctions under Code § 8.01-271.1 is triggered by the filing of a pleading, motion, or other paper," thus "the clear implication is that the filing or making of the motion must occur in the same action and same court that subsequently awards the sanctions."[276] "To hold otherwise would contravene the finality guaranteed by Rule 1:1."[277] In this case, the sanctions award improperly "included attorney's fees that were not 'incurred because of' any filing or motion made in the [p]resent [a]ction."[278]

H. *Foreign Subpoenas*

Yelp, Inc. v. Hadeed Carpet Cleaning, Inc. involved a defamation suit filed by Hadeed Carpet Cleaning, Inc. against three John Doe defendants.[279] In its complaint, Hadeed alleged that the defendants "falsely represented themselves as Hadeed customers and posted negative reviews regarding Hadeed's carpet cleaning services on Yelp"—a social media website "that allows registered users to rate and describe their experiences with local businesses."[280]

272. *Id.* at 285–86, 768 S.E.2d at 432.

273. *Id.* at 285, 768 S.E.2d at 432.

274. *Id.* at 286, 768 S.E.2d at 432.

275. *Id.* at 287, 768 S.E.2d at 433.

276. *Id.* at 286, 768 S.E.2d at 433.

277. *Id.* Rule 1:1 provides that "[a]ll final judgments, orders, and decrees . . . shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." VA. SUP. CT. R. 1:1 (Repl. Vol. 2015).

278. *EE Mart F.C.*, 289 Va. at 287, 768 S.E.2d at 433.

279. 289 Va. __, 770 S.E.2d 440 (2015).

280. *Id.* at __, 770 S.E.2d at 441.

During the course of the litigation, "Hadeed issued a subpoena duces tecum to Yelp, seeking documents revealing the identity . . . [of] the authors of the reviews."[281] Such information is stored on administrative databases accessible only by Yelp's "user operations team" located in San Francisco.[282] Yelp has no offices in Virginia, but does have a designated registered agent for service of process in Virginia—upon whom Hadeed served the subpoena duces tecum.[283] "Yelp filed written objections to the subpoena duces tecum," and subsequently, "Hadeed moved to overrule the objections and enforce the subpoena duces tecum."[284] "The circuit court issued an order enforcing the subpoena duces tecum."[285] Further, the circuit court held Yelp in civil contempt when it refused to comply with the order.[286] "The Court of Appeals [of Virginia] affirmed the circuit court's decision."[287]

On appeal, the Supreme Court of Virginia considered "whether the circuit court was empowered to enforce the subpoena duces tecum against Yelp."[288] In addressing this question, the court first distinguished between personal jurisdiction and the exercise of subpoena power.[289] "[W]hile the General Assembly has expressly provided for the exercise of *personal jurisdiction* over nonresident *defendants* under certain circumstances, it has not expressly provided for the exercise of *subpoena power* over *nonresident non-parties*."[290] Moreover, the Rules of the Supreme Court of Virginia "do not recognize the existence of subpoena power over nonresident non-parties."[291] The supreme court explained that "[t]he

281. *Id.*
282. *Id.*
283. *See id.*
284. *Id.* at __, 770 S.E.2d at 442.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.* Virginia's long-arm statute sets forth a range of options for the manner in which nonresident defendants may be served when "exercise of personal jurisdiction is authorized by this chapter." VA. CODE ANN. § 8.01-329(A) (Repl. Vol. 2015). However, "the General Assembly has not expressly authorized the exercise of subpoena power over non-parties who do not reside in Virginia." *Yelp, Inc.*, 289 Va. at __, 770 S.E.2d at 443.
291. *Yelp, Inc.*, 289 Va. at __, 770 S.E.2d at 443. While Rule 4:9A does detail the procedure for issuing a subpoena duces tecum to a non-party, it does not address the issuance of one for documents located outside the Commonwealth. *See* VA. SUP. CT. R. 4:9A (Repl. Vol. 2015).

General Assembly's authorization of the exercise of personal jurisdiction over nonresident defendants does not confer upon Virginia courts subpoena power over nonresident non-parties."[292] After all, "the power to compel a nonresident non-party to produce documents in Virginia" is not related in any way to the "consideration of whether the nonresident non-party would be subject to . . . personal jurisdiction" if named in a lawsuit.[293] These are two separate and distinct issues.[294] For these reasons, the court "vacat[ed] the judgment of the [c]ourt of [a]ppeals, vacat[ed] the contempt order of the circuit court, and remand[ed] [the case] for further proceedings . . . ."[295]

I. *Prejudgment Interest*

In *Devine v. Buki*, Donald Devine appealed "the judgment of the trial court rescinding the sale of property known as Rock Hall to Charles Z. Buki . . . and Kimberly A. Marsho . . . ."[296] Devine also "appeal[ed] the trial court's award of consequential damages and attorney's fees."[297] Among the many issues that the Court considered on appeal was Devine's contention "that the trial court erred in awarding prejudgment interest because Buki and Marsho failed to specifically request it in their pleadings."[298]

Virginia Code section 8.01-382 authorizes a trial court to award prejudgment interest, and the decision to do so is in the discretion of the fact-finder.[299] "However, although the award of prejudgment interest is discretionary, it is still 'part of the actual damages sought to be recovered.'"[300] Therefore, prejudgment interest, like other damages, must be specifically pled before it can be

292. *Yelp, Inc.*, 289 Va. at __, 770 S.E.2d at 443.

293. *Id.*

294. *Id.* at __, 770 S.E.2d at 446.

295. *Id.*

296. 289 Va. 162, 166, 767 S.E.2d 459, 461 (2015).

297. *Id.*

298. *Id.* at 179, 767 S.E.2d at 468.

299. VA. CODE ANN. § 8.01-382 (Repl. Vol. 2015) ("In any . . . action at law or suit in equity, the final order, verdict of the jury, or if no jury the judgment or decree of the court, may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence.").

300. *Devine*, 289 Va. at 179, 767 S.E.2d at 468 (quoting Dairyland Ins. Co. v. Douthat, 248 Va. 627, 631, 449 S.E.2d 799, 801 (1994)).

awarded by a trial court.[301] In this case, the relevant complaint contained no request for prejudgment interest, and thus the trial court erred in awarding prejudgment interest.[302]

J. *Plea in Bar*, *Burden of Proof*, *Damages*

The Supreme Court of Virginia addressed a host of civil procedure issues in *Smith v. McLaughlin*, an appeal arising from a legal malpractice claim.[303] It is well known that a typical "legal malpractice claim involves a case within the case, because the . . . plaintiff must establish how the attorney's negligence in the underlying litigation proximately caused [his or her] damages."[304] This case involved yet another layer—"the underlying litigation in which the alleged malpractice occurred was itself a legal malpractice claim."[305] So this was "a case (the initial criminal matter) within a case (the criminal malpractice matter) within [a] case (the legal malpractice matter [before the court])."[306]

When Bruce McLaughlin was charged with multiple counts of felony sexual abuse, he hired William J. Schewe of the firm Graham & Schewe, and Harvey J. Volzer of the firm Shaughnessy, Volzer & Gagner, P.C. to represent him in the criminal matter.[307] "At the conclusion of trial, the jury found McLaughlin guilty . . . and [he] was sentenced to serve [thirteen] years in prison."[308] Shortly after learning that his direct appeal had been denied, "McLaughlin attempted to escape from custody by running from the courthouse, but [he] was quickly apprehended."[309] He pled guilty to the felony of simple escape and was sentenced to five years in prison.[310]

301. *Id.*

302. *Id.* The supreme court explained that it is well-established that "a plaintiff cannot recover more than he sues for." *Id.* (quoting Powell v. Sears, 231 Va. 464, 470, 344 S.E.2d 916, 919 (1986)).

303. 289 Va. 241, 769 S.E.2d 7 (2015).

304. *Id.* at 248, 769 S.E.2d at 10.

305. *Id.* at 248, 769 S.E.2d at 10–11.

306. *Id.* at 248, 769 S.E.2d at 11.

307. *Id.*

308. *Id.*

309. *Id.* at 249, 769 S.E.2d at 11.

310. *Id.*

"Pursuant to habeas proceedings, McLaughlin's convictions for the felony sexual abuse charges were vacated and he was granted a new trial."[311] At the conclusion of the second trial, the jury found McLaughlin not guilty on all charges.[312] By that time, "McLaughlin had been incarcerated for over four years."[313]

McLaughlin hired Brian Shevlin of the firm Shevlin Smith to pursue a criminal malpractice claim against his criminal defense attorneys Schewe, Volzer, and their respective law firms.[314] The criminal malpractice claim alleged that the defense attorneys had failed to obtain and review taped interviews of the alleged victims.[315] Shevlin Smith negotiated a settlement and release with Schewe and the firm Graham & Schewe, settling the criminal malpractice claim against them for $50,000.[316] The release agreement "did not discharge McLaughlin's criminal malpractice claim against Volzer and the firm Shaughnessy, Volzer & Gagner, P.C."[317]

Approximately four months after Shevlin Smith executed the release agreement, the supreme court issued its opinion in *Cox v. Geary*.[318] "Based on one of the holdings in that case, Volzer and the firm Shaughnessy, Volzer & Gagner, P.C. filed a plea in bar to McLaughlin's criminal malpractice claim."[319] "Volzer and the firm argued that [the] malpractice claim against them must be dismissed because," according to the *Cox* ruling, "the settlement and release of some co-defendants to the legal malpractice claim . . . was a release of all co-defendants."[320] The trial court agreed, sustained the plea in bar, and dismissed McLaughlin's complaint.[321]

311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.* at 249–50, 769 S.E.2d at 11. Graham & Shewe's malpractice insurer provided $50,000 to the firm to handle the criminal malpractice matter or settle the case. *Id.* at 249, 769 S.E.2d at 11.
317. *Id.* at 250, 769 S.E.2d at 11. The release agreement was entered into pursuant to Virginia Code section 8.01-35.1. *Id.*
318. 271 Va. 131, 624 S.E.2d 16 (2006).
319. *Smith*, 289 Va. at 250, 769 S.E.2d at 11.
320. *Id.*
321. *Id.* at 250, 769 S.E.2d at 11–12.

After his criminal malpractice claim was dismissed, McLaughlin filed a legal malpractice suit against Shevlin Smith alleging, among other things, that "Shevlin Smith breached its duty to McLaughlin by failing to foresee how [the] holding in *Cox* would impact the Release Agreement."[322] The legal malpractice case eventually went to trial, and "the jury found Shevlin Smith liable to McLaughlin . . . in the amount of $5.75 million."[323] "Shevlin Smith . . . filed a petition for appeal with [the supreme court]."[324]

The first assignment of error addressed by the court was whether the circuit court erred in failing to sustain Shevlin Smith's second plea in bar and by rejecting his position that an attorney does not commit malpractice by failing to anticipate a change in the law.[325] The court held that the trial court's refusal to sustain the plea in bar was in error.[326]

In reaching this holding, the court first explained "that a plea in bar 'constitutes [either] a complete defense to the [complaint], *or to that part of the* [*complaint*] *to which it is pleaded*.'"[327] In other words, "a plea in bar can be sustained even if it presents a bar to recovery to only some, but not all, of the plaintiff's claims."[328] Shevlin Smith's plea in bar presented only a partial bar to McLaughlin's recovery; yet, even so, the circuit court had the ability to rule on those issues.[329]

The circuit court also denied Shevlin Smith's plea in bar on the basis that "whether Shevlin Smith breached its duty to McLaughlin was a question of fact to be decided by a jury."[330] The court found that this ruling was also error.[331] And so, on appeal, the court considered whether Shevlin Smith breached its duty to McLaughlin by failing to correctly anticipate a judicial ruling on an unsettled legal issue.[332] Citing to decisions of courts in other

322. *Id.* at 250, 769 S.E.2d at 12.
323. *Id.* at 250–51, 796 S.E.2d at 12.
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.* at 252, 769 S.E.2d at 13 (quoting Campbell v. Johnson, 203 Va. 43, 47, 122 S.E. 2d 907, 910 (1961)).
328. *Id.*
329. *Id.*
330. *Id.* at 253, 769 S.E.2d at 13.
331. *Id.*
332. *Id.* at 253, 769 S.E.2d at 13.

jurisdictions, the court discussed the "judgmental immunity rule."[333] Although the court declined to adopt this rule per se, it held that its application was instructive in this case.[334] The court stated that "[a]llowing an attorney to be liable in malpractice for simply failing to correctly predict the outcome of an unsettled legal issue unduly burdens the practice of law, which does a disservice to the profession, and hampers the development of the law, which does a disservice to the public."[335] Applying traditional standard of care principles, "an attorney's reasonable but imperfect judgment regarding an unsettled legal issue does not give rise to liability."[336]

> [I]f an attorney exercises a "reasonable degree of care, skill, and dispatch" while acting in an unsettled area of the law, which is to be evaluated in the context of "the state of the law at the time" of the alleged negligence, then the attorney does not breach the duty owed to the client.[337]

Thus, "Shevlin Smith did not breach its duty by failing to correctly anticipate a judicial ruling on an unsettled legal issue."[338] As a matter of law, the court held that "Shevlin Smith did not breach its duty to McLaughlin by failing to correctly anticipate [the] holding in *Cox*."[339] Thus, the court reversed the circuit court's judgment in denying Shevlin Smith's plea in bar.[340]

Because "the jury was incorrectly permitted to find Shevlin Smith negligent on the evidence introduced at trial supporting the theory that Shevlin Smith breached its duty by failing to correctly anticipate [the] holding in *Cox*," the court "revers[ed] the circuit court's order affirming the jury's award finding Shevlin

333. *Id.* at 254, 769 S.E.2d at 13–14.

334. *Id.* at 254, 769 S.E.2d at 14.

335. *Id.*

336. *Id.* at 254–55, 769 S.E.2d at 14.

337. *Id.* at 255, 769 S.E.2d at 14. (quoting Ripper v. Bain, 253 Va. 197, 202, 482 S.E.2d 832, 836 (1997); Heyward & Lee Const. Co. v. Sands, Anderson, Marks & Miller, 249 Va. 54, 57, 453 S.E.2d 270, 272 (1995)).

338. *Id.* at 257, 769 S.E.2d at 15. "At the time the Release Agreement was executed in 2005, the General Assembly had modified [the] common law rule in Code § 8.01-35.1 . . . so that settlement with and release of one co-tortfeasor did not release other co-tortfeasors." *Id.* at 255, 769 S.E.2d at 14. Given the jurisprudence in existence at the time of execution, Shevlin Smith acted with a "reasonable degree of care, skill, and dispatch" when operating in an unsettled area of law. *Id.* at 255, 769 S.E.2d at 15. (quoting *Ripper*, 253 Va. at 202, 482 S.E.2d at 836).

339. *Id.* at 257, 769 S.E.2d at 15.

340. *Id.*

Smith liable to McLaughlin, and vacat[ed] that award."[341] The court then went on to address additional issues presented on appeal that were likely to arise on remand.[342]

The next assignment of error that the court addressed was whether "[t]he circuit court erred in permitting [McLaughlin] to recover more in [the legal malpractice] action than he could have collected from [Schewe, Volzer, and their respective law firms] in the absence of Shevlin Smith's alleged malpractice."[343] The court disagreed with McLaughlin's contention that collectability is irrelevant to legal malpractice claims.[344] The court went on to hold that "the burden of pleading and disproving collectibility [is] on the negligent attorney as an affirmative defense," not on the legal malpractice plaintiff.[345]

The court next considered whether non-pecuniary, non-economic damages, such as pain and suffering, are recoverable in a legal malpractice claim.[346] McLaughlin assigned error to the circuit court's ruling that non-economic damages were unavailable to him, but the supreme court affirmed this ruling.[347] As the court explained, "[t]he question of what damages are recoverable in a legal malpractice claim is . . . governed by [the] law pertaining to what damages are recoverable in a breach of contract claim."[348] Because non-pecuniary injury is not recoverable in a breach of contract claim, it follows that non-pecuniary damages are not recoverable in a legal malpractice claim.[349] Instead, "[a] legal mal-

341. *Id.* at 259, 796 S.E.2d at 16.

342. *Id.* at 259, 769 S.E.2d at 17.

343. *Id.* at 259–60, 769 S.E.2d at 17.

344. *Id.* at 261, 769 S.E.2d at 17.

345. *Id.* at 262–63, 769 S.E.2d at 18.

346. *Id.* at 263–267, 769 S.E.2d at 19–21.

347. *Id.* at 263–64, 769 S.E.2d at 19.

348. *Id.* at 265, 769 S.E.2d at 19. "[T]he duty that an attorney must 'exercise a reasonable degree of care, skill, and dispatch in rendering the services for which the attorney was employed,' . . . does not arise in tort, but is [a] duty arising from the attorney-client 'contractual' relationship . . . ." *Id.* at 264, 769 S.E.2d at 19 (quoting Cox v. Geary, 271 Va. 141, 152, 624 S.E.2d 16, 22 (2006); Ripper v. Bain, 253 Va. 197, 202–03, 482 S.E.2d 832, 836 (1997)). Thus, any damage to be recovered by operation of Virginia Code section 54.1-3906 is contract damage. *Id.*

349. *Id.* at 265–66, 769 S.E.2d at 20.

practice plaintiff may recover only pecuniary damages proximately caused by an attorney's breach of the contractually implied duties."[350]

Lastly, the supreme court considered whether the circuit court erred in allowing McLaughlin, in both his opening statement and closing argument, to ask for millions more in damages than his ad damnum clause alleged.[351] As pled in the ad damnum clause of his legal malpractice complaint, McLaughlin sought $6 million in damages.[352] Yet during his opening and closing, McLaughlin's counsel requested approximately $10 million in damages from the jury.[353] "[T]he circuit court overruled Shevlin Smiths' objections to [the] $10 million request."[354] The supreme court determined that this was error, as "a plaintiff may not request from the jury, in either opening statement or closing argument, an amount of damages that exceeds the amount of the plaintiff's ad damnum."[355]

K. *Punitive Damages*

The Supreme Court of Virginia provided some instructive commentary regarding jury instructions generally, and regarding punitive damages in particular, in *Cain v. Lee*.[356] The case arose in the context of an automobile accident involving an intoxicated driver.[357] The defendant requested and obtained a jury instruction on punitive damages as follows: "Punitive damages are generally not favored and should be awarded only in cases involving egregious conduct."[358] The court noted that this language was "taken directly" out of the court's opinion in *Xspedius Management Co. of Virginia, LLC v. Stephan*.[359] Notwithstanding this fact, the court held the instruction improper and reversed the case.[360] In so do-

350. *Id.* at 266, 769 S.E.2d at 20.
351. *Id.* at 269, 769 S.E.2d at 22.
352. *Id.*
353. *Id.* at 270, 769 S.E.2d at 22.
354. *Id.*
355. *Id.*
356. 289 Va. __, __, 772 S.E.2d 894, 896–97 (2015).
357. *Id.* at __, 772 S.E.2d at 895.
358. *Id.* at __, 772 S.E.2d at 896.
359. *Id.* at __, 772 S.E.2d at 897 (citing Xspedius Mgmt. Co. of Va., LLC v. Stephan, 269 Va. 421, 425, 611 S.E.2d 385, 387 (2005)).
360. *Id.* at __, 772 S.E.2d at 896, 898.

ing, the court admonished against "the danger of the indiscriminate use of language from appellate opinions in a jury instruction."[361] Focusing on the language here, the court characterized it as "'argumentative language' about legal matters that is inappropriate for consideration by the jury."[362]

L. *Authority to Enter a Decree of Sale*

In *CVAS 2, LLC v. City of Fredericksburg*, the court considered whether the circuit court "had authority to enter a decree of sale of real estate pursuant to [the City's] suit to collect delinquent real estate taxes and delinquent special assessments."[363] CVAS 2's petition for appeal contained a single assignment of error: "[t]he trial court erred in its construction of Virginia Code §§ 15.2-5158 and 58.1-3965(A) by ordering the sale of CVAS 2's real estate when [the] taxes were less than two years delinquent."[364]

CVAS 2 owns real estate in the city of Fredericksburg, and "the City ha[d] levied that real estate with taxes."[365] The local governing body levied the real estate with special assessments for the benefit of the Celebrate Virginia South Community Development Authority ("CDA").[366] CVAS 2 had "outstanding real estate taxes dating back to the 2012 fiscal year, and [had] outstanding special assessments dating back to the 2009 fiscal year."[367] The City brought suit against CVAS 2 on June 13, 2013, seeking to have CVAS 2's real estate sold in order to collect the real estate taxes and special assessments owed by CVAS 2.[368]

In response to the City's complaint and motion for decree of sale, CVAS 2 filed a motion to dismiss, in which it asserted that the City failed to comply with Virginia Code section 58.1-3965, and therefore the property could not be sold "to recover the delin-

361. *Id.* at __, 772 S.E.2d at 897 (quoting Blondel v. Hays, 241 Va. 467, 474, 403 S.E.2d 340, 344 (1991)).

362. *Id.* (quoting Abernathy v. Emporia Manufacturing Co., 122 Va. 406, 413, 95 S.E. 418, 420 (1918)).

363. 289 Va. 100, 107, 766 S.E.2d 912, 913 (2015).

364. *Id.* at 108, 766 S.E.2d at 914.

365. *Id.* at 107, 766 S.E.2d at 913.

366. *Id.*

367. *Id.*

368. *Id.* at 107, 766 S.E.2d at 913–14.

quent real estate taxes and special assessments."[369] After a hearing on the matter, the circuit court entered a decree of sale ordering that the real estate be sold to pay "the taxes, penalties, interest, special assessments, fees, costs, and any liens whatever thereon."[370] CVAS 2's appeal followed.[371]

The court's opinion first addressed the City's motion to dismiss CVAS 2's appeal on the grounds that "the circuit court's entry of the decree of sale was not a final order giving rise to [the supreme court's] jurisdiction under Code § 8.01-670(A)."[372] The court dispensed with this issue quickly, explaining that the decree of sale was "an interlocutory decree in a case on an equitable claim," and that the court has jurisdiction to resolve appeals from interlocutory orders "requiring . . . title of property to be changed."[373] For this reason, the court denied the City's motion to dismiss the appeal.[374]

The court then turned to the central issue in this case: the mechanisms by which "different governmental entities may levy and collect certain taxes and assessments on real estate."[375] Citing to section 58.1-3965(A), the court highlighted two provisions that were important to this appeal.[376] "First, [a] locality may not bring suit to collect delinquent taxes on real estate until the December 31 two years after the real estate taxes became due."[377] "Second, the suit to collect such delinquent taxes may be enforced through the sale of the real estate upon which the delinquent taxes were levied."[378]

369. *Id*. at 107, 766 S.E.2d at 914.

370. *Id*. at 107–08, 766 S.E.2d at 914.

371. *Id*. at 108, 766 S.E.2d at 914.

372. *Id*.

373. *Id*. at 109, 766 S.E.2d at 914–15 (quoting VA. CODE ANN. § 8.01-670(B)(2)(Repl. Vol. 2015)).

374. *See id*. at 109, 766 S.E.2d at 915.

375. *Id*. at 110, 766 S.E.2d at 915.

376. *Id*. at 110, 766 S.E.2d at 915 (citing VA. CODE ANN. § 58.1-3965(A) (Repl. Vol. 2013)).

377. *Id*. (citing VA. CODE ANN. § 58.1-3965(A) (Repl. Vol. 2013)). The General Assembly allows a city to reduce the two-year delay built into Virginia Code section 58.1-3965(A) to a single year by passing an ordinance. VA. CODE ANN. § 58.1-3965.1 (Cum. Supp. 2015).

378. *CVAS 2*, 289 Va. at 110, 766 S.E.2d at 915 (VA. CODE ANN. § 58.1-3965(A) (Repl. Vol. 2013)).

With regard to the CDA assessments, the court explained that although a CDA may request that a locality levy and collect a special tax on its behalf, the CDA may not do so itself.[379] Instead, the method for a locality to collect such special taxes to be paid over to the CDA is set forth in Virginia Code section 15.2-5158(A)(3).[380] Specifically, the special taxes must be collected "at the same time and in the same manner as the locality's taxes are collected . . . ."[381] The City and CVAS 2 had opposing views as to the operation of the statutory phrase "at the same time and in the same manner . . . ."[382]

The court, however, concluded that this phrase means exactly what it says—"a special tax must be collected in accordance with the procedural provisions that govern the collection of 'the locality's taxes,'" and the timing of collection is determined by the time when the locality's taxes are collected.[383] Consequently, in this case, the City could "collect delinquent special taxes only at the time when the City properly [sought] to collect delinquent real estate taxes under Code § 58.1-3965."[384]

Like special taxes, a CDA also "has the ability to have a 'special assessment . . . imposed by the local governing body.'"[385] However, "as with special taxes, the [CDA] does not have the power to levy and collect the special assessment itself."[386] The General Assembly's method for a locality to collect such special assessments is set forth in section 15.2-5158(A)(5).[387] Unlike a special tax, a special assessment must be collected as a lien.[388] Further, the method by which a delinquent special assessment is collected differs significantly from the method in which a delinquent special tax is collected.[389] That is, a special assessment need not be collected "at

379. *Id.* at 111, 766 S.E.2d at 916.

380. *Id.* (citing VA. CODE ANN. § 15.2-5158(A)(3) (Repl. Vol. 2012)).

381. *Id.* (quoting VA. CODE ANN. § 15.2-5158(A)(3) (Repl. Vol. 2012)).

382. *Id.*

383. *Id.* at 111–12, 766 S.E.2d at 916 (citing VA. CODE ANN. § 15.2-5158(A)(3) (Repl. Vol. 2012)).

384. *Id.* at 112, 766 S.E.2d at 917.

385. *Id.* at 113, 766 S.E.2d at 917 (quoting VA. CODE ANN. § 15.2-5158(A)(5) (Repl. Vol. 2012)).

386. *Id.* (citing VA. CODE ANN. § 15.2-5158(A)(5) (Repl. Vol. 2012)).

387. *Id.* (citing VA. CODE ANN. § 15.2-5158(A)(5) (Cum. Supp. 2015)).

388. *Id. Compare* VA. CODE ANN. § 15.2-5158(A)(3) (Cum. Supp. 2015), *with* VA. CODE ANN. § 15.2-5158(A)(5) (Cum. Supp. 2015).

389. *CVAS 2*, 289 Va. at 113, 766 S.E.2d at 917. *Compare* VA. CODE ANN. § 15.2-

the same time and in the same manner" as another type of locality's taxes, but also, the real estate may not be sold in order to collect a delinquent special assessment.[390]

"Having laid out the statutory framework," the court then addressed "whether the circuit court erred in entering the decree of sale."[391] The court concluded that "the City's suit, filed on June 13, 2013, to collect those delinquent real estate taxes was premature."[392] Pursuant to Virginia Code section 58.1-3965, the earliest a suit can be brought to collect outstanding real estate taxes is the December 31 two years after the anniversary of when the taxes became due, which in this case, would have been December 31, 2013.[393] The court noted that "a suit to sell real estate to collect delinquent taxes on . . . property is purely a creature of statute."[394] As such, "[a] party's ability to 'enforce' such a statutory right, 'rest[s] upon compliance with the statute.'"[395] In this case, the City failed to strictly comply with the time requirements of section 58.1-3965(A).[396]

Turning next to the issue of the collection of special assessments, the court first distinguished between "special taxes," governed by section 15.2-5158(A)(3), and "special assessments," governed by section 15.2-5158(A)(5).[397] "A special tax must come as an 'annual request' by the [CDA] for the locality to 'levy and collect' that tax so as to 'finance the services and facilities provided by' the [CDA]."[398] On the other hand, "a special assessment arises from 'improvements' to 'the services and facilities' provided 'to abutting property within the district' under the [CDA's] over-

5158(A)(3) (Cum. Supp. 2015), *with* VA. CODE ANN. § 15.2-5158(A)(5) (Cum. Supp. 2015).

390. *CVAS 2*, 289 Va. at 114, 766 S.E.2d at 917. *Compare* VA. CODE ANN. § 15.2-5158(A)(3) (Cum. Supp. 2015), *with* VA. CODE ANN. § 15.2-5158(A)(5) (Cum. Supp. 2015).

391. *CVAS 2*, 289 Va. at 115, 766 S.E.2d at 918.

392. *Id.* at 116, 766 S.E.2d at 918 (citing VA. CODE ANN. 58.1-3965(A) (Cum. Supp. 2015)).

393. *Id.* (citing VA. CODE ANN. § 58.1-3965 (Cum. Supp. 2015)).

394. *Id.*

395. *Id.* (quoting Isle of Wight Materials Co., Inc. v. Cowling Bros., Inc., 246 Va. 103, 105, 431 S.E.2d 42, 43 (1993)).

396. *Id.* at 116, 766 S.E.2d at 918–919.

397. *Id.* at 118, 766 S.E.2d at 920. *Compare* VA. CODE ANN. § 15.2-5158(A)(3) (Repl. Vol. 2012), *with* VA. CODE ANN. § 15.2-5158(A)(5) (Repl. Vol. 2012).

398. *CVAS 2*, 289 Va. at 118, 766 S.E.2d at 920 (citing VA. CODE ANN. § 15.2-5158(A)(3) (Repl. Vol. 2012)).

sight."[399] Determining whether an obligation is a special tax or a special assessment for purposes of the Code is a mixed question of law and fact.[400] Given the insufficiency of the record on this question, the court declined to make the factual finding, holding instead that it need not decide the issue, since "the circuit court erred as a matter of law in entering the decree of sale regardless of whether the delinquent special assessments [were] categorized as special taxes or special assessments."[401]

Assuming the special assessments were actually special taxes, the collection of those special taxes would be governed by section 15.2-5158(A)(3) and the timing of that collection would be "dictated by when the City could collect such delinquent real estate taxes" under a special assessment section 58.1-3965(A).[402] "Because the City did not strictly comply with the time period in Code §§ 15.2-5158(A)(3) and 58.1-3965(A) . . . the City had no authority under those statutes to bring suit to sell CVAS 2's real estate as a means to collect delinquent special taxes."[403]

"The collection of a delinquent 'special assessment' on behalf of a [CDA] is governed by Code § 15.2-5158(A)(5)."[404] Pursuant to this subsection, special assessments "may be collected as a lien upon the property if the locality has passed an ordinance allowing for special assessments to be made effective in such a manner."[405] "[T]he plain language of Code § 15.2-5158(A)(5) does not invoke the authority under § 58.1-3965(A) to sell real estate subject to a special assessment."[406] Again, because the City did not strictly comply with the statute, the City had no authority "to bring suit to sell CVAS 2's real estate as a means to collect the delinquent special assessments."[407] For these reasons, the judgment of the circuit court was reversed.[408]

399. *Id.* (citing VA. CODE ANN. § 15.2-5158(A)(5) (Repl. Vol. 2012)).

400. *Id.* at 127, 766 S.E.2d at 925 (Powell, J. concurring) (quoting Smyth Cty. Comm. Hosp. v. Town of Marios, 259 Va. 328, 366, 527 S.E.2d 401, 405 (2000)).

401. *Id.* at 120, 766 S.E.2d at 921.

402. *Id.*

403. *Id.* at 121, 766 S.E.2d at 922.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.* at 122, 766 S.E.2d at 922.

408. *Id.*

M. *Statute of Limitations*

Commonwealth ex rel. Fair Housing Board v. Windsor Plaza Condominium Ass'n, Inc.,[409] involved two consolidated appeals in which the court considered various issues arising under the Virginia Fair Housing Law ("VFHL")[410] and the Federal Fair Housing Amendments Act ("FHAA") of 1988.[411] "Michael Fishel . . . filed complaints with the Virginia Fair Housing Board (FHB) and the United States Department of Housing and Urban Development (HUD), alleging that Windsor Plaza Condominium Association (Windsor Plaza) had discriminated against him in violation of the VFHL and the FHAA."[412] Fishel's complaint was based on the fact that Windsor was unable to provide him with a handicap accessible parking space.[413]

After the FHB conducted an investigation and "determined that reasonable cause existed to believe that Windsor Plaza had engaged in a 'discriminatory housing practice . . . in violation of . . . Code § 36-96.3(B)(ii)[,]' . . . the Office of the Attorney General, on behalf of the Commonwealth, filed a complaint against Windsor Plaza in the Circuit Court of Arlington County."[414] Plaintiffs alleged "that Windsor Plaza had . . . [failed] 'to make reasonable accommodations . . . necessary to afford [Fishel] equal opportunity to use and enjoy [his] dwelling.'"[415]

Fishel and his wife moved to intervene in the Commonwealth's lawsuit pursuant to Virginia Code section 36-96.16(B).[416] The Fishels also lodged a "Complaint in Intervention" alleging that "Windsor Plaza had violated the VFHL by refusing their request for a reasonable accommodation."[417] The Fishels also asserted ad-

409. *See* Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n, Inc., et al., 289 Va. 34, 768 S.E.2d 79 (2014).

410. *Id.* at 43, 768 S.E.2d at 82; *see* VA. CODE ANN. § 36-96.1 (Repl. Vol. 2014) (stating that chapter 5.1 of the Virginia Code is the Virginia Fair Housing Law).

411. *Windsor*, 289 Va. at 43, 768 S.E.2d at 82; *see* 42 U.S.C. § 3601 (2012).

412. *Windsor*, 289 Va. at 43, 768 S.E.2d at 82.

413. *See id.* at 45–46, 768 S.E.2d at 84 (responding to the complaint, Windsor claimed all garage spaces were individually owned and it could not force any individual parking space owner to give up or trade his/her space in order to accommodate Fishel).

414. *Id.* at 43, 768 S.E.2d at 82.

415. *Id.*

416. *Id.*; *see* VA. CODE ANN. § 36-96.16 (B) (Repl. Vol. 2014 & Cum. Supp. 2015).

417. *See Windsor*, 289 Va. at 43, 768 S.E.2d at 82.

ditional causes of action based on the allegedly discriminatory practices of Windsor Plaza.[418] The circuit court granted the motion to intervene.[419] Windsor Plaza then filed "a plea in bar to the Fishels' intervening complaint, arguing that the Fishels' new state and federal fair housing claims were barred by the applicable statute of limitations."[420] "After a hearing . . . the circuit court sustained Windsor Plaza's plea in bar to the Fishels' complaint."[421]

The case proceeded to trial, and "at the close of the Commonwealth's case-in-chief, Windsor Plaza moved to strike the Commonwealth's evidence and for summary judgment."[422] "The circuit court granted the motion."[423] The Commonwealth and the Fishels filed separate appeals, which the court considered together.[424]

The Fishels' appeal included multiple assignments of error, the second of which was that the circuit court erred in "applying the statute of limitations period in Code § 36–36-96.18(B) to their additional claims brought when they intervened" in the Commonwealth's case.[425] According to the Fishels, they intervened in the Commonwealth's action pursuant to section 36-96.16, and under subsection B, intervention "as of right."[426] The Fishels argued that "there is no statute of limitations for intervention under Rule 3:14 or Code § 36-96.16 and that circuit courts instead exercise their sound discretion in permitting intervention."[427]

In response, Windsor Plaza argued that sections 36-96.16 and 36-96.18 should be construed together, meaning that "the statute of limitations period in Code § 36-96.18 [would apply] to the Fishels' new claims."[428] Importantly, the Fishels not only intervened in the Commonwealth's case, but they also filed an inter-

418. *Id.* at 43, 768 S.E.2d at 82–83.
419. *Id.* at 43, 768 S.E.2d at 83.
420. *Id.*
421. *Id.* at 44, 768 S.E.2d at 83.
422. *Id.* at 44–45, 768 S.E.2d at 83.
423. *Id.* at 45, 768 S.E.2d at 83.
424. *Id.*
425. *Id.* at 58, 768 S.E.2d at 90.
426. *Id.* at 61, 768 S.E.2d at 92.
427. *Id.*
428. *Id.* at 61–62, 768 S.E.2d at 92.

vening complaint which raised additional causes of action separate and apart from the Commonwealth's complaint.[429]

Section 36-96.16(B) enables an "aggrieved person" to intervene in the Commonwealth's civil action.[430] This section does not include a statute of limitations for claims made through intervention.[431] However, section 36-96.18(A), which permits "aggrieved persons" to file original civil actions alleging "discriminatory housing practices," does contain a limitations period.[432] Notably, "[t]he statutory language gives no indication that an intervenor's civil action should be immune from the statute of limitations normally applicable to claims brought by aggrieved persons."[433] In fact, both statutes use the term "aggrieved person" to describe a private party plaintiff.[434] Thus, the court held that "[w]hen an aggrieved person not only intervenes in a civil action, but also files a new claim not previously asserted, the applicable statute of limitations applies to that new claim."[435] Therefore, "the circuit court did not err in applying the statute of limitations in Code § 36-96.18."[436]

Multiple circuit court opinions discussing statutes of limitations are also worthy of inclusion in this discussion. *Graham v. United Services Automobile Ass'n* dealt with a contractual limitations provision contained in a fire insurance policy.[437] In *Massie v. Blue Cross & Blue Shield*, the Supreme Court of Virginia held that contractual limitation provisions were not subject to the tolling provisions of Virginia Code section 8.01-229(E), which would

429. *Id.* at 62, 768 S.E.2d at 92.

430. VA. CODE ANN. § 36-96.16 (B) (Repl. Vol. 2014 & Cum. Supp. 2015).

431. *Id.*

432. *See* VA. CODE ANN. § 36-96.18(B) (Repl. Vol. 2014 & Cum. Supp. 2015). The Virginia Code states:

> An aggrieved person may commence a civil action under §36-96.18(A) no later than 180 days after the conclusion of the administrative process with respect to a complaint or charge, or not later than two years after the occurrence or the termination of an alleged discriminatory housing practice, whichever is later.

Id.

433. *Windsor*, 289 Va. at 62, 768 S.E.2d at 93.

434. *Id.*

435. *Id.* at 63, 768 S.E.2d at 93.

436. *Id.*

437. Graham v. United Servs. Auto. Ass'n, 89 Va. Cir. 94, 94–95 (2014) (Prince William County).

otherwise allow a plaintiff a minimum of six months in which to refile following a nonsuit.[438] In the intervening years, several federal cases held that where a limitations provision was statutorily mandated, as in the case of a standard fire insurance policy, the limitations provision was the functional equivalent of a statute of limitations and subject to tolling under section 8.01-229(E).[439] However, Judge Johnston declined to follow suit and, after a detailed analysis of Title 38.2, he concluded that "there is nothing in the statutory scheme . . . which evinces an intent by the legislature to convert insurance contracts to something besides contracts of insurance, such as statutes of limitation."[440] Accordingly, he concluded that a special assessment, section 8.01-229(E)'s tolling provision did not apply to contractual limitations provisions even where the provision is statutorily mandated.[441]

A second tolling case of note is *Law v. PHC-Martinsville, Inc.*[442] In this medical malpractice case, the plaintiff initially filed and then nonsuited her case having to do with certain medication administered by defendants.[443] In her refiled action, plaintiff expanded upon her allegations to state that "the hospital made an ill-advised arbitrary decision to substitute Doripenem for Merrem in all situations where the ordered [sic] physician prescribed Merrem, and that 'the hospital failed to promulgate the results of this decision regarding Doripenem/Merrem to nurses and/or staff physicians."[444] These allegations did not appear in the previously filed action.[445] Judge Greer observed that there was no appellate decision directly on point and that the reported trial court decisions are in conflict as to whether to apply the "same evidence" test or the "same transaction" test.[446] Clearly, in the Judge's view,

438. Massie v. Blue Cross & Blue Shield, 256 Va. 161, 162, 165, 500 S.E.2d 509, 510–11 (1998).

439. *See, e.g.*, Vaughan v. First Liberty Ins. Corp., No. 3:09cv364, 2009 U.S. Dist. LEXIS 108045, at *8–9, *14–15 (E.D. Va. Nov. 13, 2009); Zaeno Int'l, Inc. v. State Farm Fire & Cas., 152 F. Supp. 2d 882, 884–85 (E.D. Va. 2001); Erie Ins. Exch. v. Clover, No. 5:98CV00092, 2000 U.S. Dist. LEXIS 14282, at *11–16 (E.D. Va. Sept. 1, 2000).

440. *Graham*, 89 Va. Cir. at 94–95, 97.

441. *Id.* at 95–96, 98.

442. Law v. PHC-Martinsville, Inc., 89 Va. Cir. 231, 232 (2014) (Martinsville City).

443. *Id.* at 231–32.

444. *Id.* at 232.

445. *Id.*

446. *Id.* (citing Dunston v. Huang, 709 F. Supp. 2d 414 (E.D. Va. 2010) (applying the "same transaction" test); Lawton-Gunter v. Meyer, 88 Va. Cir. 327 (2014) (Roanoke City) (applying the "same evidence" test)).

applying the "same evidence" test would result in striking this portion of plaintiff's claim as time-barred, whereas all of the allegations in plaintiff's refiled action arose out of the same transaction or occurrence.[447] Between these two alternatives, the Judge found *Dunston v. Huang*'s "same transaction" test more persuasive and followed it.[448]

Finally, there is *Newman v. Freeman Homes, Inc.*[449] This case arose in connection with the sale of a new home and involved claims of breach of contract, breach of warranty, negligence, and fraud.[450] Plaintiff took an initial nonsuit as to the warranty claims.[451] A second nonsuit, approximately fourteen months later, went to the breach of contract claim and, as it was the sole remaining claim at the time, this nonsuit ended the action.[452] The refiled action was filed within six months of the final nonsuit, but more than six months from the initial one.[453] Thus, the notable issue was whether section 8.01-229(E)'s tolling provision applied to the warranty claims.[454] Relying on *McKinney v. Virginia Surgical Associates*,[455] Judge Martin held that the final nonsuit and section 8.01-229(E)'s tolling provision applied to plaintiff's "cause of action" which subsumed at least two "rights of action," for example, breach of contract and breach of warranty.[456] Thus, both were held to have been timely refiled.[457]

N. *Offset of Settlement Amounts*

RGR, LLC v. Settle involved a "wrongful death action arising out of a collision at a private railroad crossing."[458] "RGR, LLC (RGR) appeal[ed] the jury's verdict awarding $2.5 million to Georgia Settle (Mrs. Settle) for the death of her husband, Charles

447. *PHC-Martinsville*, 89 Va. Cir. at 232.
448. *Id*. at 233.
449. Newman v. Freeman Homes, Inc., 89 Va. Cir. 377 (2014) (Norfolk City).
450. *Id*. at 377–78.
451. *Id*. at 378.
452. *Id*. at 380.
453. *Id*.
454. *See id*. at 379–80.
455. 284 Va. 455, 732 S.E.2d 27 (2012).
456. *Newman*, 89 Va. Cir. at 379–80.
457. *Id*. at 379–80.
458. 288 Va. 260, 268, 764 S.E.2d 8, 12 (2014).

E. Settle, Sr. (Settle)."[459] "Settle was fatally injured when a train owned and operated by Norfolk Southern Corporation (Norfolk Southern) [hit] the dump truck that he was [driving]."[460] "Adjacent to the railroad tracks" where the accident occurred, RGR "operated a business offloading lumber from train cars and reloading it onto tractor-trailers."[461] On the day of the accident, RGR's lumber was stacked near the railroad tracks, allegedly blocking Settle's view of the approaching train.[462] In her wrongful death action, Mrs. Settle named "RGR, Norfolk Southern, and two other commercial business entities as defendants."[463] "[She] alleged that the defendants created a hazardous condition by stacking lumber near the railroad tracks, breached their duty of reasonable care, . . . and failed to take reasonable steps to make the railroad crossing safe."[464] "Before [the] trial, the claim against Norfolk Southern was settled."[465] At trial, "[t]he jury returned a verdict for Mrs. Settle in the amount of $2.5 million, along with pre-judgment interest."[466]

Both parties agreed, however, to suspend entry of the circuit court's final order "to address the parties' disagreement on how to calculate the offset of the $500,000 settlement Mrs. Settle obtained from Norfolk Southern, pursuant to Code § 8.01-35.1 (A)(1)."[467] Mrs. Settle argued that section 8.01-35.1(A)(1) "require[s] that the settlement amount be deducted from the sum of the $2.5 million verdict plus the prejudgment interest awarded by the jury."[468] RGR asserted that the amount of the settlement "should be subtracted from the $2.5 million jury award, with prejudgment interest then calculated on the difference."[469] The circuit court agreed with Mrs. Settle's calculation and "entered judgment against RGR in the amount of $2,585,205.48."[470]

459. *Id*.
460. *Id*.
461. *Id*. at 269, 764 S.E.2d at 12.
462. *Id*.
463. *Id*.
464. *Id*.
465. *Id*. at 274, 764 S.E.2d at 15.
466. *Id*.
467. *Id*.
468. *Id*.
469. *Id*.
470. *Id*. at 274, 764 S.E.2d at 15–16.

On appeal, RGR challenged the circuit court's decision to adopt Mrs. Settle's calculation of the offset under section 8.01-35.1.[471] RGR argued that the phrase "principal sum awarded," as used in Virginia Code section 8.01-382, should only include the principal amount awarded, not prejudgment interest or post-judgment interest.[472] In this case, that would mean that the settlement amount would be deducted from the jury award of $2.5 million.[473]

"In response, Mrs. Settle [asserted] that the phrase 'amount recovered' in Code § 8.01-35.1 'unmistakably' means the amount of damages awarded plus any prejudgment interest."[474] "[B]ecause prejudgment interest is 'normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered,'" Mrs. Settle argued "that the term 'amount recovered' cannot be interpreted to mean only the 'principal sum awarded' as used in Code § 8.01-382."[475]

In construing the two statutes, the court concluded that "the purposes underlying Code § 8.01-35.1 require that the $500,000 settlement amount be subtracted from the $2.5 million damage award before calculating the prejudgment interest also awarded by the jury."[476] The circuit court's construction of section 8.01-35.1 negated the offset benefit to the non-settling tortfeasor "by requiring the non-settling tortfeasor to pay interest on the offset amount."[477] In other words, RGR should not be required to pay interest on the $500,000 paid by Norfolk Southern in settlement with Mrs. Settle.[478] And so, on the issue of the calculation of the offset, the court "reverse[d] the circuit court's judgment and remand[ed] for further proceedings."[479]

471. *Id.* at 294, 764 S.E.2d at 27.
472. *Id.* at 294, 764 S.E.2d at 27–28.
473. *Id.* at 294, 764 S.E.2d at 27.
474. *Id.* at 294, 764 S.E.2d at 28.
475. *Id.* (quoting Shepard v. Capitol Foundry of Va., 262 Va. 715, 722, 554 S.E.2d 72, 76 (2001)).
476. *Id.* at 296, 764 S.E.2d at 29.
477. *Id.*
478. *Id.*
479. *Id.*

O. *Equitable Tolling*

In *Birchwood-Manassas Associates, L.L.C. v. Birchwood at Oak Knoll Farm, L.L.C.*, the Supreme Court of Virginia refused to extend the doctrine of equitable tolling to situations where self-dealing or breach of fiduciary duty prevented the plaintiff from bringing suit.[480] As the names of the parties imply, this case dealt with related entities under common ownership and management.[481] A member of Birchwood-Manassas brought suit seeking dissolution and appointment of a liquidating trustee for the LLC.[482] The trustee demanded immediate repayment and brought suit on behalf of Birchwood-Manassas against related entities to collect on various loans and transfers as reflected on the company's books.[483] There were no formal loan documents or terms of repayment.[484] As the obligations being sued upon were more than three years old, all parties agreed they were time-barred unless equitable tolling applied.[485] Citing *Brunswick Land Corp. v. Perkinson*, the trustee argued that the conflict of interest and breach of fiduciary duty by the managers of the LLC in failing to seek repayment within the statute of limitations against other related entities they also owned and controlled should be recognized as grounds for equitable tolling.[486] The Supreme Court of Virginia reaffirmed the doctrine of equitable tolling as it had previously been recognized, for example, "where fraud prevents the plaintiff from asserting its claims," or where the defendant "has by affirmative act deprived the plaintiff of his power to assert his cause of action in due season."[487] The court, however, expressly declined to extend the doctrine any further, including affiliated entities with overlapping management, noting in this case that any member of the LLC could have brought a derivative action at any time.[488] Holding that Birchwood-Manassas had "sle[pt] on their rights,"

480. 289 Va. __, __, 773 S.E.2d 162, 164 (2015).
481. *Id.* at __,773 S.E.2d at 162–63.
482. *Id.*
483. *Id.*
484. *Id.*
485. *Id.*
486. *Id.* at __, 773 S.E.2d at 164 (citing Brunswick Land Corp. v. Perkinson, 153 Va. 603, 608, 151 S.E.2d 138, 140 (1930)).
487. *Id.* (quoting *Brunswick Land Corp.*, 153 Va. at 608, 151 S.E.2d at 140).
488. *Id.*

the court affirmed the trial court's dismissal of the trustee's action.[489]

P. *Virginia Consumer Protection Act*

The Supreme Court of Virginia clarified the standard of proof in actions brought under the VCPA in *Ballagh v. Fauber Enterprises, Inc.*[490] The case involved allegations of fraud and misrepresentation by the seller of real estate related to water leaks in the basement.[491] As to the plaintiffs' claims under Virginia Code sections 59.1-200(A)(6) and 59.1-200(A)(14) of the VCPA, the parties presented conflicting jury instructions regarding the burden of proof.[492] The trial court accepted the defendants' argument that the VCPA claims were akin to common law fraud, which is subject to a "clear and convincing" standard.[493] The trial judge gave this instruction, and the jury returned a verdict for the defense.[494] On appeal, the Supreme Court of Virginia analyzed the VCPA and found no indication of intent by the General Assembly to apply anything other than the normal preponderance standard to actions under the Act.[495] Accordingly, the verdict was set aside and the matter was remanded for a new trial.[496]

Q. *Judicial Estoppel*

In *Harvard v. Shore Bank*, Judge Poston provided an excellent analysis of the doctrine of judicial estoppel or estoppel by "inconsistent positions."[497] The factual background of the case is rather

489. *Id.* (quoting Chesapeake & Ohio Ry. Co. v. Willis, 200 Va. 299, 306, 105 S.E.2d 833, 839 (1958)).

490. 289 Va. __, __, 773 S.E.2d 366, 368 (2015) (indicating the preponderance standard applies to new statutory causes of actions unless expressly stating otherwise).

491. *Id.* at __, 773 S.E.2d at 367.

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.* at __, 773 S.E.2d at 368 (reasoning the General Assembly chose to include express direction in the VCPA, and the court must give such direction full effect by construing "remedial legislation" liberally, in favor of the injured party); *see* VA. CODE ANN. § 59.1-197 (Repl. Vol. 2015) (indicating the VCPA "shall be applied as remedial legislation to promote fair and ethical standards of dealings between supplies and the consuming public").

496. *Ballagh*, 289 Va. at __, 773 S.E.2d at 370.

497. Harvard v. Shore Bank, 89 Va. Cir. 328, 331–34 (2014) (Norfolk City), *rev'd on*

dense. At issue was the severance compensation due to the former President of Shore Bank under his employment agreement and the effects of such executive compensation agreements in relation to the Troubled Assets Relief Program ("TARP") legislation.[498] In connection with the plea at bar, Shore and Hampton Roads Bankshares argued that they were both "TARP fund recipients" for purposes of application of TARP's restrictions on "golden parachute" payments to executives.[499] Significantly, the circuit court denied the plea.[500] Later, the banks took a contradictory position and the plaintiff sought to invoke the doctrine of judicial estoppel.[501] After summarizing the doctrine of judicial estoppel, the court focused on the element requiring the court to have "relied" on the position taken by the adverse party in order to invoke judicial estoppel.[502] This element has been interpreted to mean that the party against whom judicial estoppel is invoked must have prevailed in their prior inconsistent position.[503] However, relying primarily on *Virginia Electric & Power Co. v. Norfolk Southern Railway*,[504] Judge Poston held that "relied upon" merely required the position to have been relevant to a prior ruling and did not require that the party prevailed in their original position.[505]

R. *Relation Back*

In *Rife v. Buchanan County Hospice*, Judge Johnson weighed in on an issue dividing the circuit courts in Virginia related to the application of Virginia Code section 8.01-6.1.[506] This section states

other grounds, 2015 Va. LEXIS 95 (2015).

498. *Id.* at 328–31; *see generally* 12 U.S.C. § 52 (2008) (granting the Secretary of the Treasury the authority to purchase and insure certain types of troubled assets from financial institutions in order to provide liquidity to such institutions).

499. *Harvard*, 89 Va. Cir. at 330–31 (quoting 111 Pub. L. No. 111-5, § 7001, 123 Stat. 517 (2009) & 31 C.F.R. § 30.1 (2009)).

500. *Id.* at 331.

501. *Id.*

502. *Id.*

503. *Id.* (citing Matthews v. Matthews, 277 Va. 522, 529, 675 S.E.2d 157, 161 (2009); Bentley Funding Grp. v. SK&R Grp., 269 Va. 315, 327, 609 S.E.2d 49, 54–55 (2005)).

504. Virginia Elec. & Power Co. v. Norfolk S. Ry. Co., 278 Va. 444, 463, 683 S.E.2d 517, 528 (2009).

505. *Harvard*, 89 Va. Cir. 328, 332 (2014) (Norfolk City), *rev'd on other grounds*, 2015 Va. LEXIS 95 (2015).

506. Rife v. Buchanan Cty. Hospice, 89 Va. Cir. 396, 399 (2015) (Buchanan County).

that a claim or defense will "relate back" if: (i) the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading; (ii) the amending party was reasonably diligent in asserting the amended claim or defense; and (iii) parties opposing the amendment will not be substantially prejudiced.[507]

The case arose in connection with the hospice care of plaintiff's decedent.[508] The case was originally filed on a theory of respondeat superior.[509] Later, the case was amended to add several additional allegations, including one of negligent retention of certain employees.[510] The case was nonsuited and refiled, however, this is not another tolling case under section 8.01-229(E).[511] Rather, the issue had to do with whether the additional allegations related to negligent retention in the original action were timely as this amendment was filed more than two years after the date of the injury.[512] The opinion notes that reported circuit court decisions are split as to whether the statute was intended merely to codify the Supreme Court of Virginia's "cause of action" analysis in *Vines v. Branch* or to articulate a new and different test for relation back.[513] As between these approaches, the Judge stated: "the Court is of the opinion that Code § 8.01-6.1 . . . reflects the common law test as enunciated in *Vines*; when a new claim is added in amended complaint, it does not relate back to the original complaint under Code § 8.01-6.1."[514] Conversely, "[w]here an amended complaint merely expounds the factual allegations previously made, a new cause of action has not been introduced."[515]

507. VA. CODE ANN. § 8.01-6.1 (Repl. Vol. 2015).

508. *Rife*, 89 Va. Cir. at 396.

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.* at 397–98.

513. *Rife*, 89 Va. Cir. at 398–400; *see* Vines v. Branch, 244 Va. 185, 185, 418 S.E.2d 890, 891 (1992). *Compare* Swanson v. Woods Serv. Ctr., Inc., 71 Va. Cir. 281, 282 (2006) (Roanoke County) (holding the statute a codification of common law), *with* Clark v. Britt, 79 Va. Cir. 60, 66 (2009) (Fairfax County) (holding the statute to be a "clear and unambiguous departure" from the common law).

514. *Rife*, 89 Va. Cir. at 400.

515. *Id.*

S. *Electronically Stored Information and Spoliation*

Noting that "[t]here is a dearth of Virginia case law on the subject of ESI discovery," Judge Carson provided a useful analytical framework in *Huff v. Winston*.[516] The case involved an allegedly wrongful termination; however, the framework set out in the opinion can be adapted to virtually any case.[517] The judge started off with the statement that "[i]n evaluating this or any discovery dispute, of critical importance to this [c]ourt, and consistent with the Rules governing discovery of ESI, is the concept of reasonableness."[518] The circuit court then set out a five part analysis:

> 1. Is the contemplated discovery reasonably calculated to lead to the discovery of admissible evidence?
> 2. Is the discovery reasonably narrow in its scope?
> 3. If the responding party is objecting to the discovery on the basis that it is burdensome or costly, what is the burden to the responding party as compared to the potentially prejudicial effect to the requesting party if the discovery is limited or quashed?
> 4. After some showing by the responding party regarding the estimated cost of production, is it most reasonable to leave the costs associated with production with the responding party; or is some shifting of costs more reasonable; or in a particular case is it most reasonable to simply determine that production costs are a taxable cost that the court can award to the prevailing party at the conclusion of the litigation?
> 5. Finally, in their dealings leading up to their appearance in court, have the parties conferred and reasonably attempted to resolve their dispute as specifically contemplated by Rule 4:12(a)(2)?[519]

Applying the above framework, the judge ended up ordering most, but not all, of the discovery sought.[520] No fee shifting was ordered, nor were fees awarded for bringing the motion to compel, which prompted the circuit court's ruling.[521] Emphasizing the need and expectation of communication and cooperation among counsel, the circuit court's concluding statement was:

> ESI matters are inherently complex, involving multifaceted and ever-changing technology, which necessarily requires communication

516. 89 Va. Cir. 429, 431 (2015) (Roanoke County).
517. *Id*. at 429.
518. *Id*. at 431.
519. *Id.*
520. *Id*. at 432.
521. *Id*. at 432–33.

> and compromise between counsel in the event of a dispute . . . . Thus, I both contemplate and expect that counsel will confer with one another to shore up any remaining details in order to comply with my rulings, *supra.*[522]

The reverse situation was presented in *Bannon v. Bannon*, a divorce action where the defendant materially impeded electronic discovery by, among other things, reformatting the hard drive on a personal computer containing the couple's financial records and refusing to produce mobile digital devices containing potentially relevant evidence.[523] Citing various authorities from both Virginia and elsewhere, Judge Harris invoked the adverse inference sanction for spoliation of evidence and held that such information had it been made available, would have tended to prove defendant's adultery and secretion and waste of marital assets.[524] The treatises and cases cited in the opinion provide useful supporting authorities for those pursuing spoliation claims.[525]

II. AMENDMENTS TO RULES OF COURT

A. *The Judicial Performance Evaluation Program*

By an order dated October 31, 2014, and effective immediately, the Supreme Court of Virginia promulgated Rule 9:1, defining the purpose and operation of the Judicial Performance Evaluation ("JPE") program.[526] Established pursuant to Virginia Code section 17.1-100, the purpose of Virginia's JPE program is twofold: (1) providing a mechanism for judge self-improvement and (2) providing a source of information for the re-election of judges by the General Assembly.[527]

New Rule 9:2 ensures that all surveys, responses, evaluations, and other records created or maintained as a part of the JPE program will remain confidential.[528] JPE program records are not to

522. *Id.* at 433.

523. Bannon v. Bannon, 89 Va. Cir. 274, 275–76 (2014) (Hanover County).

524. *Id.*

525. *See id.* at 274–76.

526. Order Amending Rule 9:1, Rules of the Supreme Court of Virginia (Oct. 31, 2014) (effective immediately), http://www.courts.state.va.us/courts/scv/amendments_tracked/rule_9_1_interlineated.pdf.

527. VA. SUP. CT. R. 9:1 (Repl. Vol. 2015).

528. VA. SUP. CT. R. 9:2 (Repl. Vol. 2015).

be disclosed to any third party, unless a report is provided to the General Assembly, at which point the evaluation will be a public record.[529]

B. *Admission to Practice*

On October 31, 2014, the Supreme Court of Virginia amended Rule 1A:1, relating to admission to practice in the Commonwealth without examination stating:

> Any person who has been admitted to practice law before the court of last resort of any state or territory of the United States or of the District of Columbia may file an application to be admitted to practice law in this Commonwealth without examination, if counsel licensed to practice law in this Commonwealth may be admitted in that jurisdiction without examination.[530]

The regulations governing applications for admission to the Virginia Bar have also been revised.[531] Specifically, section (a) of the Rule, which discusses reciprocity, has been edited to eliminate the requirement that an applicant must have passed the bar examination in another jurisdiction.[532] Now, the Virginia Board of Bar Examiners may consider an application for admission without examination from persons who have been admitted to practice in courts of other jurisdictions, provided the other jurisdiction permits lawyers licensed in Virginia to be admitted to practice without examination.[533]

C. *Virginia Rules of Evidence*

The Supreme Court of Virginia's order dated November 12, 2014, effective July 1, 2015, amended Part Two of the Virginia Rules of Evidence in two significant ways.[534] First, the court add-

529. Order Amending Rule 9:2, Rules of the Supreme Court of Virginia (Oct. 31, 2014) (effective immediately), http://www.courts.state.va.us/courts/scv/amendments_tracked/rule_9_2_interlineated.pdf; R. 9:2 (Repl. Vol. 2015).

530. Order Amending Rule 1A:1, Rules of the Supreme Court of Virginia (Oct. 31, 2014) (effective immediately), http://www.courts.state.va.us/courts/scv/amendments_tracked/2014_1031_update.pdf; *see* VA. SUP. CT. R. 1A:1 (Repl. Vol. 2015).

531. Order Amending Rule 1A:1, *supra* note 530; R. 1A:1 (Repl. Vol. 2015).

532. R. 1A:1 (Repl. Vol. 2015).

533. *Id.*

534. Order Amending Rule 2:801, Rules of the Supreme Court of Virginia (Nov. 12, 2014) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments_trac

ed a definition of "Prior Statements" to the definitions section of Article VIII defining Hearsay, stating, in pertinent part: "a prior statement . . . is hearsay if offered in evidence to prove the truth of the matters it asserts, but may be received in evidence for all purposes if the statement is admissible under any hearsay exception provided in Rules 2:803 or 2:804."[535] Furthermore, the amended Rule provides that a prior statement may also be admitted as a "Prior Inconsistent Statement" or a "Prior Consistent Statement."[536]

Additionally, Article VIII of Part Two was amended by modifying the section entitled "Hearsay Exceptions Applicable Regardless of Availability of the Declarant."[537] The court added a new, more encompassing section entitled "Records of Regularly Conducted Activity."[538] The Rule states that a record is admissible under this section if:

> (A) the record was made at or near the time of the acts, events, calculations, or conditions by—or from information transmitted by—someone with knowledge; (B) the record was made and kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making and keeping the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness."[539]

The court first adopted a comprehensive set of evidentiary rules in June 2012, bringing Virginia in line with the vast majority of other states in the country that have adopted rules of evidence.[540]

ked/interlineated_rule_2_801.pdf; Order Amending Rule 2:803, Rules of the Supreme Court of Virginia (Nov. 12, 2014) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments_ tracked/interlineated_rule_2_803.pdf.

535. VA. SUP. CT. R. 2:801 (Repl. Vol. 2015).

536. *Id.*

537. VA. SUP. CT. R. 2:803 (Repl. Vol. 2015).

538. *Id.*

539. *Id.*

540. Order Amending Part Two Virginia Rules of Evidence, Rules of the Supreme Court of Virginia (June 1, 2012) (effective July 1, 2012), http://www.courts.state.va.us/courts/scv/amendments/2012_0525_part_2.pdf.

D. *Discovery*

By an order dated February 27, 2015, effective May 1, 2015, the Supreme Court of Virginia amended Part Four of the Rules, specifically Rule 4:11, which sets forth the guidelines governing requests for admission.[541] The court amended the Rule by adding subsection (e), which set a limit on the number of requests for admission that a party may request of another party.[542] At any one time or cumulatively, a party may serve another party only thirty requests for admission that do not relate to the genuineness of a document.[543] However, if requests for admission are related to the genuineness of documents, then the court does not limit the number of requests available.[544] In the interest of justice, the court will liberally grant leave to propound additional requests or limit requests.[545]

E. *Procedures for Notification to Clients When a Lawyer Leaves a Law Firm or When a Law Firm Dissolves*

On February 27, 2015, the Supreme Court of Virginia approved a petition presented by the Virginia State Bar relating to the addition of Rule 5:8 to Part Six of the Rules of the court.[546] Part Six of the Rules discusses the integration of the State Bar, and new Rule 5:8 sets forth procedures for notification of clients when a lawyer leaves a law firm or when a law firm dissolves.[547] In sum, Rule 5:8 requires that when a lawyer seeks to leave his or her law firm, he or she must confer with an authorized representative of that law firm regarding how to best communicate with the clients regarding future representation.[548] Absent a specific agreement otherwise, neither a lawyer who is leaving a law firm nor other

541. Order Amending Rule 4:11, Rules of the Supreme Court of Virginia (Feb. 27, 2015) (effective May 1, 2015), http://www.courts.state.va.us/courts/scv/amendments_tracked/rule_4_11_interlineated.pdf.

542. VA. SUP. CT. R. 4:11 (Repl. Vol. 2015).

543. *Id*.

544. *Id*.

545. *Id*.

546. Order Amending Rule 5.8, Rules of the Supreme Court of Virginia (Feb. 27, 2015) (effective May 1, 2015), http://www.courts.state.va.us/courts/scv/amendments/2015_02_27_part%206_rule_5_8_vsb.pdf.

547. VA. SUP. CT. R. 5:8 (Repl. Vol. 2015).

548. *Id*.

lawyers in the firm may unilaterally contact clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless the lawyer and the law firm have conferred and been unable to agree on a joint communication to clients.[549] Any communications with clients by a lawyer leaving a law firm, or by members of a dissolving law firm, must not contain false or misleading statements, and must notify the client of his option to choose representation.[550] If a client of a departing lawyer fails to advise the lawyer and law firm of the client's intention with regard to who is to provide future legal services, the client is deemed to be a client of the law firm until the client advises otherwise, or until the law firm terminates the engagement in writing.[551]

F. *Provisional Admission to the Virginia Bar for a Military Spouse*

Through its order dated February 27, 2015, effective immediately, the Supreme Court of Virginia amended Rule 1A:8 of the Rules of the Supreme Court of Virginia, which addresses how a military spouse, upon motion, can be provisionally admitted to the practice of law in Virginia.[552] As amended, the Rule requires approved applicants to take and subscribe to the oath, required of attorneys at law in Virginia, by appearing before the Justices of the Supreme Court of Virginia in Richmond, or by appearing before a judge of a court of record in Virginia.[553] The oath remains effective until the attorney's provisional admission is terminated.[554]

549. *Id.*

550. *Id.*

551. *Id.*

552. Order Amending Rule 1A:8A, Rules of the Supreme Court of Virginia (Feb. 27, 2015) (effective immediately), http://www.courts.state.va.us/courts/scv/amendments_tracked/rule_1a_8_interlineated.pdf. Rule 1A:8 was originally adopted May 16, 2014, and became effective July 1, 2014. VA. SUP. CT. R. 1A:8 (Repl. Vol. 2015).

553. R. 1A:8 (Repl. Vol. 2015).

554. *Id.*

G. *Citation of Supplemental Authorities*

By order entered on April 10, 2015, the supreme court added, amended, and deleted multiple rules.[555] The first change is the addition of Rules 5:6A and 5A:4A, regarding the citation of supplemental authorities.[556] Both Rules state as follows:

> If pertinent and significant authorities come to a party's attention after the party's petition for appeal, brief in opposition, or brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and shall not exceed 350 words. The Court, in its discretion, may refuse to consider the supplemental authorities if they unfairly expand the scope of the arguments on brief, raise matters that should have been previously briefed, appear to be untimely, or are otherwise inappropriate to consider.[557]

H. *Notice of Appeal*

The court's April 10, 2015 order also amended Rule 5:9 regarding the notice of appeal.[558] Subsection (b) provides that a notice of appeal shall alert the court if any transcript or statement of facts will be filed.[559] In the event that a transcript is to be filed, the notice of appeal must certify that a copy of the transcript has been ordered from the court reporter.[560] Alternatively, subsection (b) now provides that if the transcript is already in the possession of the appellant or was previously filed, the notice of appeal should

555. *See Amendments to the Rules of the Supreme Court of Virginia*, OFFICE OF THE EXECUTIVE SECRETARY OF THE SUPREME COURT OF VIRGINIA, http://www.courts.state.va.us/courts/scv/amend.html (last visited Oct. 1, 2015).

556. Order Amending Rule 5:6A & 5A:4A, Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments/2015_0410_rule_5_6a_5_9_5_17_5_18_5_19_5_20_5_20a_5_30_5a_4a_5a_6_5a_12_5a_23.pdf.

557. VA. SUP. CT. R. 5:6A (Repl. Vol. 2015); VA. SUP. CT. R. 5A:4A (Repl. Vol. 2015).

558. Order Amending Rule 5:9 (Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments/2015_0410_rule_5_6a_5_9_5_17_5_18_5_19_5_20_5_20a_5_30_5a_4a_5a_6_5a_12_5a_23.pdf.

559. VA. SUP. CT. R. 5:9 (Repl. Vol. 2015).

560. *Id.*

inform the court of this fact.[561] The court made this same change to Rule 5A:6, which relates to the filing of a notice of appeal with the Virginia Court of Appeals.[562]

I. *Petition for Appeal*

Among other things, Rule 5:17 outlines what a petition filed with the Supreme Court of Virginia must contain.[563] Previously, under a heading entitled "Assignments of Error," the Rule required the petition to list "the specific errors in the rulings below upon which the party intended to rely" on appeal.[564] As amended, the petition may alternatively list the specific existing case law that should be overturned, extended, modified, or reversed.[565] The court made this same change to Rule 5A:12, which sets forth the content requirements for a petition filed with the Court of Appeals of Virginia.[566]

The court's April 10, 2015 order also amended Rule 5:17 by adding a requirement that the appellant send notice of oral argument to counsel for the appellee or any pro se appellee who has filed a brief in opposition or otherwise appeared in the appeal.[567]

J. *Briefing on Appeal*

Among the other amendments effected by the court's order dated April 10, 2015, were changes to the rules governing the filing of appeal briefs. Rule 5:18(b), which governs the form and content of a brief in opposition, was amended to add the requirement that the brief in opposition be signed by at least one counsel of record.[568] The court also amended Rule 5:19, changing the timeline

561. *Id.*

562. VA. SUP. CT. R. 5A:6 (Repl. Vol. 2015).

563. VA. SUP. CT. R. 5:17 (Repl. Vol. 2015).

564. R. 5:17(c)(1) (Repl. Vol. 2015).

565. *Id.*

566. VA. SUP. CT. R. 5A:12 (Repl. Vol. 2015).

567. Order Amending Rule 5:17, Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2014), http://www.courts.state.va.us/courts/scv/amendments/2015_0410_rule_5_6a_5_9_5_17_5_18_5_19_5_20_5_20a_5_30_5a_4a_5a_6_5a_12_5a_23.pdf.

568. Order Amending Rule 5:18, Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2014), http://www.courts.state.va.us/courts/scv/amendments/2015_0410_rule_5_6a_5_9_5_17_5_18_5_19_5_20_5_20a_5_30_5a_4a_5a_6_5a_12_5a_23.pdf.

for submission of a reply brief.[569] When cross-error is assigned in a brief in opposition, the appellant now has fourteen days (as opposed to seven) to file a reply brief with the clerk.[570]

Through its order dated April 10, 2015, effective July 1, 2015, the Supreme Court of Virginia also amended Rules 5:30 and 5A:23.[571] Both Rules now allow a brief amicus curiae to be filed during the petition, perfected appeal or rehearing stages of the appellate proceedings and in proceedings invoking the court's original jurisdiction.[572]

K. *Petition for Rehearing*

The court significantly amended Rule 5:20, which "governs requests for rehearing of the refusal or dismissal of a petition for appeal filed pursuant to Rule 5:17, the refusal of one or more assignments of cross-error, or the disposition of an original jurisdiction petition filed pursuant to Rule 5:7, Rule 5:7A, or Rule 5:7B."[573] As amended, Rule 5:20 incorporates the provisions of old Rule 5:20A and sets forth guidelines regarding the time to file a petition, the filing requirements, oral arguments, notification of the action taken on the petition, and attorney's fees.[574] The court deleted Rule 5:20A.[575]

L. *Petitions for Review*

By an order dated April 10, 2015, effective July 1, 2015, the Supreme Court of Virginia amended Rule 5:17A, and added Rule 5A:38 regarding petitions for review pursuant to Virginia Code section 8.01-626.[576] The court's order resulted in several changes

569. VA. SUP. CT. R. 5:19 (Repl. Vol. 2015).

570. *Id*.

571. Order Amending Rules 5:30 & 5A:23, Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments/2015_0410_rule_5_6a_5_9_5_17_5_18_5_19_5_20_5_20a_5_30_5a_4a_5a_6_5a_12_5a_23.pdf.

572. VA. SUP. CT. R. 5:30(a) (Repl. Vol. 2015); VA. SUP. CT. R. 5A:23(a) (Repl. Vol. 2015).

573. VA. SUP. CT. R. 5:20 (Repl. Vol. 2015).

574. *Id*. Notably, Rule 5:20(c) requires that petitions for rehearing be filed electronically. Subsection (c) enumerates the requirements for electronic filing with the court. *Id*.

575. R. 5:20A (Repl. Vol. 2015).

576. Order Amending Rules 5:17A & 5A:23, Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments/2015_0410_rule_5_17a_5a_38.pdf.

to Rule 5:17A.[577] First, the court addressed the appropriate time for filing.[578] A petition for review must be filed within fifteen days of either, "(i) an order of a circuit court that grants an injunction, refuses an injunction, or dissolves or refuses to enlarge an existing injunction; or (ii) an order of the Court of Appeals deciding a petition for review filed in that court pursuant to Code § 8.01-626."[579] Additionally, the court revised the process for sending a copy of the petition to opposing counsel.[580] The amended Rule provides that "[a]t the same time that the petition is served, a copy of the petition shall also be emailed to counsel for the respondent, unless said counsel does not have, or does not provide, an email address."[581] Notably, the parties may agree to serve the petition solely by email.[582]

The court also amended the requirements regarding the appropriate length of the petition for review and what the petition for review must contain.[583] The Rule now requires that the petition be accompanied by a copy of the pertinent portions of the record of the lower court as well as a certificate that: (1) provides identification and contact information for the parties and their counsel; (2) certifies that a copy of the petition has been served on all opposing counsel; (3) certifies the number of words used; and (4) certifies that the copy of the record being filed is accurate.[584] In addition, the court amended the filing fee requirement, allowing the clerk of the court to file a petition for review that is not accompanied with the fee, as long as the clerk receives the fee within five days of the date the petition of review is filed.[585]

Perhaps the most significant changes to Rule 5:17A are the revisions to subsection (f) describing the scope and review of a petition, and the addition of subsection (g) regarding responsive pleadings.[586] First, the court may consider a petition for review whether the lower court's order on the injunction is temporary or

577. VA. SUP. CT. R. 5:17A (Repl. Vol. 2015).
578. *Id*.
579. R. 5:17A(a) (Repl. Vol. 2015).
580. R. 5:17A(b) (Repl. Vol. 2015).
581. *Id*.
582. *Id*.
583. R. 5:17A(c) (Repl. Vol. 2015).
584. R. 5:17A(c)(ii)–(iii) (Repl. Vol. 2015).
585. VA. SUP. CT. R. 5:17A(e) (Repl. Vol. 2015).
586. R. 5:17A(f)–(g) (Repl. Vol. 2015).

permanent.[587] "If review is sought from a final order that deals with injunctive relief and other issues, a petition for review must address only that part of the final order that actually addresses injunctive relief."[588] "[A] petition for review may be considered by a single Justice of [the] Court, or by a panel of Justices."[589] Additionally, "[a] respondent may file a response to a petition for review within seven days of the date of service . . . unless the [c]ourt specifies a shorter time frame."[590] "Notwithstanding the foregoing, the Court may act on a petition for review without awaiting a response . . . ."[591]

As mentioned above, the court also added Rule 5A:38, which reads nearly identical to Rule 5:17A, except that it relates to petitions for review filed with the Virginia Court of Appeals instead of the Supreme Court of Virginia.[592]

M. *Record on Appeal*

By order dated April 10, 2015, the court slightly modified the language of Rules 5:10 and 5A:7 to clarify that the record on appeal from the trial court must include "the documents and exhibits filed or lodged in the office of the clerk of the trial court, including any report of a commissioner in chancery and the accompanying depositions and other papers . . . ."[593] Previously, these Rules referred to "papers," which has been changed to "documents" to allow for a digital appellate record.[594]

Significantly, the court added two new Rules concerning the preparation and transmission of the digital appellate record: Rule

587. R. 5:17A(f)(i) (Repl. Vol. 2015).

588. *Id*.

589. R. 5:17A(f)(ii) (Repl. Vol. 2015).

590. R. 5:17A(g) (Repl. Vol. 2015).

591. *Id*.

592. Order Amending Rules 5:17A & 5A:38, Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments/2015_0410_rule_5_17a_5a_38.pdf. *Compare* VA. SUP. CT. R. 5:17A (Repl. Vol. 2015), *with* VA. SUP. CT. R. 5A:38 (Repl. Vol. 2015).

593. Order Amending Rule 5:10 & 5A:7, Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments/2015_0410_dig_recs_rule_5_10_5_13a_5_15_5a_7_5a_10_5a_10a.pdf; *see* VA. SUP. CT. R. 5:10 (Repl. Vol. 2015); VA. SUP. CT. R. 5A:7 (Repl. Vol. 2015).

594. *See* R. 5:10 (Repl. Vol. 2015); R. 5A:7 (Repl. Vol. 2015).

5:13A and Rule 5A:10A.[595] For courts that utilize the Case Imaging System, a digital appellate record may be created instead of a paper record.[596] The new Rules specify the requirements for form, exhibits, transmission, disposition, and availability of the digital record.[597]

The addition of new Rules for digital appellate records resulted in minor changes to Rules 5:15 and 5A:10. Specifically, the court replaced the word "papers" with "documents."[598]

N. *Brief Requirements*

In general, the majority of the Rule amendments resulting from the court's April 10, 2015 orders are changes intended to update and modernize the rules and to account for electronic filing. Rule 5:6, governing forms of briefs and other papers filed with the Supreme Court of Virginia, outlines the physical formatting requirements for a filing.[599] The court amended this section to allow briefs, appendices, motions, and other papers to not only be printed but also be produced on a screen.[600] The court also replaced any mention of "paper" with "document."[601] Subsection (c) provides that "[n]o appeal shall be dismissed for failure to comply with the provisions of this Rule," however, the clerk may require that a document be redone to comply with the Rule.[602] As amended, the Rule now states that "[f]ailure to comply after notice of noncompliance . . . may result in the dismissal of the case."[603] These same changes were made to Rule 5A:4, governing forms of briefs and other papers filed with the Court of Appeals of Virginia.[604]

595. Order Amending Rules 5:13A & 5A:10A, Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments/2015_0410_dig_recs_rule_5_10_5_13a_5_15_5a_7_5a_10_5a_10a.pdf.

596. VA. SUP. CT. R. 5:13A(a) (Repl. Vol. 2015); VA. SUP. CT. R. 5A:10A(a) (Repl. Vol. 2015).

597. R. 5:13A(b)–(f) (Repl. Vol. 2015); R. 5A:10A(b)–(f) (Repl. Vol. 2015).

598. VA. SUP. CT. R. 5:15 (Repl. Vol. 2015); VA. SUP. CT. R. 5A:10 (Repl. Vol. 2015).

599. *See* VA. SUP. CT. R. 5:6 (Repl. Vol. 2015).

600. R. 5:6(a)(1) (Repl. Vol. 2015).

601. *Id.*

602. VA. SUP. CT. R. 5:6(c) (Repl. Vol. 2015).

603. *Id.*

604. Order Amending Rules 5:6 & 5A:4, Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments/

The general requirements for all briefs filed with the court, set forth in Rule 5:26, were also amended.[605] First, with regard to page limits, the court added that "[b]riefs of amici curiae [must] comply with the page limits that apply to briefs of the party being supported."[606] Also, the court added subsection (j), which provides guidelines for when a party has technical problems with electronic filing.[607] The new Rule states:

> If technical problems at the Supreme Court result in a failure to timely receive the electronically filed brief or appendix, counsel shall provide to the clerk of the [c]ourt on the next business day all documentation which exists demonstrating the attempt to electronically file the brief or appendix, any error message received in response to the attempt, documentation that the brief or appendix was later successfully resubmitted, and a motion requesting that the [c]ourt accept the resubmitted brief or appendix.[608]

The court made the same changes to Rule 5A:19, governing general requirements for all briefs filed with the Court of Appeals of Virginia.[609]

Additionally, the court amended subsection (e) addressing copies of filings.[610] As amended, the Rule states that "[t]he electronic version must be filed in the manner prescribed by the VACES Guidelines and User's Manual, using the Virginia Appellate Courts eBriefs System (VACES)."[611] In addition, ten printed copies of each brief must be filed in the clerk's office.[612] "All briefs shall contain a certificate evidencing the date and method of electronic transmission of the brief to opposing counsel."[613] Previously, a party who failed to comply with these Rules or failed to file a required brief forfeited his or her opportunity for oral argument; however, the court amended this provision so that the court now

2015_0410_ebriefs_rule_5_6_5_26_5_32_5a_4_5a_19_5a_20_5a_21_5a_25.pdf; *see* VA. SUP. CT. R. 5A:4 (Repl. Vol. 2015).

605. VA. SUP. CT. R. 5:26 (Repl. Vol. 2015).
606. R. 5:26(b) (Repl. Vol. 2015).
607. R. 5:26(j) (Repl. Vol. 2015).
608. *Id*.
609. VA. SUP. CT. R. 5A:19 (Repl. Vol. 2015).
610. R. 5:26(e) (Repl. Vol. 2015).
611. *Id.*
612. *Id.*
613. *Id.*

has discretion to decide whether to sanction the party or withhold oral argument.[614]

The court also similarly amended Rule 5A:19, governing how copies of filings may be filed with the Virginia Court of Appeals.[615] The Rule no longer requires seven copies of each brief to be filed and one copy to be mailed or delivered to opposing counsel.[616] Instead, an electronic version, in PDF, and four printed copies of each brief must be filed with the clerk and the PDF served on opposing counsel.[617] "For purposes of this Rule, service by email shall be governed by Rule 1:17, which allows electronic transmission without the need of consent by opposing counsel."[618] "The electronic version must be filed in the manner prescribed by the VACES Guidelines and User's Manual, using the Virginia Appellate Courts eBriefs System (VACES)."[619]

O. *Appendices*

By order dated April 10, 2015, the court amended Rule 5:32, which governs the appropriate time to file appendices and the number of copies required when filing with the Supreme Court of Virginia.[620] As amended, the Rule requires the appellant to file three printed copies and an electronic copy of the appendix with the appellant's brief, and the appellant must also serve a copy on counsel for each party separately represented.[621] The appendix and a sealed volume of the appendix must be filed in the manner prescribed by the VACES Guidelines and User's Manual, using Virginia Appellate Courts eBriefs System.[622] The court made similar changes to Rule 5A:25 governing the time to file appendices

614. VA. SUP. CT. R. 5:26 (Repl. Vol. 2015).

615. VA. SUP. CT. R. 5A:19 (Repl. Vol. 2015).

616. R. 5A:19(f) (Repl. Vol. 2015).

617. *Id.*

618. *Id.*

619. *Id.*

620. Order Amending Rule 5:32, Rules of the Supreme Court of Virginia (Apr. 10, 2015) (effective July 1, 2015), http://www.courts.state.va.us/courts/scv/amendments/2015_0410_ebriefs_rule_5_6_5_26_5_32_5a_4_5a_19_5a_20_5a_21_5a_25.pdf; *see* VA. SUP. CT. R. 5:32 (a)(3) (Repl. Vol. 2015).

621. R. 5:32(a)(3)(i) (Repl. Vol. 2015).

622. *Id.*; VA. SUP. CT. R. 5:32(b)(2) (Repl. Vol. 2015).

and number of copies required when filing with the Court of Appeals of Virginia.[623]

IV. NEW LEGISLATION

A. *Jury Commissioners*

House Bill 1315, relating to the information compiled and retained by jury commissioners, amended and reenacted Virginia Code sections 8.01-345, 24.2-404, and 24.2-427 to add new requirements relating to juror qualifications.[624] Specifically, the jury commissioners must transmit to the State Board of Elections lists of those persons not qualified to serve as jurors as a result of:

> (i) not being a citizen of the United States, (ii) no longer being a resident of the Commonwealth, (iii) being a resident of another county or city in the Commonwealth, (iv) having been convicted of a felony and having not provided evidence that their right to vote has been restored, or (v) having been adjudicated incapacitated.[625]

The sheriff, clerk of court, or other official responsible for maintaining this information must make this list available, upon request, to the general registrar for that locality.[626] The bill also requires the general registrars to utilize this information to identify voters who are no longer qualified to vote and initiate list maintenance procedures in accordance with current law.[627]

B. *Temporary Injunction*

On recommendation of the Boyd-Graves Conference,[628] the General Assembly amended Virginia Code section 8.01-628 to allow that an application for a temporary injunction may be supported or opposed by an affidavit or verified pleading.[629]

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623. *See* VA. SUP. CT. R. 5A:25 (Repl. Vol. 2015).

624. H.B. 1315, Va. Gen. Assembly (Reg. Sess. 2015).

625. *Id*.

626. *Id*.

627. *Id*.

628. TEMPORARY INJUNCTION: AFFIDAVIT OR VERIFIED PLEADING, VA. LEGIS. INFO. SYS., HB 1367, http://lis.virginia.gov/cgi-bin/legp604.exe?ses=151&typ=bil&val=HB1367 (last visited Oct. 1, 2015).

629. Act of Mar. 16, 2015, ch. 125 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-628 (Repl. Vol. 2015)).

C. *Experts*

The General Assembly amended the Virginia Code to allow nurse practitioners to testify as expert witnesses in a court of law on certain matters within the scope of their activities as authorized by Virginia Code section 54.1-2952.[630] Further, "nurse practitioner" has been added to the definition of "health care provider" appearing in Virginia Code section 8.01-581.1.[631] Importantly, the General Assembly made clear that the provisions of this bill are not intended to be a codification of Rule 702 of the Federal Rules of Evidence.[632]

Virginia Code section 8.01-581.20 discusses the standard of care in proceedings before the medical malpractice review panel.[633] As set forth in this section, health care providers licensed to practice in Virginia are presumed to know the statewide standard of care in their particular specialty of field of practice.[634] House Bill 1775 amended this section to state that this presumption of knowledge of the standard of care also applies to health care providers licensed in other states and who meet the educational and examination requirements for licensure in Virginia.[635]

D. *Damages*

In an effort to provide consistency, the General Assembly amended and reenacted multiple sections of the Virginia Code relating to punitive damages. Specifically, references to "exemplary damages" or "punitive or exemplary damages" were changed to simply "punitive damages."[636] The reason for this change being

630. Act of Mar. 17, 2015, ch. 295, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-401.2 (Repl. Vol. 2015)).

631. Act of Mar. 17, 2015, ch. 295, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-581.1 (Repl. Vol. 2015).

632. *Id.* Rule 702 discusses testimony of expert witnesses. FED. R. EVID. 702.

633. VA. CODE ANN. § 8.01-581.20 (Repl. Vol. 2015).

634. *Id.* Prior to this amendment, this presumption was limited to physicians and nurses. VA. CODE ANN. § 8.01-581.20 (Cum. Supp. 2014).

635. H.B. 1775, Va. Gen. Assembly (Reg. Sess. 2015) (enacted as Act of Mar. 17, 2015, ch. 310, 2015 Va. Acts __, __).

636. Act of Mar. 27, 2015, ch. 710, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 8.01-40, -44.5, -622.1 (Repl. Vol. 2015); §§ 38.2-1501, -1603, -1701 (Supp. 2015); §§ 46.2-1527.5, -1527.10 (Cum. Supp. 2015); § 51.5-46 (Cum. Supp. 2015); §§ 54.1-1123, -2116 (Supp. 2015)).

that "exemplary" and "punitive" are interchangeable and thus duplicative when they appear together. The bill also makes additional technical corrections.[637]

E. *Statute of Limitations*

With regard to actions for defamation, the statute of limitations is one year from when the cause of action accrues.[638] As amended, Virginia Code section 8.01-247.1 now provides that:

> If a publisher of statements actionable under this section publishes anonymously or under a false identity on the Internet, an action may be filed under this section and the statute of limitations shall be tolled until the identity of the publisher is discovered or, by the exercise of due diligence, reasonably should have been discovered.[639]

F. *Unauthorized Dissemination of Criminal History Records*

During the 2015 session, the General Assembly added Virginia Code section 8.01-40.3 relating to the dissemination of criminal history record information.[640] Importantly, the new section creates a civil penalty for the wrongful dissemination of criminal history record information that should have been expunged.[641] This section states as follows:

> A. Any person who disseminates, publishes, or maintains or causes to be disseminated, published, or maintained the criminal history record information . . . of an individual pertaining to that individual's charge or arrest for a criminal offense and solicits, requests, or accepts money or other thing of value for removing such criminal history record information shall be liable to the individual who is the subject of the information for actual damages or $500, whichever is greater, in addition to reasonable attorney fees and costs.
> B. Nothing in this section shall be construed to impose liability on:

637. *See, e.g.*, H.B. 1610, Va. Gen. Assembly (Reg. Sess. 2015) (enacted as Act of Mar. 27, 2015, ch. 710, 2015 Va. Acts __, __) (amending "attorneys' fees" to "attorney fees" and correcting the spelling of "judgment" in section 46.2-1527.10).

638. VA. CODE ANN. § 8.01-247.1 (Repl. Vol. 2015).

639. *Id.*

640. Act of Mar. 23, 2015, ch. 415, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-40.3 (Repl. Vol. 2015)).

641. *Id.*

> 1. An interactive computer service, as defined in 47 U.S.C. § 230(f), for content provided by another person.
> 2. Any speech protected by Article I, Section 12 of the Constitution of Virginia.
>
> C. As used in this section, "*criminal history record information*" means the same as that term is defined in § 9.1-101.[642]

Similarly, the General Assembly added section 8.01-40.3, which creates a civil action against:

> Any person who disseminates, publishes, or maintains . . . the criminal history record information . . . of an individual pertaining to that individual's charge or arrest for a criminal offense and solicits, requests, or accepts money or other thing of value for removing such criminal history record information shall be liable to the individual who is the subject of the information for actual damages or $500, whichever is greater, in addition to reasonable attorney fees and costs.[643]

G. *Summons for Unlawful Detainer*

Minor changes were made to certain sections of the Virginia Code relating to unlawful detainer proceedings and satisfaction of judgments. In an unlawful detainer proceeding where the tenant fails to appear, the landlord, or the landlord's agent, may submit evidence of outstanding rent, late charges, attorney's fees, and other damages by affidavit or sworn testimony.[644] Revised Virginia Code section 8.01-126(C) also now requires that the landlord, or the landlord's agent, advise the court of any payments made by the tenant that would result in a reduction of the amount due as of the date of the hearing.[645] Section 8.01-126 also now provides that:

> In determining the amount due the plaintiff as of the date of the hearing, if the rental agreement or lease provides that rent is due and payable on the first of the month in advance for the entire month, at the request of the plaintiff or the plaintiff's attorney or agent, the amount due as of the date of the hearing shall include the rent due for the entire month in which the hearing is held, and rent shall not be prorated as of the actual court date. Otherwise, the rent

642. *Id.*

643. Act of Mar. 23, 2015, ch. 415, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-40.3 (Repl. Vol. 2015).

644. VA. CODE ANN. § 8.01-126 (Repl. Vol. 2015).

645. *Id.*

> shall be prorated as of the date of the hearing. However, nothing herein shall be construed to permit a landlord to collect rent in excess of the amount stated in such rental agreement or lease. If a money judgment has been granted for the amount due for the month of the hearing pursuant to this section and the landlord re-rents such dwelling unit and receives rent from a new tenant prior to the end of such month, the landlord is required to reflect the applicable portion of the judgment as satisfied pursuant to § 16.1-94.01.[646]

Finally, the General Assembly amended Virginia Code sections 8.01-454 and 16.1-94.01 to clarify that a creditor is required to note satisfaction of a judgment only when it has been paid in full.[647]

H. *Circuit Court Clerk Responsibilities*

During the 2015 session, the General Assembly revised certain sections of the Virginia Code relating to the responsibilities of circuit court clerks. With regard to the posting of notices, summons, orders, and other official documents, the notice requirement is satisfied if such documents are posted on the public government website of the locality served by the court or on the circuit court clerk's website.[648] Virginia Code section 8.01-217, relating to how the name of a person may be changed, has been amended to clarify that if a name change is granted to a convicted sex offender, the clerk entering such an order must transmit a certified copy to any agency or department of the Commonwealth that has issued a license using such person's changed name, if known to the court and identified in the court order.[649] With regard to entering payment or discharge on the judgment docket, Virginia Code section 8.01-453 now provides that the clerk must only docket judgments that have been satisfied in full—the clerk is not required to enter partial satisfactions of judgments.[650] Finally, Virginia Code sec-

646. *Id.*

647. Act of Mar. 26, 2015, ch. 631, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-454 (Repl. Vol. 2015)); Act of Mar. 23, 2015, ch. 547, 2015 Va. Acts, __, __ (codified at VA. CODE ANN. § 16.1-94.01 (Repl. Vol. 2015)).

648. Act of Mar. 26, 2015, ch. 631, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 1-211.1 (Supp. 2015)).

649. Act of Mar. 26, 2015, ch. 631, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-217 (Repl. Vol. 2015)).

650. VA. CODE ANN. § 8.01-453 (Repl. Vol. 2015).

tion 64.2-505 was amended to allow the clerk to compel a personal representative to produce a will or to require security.[651]

I. *Payment of Funds Into Circuit Court*

Virginia Code section 8.01-600, pertaining to money held by the clerk of the circuit court, was amended to provide that "where judgment is taken in the circuit court, upon motion of a party for good cause shown, the court may enter an order directing the clerk to [hold certain funds]."[652] The bill also adds subsection (C) to Virginia Code section 8.01-606, which provides:

> Where judgment is taken in the general district court, upon motion of a party for good cause shown, the general district court judge may enter an order directing the clerk of the general district court to hold such funds . . . for a period not to exceed 180 days to enable such party to file a petition . . . requesting that such funds be received and held by the clerk of the circuit court.[653]

If an order directing the clerk of the general district court to transfer funds to the circuit court is not received within the 180-day period, the clerk of the general district court may disburse the funds to the plaintiff.[654]

J. *Civil Immunity*

Virginia Code section 8.01-225 provides that persons rendering certain emergency services may not be found "liable for any civil damages for acts or omissions resulting from the rendering of such care . . . ."[655] As amended, section 8.01-225 now provides the following description of "emergency care or assistance":

> For purposes of this subdivision, emergency care or assistance includes the forcible entry of a motor vehicle in order to remove an unattended minor at risk of serious bodily injury or death, provided the person has attempted to contact a law-enforcement officer, as de-

651. Act of Mar. 26, 2015, ch. 631, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-505 (Cum. Supp. 2015)).

652. Act of Mar. 26, 2015, ch. 633, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-600 (Repl. Vol. 2015)) (alteration in original).

653. Act of Mar. 26, 2015, ch. 633, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-606 (Repl. Vol. 2015)).

654. *Id.*

655. VA. CODE ANN. § 8.01-225 (Repl. Vol. 2015).

> fined in § 9.1-101, a firefighter, as defined in § 65.2-102, emergency medical services personnel, as defined in § 32.1-111.1, or an emergency 911 system, if feasible under the circumstances.[656]

Senate Bill 1186 resulted in another change to section 8.01-225.[657] Specifically, this section now grants civil immunity to persons who, "[i]n good faith, prescribes, dispenses, or administers naloxone or other opioid antagonist used for overdose reversal in an emergency to an individual who is believed to be experiencing or about to experience a life-threatening opiate overdose."[658]

K. *Personal Injury and Wrongful Death Actions*

Virginia Code section 8.01-417, as amended, now requires insurance companies to disclose the address of an alleged tortfeasor upon the request of an injured person, personal representative, or attorney in personal injury and wrongful death actions related to motor vehicle accidents, if such address has not previously been disclosed.[659] The section also now states:

> if the alleged tortfeasor has insurance coverage from a self-insured locality for a motor vehicle accident . . . and the locality is authorized by the alleged tortfeasor to accept service of process . . . the locality . . . may [instead] disclose the insured's work address and the name and address of the person who shall accept service of process on behalf of the alleged tortfeasor.[660]

L. *Petition for Attachment*

The most significant change to Virginia Code section 8.01-537, which relates to petitions for attachment, is that the amended section removes judges from the list of persons before whom a petition for attachment shall be filed.[661] As amended, section 8.01-

656. *Id.*

657. S.B. 1186, Va. Gen. Assembly (Reg. Sess. 2015); VA. CODE ANN. § 8.01-225 (Repl. Vol. 2015).

658. VA. CODE ANN. § 8.01-225 (Repl. Vol. 2005).

659. VA. CODE ANN. § 8.01-417 (Repl. Vol. 2015).

660. *Id.* (alteration in original).

661. Act of Mar. 26, 2015, ch. 639, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-537 (Repl. Vol. 2015).

537 also adds magistrates to those who may receive payments for an attachment petition.[662]

M. *Habeas Corpus*

Multiple subsections have been added to Virginia Code section 8.01-658, clarifying how a writ of habeas corpus is to be served.[663] Section 8.01-658 now specifies the proper respondent to be named in a writ of habeas corpus based upon whether the petition is in prison or jail, is on parole or probation, or has a suspended sentence.[664] As amended, section 8.01-658 now provides for amendment of the petition if the petitioner does not name a proper respondent.[665] If the petitioner fails to name a proper respondent within the time allotted by the court, the habeas petition must be dismissed without prejudice.[666]

662. *Id.*

663. Act of Mar. 23, 2015, ch. 554, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-658 (Repl. Vol. 2015).

664. *Id.*

665. *Id.*

666. *Id.*