

# ARTICLES

## CIVIL PRACTICE AND PROCEDURE

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### I. INTRODUCTION

This article surveys recent significant developments in Virginia civil practice and procedure. Specifically, the article discusses opinions of the Supreme Court of Virginia from June 2010 through June 2011 addressing civil procedure topics; significant amendments to the Rules of the Supreme Court of Virginia concerning procedural issues during the same period; and legislation enacted by the Virginia General Assembly during its 2011 session that relates to civil practice.

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

#### A. *Waiver of Attorney-Client Privilege*

In *Walton v. Mid-Atlantic Spine Specialists, P.C.*, the Supreme Court of Virginia articulated a multi-part test for evaluating whether the attorney-client privilege is waived by virtue of the inadvertent disclosure of an otherwise privileged communication during the course of discovery.<sup>1</sup> The *Walton* case involved a doctor who inadvertently produced a letter written to his lawyer during

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1. 280 Va. 113, 126–27, 694 S.E.2d 545, 552 (2010).

a document production in response to a subpoena *duces tecum*.<sup>2</sup> According to the doctor, he kept the letter separate from the patient's medical records.<sup>3</sup> Nevertheless, the copy service he used to gather the subpoenaed documents "obtained a copy of the letter and produced it" along with the patient's records.<sup>4</sup>

On appeal, the supreme court held "that the disclosure of the letter was inadvertent."<sup>5</sup> Echoing the sentiments of most Virginia litigators, the supreme court noted that such inadvertent production "is a specter that haunts every document intensive case."<sup>6</sup> According to the supreme court, inadvertent disclosure includes the "failure to exercise proper precautions to safeguard the privileged document, and does not require that the disclosure be a result of criminal activity or bad faith."<sup>7</sup> The supreme court held that waiver may occur if reasonable measures were not taken to "maintain the document's confidentiality" or to take prompt and reasonable action to correct a mistaken production.<sup>8</sup> The court then adopted the following multi-part test for considering whether this standard has been met in a particular case:

- (1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances.<sup>9</sup>

"None of [the above] factors is . . . dispositive, and the [reviewing] court [should] also consider any other factors . . . that have . . . bearing on the reasonableness issues."<sup>10</sup> Evaluating the doctor's inadvertent production of the document at issue, the supreme court reversed the trial court's decision and held that the doctor

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2. *Id.* at 118–19, 694 S.E.2d at 547.

3. *See id.* at 118, 694 S.E.2d at 547.

4. *Id.* at 118–19, 694 S.E.2d at 547.

5. *Id.* at 125, 694 S.E.2d at 551. The doctors had argued, and the circuit court had ruled, that the privilege was not waived because the disclosure was "involuntary," as the letter had not been disclosed by the doctor or his lawyer and the doctor had taken reasonable precautions to avoid disclosure. *Id.* at 121, 124, 694 S.E.2d at 548, 550–51.

6. *Id.* at 126, 694 S.E.2d at 551 (quoting *FDIC v. Marine Midland Realty Corp.*, 138 F.R.D. 479, 479–80 (E.D. Va. 1991)) (internal quotation marks omitted).

7. *Id.*

8. *Id.* at 126–27, 694 S.E.2d at 552 (citing *FDIC*, 138 F.R.D. at 482).

9. *Id.* at 127, 694 S.E.2d at 552.

10. *Id.*

had not met his burden to prove that privilege had not been waived, as he had failed to establish the sufficiency of the measures employed to safeguard the document, and exclusion of the document raised a significant possibility that the doctor's own testimony would mislead the jury.<sup>11</sup>

### B. *Signing Pleadings*

On the same day, the Supreme Court of Virginia issued two opinions striking down efforts of a pro se litigant and a Virginia lawyer to have individuals who were not licensed to practice law in Virginia sign pleadings on their behalf.<sup>12</sup> In *Aguilera v. Christian*, a pro se plaintiff authorized a neighbor, who was a lawyer licensed to practice in Washington, D.C., but not Virginia, to sign the plaintiff's name for him on his complaint.<sup>13</sup> The neighbor "signed [the plaintiff's] name . . . [, but] placed her initials . . . directly above the signature."<sup>14</sup> The trial court dismissed the complaint because it was not signed by the plaintiff himself or by a Virginia attorney, as required by Virginia Code section 8.01-271.1, and therefore a nullity.<sup>15</sup> On appeal, the pro se plaintiff contended that as long as the signature was placed on the complaint with his permission and the intent to authenticate it, then the statutory requirement was satisfied.<sup>16</sup> The supreme court disagreed, holding that section 8.01-271.1 states unambiguously that "a party not represented by an attorney 'shall sign' a pleading."<sup>17</sup> Therefore, because the complaint had not been signed by the pro se plaintiff himself, or by a Virginia attorney on his behalf, it was a nullity and properly dismissed.<sup>18</sup>

In *Shipe v. Hunter*, the supreme court decided the "closely related question [of] whether a Virginia [attorney] may . . . authorize [an out-of-state attorney] to sign the Virginia [attorney's] name to a pleading."<sup>19</sup> In *Shipe*, a Virginia attorney representing

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11. *Id.* at 130–31, 694 S.E.2d at 554.

12. *See* *Aguilera v. Christian*, 280 Va. 486, 488–89, 699 S.E.2d 517, 518–19 (2010); *Shipe v. Hunter*, 280 Va. 480, 482–83, 485, 699 S.E.2d 519, 520, 522 (2010).

13. *Aguilera*, 280 Va. at 487 & n.1, 699 S.E.2d at 518 & n.1.

14. *Id.* at 487, 699 S.E.2d at 518.

15. *Id.* at 488, 699 S.E.2d at 518.

16. *Id.* at 488–89, 699 S.E.2d at 518–19.

17. *Id.* at 489, 699 S.E.2d at 519.

18. *Id.*

19. 280 Va. 480, 482, 699 S.E.2d 519, 519–20 (2010).

the plaintiff in a civil lawsuit, along with foreign co-counsel, authorized his co-counsel to sign the Virginia attorney's name on the complaint.<sup>20</sup> The co-counsel did so by signing the Virginia attorney's name to the pleading followed by his initials.<sup>21</sup> As in *Aguilera*, the trial court in *Shipe* found that the complaint was a nullity due to the deficient signature and dismissed it.<sup>22</sup> In deciding the issue, the supreme court again cited to section 8.01-271.1, but also to Rule 1A:4 of the Supreme Court of Virginia, which provides that no out-of-state lawyer may appear *pro hac vice* except in association with local counsel who is an active member in good standing with the Virginia State Bar, and that any pleading is invalid unless signed by local counsel.<sup>23</sup> Similar to the plaintiff in *Aguilera*, the plaintiff in *Shipe* contended that "a person may make another his agent for the purpose of signing a pleading and . . . , if the [signature is] authorized . . . [it is] as effective as if the [individual] had personally signed."<sup>24</sup> In rejecting this proposition, the court stressed the policy reasons behind the requirement that a party, or a Virginia attorney on the party's behalf, sign pleadings that are filed in Virginia courts.<sup>25</sup>

### C. *Relief from Default*

In *AME Financial Corporation v. Kiritsis*, the Supreme Court of Virginia evaluated whether a trial court abused its discretion in failing to grant leave to file a late responsive pleading to a party found to be in default.<sup>26</sup> Counsel for the plaintiff in the case had notified a vice president of defendant AME Financial Corporation ("AME") that the company would need to retain a Virginia attorney to file responsive pleadings to his client's complaint.<sup>27</sup> Nevertheless, AME filed an answer signed only by the vice president, who was not an attorney.<sup>28</sup> The plaintiff filed a motion to strike

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20. *See id.* at 482–83, 699 S.E.2d at 520.

21. *Id.*

22. *Id.*

23. *Id.* at 483, 699 S.E.2d at 520 (citing VA. SUP. CT. R. pt. 1A, R. 1A:4 (Repl. Vol. 2010)).

24. *Id.*, 699 S.E.2d at 521.

25. *Id.* at 484, 699 S.E.2d at 521. The court also held that the defect could not be cured by amendment. *Id.* at 485, 699 S.E.2d at 521–22 (citing *Kone v. Wilson*, 272 Va. 59, 63, 630 S.E.2d 744, 746 (2006)).

26. 281 Va. 384, 386, 707 S.E.2d 820, 821–22 (2011).

27. *Id.* at 388, 707 S.E.2d at 821.

28. *Id.* at 387–88, 707 S.E.2d at 821.

the answer, based on the defective signature, and for default judgment.<sup>29</sup> AME did not appear for a hearing on the motions, despite having been sent notice, and the trial court granted the plaintiff's motion to strike and found AME in default.<sup>30</sup> Ten days after the hearing, and more than two months after being told of the need to secure representation, AME hired Virginia counsel, who filed a motion for leave to file late responsive pleadings and, subsequently, a motion for relief from default, which were both denied.<sup>31</sup>

On appeal, AME contended that the trial court abused its discretion in denying its motions because it had demonstrated good cause.<sup>32</sup> Rule 3:19 of the Supreme Court of Virginia provides that, “[p]rior to the entry of judgment, for good cause shown the court may grant leave to a defendant who is in default to file a late responsive pleading.”<sup>33</sup> Although noting that it had not yet had occasion to construe the term “good cause” as used in the current Rule 3:19, the supreme court explained that it had previously held that circumstances supporting the extension of time to file a late pleading include but are not limited to

lack of prejudice to the opposing party, the good faith of the moving party, the promptness of the moving party in responding to the opposing parties' decision to progress with the cause, the existence of a meritorious claim or substantial defense, the existence of legitimate extenuating circumstances, and [the] justified belief that the suit has been abandoned.<sup>34</sup>

Regardless, the court made clear that “[a] good cause determination invests a trial court with discretion,” and also noted that, even if good cause is shown, the trial court still has discretion to grant or refuse a late filing under the language of Rule 3:19.<sup>35</sup> Focusing on AME's pre-filing notice that it needed Virginia counsel, as well as AME's failure to appear for the default hearing, the supreme court held that the trial court did not abuse its discretion in refusing to allow a late-filed responsive pleading.<sup>36</sup>

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29. *Id.* at 388, 391, 707 S.E.2d at 821, 823.

30. *Id.* at 388, 707 S.E.2d at 822.

31. *Id.* at 387–89, 707 S.E.2d at 821–22.

32. *Id.* at 391, 707 S.E.2d at 823.

33. VA. SUP. CT. R. pt. 3, R. 3.19(b) (Repl. Vol. 2011).

34. *Kiritsis*, 281 Va. at 392, 707 S.E.2d at 824.

35. *Id.*

36. *Id.* at 391–94, 707 S.E.2d at 823–25.

#### D. *Statutes of Limitation*

The Supreme Court of Virginia issued several recent opinions addressing statutes of limitation, including accrual of claims and tolling.<sup>37</sup> In *Van Dam v. Gay*, the supreme court answered the question of when a right of action for legal malpractice accrued, thereby triggering the running of the statute of limitations.<sup>38</sup> The attorney represented the wife in a divorce case and drafted a property settlement agreement that was incorporated into the final decree of divorce, entered in 1986.<sup>39</sup> When the husband died in 2006, the wife applied for survivor's benefits under certain federal retirement plans in which the husband participated, but her claims were rejected on the grounds that the settlement agreement was, as a matter of federal law, insufficient to entitle her to benefits under the plans.<sup>40</sup> In response to the wife's legal malpractice suit, the attorney who drafted the agreement pled the statute of limitations, and the issue presented to the supreme court was the date of accrual of the wife's right of action.<sup>41</sup> While conceding that her discovery of the malpractice did not trigger accrual of the right of action under Virginia Code section 8.01-230, the wife contended that, because injury or damage is an essential element of a malpractice claim, her cause of action could not have accrued until the death of the husband, as "her right to survivors' benefits [under his retirement plans was] contingent upon his predeceasing her."<sup>42</sup> The supreme court rejected this argument, ruling that the wife suffered a legal injury with regard to her rights to the retirement plans in 1986, by virtue of the entry of the final decree incorporating the deficient settlement agreement.<sup>43</sup> In so ruling, the supreme court noted:

Some injury or damage, however slight, is essential to a cause of action, but it is immaterial that all the damages resulting from the

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37. See *Chalifoux v. Radiology Assocs. of Richmond, Inc.*, 281 Va. 690, 708 S.E.2d 834 (2011); *Addison v. Jurgelsky*, 281 Va. 205, 704 S.E.2d 402 (2011); *Estate of Conger v. Barrett*, 280 Va. 627, 702 S.E.2d 117 (2010); *Van Dam v. Gay*, 280 Va. 457, 699 S.E.2d 480 (2010).

38. 280 Va. at 459, 699 S.E.2d at 480.

39. *Id.*

40. *Id.*

41. *Id.* at 459–60, 699 S.E.2d at 480–81.

42. *Id.* at 461, 699 S.E.2d at 481.

43. *Id.* at 462, 699 S.E.2d at 482.

injury do not occur at the time of the injury. The running of the limitation period will not be tolled by the fact that actual or substantial damages did not occur until a later date.<sup>44</sup>

In *Estate of Conger v. Barrett*, the supreme court addressed the interplay between Virginia Code section 8.01-244(B), addressing the tolling of the statute of limitations governing wrongful death claims, and Virginia Code section 8.01-335(B), addressing the discontinuance of cases inactive for over three years.<sup>45</sup> The *Conger* case involved a wrongful death claim brought in 2002, which was subsequently dismissed in 2007 under section 8.01-335(B) due to inactivity for over three years.<sup>46</sup> As allowed under section 8.01-335, the plaintiff filed a motion within one year of the dismissal to reinstate the case, and the trial court granted the motion.<sup>47</sup> The defendant subsequently filed a plea of the statute of limitations, arguing the discontinuance order “dismissed the case ‘without determining the merits of [the] action’ within the meaning of Code § 8.01-244(B),” and contending that the two-year limitations period had run during the period between the discontinuance order and the motion to reinstate.<sup>48</sup> In ruling on the issue, the supreme court noted that Virginia Code sections 8.01-244(B) and 8.01-335(B) “are both implicated but they are not in conflict.”<sup>49</sup> The su-

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44. *Id.* at 463, 699 S.E.2d at 482–83.

45. 280 Va. 627, 631–32, 702 S.E.2d 117, 118–19 (2010).

46. *Id.* at 629–30, 702 S.E.2d at 117–18. Virginia Code section 8.01-335(B) provides as follows:

Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

VA. CODE ANN. § 8.01-335(B) (Repl. Vol. 2007 & Cum. Supp. 2011). According to the supreme court, the reinstatement provision in section 8.01-335(B) “creates a rare exception to the rule that a circuit court loses jurisdiction over a case [twenty-one] days after entering a final order.” *Conger*, 280 Va. at 631–32, 702 S.E.2d at 119.

47. *Conger*, 280 Va. at 630, 702 S.E.2d at 118.

48. *Id.* Virginia Code section 8.01-244(B) states that if any wrongful death action is brought within [a] period of two years after such person’s death and for any cause abates or is dismissed without determining the merits of such action, the time such action is pending shall not be counted as any part of such period of two years and another action may be brought within the remaining period of such two years as if such former action had not been instituted.

VA. CODE ANN. § 8.01-244(B) (Cum. Supp. 2011) (alteration in original).

49. *Conger*, 280 Va. at 631, 702 S.E.2d at 118.

preme court held that, “by its plain terms, Code § 8.01-244(B) bars only the filing of another action if the two-year limitation period has expired,” and that a “motion [under section 8.01-335] to reinstate [a] case [does] not create another action.”<sup>50</sup> The supreme court therefore reversed the trial court’s order dismissing the case under section 8.01-244(B).<sup>51</sup>

The supreme court also addressed the statute of limitations under section 8.01-244 in *Addison v. Jurgelsky*.<sup>52</sup> In that case, a wrongful death claim was brought by only one of two co-administrators of the decedent’s estate.<sup>53</sup> The defendants raised the issue of nonjoinder and the court granted leave to file an amended complaint adding the co-administrator as an additional plaintiff.<sup>54</sup> Thereafter, defendants filed a plea in bar, arguing that the two-year statute of limitations under section 8.01-244 was not tolled by the filing of the initial complaint “because an action by only one of two co-administrators was a nullity,” and the trial court dismissed the amended complaint.<sup>55</sup> On appeal, the supreme court first addressed the issue of whether a single co-administrator may file an action under Virginia’s wrongful death statutes.<sup>56</sup> In analyzing this question, the court looked to the plain meaning of the language of section 8.01-50(B), which states that “[e]very such action under this section shall be brought by and in the name of the personal representative of such deceased person within the time limits specified in § 8.01-244.”<sup>57</sup> The court ruled that in using the term “personal representative” in section 8.01-50, the General Assembly “intended a unity of action whether there is one personal representative or more than one.”<sup>58</sup> The court then addressed the issue of whether the absent co-administrator could be joined as a plaintiff after the expiration of the statute of limitations.<sup>59</sup> On this point, the court looked to section 8.01-5(A), which states in relevant part that “[n]o action or suit shall abate or be defeated by the nonjoinder or misjoinder of

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50. *Id.* at 633, 702 S.E.2d at 119–20 (internal quotation marks omitted).

51. *Id.* at 633–34, 702 S.E.2d at 120.

52. 281 Va. 205, 207–08, 704 S.E.2d 402, 404 (2011).

53. *Id.*, 704 S.E.2d at 403–04.

54. *Id.* at 207, 704 S.E.2d at 403–04.

55. *Id.* at 207–08, 704 S.E.2d at 404.

56. *Id.* at 208–09, 704 S.E.2d at 404–05.

57. *Id.* (quoting VA. CODE ANN. § 8.01-50(B) (Repl. Vol. 2007 & Cum. Supp. 2011)).

58. *Id.* at 208, 704 S.E.2d at 404.

59. *See id.* at 210–11, 704 S.E.2d at 405–06.



parties, . . . but . . . new parties may be added . . . by order of the court at any time as the ends of justice may require.”<sup>60</sup> After reviewing the public policy behind the statute of limitations, the court held that “§ 8.01-5 permits the joinder of a co-administrator to a wrongful death action under Code § 8.01-50 when the other co-administrator is already a party plaintiff and the claims in the suit do not change as a result of the joinder.”<sup>61</sup> The court further held that the single co-administrator’s initial filing tolled the limitations period under section 8.01-244, and therefore reversed the trial court’s dismissal of the case.<sup>62</sup>

In *Chalifoux v. Radiology Associates of Richmond, Inc.*, the Supreme Court of Virginia considered whether to apply the “continuing treatment rule” to a medical malpractice claim against a radiology group that had conducted a series of magnetic resonance imagings on the plaintiff patient in connection with her treatment by certain other physicians.<sup>63</sup> The suit was brought more than two years from the date of the alleged malpractice, but the plaintiff contended that, based on her continuing treatment by the radiology group, the statute of limitations did not begin to run until the conclusion of the course of treatment.<sup>64</sup> The trial court held that the plaintiff’s treatments by the radiology group “were ‘single, isolated acts [that did] not toll the statute of limitations’” and dismissed the case.<sup>65</sup> On appeal, the supreme court reviewed the history of its continuing treatment rule jurisprudence in the health care area and noted that the “dispositive issue is whether ‘a continuous and substantially uninterrupted course of examination and treatment’ existed between [plaintiff] and [the radiology group], or whether [the group’s] treatment of [plaintiff] was a series of ‘single, isolated act[s].’”<sup>66</sup> Noting that it had not previously considered the application of the continuing treatment rule to radiologists, the court reviewed cases from other jurisdictions ad-

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60. *Id.* at 210, 704 S.E.2d at 405 (quoting VA. CODE ANN. § 8.01-5(A) (Repl. Vol. 2007 & Cum. Supp. 2011)).

61. *Id.* at 210–11, 704 S.E.2d at 405–06.

62. *Id.* at 211, 704 S.E.2d at 406.

63. 281 Va. 690, 692–94, 699–701, 708 S.E.2d 834, 835–36, 839–40 (2011).

64. *See id.* at 694, 708 S.E.2d at 836.

65. *Id.* at 695, 708 S.E.2d at 837 (quoting *Chalifoux v. Radiology Assocs. of Richmond, Inc.*, 79 Va. Cir. 356, 356 (2009) (Richmond City)).

66. *Id.* at 96–98, 708 S.E.2d at 837–38 (quoting *Farley v. Goode*, 219 Va. 969, 976, 980, 252 S.E.2d 594, 599, 601 (1979)) (alteration in original).

addressing the rule in the radiology context.<sup>67</sup> Emphasizing that the plaintiff's treating physicians referred her to the radiology group on six occasions during roughly a three-year period for studies related to the same or similar symptoms, the court held that "a continuous and . . . uninterrupted course of . . . treatment' existed between [plaintiff] and [the radiology group]."<sup>68</sup> Thus, the continuous treatment rule applied and the statute of limitations did not begin to run until the physician-patient relationship between the group and plaintiff ended.<sup>69</sup>

### E. *Variance Between Pleading and Evidence*

In several recent cases, the Supreme Court of Virginia evaluated issues of variance between pleadings and the evidence at trial and motions to amend the pleadings to conform to the evidence.<sup>70</sup> *Syed v. ZH Technologies, Inc.*, a business torts case, involved, among other things, claims of breach of fiduciary duty, conspiracy, and tortious interference.<sup>71</sup> At trial, the plaintiff company presented evidence suggesting that one of the defendants had breached his fiduciary duty as a partner, whereas the complaint had alleged a breach in his capacity as an employee, and that the same defendant had engaged in a conspiracy with an individual not referenced in the complaint.<sup>72</sup> At the conclusion of the evidence, the plaintiff moved to amend its pleadings to conform to this evidence, but the motion was denied by the trial court, which ruled that it would be "fundamentally unfair" at that point to allow the amendment after the defendants had put on their case in response to the allegations as pled.<sup>73</sup> The trial court did, however, "allow[] [the plaintiff] to argue to the jury, based upon instructions that conformed to the evidence," and the jury returned a verdict in favor of the plaintiff on the breach of fiduciary duty and

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67. *See id.* at 699–700, 708 S.E.2d at 839.

68. *Id.* at 700–01, 708 S.E.2d at 839–40 (quoting *Farley*, 219 Va. at 976, 252 S.E.2d at 599).

69. *Id.* at 701, 708 S.E.2d at 840.

70. *See Dabney v. Augusta Mut. Ins. Co.*, 282 Va. 78, 710 S.E.2d 726 (2011); *Bennett v. Sage Payment Solutions, Inc.*, 282 Va. 49, 710 S.E.2d 736 (2011); *Syed v. ZH Techs., Inc.*, 280 Va. 58, 694 S.E.2d 625 (2010).

71. 280 Va. at 61, 694 S.E.2d at 627.

72. *Id.* at 62–64, 694 S.E.2d at 627–29.

73. *Id.* at 64–65, 694 S.E.2d at 629.

conspiracy claims.<sup>74</sup> In assessing the trial court's decision, the supreme court cited Virginia Code section 8.01-377, which provides as follows:

If, at the trial of any action, there appears to be a variance between the evidence and the allegations or recitals, the court, if it consider[s] that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case.<sup>75</sup>

The supreme court then held that it was fundamentally unfair for the trial court to allow jury instructions and argument on an unpled theory of breach of fiduciary duty by a partner when the defendant had not had an opportunity to defend against such a claim and was prejudiced against as a result.<sup>76</sup> As to the business conspiracy claim, the court did not address the variance issue, because reversal was necessary due to the trial court's error in having allowed a retrial on damages when the jury had awarded "\$0" in compensatory damages for the claim.<sup>77</sup> The court held that because the jury found no damages, an essential element of the claim, it was an error for the trial court to have confirmed the verdict as to liability.<sup>78</sup> The court also held that the trial court had erred in allowing a new trial on damages for the tortious interference claim when the jury had awarded punitive damages, while finding "\$0" in compensatory damages.<sup>79</sup>

In *Dabney v. Augusta Mutual Insurance Co.*, an insurance coverage case, the supreme court considered whether a trial court erred in barring a jury from considering facts not pled in the complaint.<sup>80</sup> The plaintiff's complaint stated that she provided the defendant insurance company with timely notice of her claim in May 2004, but at trial she put on evidence showing that the in-

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74. *Id.* at 65–66, 694 S.E.2d at 629.

75. VA. CODE ANN. § 8.01-377 (Repl. Vol. 2007 & Cum. Supp. 2011); *Syed*, 280 Va. at 70–71, 694 S.E.2d at 632.

76. *Syed*, 280 Va. at 71, 694 S.E.2d at 632–33.

77. *Id.* at 72–73, 694 S.E.2d at 633.

78. *Id.*

79. *Id.* at 74–75, 694 S.E.2d at 634.

80. 282 Va. 78, 81, 710 S.E.2d 726, 728 (2011).

surer received notice regarding her claim in early 2005.<sup>81</sup> At the conclusion of the evidence, the insurance company moved to strike, contending that the plaintiff's complaint only alleged notice in May 2004 and thus "the issue submitted to the jury should be limited to whether [the company] had notice of [the] claim [at that time]."<sup>82</sup> The trial court agreed, "rul[ing] that [the plaintiff] was bound by the allegations in her . . . complaint."<sup>83</sup> On appeal, the supreme court noted that "[t]he law in Virginia is well-established that a court cannot enter judgment based on facts that are not alleged in the parties' pleadings," and therefore upheld the trial court's decision to limit the plaintiff's relief based upon the allegations in her complaint.<sup>84</sup>

In *Bennett v. Sage Payment Solutions, Inc.*, a breach of contract case, the supreme court upheld an amendment to conform to the evidence under Virginia Code section 8.01-377.<sup>85</sup> In the instant case, the plaintiff's own testimony tended to show that he had repudiated the parties' agreement.<sup>86</sup> As a result, "prior to the close of [the plaintiff's] case-in-chief, [the defendant] moved . . . to amend its [answer under section 8.01-377] to [assert] a defense of repudiation," which the trial court allowed.<sup>87</sup> In considering the propriety of the trial court's decision, the supreme court held that the trial court did not abuse its discretion in allowing the amendment because the plaintiff's own evidence established the defense, thereby negating the plaintiff's argument that he was prejudiced by the amendment.<sup>88</sup>

#### F. *Expert Testimony*

The Supreme Court of Virginia held in *CNH America L.L.C. v. Smith* that a trial court abused its discretion by admitting the

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81. *Id.* at 84, 710 S.E.2d at 729.

82. *Id.* at 83–84, 710 S.E.2d at 729.

83. *Id.*, 710 S.E.2d at 729–30.

84. *Id.* at 86–87, 710 S.E.2d at 730–31. The Supreme Court of Virginia noted that "[the plaintiff's] counsel did not argue to the [trial] court that . . . [her] pleading could [be] amended to conform to the evidence [under section 8.01-377]." *Id.* at 87 n.3, 710 S.E.2d at 731 n.3.

85. 282 Va. 49, 59–61, 710 S.E.2d 736, 742–43 (2011).

86. *Id.* at 59–61, 710 S.E.2d at 742–43.

87. *Id.* at 53–55, 710 S.E.2d at 739–40.

88. *Id.* at 61, 710 S.E.2d at 743.

testimony of two experts in a product liability case.<sup>89</sup> The plaintiff was injured when a hose on a hay mower burst, injecting burning hydraulic fluid into his hand.<sup>90</sup> In support of his claims against the manufacturer of the mower, the plaintiff presented testimony from two experts.<sup>91</sup> The first expert, who testified that the hose had a manufacturing defect, admittedly had never qualified as a hose expert.<sup>92</sup> The expert also admitted that he performed no tests to support his defect theory and that he saw no evidence of the defect when he inspected the hose.<sup>93</sup> The second expert, called to testify about the mower's hydraulic system, "admitted that his experience [in] hydraulic[s] . . . was [confined] to the mining industry and that he was not an expert in the . . . type . . . of . . . mower [at issue]." The trial court allowed testimony from both experts over the defendant's objection and the jury returned a verdict in favor of the plaintiff.<sup>94</sup> On appeal, the supreme court stated that "expert testimony is inadmissible if it rests on assumptions that have an insufficient factual basis or it fails to take into account all of the relevant variables."<sup>95</sup> As to the first expert, the supreme court ruled that the trial court abused its discretion in allowing the testimony because it was not based upon an adequate foundation, as the expert had admitted that he failed to perform tests he could have performed to support his defect theory.<sup>96</sup> The court ruled that it was also an abuse of discretion to allow the second expert because his qualifications did not correlate to the opinions he gave at trial.<sup>97</sup>

In *Condominium Services, Inc. v. First Owners' Ass'n of Forty Six Hundred Condominium, Inc.*, a case involving claims of breach of a property management agreement and conversion of funds, the supreme court addressed whether a trial court abused its discretion in allowing an expert's testimony in light of the party's expert designation—an issue recently imprinted on the minds

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89. 281 Va. 60, 62–63, 67–68, 704 S.E.2d 372, 373, 375–76 (2011).

90. *Id.* at 62–64, 704 S.E.2d at 373–74.

91. *Id.* at 62–65, 704 S.E.2d at 373–74.

92. *Id.* at 64, 704 S.E.2d at 374.

93. *Id.*

94. *Id.*

95. *Id.* at 67, 704 S.E.2d at 375 (citing *Tittsworth v. Robinson*, 252 Va. 151, 154, 475 S.E.2d 261, 263 (1996); *Tarmac Mid-Atl., Inc. v. Smiley Block Co.*, 250 Va. 161, 166, 458 S.E.2d 462, 465–66 (1995)).

96. *Id.* at 67–68, 704 S.E.2d at 375–76.

97. *See id.* at 68, 704 S.E.2d at 376.

of all Virginia trial lawyers by the case of *John Crane, Inc. v. Jones*.<sup>98</sup> In response to a standard expert disclosure interrogatory, the owners' association identified an accountant and stated that he would opine that the opposing party's failures caused the association to underpay taxes and incur interest and penalties as a result.<sup>99</sup> The interrogatory answer did not state the amount of the interest or penalty the expert believed the owners' association would incur, but the expert later testified to the figures in his deposition.<sup>100</sup> A motion in limine was later filed seeking to exclude the expert from testifying about potential penalties and interest because the expert interrogatory answer "failed to [state] the amount of . . . penalties and interest claimed and failed to state the basis for . . . such damages."<sup>101</sup> The trial court denied the motion and allowed the testimony.<sup>102</sup> On appeal, the supreme court noted that a trial court's decision to admit or exclude expert testimony is reviewed under the abuse of discretion standard.<sup>103</sup> In evaluating the trial court's decision to allow the testimony, the court stated that, although the association "did not itemize the specific amounts of penalties and interest, the interrogatory response disclosed that it was [the expert's] opinion that [the opposing party's] failures resulted in underpayment of taxes and [the association] incurring interest and penalties."<sup>104</sup> The supreme court therefore held that it was within the trial court's discretion to determine that the response sufficiently disclosed the subject matter of the expert's testimony, the substance of the opinions, and the grounds for such opinions.<sup>105</sup> In so holding, the supreme court contrasted the *John Crane* case, where the opinions at issue had not been disclosed in any form.<sup>106</sup>

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98. *Condominium Servs., Inc.*, 281 Va. 561, 567, 575–76, 709 S.E.2d 163, 167, 172 (2011). In *John Crane*, the supreme court upheld a trial court's decision to exclude expert testimony that was not included in the party's expert interrogatory response, even though the opposing party was aware of the opinions from deposition and testimony in other proceedings. See 274 Va. 581, 586, 591–92, 650 S.E.2d 851, 856 (2007).

99. *Condominium Servs., Inc.*, 281 Va. at 567, 569, 709 S.E.2d at 167–68.

100. *Id.* at 569–70, 709 S.E.2d at 168.

101. *Id.* at 570, 709 S.E.2d at 168.

102. See *id.*

103. *Id.* at 575, 709 S.E.2d at 172 (citing *John Crane*, 274 Va. at 591, 650 S.E.2d at 856); *Blue Ridge Serv. Corp. v. Saxon Shoes, Inc.*, 271 Va. 206, 212, 624 S.E.2d 55, 58 (2006)).

104. *Id.* at 576, 709 S.E.2d at 172.

105. *Id.*

106. Compare *Condominium Servs., Inc.*, 281 Va. at 576, 709 S.E.2d at 172, with *John*

### G. Evidence

In *Jones v. Williams*, the Supreme Court of Virginia construed the corroboration requirements of Virginia's "Dead Man's Statute," Virginia Code section 8.01-397.<sup>107</sup> *Jones* involved a personal injury case against the personal representative of a deceased physician who delivered a baby who suffered injuries during birth.<sup>108</sup> According to the testimony of the obstetric nurse, the physician ordered her to apply "fundal pressure" to the mother in an effort to address an emergency condition in the baby that had developed during the course of the delivery.<sup>109</sup> Section 8.01-397 provides as follows:

In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.<sup>110</sup>

At trial, the defendant moved to strike the evidence, arguing that the testimony regarding fundal pressure was inadmissible under the Dead Man's Statute because the nurse was an interested party under the law who could not corroborate the claim.<sup>111</sup> The trial court denied the motion and the jury returned a verdict in favor of the plaintiff.<sup>112</sup> The deceased physician's estate argued that the nurse was an "interested party" for purposes of section 8.01-397 "because [the plaintiff's] recovery against [the physician] relieved [the nurse] of potential liability."<sup>113</sup> The supreme court, however, disagreed, noting that "a witness whose testimony provides [grounds] for . . . her own liability is not an 'interested party,'" and that the nurse's testimony could have provided a basis for a contribution claim against her by the physician's estate.<sup>114</sup> The court also noted that the nurse's testimony was neutral on

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*Crane*, 274 Va. at 592–93, 650 S.E.2d at 857.

107. 280 Va. 635, 637, 701 S.E.2d 405, 405 (2010); *see also, e.g.*, *Diehl v. Butts*, 255 Va. 482, 487–89, 499 S.E.2d 833, 837–38 (1998) (discussing Virginia's "Dead Man's Statute").

108. *Jones*, 280 Va. at 637–38, 701 S.E.2d at 406.

109. *Id.* at 637, 701 S.E.2d at 406.

110. VA. CODE ANN. § 8.01-397 (Repl. Vol. 2007 & Cum. Supp. 2011).

111. *Jones*, 280 Va. at 638, 701 S.E.2d at 406.

112. *Id.*

113. *Id.* at 639, 701 S.E.2d at 407.

114. *Id.* at 639–40, 701 S.E.2d at 407 (citing *Johnson v. Raviotta*, 264 Va. 27, 38 n.2, 563 S.E.2d 727, 734 n.2 (2002)).

the dispositive question of *when* the fundal pressure was applied.<sup>115</sup> The supreme court therefore upheld the trial court's decision to deny the motion to strike.<sup>116</sup>

At issue in *Smith v. Commonwealth*, a sexually violent predator commitment case, was whether the trial court erred in considering records of the respondent's treatment in a behavioral rehabilitation facility.<sup>117</sup> The subject objected to the consideration of the records on the grounds that they were inadmissible hearsay documents.<sup>118</sup> In evaluating the trial court's decision to consider the treatment records, the supreme court held that the treatment records "easily passed" the tests under Virginia law for meeting the business records exception to the hearsay rule, noting that department policy required creation of the records and that the records were "maintained in the 'regular and ordinary course of business for all residents'" of the facility.<sup>119</sup>

In *Midkiff v. Commonwealth*, a criminal case involving child pornography, the supreme court addressed a "best evidence rule" issue regarding digital images, which is also instructive for civil litigators in the electronic age.<sup>120</sup> In *Midkiff*, the trial court admitted digital video recordings and still images of child pornography reproduced from electronic files on DVDs copied from the hard drives of the defendant's computer.<sup>121</sup> At trial, the defendant argued that admission of the images and recordings violated the best evidence rule because "they were a 'third generation removed' from the defendant's hard drives."<sup>122</sup> In declining to extend the best evidence rule to the images and recordings at issue, the supreme court held that the rule is "limited to written documents."<sup>123</sup> Furthermore, the court held that, given the testimony of the Commonwealth's forensic expert, "the purpose of the rule, reliability of evidence, is amply met," concluding that "the printed

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115. *Id.* at 640, 701 S.E.2d at 407.

116. *Id.*

117. 280 Va. 178, 181, 694 S.E.2d 578, 579 (2010).

118. *Id.* at 181, 183, 694 S.E.2d at 579–80.

119. *Id.* at 183–84, 694 S.E.2d at 580–81.

120. 280 Va. 216, 217–19, 694 S.E.2d 576, 576–77 (2010).

121. *Id.* at 218–19, 694 S.E.2d at 577.

122. *Id.*, 694 S.E.2d at 577.

123. *Id.* at 219, 694 S.E.2d at 577 (citing *Meade v. Commonwealth*, 177 Va. 811, 815, 12 S.E.2d 796, 797–98 (1941)).



pictures and video recordings were reliable representations of the material contained” in the files on the defendant’s computer.<sup>124</sup>

#### H. *Res Judicata*

In *Gunter v. Martin*, the supreme court addressed the doctrine of res judicata as it existed prior to the enactment of Rule 1:6 in July 2006.<sup>125</sup> *Gunter* involved a suit by an alleged heir to a decedent’s estate against the decedent’s widow to quiet title to certain parcels of land and for their sale or allotment between the heir and the widow.<sup>126</sup> Several years prior, in 2005, the same heir had filed a different suit against the widow, individually and in her capacity as administrator of the decedent’s estate, contending that the list of heirs filed by the administrator was incorrect (the “2005 Suit”).<sup>127</sup> The court dismissed the 2005 Suit because the heir had not satisfied certain statutory requirements for filing an affidavit of parenthood.<sup>128</sup> The widow filed a plea in bar of res judicata in response to the heir’s second suit, contending that the claim was “dependent upon a determination that [the heir] is the biological child of [the decedent],” which was decided in the 2005 Suit.<sup>129</sup> The heir responded that the new claim was not barred by res judicata, *inter alia*, because he sought different relief in the second suit.<sup>130</sup> The trial court sustained the plea in bar and dismissed the case.<sup>131</sup> On appeal, the supreme court stated that,

to prevail upon a plea of res judicata [outside of Rule 1:6], [the heir] was required to establish four elements: identity of the remedies sought, identity of the cause of action, identity of the parties, and identity of the quality of the persons for or against whom the claim is made.<sup>132</sup>

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124. *Id.* 218–20, 694 S.E.2d at 577–78.

125. 281 Va. 642, 643, 708 S.E.2d 875, 875 (2011). Rule 1:6 codified the doctrine of res judicata and applies to all judgments entered in civil actions commenced after July 1, 2006. VA. SUP. CT. R. pt. 1, R. 1:6 (Repl. Vol. 2011). The judgment at issue in *Gunter* was not subject to Rule 1:6 because the action had been commenced in 2005. 281 Va. at 645, 708 S.E.2d at 876.

126. 281 Va. at 644, 708 S.E.2d at 876.

127. *Id.* at 643–44, 708 S.E.2d at 875–76.

128. *Id.* at 644, 708 S.E.2d at 876.

129. *Id.* at 645, 708 S.E.2d at 876.

130. *Id.*

131. *Id.*

132. *Id.*, 708 S.E.2d at 876–77 (quoting *State Water Control Bd. v. Smithfield Foods, Inc.*, 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001)) (internal quotation marks omitted).

Holding that the remedy sought was not of the same identity as that sought in the 2005 Suit, the supreme court ruled that res judicata did not bar the claim and reversed the trial court's decision.<sup>133</sup>

### I. *Jury Instructions and Law of the Case*

The case of *Wintergreen Partners, Inc. v. McGuireWoods, LLP*, involved a claim for legal malpractice over the failure to ensure that trial transcripts were timely filed in connection with the appeal of an adverse trial verdict.<sup>134</sup> In affirming the trial court's grant of summary judgment for the defendant law firm in the malpractice case, on the basis that the client could not prove as a matter of law that the judgment would have been reversed if a timely appeal had been filed, the supreme court once again made clear that "[jury] instructions given without objection become the law of the case and thereby bind the parties in the trial court and . . . on review."<sup>135</sup> Because the defendant in the underlying case for the malpractice action failed to object to the verdict form and certain specific jury instructions offered, they became the law of the case and supported the judgment.<sup>136</sup> As a result, that same party was unable to prove in its malpractice case that the trial verdict would have been reversed on appeal if the transcripts had been timely filed.<sup>137</sup> Thus, Virginia trial lawyers should be mindful of the importance of raising specific objections to jury instructions.

### J. *Twenty-One Day Rule and Sanctions*

The case of *Johnson v. Woodard* provided the Supreme Court of Virginia an opportunity to address issues of retention of jurisdiction under Rule 1:1, as well as the scope of sanctions under Virginia Code section 8.01-271.1.<sup>138</sup> The case arose out of a petition filed by forty citizens of Gloucester County who sought removal of certain members of the Gloucester County's Board of Supervisors

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133. *Id.* at 645–46, 708 S.E.2d at 877.

134. 280 Va. 374, 376, 698 S.E.2d 913, 914 (2010).

135. *Id.* at 376, 379–80, 698 S.E.2d at 914, 916 (quoting *Owens-Illinois, Inc. v. Thomas Baker Real Estate, Ltd.*, 237 Va. 649, 652, 379 S.E.2d 344, 346 (1989)) (citations omitted).

136. *Id.* at 379–80, 698 S.E.2d at 916.

137. *Id.* at 376, 380, 698 S.E.2d at 914, 916 (citations omitted).

138. 281 Va. 403, 406, 707 S.E.2d 325, 326 (2011).

for neglect of duty, misuse of office, or incompetence.<sup>139</sup> Following the filing of the petition, “[t]he circuit court appointed a special prosecutor to litigate the removal action.”<sup>140</sup> Later, the prosecutor moved to nonsuit the removal action on technical grounds, but also noted that “[b]ased on the information he had from witnesses,” he did not believe the case would withstand a motion to strike.<sup>141</sup> The trial court granted the motion for nonsuit and entered an order stating in part that “for purposes of Rule 1:1, this is not a final order, in that this [c]ourt shall retain jurisdiction of this matter to consider any application for attorney’s fees and costs and such other relief as may be sought.”<sup>142</sup> Subsequently, the supervisors filed a motion for sanctions against the petitioners under section 8.01-271.1.<sup>143</sup> After stating that he had “never seen more of a misuse of the judicial system” in his twenty-three years on the bench, the trial court judge granted the supervisors’ motion for sanctions and ordered that each petitioner pay \$2000.<sup>144</sup>

On appeal “[t]he petitioners argue[d] that the nonsuit order was a final order for purposes of Rule 1:1, and . . . thus the [trial] court lost jurisdiction over the case [twenty-one] days after its entry,” and so did not have the power to impose sanctions.<sup>145</sup> The petitioners further argued that they were not parties to the removal action for purposes of section 8.01-271.1.<sup>146</sup> As to the Rule 1:1 issue, the supreme court recognized that under its previous holding in *Super Fresh Food Markets of Virginia, Inc. v. Ruffin*,<sup>147</sup> “a circuit court may avoid the application of the [twenty-one] day [rule] by including specific language [in an order to indicate that it] is retaining jurisdiction to address matters still pending.”<sup>148</sup> The supreme court therefore held that the nonsuit order was not final due to the reservation language and that the trial court had jurisdiction to impose sanctions.<sup>149</sup> On the issue of sanctions, how-

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139. *Id.* at 406–07, 707 S.E.2d at 326.

140. *Id.* at 407, 707 S.E.2d at 327.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 407–08, 707 S.E.2d at 327.

145. *Id.* at 408, 707 S.E.2d at 327.

146. *Id.* at 410, 707 S.E.2d at 328.

147. 263 Va. 555, 561, 561 S.E.2d 734, 737 (2002).

148. *Johnson*, 281 Va. at 409–10, 707 S.E.2d at 328 (citing *Super Fresh Farm Mkts. of Va., Inc.*, 263 Va. at 561, 561 S.E.2d at 737).

149. *Id.*

ever, the supreme court explained that section 8.01-271.1 “applies only to parties and their attorneys.”<sup>150</sup> The supreme court further held that although the removal action was initiated by the filing of the petition, the parties to the removal action were the Commonwealth and the supervisors, and the petitioners themselves were not “parties” who were subject to sanctions.<sup>151</sup>

### K. *Discontinuance of Inactive Cases*

In *Rutter v. Oakwood Living Centers of Virginia*, the supreme court held that Virginia Code section 8.01-335(B), governing discontinuance of actions after more than three years of inactivity, does not allow a trial court to dismiss or discontinue a case with a self-executing, prospective order.<sup>152</sup> The case involved a plaintiff in a wrongful death suit with several defendants.<sup>153</sup> In September 2000, two of the defendants filed for bankruptcy and notified the circuit court of the stay of the wrongful death case against them under federal bankruptcy law.<sup>154</sup> In response to the notice, the circuit court entered an order on October 4, 2000, removing the action from the court’s docket “with leave . . . to place [the] action back on the docket . . . upon resolution of the bankruptcy proceeding.”<sup>155</sup> The court’s order further stated that “[t]his action shall be ordered to be discontinued if after three years there has been no further order or proceeding under [Code] § 8.01-335(B).”<sup>156</sup> After some confusion as to the scope of the removal order, the plaintiff filed a motion to set a trial date in June 2005.<sup>157</sup> Thereafter, however, there was no activity on the docket “until April 2009, when [one of the defendants] filed a plea of statute of limitations and/or motion to dismiss.”<sup>158</sup> The defendant argued that under the court’s October 4, 2000, order, the action abated as of October 4, 2003, and the plaintiff had both failed to re-file within the remaining statute of limitations and within the one year to file a motion for

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150. *Id.* at 412, 707 S.E.2d at 329.

151. *Id.* at 406–07, 410–12, 707 S.E.2d at 326–29.

152. 282 Va. 4, 12, 710 S.E.2d 460, 464 (2011); see VA. CODE ANN. § 8.01-335(B) (Repl. Vol. 2007 & Cum. Supp. 2011).

153. 282 Va. at 7, 710 S.E.2d at 461.

154. *Id.* at 7–8, 710 S.E.2d at 461.

155. *Id.*, 710 S.E.2d at 461–62 (citation omitted).

156. *Id.* at 8, 710 S.E.2d at 461–62.

157. *Id.*, 710 S.E.2d at 462 (alteration in original).

158. *Id.*

reinstatement.<sup>159</sup> The circuit court granted the motion and dismissed the complaint.<sup>160</sup>

On appeal, the issue presented was “whether the circuit court erred by treating the 2000 [o]rder as a self-executing order prospectively discontinuing [plaintiff’s] action under Code § 8.01-355(B).”<sup>161</sup> According to code section 8.01-355:

Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.<sup>162</sup>

Under this language, the supreme court held that “the [trial] court erred [in ruling] that the [October] 2000 [o]rder served to discontinue [the case] as of October 2003.”<sup>163</sup> As the supreme court explained, a “trial court’s determination that there *has been* no order or proceeding for at least three years must be made contemporaneously with the entry of the order discontinuing or dismissing the action.”<sup>164</sup> The court also noted that section 8.01-335(B) additionally “requires the clerk of the trial court to provide the parties with a copy of the final order . . . dismissing the action,” and reasoned that, “in the case of a self-executing, prospective order of discontinuance, the clerk could not provide the parties with ‘the final order’” contemplated in the statute.<sup>165</sup> After so ruling, however, the court ultimately dismissed the appeal, *sua sponte*, on the grounds that it lacked jurisdiction because the circuit court’s order dismissing the action as to one of the defendants was not a final, appealable order.<sup>166</sup>

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159. *Id.*

160. *Id.* at 9, 710 S.E.2d at 462.

161. *Id.*

162. VA. CODE ANN. § 8.01-335(B) (Repl. Vol. 2007 & Cum. Supp. 2011).

163. *Rutter*, 282 Va. at 10, 710 S.E.2d at 463.

164. *Id.* at 11, 710 S.E.2d at 463.

165. *Id.* (quoting VA. CODE ANN. § 8.01-335(B) (Repl. Vol. 2007 & Cum. Supp. 2011)).

166. *Id.* at 15, 710 S.E.2d at 466.

### L. *Jurisdiction and Standing*

The Supreme Court of Virginia also decided several recent cases addressing issues of jurisdiction and standing.<sup>167</sup> In *Jenkins v. Mehra*, the supreme court dismissed an appeal of a trial court's judgment refusing to hold a party in contempt for failing to abide by the terms of a prior court order.<sup>168</sup> In so ruling, the court noted that no right to appeal a contempt order existed at common law and the General Assembly had not provided appellate jurisdiction to the supreme court or the court of appeals to review the judgment of the circuit court refusing to hold the party in contempt of court.<sup>169</sup> In *Davis v. County of Fairfax*, the supreme court addressed a multi-layered question of whether a circuit court properly exercised jurisdiction "over a case that originated in [the] . . . [g]eneral [d]istrict [c]ourt, was appealed to the circuit court and non-suited there, was subsequently re-filed in the general district court, and then appealed to the circuit court."<sup>170</sup> According to the supreme court, the circuit court obtained appellate jurisdiction from the de novo appeal taken from the general district court and the nonsuit did not divest the circuit court of that jurisdiction.<sup>171</sup> Thus, under Virginia Code section 8.01-380, governing nonsuits, the case was required to be refiled in the circuit court, not the general district court.<sup>172</sup> Because the general district court did not have jurisdiction to hear the refiled case, the circuit court did not have jurisdiction to decide the appeal because of its derivative appellate jurisdiction.<sup>173</sup> In so holding, the supreme court expressly overruled *Lewis v. Culpeper County Department of Social Services*, to the extent inconsistent with the court's opinion.<sup>174</sup>

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167. See *Davis v. Cnty. of Fairfax*, 282 Va. 23, 26, 710 S.E.2d 466, 467 (2011); *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 682, 709 S.E.2d 150, 152 (2011); *Jenkins v. Mehra*, 281 Va. 37, 40, 704 S.E.2d 577, 579 (2011); *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 466, 698 S.E.2d 900, 901 (2010).

168. 281 Va. at 40, 704 S.E.2d at 579.

169. *Id.* at 43, 48, 704 S.E.2d at 580, 583.

170. 282 Va. at 26, 710 S.E.2d at 467.

171. *Id.* at 30, 710 S.E.2d at 469.

172. *Id.* (citing VA. CODE ANN. § 8.01-380(A) (Repl. Vol. 2007 & Cum. Supp. 2011)).

173. *Id.* at 30-31, 710 S.E.2d at 469.

174. *Id.* at 31, 710 S.E.2d at 470 (citing *Lewis v. Culpeper Cnty. Dep't of Soc. Servs.*, 50 Va. App. 160, 168, 647 S.E.2d 511, 515 (2007), *overruled in part by Davis*, 282 Va. at 31, 710 S.E.2d at 470).

In *Virginian-Pilot Media Companies, L.L.C. v. Dow Jones & Company, Inc.*, a case Justice Mims's concurring opinion described as presenting a "procedural Gordian knot,"<sup>175</sup> the supreme court addressed whether a circuit court has subject-matter jurisdiction to determine whether a newspaper meets the requirements under Virginia Code section 8.01-324(A) for publication of ordinances, resolutions, notices, or advertisements required by law and whether a rival newspaper had standing to challenge the circuit court's jurisdiction.<sup>176</sup> On appeal, the supreme court held that section 8.01-324(A) lacks any grant of subject-matter jurisdiction to the circuit courts,<sup>177</sup> but found it unnecessary to address the standing question, as a court order entered without jurisdiction is a nullity.<sup>178</sup> In a lengthy dissent, Justice Lemons, joined by Justice Kinser, criticized the majority for ignoring the issue of standing.<sup>179</sup> According to Justice Lemons,

[t]he effect of the majority holding in this case is truly far reaching. Pursuant to the majority holding, a person in Roanoke learning by newspaper account of a judgment rendered by the Circuit Court of the County of Fairfax could intervene in the appeal of the matter to the Supreme Court of Virginia for the sole purpose of asserting lack of subject matter jurisdiction, even though that person had no interest whatsoever in the merits of the case.<sup>180</sup>

In another opinion on standing, *Virginia Marine Resources Commission v. Clark*, the supreme court addressed whether a petition for review from a decision of the Virginia Marine Resources Commission ("VMRC") was deficient because it did not contain allegations to show the plaintiff's standing.<sup>181</sup> The court of appeals ruled the petition was sufficient because Rule 2A:4(b) states that a petition for appeal "shall designate the regulation or case decision appealed from, specify the errors assigned, state the reasons why the regulation or case decision is deemed to be unlawful and conclude with a specific statement of the relief requested," and does not specifically state that the petition must contain factual

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175. 280 Va. 464, 478, 698 S.E.2d 900, 908 (2010) (Mims, J., concurring).

176. *Id.* at 466, 698 S.E.2d at 901 (majority opinion).

177. *Id.* at 469, 698 S.E.2d at 902 (citing VA. CODE ANN. § 8.01-324(A) (Repl. Vol. 2009 & Cum. Supp. Vol. 2011)).

178. *Id.* at 468–70, 698 S.E.2d at 902–03 (citations omitted).

179. *Id.* at 470–78, 698 S.E.2d at 903–07 (Lemons, J., dissenting).

180. *Id.* at 477, 698 S.E.2d at 907.

181. 281 Va. 679, 682, 709 S.E.2d 150, 152 (2011).

allegations supporting the petitioner's standing.<sup>182</sup> The supreme court held that nothing in Rule 2A:4 excused the petitioner from establishing his standing by setting forth allegations to show that he was a person "aggrieved" by the VMRC for purposes of contesting its decision.<sup>183</sup> Thus, even though the petition satisfied the four elements of Rule 2A:4, the supreme court held that it was properly dismissed by the circuit court for failure to allege the basis for the petitioner's standing.<sup>184</sup>

### III. AMENDMENTS TO RULES OF COURT

#### A. *Amendments*

Through an order dated March 1, 2011, effective May 2, 2011, the Supreme Court of Virginia amended Rule 1:8 to provide that, "[u]nless otherwise [ordered] in a particular case, any written motion for leave to file an amended pleading shall be accompanied by a properly executed proposed amended pleading, in a form suitable for filing."<sup>185</sup> The rule further provides that "[i]f the motion [to amend] is granted, the [proposed] amended pleading . . . [is] deemed filed . . . as of the date of the court's order permitting such amendment."<sup>186</sup> In the event that the motion is granted in part, the rule provides that "the court may provide for filing an amended pleading as the court . . . deem[s] reasonable and proper."<sup>187</sup> The rule also provides that if amendment "is granted [by means] other than [through] written motion, . . . the amended pleading [must] be filed within [twenty-one] days after leave . . . is granted or [within] such time as the court may prescribe."<sup>188</sup> The supreme court's March 1, 2011 order also amends Rule 3:16, which addresses the addition of new parties through amended

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182. *Id.* at 684–85, 709 S.E.2d at 153 (quoting VA. SUP. CT. R. pt. 2A, R. 2A:4(b) (Repl. Vol. 2011)).

183. *Id.* at 685, 709 S.E.2d at 154.

184. *Id.* at 683–85, 709 S.E.2d at 153–54.

185. Order Amending Rule 1:8, Rules of Supreme Court of Virginia (Mar. 1, 2011) (effective May 2, 2011), *available at* [http://courts.state.va.us/courts/scv/amendments\\_tracked/2011\\_0502\\_rule\\_1\\_08\\_amend.pdf](http://courts.state.va.us/courts/scv/amendments_tracked/2011_0502_rule_1_08_amend.pdf).

186. VA. SUP. CT. R. pt. 1, R. 1:8 (Repl. Vol. 2011).

187. *Id.*

188. *Id.*



pleadings, to address the requirement of attaching a properly executed proposed amended complaint.<sup>189</sup>

### B. *Electronic Filing and Service*

By order dated March 1, 2011, and effective May 2, 2011, the Supreme Court of Virginia substantially edited Rule 1:17 regarding electronic filing and service.<sup>190</sup> The order also amended several other rules to contemplate cases with electronic filings under Rule 1:17.<sup>191</sup>

### C. *Appellate Practice*

In 2010, the Supreme Court of Virginia adopted a wholesale reenactment of Part Five and Part Five A, which govern practice before the Supreme Court of Virginia and Court of Appeals of Virginia.<sup>192</sup> Through its order dated March 1, 2011, effective May 2, 2011, the supreme court adopted further amendments to both parts.<sup>193</sup> The most significant amendments were to clarify in a number of rules that the length of petitions and briefs is the longer of either the page or word count limit.<sup>194</sup> In addition, Rule 5:5, regarding filing deadlines, was amended to provide that the deadline for filing a petition for the review of a temporary injunction under Virginia Code section 8.01-626 and Rule 5:17A, is mandatory.<sup>195</sup> Rule 5:7, regarding petitions for writs of habeas corpus, was also amended to provide that, “[i]f the statute of limitations has not expired, a petitioner may move . . . at any time before a ruling is rendered on the merits of the petition . . . for leave . . . to

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189. *Id.*; Order Amending Rule 3:16, Rules of Supreme Court of Virginia (Mar. 1, 2011) (effective May 2, 2011), *available at* [http://courts.state.va.us/courts/scv/amendments\\_track\\_ed/2011\\_0502\\_rule\\_1\\_08\\_amend.pdf](http://courts.state.va.us/courts/scv/amendments_track_ed/2011_0502_rule_1_08_amend.pdf).

190. Order Amending Rule 1:17, Rules of Supreme Court of Virginia, at 5–12 (Mar. 1, 2011) (effective May 2, 2011), *available at* [http://courts.state.va.us/courts/scv/amendments/2011\\_0301\\_efiling\\_part\\_1\\_4\\_seven\\_8.pdf](http://courts.state.va.us/courts/scv/amendments/2011_0301_efiling_part_1_4_seven_8.pdf).

191. *Id.* at 1–4.

192. Order Amending Part Five and Part Five A, Rules of Supreme Court of Virginia (Apr. 30, 2011) (effective July 1, 2010), *available at* [http://courts.state.va.us/courts/scv/amendments/2010\\_0430\\_part\\_five\\_and-part\\_five\\_a.pdf](http://courts.state.va.us/courts/scv/amendments/2010_0430_part_five_and-part_five_a.pdf); *see also* John R. Walk & Andrew P. Sherrod, *Annual Survey of Virginia Law: Civil Practice and Procedure*, 45 U. RICH. L. REV. 183, 211–12 (2010) (discussing appellate rules amendments).

193. Order Amending Part Five and Part Five A, Rules of Supreme Court of Virginia (Mar. 2, 2011) (effective May 2, 2011).

194. *Id.* at 2.

195. *Id.* at 1.

substitute an amended petition.”<sup>196</sup> The rule now also provides that the amended petition can include additional claims not presented in the initial petition.<sup>197</sup> The rule requires that “any such motion [for amendment must] attach a copy of the proposed amended petition.”<sup>198</sup> The order also modifies Rule 5A:35 to provide specific requirements for rehearings.<sup>199</sup>

#### IV. NEW LEGISLATION

##### A. *Jurisdictional Limit for General District Court*

In a move that will likely promote cost-efficiency in trying modest disputes, the 2011 General Assembly increased the jurisdictional limit for cases brought in general district courts from \$15,000 to \$25,000.<sup>200</sup> The General Assembly also expanded the reach of the exception to the jurisdictional limit for claims, counterclaims, and cross claims for damages in unlawful detainer actions by eliminating a provision that limited the exception to claims “where the premises were used by the occupant primarily for business, commercial or agricultural purposes.”<sup>201</sup>

##### B. *Statute of Limitations for Sexual Abuse Claims*

Through chapter 617 of the 2011 Acts of Assembly, the General Assembly lengthened the statute of limitations for “action[s] for injury to the person . . . resulting from sexual abuse occurring during infancy or incapacity . . . [to twenty] years after the cause of action accrues.”<sup>202</sup> The limitations period had previously been two years from time of accrual under the general provisions of Virginia Code section 8.01-243.<sup>203</sup>

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196. *Id.* at 3.

197. *Id.*

198. *Id.*

199. *Id.* at 17.

200. Act of March 26, 2011, ch. 702, 2011 Va. Acts \_\_\_ (codified as amended in scattered sections of VA. CODE ANN. (Cum. Supp. 2011)).

201. Act of March 14, 2011, ch. 76, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 16.1-77(3) (Supp. 2011)).

202. Act of March 26, 2011, ch. 617, 2011 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 8.01-243 (Cum. Supp. 2011)).

203. VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 2007).

### C. *Medical Malpractice Damages Cap*

Section 8.01-581.15 of the Virginia Code sets forth limitations on the total amount recoverable for certain medical malpractice actions.<sup>204</sup> Previously, the statute established annual increases through July 1, 2008.<sup>205</sup> In its 2011 session, the General Assembly amended section 8.01-581.15 to establish additional periodic increases to the medical malpractice damages cap beginning July 1, 2012.<sup>206</sup> Thereafter, the cap increases annually in the amount of \$50,000 through July 1, 2031, when the cap reaches \$3 million.<sup>207</sup> The Act provides that “[e]ach annual increase shall apply to the act or acts of malpractice occurring on or after the effective date of the increase.”<sup>208</sup>

### D. *Sovereign Immunity under Fraud Against Taxpayers Act*

In the 2010 case of *Ligon v. County of Goochland*, the Supreme Court of Virginia held that the doctrine of sovereign immunity barred a claim against a county under the Virginia Fraud Against Taxpayers Act (“VFATA”).<sup>209</sup> In so ruling, the supreme court pointed out that nothing in the VFATA “specifically states that employees of the Commonwealth and its political subdivisions may sue their employers for retaliatory discharge under the statute.”<sup>210</sup> In response to *Ligon*, during the 2011 session, the General Assembly amended VFATA to provide an express waiver of sovereign immunity and to make clear that the law “creates a cause of action by an employee against the Commonwealth if the Commonwealth is the employer responsible for the adverse employment action that would entitle the employee to . . . relief.”<sup>211</sup> The

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204. VA. CODE ANN. § 8.01-581.15 (Cum. Supp. 2011).

205. VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 2007).

206. Act of April 6, 2011, ch. 758, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-581.15 (Cum. Supp. 2011)).

207. *Id.*

208. *Id.*

209. 279 Va. 312, 319, 689 S.E.2d 666, 670 (2010). *See generally* Walk & Sherrod, *supra* note 192, at 207–08 (discussing *Ligon* case).

210. *Ligon*, 279 Va. at 319, 689 S.E.2d at 670.

211. Act of Mar. 26, 2011, ch. 651, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-216.8) (Cum. Supp. 2011)). The General Assembly also made substantive changes to FATA. *See* Act of Mar. 26, 2011, ch. 676, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 8.01-216.2, -216.3, -216.8, -216.9, -216.17; codified at *id.* § 8.01-216.10 (Cum. Supp. 2011)).

Act also provides that any such damages would “be reduced by any amount awarded to the employee through a state or local grievance process.”<sup>212</sup>

#### E. *Bond Requirement for Appeals from General District Court*

Chapter 58 of the 2011 Acts of Assembly modifies section 16.1-107 of the Virginia Code, addressing requirements for appeals from general district courts.<sup>213</sup> The Act provides that an appeal bond is not required for “a defendant [who has] indemnity coverage through a . . . liability insurance [policy] sufficient to satisfy the judgment.”<sup>214</sup> The insurance company must, however, “provide[] a written irrevocable confirmation of coverage in the amount of the judgment.”<sup>215</sup> If the insurer does not provide such a letter, an appeal bond is required.<sup>216</sup>

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

Through chapter 15 of the 2011 Acts of Assembly, the legislature clarified the scope of privilege and protection from discovery afforded to information provided in the peer review process.<sup>217</sup> The Act provides that “factual information regarding specific patient health care or treatment, including patient health care incidents,” is not privileged.<sup>218</sup> “Information known by a witness with knowledge of the [underlying] facts . . . [can therefore] be discovered by deposition or otherwise.”<sup>219</sup> In contrast, “the analysis, findings, conclusions, recommendations, and the deliberative process of any medical staff committee, utilization review committee, or other committee, board, group, commission, or other [specified] entit[ies]” are privileged and subject to protection from discovery.<sup>220</sup> The proceedings, minutes, records, and reports (including

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212. Act of Mar. 26, 2011, ch. 651, 2011 Va. Acts \_\_ (codified as amended at VA. CODE ANN. § 8.01-216.8 (Cum Supp. 2011)).

213. See Act of Mar. 14, 2011, ch. 58, 2011 Va. Acts \_\_ (codified as amended at VA. CODE ANN. § 16.1-107 (Supp. 2011)); Walk & Sherrod, *supra* note 192, at 221.

214. *Id.*

215. *Id.*

216. *Id.*

217. Act of Feb. 25, 2011, ch. 15, 2011 Va. Acts \_\_ (codified as amended at VA. CODE ANN. § 8.01-581.17) (Cum. Supp. 2011)).

218. *Id.*

219. *Id.*

220. *Id.*

those of experts) of such bodies are also protected, and “[a] person involved in the work of [such bodies is] not . . . made a witness with knowledge of the [underlying] facts [merely] by virtue of [participation] in the quality assurance, peer review, or credentialing process.”<sup>221</sup>

### G. *Objections to Jurisdiction and Defective Process—Waiver*

Chapter 710 of the 2011 Acts of Assembly enacts a new statute to provide explicit and welcome guidance to practitioners regarding what types of affirmative conduct will constitute a waiver of objections to personal jurisdiction or deficient service of process.<sup>222</sup> Objections to personal jurisdiction and defective process are waived if a party “engages in conduct related to adjudicating the merits of the case.”<sup>223</sup> Examples of such conduct include “[f]iling a demurrer, plea . . . bar, answer, counterclaim, cross-claim, or third-party claim; [c]onducting discovery,” unless authorized by the court to adjudicate the objection to jurisdiction or process; “[s]eeking a ruling on the merits . . . ; or [a]ctively participating in proceedings related to [a] determin[ation of] the merits of the case.”<sup>224</sup> Conversely, the Act specifies that

[a] person does not waive . . . objection[s] to personal jurisdiction or defective process . . . [by] engag[ing] in conduct unrelated to adjudicating the merits . . . , [such as r]equesting or agreeing to an extension of time; [a]greeing to a scheduling order; [c]onducting [authorized] discovery . . . related to . . . the objection; . . . [f]iling a motion to transfer venue [along with the objection to jurisdiction or process], or [r]emoving the case to federal court.<sup>225</sup>

### H. *Circuit Court Fees*

Virginia Code section 17.1-275 sets forth various fees collected by clerks of the circuit courts.<sup>226</sup> Through chapter 707 of the 2011 Acts of Assembly, the legislature exempted “counterclaims [and] other responsive pleading[s] in any annulment, divorce, or

221. *Id.*

222. Act of Mar. 26, 2011, ch. 710, 2011 Va. Acts \_\_\_\_ (codified at VA. CODE ANN. § 8.01-277.1) (Cum. Supp. 2011)).

223. *Id.*

224. *Id.*

225. *Id.*

226. VA. CODE ANN. § 17.1-275 (Supp. 2011).

separate maintenance proceeding” from being charged a filing fee by the clerk.<sup>227</sup>

### I. *Judicial Notice of Certain Tax-Related Documents*

Chapter 800 of the 2011 Acts of Assembly provides that a tribunal may take judicial notice of certain tax rulings, bulletins, guidelines, and other specified publications in proceedings relating to the interpretation or enforcement of the Virginia tax laws.<sup>228</sup>

### J. *Civil Immunity for Non-Profit Officers*

Chapter 693 of the 2011 Acts of Assembly makes clear that the civil immunity for certain directors, partners, members, managers, trustees, and officers of certain non-profits provided under current law “survive[s] any termination, cancellation, or other discontinuance of the organization.”<sup>229</sup>

### K. *Presumption for Certain Workers’ Compensation Cases*

Chapter 304 of the 2011 Acts of Assembly adds a provision to the Workers’ Compensation Act that creates a presumption in certain cases that the injury at issue was work-related.<sup>230</sup> In order for the presumption to apply, the employee must be “physically or mentally unable to testify as confirmed by competent medical evidence,” and there must be “unrebutted prima facie evidence that indicates . . . the injury was work related.”<sup>231</sup> The presumption can be overcome by a preponderance of the evidence.<sup>232</sup>

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227. Act of Mar. 26, 2011, ch. 707, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 17.1-275) (Supp. 2011)).

228. Act of Apr. 6, 2011, ch. 800, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 58.1-204, -205) (Cum. Supp. 2011)).

229. Act of Mar. 26, 2011, ch. 693, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 13.1-8701; codified at *id.* §§ 8.01-220.1:1, 13.1-870.1, -870.2) (Cum. Supp. 2011)).

230. Act of Mar. 20, 2011, ch. 304, 2011 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 65.2-105) (Cum. Supp. 2011)).

231. *Id.*

232. *Id.*

L. *Retired Judges Allowed to Perform Certain Pro Bono Work*

Through chapter 705 of the 2011 Acts of Assembly, the legislature allowed retired judges to appear as counsel in pro bono matters under certain specified circumstances.<sup>233</sup>

M. *Defined Terms in Evidence*

Chapter 81 of the 2011 Acts of Assembly adds “official publication,” “publish,” and “required to be published pursuant to the laws thereof” as defined terms used in the Virginia Code Chapter on Evidence.<sup>234</sup>

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233. Act of Mar. 26, 2011, ch. 705, 2011 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 51.9-309) (Cum. Supp. 2011)).

234. Act of Mar. 14, 2011, ch. 81, 2011 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 8.01-385) (Cum. Supp. 2011)).