

CIVIL PRACTICE AND PROCEDURE

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INTRODUCTION

This article surveys recent significant developments in Virginia civil practice and procedure. Part I of this article discusses opinions of the Supreme Court of Virginia from June 2013 through June 2014 addressing noteworthy civil procedure topics. Part II addresses amendments to the Rules of the Supreme Court of Virginia concerning procedural issues during the same period. Part III discusses legislation enacted by the Virginia General Assembly during its 2014 session that relates to civil practice.

I. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Contemporaneous Objection Rule*

In three different opinions handed down in February 2014, the Supreme Court of Virginia analyzed the contemporaneous objection exception set forth in Virginia Code section 8.01-384(A).¹ While decided in the criminal context, these cases provide important lessons for civil trial lawyers as well. Two of the appeals, *Maxwell v. Commonwealth* and *Rowe v. Commonwealth*, were considered together, as they presented two different applications of Virginia Code section 8.01-384(A).²

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1. *Maxwell v. Commonwealth*, 287 Va. 258, 261, 754 S.E.2d 516, 517 (2014) (decided with companion case *Rowe v. Commonwealth* 287 Va. 258, 261, 754 S.E.2d 516, 517 (2014)); *Commonwealth v. Amos*, 287 Va. 301, 305, 754 S.E.2d 304, 305 (2014).

2. *Maxwell*, 287 Va. at 261, 754 S.E.2d at 517.

In *Maxwell*, Derick Ganson Maxwell was indicted for unlawful wounding and tried before a jury for the offense in the Frederick County Circuit Court.³ Immediately after the jury left the courtroom to begin deliberations, Maxwell's counsel requested that she be allowed to return to her office.⁴ The Assistant Commonwealth's Attorney also left the courtroom to await the verdict.⁵ Upon its return, the jury found Maxwell guilty.⁶

After the circuit court dismissed the jury, Maxwell's counsel was alerted to the fact that there had been a jury question.⁷ The circuit court confirmed that a jury question arose but that there had been no reason for Maxwell or his counsel to be present.⁸ Subsequently, Maxwell filed a motion to set aside his conviction on the basis that the court's ex parte communications with the jury violated his Sixth Amendment rights and his right to be present during trial.⁹ When the circuit court denied the motion, Maxwell appealed to the Court of Appeals of Virginia and assigned error to the circuit court's ex parte communication with the jury.¹⁰ The court of appeals held that "Rule 5A:18 prohibited consideration of the merits of Maxwell's assignment of error because Maxwell did not make a contemporaneous objection to the circuit court's allegedly improper communications with the jury."¹¹

In *Rowe*, Vincent A. Rowe was tried by a jury and found guilty of grand larceny.¹² In its closing argument, the Commonwealth stated that inferences could support a finding of guilt.¹³ At the conclusion of the Commonwealth's closing argument, Rowe's attorney requested to make a motion outside the presence of the jury, and the Portsmouth City Circuit Court responded that it

3. *Id.* at 262, 754, S.E.2d at 517.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 263, 754 S.E.2d at 518; *see also* VA. CODE ANN. §§ 19.2-259, 263.1 (Repl. Vol. 2008 & Cum. Supp. 2014) (addressing a defendant's presence in proceedings and prohibiting any contact between the judge and a juror outside the presence of the parties or counsel).

10. *Maxwell*, 287 Va. at 263, 754 S.E.2d at 518.

11. *Id.*

12. *Id.*

13. *Id.*

would address the motion when the jury went out to deliberate.¹⁴ After the jury left, the defense made a motion for a mistrial, arguing that the Commonwealth's statements concerning the fact that Rowe did not take the stand or present any evidence "were unduly prejudicial and warranted a mistrial."¹⁵ The circuit court denied the motion for mistrial.¹⁶

On appeal to the court of appeals, Rowe alleged that the circuit court erred by denying his motion because the Commonwealth's comments during closing argument improperly shifted the burden to the defense.¹⁷ The court of appeals refused to consider the merits of the assignment of error, "holding that Rowe's objection to the Commonwealth's closing statement was not timely made."¹⁸

The Supreme Court of Virginia explained that the purpose of the contemporaneous objection rule set forth in Rule 5A:18 "is to avoid unnecessary appeals by affording the trial judge an opportunity to rule intelligently on objections."¹⁹ To meet the requirements of Rule 5A:18, an objection must "be made . . . at a point in the proceeding when the [circuit] court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error."²⁰ However, Virginia Code section 8.01-384(A) "requires appellate courts to consider issues on appeal that do not satisfy the contemporaneous objection requirement when the litigant had no opportunity to make the requisite timely objection."²¹

14. *Id.* at 264, 754 S.E.2d at 518.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 264–65, 754 S.E.2d at 519 (quoting *State Highway Comm'r v. Easley*, 215 Va. 197, 201, 207 S.E.2d 870, 873 (1974)).

20. *Id.* 287 Va. at 265, 754 S.E.2d at 519 (quoting *Scialdone v. Commonwealth*, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010)).

21. *Id.* at 265, 754 S.E.2d at 519.

Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be

Maxwell and Rowe both argued that section 8.01-384(A) applied to preserve their respective assignments of error.²²

With respect to Maxwell, the supreme court found that section 8.01-384(A) required consideration of his argument on appeal.²³ When the judge received and answered the questions raised by the jury, neither Maxwell nor his attorney were present in the courtroom.²⁴ Though through no fault of their own, because they were absent, “Maxwell and his counsel did not have the opportunity to be present and challenge the court’s decision to address questions from the jury in their absence.”²⁵ In *Rowe*, however, the supreme court held that the defendant failed to alert the circuit court to the nature of his objection before the jury retired and consequently, Rule 5A:18 barred consideration of the objection on appeal.²⁶ Rowe did not raise a discernible objection at a time when the court could appropriately act.²⁷ Importantly, Rowe’s motion “failed to set forth for the court the details of his objection or the time-sensitive nature of his motion.”²⁸ For these reasons, the supreme court concluded that the court of appeals did not err in refusing to consider Rowe’s challenge to the Commonwealth’s allegedly improper statements made during its closing argument.²⁹

deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.

VA. CODE ANN. § 8.01-384(A) (Repl. Vol. 2007 & Cum. Supp. 2014).

22. *Maxwell*, 287 Va. at 265, 754 S.E.2d at 519.

23. *Id.* at 266, 754 S.E.2d at 520.

24. *Id.*

25. *Id.* at 266–67, S.E.2d at 520.

26. *Id.* at 267–68, 754 S.E.2d at 520–21.

27. *Id.* at 267, 754 S.E.2d at 520.

28. *Id.* at 268, 754 S.E.2d at 521.

29. *Id.* at 269, 754 S.E.2d at 521. Justice Lemons and Justice Mims dissented, stating that in their judgment, Rowe’s request was sufficient to preserve the matter for appellate review since the basis for the request was readily apparent under the circumstances. *Id.* at 270–71, 754 S.E.2d at 521–22 (Lemons, J., dissenting). The dissent went on to state that had Rowe’s counsel argued with the judge immediately before the jury retired, he would have risked prejudicing the jury against his client. *Id.* According to the dissent, “[c]ivility and decorum on the part of defense counsel should not be equated to a waiver of the defendant’s fundamental right to appeal.” *Id.*

The supreme court again discussed the contemporaneous objection exception in *Commonwealth v. Amos*.³⁰ Antonio Jose Amos was convicted of assaulting his estranged wife, Felecia Amos.³¹ Mr. Amos was ordered to have no contact with Ms. Amos during his probation.³² Ms. Amos later wrote to the Office of the Commonwealth Attorney alleging that Mr. Amos harassed her.³³ Upon receiving this letter, the Assistant Commonwealth's Attorney sought and obtained a rule to show cause against Mr. Amos.³⁴ At the hearing on the show cause order, Ms. Amos' testimony was contradicted by that of Mr. Amos and another individual who was present when the harassment allegedly took place.³⁵ A tape recording of the incident made by Mr. Amos further contradicted Ms. Amos' account of the events.³⁶

The circuit court ruled that Mr. Amos did not violate the terms and conditions of his probation.³⁷ The court went on to hold Ms. Amos in contempt of court for lying under oath.³⁸ Ms. Amos was sentenced to ten days in jail and was immediately taken to jail.³⁹ She did not make any statements to the circuit court judge at the time of the contempt ruling.⁴⁰

Ms. Amos later filed a pro se motion contesting her sentence and the court's ruling, in which she argued, among other things, that she testified truthfully at trial and the circuit court never gave her an opportunity to object to the finding of contempt.⁴¹ Ms. Amos also filed a notice of appeal with the Court of Appeals of Virginia.⁴² The court of appeals reversed Ms. Amos' summary contempt conviction, concluding that the circuit court deprived her of

30. 287 Va. 301, 303, 754 S.E.2d 304, 305 (2014).

31. *Id.*

32. *Id.*

33. *Id.* at 304, 754 S.E.2d at 305.

34. *Id.*

35. *Id.*, 754 S.E.2d at 306.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 304–05, 754 S.E.2d at 306.

any opportunity to object at the time of the ruling.⁴³ The Commonwealth appealed to the supreme court.⁴⁴

As the supreme court explained, Virginia Code section 8.01-384(A) imposes no requirement that when the contemporaneous objection exception applies, a party, if able, must file a post-conviction objection or otherwise bring the objection to the court's attention at a later point in the proceedings.⁴⁵ Importantly, in this case Ms. Amos was not a party—she was a witness who was not represented by counsel. Following the judge's ruling, Ms. Amos was immediately taken to jail, which prevented her from presenting a contemporaneous objection. Therefore, the contemporaneous objection exception of section 8.01-384(A) applied and no further steps were required to preserve the issues for appellate review.⁴⁶

B. *Endorsement of Orders and Waiver*

Before analyzing the substantive defamation issues in *Cashion v. Smith*, the Supreme Court of Virginia first tackled the question of whether an endorsement of an order withdrew or waived an issue for appeal under Virginia Code section 8.01-384(A).⁴⁷ Following a patient's death, the surgeon criticized the anesthesiologist in front of other members of the operating team, accusing him of purposefully failing to resuscitate the patient.⁴⁸ The surgeon repeatedly stated that the anesthesiologist euthanized the patient.⁴⁹

The anesthesiologist sued for defamation and defamation per se against the surgeon and his employer.⁵⁰ The defendants "filed demurrers and pleas in bar asserting . . . that [the surgeon's] statements were non-actionable expressions of opinion or rhetorical hyperbole."⁵¹ After a hearing on the motions, the circuit court entered an order "sustaining the demurrers and granting the pleas in bar as to the non-euthanasia statements on the ground

43. *Id.* at 305, 754 S.E.2d at 306.

44. *Id.*

45. *Id.*

46. *Id.*

47. 286 Va. 327, 333, 749 S.E.2d 526, 529 (2013).

48. *Id.* at 332, 749 S.E.2d at 528–29.

49. *Id.*, 749 S.E.2d at 529.

50. *Id.*

51. *Id.*

that they were non-actionable expressions of opinion.”⁵² As to the euthanasia statements, the circuit court overruled the demurrers and denied the pleas in bar.⁵³ Counsel for the anesthesiologist noted their objections on the circuit court’s order and endorsed it “WE ASK FOR THIS.”⁵⁴

On appeal, the anesthesiologist argued that the circuit court erred by sustaining the demurrers and pleas in bar as to the non-euthanasia statements.⁵⁵ The defendants responded by arguing that the anesthesiologist withdrew or waived that argument for appeal under section 8.01-384(A) because he endorsed the order “WE ASK FOR THIS.”⁵⁶ The supreme court disagreed.⁵⁷

“[In] order for a waiver to occur within the meaning of Code § 8.01-384(A), the record must affirmatively show that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection.”⁵⁸ After summarizing prior case law regarding the effect of endorsements, the supreme court concluded that the “WE ASK FOR THIS” endorsement reflected only the anesthesiologist’s request that the court enter an order memorializing its ruling.⁵⁹ The endorsement did not constitute his agreement to the portion of the order adverse to him and thus, was not an “express written agreement” to waive the argument on appeal.⁶⁰

C. *Assignment of Error*

In *Ferguson v. Stokes*, the Supreme Court of Virginia reiterated the well-settled rule that in order for a party to challenge the ruling of a lower court, he must, on appeal, assign error to each articulated basis for that ruling.⁶¹ *Ferguson* was an ejection action

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 333, 749 S.E.2d at 529.

57. *Id.*

58. *Id.* at 333–34, 749 S.E.2d at 529–30 (quoting *Kellesman v. McDonough*, 278 Va. 478, 491, 684 S.E.2d 786, 792 (2009)).

59. *Id.* at 336, 749 S.E.2d at 531.

60. *Id.*

61. 287 Va. 446, 452, 756 S.E.2d 455, 458 (2014) (citing *Manchester Oaks Homeowners Ass’n v. Batt*, 284 Va. 409, 421, 732 S.E.2d 690, 698 (2012)).

involving a man-made island in the Rappahannock River.⁶² At trial, Ferguson, the owner of the island, argued that the ejectment action failed because, pursuant to Virginia Code section 28.2-1200.1(B)(2), he owned title to the bottomlands beneath the island.⁶³ The plaintiffs argued that Ferguson did not specifically plead the statute as a defense to the ejectment action and therefore could not rely on section 28.2-1200.1(b)(2).⁶⁴ The circuit court agreed and held that Ferguson could not rely on section 28.2-1200.1(B)(2) because it had not been properly pled and because Ferguson could not meet the statute's substantive requirements.⁶⁵

On appeal, the supreme court affirmed the circuit court's ruling.⁶⁶ The supreme court first noted that Ferguson had only assigned error to two of the three bases for the circuit court's ruling on his ability to assert the defense of section 28.2-1200.1(B)(2).⁶⁷ The court explained that it cannot review the ruling of a lower court for error when the appellant does not assign error to every legal basis given for that ruling.⁶⁸ Nevertheless, the court went on to find that because the circuit court properly found section 28.2-1200.1(B)(2) inapplicable, this provided a separate and independent basis for the supreme court to affirm the circuit court's ruling.⁶⁹

62. *Id.* at 449, 756 S.E.2d at 456–57.

63. *Id.* at 450, 756 S.E.2d at 457.

Titles to lands that (i) were once or may have been state-owned bottomlands covered by waters, (ii) were filled prior to July 1, 1960, and (iii) were acquired by private persons in good faith for value after such lands were filled, are hereby declared to be free and clear of any claimed ownership or interest by the Commonwealth and are released to such private persons and their successors and assigns by the Commonwealth to the extent that the areas of these lands were not state-owned bottomlands covered by waters on July 1, 1960.

VA. CODE ANN. § 28.2-1200.1(B)(2) (Repl. Vol. 2011).

64. *Ferguson*, 287 Va. at 450, 756 S.E.2d at 457.

65. *Id.*

66. *Id.* at 454, 756 S.E.2d at 459.

67. *Id.* at 452, 756 S.E.2d at 458.

68. *Id.* (citing *Prince Seating Corp. v. Rabideau*, 275 Va. 468, 470, 659 S.E.2d 305, 307 (2008)).

69. *Id.* at 453, 756 S.E.2d at 459.

D. Sanctions

In *Shebelskie v. Brown*, attorneys Michael R. Shebelskie and William H. Wright, Jr. appealed the circuit court's judgment sanctioning them pursuant to Virginia Code section 8.01-271.1.⁷⁰ Shebelskie and Wright represented Betty G. Brown in a suit filed by her ex-husband, Larry E. Brown, seeking partition and judicial sale of certain real property.⁷¹ After extensive litigation, the circuit court confirmed the sale of the property.⁷² Subsequently, the court entered an order directing Ms. Brown to close on the purchase of the property no later than May 5, 2011.⁷³ The order also required that Ms. Brown pay all costs and attorneys' fees incurred by Mr. Brown.⁷⁴

Following the entry of the order, Wright questioned Mr. Brown's counsel regarding the amount of attorneys' fees and costs incurred.⁷⁵ After Ms. Brown closed on the real property in accordance with the terms of the order, the parties continued to discuss how Mr. Brown's attorneys' fees and costs would be paid.⁷⁶ Mr. Brown rejected Wright's suggestion that the attorneys' fees and costs be offset from money owed by Mr. Brown to Ms. Brown in connection with their divorce.⁷⁷ Subsequently, having not received payment from Ms. Brown, Mr. Brown filed a motion for the issuance of a rule to show cause as to why Ms. Brown should not be held in contempt for failure to pay the attorneys' fees and costs in accordance with the court's order.⁷⁸ The circuit court issued a rule to show cause.⁷⁹

In Ms. Brown's brief in response to the rule to show cause, Wright argued that the order was not yet final and, therefore, Ms. Brown had no current obligation to pay.⁸⁰ Further, Wright assert-

70. 287 Va. 18, 24–25, 752 S.E.2d 877, 880–81 (2014).

71. *Id.* at 22, 752 S.E.2d at 879.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 22–23, 752 S.E.2d at 879–80.

79. *Id.* at 23, 752 S.E.2d at 880.

80. *Id.*

ed that the order did not set a “deadline for payment and [said] nothing . . . about the manner in which the payment [was] to be made.”⁸¹ Finally, Wright argued that the order neglected to specifically state the total amount due.⁸²

At the hearing on the rule to show cause, Shebelskie reiterated Wright’s arguments made in the brief.⁸³ Shebelskie claimed that because the order lacked specificity with respect to the due date and the amount owed, it was an interlocutory order for which there was no current obligation to pay.⁸⁴ Importantly, Shebelskie informed the court that Ms. Brown was not ignoring the court’s order—she had, in fact, discussed the amount and method of payment with Mr. Brown.⁸⁵ The court took the matter under advisement to consider the possible section 8.01-271 violation.⁸⁶

After the hearing, Shebelskie sent a letter to the circuit court citing authorities to establish the good faith basis of Ms. Brown’s position.⁸⁷ Although the circuit court exonerated Ms. Brown of contempt, it found that her counsel violated section 8.01-27.1 by arguing in writing and orally that Ms. Brown did not have to comply with the order.⁸⁸ The court ordered Shebelskie and Wright to pay Mr. Brown’s costs and attorneys’ fees.⁸⁹

Shebelskie and Wright then filed a motion for reconsideration expressing their concern that the court misunderstood their arguments.⁹⁰ “Shebelskie and Wright stressed that their argument was not that [Ms. Brown] did not have to comply with the April order, but rather that she could not be held in contempt because the April order did not specify both an amount due and a payment date.”⁹¹ Shebelskie and Wright also argued that Wright alone signed a pleading that fell within section 8.01-271.1 and

81. *Id.* (internal citation omitted).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 23–24, 752 S.E.2d at 880. Virginia Code section 8.01-271 provides that “[s]ubject to the provisions of this title, pleadings shall be in accordance with Rules of the Supreme Court.” VA. CODE ANN. § 8.01-271 (Repl. Vol. 2007).

87. *Shebelskie*, 287 Va. at 24, 752 S.E.2d at 880.

88. *Id.*

89. *Id.*, 752 S.E.2d at 880–81.

90. *Id.*, 752 S.E.2d at 881.

91. *Id.* at 24–25, 752 S.E.2d at 881.

that neither attorney made an oral motion.⁹² Ultimately, the court entered a final order imposing sanctions against both Shebelskie and Wright.⁹³

On appeal, the Supreme Court of Virginia reviewed the circuit court's decision to impose a section 8.01-271.1 sanction under the abuse of discretion standard.⁹⁴ The supreme court employed the "objective standard of reasonableness" to determine whether an attorney, "after reasonable inquiry, could have formed a reasonable belief that the pleading was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."⁹⁵ Considering the sanctions against each attorney in turn, the court first held that Shebelskie's oral argument did not constitute an "oral motion" under section 8.01-271.1, and therefore the circuit court abused its discretion by imposing a sanction against him.⁹⁶ The supreme court also found that the circuit court's findings misstated Wright's argument.⁹⁷ Because the order did not express in definite terms the total amount to be paid by Ms. Brown and failed to specify when Ms. Brown was to pay the undetermined amount, the order was not final.⁹⁸ The arguments set forth in Wright's brief "were 'warranted by existing law' governing contempt," and thus, the circuit court abused its discretion by holding that Wright violated section 8.01-271.1.⁹⁹

E. Evidence

In *Harman v. Honeywell International, Inc.*, the Supreme Court of Virginia considered multiple evidentiary issues.¹⁰⁰ In this appeal, which arose from two consolidated wrongful death actions against Honeywell International, Inc. ("Honeywell"), the court

92. *Id.* at 25, 752 S.E.2d at 881; see VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 2014).

93. *Shebelskie*, 287 Va. at 25, 752 S.E.2d at 881.

94. *Id.* at 26, 752 S.E.2d at 881 (citing *Gilmore v. Finn*, 259 Va. 448, 466, 527 S.E.2d 426, 435 (2000)); see VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 2014).

95. *Shebelskie*, 287 Va. at 27, 752 S.E.2d at 882 (quoting *Gilmore*, 259 Va. at 466, 527 S.E.2d at 435–36).

96. *Id.* at 27–28, 752 S.E.2d at 882–83; see VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 2014).

97. *Shebelskie*, 287 Va. at 29, 752 S.E.2d at 883.

98. *Id.* at 32, 752 S.E.2d at 885.

99. *Id.* at 32–33, 752 S.E.2d at 885 (quoting *Gilmore*, 259 Va. at 466, 527 S.E.2d at 435–36); see VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 2014).

100. No. 130627, 2014 Va. LEXIS 97 at *1, 758 S.E.2d 515, 518 (June 5, 2014).

addressed the following issues: (1) the admissibility of testimony regarding the contents of an accident investigation report; (2) the admissibility of lay witness opinion testimony; (3) statements made by Honeywell's counsel during closing argument; and (4) whether the circuit court erred in striking portions of a proffered jury instruction defining proximate cause.¹⁰¹

Joseph A. Grana ("Grana") and his father, Joseph E. Grana, Sr., were killed on April 27, 2008 when the airplane that Grana was piloting crashed shortly after takeoff.¹⁰² Although the takeoff was normal, the plane spiraled nose-down to the ground approximately ninety seconds into the flight.¹⁰³ The administrators of the Granas' estates (the "Administrators") filed wrongful death actions in the circuit court against Honeywell, the manufacturer of the plane's autopilot system.¹⁰⁴

Breach of the warranty of merchantability was the only claim raised at trial.¹⁰⁵ The Administrators asserted that the design of the autopilot system was defective in that it allowed debris to enter into one of the gear systems, which then jammed the gears and caused the plane to become uncontrollable.¹⁰⁶ Honeywell denied any defective design or malfunction, instead maintaining that the crash was simply the result of an inexperienced pilot unfamiliar with flying in difficult meteorological conditions.¹⁰⁷ Grana had only recently begun pilot training and only received his pilot's license approximately fourteen months before the accident occurred.¹⁰⁸ He had, at most, only one hour of solo flight time in cloudy conditions in this particular plane (the "Mooney plane").¹⁰⁹ Following a nine-day trial, the jury returned a verdict for Honeywell.¹¹⁰

On appeal, the Administrators asserted five assignments of error, most of which focused on evidentiary rulings made by the cir-

101. *Id.* at *1–5, 758 S.E.2d at 518–19.

102. *Id.* at *2, 758 S.E.2d at 518.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at *2–3, 758 S.E.2d at 518.

107. *Id.* at *3, 758 S.E.2d at 519.

108. *Id.*

109. *Id.* at *3–4, 758 S.E.2d at 519.

110. *Id.* at *4, 758 S.E.2d at 519.

cuit court.¹¹¹ First, “the Administrators assign[ed] error to the circuit court’s admission of testimony regarding an accident investigation report prepared by Mooney Airplane Company describing its investigation of the crash.”¹¹² This report (the “Mooney Report”) “describe[d] the plane’s movements during flight and the condition of the wreckage” and contained information on the position of the jackscrew, “a component in the autopilot’s auto-trim system.”¹¹³ Because “[t]he central question in the case was whether contaminated gears in the autopilot system caused the plane to become . . . uncontrollable[,] . . . [a] critical issue at trial was the position of the autopilot’s trim setting at the time of impact.”¹¹⁴

Honeywell’s expert “testified that the jackscrew was in a ‘normal and safe take off position,’ and therefore the runaway trim could not have been the cause of the accident.”¹¹⁵ Honeywell’s counsel pointed to the Mooney Report to support that opinion.¹¹⁶ When the Administrators objected on the basis of hearsay, Honeywell responded that the report was “admissible pursuant to the ‘learned treatise’ exception to the hearsay rule set forth in Code § 8.01-401.1.”¹¹⁷ The circuit court agreed and overruled the objections made by the Administrators.¹¹⁸ The Mooney Report was then introduced, in its entirety, into evidence.¹¹⁹

On appeal, the supreme court held that the testimony regarding the contents of the Mooney Report failed to satisfy the requirements of section 8.01-401.1.¹²⁰ Specifically, the court found that “the Mooney Report [was] not the type of authoritative literature contemplated by Code § 8.01-401.1, . . . [as it] lack[ed] assurances of trustworthiness, . . . [was] not a ‘published treatise, periodical, or pamphlet[]’ on a ‘subject of . . . science,’ . . . was prepared for litigation purposes, and ‘was not subject to peer review or scrutiny.’”¹²¹ Further, the supreme court determined that the

111. *Id.* at *4–5, 758 S.E.2d at 519.

112. *Id.* at *5, 758 S.E.2d at 519.

113. *Id.*

114. *Id.* at *5–6, 758 S.E.2d at 519.

115. *Id.* at *6, 758 S.E.2d at 519.

116. *Id.*

117. *Id.*, 758 S.E.2d at 519–20.

118. *Id.*, 758 S.E.2d at 520.

119. *Id.* at *7, 758 S.E.2d at 520.

120. *Id.* at *9, 758 S.E.2d at 521.

121. *Id.* at *9–11, 758 S.E.2d at 521.

Mooney Report was not a source generally used by experts in the field and, therefore, was not a reliable source.¹²² For these reasons, the supreme court held that “the circuit court abused its discretion by permitting [Honeywell’s expert] to testify regarding the conclusions reached in the Mooney report.”¹²³

The court went on to hold that the admission of these hearsay statements was not harmless error.¹²⁴ The court stated that “[t]he Mooney Report contain[ed] conclusions that [went] to the very heart of the case.”¹²⁵ The Mooney Report was admitted into evidence, repeatedly brought to the jury’s attention, and was even taken into the jury room during deliberations.¹²⁶ For these reasons, it was very plausible that the jury verdict was impacted by the erroneous admission of the hearsay statements, and so the court reversed the judgment and remanded the case for a new trial.¹²⁷

Because it was likely the other issues raised on appeal would arise in the retrial of the case, the supreme court went on to discuss the Administrators’ other assignments of error.¹²⁸ At trial, the jury heard testimony from William Abel, Grana’s friend and flight instructor.¹²⁹ Abel testified that he and Grana had agreed that Grana would not fly the Mooney plane in poor weather conditions.¹³⁰ Abel also testified that he had concerns about Grana’s judgment in deciding to fly on the day of the accident.¹³¹ According to the Administrators, such testimony was “improper opinion testimony by a lay witness that invaded the province of the jury.”¹³²

Robert Norman, the co-owner of the Mooney plane, who received his pilot’s license at roughly the same time as Grana, testified about his personal experiences flying the Mooney plane.¹³³ Additionally, Norman had experience flying a Cessna plane and

122. *Id.* at *11–12, 758 S.E.2d at 521.

123. *Id.* at *12, S.E.2d at 521.

124. *Id.* at *14, 758 S.E.2d at 522.

125. *Id.* at *13, 758 S.E.2d at 521.

126. *Id.* at *13–14, 758 S.E.2d at 522.

127. *Id.* at *14–15, 758 S.E.2d at 522.

128. *Id.* at *15, 758 S.E.2d at 522.

129. *Id.* at *15–16, 758 S.E.2d at 522.

130. *Id.* at *16, 758 S.E.2d at 522.

131. *Id.* at *16–17, 758 S.E.2d at 522.

132. *Id.* at *17, 758 S.E.2d at 523.

133. *Id.* at *17–18, 758 S.E.2d at 523.

he compared the experience of flying the Mooney plane to that of flying a Cessna plane.¹³⁴ The Administrators argued that Norman's testimony regarding his subjective feelings and experiences flying these planes constituted "improper opinion testimony by a lay witness, [was] irrelevant, and prejudicial."¹³⁵

The supreme court analyzed the circuit court's decision to admit the testimony of Abel and Norman using an abuse of discretion standard.¹³⁶ The court used Rule 2:70 in reviewing Abel and Norman's testimony because neither was qualified by the court as an expert.¹³⁷ "Rule 2:701 permits lay witness opinion testimony if (1) it is reasonably based upon the personal experience or observations of the witness; and (2) it will aid the trier of fact in understanding the witness' perceptions."¹³⁸ Applying this rule, the court determined that the circuit court should not have allowed Abel's testimony regarding Grana's judgment as it was unnecessary.¹³⁹ Abel's opinion that Grana exercised poor judgment in deciding to fly on the day of the crash "was superfluous—[t]he jury was fully capable of listening to the specific facts recited by Abel and reaching its own conclusion" regarding Grana's judgment.¹⁴⁰ In addition, the supreme court found that Abel's statements at trial were "an impermissible assessment of Grana's culpability for the accident."¹⁴¹

With regard to admitting Norman's testimony, the supreme court found that the circuit court did not abuse its discretion.¹⁴² Unlike Abel's testimony, Norman's testimony, which focused solely on his own experiences flying the Mooney and Cessna planes, did not assess Grana's judgment or his ability to pilot a plane.¹⁴³ Norman's testimony aided the jury in understanding his experi-

134. *Id.* Most of Grana's flying experience had been in a less-powerful, less-complex plane manufactured by Cessna Aircraft Company. *Id.* at *4, 758 S.E.2d at 519.

135. *Id.* at *18, 758 S.E.2d at 523.

136. *Id.*

137. *Id.*

138. *Id.* at *18–19, 758 S.E.2d at 523 (quoting VA. SUP. CT. R. 2:701 (2014)).

139. *Id.* at *21, 758 S.E.2d at 524.

140. *Id.*

141. *Id.* at *21–22, 758 S.E.2d at 524 (citing *Davis v. Souder*, 134 Va. 356, 362, 114 S.E. 605, 607 (1922)); CHARLES E. FRIEND & KENT SINCLAIR, *THE LAW OF EVIDENCE IN VIRGINIA* § 13-5[a] (7th ed. 2012)).

142. *Harmon*, 2014 Va. LEXIS 97 at *22, 758 S.E.2d at 524.

143. *Id.*

ences and therefore, pursuant to Rule 2:701, qualified as proper lay opinion testimony.¹⁴⁴ Further, Norman's testimony provided the jury with an understanding of Grana's transition between the Mooney plane and Cessna planes.¹⁴⁵ Therefore, the circuit court properly admitted Norman's testimony.¹⁴⁶

Next, the supreme court turned to the Administrators' allegation that Honeywell's counsel made statements during closing argument that violated both a pretrial order and Virginia law.¹⁴⁷ Before trial, the circuit court granted a motion in limine filed by the Administrators seeking to exclude any argument regarding to the safety history of the Honeywell autopilots.¹⁴⁸ Despite this decision, "during closing argument, Honeywell's counsel stated [that] . . . [an accident of this kind had] 'never happened before' [and that] '[t]here [was] no evidence this ha[d] ever happened anywhere any time.'" ¹⁴⁹ The Administrators immediately objected on the basis that the statements violated the circuit court's order granting the motion in limine.¹⁵⁰ The circuit court overruled the Administrators' objection and allowed Honeywell to proceed.¹⁵¹ Moments later, "Honeywell's counsel again argued that the autopilot system had a 'safe design for [thirty-five] years, and no complaints,' and that there was 'no evidence of a prior problem at all ever.'" ¹⁵² On appeal, the Administrators contended that Honeywell violated the ruling on the motion in limine by repeatedly stating to the jury that there was an absence of other incidents.¹⁵³ The supreme court agreed, finding "it was error for the circuit court to allow Honeywell's counsel to make statements in contravention of its own order."¹⁵⁴

144. *Id.* at *23, 758 S.E.2d at 524.

145. *Id.*

146. *Id.*

147. *Id.* at *24, 758 S.E.2d at 525.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at *24–25, 758 S.E.2d at 525.

152. *Id.* at *25, 758 S.E.2d at 525.

153. *Id.* at *26, 758 S.E.2d at 525.

154. *Id.* at *26–27, 758 S.E.2d at 525. Honeywell argued that its counsel's statements merely summarized the testimony of the Administrators' experts. *Id.* The supreme court rejected this argument, finding that the statements made during closing argument went beyond summarizing the experts' testimony. *Id.*

Lastly, the supreme court discussed the Administrators' contention that the circuit court erred in striking portions of their proposed jury instruction on proximate cause.¹⁵⁵ At trial, the Administrators proffered an instruction defining proximate cause, which stated, in part, "[t]here may be more than one proximate cause[]. Proximate cause need not be established with such certainty so as to exclude every other possible conclusion."¹⁵⁶ Honeywell objected to this language, stating that it was not included in the Virginia model jury instruction defining proximate cause.¹⁵⁷ The circuit court struck these two sentences.¹⁵⁸

The Administrators argued on appeal that their proposed jury instruction was an accurate statement of Virginia law and that the last two sentences, which were stricken by the circuit court, were necessary to dismiss any incorrect belief that only one proximate cause of the accident could exist.¹⁵⁹ The supreme court disagreed, stating that the "granted instruction fully and fairly covered the principle of proximate [cause]."¹⁶⁰ Further, the supreme court held that the additional sentences could have caused the jury confusion regarding the burden of proof.¹⁶¹ Thus, the supreme court ruled that "the circuit court did not err in striking the last two sentences of the Administrators' proposed instruction on proximate cause."¹⁶²

F. *Remittitur*

In *Coalson v. Canchola*, the Supreme Court of Virginia considered the question of whether the Fairfax County Circuit Court properly remitted the jury's award of punitive damages.¹⁶³ Victoria Coalson and Michael Stemke each filed lawsuits against Victor Canchola seeking compensatory and punitive damages for personal injuries arising out of an automobile accident.¹⁶⁴ At the

155. *Id.* at *27, 758 S.E.2d at 525–26.

156. *Id.*, 758 S.E.2d at 526 (internal quotations omitted).

157. *Id.* at *27–28, 758 S.E.2d at 526.

158. *Id.* at *28, 758 S.E.2d at 526.

159. *Id.*

160. *Id.* at *30, 758 S.E.2d at 526.

161. *Id.* at *31–32, 758 S.E.2d at 527.

162. *Id.* at *32, 758 S.E.2d at 527.

163. 287 Va. 242, 249, 754 S.E.2d 525, 528 (2014).

164. *Id.* at 245, 754 S.E.2d at 526.

time of the accident, Canchola, who was driving while intoxicated and talking on his cell phone, turned in front of a vehicle driven by Coalson, who had the right of way and was unable to stop before colliding with Canchola's vehicle.¹⁶⁵ As a result of the collision, both Coalson, who was driving, and Stemke, who was riding in the passenger seat, suffered minor injuries.¹⁶⁶ Canchola had an extensive history of driving while intoxicated.¹⁶⁷ Despite receiving a warning from a police officer not to drive, Canchola, who had been drinking all day,¹⁶⁸ got behind the wheel and drove his vehicle. After the accident, Canchola left the scene in his girlfriend's vehicle.¹⁶⁹ He was subsequently arrested at his hotel, where he lied to the police about his involvement in the accident.¹⁷⁰

The actions by Coalson and Stemke were consolidated and the jury awarded Coalson \$5600 in compensatory damages and \$100,000 in punitive damages against Canchola.¹⁷¹ The jury also awarded Stemke \$14,000 in compensatory damages and \$100,000 in punitive damages.¹⁷² "Canchola filed a post-trial motion for remittitur of both punitive damages awards, arguing that the awards were excessive under Virginia law and the Due Process Clause of the Fourteenth Amendment."¹⁷³ Noting the "significant disparity" between the compensatory damages of the awards, the circuit court concluded that Coalson's award was arbitrarily made.¹⁷⁴ Thus, the circuit court granted remittitur to Coalson's punitive damages, lowering her award to \$50,000.¹⁷⁵

On appeal, "Coalson argue[d] that the circuit court erred in remitting her punitive damages award because the . . . decision was based upon comparing her punitive damages award to Stemke's, punitive damages award and upon the proportionality of her punitive damages award in relation to her compensatory

165. *Id.* at 247, 754 S.E.2d at 527.

166. *Id.*

167. Canchola had at least seven convictions for driving while intoxicated on his record. *Id.*

168. *Id.*

169. *Id.* at 248, 754 S.E.2d at 527.

170. *Id.*, 754 S.E.2d at 528.

171. *Id.* at 245-46, 754 S.E.2d at 526.

172. *Id.* at 246, 754 S.E.2d at 526.

173. *Id.*

174. *Id.*

175. *Id.*

damages award.”¹⁷⁶ According to Coalson, because of the serious and dangerous nature of Canchola’s conduct and its potential for harm, a higher ratio between compensatory and punitive damages was appropriate in this case.¹⁷⁷ Canchola responded that the circuit court properly applied all of the remittitur factors.¹⁷⁸ The supreme court recognized that there is no set standard or bright-line test for determining the amount of punitive damages.¹⁷⁹

For the first time, the supreme court addressed whether a comparison of punitive damages awards is appropriate in evaluating excessiveness.¹⁸⁰ Looking to case law discussing compensatory damages, the supreme court determined that comparing punitive damages awards is not probative of whether or not they are excessive.¹⁸¹ Therefore, the supreme court held that “[t]he circuit court’s consideration of Coalson’s and Stemke’s relative ratios of compensatory damages to punitive damages as a basis for granting remittitur was error.”¹⁸²

The supreme court went on to hold that Coalson’s punitive damages (as awarded by the jury) were reasonably related to both her actual damages and to the necessary degree of punishment, which in this case the court found to be great.¹⁸³ Because Canchola’s conduct was so deplorable and presented such a threat to public safety, the court found that the punitive damages award was not “unreasonable or strikingly out of proportion.”¹⁸⁴ The supreme court did not find that the punitive damages award by the jury “shock[ed] the court’s conscience” and therefore found the circuit court’s remittitur erroneous.¹⁸⁵

Because the circuit court did not make clear whether it granted Canchola’s motion for remittitur on state law or federal constitutional grounds, the supreme court went on to analyze Coalson’s

176. *Id.* at 248, 754 S.E.2d at 528.

177. *Id.*

178. *Id.*

179. *Id.* at 248–49, 754 S.E.2d at 528.

180. *Id.* at 249, 754 S.E.2d at 529.

181. *Id.* at 250, 754 S.E.2d at 529 (citing *John Crane, Inc. v. Jones*, 274 Va. 581, 595, 650 S.E.2d 851, 858 (2007)).

182. *Id.* at 250, 754 S.E.2d at 529.

183. *Id.* at 250–51, 754 S.E.2d at 529.

184. *Id.* at 251, 754 S.E.2d at 529 (quoting *Baldwin v. McConnell*, 273 Va. 650, 659, 643 S.E.2d 703, 707 (2007)).

185. *Id.*, 754 S.E.2d at 529–30.

punitive damages award considering the relevant federal constitutional law.¹⁸⁶ Specifically, the supreme court discussed the three guidelines prescribed by the United States Supreme Court for use in reviewing whether punitive damages awards are excessive: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”¹⁸⁷ The Supreme Court of Virginia concluded that remittitur was also erroneous on federal due process grounds.¹⁸⁸ Although the United States Supreme Court has stated that the “ratios between actual or potential harm and punitive damages should generally be within single digits to satisfy due process requirements, . . . higher ratios may be constitutional where a defendant’s actions are especially reprehensible.”¹⁸⁹ This was one of those cases. The Supreme Court of Virginia determined that Canchola demonstrated a need for “stronger medicine to cure his disrespect for the law,” and, as such, the judgment of the circuit court was reversed and the jury verdict was reinstated.¹⁹⁰

G. *Demurrers*

The Supreme Court of Virginia addressed the issue of using a demurrer to challenge the enforceability of restrictive covenants in an employment agreement in *Assurance Data, Inc. v. Malyevac*.¹⁹¹ The employment agreement in question, between Assurance Data, Inc. (“ADI”) and John Malyevac, contained a non-compete clause, a non-solicit clause, and provisions governing the disclosure and return of confidential information.¹⁹² After Malyevac resigned, ADI sued for violation of the restrictive covenants in his employment agreement. Malyevac responded by filing a demurrer, contending that because the non-compete and

186. *Id.*, 754 S.E.2d at 530.

187. *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003)).

188. *Id.* at 252, 754 S.E.2d at 530.

189. *Id.* (citing *State Farm*, 538 U.S. at 425).

190. *Id.* at 253–54, 754 S.E.2d at 531.

191. 286 Va. 137, 747 S.E.2d 804 (2013).

192. *Id.* at 139, 747 S.E.2d at 805.

non-solicit clauses were overly broad, they were unenforceable.¹⁹³ ADI opposed the demurrer by arguing that the pleading “only tests whether a cause of action has been pled and that it cannot be used to decide the merits of a claim.”¹⁹⁴ ADI contended that it was entitled to put on evidence regarding the reasonableness of the restraints on competition set forth in the agreement.¹⁹⁵ The Fairfax County Circuit Court sustained the demurrer, without leave to amend, concluding that the restrictive covenants were unenforceable as a matter of law.¹⁹⁶

On appeal, the supreme court cited its previous decisions and noted that the enforceability of covenants restraining competition “must be evaluated on their own facts, by balancing the provisions of the contract with the circumstances of the businesses and employees involved.”¹⁹⁷ According to the court, a premise running through its precedents “is that restraints on competition are neither enforceable nor unenforceable in a factual vacuum.”¹⁹⁸ The court then explained that a demurrer “has *one* purpose—to determine whether a complaint states a cause of action upon which the requested relief may be granted.”¹⁹⁹ According to the supreme court, in ruling on demurrer that the covenants were overly broad and unenforceable as a matter of law, the circuit court ruled on the merits and curtailed ADI’s ability to present evidence on the reasonableness of the restraints.²⁰⁰ The supreme court consequently therefore held that the circuit court erred by sustaining the demurrer, because “[a] demurrer does not permit the trial court to evaluate and decide the merits of the claim set forth in a . . . complaint.”²⁰¹

193. *Id.* at 141, 143, 747 S.E.2d at 806–07.

194. *Id.*, 747 S.E.2d at 807.

195. *Id.*

196. *Id.*

197. *Id.* at 144, 747 S.E.2d at 808 (quoting *Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc.*, 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005); *Modern Env’ts, Inc. v. Stinnett*, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002)).

198. *Id.* at 144, 747 S.E.2d at 808.

199. *Id.* at 145, 747 S.E.2d at 808–09.

200. *Id.*, 747 S.E.2d at 809.

201. *Id.* (quoting *Concerned Taxpayers of Brunswick Cnty. v. Cnty. of Brunswick*, 249 Va. 320, 327, 455 S.E.2d 712, 716 (1995)).

H. *Res Judicata*

In *Raley v. Haider*, the Supreme Court of Virginia considered whether the Fairfax County Circuit Court erred in dismissing the plaintiff's entire case on the basis of res judicata.²⁰² Dr. Thomas J. Raley was employed by a medical practice ("MISI") owned and managed by Dr. Naimeer Haider.²⁰³ In the original case filed in circuit court, Dr. Raley claimed that MISI did not pay him all of the money he had earned.²⁰⁴ Dr. Raley later amended his complaint to sue both MISI and Dr. Hailer individually, alleging that Dr. Hailer improperly dispensed funds from MISI to himself, in turn depleting MISI of money in violation of Virginia Code section 13.1-1035, which governs distributions made by Virginia limited liability companies.²⁰⁵ MISI and Dr. Hailer filed a demurrer arguing that under section 13.1-1035 only the limited liability company ("LLC") itself or a member of the LLC may bring an action.²⁰⁶ The circuit court agreed and sustained the demurrer on the basis that Dr. Raley, who was not a member of MISI, could not bring the case.²⁰⁷ The suit proceeded against MISI on other counts, and Dr. Raley obtained a judgment against MISI.²⁰⁸

When Dr. Raley was unable to collect the judgment, he filed a garnishment proceeding naming Dr. Hailer as the garnishee and asserting the rights of MISI for Dr. Hailer's alleged violation of section 13.1-1035.²⁰⁹ Two days later, Dr. Raley filed a complaint against Dr. Hailer and others seeking, as MISI's judgment creditor, to enforce MISI's rights against Dr. Hailer with respect to the wrongfully transferred money.²¹⁰ Dr. Raley alleged in the second complaint that Dr. Hailer had improperly transferred money

202. 286 Va. 164, 167, 747 S.E.2d 812, 814 (2013).

203. *Id.*

204. *Id.*

205. *Id.*; see also VA. CODE ANN. § 13.1-1035 (Repl. Vol. 2011) (outlining the restrictions on distributions for Virginia limited liability companies).

206. *Raley*, 286 Va. at 167, 747 S.E.2d at 814.

207. *Id.*

208. *Id.* at 168, 747 S.E.2d at 814.

209. *Id.*

210. *Id.* Because both the garnishment action and Count I of the second Complaint sought to assert rights of MISI for violation of Virginia Code section 13.1-1305, the actions were consolidated. *Id.*; see VA. CODE ANN. § 13.1-1035 (Repl. Vol. 2011).

away from MISI in order to prevent the payment of Dr. Raley's judgment.²¹¹

Dr. Hailer and the other defendants filed a demurrer, which the circuit court sustained on all counts.²¹² The circuit court held that, based upon the dismissal with prejudice in the original case, "res judicata barred all subsequent claims regarding funds Dr. Raley alleged to have been improperly transferred by Dr. Hailer out of MISI."²¹³

On appeal, the supreme court first addressed Dr. Raley's argument that res judicata could not bar the consolidated action because the circuit court's dismissal of Count II in the original case was based on lack of standing, a jurisdictional determination, rather than on the merits.²¹⁴ The court found that Dr. Raley had waived this argument because he failed to articulate it to the circuit court.²¹⁵ Thus, the court considered "the dismissal with prejudice of Count II in the original case [to be] a final judgment on the merits."²¹⁶

Alternatively, Dr. Raley argued that his assertion of claims belonging to MISI in the consolidated action could not be barred by res judicata because the parties were not identified.²¹⁷ Applying Rule 1:6, which governs the doctrine of res judicata, the court determined that for all intents and purposes, the consolidated actions were a proceeding by the judgment debtor (MISI) in the name of the judgment creditors (Dr. Raley) against the garnishee (Dr. Hailer).²¹⁸ In effect, in the consolidated cases, MISI was suing Dr. Hailer, whereas originally, Dr. Raley was suing Dr. Hailer.²¹⁹ Because the same parties were not in opposition in the original case and the consolidated actions, res judicata could not work to bar the garnishment and Count I claims against Dr. Hailer.²²⁰ However, as to the remaining claims in the consolidated actions,

211. *Raley*, 286 Va. at 168, 747 S.E.2d at 814.

212. *Id.*

213. *Id.*

214. *Id.* at 169, 747 S.E.2d at 815.

215. *Id.*

216. *Id.*

217. *Id.* at 170, 747 S.E.2d at 815.

218. *Id.* at 170–71, 747 S.E.2d at 815–16.

219. *Id.* at 171, 747 S.E.2d at 816.

220. *Id.*

Counts II through VIII, the court found that the same opposing parties were involved as in the original case and that the claim arose from the same conduct, transaction, or occurrence.²²¹ Therefore, res judicata barred the re-litigation of the claims against Dr. Hailer in Counts II through VIII.²²²

With regard to the other defendants in the consolidated cases, because they were not parties in the original case, the court held that res judicata would only bar the claims against them if they were in privity with Dr. Hailer or MISI in the original case.²²³ After analyzing the relationships and interests of the parties, the Court concluded that there was no privity and, thus, res judicata did not bar Dr. Raley's claims against the other defendants.²²⁴

I. *Standing*

In *Small v. Federal National Mortgage Ass'n*, the Supreme Court of Virginia, in response to a certified question from the United States District Court for the Eastern District of Virginia, addressed whether, under Virginia law, a clerk of court possesses statutory standing to initiate a lawsuit, in his official capacity, to enforce the real estate transfer tax on the recording of instruments.²²⁵ The supreme court answered this question in the negative, and thus did not analyze the second certified question, which queried whether the clerk could bring suit as a class representative on behalf of all clerks of court throughout the Commonwealth.²²⁶

Acting in his official capacity as the Fredericksburg City Circuit Court Clerk, Jeffrey S. Small filed a putative class action in federal court against the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corpora-

221. *Id.*

222. *Id.* at 171–72, 747 S.E.2d at 816.

223. *Id.* at 172, 747 S.E.2d at 816.

224. *Id.* at 173, 747 S.E.2d at 817.

225. 286 Va. 119, 123, 747 S.E.2d 817, 819 (2013). Article VI, section 1 of the Virginia Constitution discusses judicial power and jurisdiction. VA. CONST. art. VI, § 1. Specifically, it states that the Supreme Court of Virginia "shall, by virtue of this Constitution, have original jurisdiction . . . to answer questions of state law certified by a court of the United States[.]" *Id.* Rule 5:40 of the Rules of the Supreme Court of Virginia sets forth the certification procedures. VA. SUP. CT. R. 5:40 (2014).

226. *Small*, 286 Va. at 133, 747 S.E.2d at 824.

tion (“Freddie Mac”).²²⁷ Professing to represent all clerks of court in the Commonwealth, Small argued that Fannie Mae and Freddie Mac failed to pay the taxes imposed by Virginia Code sections 58.1-801 and 58.1-802, which levy real estate transfer taxes on recorded instruments.²²⁸ According to Small, Fannie Mae and Freddie Mac improperly asserted that they were exempt from paying taxes given their status as government entities.²²⁹ The defendants raised a number of defenses, including the argument that as clerk of court, Small lacked authority to bring an enforcement action under section 58.1-800.²³⁰

The central question before the supreme court was whether Small had “statutory standing” to bring this action.²³¹ Under federal law, whether a plaintiff has statutory standing is “simply [a matter of] statutory interpretation.”²³² In other words, the analysis hinges upon whether the plaintiff is a member of the class given authority by a statute to bring suit.²³³ The court noted that while the term “statutory standing” does not appear in its jurisprudence, the concept is a familiar one to the court.²³⁴ According to the supreme court, it is well settled that when a plaintiff such as Small files an action under a particular statute, the determination of standing turns on whether the plaintiff possesses the

227. *Id.* at 124, 797 S.E.2d at 819.

228. *Id.* Section 58.1-801 provides, in pertinent part:

[o]n every deed admitted to record, except a deed exempt from taxation by law, there is hereby levied a state recordation tax. The rate of the tax shall be 25 cents on every \$100 or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater.

VA. CODE ANN. § 58.1-801(A) (Repl. Vol. 2013 & Supp. 2014). Section 58.1-802 imposes a similar tax:

In addition to any other tax imposed under the provisions of this chapter, a tax is hereby imposed on each deed, instrument, or writing by which lands, tenements or other realty sold is granted, assigned, transferred, or otherwise conveyed to, or vested in the purchaser, or any other person, by such purchaser's direction.

Id. § 58.1-802 (Repl. Vol. 2013 & Supp. 2014).

229. *Small*, 286 Va. at 124, 747 S.E.2d at 819–20.

230. *Id.*, 747 S.E.2d at 820.

231. *Id.* at 125, 747 S.E.2d at 820.

232. *Id.* (quoting *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 295 (3d Cir. 2007)).

233. *Id.* at 126, 747 S.E.2d at 820.

234. *Id.* at 125, 747 S.E.2d at 820.

“legal right” to bring the action, which depends wholly on the provisions of the relevant statute.²³⁵

Small asserted that he derived his authority to bring suit to enforce the collection of unpaid real estate transfer taxes arose from Virginia Code sections 58.1-801 and 58.1-802.²³⁶ The court disagreed, holding that the General Assembly gave the Department of Taxation the exclusive authority to collect real estate transfer taxes.²³⁷ None of the tax statutes expressly authorize clerks of court to file suit to collect unpaid real estate transfer taxes.²³⁸ As the statutes make clear, the filing of an enforcement action is discretionary—it is one of many options state officials have to collect unpaid taxes.²³⁹ The duties of the clerk of court, however, have consistently been determined to be ministerial, which, by definition, makes them non-discretionary.²⁴⁰ Thus, the court concluded that the clerk’s duty to collect real estate transfer taxes is a ministerial act that does not grant the clerk the authority to file an enforcement proceeding.²⁴¹

The issue of standing arose again in *Bartee v. Vitocruz*, when the supreme court considered an issue of first impression: whether a sole surviving co-administrator of an estate may maintain a wrongful death action.²⁴² Following the death of Tonia Begley, Robert Bartee and Wiley Begley (“Wiley”) qualified in the Wise County Circuit Court as co-administrators of Ms. Begley’s estate.²⁴³ Thereafter, Wiley died.²⁴⁴ Subsequently, Bartee, as the surviving administrator of Ms. Begley’s estate, filed a lawsuit for wrongful death pursuant to section 8.01-50, alleging that Marissa G. Vitocruz, an emergency room physician, was negligent in her medical care and treatment, causing Ms. Begley’s death.²⁴⁵

235. *Id.* at 126, 747 S.E.2d at 820.

236. *Id.* at 127, 747 S.E.2d at 821.

237. *Id.* at 129, 747 S.E.2d at 822.

238. *Id.* at 130–31, 747 S.E.2d at 823.

239. *Id.* at 131, 747 S.E.2d at 824.

240. *Id.* at 127, 747 S.E.2d at 821.

241. *Id.* at 132, 747 S.E.2d at 824.

242. No. 131283, 2014 Va. LEXIS 95, at *1, 758 S.E.2d 549, 549 (June 5, 2014).

243. *Id.*

244. *Id.*

245. *Id.* at *2, 758 S.E.2d at 549–50.

Vitocruz moved to dismiss the wrongful death action, asserting that without the co-administrator (the deceased Ms. Begley) joining in the case, Bartee lacked standing to file the wrongful death claim.²⁴⁶ The circuit court agreed, holding that Bartee lacked standing to bring the lawsuit alone.²⁴⁷ The circuit court further held that Wiley could be joined as an additional party plaintiff.²⁴⁸ Bartee filed a motion to reconsider, which the circuit court denied; however, the court granted Bartee leave to file an amended complaint.²⁴⁹ Bartee filed an amended complaint but did not add Wiley as a plaintiff.²⁵⁰ Bartee explained that the circuit court clerk refused his requested qualification or requalification, insisting that the original qualification was effective and that Bartee, as the surviving administrator, had the authority to act alone in bringing the wrongful death action.²⁵¹

Vitocruz again filed a motion to dismiss based upon lack of standing, which the circuit court again granted.²⁵² On appeal, Bartee argued that, under the doctrine of survivorship, as the sole living co-administrator, he had the authority to bring the wrongful death action.²⁵³ Bartee argued that the doctrine of survivorship applicable to executors also applies to administrators.²⁵⁴ This was a novel theory, however, the court found that the relevant Virginia law, both statutory and case law, addressing the powers of administrators and substitution of parties supported Bartee's application of the doctrine of survivorship.²⁵⁵

The court began by noting the impossibility of the circuit court's requirement that Ms. Begley be added as a plaintiff.²⁵⁶ Af-

246. *Id.*, 758 S.E.2d at 550.

247. *Id.* The circuit court's holding was based upon the supreme court's holding in *Addison v. Jurgelsky*, which interpreted Virginia Code section 8.01-50(C) to mean that there must be "a unity of action whether there is one personal representative or more than one." 281 Va. 205, 208, 704 S.E.2d 402, 404 (2011); *see* VA. CODE ANN. § 8.01-50(C) (Cum. Supp. 2014).

248. *Bartee*, 2014 Va. LEXIS 95, at *2, 758 S.E.2d at 550.

249. *Id.* at *2-3, 758 S.E.2d at 550.

250. *Id.*

251. *Id.*

252. *Id.* at *3-4, 758 S.E.2d at 550.

253. *Id.* at *4, 758 S.E.2d at 550.

254. *Id.* at *5-6, 758 S.E.2d at 551.

255. *Id.* at *6, 758 S.E.2d at 551.

256. *Id.*

ter all, Ms. Begley was deceased.²⁵⁷ The court then explained that under Virginia law, once an administrator is properly qualified and appointed, another administrator may not be appointed unless there is a vacancy in the office.²⁵⁸ Because Bartee was an existing qualified administrator and there was no vacancy, he had authority to exercise the powers attached to the office, thus, standing to file the action.²⁵⁹ Applying the doctrine of survivorship, the power of appointment given to Bartee and Ms. Begley as co-administrators to prosecute a wrongful death action could be exercised by Bartee alone.²⁶⁰

J. *Statute of Limitations*

Responding to a certified question from the United States Court of Appeals for the Fourth Circuit, in *Dunlap v. Cottman Transmission Systems*, the Supreme Court of Virginia addressed whether, under Virginia Code section 8.01-243, “. . . a two-year or . . . five-year statute of limitations appl[ies] to claims of tortious interference with contract and tortious interference with business expectancy.”²⁶¹

James Dunlap filed suit against Cottman Transmission Systems, LLC and Todd P. Leff (collectively, “Cottman”) “alleging claims for tortious interference with contract, tortious interference with business expectancy, and business conspiracy.”²⁶² The claims stemmed from franchise agreements between Dunlap and AAMCO Transmissions, Inc., under which Dunlap ran two AAMCO repair shops for over thirty years.²⁶³ When Dunlap’s facilities closed, he blamed an alleged conspiracy between Cottman and others who Dunlap alleged would benefit from the closing of his franchises.²⁶⁴

257. *Id.*

258. *Id.* at *8, 758 S.E.2d at 551 (citing *Bolling v. D’Amato*, 259 Va. 299, 303–04, 526 S.E.2d 257, 259 (2000)).

259. *Id.* The court reached a similar conclusion with regard to executors in *Davis v. Christian*, 56 Va. (15 Gratt.) 728, 738 (1859).

260. *Bartee*, 2014 Va. LEXIS 95, at *12, 758 S.E.2d at 552.

261. 287 Va. 207, 211, 754 S.E.2d 313, 315 (2014).

262. *Id.*

263. *Id.*

264. *Id.* at 212, 754 S.E.2d at 315.

The United States District Court for the Eastern District of Virginia dismissed the business conspiracy claim for failure to allege all elements required to establish such a claim.²⁶⁵ The district court later dismissed Dunlap's two remaining tort claims on the basis that they were barred by the two-year statute of limitations set forth in section 8.01-248.²⁶⁶ According to the district court, Dunlap's claimed damages were "disappointed economic expectations," not injury to property.²⁶⁷ Thus, the claims were not subject to the five-year statute of limitations.²⁶⁸

The supreme court disagreed, holding that the five-year statute of limitations in section 8.01-243(B) applies.²⁶⁹ Addressing the second of two certified questions, the supreme court explained that "[t]he dispositive issue [was] whether tortious interference with contract and tortious interference with business expectancy allege injury to property."²⁷⁰ After addressing prior case law, the court explained that "one of the elements of a claim for tortious interference with either a contract or business expectancy requires intentional interference inducing or causing a breach or termination of the contractual relationship or business expectancy."²⁷¹ According to the court, "[s]uch interference is directed at and injures a property right, i.e., the right to performance of a contract and to reap profits and benefits . . . from the contract . . . [and] advantageous business relationships."²⁷² Tortious interference is not merely an allegation of disappointed economic expectations.²⁷³ Therefore, the five-year statute of limitations applies.²⁷⁴

K. *Right to a Jury*

In *Norfolk Southern Railway Co. v. Breeden, Inc.*, Norfolk Southern appealed from the judgment of the Rockingham County

265. *Id.*

266. *Id.*, 754 S.E.2d at 316.

267. *Id.*

268. *Id.*

269. *Id.* at 222, 754 S.E.2d at 321.

270. *Id.* at 219, 754 S.E.2d at 320.

271. *Id.* at 221, 754 S.E.2d at 321 (citing *Chaves v. Johnson*, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985)).

272. *Id.*

273. *Id.* at 222, 754 S.E.2d at 321.

274. *Id.*

Circuit Court granting E.A. Breeden, Inc. (“Breeden”) permanent injunctive relief and requiring the railroad company to “restore a private grade crossing over its railway tracks in Rockingham County.”²⁷⁵ On appeal, Norfolk Southern argued that “the circuit court erred in granting the injunction without requiring Breeden to prove harm and without balancing the equities.”²⁷⁶ As the Supreme Court of Virginia discussed, Breeden succeeded in interest to a crossing agreement, which the circuit court found to be a valid covenant running with the land that obligated Norfolk Southern to construct and maintain a private graded crossing.²⁷⁷ Therefore, Breeden was entitled to an injunction requiring the replacement of the crossing unless Norfolk Southern could prove that such a remedy would create a hardship or an injustice, that performance would be impossible, or that enforcement would be unusually difficult for the court.²⁷⁸ At trial, Breeden put forth evidence of its use of the crossing and its need to access the crossing. Norfolk Southern did not call any witnesses, rather, it simply argued that Breeden did not suffer any injury.²⁷⁹ The circuit court ruled in favor of Breeden and granted the requested injunctive relief.²⁸⁰

Norfolk Southern argued on appeal that the “circuit court erred in hearing Breeden’s request for a permanent injunction prior to the trial scheduled for Breeden’s breach of contract claim because it deprived Norfolk Southern of its right to a jury.”²⁸¹ According to Norfolk Southern, the circuit court’s action violated Rule 3:22(e) because the circuit court resolved factual disputes that were at issue in the breach of contract claim.²⁸² In analyzing Rule 3:22(e), the supreme court held that, under the plain language of the rule, “it only applies when there are jury issues to be tried.”²⁸³ The

275. 287 Va. 456, 459, 756 S.E.2d 420, 422 (2014).

276. *Id.* at 463, 756 S.E.2d at 424.

277. *Id.* at 465, 756 S.E.2d at 425.

278. *Id.* (quoting *Perel v. Brannan*, 267 Va. 691, 700, 594 S.E.2d 899, 904–05 (2004)).

279. *Id.* at 466, 756 S.E.2d at 425.

280. *Id.*, 756 S.E.2d at 426.

281. *Id.* at 467, 756 S.E.2d at 426.

282. *Id.*

283. *Id.* (“In any case when there are both jury and non-jury issues to be tried, the court shall adopt trial procedures and a sequence of proceedings to assure that all issues properly heard by the jury are decided by it, and applicable factual determinations by the jury shall be used by the judge in resolving the non-jury issues in the case.”) (quoting VA. SUP. CT. R. 3:22(e) (2014)).

court found that because no factual determinations common to the breach of contract claim were to be decided by the circuit court at the injunction hearing, Rule 3:22(e) did not apply.²⁸⁴

II. AMENDMENTS TO RULES OF COURT

A. *Virginia Rules of Evidence*

On July 2, 2014, multiple amendments were made to various provisions in the Virginia Rules of Evidence. The most significant change is the addition of Rule 2:413, which discusses evidence of similar crimes in child sexual offense cases.²⁸⁵ This rule, derived from Virginia Code section 18.2-67.7:1, states:

- (a) In a criminal case in which the defendant is accused of a felony sexual offense involving a child victim, evidence of the defendant's conviction of another sexual offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant.
- (b) The Commonwealth shall provide to the defendant 14 days prior to trial notice of its intention to introduce copies of final orders evidencing the defendant's qualifying prior criminal convictions. Such notice shall include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was obtained, and (iii) each offense of which the defendant was convicted. Prior to commencement of the trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the final orders that it intends to introduce.
- (c) This Rule shall not be construed to limit the admission or consideration of evidence under any other rule of court or statute.
- (d) For purposes of this Rule, "sexual offense" means any offense or any attempt or conspiracy to engage in any offense described in Article 7 (§ 18.2-61 et seq.) of Chapter 4 or § 18.2-370, 18.2-370.01, or 18.2-370.1 or any substantially similar offense under the laws of another state or territory of the United States, the District of Columbia, or the United States.
- (e) Evidence offered in a criminal case pursuant to the provisions of this Rule shall be subject to exclusion in accordance with the Virginia Rules of Evidence, including but not limited to Rule 2:403.²⁸⁶

284. *Id.* at 468, 756 S.E.2d at 427.

285. VA. R. EVID. 2:413 (2014).

286. *Id.*

Rule 2:404, which governs character evidence, was revised to include a reference to the new Rule 2:413.²⁸⁷ Subsection (b) now states:

*Except as provided in Rule 2:413 or by statute, evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.*²⁸⁸

Rule 2:803, which addresses hearsay exceptions that apply regardless of the declarant's availability, underwent only a minor housekeeping change. Specifically, the caption now properly states that Rule 2:803(10)(a) derives from section 8.01-390(C).²⁸⁹ Likewise, the caption of Rule 2:902 was amended to identify sections 8.01-390.3 and 8.01-391(D) as the sections from which the new subsection (6) was derived.²⁹⁰

Subsection (6), which governs certified records of a regularly conducted activity, is new to Rule 2:902 and states:

(a) In any civil proceeding where a business record is material and otherwise admissible, authentication of the record and the foundation required by subdivision (6) of Rule 2:803 may be laid by (i) witness testimony, (ii) a certification of the authenticity of and foundation for the record made by the custodian of such record or other qualified witness either by affidavit or by declaration pursuant to Code § 8.01-4.3, or (iii) a combination of witness testimony and a certification.

(b) The proponent of a business record shall (i) give written notice to all other parties if a certification under this section will be relied upon in whole or in part in authenticating and laying the foundation for admission of such record and (ii) provide a copy of the record and the certification to all other parties, so that all parties have a fair opportunity to challenge the record and certification. The notice and copy of the record and certification shall be provided no later than 15 days in advance of the trial or hearing, unless an order of the court specifies a different time. Objections shall be made within five days thereafter, unless an order of the court specifies a different time. If

287. R. 2:404(b).

288. *Id.* (emphasis added).

289. R. 2:803.

290. R. 2:902.

any party timely objects to reliance upon the certification, the authentication and foundation required by subdivision (6) of Rule 2:803 shall be made by witness testimony unless the objection is withdrawn.

(c) A certified business record that satisfies the requirements of this section shall be self-authenticating and requires no extrinsic evidence of authenticity.

(d) A copy of a business record may be offered in lieu of an original upon satisfaction of the requirements of Code § 8.01-391(D) by witness testimony, a certification, or a combination of testimony and a certification.²⁹¹

B. *Petition for Appeal*

Effective May 16, 2014, multiple rules were amended to incorporate changes made to Rule 5:17, which sets forth the requirements for filing a petition for appeal.²⁹² The changes to Rule 5:17 target the provisions concerning assignments of error. Subsection (c)(1) now states:

Under a heading entitled “Assignments of Error,” the petition shall list, clearly and concisely and without extraneous argument, the specific errors in the rulings below upon which the party intends to rely. An exact reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken shall be included with each assignment of error *but is not part of the assignment of error*.²⁹³

Subsection (c)(1)(i) was amended to remove the requirement that assignments of error be set forth under a separate heading.²⁹⁴ Subsection (c)(1)(iii), which discusses insufficient assignments of error, has been amended to read:

An assignment of error that does not address the findings or rulings in the trial court or other tribunal from which an appeal is taken, or which merely states that the judgment or award is contrary to the law and the evidence, is not sufficient. *An assignment of error in an appeal from the Court of Appeals to the Supreme Court which recites that “the trial court erred” and specifies the errors in the trial court, will be sufficient so long as the Court of Appeals ruled upon the specific merits of the alleged trial court error and the error assigned in*

291. R. 2:902(6).

292. VA. SUP. CT. R. 5:17 (2014).

293. R. 5:17(c)(1) (emphasis added).

294. R. 5:17(c)(1)(i).

this Court is identical to that assigned in the Court of Appeals. If the assignments of error are insufficient, the petition for appeal shall be dismissed.²⁹⁵

Finally, the amendment to Rule 5:17 added new subsection (c)(1)(iv), which discusses the effect of a failure to use a separate heading or include a preservation reference.²⁹⁶ Specifically, subsection (c)(1)(iv) states:

If the petition for appeal contains assignments of error, but the assignments of error are not set forth under a separate heading as provided in subparagraph (c)(1) of this Rule, a rule to show cause will issue pursuant to Rule 5:1A. If there is a deficiency in the reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken, a rule to show cause will issue pursuant to Rule 5:1A.²⁹⁷

These changes to Rule 5:17 resulted in amendments to other rules as well. Rule 5:1A, which addresses penalties for non-compliance, show cause, and dismissal, now includes a reference to Rule 5:17(c)(1)(i) and (iii).²⁹⁸ According to Rule 5:1A(a), any defects in the assignment of error requirements of Rule 5:17(c)(1)(i) and (iii) are not curable.²⁹⁹

Rule 5A:1A, titled “Penalties for Non-compliance; Show Cause; Dismissal” was also added by amendment.³⁰⁰ Rule 5A:1A states as follows:

(a) Penalties; Show Cause; Dismissal. This Court may dismiss an appeal or impose such other penalty as it deems appropriate for non-compliance with these Rules. Except as provided in Rule 5A:12(c)(1)(i) and (ii) regarding assignments of error, prior to the dismissal of an appeal for any defect in the filings related to formatting, curable failure to comply with other requirements, or the failure to meet non-mandatory filing deadlines, this Court may issue a show cause order to counsel or a party not represented by an attorney, prescribing a time in which to cure such defect or to otherwise show cause why the appeal should not be dismissed or other penalty imposed.

(b) Report to Virginia State Bar. If an attorney’s failure to comply with these Rules results in the dismissal of an appeal, this Court

295. R. 5:17(c)(1)(iii) (emphasis added).

296. R. 5:17(c)(1)(iv).

297. *Id.*

298. R. 5:1A.

299. *Id.*

300. R. 5A:1A.

may report the attorney to the Virginia State Bar in accordance with Rule 8.3 of the Virginia Rules of Professional Conduct.³⁰¹

Similarly, Rule 5A:12 was amended to reflect the same changes to the assignment of error requirements contained in Rule 5:17.³⁰² That is, subsection (c)(1) now reads:

Under a heading entitled “Assignments of Error,” the petition shall list, clearly and concisely and without extraneous argument, the specific errors in the rulings below upon which the party intends to rely. An exact reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken shall be included with each assignment of error but is not part of the assignment of error.³⁰³

Subsection (c)(iii) is a new addition, which like its counterpart in Rule 5:17, discusses the effect of a failure to use a separate heading or include a preservation reference:

If the petition for appeal contains assignments of error, but the assignments of error are not set forth under a separate heading as provided in subparagraph (c)(1) of this Rule, a rule to show cause will issue pursuant to Rule 5A:1A. If there is a deficiency in the reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken, a rule to show cause will issue pursuant to Rule 5A:1A.³⁰⁴

C. *Petition for Rehearing*

On November 1, 2013, a minor amendment to subsection (a) of Rule 5:20 went into effect, which sets forth when and how a petition for rehearing may be filed after the refusal of a petition for appeal or disposition of an original jurisdiction petition.³⁰⁵ The amendment clarified that counsel for the appellant may, within fourteen days after the date of the order denying the appeal, file in the office of the clerk of the supreme court a petition for rehearing.³⁰⁶ The amendment simply substituted the language “date

301. *Id.*

302. R. 5A:12(c)(1).

303. *Id.*

304. R. 5A:12(c)(1)(iii).

305. R. 5:20.

306. *Id.*

of this order” for date of this notice.³⁰⁷ Further, as amended, Rule 5:20 now prohibits attempts to incorporate facts or arguments from the petition for appeal.³⁰⁸

D. Appeals from the Virginia State Bar Disciplinary Board or a Three-Judge Circuit Court Determination

Rule 5:21, titled “Special Rules Applicable to Certain Appeals of Right,” discusses, in part, appeals from the Virginia State Bar Disciplinary Board or a three-judge circuit court determination.³⁰⁹ Subsection (b)(5) of the Rule sets forth when and how an attorney may file a motion for a stay pending appeal of an order suspending or revoking his or her law license.³¹⁰ The January 31, 2014 amendment added language clarifying that an attorney may request a stay pending appeal of an order either suspending *or revoking* his or her license.³¹¹ The amendment also added the following language: “[a]ny order of Admonition or Public Reprimand shall be automatically stayed prior to or during the pendency of an appeal of the order.”³¹²

E. Notice of Appeal under Administrative Process Act

Rule 2A:2, which discusses notice of appeals pursuant to the Administrative Process Act, underwent a minor revision. The amendment to subsection (a) establishes that “[w]ith respect to an appeal from a regulation, the date of adoption or readoption shall be the date of publication in the Register of Regulations.”³¹³

F. Pretrial Scheduling Order

Effective May 1, 2014, amended Rule 1:18 provides more detail regarding the court’s entry of the Uniform Pretrial Scheduling Order.³¹⁴ Specifically, the requirement that the court provide no-

307. *Id.*

308. *Id.*

309. R. 5:21.

310. R. 5:21(b)(5).

311. *Id.*

312. *Id.*

313. R. 2A:2(a).

314. R. 1:18

tice to the parties before entry of the Uniform Pretrial Scheduling Order has been removed.³¹⁵ Subsection (B) now states:

In any civil case in which a pretrial scheduling order has not otherwise been entered pursuant to the court's normal scheduling procedure, the court may, upon request of counsel of record for any party, or in its own discretion, enter the pretrial scheduling order contained in Section 3 of the Appendix of Forms at the end of Part I of these Rules (Uniform Pretrial Scheduling Order). The court shall cause copies of the order so entered to forthwith be transmitted to counsel for all parties. If any party objects to or requests modification of that order, the court shall (a) hold a hearing to rule upon the objection or request or (b) with the consent of all parties and the approval of the court, enter an amended pretrial scheduling order.³¹⁶

III. NEW LEGISLATION

A. *Evidence*

The General Assembly adopted Virginia Code section 8.01-390.3 regarding the admissibility of business records under the business records exception to the rule against hearsay.³¹⁷ Section 8.01-390.3 provides:

[i]n any civil proceeding where a business record is material and otherwise admissible, authentication of the record and the foundation required by [Rule 2:803(6)] may be laid by (i) witness testimony, (ii) a certification of the authenticity of and foundation for the record made by the custodian of such record or other qualified witness either by affidavit or by declaration pursuant to § 8.01-4.3, or (iii) a combination of witness testimony and a certification.³¹⁸

Subsection (B) of the amended section 8.01-390.3 requires the proponent of the business record to give written notice to all other parties, reasonably in advance of the trial or hearing, if a certification will be relied upon for the admission into evidence of such a record.³¹⁹ A copy of the record and the certification must be provided to all parties so that all parties have an opportunity to

315. *See id.*

316. R. 1:18(B).

317. Act of Mar. 31, 2014, ch. 398, 2014 Va. Acts ___, ___ (codified at VA. CODE ANN. § 8.01-390.3 (Cum. Supp. 2014) and codified as amended at VA. CODE ANN. § 8.01-391 (Cum. Supp. 2014)).

318. VA. CODE ANN. § 8.01-390.3 (Cum. Supp. 2014).

319. *Id.* § 8.01-390.3(B) (Cum. Supp. 2014).

lodge an objection.³²⁰ Finally, section 8.01-390.3 states that if any party timely objects to the use of the certification, the authentication and foundation required for the admission of the record must be made by witness testimony.³²¹

The General Assembly also amended section 8.01-390, which discusses nonjudicial records as evidence.³²² Section 8.01-390 now includes a discussion of 911 emergency service calls.³²³ Subsection (B) states:

Records and recordings of 911 emergency service calls shall be deemed authentic transcriptions or recordings of the original statements if they are accompanied by a certificate that meets the provisions of subsection A and the certificate contains the date and time of the incoming call and the incoming phone number, if available, associated with the call.³²⁴

The legislature amended and reenacted section 16.1-88.2, which relates to evidence of medical reports or records and the testimony of health care providers and custodians of records.³²⁵ Section 16.1-88.2 provides that in an action for personal injuries tried in general district court or appealed to the circuit court, either party may present evidence as to the extent, nature, and treatment of the injury, the examination of the injured person, and the costs of such treatment and examination.³²⁶ Such evidence may be presented through a report from the treating or examining health care provider “*or a health care provider licensed outside of the Commonwealth for his treatment of the plaintiff outside of the Commonwealth.*”³²⁷

The legislature further amended section 16.1-88.2.³²⁸ As amended, a medical report from a treating or examining health care provider may be admitted into evidence in a civil action for personal injuries or to resolve a dispute with an insurance company

320. *Id.*

321. *Id.*

322. Act of Mar. 27, 2014, ch. 353, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 8.01-390 (Cum. Supp. 2014)).

323. VA. CODE ANN. § 8.01-390 (Cum. Supp. 2014).

324. *Id.* § 8.01-390(B) (Cum. Supp. 2014).

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

326. VA. CODE ANN. § 16.1-88.2 (Cum. Supp. 2014).

327. *Id.* (emphasis added).

328. Ch. 25, 2014 Va. Acts ___.

or health care provider.³²⁹ However, such a report must be accompanied by a sworn statement from the custodian of the report stating that the report is a true and accurate copy.³³⁰ Prior to this amendment, such a report could only be admitted if it was accompanied by a sworn statement of the treating or examining health care provider.³³¹

B. *Expert Witness Testimony*

During the 2014 session, the General Assembly amended and reenacted Virginia Code section 8.01-401.2 relating to expert witness testimony of chiropractors and physician assistants.³³² As amended, section 8.01-401.2 allows a properly qualified chiropractor or physician assistant to testify as an expert “as to etiology, diagnosis, prognosis, *treatment*, *treatment plan*, and disability, including anatomical, physiological, and pathological considerations within the scope of the practice of chiropractic”³³³ The new subsection (B) states:

A physician assistant, when properly qualified, may testify as an expert witness in a court of law as to etiology, diagnosis, prognosis, treatment, treatment plan, and disability, including anatomical, physiological, and pathological considerations within the scope of his activities as authorized pursuant to § 54.1-2952. However, no physician assistant shall be permitted to testify as an expert witness for or against (i) a defendant doctor of medicine or osteopathic medicine in a medical malpractice action regarding the standard of care of a doctor of medicine or osteopathic medicine or (ii) a defendant health care provider in a medical malpractice action regarding causation.³³⁴

C. *Holding Cases Under Advisement*

Virginia Code section 17.1-107 discusses the designation of a judge to assist a regular judge who is holding a case under advisement for an unreasonable length of time.³³⁵ As amended by the 2014 General Assembly, section 17.1-107 now states that in

329. VA. CODE ANN. § 16.1-88.2 (Cum. Supp. 2014).

330. *Id.* § 16.1-88.2(1) (Cum. Supp. 2014).

331. *Id.*

332. S.B. 185, Va. Gen. Assembly (Reg. Sess. 2014).

333. VA. CODE ANN. § 8.01-401.2(A) (Cum. Supp. 2014) (emphasis added).

334. *Id.* § 8.01-401.2(B) (Cum. Supp. 2014).

335. *Id.* § 17.1-107 (Cum. Supp. 2014).

any civil action in which a circuit court judge failed to act on any matter, motion, or issue submitted to the court for a decision or failed to render a final decision for more than sixty days after the decision was requested, the judge must report, in writing, to the parties or their counsel the expected time of a decision.³³⁶ A judge who fails to make such a report or who fails to render a decision within the time stated in the report may be reported to the Chief Justice of the Supreme Court of Virginia.³³⁷ Importantly, the General Assembly's amendment shortens the advisement period from ninety days to sixty days.³³⁸

D. *Confidential Information*

The General Assembly amended the Virginia Code by adding section 8.01-420.8, which addresses the protection of confidential information in court files.³³⁹ Section 8.01-420.8 states:

[w]henever a party files . . . [a] document containing a social security number or other identification number appearing on a driver's license, credit card, debit card, bank account, or other electronic billing and payment systems, the party shall make reasonable efforts to redact all but the last four digits of the identification number.³⁴⁰

This requirement applies "to all civil actions in circuit and district court, unless there is a specific statute to the contrary."³⁴¹ The failure to redact such identifying information does not create a private cause of action against the party or attorney who filed the document or any court personnel who received the document.³⁴²

E. *Statute of Limitations*

The General Assembly amended Virginia Code section 8.01-243, which relates to actions for injury to person or property.³⁴³ As

336. *Id.*

337. *Id.*

338. *Id.*

339. Act of Mar. 31, 2014, ch. 427, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 8.01-420.8 (Cum. Supp. 2014)).

340. VA. CODE ANN. § 8.01-420.8 (Cum. Supp. 2014).

341. *Id.* § 8.01-420.8(B) (Cum. Supp. 2014).

342. *Id.* § 8.01-420.8(C) (Cum. Supp. 2014).

343. Act of Apr. 4, 2014, ch. 586, 2014 Va. Acts ___ (codified at VA. CODE ANN. § 8.01-243 (Cum. Supp. 2014)).

amended, section 8.01-243 now provides for a five-year statute of limitations for actions for injury to property brought by the Commonwealth against a tortfeasor for expenses arising out of the negligent operation of a motor vehicle.³⁴⁴ With this change, the statute of limitations applicable to actions by a parent or guardian of an infant against a tortfeasor is now also applicable to actions for injury to property brought by the Commonwealth.³⁴⁵

F. *Nonsuits*

The legislature amended Virginia Code section 8.01-380, which addresses the dismissal of an action by nonsuit.³⁴⁶ Specifically, the bill adds subsection (E), which provides that “[a] voluntary nonsuit taken pursuant to this section is subject to the tolling provisions of subdivision (E)(3) of section 8.01-229.”³⁴⁷ In other words, when a voluntary nonsuit is taken in a civil case, the statute of limitations with respect to the cause of action is tolled and “the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation . . . whichever [] is longer.”³⁴⁸

G. *Injunctions*

Virginia Code section 8.01-626 was amended to clarify when and how a justice of the Supreme Court of Virginia or a judge of the Court of Appeals of Virginia may review a circuit court’s grant or refusal of an injunction.³⁴⁹ Section 8.01-626 requires that the aggrieved party file a petition for review within fifteen days of the court’s order granting or refusing the injunction.³⁵⁰ As amended, section 8.01-626 now includes the requirement that the aggrieved party serve a copy of the petition for review on opposing

344. VA. CODE ANN. § 8.01-243 (Cum. Supp. 2014).

345. *Id.* § 8.01-243(B), (E) (Cum. Supp. 2014).

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

347. *Id.*

348. VA. CODE ANN. § 8.01-229(E)(3) (Repl. Vol. 2007 & Cum. Supp. 2014).

349. Act of Apr. 3, 2014, ch. 526, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 8.01-626 (Cum. Supp. 2014)).

350. VA. CODE ANN. § 8.01-626 (Cum. Supp. 2014).

counsel.³⁵¹ The opposing party may file a response within seven days of the date of service unless the court determines a shorter time frame.³⁵²

H. *Jury Trials*

The General Assembly amended Virginia Code section 8.01-336 to clarify how the right to a trial by jury may be preserved.³⁵³ Section 8.01-336 now states that “[u]nless waived, any demand for a trial by jury in a civil case made in compliance with the Rules of Supreme Court of Virginia shall be sufficient, with no further notice, hearing, or order, to proceed thereon.”³⁵⁴ Section 8.01-336 also reduced the required amount of recovery sought for the court to hear the entire case in the absence a waiver of a jury trial from \$100 to \$20.³⁵⁵

The 2014 General Assembly also amended section 8.01-337, which deals with who is able to serve as a juror.³⁵⁶ The legislature added two military branches, the United States Marine Corps and the United States Coast Guard, to the list of military personnel who shall not be considered residents of the Commonwealth by reason of their being stationed in Virginia.³⁵⁷ Prior to this amendment, only members of the United States Army, Air Force, and Navy who were stationed in Virginia were considered non-residents of the Commonwealth during deployment.³⁵⁸

I. *Attorneys’ Fees*

The General Assembly amended the Virginia Code by adding section 8.01-221.2, which states:

[i]n any civil action to rescind a deed, contract, or other instrument, the court may award to the plaintiff reasonable attorney fees and

351. *Id.*

352. *Id.*

353. Act of Mar. 5, 2014, ch. 172, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 8.01-336 (Cum. Supp. 2014)).

354. *Id.*

355. *Id.*

356. Act of Apr. 4, 2014, ch. 595, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 8.01-337 (Cum. Supp. 2014)).

357. *Id.*

358. *See id.*

costs associated with bringing such action where the court finds, by clear and convincing evidence, that the deed, contract, or other instrument was obtained by fraud or undue influence on the part of the defendant.³⁵⁹

The legislature also amended and reenacted Virginia Code section 17.1-624 to eliminate the award of de minimis attorney fees to any party that recovers costs.³⁶⁰

J. *Uniform Foreign-Country Money Judgments Recognition Act*

The General Assembly updated the Uniform Foreign Country Money Judgments Recognition Act (the “Act”).³⁶¹ The Act provides for recognition and enforcement of foreign-country judgments in a United States state court.³⁶² The Act is not applicable to a foreign-country judgment for taxes, a fine or other penalty, or a judgment rendered in connection with a domestic relations matter.³⁶³ The Act specifies certain standards for recognition of a foreign-country judgment.³⁶⁴ For example, a foreign-country judgment will not be recognized by a court of the Commonwealth if it “was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law” or if the foreign court did not have jurisdiction.³⁶⁵ The Act also states that “[a] party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for non-recognition . . . exists.”³⁶⁶ The Act also lays out the procedure for seeking enforcement of a foreign-country judgment and explains that the effect of recognition of a foreign-country judgment is that it is “[e]nforceable in the same manner and to the same extent as a judgment rendered in the Commonwealth.”³⁶⁷

359. Act of Mar. 5, 2014, ch. 164, 2014 Va. Acts ___, ___ (codified at VA. CODE ANN. § 8.01-221.2 (Cum. Supp. 2014)).

360. Act of Mar. 27, 2014, ch. 315, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 17.1-624 (Cum. Supp. 2014)).

361. Act of Mar. 31, 2014, ch. 462, 2014 Va. Acts ___ (codified at VA. CODE ANN. § 8.01-465.13:1 to .13:11 (Cum. Supp. 2014)).

362. VA. CODE ANN. § 8.01-465.13:3(A) (Cum. Supp. 2014).

363. *Id.* § 8.01-465.13:2(B) (Cum. Supp. 2014).

364. *See id.* § 8.01-465.13:3 (Cum. Supp. 2014.)

365. *Id.* § 8.01-465.13:3(B)(1) (Cum. Supp. 2014).

366. *Id.* § 8.01-465.13:3(D) (Cum. Supp. 2014).

367. *Id.* § 8.01-465.13:6(2) (Cum. Supp. 2014); *see id.* § 8.01-465.13:5 (Cum. Supp. 2014).

K. *Fines for Judgment Creditors*

Virginia Code section 8.01-454, as amended, requires that payment by a judgment debtor be entered on the docket by the judgment creditor within ninety days of payment or satisfaction of the judgment, or within ten days of being notified by the debtor of the payment or satisfaction.³⁶⁸ Should the judgment creditor fail to do so, the amendment provides that he shall be liable for a fine of \$100 and must pay the cost of releasing the judgment.³⁶⁹ Prior to this amendment, the judgment creditor was only subject to a fine of up to \$50 for failure to enter judgment within ten days after receiving notice of satisfaction.³⁷⁰

L. *Summons for Unlawful Detainer*

The 2014 General Assembly amended and reenacted Virginia Code section 8.01-126, relating to summons for unlawful detainer.³⁷¹ Specifically, subsection (C) now permits the amendment of the amount requested on the summons for unlawful detainer in the event of the defendant's default.³⁷² When a defendant fails to make an appearance in court, upon the request of the plaintiff and a determination by the court regarding the accuracy of the amount due, as set forth in the affidavit,

the court shall permit amendment of the amount requested on the summons for unlawful detainer filed in court in accordance with the affidavit and shall enter a judgment for such amount due as of the date of the hearing in addition to entering an order of possession for the premises.³⁷³

M. *Dismissal for Failure to Comply with Court Rules*

Virginia Code section 8.01-4, which governs certain rules prescribed by district courts and circuit courts, enables courts to cre-

368. Act of Mar. 24, 2014, ch. 274, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 8.01-454 (Cum. Supp. 2014)).

369. *Id.*

370. VA. CODE ANN. § 8.01-454 (Repl. Vol. 2007).

371. Act of Mar. 5, 2014, ch. 168, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 8.01-126 (Cum. Supp. 2014)).

372. VA. CODE ANN. § 8.01-126(C) (Cum. Supp. 2014).

373. *Id.*

ate rules necessary to promote proper order and decorum and to ensure the efficient and safe use of courthouse facilities and clerks' offices.³⁷⁴ Section 8.01-4 also provides that courts may prescribe certain docket control procedures.³⁷⁵ However, as amended, section 8.01-4 now limits the adverse consequences that a party may suffer for failure to comply with such rules.³⁷⁶ Section 8.01-4 states that “[n]o civil matter shall be dismissed with prejudice by any district or circuit court for failure to comply with any rule created under this section.”³⁷⁷

N. *Posting Courthouse Notices on Websites*

The General Assembly amended Virginia Code section 1-211.1 to include that, if “any notice, summons, order or other official document of any type is required to be posted on or at the front door of a courthouse or on a public bulletin board at a courthouse, it shall constitute compliance with this requirement” if the document “is posted with other such documents . . . on the public government website of the locality served by the court where such . . . document is posted.”³⁷⁸

O. *Computation of Time*

The legislature amended Virginia Code section 1-210, which governs computation of time, to state that, “[f]or the purposes of this section, any day on which the Governor authorizes the closing of the state government shall be considered a legal holiday.”³⁷⁹

P. *Recording Proceedings*

Prior to amendment by the General Assembly, Virginia Code section 16.1-69.35:2 provided that tape recordings could be made

374. *Id.* § 8.01-4 (Repl. Vol. 2007).

375. *Id.*

376. Act of Mar. 27, 2014, ch. 348, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 8.01-4 (Cum. Supp. 2014)).

377. VA. CODE ANN. § 8.01-4 (Cum. Supp. 2014).

378. Act of Mar. 24, 2014, ch. 269, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 1-211.1 (Cum. Supp. 2014)).

379. Act of Apr. 4, 2014, ch. 596, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 1-210 (Cum. Supp. 2014)).

of proceedings in general district court.³⁸⁰ As amended, section 16.1-69.35:2 now allows the making of “an audio recording of proceedings in a general district court” by a party or his counsel, indicating that such audio recordings are no longer limited to tape recordings.³⁸¹

380. VA. CODE ANN. § 16.1-69.32:2 (Cum. Supp. 2014).

381. Act of Mar. 24, 2014, ch. 268, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 16.1-69.35:2 (Repl. Vol. 2010)).