

# ARTICLES

## CIVIL PRACTICE AND PROCEDURE

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This article serves (hopefully) as a practical update on recent changes in Virginia civil practice and procedure.<sup>1</sup> It does not attempt to capture every such change, but the goal is to present the significant points from Supreme Court of Virginia decisions<sup>2</sup> as well as amendments to the Rules of the Supreme Court of Virginia<sup>3</sup> and relevant statutes. Some of the discussion also focuses on certain procedural issues that may not have significantly changed but that a practitioner likely will not face often and could otherwise be a fatal trap for the unwary.

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

#### A. Res Judicata

In a 4-3 decision in *Funny Guy, LLC v. Lecego, LLC*, the Supreme Court of Virginia tackled res judicata and underscored the

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1. Due to the publishing schedule, the article encompasses approximately a June 2016 to June 2017 timeframe.

2. For case law updates, the author reminds the reader that supreme court opinions can easily be found (in reverse chronological order) online. *Supreme Court of Virginia Opinions*, VA’S JUD. SYS., <http://www.courts.state.va.us/scndex.htm> (last visited Sept. 27, 2017).

3. Amendments to the rules are readily available online. *Rules of the Supreme Court of Virginia*, VA’S JUD. SYS., <http://www.courts.state.va.us/courts/scv/rules.html> (last visited Sept. 27, 2017).

importance of a party pleading all of its potential claims (in the alternative if necessary).<sup>4</sup> The plaintiffs, The Funny Guy, LLC, and Mark Goldstein (collectively “Funny Guy”), alleged that the defendants, Lecego, LLC, and Vision-It, Inc., and their respective owners (collectively “Lecego”), failed to pay Funny Guy for the work it performed.<sup>5</sup>

The supreme court summarized Funny Guy’s claims as three theories of recovery: that Lecego had agreed to pay a certain amount to settle the dispute (“the settlement theory”); that there was a binding oral contract between the parties (“the oral-contract theory”); and, alternatively, even without a contract, Funny Guy was entitled to be paid for its services (“the quantum-meruit theory”).<sup>6</sup> In 2014, Funny Guy sued Lecego under the first theory of recovery, and the Fairfax County Circuit Court dismissed the suit on demurrer, finding there was “no meeting of the minds as a matter of law.”<sup>7</sup> Less than a year later, Funny Guy filed suit against Lecego under the oral-contract theory and, in the alternative, under the quantum-meruit theory.<sup>8</sup> In response, Lecego filed a plea in bar of res judicata, contending that “these alternative theories of recovery could have been, and thus should have been, asserted in the first suit.”<sup>9</sup> The circuit court agreed and dismissed the second action with prejudice.<sup>10</sup>

The Supreme Court of Virginia agreed with the circuit court in its application of Rule 1:6 in that it “prohibited Funny Guy from filing two separate lawsuits when one would have been perfectly sufficient.”<sup>11</sup> Funny Guy had argued that the oral-contract and quantum-meruit theories were “wholly separate disputes” from the settlement theory.<sup>12</sup> The supreme court disagreed and noted that the argument came “uncomfortably close” to the “same evidence” test from *Davis v. Marshall Homes, Inc.*, which had been “expressly rejected” by Rule 1:6.<sup>13</sup>

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4. 293 Va. 135, 795 S.E.2d 887 (2017).

5. *Id.* at 140, 795 S.E.2d at 889.

6. *Id.* at 139–40, 795 S.E.2d at 888.

7. *Id.* at 140, 795 S.E.2d at 889 (citations omitted).

8. *Id.* at 140, 795 S.E.2d at 889.

9. *Id.* at 140, 795 S.E.2d at 889.

10. *Id.* at 140, 795 S.E.2d at 889.

11. *Id.* at 141, 795 S.E.2d at 889; Va. Sup. Ct. R. 1:6 (Repl. Vol. 2017).

12. *Id.* at 141, 795 S.E.2d at 889.

13. *Id.* at 141, 795 S.E.2d at 889 (citing *Davis v. Marshall Homes, Inc.*, 265 Va. 159,

The court went on to elucidate the origins of res judicata and its appearance “in nearly every legal system.”<sup>14</sup> “For all of the legal argot making the doctrine sound tiresomely erudite, the thought is really no more complicated than saying that, as Henry Black put it, litigants must ‘make the most of their day in court.’”<sup>15</sup> The supreme court further quoted Kent Sinclair, saying, “The law should afford one full, fair hearing relating to a particular problem—but not two.”<sup>16</sup> It also discussed how res judicata includes “both issue and claim preclusion,” as well as the characteristics, origins, and evolution of both.<sup>17</sup>

“As modern pleading reforms loosened the procedural limitations on res judicata, this Court, ironically, tightened the historic scope of the merger-bar principles of the doctrine.”<sup>18</sup> The previously referenced *Davis v. Marshall Homes* decision “adopted a strict view of the same-evidence test that was wholly out of sync with the prior, far broader, same-subject-matter test.”<sup>19</sup> The same evidence test simply compared the evidence required to prove the claims (and their elements) and as long as the claims required “different, though related, fact patterns,” then res judicata would not apply “even if the claims all arise out of the same underlying dispute.”<sup>20</sup> The supreme court noted and discussed the subsequent criticism of the decision, even stating that “[t]hough harsh, such criticisms were not unfair.”<sup>21</sup> Three years after that decision, the supreme court implemented Rule 1:6, which “parallels the ‘same transactions or occurrence’ scope” of Virginia Code sections 8.01-272 and 8.01-281.<sup>22</sup> “[I]f the underlying dispute produces different legal claims that can be joined in a single suit under the joinder statutes, Rule 1:6 provides that they should be joined unless a judicially-recognized exception to res judicata exists.”<sup>23</sup>

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166–68, 576 S.E.2d 504, 507–08, 510 (2003)).

14. *Id.* at 141–42 & nn.4–7, 795 S.E.2d at 889–90 & nn.4–7 (citations omitted).

15. *Id.* at 143, 795 S.E.2d at 890 (citation omitted).

16. *Id.* at 143, 795 S.E.2d at 890 (quoting KENT SINCLAIR, GUIDE TO VIRGINIA LAW: EQUITY REFORM AND OTHER LANDMARK CHANGES § 11.01 (2006)).

17. *Id.* at 142–43, 795 S.E.2d at 890 (citation omitted).

18. *Id.* at 148, 795 S.E.2d at 894.

19. *Id.* at 148, 795 S.E.2d at 894.

20. *Id.* at 148–49, 795 S.E.2d at 894.

21. *Id.* at 149, 795 S.E.2d at 894.

22. *Id.* at 150, 795 S.E.2d at 895.

23. *Id.* at 150, 795 S.E.2d at 895. The court provided examples of exemptions to res judicata such as non-final judgments, dismissals due to lack of jurisdiction or improper venue, misjoinder, nonjoinder, nonsuits, dismissals without prejudice, and the “unique

The supreme court also discussed several statutes and rules that encourage parties to bring their claims all at once. Virginia Code section 8.01-272 allows a plaintiff to “join multiple claims in the same proceeding (including those, like tort and contract claims, which he previously could not join) so long as they ‘arise out of the same transaction or occurrence.’”<sup>24</sup> The supreme court further noted that Virginia Code section 8.01-281(A) and Rule 1.4(K) allow a plaintiff to “plead alternative facts and theories of recovery.”<sup>25</sup> It emphasized the “broad scope of joinder in Virginia.”<sup>26</sup>

Leaning on the Second Restatement of Judgments, the supreme court established a “practical analysis” of applying *res judicata* that focused on “whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.”<sup>27</sup> No factor is “indispensable or determinative,” but instead should “be considered ‘pragmatically’ with a view toward uncovering the true underlying dispute between the parties.”<sup>28</sup> The supreme court found that each of the factors “support[ed] the trial court’s application of *res judicata* in this case.”<sup>29</sup> “Most litigants, we believe, would view all three of Funny Guy’s alternative claims as arising out of ‘a natural grouping or common nucleus of operative facts.’”<sup>30</sup>

The majority was not convinced by Funny Guy’s and the dissent’s attempts to separate out the alleged settlement agreement and the underlying work. The court did not consider the three percent difference between the purported settlement amount and the claimed amount of damages indicative of two different disputes (and claims) because the smaller figure was simply a

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contexts of property and personal injury damage,” which are statutorily permitted to be brought separately. *Id.* at 150 n.15, 795 S.E.2d at 895 n.15.

24. *Id.* at 151, 795 S.E.2d at 895 (quoting VA. CODE ANN. § 8.01-272 (Repl. Vol. 2015 & Cum. Supp. 2017)).

25. *Id.* at 151–52, 795 S.E.2d at 895.

26. *Id.* at 151, 795 S.E.2d at 895.

27. *Id.* at 154, 795 S.E.2d at 897 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (AM. LAW INST. 1982)).

28. *Id.* at 154–55, 795 S.E.2d at 897 (quoting RESTATEMENT (SECOND) OF JUDGMENTS §§ 24 cmt. b, 24(2) (AM. LAW INST. 1982)).

29. *Id.* at 155, 795 S.E.2d at 897.

30. *Id.* at 156, 795 S.E.2d at 898 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (AM. LAW INST. 1982)).

“showing of good faith’ during negotiations.”<sup>31</sup> “The *only* dispute between Funny Guy and Lecego was, and is, Funny Guy wanting to get paid for its work.”<sup>32</sup> The majority also did not find the alleged non-monetary settlement provisions sufficient to separate that settlement theory from the other two theories; “[m]ore importantly, none of these non-monetary provisions changed the *essential character* of the purported settlement agreement.”<sup>33</sup>

The supreme court concluded by stressing that the holding in this case is specific to its unique facts. Therefore, the supreme court does not believe that the case exposes settling parties to face both litigation of the breach and “the underlying claim with all of its evidentiary burdens and litigation expenses.”<sup>34</sup> To the majority, there was a unique commonality between the settlement amount and the underlying damages, one that is unlikely to apply to “common-law tort claims, statutory rights of action, or constitutional claims.”<sup>35</sup> The majority also argued that the commonality issue will also only come into play when “the defendant disputes the very existence of the settlement agreement.”<sup>36</sup>

If the parties accept the settlement agreement as a legally enforceable meeting of the minds, but merely dicker among themselves over whether it was breached, there would be no reason to assert an alternative claim that presupposed the settlement agreement did not legally exist because neither party would be making that assertion.<sup>37</sup>

Justice Mims, joined by Justices Goodwyn and McCullough, dissented. The dissent began by admitting that it disagrees with the majority on one key issue: “[T]hat there is only one dispute

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31. *Id.* at 156, 795 S.E.2d at 898.

32. *Id.* at 156, 795 S.E.2d at 898 (emphasis added).

33. *Id.* at 157, 795 S.E.2d at 899 (emphasis added). The court highlighted that the agreement was for “*full accord and satisfaction* for any and all claims now know[n] or known in the future against any party *for the work performed by [Funny Guy] on the Contract.*” *Id.* at 157, 795 S.E.2d at 899 (alterations in original).

34. *Id.* at 159, 795 S.E.2d at 900.

35. *Id.* at 159, 795 S.E.2d at 900. The commonality distinction seems to be splitting hairs too fine. Every settlement amount will have commonality with the underlying damages, and philosophically it is unclear why a “good faith” 3% difference is insignificant as opposed to, for example, 10% or 30% (or wherever the line is ultimately drawn). However, the majority appears correct that the “direct” commonality issue will have limited potential application, likely only to breach of contract actions such as the one at issue here.

36. *Id.* at 160, 795 S.E.2d at 900.

37. *Id.* at 160, 795 S.E.2d at 900. As the dissent saliently points out, a plaintiff may not know if the defendant is denying the existence of a settlement agreement until the defendant files a responsive pleading. *Id.* at 165 n.3, 795 S.E.2d at 903 n.3 (Mims, J., dissenting).

here.”<sup>38</sup> The dissent believes that Funny Guy “alleged two wholly separate, though sequential, disputes, and they arise from different conduct, transactions, or occurrences.”<sup>39</sup> Specifically, “[t]he settlement agreement is not part of the same transaction as the oral agreement.”<sup>40</sup> The dissent persuasively states,

The consideration for [Lecego] from the oral agreement was the work Funny Guy promised to perform; the consideration for [Lecego] from the settlement agreement was Funny Guy’s release of its claim that [Lecego] breached the oral agreement, its promise not to disparage them, and its withdrawal of the critical correspondence sent to third parties.<sup>41</sup>

The dissent also argued that the claims could not arise out of the same occurrence because the oral-contract and quantum-meruit theories accrued after a breach of that agreement, whereas the settlement theory claim did not accrue until much later pursuant to a breach of an alleged settlement agreement.<sup>42</sup> In addition to these distinctions, the dissent gave much greater weight to the non-monetary provisions of the alleged settlement agreement.<sup>43</sup> Accordingly, the underlying conduct (and expectations) for the underlying theories were not the same.<sup>44</sup>

The practical takeaway, particularly for breach-of-contract actions that also involve a subsequent settlement agreement, is that a plaintiff should make sure to allege all potential theories of recovery against the defendant, including any underlying claims. It is unclear from the opinion why Funny Guy waited to bring the second action. One would expect that the circuit court would have granted a motion by Funny Guy for leave to amend the complaint and allege the other two theories of recovery in the original action, which would have saved those theories.

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38. *Id.* at 161, 795 S.E.2d at 901 (Mims, J., dissenting).

39. *Id.* at 161, 795 S.E.2d at 901.

40. *Id.* at 162, 795 S.E.2d at 901.

41. *Id.* at 162, 795 S.E.2d at 901. And this argument particularly highlights the weakness of the commonality analysis by the majority.

42. *Id.* at 163, 795 S.E.2d at 902.

43. *Id.* at 162 n.1, 795 S.E.2d at 901–02 n.1.

44. *Id.* at 163, 795 S.E.2d at 902.

### B. *Attorney's Fees*

In *Lambert v. Sea Oats Condominium Ass'n*, the Supreme Court of Virginia provided additional guidance for courts on appropriate factors to consider in awarding attorney's fees.<sup>45</sup> Martha Lambert ("Lambert"), a condominium unit owner, sued her condominium association (the "Association") for \$500 for failing to repair an exterior door to her unit.<sup>46</sup> The suit in general district court "alleged that the door was a common element and that the Association bore the burden of repairing it under the Association's declaration, its bylaws, and Code §§ 55-79.41 and 55-79.79(A)."<sup>47</sup> She sought \$500 for the repairs and her attorney's fees.<sup>48</sup> The general district court ruled in favor of the Association, and Lambert appealed to the Virginia Beach City Circuit Court, still seeking \$500 in damages plus her incurred attorney's fees.<sup>49</sup>

During closing argument at trial in the circuit court, Lambert's counsel "reminded the court that [Lambert] was seeking an award of attorney's fees and supplied an affidavit stating that \$8232.00 had been incurred."<sup>50</sup> Counsel further advised the court that the defendant had not reviewed the affidavit and "requested a later hearing under Rule 3:25 to determine the reasonableness of the amount she sought."<sup>51</sup> The Association did not make any objections and moved to its closing argument.<sup>52</sup> The court found in Lambert's favor, awarding her \$500 in damages and "asked the Association how much time it needed to review Lambert's attorney's fees affidavit and expressed its preference that the parties respond in writing rather than holding a hearing."<sup>53</sup> The parties agreed that the Association would file a response within three weeks, and Lambert would respond within a week thereafter.<sup>54</sup>

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45. 293 Va. 245, 798 S.E.2d 177 (2017). Specifically, the court gave guidance when attorney's fees are provided for by statute or contract as opposed to sanctions.

46. *Id.* at 248, 798 S.E.2d at 179.

47. *Id.* at 248, 798 S.E.2d at 179.

48. *Id.* at 248, 798 S.E.2d at 179–80.

49. *Id.* at 248, 798 S.E.2d at 180.

50. *Id.* at 248, 798 S.E.2d at 180.

51. *Id.* at 248, 798 S.E.2d at 180.

52. *Id.* at 248, 798 S.E.2d at 180.

53. *Id.* at 249, 798 S.E.2d at 180.

54. *Id.* at 249, 798 S.E.2d at 180.

In its submission, the Association argued that Lambert had to prove her attorney's fees during her prima facie case.<sup>55</sup> Because Lambert introduced the affidavit in her closing argument, after she had rested, she had failed to establish a prima facie case of attorney's fees, and none could be awarded to her.<sup>56</sup> The Association also contended that since Lambert's attorney's fees were sixteen times the judgment, the Supreme Court of Virginia's decision in *West Square, L.L.C. v. Communication Technologies*, where an award of attorney's fees was reduced from over twice the judgment amount to less than a third,<sup>57</sup> required a similar result in the instant case.<sup>58</sup> Finally, the brief noted that the fees improperly included staff work, duplicative work, and work in a prior lawsuit brought by Lambert.<sup>59</sup>

"The court thereafter issued an opinion letter, without waiting for Lambert's reply to the Association's response, awarding Lambert only \$375 in attorney's fees and asking her to prepare and circulate a final order."<sup>60</sup> Lambert filed a reply anyway and argued: "(1) attorney's fees are often decided after a ruling on the merits, (2) nothing requires the presentation of evidence of attorney's fees before the merits have been decided, and (3) in any event, the Association had agreed to the procedure for deciding attorney's fees that the court had proposed at trial."<sup>61</sup> Lambert further argued that Virginia law did not tie reasonable attorney's fees to the judgment amount and that doing so would undermine the statutory recovery of attorney's fees.<sup>62</sup> Lambert did concede, however, that there was duplicative work and eliminated those fees (thereby reducing the original amount), but she also requested fees incurred since trial, which led to an actual increase in the outstanding attorney's fees.<sup>63</sup>

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55. *Id.* at 249, 798 S.E.2d at 180.

56. *Id.* at 249, 798 S.E.2d at 180.

57. 274 Va. 425, 432, 649 S.E.2d 698, 701 (2007).

58. *Lambert*, 293 Va. at 249, 798 S.E.2d at 180.

59. *Id.* at 249, 798 S.E.2d at 180.

60. *Id.* at 249, 798 S.E.2d at 180.

61. *Id.* at 249–50, 798 S.E.2d at 180.

62. *See id.* at 250, 798 S.E.2d at 180–81. This "would undermine this legislative intent [of encouraging private parties to litigate this issue] because private parties would not undertake private enforcement litigation where the money damages were small if they had to pay attorney's fees out of pocket." *Id.* at 250, 798 S.E.2d at 181.

63. *See id.* at 250, 798 S.E.2d at 181.

“The court responded with a letter stating that it had reviewed Lambert’s reply and was renewing its award of only \$375 in attorney’s fees.”<sup>64</sup> Lambert then filed a motion to reconsider on which the court held a hearing.<sup>65</sup> The court again awarded only \$375 in attorney’s fees but stated that it “felt compelled to impose a relationship between the amount in controversy and the level to which [it] was going to require the defendant to pay the fees.”<sup>66</sup> Lambert appealed, and the Association filed an assignment of cross-error.<sup>67</sup>

The supreme court noted that it has “expressly identified seven factors for courts to consider when weighing the reasonableness of an amount of attorney’s fees.”<sup>68</sup> These factors are:

[ (1) ] the time and effort expended by the attorney, [ (2) ] the nature of the services rendered, [ (3) ] the complexity of the services, [ (4) ] the value of the services to the client, [ (5) ] the results obtained, [ (6) ] whether the fees incurred were consistent with those generally charged for similar services, and [ (7) ] whether the services were necessary and appropriate.<sup>69</sup>

The supreme court concluded that the amount of damages awarded falls under the fifth factor—results obtained.<sup>70</sup> However, it distinguished *Swank v. Reherd*,<sup>71</sup> and stated that there it “did not calculate [the attorney’s] reasonable compensation by dividing the plaintiffs’ judgment by their ad damnum to arrive at a percentage.”<sup>72</sup>

Thus, the purpose of comparing the damages awarded to the damages sought is to ensure that the ad damnum is reasonable in relation to the cause of action, thereby defusing the litigation arms race that unreasonably high claims for damages may provoke, rather than to handicap plaintiffs in pursuing a full recovery.<sup>73</sup>

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64. *Id.* at 250, 798 S.E.2d at 181.

65. *Id.* at 250, 798 S.E.2d at 181.

66. *Id.* at 251, 798 S.E.2d at 181. The court also noted that Lambert’s counsel “did a magnificent job.” *Id.* at 251, 798 S.E.2d at 181. However, the court “didn’t think it was right to impose that kind of attorney’s fees in a case where the amount in controversy was \$500.” *Id.* at 251, 798 S.E.2d at 181.

67. *Id.* at 251, 798 S.E.2d at 181.

68. *Id.* at 254, 798 S.E.2d at 183.

69. *Id.* at 254, 798 S.E.2d at 183 (quoting *Manchester Oaks Homeowners Ass’n v. Batt*, 284 Va. 409, 430, 732 S.E.2d 690, 703 (2012)).

70. *See id.* at 255–56, 798 S.E.2d at 184.

71. 181 Va. 943, 27 S.E.2d 191 (1943).

72. *Lambert*, 293 Va. at 255–56, 798 S.E.2d at 184.

73. *Id.* at 256, 798 S.E.2d at 184.

“However, the ‘results obtained’ factor does not permit courts to do what the circuit court did here—i.e., to use the amount of damages sought as a limit beyond which no attorney’s fees will be awarded.”<sup>74</sup> To hold otherwise would mean plaintiffs in smaller value cases can never hope to actually recover their attorney’s fees.<sup>75</sup> Failing to adequately award fees “deprives the parties of the benefit of their bargain if the fee-shifting provision is contractual and contravenes the intent of the General Assembly if the provision is statutory.”<sup>76</sup>

The supreme court also addressed the Association’s cross-error that Lambert failed to introduce evidence of her fees in her prima facie case and that she “did not give any notice of the amount of attorney’s fees she sought because she only indicated that she would seek an award, without specifying any specific amount in her pleadings or responses to pre-trial discovery.”<sup>77</sup> Because the Association did not object to the introduction of the affidavit, it could not argue that the circuit court could not consider the affidavit as it was introduced after Lambert had rested.<sup>78</sup> However, more importantly, the supreme court clarified that a party seeking attorney’s fees as the prevailing party does not have the burden of proving attorney’s fees in its case-in-chief.<sup>79</sup> Instead, “it is often appropriate to delay the issue of awarding attorney’s fees until the disposition on the merits reveals which party has actually prevailed, and on which claims.”<sup>80</sup> But it is important to note here that while Rule 3:25(D) allows a court “to establish a procedure to adjudicate any claim for attorney’s fees,” the rule does specify that this be done “in advance of trial.”<sup>81</sup> Finally, due to the “countless variables” involved, the supreme court dismissed the Association’s argument that Lambert had to provide advance notice of the actual amount of attorney’s fees.<sup>82</sup>

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74. *Id.* at 257, 798 S.E.2d at 184.

75. *Id.* at 257, 798 S.E.2d at 184.

76. *Id.* at 258, 798 S.E.2d at 185.

77. *Id.* at 259–60, 798 S.E.2d at 186.

78. *Id.* at 259 n.9, 798 S.E.2d at 186 n.9.

79. *Id.* at 260, 798 S.E.2d at 186–87.

80. *Id.* at 260, 798 S.E.2d at 187.

81. VA. SUP. CT. R. 3:25(D) (Repl. Vol. 2017). The court noted that the Association had not objected to the court establishing the procedure at the conclusion of trial. *Lambert*, 293 Va. at 248, 798 S.E.2d at 180.

82. *Lambert*, 293 Va. at 261, 798 S.E.2d at 187. However, this seems limited to the issue on appeal in a fairly minor case. It seems unlikely that the court intended to hold that a party does not have to provide such information when requested in discovery and

This decision makes clear that a court cannot cut attorney's fees solely because the amount in controversy is small—or even *de minimis*. The judgment amount can play into the court's analysis of whether the attorney's time was reasonable or the representation effective, but cannot serve as an arbitrary ceiling for the attorney's fees themselves. Historically, courts, particularly at the general district level, have been reluctant to award attorney's fees exceeding the damages for precisely the same reason elucidated by the circuit court in this case.<sup>83</sup> However, this decision aims to eliminate that hesitation.

### C. *Standing*

In *Ricketts v. Strange*, the Supreme Court of Virginia issued a decision on standing for a plaintiff that failed to disclose a personal injury cause of action or claim in her Chapter 7 bankruptcy.<sup>84</sup> In February 2012, Sheryl Denise Ricketts (“Ricketts”) was in a car accident and subsequently suffered radiating neck and back pain, which ultimately resulted in her undergoing surgery.<sup>85</sup> In January 2014, close to, but before the statute of limitations expired, she filed suit in circuit court alleging negligence and resulting personal injury damages.<sup>86</sup> The defendant filed a motion for summary judgment arguing that Ricketts lacked standing because in September 2012, when she filed for Chapter 7 bankruptcy, she had failed to exempt her personal-injury claim from the bankruptcy estate.<sup>87</sup> Ricketts disagreed, but also filed motions to change the plaintiff to the bankruptcy trustee by either amending under a misnomer theory or as a proper plaintiff pursuant to Rule 3:17.<sup>88</sup> The circuit court denied Ricketts's motions and granted

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readily available (with the obvious caveat that the figure could change).

83. See, e.g., *West Square, L.L.C. v. Commc'n Techs.*, 274 Va. 425, 432–35, 649 S.E.2d 698, 701–03 (2007) (upholding a circuit court's ruling that reduced the award for attorney's fees when the fee was twice the amount of damages to less than a third of the amount of damages). “[T]he total cost, which is over \$80,000 in attorneys' fees, over \$5,000 in expenses, is certainly a figure that is too high for this case. I would be remiss not to go on the record saying that.’ The circuit court found the amount of attorneys' fees and costs requested by West Square ‘to be exorbitant . . . consider[ing] the amount sued for.’” *Id.* at 432, 649 S.E.2d at 701.

84. 293 Va. 101, 112, 796 S.E.2d 182, 188 (2017).

85. *Id.* at 104, 796 S.E.2d at 184.

86. *Id.* at 104, 796 S.E.2d at 184.

87. *Id.* at 104–05, 796 S.E.2d at 184.

88. *Id.* at 105–06, 796 S.E.2d at 184.

summary judgment in favor of the defendant.<sup>89</sup> Ricketts then appealed.<sup>90</sup>

The majority of the opinion dealt with the issue of whether Ricketts had properly exempted her personal-injury claim. Question 18 of Schedule B of the mandatory bankruptcy schedules requires the debtor to list any “liquidated debts . . . including tax refunds.”<sup>91</sup> Ricketts disclosed the following:

Potential funds due to Debtor unknown at this time, including State & Federal tax refunds, 9/12 interest in joint 2012 tax refund of approximately \$9700=\$7274, debtor ½ interes[t] = \$3638, possible garnishment funds, insurance proceeds, *proceeds related to claims or causes of action that may be asserted by the debtor*, any claim for earned but unpaid wages, and/or inheritance.<sup>92</sup>

Meanwhile Question 21 of Schedule B requests “[o]ther contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims,” to which Ricketts responded: “None.”<sup>93</sup>

Ricketts did appear to concede that her cause of action would have been better disclosed under Question 21, rather than Question 18.<sup>94</sup> However, she nonetheless argued that her disclosure under Question 18 was sufficient to exempt her personal-injury claim.<sup>95</sup> The supreme court disagreed.

The supreme court began its opinion with a basic explanation of the bankruptcy process and emphasized that a debtor’s “legal and equitable interests” in pre-petition property “become a part of the bankruptcy estate, under the control of the trustee.”<sup>96</sup> “This includes a debtor’s ‘causes of action which are pending in court,’ and ‘those which are only inchoate claims at the time of filing.’”<sup>97</sup> The court also explained how and why a debtor can exempt assets, including the required process of listing it in Schedule B and

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89. *Id.* at 106, 796 S.E.2d at 184.

90. *Id.* at 106, 796 S.E.2d at 184.

91. *Id.* at 105, 796 S.E.2d at 184.

92. *Id.* at 105, 796 S.E.2d at 184 (emphasis added).

93. *Id.* at 105, 796 S.E.2d at 184.

94. *Id.* at 110, 796 S.E.2d at 186–87.

95. *Id.* at 106, 796 S.E.2d at 184.

96. *Id.* at 106, 796 S.E.2d at 185 (quoting *Kocher v. Campbell*, 282 Va. 113, 117, 712 S.E.2d 477, 479 (2011)).

97. *Id.* at 106, 796 S.E.2d at 185 (quoting *Kocher*, 282 Va. at 117, 712 S.E.2d at 479) (emphasis added).

“then claim[ing] it as exempt property on his Schedule C.”<sup>98</sup> Otherwise, by default, the asset becomes “a part of the bankruptcy estate [and] . . . remains so, and is enforceable solely by the trustee.”<sup>99</sup> Critically, “the trustee alone has standing” to bring a claim or cause of action that is part of the bankruptcy estate.<sup>100</sup>

The supreme court was called upon to “consider the level of specificity with which an asset must be identified in a debtor’s schedules to exempt it from the bankruptcy estate.”<sup>101</sup> The court provided a thorough analysis of a trustee’s purpose and responsibilities, and the importance of full and accurate disclosures to the bankruptcy process.<sup>102</sup> “Therefore, a debtor’s description of his assets and exemptions must contain sufficient detail to enable the trustee to determine whether further investigation into a claimed exemption is warranted.”<sup>103</sup> The supreme court was not impressed with Ricketts’s disclosure. It described her exemption as “overly general at best and boilerplate at worst,” resulting in “no useful information that would lead the trustee to discover the claim against [the defendant].”<sup>104</sup> While the court declined to provide a “bright-line rule,” it emphasized that an exemption “must contain sufficient detail to lead the trustee to the claim ultimately asserted.”<sup>105</sup>

The supreme court also made quick work of Ricketts’s arguments regarding misnomer and “proper plaintiff” under Rule 3:17. The trustee could not be substituted pursuant to a misnomer because “a misnomer is a mistake in the name, not the identification of a party.”<sup>106</sup> The trustee was the “right person,” but “he was not incorrectly named.”<sup>107</sup> Instead, the complaint named the “wrong person”—Ricketts—which did not constitute a misnomer.<sup>108</sup> Meanwhile, Rule 3:17 could not be applied because it

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98. *Id.* at 107, 796 S.E.2d at 185 (quoting *Kocher*, 282 Va. at 118, 712 S.E.2d at 480).

99. *Id.* at 107, 796 S.E.2d at 185.

100. *Id.* at 106–07, 796 S.E.2d at 185 (quoting *Nat’l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999)).

101. *Id.* at 107, 796 S.E.2d at 185.

102. *Id.* at 108, 796 S.E.2d at 186.

103. *Id.* at 108, 796 S.E.2d at 186.

104. *Id.* at 109, 796 S.E.2d at 186.

105. *Id.* at 110, 796 S.E.2d at 187.

106. *Id.* at 108, 796 S.E.2d at 186 (quoting *Richmond v. Volk*, 291 Va. 60, 64, 781 S.E.2d 191, 193 (2016)).

107. *Id.* at 111, 796 S.E.2d at 187.

108. *Id.* at 111, 796 S.E.2d at 187.

applies only to plaintiffs who “become[] incapable,” and Ricketts was “incapable of prosecuting her claim since it was filed.”<sup>109</sup>

This case is a lesson in the pitfalls of a disconnect where a client’s bankruptcy and plaintiff litigation overlap. For bankruptcy practitioners, it is important to verify and nail down what, if any, potential claims or causes of action the client or debtor may have. Failing to find and exempt these claims and causes of action can ultimately be quite detrimental to the client. Meanwhile, for plaintiffs’ attorneys, it is imperative to check the bankruptcy petitions and verify that your client properly exempted the claim (and the value assigned to it)<sup>110</sup> if the client declared bankruptcy after the cause of action accrued.

#### D. *Failure to Preserve the Issue*

In *Verizon Online LLC v. Horbal*, the Supreme Court of Virginia highlighted the importance (and potential pitfalls) of preserving issues for appellate review.<sup>111</sup> Verizon Online, LLC (“Verizon”) argued, in Chesterfield County, that its set top boxes were “intangible personal property” exempt from local taxation under Virginia Code section 58.1-1101(A)(2a) and that it was entitled to refunds for prior tax years.<sup>112</sup> The local tax exemption portion of the decision is not germane to this article’s focus; however, preserving the refund issue for appellate review is illustrative in Virginia procedure.

On December 28, 2010, by letter to Joseph A. Horbal (“Horbal”), Commissioner of the Revenue for Chesterfield County, Verizon “initiated its local appeal of the 2008, 2009, and 2010 tax as-

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109. *Id.* at 111, 796 S.E.2d at 187 (emphasis added). Even though this disposed of the issue, the supreme court still addressed Ricketts’s reliance on *Jacobson v. Southern Biscuit Co.*, 198 Va. 813, 817, 97 S.E.2d 1, 4 (1957), which liberally allowed substituting parties (including plaintiffs) “if the substituted party bears a real relation of interest to the original party and no new cause of action is introduced.” *Ricketts*, 293 Va. at 111, 796 S.E.2d at 187 (quoting *Chesapeake House on the Bay, Inc. v. Va. Nat’l Bank*, 231 Va. 440, 442, 344 S.E.2d 913, 915 (1986)). However, when the original plaintiff (i.e., the one needing to be substituted) lacks standing, “the sole remedy is a nonsuit followed by a new action brought in the name of the proper plaintiff.” *Ricketts*, 293 Va. at 111–12, 796 S.E.2d at 187–88 (quoting *Chesapeake House on the Bay*, 231 Va. at 443, 344 S.E.2d at 915).

110. The importance of the assigned value lies in the fact that there is a strong argument that the ad damnum in the subsequent and related litigation cannot be higher than the value assigned to it in the bankruptcy proceeding.

111. 293 Va. 176, 796 S.E.2d 409 (2017).

112. *Id.* at 179, 796 S.E.2d at 410.

sessments” on its set top boxes.<sup>113</sup> On January 28, 2011, Horbal responded to Verizon and indicated that its appeal was “incomplete” and that it would not be considered until it complied with Virginia Code section 58.1-3983.1(B)(2).<sup>114</sup> Verizon subsequently amended its appeal by June 22, 2011.<sup>115</sup> On July 14, 2011, Horbal issued a “Final Local Determination” where he denied Verizon’s appeal deeming it “complete” and “qualifying as a local appeal.”<sup>116</sup> Verizon administratively appealed Horbal’s determination with the Tax Commissioner.<sup>117</sup> Chesterfield County filed a response arguing the merits (that set top boxes are subject to local taxation) but “did not raise any issue regarding the timeliness of Verizon’s local appeal or assert that the Tax Commissioner was without jurisdiction to hear the matter.”<sup>118</sup>

The Tax Commissioner ruled in favor of Verizon, holding that the set top boxes were exempt from local taxes and remanded for the county to issue refunds for 2008 through 2010.<sup>119</sup> Horbal then “filed an application for judicial review of the determination of the Tax Commissioner in the circuit court pursuant to Code §§ 58.1-3983.1(G), -3984.”<sup>120</sup> In addition to arguing the merits, Horbal contended that the Tax Commissioner did not have jurisdiction to order refunds as to 2008 and 2009 because Verizon failed to timely file its local appeal.<sup>121</sup> The circuit court ruled in favor of Verizon as to its set top boxes but agreed with Horbal as to the refunds and found that Verizon had failed to timely file its local appeal.<sup>122</sup> Horbal appealed the determination of tax exemption and Verizon appealed that it was not owed refunds due to untimely local appeals.<sup>123</sup>

The thrust of Verizon’s argument was that the “issue regarding the timeliness of Verizon’s local appeal was not presented to the Tax Commissioner and, therefore, was waived.”<sup>124</sup> The supreme

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113. *Id.* at 185, 796 S.E.2d at 413.

114. *Id.* at 185, 796 S.E.2d at 413.

115. *Id.* at 185, 796 S.E.2d at 413–14.

116. *Id.* at 185, 796 S.E.2d at 414.

117. *Id.* at 185, 796 S.E.2d at 414.

118. *Id.* at 185, 796 S.E.2d at 414.

119. *Id.* at 181, 796 S.E.2d at 411.

120. *Id.* at 181, 796 S.E.2d at 411 (footnote omitted).

121. *Id.* at 185–86, 796 S.E.2d at 414.

122. *Id.* at 186, 796 S.E.2d at 414.

123. *Id.* at 181, 796 S.E.2d at 411.

124. *Id.* at 186, 796 S.E.2d at 414.

court agreed.<sup>125</sup> It noted that in a proceeding pursuant to Virginia Code section 58.1-3983.1(G), “the circuit court acts in the role of an appellate court.”<sup>126</sup> Because “principles of procedural default . . . apply to determinations of the Tax Commissioner judicially challenged[,] . . . issues not argued in the proceedings before the Tax Commissioner . . . may not be argued as a basis for reversal.”<sup>127</sup>

The court also clarified that the local appeal deadline is not a subject matter jurisdiction issue “that may be raised at any time.”<sup>128</sup> It reiterated that it recently “distinguished between the element of subject matter jurisdiction, which can be raised at any point in the proceedings, and other elements of jurisdiction that are subject to waiver if not properly raised.”<sup>129</sup> Because they had previously concluded that a thirty-day filing requirement for judicial review of a board of zoning appeal by a circuit court was not subject matter jurisdiction, the same logic applied to the local appeal deadline in this instance. The local appeal deadline was “an other jurisdictional element subject to waiver if not properly raised.”<sup>130</sup> Horbal had failed to timely raise the local appeal deadline and had waived the issue.<sup>131</sup>

This decision emphasizes the need to fully analyze and raise all affirmative defenses, including filing deadlines, at the onset of the case. This is of particular importance in administrative or agency matters where it is easy to forget that the circuit court judicial review is appellate review (and not an opportunity for a mulligan).

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125. *Id.* at 186, 796 S.E.2d at 414.

126. *Id.* at 186, 796 S.E.2d at 414.

127. *Id.* at 187, 796 S.E.2d at 414–15.

128. *Id.* at 188, 796 S.E.2d at 415.

129. *Id.* at 188, 796 S.E.2d at 415 (citing *Bd. of Supervisors v. Bd. of Zoning Appeals*, 271 Va. 336, 343–48, 626 S.E.2d 374, 378–81 (2006)).

130. *Id.* at 188, 796 S.E.2d at 415 (quoting *Bd. of Supervisors*, 271 Va. at 347, 626 S.E.2d at 381). The supreme court also noted that Virginia Code section 8.01-235 “remove[d] jurisdictional considerations affecting subject matter jurisdiction from the application of statutory limitation periods.” *Id.* at 188 n.14, 796 S.E.2d at 415 n.14 (citing W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 6.03[8][k][ii], at 6-53 to 6-54 (4th ed. 2004)).

131. *Id.* at 186, 796 S.E.2d at 414.

### E. *Sanctions*

This article would not be complete without a case on an issue that always garners attention: sanctions. In *Westlake Legal Group v. Flynn*, the Supreme Court of Virginia not only affirmed the circuit court's award of attorney's fees, but also remanded to the circuit court to award additional attorney's fees for the appeal.<sup>132</sup>

Eileen Flynn ("Flynn") retained Plofchan & Associates, which ultimately became Westlake Legal Group ("Westlake"), as her counsel for a domestic-relations case.<sup>133</sup> Flynn signed a "representation agreement" which provided Westlake with several remedies in the event Flynn failed to pay.<sup>134</sup> The agreement provided that: "[I]n the event the firm should be required to institute legal proceedings against [Flynn] for sums due under the agreement, the firm would be its own attorney and [Flynn] would be responsible for its fees in collection proceedings at a \$400 hourly rate."<sup>135</sup> The agreement also stated that if Flynn failed to pay a bill within forty-five days, "her entire account would be due and accrue interest at an annual rate of 18%."<sup>136</sup> Finally, the agreement also included a confession-of-judgment clause that appointed one of two Westlake attorneys as Flynn's attorney-in-fact authorized to confess judgment against Flynn "for the entire unpaid balance due under the agreement."<sup>137</sup>

On April 30, 2014, Westlake billed Flynn for \$8,910.07 and on June 5, 2014, for \$550 in legal fees.<sup>138</sup> Both bills were mailed to Flynn at a Purcellville, Virginia, address.<sup>139</sup> On June 6, 2014, a Westlake attorney acting as attorney-in-fact for Flynn "filed a confession of judgment against her in the clerk's office of the Circuit Court of Loudoun County in the amount of \$9,460.07, with interest at 18% from April 30, 2014."<sup>140</sup> The confession noted Flynn's address as "21804 Cresnet [sic] Park Square, Broadlands,

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132. 293 Va. 344, 353, 798 S.E.2d 187, 191 (2017).

133. *Id.* at 347, 798 S.E.2d at 188.

134. *Id.* at 347, 798 S.E.2d at 188.

135. *Id.* at 347, 798 S.E.2d at 188.

136. *Id.* at 347, 798 S.E.2d at 188.

137. *Id.* at 347, 798 S.E.2d at 188 (noting the agreement contained the warning required by Virginia Code section 8.01-433.1).

138. *Id.* at 348, 798 S.E.2d at 188.

139. *Id.* at 348, 798 S.E.2d at 188.

140. *Id.* at 348, 798 S.E.2d at 188.

VA 20148.”<sup>141</sup> The clerk entered the judgment and pursuant to Virginia Code section 8.01-438 issued a certified copy of the judgment to be served on Flynn.<sup>142</sup> On June 10, 2014, the sheriff returned the judgment as “not found” and noted a “misspelled street address.”<sup>143</sup> On appeal it was “undisputed that no copy of the judgment was ever served on [Flynn].”<sup>144</sup>

On March 18, 2015, Westlake filed a garnishment against Flynn, “this time giving her address as ‘2221 Hunters Run Dr., Reston, VA 20191.’”<sup>145</sup> Flynn retained (different) counsel who moved the circuit court to quash the confessed judgment and have it declared void *nunc pro tunc* due to it not being served within sixty days, as required by Virginia Code section 8.01-483.<sup>146</sup> Westlake moved for a voluntary nonsuit while Flynn moved for an award of her attorney’s fees.<sup>147</sup>

At a hearing on September 4, 2015, the court entered four orders: (1) granting the nonsuit, (2) quashing the confessed judgment *nunc pro tunc*, (3) ordering payment to [Flynn] of all sums held by the clerk by reason of the garnishment, and (4) pursuant to Code § 8.01-271.1, awarding sanctions in the amount of \$1,805 . . . to [Flynn] as reasonable expenses she incurred by reason of the garnishment proceedings.<sup>148</sup>

Westlake appealed and presented six assignments of error, of which the court considered five.<sup>149</sup>

Westlake primarily argued that the circuit court lacked jurisdiction to impose sanctions. Westlake contended that the “voluntary nonsuit had the effect of depriving the court of jurisdiction: ‘Because the underlying judgment ha[d] been dismissed, the circuit court lost jurisdiction to enter a judgment in the garnishment action.’”<sup>150</sup> The Supreme Court of Virginia disagreed. It first noted that confessed judgments are “creatures of statute” and “to the

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141. *Id.* at 348, 798 S.E.2d at 188 (alteration in original).

142. *Id.* at 348, 798 S.E.2d at 188.

143. *Id.* at 348, 798 S.E.2d at 188–89.

144. *Id.* at 348, 798 S.E.2d at 189.

145. *Id.* at 348, 798 S.E.2d at 189. The court noted that Westlake had argued in its brief that the address for the confessed judgment and the garnishment were identical. *Id.* at 348 n.1, 798 S.E.2d at 189 n.1.

146. *Id.* at 348, 798 S.E.2d at 189.

147. *Id.* at 348, 798 S.E.2d at 189.

148. *Id.* at 348–49, 798 S.E.2d at 189.

149. *Id.* at 349, 798 S.E.2d at 189.

150. *Id.* at 349, 798 S.E.2d at 189.

extent they are in derogation of the common law, such statutes are strictly construed.”<sup>151</sup> Virginia Code section 8.01-438 requires the clerk to issue a certified copy of the order and have it served on the judgment debtor and explicitly provides that “[t]he failure to serve a copy of the order within sixty days from the date of entry thereof shall render the judgment void as to any debtor not so served.”<sup>152</sup> With such a “clearly self-executing” provision, the confessed judgment was void after sixty days anyway because Flynn was never actually served.<sup>153</sup> “Accordingly, neither the nonsuit nor the order declaring the judgment void *nunc pro tunc* had any effect on the court’s jurisdiction.”<sup>154</sup>

Instead, the circuit court had jurisdiction to impose sanctions or attorney’s fees pursuant to Virginia Code section 8.01-271.1, which provides that a “signature of an attorney or party constitutes a certificate . . . that . . . to the best of his knowledge, information and belief, *formed after reasonable inquiry*, it is well grounded in fact and is warranted by existing law.”<sup>155</sup> Furthermore, “[i]f a pleading, motion or other paper is signed or made in violation of this rule, the court, upon motion *or upon its own initiative*, shall impose upon the person who . . . made the motion . . . an appropriate sanction.”<sup>156</sup> The court noted that when Westlake filed its garnishment in March 2015, “the sheriff’s ‘not found’ return on the certified copy of the confessed judgment had been in the clerk’s records open to public view for over nine months” and just “[a] few minutes of search would have revealed to the attorney that the judgment was void for failure to comply with Code § 8.01-438.”<sup>157</sup> The court concluded that the “record before the circuit court at the hearing on September 4, 2015, contained evidence of facts clearly sufficient to establish jurisdiction to consider and award sanctions under this section.”<sup>158</sup>

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151. *Id.* at 350, 798 S.E.2d at 190.

152. *Id.* at 349–50, 798 S.E.2d at 189–90 (quoting VA. CODE ANN. § 8.01-438 (Repl. Vol. 2015 & Cum. Supp. 2017)).

153. *Id.* at 350–51, 798 S.E.2d at 190.

154. *Id.* at 351, 798 S.E.2d at 190.

155. *Id.* at 351, 798 S.E.2d at 190 (emphasis added) (quoting VA. CODE ANN. § 8.01-271.1 (Repl. Vol. 2015)).

156. *Id.* at 351, 798 S.E.2d at 190 (emphasis added) (quoting VA. CODE ANN. § 8.01-271.1 (Repl. Vol. 2015)). Of course, in this particular case, Flynn had moved for attorney’s fees.

157. *Id.* at 351–52, 798 S.E.2d at 190.

158. *Id.* at 351, 798 S.E.2d at 190.

The supreme court quickly dispensed with Westlake's other assignments of error. Westlake's second and third assignments of error relied on arguments it had only made in a motion for reconsideration filed nineteen days after the court's order awarding sanctions.<sup>159</sup> "A motion to reconsider is insufficient to preserve an argument not previously presented unless the record establishes that the court had an opportunity to rule on the motion."<sup>160</sup> Because the motion was never heard (or a hearing on it even requested), the arguments were not preserved.<sup>161</sup> The fourth assignment of error argued that the circuit court abused its discretion to the extent that "Flynn's pleadings were not necessarily nor reasonably grounded in law" and her attorney's fees "unsubstantiated."<sup>162</sup> The court held that Westlake failed to identify a legal flaw in the pleadings and the circuit court did not abuse discretion since Flynn filed an affidavit with the court "specifying the hours devoted to the case and his charges therefor."<sup>163</sup> The last assignment of error "was never presented to the circuit court and [was] thus barred by Rule 5:25."<sup>164</sup>

The Supreme Court of Virginia summarized the case thusly: "[Westlake] filed a suggestion in garnishment to divert [Flynn's] wages in an effort to enforce a judgment that had been void by operation of law for more than a year, a situation a reasonable inquiry would have disclosed," which in turn "resulted in harm to [Flynn] consisting of attorney's fees, costs and expenses including those incurred by reason of the attorney's *meritless appeal to this Court*."<sup>165</sup> Clearly, the court wanted to make a statement. In addition to affirming the award, it "remand[ed] the case to [the circuit] court with direction, after due notice and hearing, to impose such additional sanctions as the court finds appropriate to recompense [Flynn's] additional expenses, including reasonable attorney's fees, incurred by reason of this appeal."<sup>166</sup>

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159. *Id.* at 352, 798 S.E.2d at 191.

160. *Id.* at 352, 798 S.E.2d at 191 (citing *Brandon v. Cox*, 284 Va. 251, 256, 736 S.E.2d 695, 697 (2012)).

161. *Id.* at 352, 798 S.E.2d at 191.

162. *Id.* at 352, 798 S.E.2d at 191.

163. *Id.* at 352–53, 798 S.E.2d at 191.

164. *Id.* at 353, 798 S.E.2d at 191.

165. *Id.* at 353, 798 S.E.2d at 191 (emphasis added).

166. *Id.* at 353, 798 S.E.2d at 191.

## II. AMENDMENTS TO RULES OF COURT

### A. *Curing Signature Defects*

The Supreme Court of Virginia promulgated Rule 1:5A that, effective August 1, 2017, allows for curing signature defects in a variety of situations.<sup>167</sup> Pro se parties who failed to personally sign a pleading and parties whose pleadings were not signed or were signed by someone not authorized to practice law in Virginia, can now move the court for leave to properly sign the pleading.<sup>168</sup> Of course, the party making the motion must provide written notice to the other parties.<sup>169</sup> The court has “sound discretion” to decide such motions, but the motions “shall be liberally granted in furtherance of the ends of justice.”<sup>170</sup> If granted by the court, the properly signed pleading relates back to the date of original filing.<sup>171</sup> However, the court may award fees and costs incurred by a party, including reasonable attorney’s fees, which a party incurred because of the defective signature.<sup>172</sup>

The new rule also tolls the statute of limitations for complaints that are dismissed because of a defective signature.<sup>173</sup> The statute of limitations is now calculated in accordance with Virginia Code section 8.01-229(E)(1), which, of course, tolls the statute of limitations while a matter is pending.<sup>174</sup>

Finally, the new rule also allows for attorneys to save appeals from circuit court that were not properly executed.<sup>175</sup> Now, as long as an attorney licensed to practice in Virginia properly endorses and files a (late) notice of appeal within ninety days of the

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167. VA. SUP. CT. R. 1:5A, [www.courts.state.va.us/courts/scv/rulesofcourt.pdf](http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf) (last visited Sept. 27, 2017).

168. R. 1:5A(a), [www.courts.state.va.us/courts/scv/rulesofcourt.pdf](http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf) (last visited Sept. 27, 2017).

169. *Id.*

170. R. 1:5A(c), [www.courts.state.va.us/courts/scv/rulesofcourt.pdf](http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf) (last visited Sept. 27, 2017).

171. R. 1:5A(a), [www.courts.state.va.us/courts/scv/rulesofcourt.pdf](http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf) (last visited Sept. 27, 2017).

172. R. 1:5A(c), [www.courts.state.va.us/courts/scv/rulesofcourt.pdf](http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf) (last visited Sept. 27, 2017).

173. R. 1:5A(d), [www.courts.state.va.us/courts/scv/rulesofcourt.pdf](http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf) (last visited Sept. 27, 2017).

174. VA. CODE ANN. § 8.01-229(E)(1) (Cum. Supp. 2017).

175. R. 1:5A(e), [www.courts.state.va.us/courts/scv/rulesofcourt.pdf](http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf) (last visited Sept. 27, 2017).

original notice of appeal, the late notice will relate back to the original notice.<sup>176</sup>

### B. *Exceptions to Uniform Pretrial Scheduling Orders*

Rule 1:18 details pretrial scheduling orders.<sup>177</sup> Effective August 1, 2017, eminent domain cases are exempt from the requirement that courts enter the Uniform Pretrial Scheduling Order unless counsel for the parties agree otherwise or “the court, after providing an opportunity for counsel of record to be heard, makes a finding that the scheduling order contained in the Appendix is not consistent with the efficient and orderly administration of justice under the specific circumstances of that case.”<sup>178</sup> Previously, the rule only exempted domestic relations cases.<sup>179</sup> This change gives eminent domain cases greater flexibility as to the scheduling order.

### C. *Permitted Fonts for Supreme Court of Virginia*

To the joy of all typography aficionados, the Supreme Court of Virginia expanded the number of acceptable fonts for pleadings submitted to the court. Previously, the court allowed only Courier, Arial, or Verdana fonts.<sup>180</sup> In December 2016, Rule 5:6 was amended to simply reference the supreme court’s official website for a list of permissible fonts.<sup>181</sup> Currently, the list includes Arial, Cambria, Century, Century School Book, Constantia, Courier New, Franklin Gothic Book, Georgia, Palatino Linotype, Tahoma, Times New Roman, and Verdana.<sup>182</sup> The list greatly expands the potential styles for pleadings, and many attorneys will likely pay particular attention to which fonts maximize the number of words per page to squeeze in the most argument.<sup>183</sup>

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176. *Id.*

177. R. 1:18, [www.courts.state.va.us/courts/scv/rulesofcourt.pdf](http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf) (last visited Sept. 27, 2017).

178. R. 1:18(C), [www.courts.state.va.us/courts/scv/rulesofcourt.pdf](http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf) (last visited Sept. 27, 2017).

179. *See* R. 1:18(C) (Repl. Vol. 2017).

180. R. 5:6(a)(2) (Repl. Vol. 2014).

181. R. 5:6(a)(2) (Repl. Vol. 2017).

182. *List of Acceptable Fonts*, SUPREME COURT OF VIRGINIA, <http://www.courts.state.va.us/courts/scv/fontlist.pdf> (last visited Sept. 27, 2017).

183. Preliminarily, it appears that Times New Roman fits in the most words.

#### D. *Amicus Curiae Briefs*

Rule 5:30 regarding amicus curiae briefs was significantly revamped and went into effect on January 1, 2017.<sup>184</sup> Previously, the United States of America, the Commonwealth of Virginia, and anyone with written consent of all parties could file an amicus brief without leave of court.<sup>185</sup> The current rule only exempts the federal and state governments from seeking leave of court to file an amicus brief.<sup>186</sup> Anyone else must file a motion that indicates whether the brief supports the appellant(s) or appellee(s) (or neither), certifies an attempt “to obtain consent of all parties to the appeal,” and “state[s] which, if any, of the parties has consented to the motion.”<sup>187</sup> While seemingly a large change, written consent of all parties was the exception rather than the rule, so this change codifies existing reality rather than materially changing appellate practice.

The new rule also clarifies the requirements for briefs not supportive of any party. The rule now expressly provides that a brief that does not support a party must be filed on or before the appellant’s deadline and “comply with all rules applicable to the appellant.”<sup>188</sup>

#### E. *Appeal Bonds*

The Supreme Court of Virginia amended Rules 5A:17 and 5:24 regarding appeal bonds to clarify that deadlines for filing appeal bonds are not jurisdictional.<sup>189</sup> Furthermore, the appeal bond forms contained in the Appendix to Part V of the Rules of the Supreme Court of Virginia were significantly updated in terms of their substance.<sup>190</sup> The forms now use contemporary language and phrasing, which is much more understandable. Additionally, the form includes a reminder that, pursuant to Virginia Code sections 1-205 and 8.01-676.1(S), cash may be deposited—waiving the requirement for a corporate surety.<sup>191</sup>

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184. R. 5:30 (Repl. Vol. 2017).

185. R. 5:30(b) (Repl. Vol. 2014).

186. R. 5:30(b) (Repl. Vol. 2017).

187. R. 5:30(e) (Repl. Vol. 2017).

188. R. 5:30(d)–(e) (Repl. Vol. 2017).

189. R. 5A:17 (Repl. Vol. 2017); R. 5:24 (Repl. Vol. 2017).

190. VA. SUP. CT. R. APPENDIX OF FORMS, PART FIVE (Repl. Vol. 2017).

191. *Id.*

### F. *Exclusion of Witnesses*

Rule 2:615 regarding the exclusion of witnesses was updated. It now explicitly exempts as a matter of right “in an unlawful detainer action filed in general district court, a managing agent as defined in § 55-248.4” from a motion to exclude the witnesses.<sup>192</sup> For ease of reference, the statute defines managing agent as “a person authorized by the landlord to act on behalf of the landlord under an agreement.”<sup>193</sup> While the author has never had such an individual be previously excluded in an unlawful detainer action or heard an argument that such an individual was not exempted (under the “one officer or agent” language), the rule is now clear on the issue. Although, one must note that by specifying “in general district court,” it appears that such an exemption would not apply in circuit court.

## III. NEW LEGISLATION

### A. *Timeline to File Appeals*

Effective July 1, 2017, the General Assembly amended the deadline for filing appeals to the Supreme Court of Virginia.<sup>194</sup> Virginia Code section 8.01-671 now provides that the petition must be filed within ninety days of the final order, as opposed to the prior (less specific) deadline of “three months.”<sup>195</sup> Be sure to update your calendar (and deadlines) accordingly.

### B. *Determining an Indigent Party*

Senate Bill 1305<sup>196</sup> and House Bill 2328<sup>197</sup> amended Virginia Code section 17.1-606 regarding the waiver of fees and costs for indigent parties. That section now specifies that it applies to

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192. R. 2:615 (Repl. Vol. 2017); VA. CODE ANN. § 55-248.4 (Cum. Supp. 2017).

193. VA. CODE ANN. § 55-248.4 (Cum. Supp. 2017).

194. Act of Mar. 20, 2017, ch. 651, 2017 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 8.01-671 (Cum. Supp. 2017)).

195. Compare VA. CODE ANN. § 8.01-671 (Cum. Supp. 2017), with VA. CODE ANN. § 8.01-671 (Repl. Vol. 2015).

196. Act of Feb. 23, 2017, ch. 226, 2017 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 17.1-606 (Cum. Supp. 2017)).

197. Act of Feb. 23, 2017, ch. 227, 2017 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 17.1-606 (Cum. Supp. 2017)).

plaintiffs who are residents of the Commonwealth and any defendant in a civil case regardless of residency.<sup>198</sup> The new language also waives fees for indigent out-of-state defendants, as the prior language only applied to residents of the Commonwealth (without distinguishing plaintiffs from defendants).<sup>199</sup> The section now requires the court, “[i]n determining a person’s inability to pay . . . [to] consider the factors set forth in subsection B of [Virginia Code] § 19.2-159.”<sup>200</sup>

As a reminder, under Virginia Code section 19.2-159(B), a party is presumptively indigent if the party is a “current recipient of a state or federally funded program for the indigent.”<sup>201</sup> If the party is not a recipient of such funds, then the court undergoes “a thorough examination of the financial resources of the [party],” which includes an analysis of net income, all assets, and exceptional expenses.<sup>202</sup> The party is indigent if, after subtracting exceptional expenses from the net income and all assets, the remainder is “equal to or below 125 percent of the federal poverty income guidelines prescribed for the size of the household of the [party] by the federal Department of Health and Human Services.”<sup>203</sup>

### C. Attorney Discipline Procedure

The procedure for a court’s handling of attorney discipline was significantly amended in February 2017.<sup>204</sup> Virginia Code section 54.1-395 now provides that “[a]ny attorney who is the subject of a disciplinary proceeding or the Virginia State Bar [(“VSB”)] may elect to terminate the proceeding before the Bar Disciplinary Board or a district committee and demand that further proceedings be conducted by a three-judge circuit court.”<sup>205</sup> If so terminated, the VSB must “file a complaint in a circuit court where venue is proper,” and the Chief Justice of the Supreme Court of

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198. See VA. CODE ANN. § 17.1-606 (Cum. Supp. 2017).

199. Compare *id.* § 17.1-606 (Cum. Supp. 2017), with *id.* § 17.1-606 (Repl. Vol. 2015).

200. *Id.* § 17.1-606 (Cum. Supp. 2017).

201. *Id.* § 19.2-159(B) (Repl. Vol. 2015).

202. *Id.*

203. *Id.* (defining what the court should consider as under net income, all assets, and exceptional expenses).

204. Act of Feb. 20, 2017, ch. 91, 2017 Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 54.1-3935 (Cum. Supp. 2017)).

205. VA. CODE ANN. § 54.1-3935(A) (Cum. Supp. 2017).

Virginia “shall designate the three-judge circuit court, which shall consist of three circuit court judges of circuits other than the circuit in which the case is pending, to hear and decide the case.”<sup>206</sup>

#### D. *Legal Malpractice Statute of Limitations*

In another response to a Supreme Court of Virginia decision, namely *Thorsen v. Richmond SPCA*,<sup>207</sup> the General Assembly deleted half of Virginia Code section 64.2-520 and enacted Virginia Code section 64.2-520.1.<sup>208</sup> The new section still provides that “[a]n action for damages . . . resulting from legal malpractice concerning the individual’s estate planning . . . shall accrue upon completion of the representation during which the malpractice occurred.”<sup>209</sup> However, the statute no longer includes language allowing a malpractice action to be “maintained pursuant to § 8.01-281 by the grantor or by the grantor’s personal representative or the trustee if such damages are incurred after the grantor’s death.”<sup>210</sup>

More important (and in direct response to the *Thorsen* decision), the new statute provides that without a “written agreement between the individual and the defendant that expressly grants standing to a person who is not a party to the representation by specific reference to this subsection, the action may be maintained only by the individual or by the individual’s personal representative.”<sup>211</sup> This language directly overrules the holding in *Thorsen* finding that the Richmond SPCA had standing to sue for damages.<sup>212</sup>

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206. *Id.*

207. 292 Va. 257, 786 S.E.2d 453 (2016).

208. Act of Feb. 17, 2017, ch. 43, 2017 Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 64.2-520, -520.1 (Repl. Vol. 2017)).

209. VA. CODE ANN. § 64.2-520.1 (Repl. Vol. 2017).

210. Compare *id.* § 64.2-520(B) (Repl. Vol. 2017), with *id.* § 64.2-520(B) (Repl. Vol. 2012).

211. *Id.* § 64.2-520.1(B) (Repl. Vol. 2017).

212. As a brief refresher, the plaintiff, Richmond SPCA, sued for damages from legal malpractice where a third party’s will bequeathing property to the Richmond SPCA as drafted by the defendant only bequeathed tangible personal property, as opposed to all property as intended by the third party, to the Richmond SPCA. *Thorsen*, 292 Va. at 263, 786 S.E.2d at 457, 463.

### E. *Severing Tenancy by the Entirety*

In a response to *Evans v. Evans*,<sup>213</sup> the General Assembly amended Virginia Code section 55-20.2.<sup>214</sup> The statute now expressly provides that “[e]xcept as otherwise provided by statute, no interest in real property held as tenants by the entirety shall be severed by written instrument unless the instrument is a deed signed by both spouses as grantors.”<sup>215</sup> This new language overrules the holding in *Evans*.<sup>216</sup>

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213. 290 Va. 176, 772 S.E.2d 576 (2015).

214. Act of Feb. 17, 2017, ch. 38, 2017 Acts \_\_, \_\_ (codified at VA. CODE ANN. § 55-20.2 (Cum. Supp. 2017)).

215. VA. CODE ANN. § 55-20.2(B) (Cum. Supp. 2017).

216. *Evans*, 290 Va. at 185, 187, 722 S.E.2d at 581–82 (finding sufficient evidence to establish mutual consent by the parties to a tenancy by the entirety to convert that tenancy to a fee simple in one of the parties). The court held “that a husband’s transfer of rights to his wife was sufficient to sever the tenancy by the entirety, even though his wife was only the grantee, not a grantor.” *Id.* at 185, 722 S.E.2d at 581–82.