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## Civil Practice and Procedure

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# CIVIL PRACTICE AND PROCEDURE

*John R. Walk* \*

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## I. INTRODUCTION

This article will summarize recent developments of interest to practitioners handling civil cases in the courts of the Commonwealth of Virginia. Specifically included are relevant decisions of the Supreme Court of Virginia dating from opinions announced on June 10, 2004 to those announced on April 22, 2005; changes to the Rules of the Supreme Court of Virginia announced during the same time period; and legislation enacted by the Virginia General Assembly at its 2005 Session, effective July 1, 2005.

## II. MISTRIAL

In *Lowe v. Cunningham*,<sup>1</sup> the Supreme Court of Virginia addressed whether improper questioning by counsel had been cured by a cautionary instruction to the jury.<sup>2</sup> That case involved a personal injury claim arising out of an automobile accident.<sup>3</sup> On cross-examination, plaintiff was questioned about where he was living at the time of the accident.<sup>4</sup> Defense counsel then asked: "And you continued to live with her until you got into a little

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1. 268 Va. 268, 601 S.E.2d 628 (2004).

2. *Id.* at 271, 601 S.E.2d at 630.

3. *Id.* at 270, 601 S.E.2d at 629.

4. *Id.*

trouble with the law about not paying child support?"<sup>5</sup> This question was objected to immediately and the trial court sustained the objection.<sup>6</sup> Although defendant did not respond, in fact, he had been jailed for ninety days for failure to pay child support.<sup>7</sup> Plaintiff moved for a mistrial which was denied by the trial judge.<sup>8</sup> Instead, the jury was instructed to disregard the question.<sup>9</sup> The jury returned a verdict for the plaintiff but in the amount of only \$575.<sup>10</sup>

On appeal, the Supreme Court of Virginia held that the trial judge had abused his discretion in refusing to declare a mistrial.<sup>11</sup> The court recognized that this was a matter addressed to the discretion of the trial judge and, further, "that a jury is presumed to have followed a timely and explicit cautionary instruction directing it to disregard an improper remark or question by counsel."<sup>12</sup> Nonetheless, the court held:

The trial court's determination whether a statement or question of counsel is so inherently prejudicial that the prejudice cannot be cured by a cautionary instruction must be guided by a consideration of several factors. These factors include the relevance and content of the improper reference, and whether the reference was deliberate or inadvertent in nature. The court also must consider the probable effect of the improper reference by counsel. All these factors must be considered because not every irrelevant statement or question will result in prejudice to an opposing party.<sup>13</sup>

It was acknowledged that plaintiff was not called upon to answer the question and that defense counsel did not persist in the line of questioning after the trial judge sustained the objection.<sup>14</sup> Notwithstanding these mitigating factors, however, the court was persuaded that the question was a deliberate attempt to unfairly

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5. *Id.* at 271, 601 S.E.2d at 629.

6. *Id.*, 601 S.E.2d at 629-30.

7. *Id.*

8. *Id.*

9. *See id.*, 601 S.E.2d at 630.

10. *Id.*

11. *Id.* at 274, 601 S.E.2d at 631-32.

12. *Id.* at 272, 601 S.E.2d at 630.

13. *Id.* at 273, 601 S.E.2d at 631.

14. *Id.* at 274, 601 S.E.2d at 631.

prejudice the jury against the plaintiff and held that the cautionary instruction could not remove the resulting prejudice.<sup>15</sup>

Justices Agee, Lacy, and Kinser dissented from the decision, primarily pointing to the presumption and mitigating factors discussed above.<sup>16</sup> Interestingly, although the issue presented was remarkably similar to that involved in *Velocity Express Mid-Atlantic, Inc. v. Hugen*,<sup>17</sup> decided a year ago, neither the majority nor the dissenting opinion discussed the case. In *Velocity Express Mid-Atlantic*, the prejudice resulted more from repetition than intent.<sup>18</sup> The plaintiff's attorney had repeatedly invoked the "Golden Rule" in argument.<sup>19</sup> Although admonished by the trial judge, the Supreme Court of Virginia held the resulting prejudice to the defendant to be incurable.<sup>20</sup>

### III. RES JUDICATA

The case of *American Safety Casualty Insurance Co. v. C.G. Mitchell Construction, Inc.*<sup>21</sup> involved the application of res judicata as between principal and surety.<sup>22</sup> American Safety had written a payment bond for the general contractor on a construction project.<sup>23</sup> Mitchell, a subcontractor, sued on the bond naming both the general contractor and American Safety.<sup>24</sup> During the pendency of the suit, the general contractor's counsel withdrew from the case, its officers and registered agent resigned, and the State Corporation Commission terminated the corporation.<sup>25</sup> When the corporation subsequently failed to produce a designee pursuant to plaintiff's Rule 4:5(b)(6) deposition notice, the trial court granted default judgment as a discovery sanction.<sup>26</sup> Ameri-

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15. *Id.*

16. *See id.* at 276, 601 S.E.2d at 632 (Agee, J., dissenting).

17. 266 Va. 188, 585 S.E.2d 557 (2003). For additional discussion of *Velocity Express Mid-Atlantic*, see John R. Walk, *Annual Survey of Virginia Law: Civil Practice and Procedure*, 39 U. RICH. L. REV. 87, 108-10 (2004).

18. 266 Va. at 202-03, 585 S.E.2d at 565.

19. *Id.* at 203, 585 S.E.2d at 565.

20. *Id.* at 202, 585 S.E.2d at 565.

21. 268 Va. 340, 601 S.E.2d 633 (2004).

22. *See id.* at 343, 601 S.E.2d at 634.

23. *Id.* at 343-44, 601 S.E.2d at 634-35.

24. *Id.* at 345, 601 S.E.2d at 635-36.

25. *Id.*, 601 S.E.2d at 636.

26. *Id.* at 346, 601 S.E.2d at 636.

can Safety had knowledge of all of the foregoing and argued that no corporate deposition was necessary because plaintiff could subpoena the former officers personally.<sup>27</sup> Following entry of default judgment against the general contractor, the plaintiff moved for summary judgment against American Safety.<sup>28</sup> The trial court held that its prior judgment against the principal was binding on the surety.<sup>29</sup>

On appeal this decision was affirmed.<sup>30</sup> Quoting from a federal case from the United States Court of Appeals for the Eleventh Circuit, *Drill South, Inc. v. International Fidelity Insurance Co.*,<sup>31</sup> the Supreme Court of Virginia reasoned: “the general rule that has emerged is that a surety is bound by any judgment against its principal, default or otherwise, when the surety had full knowledge of the action against the principal and an opportunity to defend.”<sup>32</sup> The court rejected American Safety’s argument that the plaintiff could have deposed the former officers personally, holding that this would not have the same effect as deposing the corporation pursuant to Rule 4:5(b)(6).<sup>33</sup> It also affirmed the trial court’s decision to grant default judgment as a reasonable discovery sanction under the circumstances presented.<sup>34</sup>

#### IV. JUDICIAL ESTOPPEL

The doctrine of judicial estoppel or “estoppel by inconsistent position” was the subject of *Lofton Ridge, LLC v. Norfolk Southern Railway Co.*<sup>35</sup> That case involved access to a parcel acquired by Lofton Ridge via a disputed access road across Norfolk Southern’s property.<sup>36</sup> Lofton Ridge initially brought an action against Norfolk Southern seeking an injunction from interfering with the purported access road.<sup>37</sup> While this case was pending, Lofton

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27. *Id.*

28. *Id.*

29. *Id.* at 347, 601 S.E.2d at 636.

30. *Id.* at 353, 601 S.E.2d at 640–41.

31. 234 F.3d 1232 (11th Cir. 2000).

32. 268 Va. at 350, 601 S.E.2d at 638–39 (quoting *Drill South, Inc.*, 234 F.3d at 1235).

33. *Id.* at 352, 601 S.E.2d at 640.

34. *Id.* at 352–53, 601 S.E.2d at 640.

35. 268 Va. 377, 380, 601 S.E.2d 648, 650 (2004).

36. *Id.* at 379, 601 S.E.2d at 649.

37. *Id.* at 379–80, 601 S.E.2d at 649.

Ridge sued the attorneys and surveyor involved in closing the purchase of the land alleging constructive fraud and professional negligence.<sup>38</sup> This case was dismissed with prejudice following successful mediation.<sup>39</sup> Norfolk Southern then filed a plea in bar to the present action asserting judicial estoppel.<sup>40</sup>

Citing a number of prior Virginia cases, the Supreme Court of Virginia stated that “[e]ssentially, judicial estoppel forbids parties from ‘assum[ing] successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory.’”<sup>41</sup> The court undertook to compare and contrast judicial estoppel from *res judicata* and collateral estoppel.<sup>42</sup> Among other things, the court noted that judicial estoppel does not require a prior final judgment.<sup>43</sup> It can be invoked within a single action based upon prior positions taken in that action.<sup>44</sup> It may also operate as a bar to maintaining a new cause of action.<sup>45</sup> However, “[t]he doctrine of estoppel by inconsistent position [i.e., judicial estoppel] does not apply to a prior proceeding in which the parties are not the same.”<sup>46</sup> The court discussed a prior decision, *Canada v. C.H. Beasley & Bros.*,<sup>47</sup> in which it appeared to have invoked judicial estoppel without literal mutuality of parties.<sup>48</sup> The court characterized this portion of the opinion as *dicta* and stated that to the extent *Canada* suggested judicial estoppel could be employed without mutuality of parties, it was overruled.<sup>49</sup>

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38. *Id.* at 380, 601 S.E.2d at 649.

39. *Id.*

40. *Id.*, 601 S.E.2d at 650.

41. *Id.* at 380–81, 601 S.E.2d at 650 (alteration in original) (quoting *Burch v. Grace Street Bldg. Corp.*, 168 Va. 329, 340, 191 S.E. 672, 677 (1937)).

42. *Id.* at 381–82, 601 S.E.2d at 650–51.

43. *Id.* at 381, 601 S.E.2d at 650.

44. *Id.*

45. *Id.* at 382, 601 S.E.2d at 651. This holding is particularly significant in view of the Supreme Court of Virginia’s holding in *Davis v. Marshall Homes, Inc.*, applying a strict “cause of action” test for purposes of the doctrine of *res judicata*. 265 Va. 159, 165, 576 S.E.2d 504, 506 (2003).

46. *Lofton Ridge*, 268 Va. at 382, 601 S.E.2d at 651 (quoting *Pittston Co. v. O’Hara*, 191 Va. 886, 902, 126 S.E. 34, 43 (1951)). The Supreme Court of Virginia did recognize an exception where the liability of one party is derivative of another. *Id.*

47. 132 Va. 166, 111 S.E. 251 (1922).

48. 268 Va. at 383, 601 S.E.2d at 651.

49. *Id.*

## V. SOVEREIGN IMMUNITY

In *Friday-Spivey v. Collier*,<sup>50</sup> the Supreme Court of Virginia held that a driver of a fire truck responding to a non-emergency call was not entitled to sovereign immunity.<sup>51</sup> The fire truck collided with plaintiff's vehicle while responding to a report of an infant locked in a vehicle.<sup>52</sup> It was acknowledged that this was a "Priority 2" call during which the driver did not have the emergency lights or siren activated and was required to obey all traffic regulations.<sup>53</sup> The court applied the four-prong test<sup>54</sup> of *James v. Jane*:<sup>55</sup> (1) the function performed by the employee, (2) "the extent of the state's interest and involvement in that function," (3) the degree of control and direction the state exercises over the employee, and (4) "[w]hether the act performed involves the use of judgment and discretion."<sup>56</sup> The parties agreed that the first three prongs were met in this case and that the sole issue was the "exercise of judgment and discretion" prong.<sup>57</sup>

The driver pointed to the size and weight of the fire truck and the necessity of specialized training in its operation as indicia of the exercise of judgment and discretion.<sup>58</sup> The court rejected this contention, stating that "[t]he special skill and training required to operate a fire truck under these circumstances is not the exercise *per se* of judgment and discretion for purposes of sovereign immunity."<sup>59</sup> Importantly, the court distinguished this case from other situations where exigent circumstances existed, citing *Colby v. Boyden*,<sup>60</sup> involving a high-speed police chase,<sup>61</sup> and *National Railroad Passenger Corp. v. Catlett Volunteer Fire Co.*,<sup>62</sup> involving a fire truck responding to an emergency with lights and

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50. 268 Va. 384, 601 S.E.2d 591 (2004).

51. *Id.* at 386, 601 S.E.2d at 592.

52. *Id.* at 386-87, 601 S.E.2d at 592.

53. *Id.* at 387, 601 S.E.2d at 592.

54. *Id.* at 387-88, 601 S.E.2d at 593.

55. 221 Va. 43, 282 S.E.2d 864 (1980).

56. *Id.* at 53, 282 S.E.2d at 869.

57. *Friday-Spivey*, 268 Va. at 388, 601 S.E.2d at 593.

58. *Id.* at 388-89, 601 S.E.2d at 593.

59. *Id.* at 390, 601 S.E.2d at 594.

60. 241 Va. 125, 400 S.E.2d 184 (1991).

61. *Id.* at 127, 400 S.E.2d at 185.

62. 241 Va. 402, 404 S.E.2d 216 (1991).

siren activated.<sup>63</sup> The court concluded that given the non-emergency nature of the call in the instant case, it was a “ministerial act requiring no significant judgment and discretion beyond that of ordinary driving in routine traffic.”<sup>64</sup>

Justices Kinser and Koontz dissented from the decision, stating that “driving a 40,000-pound fire truck to a shopping mall in response to a dispatch involving an infant locked in a vehicle required the exercise of judgment and discretion in order to effectuate the governmental purpose of providing rescue services.”<sup>65</sup> These Justices pointed to the fact that the situation certainly entailed the possibility of danger to the infant and the driver had no way of knowing whether or not such danger was present until he arrived.<sup>66</sup> In this regard, the case was like *Colby* and *National Railroad* cited in the majority opinion.<sup>67</sup>

The issue of sovereign immunity was also the subject of *City of Chesapeake v. Cunningham*.<sup>68</sup> Cunningham filed a lawsuit against the City of Chesapeake (“City”) alleging that she sustained a miscarriage as a result of toxic water supplied by the City.<sup>69</sup> The City defended by entering a special plea of sovereign immunity, which the trial court denied.<sup>70</sup>

As background for the case, the City in 1980 began using a water treatment plant to supply water to its residents.<sup>71</sup> The source water in the area is atypical in that the river has high levels of organic carbon.<sup>72</sup> When chlorine is added to the water, large amounts of trihalomethanes (“THMs”) are produced.<sup>73</sup> When the plant was designed, THMs were not regulated contaminants.<sup>74</sup>

Beginning in 1979, the EPA set a maximum content level (“MCL”) for THMs as contaminants at 100 parts per billion

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63. *Id.* at 405, 404 S.E.2d at 217.

64. *Friday-Spivey*, 268 Va. at 391, 601 S.E.2d at 595.

65. *Id.* at 391, 601 S.E.2d at 595 (Kinser, J., dissenting).

66. *Id.* at 392, 601 S.E.2d at 596 (Kinser, J., dissenting).

67. *Id.* at 392–93, 601 S.E.2d at 596 (Kinser, J., dissenting).

68. 268 Va. 624, 604 S.E.2d 420 (2004).

69. *Id.* at 627, 604 S.E.2d at 422.

70. *Id.*

71. *Id.* at 628–29, 604 S.E.2d at 423.

72. *Id.* at 628, 604 S.E.2d at 423.

73. *Id.*

74. *Id.*



("ppb").<sup>75</sup> The Chesapeake plant tested its water supply in 1980 and found that the water contained between 200 and 350 ppb of THMs.<sup>76</sup> Over the next five years, the City adopted various methods to reduce the level of THMs to 100 ppb and was successful at achieving that level.<sup>77</sup>

In 1997, the City anticipated that new regulations would decrease the allowable amount of THMs to 80 ppb.<sup>78</sup> In order to achieve the 80 ppb goal, the plant had to be modified.<sup>79</sup> During the modification period, the level of THMs would have to increase above 100 ppb.<sup>80</sup> The City "petitioned the State Health Commissioner . . . for a temporary exemption from the water quality regulations."<sup>81</sup> The Commissioner granted the exemption, and a notice was published in a local newspaper.<sup>82</sup>

In 1998, a study by the California Department of Health Services "found that daily consumption of more than five glasses of water with [THM] levels greater than 75 ppb increased the risk of spontaneous abortion for women in their first trimester of pregnancy."<sup>83</sup> In response to the study, the City issued three separate papers publicizing the water warnings, including actions women should take during the water plant's transition phase.<sup>84</sup> Television outlets provided extensive coverage of the problem, issuing twenty-two reports in a month-long period in 1998.<sup>85</sup> The City also mailed warnings to all postal patrons in the City and to all new water service subscribers.<sup>86</sup> Cunningham testified at trial that she did not receive any warnings.<sup>87</sup>

On appeal, the Supreme Court of Virginia reiterated the general principles of sovereign immunity. "Sovereign immunity protects municipalities from tort liability arising from the exercise of

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75. *Id.* at 628–29, 604 S.E.2d at 423.

76. *Id.* at 629, 604 S.E.2d at 423.

77. *Id.* at 629–30, 604 S.E.2d at 423–24.

78. *Id.* at 630, 604 S.E.2d at 424.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 631, 604 S.E.2d at 424.

84. *Id.*, 604 S.E.2d at 425.

85. *Id.*, 604 S.E.2d at 425.

86. *Id.* at 632, 604 S.E.2d at 425.

87. *Id.*

governmental functions.”<sup>88</sup> Government functions are defined as “powers and duties performed exclusively for the public welfare.”<sup>89</sup> The court stated that “when a municipality plans, designs, regulates, or provides a service for the common good, it performs a governmental function.”<sup>90</sup> “In contrast, routine maintenance or operation of a municipal service is proprietary” and is not protected by sovereign immunity.<sup>91</sup>

The court held that the City was exercising discretionary legislative power which is a governmental function shielded from tort liability.<sup>92</sup> The court distinguished the case from *City of Richmond v. Virginia Bonded Warehouse Corp.*<sup>93</sup> and *Woods v. Town of Marion*,<sup>94</sup> stating that in those cases, the torts stemmed from purely ministerial acts of maintaining sprinkler systems and water pipes, and thus, the municipalities in those cases were not shielded by sovereign immunity.<sup>95</sup> Instead, the court analogized the case to *Stansbury v. City of Richmond*,<sup>96</sup> where the court held that sovereign immunity protected the municipality from a claim of inadequate water pressure while the municipality was upgrading its water system to correct the problem.<sup>97</sup> Based on these cases, the court held that the City was exercising legislative discretion for the public welfare, was not engaging in a purely ministerial act, and therefore the City was shielded from sovereign immunity.<sup>98</sup>

## VI. STANDING

*Braddock, L.C. v. Board of Supervisors of Loudoun County*<sup>99</sup> involved the appeal of a zoning decision by the Loudoun County Board of Supervisors.<sup>100</sup> The original zoning case involved two

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88. *Id.* at 634, 604 S.E.2d at 426.

89. *Id.* at 633, 604 S.E.2d at 426.

90. *Id.* at 634, 604 S.E.2d at 426.

91. *Id.*, 604 S.E.2d at 426–27.

92. *Id.* at 635, 604 S.E.2d at 427.

93. 148 Va. 60, 138 S.E. 503 (1927).

94. 245 Va. 44, 425 S.E.2d 487 (1993).

95. *City of Chesapeake*, 268 Va. at 636, 604 S.E.2d at 427–28.

96. 116 Va. 205, 81 S.E. 26 (1914).

97. 268 Va. at 636–37, 604 S.E.2d at 428.

98. *See id.* at 640, 604 S.E.2d at 430.

99. 268 Va. 420, 601 S.E.2d 552 (2004).

100. *Id.* at 422–23, 601 S.E.2d at 552–53.

parcels, both of which were under contract to Braddock at the time it applied for rezoning.<sup>101</sup> Before filing suit, Braddock assigned its contract to one of the parcels to another entity.<sup>102</sup> Braddock closed on the acquisition of the other parcel after filing suit, but immediately conveyed it to another entity.<sup>103</sup> The board filed a plea in bar challenging Braddock's standing to maintain the suit since it no longer had any interest in either of the subject parcels.<sup>104</sup> Braddock responded by moving to add the owners of the two parcels as necessary parties to the suit, which the board opposed pursuant to Virginia Code section 15.2-2285(F).<sup>105</sup>

Citing *Friends of Clark Mountain Foundation v. Board of Supervisors of Orange County*,<sup>106</sup> Braddock argued that all that was required under the statute was that a case be filed by an aggrieved person and that additional parties could be added after the expiration of the thirty day period allowed by statute for challenging zoning decisions.<sup>107</sup> The Supreme Court of Virginia, however, distinguished *Clark Mountain* on the basis that the case had been timely filed by a party with standing.<sup>108</sup> The additional party added after expiration of the statutory period was the applicant that was added as a defendant.<sup>109</sup> The court went on to hold that Braddock had no standing and invoked its decision in *Chesapeake House on the Bay, Inc. v. Virginia National Bank*<sup>110</sup> barring the substitution of a party with standing for a party with no standing.<sup>111</sup>

Justice Kinser wrote a concurring opinion joined by Justice Agee, which stated that Braddock did have standing to bring the suit as to one of the two subject parcels as the contract pur-

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101. *Id.* at 423, 601 S.E.2d at 553.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (citing VA. CODE ANN. § 15.2-2285(F) (Repl. Vol. 2003 & Cum. Supp. 2005)). This code section requires that any action challenging a zoning decision be filed within thirty days of the decision. See VA. CODE ANN. § 15.2-2285(F) (Repl. Vol. 2003 & Cum. Supp. 2005).

106. 242 Va. 16, 406 S.E.2d 19 (1991) (making its decision under a predecessor statute, Virginia Code section 15.1-493(G), which similarly provided a thirty-day period for challenging zoning decisions).

107. *Braddock*, 268 Va. at 424, 601 S.E.2d at 553-54.

108. *Id.* at 424 & n.1, 601 S.E.2d at 553-54 & n.1.

109. *Clark Mountain*, 242 Va. at 18-19, 406 S.E.2d at 20.

110. 231 Va. 440, 344 S.E.2d 913 (1986).

111. *Braddock*, 268 Va. at 423, 601 S.E.2d at 553.

chaser.<sup>112</sup> Although the concurring opinion does not expressly so state, the implicit premise of the opinion is that Braddock's standing was not affected by the subsequent conveyance of this parcel.<sup>113</sup> The zoning decision being challenged, however, involved two parcels and Braddock had no interest in the second parcel when the suit was filed.<sup>114</sup> These Justices held that "[s]ince the rezoning application encompassed both parcels, Braddock did not have the requisite interest in the entire property necessary to give it standing to challenge the Board's denial of the rezoning application."<sup>115</sup> Braddock cited a number of cases involving plaintiffs holding partial interests challenging zoning decisions.<sup>116</sup> The court distinguished these cases on the basis that they involved parties holding less than a fee simple interest in the entire property that was the subject of the rezoning application.<sup>117</sup>

In one of the most significant decisions of the 2004–2005 session, the Supreme Court of Virginia, in *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*,<sup>118</sup> decided that counties have standing to challenge decisions of local boards of zoning appeals.<sup>119</sup> In 2002, an individual named Hickerson desired to subdivide his parcel into two parts, but one of the proposed parcels would only have a minimum lot width of twenty feet, in violation of the applicable zoning ordinance.<sup>120</sup> Hickerson sought and received a variance from the Board of Zoning Appeals ("BZA") to allow the subdivision.<sup>121</sup> The board of supervisors of the county then filed a petition for a writ of certiorari in the circuit court challenging the decision of the BZA.<sup>122</sup> The circuit court held that the board of supervisors had standing to challenge the decision of the BZA, *but it was the circuit court that approved the BZA's decision to grant the variance.*<sup>123</sup>

On appeal to the Supreme Court of Virginia, the main issue was whether the county had standing to challenge a decision of a

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112. *Id.* at 427, 601 S.E.2d at 555 (Kinser, J., concurring).

113. *See id.* at 426–27, 601 S.E.2d at 555 (Kinser, J., concurring).

114. *Id.* (Kinser, J., concurring).

115. *Id.* at 427, 601 S.E.2d at 555 (Kinser, J., concurring).

116. *Id.* at 424–25 n.2, 601 S.E.2d at 554 n.2.

117. *Id.*

118. 268 Va. 441, 604 S.E.2d 7 (2004).

119. *Id.* at 446, 604 S.E.2d at 9.

120. *Id.* at 444, 604 S.E.2d at 8.

121. *Id.*

122. *Id.*

123. *Id.*

local board of zoning appeals.<sup>124</sup> Virginia Code section 15.2-2314 states that “[a]ny person or persons jointly or severally aggrieved by any decision of the board of zoning appeals” may file a petition with the circuit court.<sup>125</sup> The BZA argued that the county is not aggrieved pursuant to the statute, and therefore lacks standing to appeal.<sup>126</sup> The court disagreed. First, the court cited Virginia Code section 15.2-2308, which “requires that every locality that has enacted a zoning ordinance establish a board of zoning appeals.”<sup>127</sup> Second, the court cited Virginia Code section 15.2-1404, which “grants a local governing board the broad power to institute actions in its own name with regard to ‘all matters connected with its duties.’”<sup>128</sup> The court stated that Virginia Code section 15.2-1404 was designed to enable the local governing body to ensure compliance with legislative enactments, including zoning ordinances.<sup>129</sup> Therefore, the court held that the county was an aggrieved person pursuant to Virginia Code section 15.2-2314 and had standing to sue the BZA.<sup>130</sup> The court also cited opinions from other states holding similarly, including Alabama, Nevada, Rhode Island, and Idaho, among others.<sup>131</sup>

The court distinguished the case at bar from *Virginia Beach Beautification Commission v. Board of Zoning Appeals*.<sup>132</sup> The BZA contended that this case required dismissal of the board of supervisors’ appeal.<sup>133</sup> In *Virginia Beach Beautification Commission*, the court did not consider whether a county has standing to challenge a decision of a board of zoning appeals.<sup>134</sup> Instead, *Virginia Beach Beautification Commission* only dealt with whether a non-stock corporation that claimed a general public interest in

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124. *Id.*

125. VA. CODE ANN. § 15.2-2314 (Cum. Supp. 2005).

126. *Bd. of Supervisors of Fairfax County*, 268 Va. at 445, 604 S.E.2d at 8.

127. *Id.* at 446, 604 S.E.2d at 9.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 447–48, 604 S.E.2d at 9–10 (citing *Ex parte City of Huntsville*, 684 So. 2d 123, 126 (Ala. 1996); *City of Reno v. Harris*, 111 Nev. 672, 676–77, 895 P.2d 663, 666 (1995); *City of East Providence v. Shell Oil Co.*, 110 R.I. 138, 142, 290 A.2d 915, 917–18 (1972); *City of Burley v. McCaslin Lumber Co.*, 107 Idaho 906, 908, 693 P.2d 1108, 1110 (Ct. App. 1984)).

132. *Id.* at 449, 604 S.E.2d at 11 (distinguishing *Virginia Beach Beautification Comm’n v. Bd. of Zoning Appeals*, 231 Va. 415, 344 S.E.2d 899 (1986)).

133. *Id.*

134. *Id.*

the decision of a board of zoning appeals decision was an aggrieved party for standing purposes.<sup>135</sup> There, the court held that absent an immediate, pecuniary, and substantial interest, a party is not aggrieved for standing purposes.<sup>136</sup> In contrast to *Virginia Beach Beautification Commission*, the county in the case at bar had an immediate and substantial interest in the litigation, and thus had standing.<sup>137</sup>

Finally, the court held that the BZA had impermissibly granted a variance to Hickerson.<sup>138</sup> Citing *Cochran v. Fairfax County Board of Zoning Appeals*,<sup>139</sup> the court stated that “a board of zoning appeals has authority to grant variances only to avoid an unconstitutional result.”<sup>140</sup> Only when a zoning ordinance interferes “with all reasonable beneficial uses of the property, taken as a whole” is a variance allowed.<sup>141</sup> In the case at bar, Hickerson merely wanted to subdivide his property into two lots.<sup>142</sup> Hickerson’s home or beneficial use of the property were not threatened by the zoning ordinance.<sup>143</sup> Therefore, the BZA impermissibly granted the variance.<sup>144</sup>

Justices Kinser and Lacy dissented, criticizing the majority’s holding that the county is an aggrieved person pursuant to Virginia Code section 15.2-2314.<sup>145</sup> They maintained that the strong interest of the county is no different from the interest of the public generally, and therefore, the county does not have standing to challenge decisions of boards of zoning appeals.<sup>146</sup> The dissenters cited *Virginia Beach Beautification Commission* as holding that the term “aggrieved” means “a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.”<sup>147</sup> Justices Kinser and Lacy argued that the majority

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135. *Id.*

136. *Id.* at 449–50, 604 S.E.2d at 11.

137. *Id.* at 450, 604 S.E.2d at 11.

138. *Id.* at 451–53, 604 S.E.2d at 12–13.

139. 267 Va. 756, 594 S.E.2d 571 (2004).

140. *Bd. of Supervisors of Fairfax County*, 268 Va. at 452, 604 S.E.2d at 12.

141. *Id.* (internal quotations omitted).

142. *Id.* at 453, 604 S.E.2d at 13.

143. *Id.*

144. *Id.*

145. *Id.* at 454, 604 S.E.2d at 13 (Kinser, J., dissenting).

146. *Id.* (Kinser, J., dissenting).

147. *Id.*, 604 S.E.2d at 14 (Kinser, J., dissenting) (quoting *Virginia Beautification*

did not follow the definition of aggrieved and did not demonstrate how the decision of the BZA is the denial of some personal or property right that is different from that suffered by the public generally.<sup>148</sup> The dissenters also attacked the cases from other states cited by the majority, finding that those cases involved public aggrievement, whereas in Virginia, the test for aggrievement is a right that is private or personal and not shared by the public.<sup>149</sup>

The dissenters also criticized the majority for allowing counties to appeal the decisions of any local boards established to enforce ordinances in the absence of the express grant of that power from the General Assembly.<sup>150</sup> In addition, contrary to the majority's view that a board of zoning appeals could act arbitrarily if the county lacked standing to appeal, the dissenters argued that private parties aggrieved by a decision of a board of zoning appeals have standing to sue and can act as a check on arbitrary power.<sup>151</sup> Therefore, for the above reasons, Justices Kinser and Lacy did not find that the county met the definition of an aggrieved person and therefore lacked standing to appeal the BZA's variance decision.<sup>152</sup>

In *Shilling v. Jimenez*,<sup>153</sup> the Supreme Court of Virginia addressed the issue of whether a landowner has standing to attack the decision of a local governing body concerning subdivisions by initiating suit directly against the subdividers.<sup>154</sup> Jimenez owned a tract of land in Loudoun County that was zoned A-3, a classification that would have allowed the property to be subdivided if it had 240 feet of frontage on Route 275.<sup>155</sup> The property did not have the requisite road frontage.<sup>156</sup>

Pursuant to enabling legislation by the General Assembly, Virginia Code section 15.2-2244, Loudoun County permitted family

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*Comm'n*, 231 Va. at 419–20, 344 S.E.2d at 902–03).

148. *Id.* at 455, 604 S.E.2d at 14 (Kinser, J., dissenting).

149. *Id.* at 455–57, 604 S.E.2d at 14–15 (Kinser, J., dissenting).

150. *Id.* at 457–58, 604 S.E.2d at 15–16 (Kinser, J., dissenting).

151. *Id.* at 458, 604 S.E.2d at 16 (Kinser, J., dissenting).

152. *Id.* at 459, 604 S.E.2d at 16 (Kinser, J., dissenting).

153. 268 Va. 202, 597 S.E.2d 206 (2004).

154. *Id.* at 204, 597 S.E.2d at 207.

155. *Id.*

156. *Id.*

subdivisions on private access easement roads.<sup>157</sup> Family subdivisions allowed a lot to be subdivided and conveyed to family members.<sup>158</sup> The ordinance provided that such a subdivision could not be entered into for purposes of circumventing the general regulations concerning subdivisions.<sup>159</sup> The ordinance provided that “[i]f a family subdivision grantee should convey such a lot within one year after the date of approval of the subdivision,” a presumption of intent to circumvent the ordinance would arise and authorized the Director of the Department of Building and Development to “take any reasonable actions necessary to ameliorate the effect of such circumvention,” including vacating the subdivision.<sup>160</sup>

Jiminez applied for a family subdivision to divide her parcel into three lots and conveyed two of the lots to her mother and sister and kept the remaining lot for herself.<sup>161</sup> Jiminez, her mother, and her sister submitted affidavits to the Loudoun County Board of Supervisors that the purpose of the subdivision was to keep the estate within the family.<sup>162</sup> The board of supervisors approved the subdivision.<sup>163</sup>

Less than a year after the subdivision was approved, the family conveyed two of the plats to a corporation.<sup>164</sup> Within a few months, Shilling, whose property neighbored the Jiminez estate, filed a bill of complaint against Jiminez and her family, the purchaser of the property, and a bank holding a deed of trust on the land, seeking a declaratory judgment that the family subdivision was void and a decree restoring the status quo ante.<sup>165</sup>

The purchaser of the property and the bank filed a demurrer arguing that Shilling lacked standing to raise any claim against the defendants because Shilling could not enforce the provisions of the Loudoun County Land Subdivision and Development Ordinance.<sup>166</sup> The trial court sustained the demurrer.<sup>167</sup>

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157. *Id.* at 204 & n.\*, 597 S.E.2d at 207 & n.\*.

158. *Id.*

159. *Id.*

160. *Id.* at 204–05, 597 S.E.2d at 207.

161. *Id.* at 205, 597 S.E.2d at 207–08.

162. *Id.*, 597 S.E.2d at 208.

163. *Id.*

164. *Id.*

165. *Id.* at 205–06, 597 S.E.2d at 208.

166. *Id.* at 206, 597 S.E.2d at 208.

167. *Id.*



On appeal to the Supreme Court of Virginia, Shilling argued that the local ordinance allowed private parties to enforce the ordinance.<sup>168</sup> The court held that as a subdivision of the Commonwealth, the county could not create a private right of action absent enabling legislation from the General Assembly.<sup>169</sup> Shilling argued that two Virginia Code provisions, sections 15.2-2241 and 15.2-2255, allowed a private right of action.<sup>170</sup> The court noted that the language in those sections is very general, and held that absent an express grant of authority from the General Assembly, the locality could not create a right for a private party to bring suit to enforce local ordinances.<sup>171</sup> Therefore, Shilling did not have standing to enforce the local ordinance.<sup>172</sup>

## VII. EXPERT TESTIMONY

*Hinkley v. Koehler*<sup>173</sup> involved the application of Virginia Code section 8.01-581.20(A) which provides:

A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had an active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.<sup>174</sup>

In that case, a plaintiff, who was pregnant with twins, consulted defendant obstetricians with complaints of decreased fetal activity.<sup>175</sup> Over a two-day period of testing and monitoring plaintiff's condition, both of the fetuses died in utero.<sup>176</sup> At trial, one of defendants' experts was a professor at George Washington University Medical School.<sup>177</sup> Although he had practiced for thirty-three years, the expert had given up "hands-on delivering obstetrics"

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168. *Id.*, 597 S.E.2d at 208–09.

169. *Id.* at 207–08, 597 S.E.2d at 209.

170. *Id.* at 207, 597 S.E.2d at 209.

171. *See id.* at 208, 597 S.E.2d at 209–10.

172. *Id.*, 597 S.E.2d at 210.

173. 269 Va. 82, 606 S.E.2d 803 (2005).

174. VA. CODE ANN. § 8.01-581.20(A) (Cum. Supp. 2005).

175. *Hinkley*, 269 Va. at 86, 606 S.E.2d at 805.

176. *Id.*

177. *Id.*

several years previously in favor of teaching and consulting, particularly related to “high-risk pregnancy cases and associated problems.”<sup>178</sup>

There was no issue with respect to the expert’s knowledge and expertise. The Supreme Court of Virginia made clear that the statute imposed two tests, termed the “knowledge requirement” and the “active clinical practice requirement,” which must be independently satisfied.<sup>179</sup> The court agreed with defendants that with respect to the latter test, it was not necessary to show that the expert had engaged in a specific medical procedure or the physical process of delivering a baby within the preceding year.<sup>180</sup> Nonetheless, it held that the expert’s teaching and consulting failed to meet the “active clinical practice” requirement and that the trial judge had abused his discretion in permitting the expert to testify.<sup>181</sup> Accordingly, the jury’s verdict in favor of defendants was reversed.<sup>182</sup>

*Vasquez v. Mabini*<sup>183</sup> also involved disputed expert testimony.<sup>184</sup> In this case, plaintiff’s decedent was killed by a bus driven by defendant while standing at an intersection.<sup>185</sup> Prior to her death, the decedent was employed as a part time clerical worker, although she was searching for a full time position.<sup>186</sup> She had an adult son living at home who was bipolar and had emotional and psychological problems, which rendered him dependent on the decedent.<sup>187</sup> At trial, plaintiff introduced expert testimony from a finance professor at American University, who projected the decedent’s lost income and the value of her lost household services.<sup>188</sup> In so doing, he employed a number of assumptions including that the decedent would have found full time employment and remained employed until retirement, that her employer would contribute to a 401k or similar retirement plan at the rate of 3.7 per-

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178. *Id.*

179. *Id.* at 88, 606 S.E.2d at 806.

180. *See id.* at 89, 606 S.E.2d at 807.

181. *Id.* at 90, 606 S.E.2d at 807.

182. *Id.* at 92, 606 S.E.2d at 808.

183. 269 Va. 155, 606 S.E.2d 809 (2005).

184. *Id.* at 158, 606 S.E.2d at 810.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 159, 606 S.E.2d at 811.

cent of her income, that her income would increase at the rate of 4.25 percent per year, and that her adult son would live twenty-four years into the future even though the witness knew the son had died before trial.<sup>189</sup> The jury returned a substantial verdict for plaintiff.<sup>190</sup>

Virginia Code section 8.01-401.1 provides that expert witnesses may testify “from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial.”<sup>191</sup> Such evidence need not be independently admissible “if of a type normally relied upon by others in the particular field of expertise.”<sup>192</sup> Where such evidence is based entirely on statistics and assumptions, it “is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible.”<sup>193</sup> Stated differently: “In order to form a reliable basis for a calculation of lost future income or loss of earning capacity, such evidence *must be grounded upon facts specific to the individual whose loss is being calculated.*”<sup>194</sup> The Supreme Court of Virginia examined each of the key assumptions upon which the expert’s opinion was based and found each to be lacking in factual basis in the context of this case.<sup>195</sup> There was also substantial discussion in the opinion as to whether defendant’s objection had been waived under the pre-trial scheduling order and whether a contemporaneous objection had been noted at trial under Supreme Court of Virginia Rule 5:25.<sup>196</sup> The court held that plaintiff’s pre-trial disclosure was not sufficiently detailed to give defendant notice of the grounds for objection and that defendant had noted timely and repeated objections at trial.<sup>197</sup> Accordingly, the jury’s verdict was reversed.<sup>198</sup>

In *Christian v. Surgical Specialists of Richmond, Ltd.*,<sup>199</sup> the Supreme Court of Virginia held that a physician is qualified to

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189. *Id.*

190. *Id.* at 158, 606 S.E.2d at 810.

191. VA. CODE ANN. § 8.01-401.1 (Repl. Vol. 2000 & Cum. Supp. 2005).

192. *Id.*

193. *Vasquez*, 269 Va. at 160, 606 S.E.2d at 811.

194. *Id.* (quoting *Bulala v. Boyd*, 239 Va. 218, 233, 389 S.E.2d 670, 677 (1990)).

195. *Id.* at 160–61, 606 S.E.2d at 811–12.

196. *Id.* at 161, 163, 606 S.E.2d at 812–13.

197. *Id.* at 162–63, 606 S.E.2d at 812–13.

198. *Id.* at 163, 606 S.E.2d at 813.

199. 268 Va. 60, 596 S.E.2d 522 (2004).

give expert testimony so long as the physician is familiar with the standard of care in Virginia.<sup>200</sup> In this case, the plaintiff claimed that the defendant committed medical malpractice during a gynecological surgical procedure in 1994.<sup>201</sup> At trial, the plaintiff called one doctor as an expert witness pursuant to Virginia Code section 8.01-581.20.<sup>202</sup> The doctor testified that he was licensed to practice in California and New York and had maintained a clinical practice in gynecological surgery prior to the alleged act of medical malpractice.<sup>203</sup> Furthermore, the doctor testified that he had performed hundreds of similar procedures as the one at issue in the case.<sup>204</sup>

Defendants attacked the doctor's ability to testify, maintaining that the doctor was not particularly aware of the standard of care applicable to such procedures in Virginia.<sup>205</sup> The doctor testified that he knew about the Virginia standard of care based on discussions with other surgeons in Virginia and his attendance at seminars and meetings in Virginia.<sup>206</sup> Moreover, the doctor testified that the basic surgical principles did not differ greatly from state to state, and that he had testified concerning basic gynecological surgical principles in Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Alabama, and Puerto Rico.<sup>207</sup>

The trial court ruled that the doctor had not demonstrated that he was familiar with the statewide standard of care in Virginia, and therefore, was not qualified to testify.<sup>208</sup> The Supreme Court of Virginia reversed, holding that while the determination of whether a witness demonstrates expert knowledge is a question largely within the sound discretion of the trial court, the court would reverse a holding that a witness is not qualified to testify as an expert when it appears clearly from the record that the witness possesses sufficient knowledge, skill, or experience to make him competent to testify on the subject matter.<sup>209</sup> In the

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200. *Id.* at 66, 596 S.E.2d at 525.

201. *Id.* at 62, 596 S.E.2d at 523.

202. *Id.*

203. *Id.* at 63, 596 S.E.2d at 523.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 64, 596 S.E.2d at 524.

209. *Id.* at 65, 596 S.E.2d at 524.

case at bar, the doctor testified that he was familiar with the Virginia standard of care based on his attendance at seminars and through discussions with colleagues, and had extensive expertise in the subject matter at the heart of the case.<sup>210</sup> Therefore, the court held that the trial court abused its discretion, and the case was remanded.<sup>211</sup>

### VIII. WAIVER OF OBJECTIONS

The Supreme Court of Virginia invoked a rule waiving evidentiary objections in the case *Drinkard-Nuckols v. Andrews*.<sup>212</sup> Plaintiff's decedent visited the emergency room complaining of wrist pain.<sup>213</sup> An x-ray indicated a broken wrist.<sup>214</sup> The emergency room doctor referred the decedent to the orthopedic surgeon on call who scheduled outpatient surgery for the next day.<sup>215</sup> During the course of the emergency room visit, a chest x-ray was taken, which indicated a "significant" abnormality noted by the radiologist in the decedent's medical records.<sup>216</sup> The next day, the wrist was successfully set but none of the doctors involved noted the abnormality in the chest x-ray and it was never communicated to the decedent.<sup>217</sup> A few months later, the decedent visited her family physician who ordered a chest x-ray that indicated a significantly enlarged tumor in her lung from which she died a short time later.<sup>218</sup>

Over plaintiff's objection, the orthopedic surgeon introduced evidence to the effect that he would not normally review the chest x-ray in preparation for wrist surgery.<sup>219</sup> Instead, he suggested that it would be the responsibility of the anesthesiologist, who was not a party to the case, to review the chest x-ray in order to determine whether it was prudent to administer anesthesia and

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210. *Id.* at 66, 596 S.E.2d at 525.

211. *Id.*

212. 269 Va. 93, 606 S.E.2d 813 (2005).

213. *Id.* at 95, 606 S.E.2d at 814.

214. *Id.*

215. *Id.*, 606 S.E.2d at 814-15.

216. *Id.* at 95-96, 606 S.E.2d at 815.

217. *Id.* at 96, 606 S.E.2d at 815.

218. *Id.*

219. *Id.* at 97, 606 S.E.2d at 815.

to report to him any abnormality.<sup>220</sup> The jury evidently agreed and returned a defense verdict.<sup>221</sup> The Supreme Court of Virginia agreed that evidence tending to show that a non-party was negligent where such negligence is not an intervening or superseding cause is irrelevant and inadmissible.<sup>222</sup> Plaintiff had called the radiologist in her case in chief, who testified to his expectation that his interpretation of the x-ray would have been reviewed by the emergency room physician and communicated to plaintiff's decedent.<sup>223</sup>

Quoting *Southern Railway Co. v. Blanford*,<sup>224</sup> the Supreme Court of Virginia stated: "If a party objects to the introduction of evidence which is admitted, and afterwards introduces the same evidence himself, it is not ground for reversing the judgment, although the evidence itself was incompetent."<sup>225</sup> Importantly, the above referenced rule is only applicable where the objecting party has introduced the objectionable evidence in direct testimony. As stated by the court, it has "never held that the mere cross-examination of a witness or the introduction of rebuttal evidence, either or both, will constitute a waiver of an exception to testimony which has been duly taken."<sup>226</sup> Because the evidence pointed to negligence of two different doctors, the court held the import of the evidence the same.<sup>227</sup> Because the testimony of the radiologist had been introduced by the plaintiff on direct, her objection was deemed waived and the jury's verdict was upheld.<sup>228</sup>

The Supreme Court of Virginia reached the opposite result in *Pettus v. Gottfried*.<sup>229</sup> This case also involved a claim of medical malpractice related to plaintiff's decedent's admission to an emergency room.<sup>230</sup> The decedent, who was complaining of chest

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220. *Id.* at 97–98, 606 S.E.2d at 816.

221. *Id.* at 97, 606 S.E.2d at 815–16.

222. *Id.* at 100–04, 606 S.E.2d at 817–19.

223. *Id.* at 99–100, 606 S.E.2d at 817.

224. 105 Va. 373, 54 S.E. 1 (1906).

225. *Drinkard-Nuckols*, 269 Va. at 101, 606 S.E.2d at 817 (internal quotations omitted) (quoting *Blanford*, 105 Va. at 387, 54 S.E. at 6).

226. *Id.* at 102, 606 S.E.2d at 818 (quoting *Snead v. Commonwealth*, 138 Va. 787, 801–02, 121 S.E. 82, 86 (1924)).

227. *Id.* at 102–03, 606 S.E.2d at 818–19.

228. *Id.* at 104, 606 S.E.2d at 819.

229. 269 Va. 69, 606 S.E.2d 819 (2005).

230. *Id.* at 72, 606 S.E.2d at 821.

pains, was tested and released.<sup>231</sup> He suffered a seizure and died a few days later.<sup>232</sup> At trial, both parties introduced deposition testimony of various treating physicians.<sup>233</sup> The Supreme Court of Virginia examined in detail three specific passages, which were admitted over the plaintiff's objection, and determined that one was admissible and the other two were not.<sup>234</sup> As to the two passages which were ruled inadmissible, defendant argued that plaintiff had waived any right to object by introducing similar evidence herself.<sup>235</sup>

Citing to its discussion of this evidentiary rule in *Drinkard-Nuckols*, the court reaffirmed as the general rule that when a party unsuccessfully objects to evidence offered by the opposing party but offers evidence "of the same character" on his own behalf, any right to object to the testimony is waived.<sup>236</sup> The court noted that usually the waiver occurs by subsequent introduction of similar evidence, but stated that the rule applies "regardless of the order of introduction."<sup>237</sup> The testimony that plaintiff had introduced through the doctors' depositions, while arguably violating the evidentiary rule against speculation, did not relate to the same subject as the testimony to which the plaintiff objected.<sup>238</sup> The court refused to apply the waiver rule in this circumstance, stating:

The defendants, however, effectively ask us to enlarge the rule's scope to apply this waiver principle to any purported violation of the same rule of evidence even when the subject matter of the testimony or exhibit at issue is not the same. We decline the defendant's request because the rule properly focuses on a party's introduction of evidence on the same subject and was never intended to create a waiver permitting the consideration of inadmissible evidence on a different subject.<sup>239</sup>

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231. *Id.*, 606 S.E.2d at 822.

232. *Id.* at 73, 606 S.E.2d at 822.

233. *Id.* at 73-76, 606 S.E.2d at 822-24.

234. *Id.* at 73-74, 606 S.E.2d at 822-23. One passage was stricken on the basis that the doctor was testifying to medical conclusions not held to a "reasonable degree of medical probability" as required by Virginia Code section 8.01-399(B). *Id.* at 78, 606 S.E.2d at 825. In the other passage, the doctor testified that he was "pretty sure" the nurses would have informed him of any complaints of chest pain. *Id.* at 74, 606 S.E.2d at 823. This passage was stricken as speculative and without factual basis. *Id.*

235. *Id.* at 75, 606 S.E.2d at 823.

236. *Id.* at 79, 606 S.E.2d at 825.

237. *Id.*

238. See *supra* note 234 and accompanying text.

239. 269 Va. at 79-80, 606 S.E.2d at 826.

Accordingly, the court reversed the defense verdict and remanded the case for a new trial.<sup>240</sup>

## IX. VIRGINIA PROCUREMENT ACT

*Mid-Atlantic Business Communications, Inc. v. Virginia Department of Motor Vehicles*<sup>241</sup> involved a claim under a contract to create and install an Internet Call Center for the Department of Motor Vehicles (“DMV”).<sup>242</sup> DMV rejected a portion of the work citing “security issues.”<sup>243</sup> This resulted in a claim for the balance of the contract amount.<sup>244</sup> DMV’s Manager of Budget and Procurement responded by letter, dated August 22, 2002, stating that Mid-Atlantic’s claim for payment was denied.<sup>245</sup> Mid-Atlantic then lodged its claim with the Commissioner of DMV, who responded by letter dated August 30, 2002, to the effect that “the DMV stands by the decision to cancel.”<sup>246</sup> Finally, Mid-Atlantic sent a demand for payment to the Comptroller of the Commonwealth.<sup>247</sup> By letter, dated January 31, 2003, the Comptroller denied Mid-Atlantic’s claim.<sup>248</sup> The suit was filed on February 27, 2003.<sup>249</sup>

Under the Virginia Public Procurement Act,<sup>250</sup> any suit on a claim against a public body based on a contract awarded under the act must be filed within six months of “final decision of the ‘public body.’”<sup>251</sup> DMV asserted that Mid-Atlantic’s suit was time barred.<sup>252</sup> Mid-Atlantic argued that the final decision did not occur until it received the January 31, 2003 letter from the Commissioner of DMV which would render its suit timely.<sup>253</sup> Among other things, Mid-Atlantic cited to the claim procedure of Virginia

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240. *Id.* at 81, 606 S.E.2d at 827.

241. 269 Va. 51, 606 S.E.2d 835 (2005).

242. *Id.* at 54, 606 S.E.2d at 837.

243. *Id.*

244. *Id.* at 54–55, 606 S.E.2d at 837.

245. *Id.* at 55, 606 S.E.2d at 837.

246. *Id.* (internal quotations omitted).

247. *Id.*

248. *Id.*

249. *Id.*

250. VA. CODE ANN. § 2.2-4301 to -4363 (Repl. Vol. 2005).

251. *Mid-Atlantic*, 269 Va. at 55–56, 606 S.E.2d at 837.

252. *Id.* at 55, 606 S.E.2d at 837.

253. *Id.* at 56–57, 606 S.E.2d at 838.



Code section 2.2-814.<sup>254</sup> This section specifically provides: “Any person having any pecuniary claim against the Commonwealth upon any legal ground shall present the same to the head of the department . . . responsible for the alleged act or omission which, if proved, gives rise to the claim.”<sup>255</sup>

The Supreme Court of Virginia held that the provisions of the Virginia Public Procurement Act control claims arising under contracts awarded pursuant to the act.<sup>256</sup> The fact that Mid-Atlantic invoked what the court termed a “separate, unrelated procedure” under Virginia Code section 2.2-814 did not affect the court’s analysis.<sup>257</sup> Accordingly, the court determined that the August 22, 2002 letter from the Manager of Budget and Procurement constituted the final decision of the agency under the terms of the Vendor’s Manual applicable to the subject contract.<sup>258</sup> Because Mid-Atlantic did not file its suit until February 27, 2003, the suit was untimely, and the trial court correctly sustained DMV’s statute of limitations plea.<sup>259</sup>

Finally, the court examined Mid-Atlantic’s contention that the statute of limitations was tolled under Virginia Code section 8.01-229(D).<sup>260</sup> This statute tolls the statute of limitations if the defendant obstructs the filing of the suit by any “direct or indirect” means.<sup>261</sup> Mid-Atlantic contended that DMV’s action forwarding a recommendation to the Comptroller under the claims procedure of Virginia Code section 2.2-814 led it to believe the prior decisions were not final and delayed the filing of suit.<sup>262</sup> The court rejected DMV’s claim that it was not subject to Virginia Code section 8.10-229(D), but found there to be no facts to support Mid-Atlantic’s claim of obstruction.<sup>263</sup>

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254. *Id.* at 56, 606 S.E.2d at 838.

255. VA. CODE ANN. § 2.2-814(A) (Repl. Vol. 2005).

256. *Mid-Atlantic*, 269 Va. at 56, 606 S.E.2d at 838.

257. *Id.*

258. *Id.* at 56–57, 606 S.E.2d at 838.

259. *Id.* at 57, 606 S.E.2d at 838.

260. *Id.*

261. *Id.*

262. *Id.* at 58, 606 S.E.2d at 839.

263. *Id.* at 58–59, 606 S.E.2d at 839.

## X. NEGLIGENCE PER SE

The case of *Schlimmer v. Poverty Hunt Club*<sup>264</sup> involved whether a trial court erred in declining to give an instruction on negligence per se.<sup>265</sup> Schlimmer, a fourteen year old, was a guest of his father on a hunting expedition on property leased to the defendant hunt club.<sup>266</sup> The members of the club assigned different hunters to various hunting stands in the woods.<sup>267</sup> Schlimmer and his father were assigned to a particular hunting stand called "Fletcher's Old Stand."<sup>268</sup> "They were told that someone would meet them . . . and show them where their assigned stand was located."<sup>269</sup> No one met them there.<sup>270</sup>

After some period of time, Schlimmer and his father decided that they could find the stand themselves.<sup>271</sup> They found a stand familiar to Schlimmer's father and sat down.<sup>272</sup> Meanwhile, another hunter, Cofield, walked past Schlimmer about twenty-five to thirty yards away and proceeded to an adjacent stand.<sup>273</sup> Neither Schlimmer nor his father said anything to Cofield, and Cofield did not see either one of them.<sup>274</sup> Schlimmer was then shot by Cofield.<sup>275</sup>

A game warden investigated the accident and "charged Cofield with reckless handling of a firearm in violation of [Virginia Code section] 18.2-56.1(A)."<sup>276</sup> That section makes it "unlawful for any person to handle recklessly any firearm so as to endanger the life, limb or property of any person."<sup>277</sup> Cofield pled guilty to this offense.<sup>278</sup>

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264. 268 Va. 74, 597 S.E.2d 43 (2004).

265. See *id.* at 76, 597 S.E.2d at 44.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 77, 597 S.E.2d at 44.

273. *Id.*, 597 S.E.2d at 45.

274. *Id.*

275. *Id.*

276. *Id.*

277. VA. CODE ANN. § 18.2-56.1(A) (Repl. Vol. 2004 & Cum. Supp. 2005).

278. *Schlimmer*, 268 Va. at 77, 597 S.E.2d at 45.

At the civil trial, Schlimmer moved for the Supreme Court of Virginia to give the jury an instruction on negligence based on Cofield's guilty plea.<sup>279</sup> The trial court refused, finding that "[Cofield] could have been convicted of reckless handling of a fire-arm even if nobody had been hit."<sup>280</sup> In reversing the trial court's decision, the court held that "[a] litigant is entitled to jury instructions supporting his or her theory of the case if sufficient evidence is introduced to support that theory."<sup>281</sup> Moreover, "[i]f a proffered instruction finds any support in credible evidence, its refusal is reversible error."<sup>282</sup> For negligence, a party must present evidence that demonstrates: (1) that the opposing party violated a statute enacted for public safety, (2) that the party is part of the class of persons for whom the statute is designed to protect, and (3) that the statutory violation was a proximate cause of the injury.<sup>283</sup>

The first two prongs of the negligence per se standard are to be determined as a matter of law by the trial court, while the issue of proximate causation is to be decided by the jury.<sup>284</sup> The court held that Schlimmer had provided sufficient evidence that Cofield violated a statute enacted for the public safety and that he was part of the class of people the statute was designed to protect.<sup>285</sup> Therefore, the court reversed the judgment of the trial court and remanded the case.<sup>286</sup>

## XI. COUNSEL OF RECORD

The question of whether an attorney who delivers a pleading, signed by a pro se plaintiff, on behalf of that plaintiff, is "counsel of record" was addressed in *Walker v. American Ass'n of Professional Eye Care Specialists*.<sup>287</sup> Walker signed a motion for judg-

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279. *Id.* at 78, 597 S.E.2d at 45.

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

281. *See id.*

282. *Id.* (quoting *McClung v. Commonwealth*, 215 Va. 654, 657, 212 S.E.2d 290, 293 (1975)).

283. *See id.* at 78-79, 597 S.E.2d at 46.

284. *Id.* at 79, 597 S.E.2d at 46.

285. *See id.*

286. *Id.* at 80, 597 S.E.2d at 46.

287. 268 Va. 117, 119, 597 S.E.2d 47, 47 (2004).

ment alleging negligent medical treatment by the defendants.<sup>288</sup> Attorney Robert S. Cohen arranged for delivery of the motion for judgment to the trial court because Walker did not know the location of the courthouse.<sup>289</sup> Cohen also drafted a cover letter indicating that the motion for judgment was to be filed on behalf of Walker and included a check drawn on Cohen's client trust account for the filing fee.<sup>290</sup>

Cohen had represented Walker prior to initiation of the lawsuit to investigate whether Walker had a case and established an escrow account for Walker.<sup>291</sup> Cohen later informed Walker that he would not represent her in the case, but agreed to help Walker find an expert witness, used some of the money from the escrow account for the filing fee, and forwarded the remainder to Walker's new attorney.<sup>292</sup> Both Cohen and Walker understood at the time the motion for judgment was filed that Cohen was not her attorney.<sup>293</sup>

Defendants "filed a motion to strike and a motion to quash, arguing that Walker's pleading was improperly signed because Cohen represented her."<sup>294</sup> The trial court granted the motions, finding that Walker's pleading had been improperly signed by her under Rules 1:4 and 1A:4 of the Supreme Court of Virginia.<sup>295</sup>

On appeal, the Supreme Court of Virginia reversed, holding as a matter of law that Cohen was not Walker's counsel of record.<sup>296</sup> Because Cohen was not Walker's counsel as a matter of law, Walker did not act improperly in signing her name on the pleading.<sup>297</sup>

## XII. NONSUITS

The issue of whether a plaintiff lacking standing who suffers a nonsuit can preclude a nonsuit by a subsequent plaintiff with

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288. *Id.*, 597 S.E.2d at 47–48.

289. *Id.*, 597 S.E.2d at 48.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 120, 597 S.E.2d at 48.

296. *See id.*

297. *Id.*

standing was before the Supreme Court of Virginia in *Brake v. Payne*.<sup>298</sup> Guadalupe Sias, the parent and next of kin of Eduardo Calzada, filed a motion for judgment (the "First Action") against Kelly Harrison, a police officer, alleging assault and battery, and false imprisonment, arising from Calzada's arrest.<sup>299</sup> Calzada was deceased at the time the First Action was filed.<sup>300</sup> Harrison filed a demurrer, asserting that Sias did not have standing to file suit in Calzada's name.<sup>301</sup> The circuit court agreed and sustained the demurrer, but allowed Sias leave to amend the motion for judgment.<sup>302</sup> Sias, however, elected to suffer a voluntary nonsuit of the action, and the circuit court entered an order nonsuiting the case.<sup>303</sup>

Subsequently, Kelly Payne, as personal representative of the estate of Calzada, filed a motion for judgment (the "Second Action") in the same circuit court alleging the same claims as in the First Action plus numerous other claims against Harrison and a host of other law enforcement defendants.<sup>304</sup> Payne never served any of the defendants.<sup>305</sup> On the day before the expiration of the one-year service limitation, Payne submitted a proposed nonsuit order to the circuit court.<sup>306</sup> However, "she did not file a praecipe or otherwise schedule a hearing for entry of the nonsuit order."<sup>307</sup>

Six months later, Payne filed another motion for judgment (the "Third Action"), alleging essentially the same claims against the same defendants as in the Second Action.<sup>308</sup> Payne did effectuate service of process on the defendants in the Third Action.<sup>309</sup> The defendants in the Third Action objected to the nonsuit in the Second Action, arguing that it was not timely.<sup>310</sup> The trial court concluded that the Second Action was distinct from the First Action, thus the request of a nonsuit in the Second Action was the first

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298. 268 Va. 92, 95, 597 S.E.2d 59, 60 (2004).

299. *Id.*, 597 S.E.2d at 60-61.

300. *Id.*, 597 S.E.2d at 61.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 95-96, 597 S.E.2d at 61.

305. *Id.* at 96, 597 S.E.2d at 61.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

request for a nonsuit, and determined that the order of nonsuit in the Second Action be entered nunc pro tunc to the date when the order was originally submitted.<sup>311</sup>

On appeal to the Supreme Court of Virginia, the two main issues addressed were (1) whether the circuit court erred in allowing a nonsuit in the Second Action, and (2) whether the circuit court erred by entering the nonsuit order nunc pro tunc to the date it was filed.<sup>312</sup>

The court held that the circuit court did not err in allowing a nonsuit in the Second Action.<sup>313</sup> The court held that because Sias did not have standing in the First Action, and because Sias and Payne were not “substantially the same parties” (they were not suing in the same right), a nonsuit in the Second Action was the first nonsuit, and thus allowable.<sup>314</sup>

The court, however, reversed the circuit court’s entry of the nonsuit order nunc pro tunc.<sup>315</sup> The court noted that “the purpose of a *nunc pro tunc* entry is to correct mistakes of the clerk or other court officials . . . to make the record show what actually took place.”<sup>316</sup> In contrast, a nunc pro tunc order cannot be used to make the record say something that did not take place or what ought to have taken place.<sup>317</sup> Therefore, the court held that the circuit court erred in backdating the entry of the nonsuit order within the one-year service limitation, and thus the case was remanded.<sup>318</sup>

### XIII. ASSAULT AND WILLFUL AND WANTON CONDUCT

In *Etherton v. Doe*,<sup>319</sup> the issue before the Supreme Court of Virginia was “the sufficiency of evidence to frame a jury issue with respect to assault and willful and wanton conduct in a non-

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311. *Id.* at 97, 597 S.E.2d at 61–62.

312. *Id.*, 597 S.E.2d at 62.

313. *See id.* at 100, 597 S.E.2d at 63.

314. *Id.*

315. *See id.* at 101, 597 S.E.2d at 64.

316. *Id.* at 100, 597 S.E.2d at 64 (quoting *Council v. Commonwealth*, 198 Va. 288, 293, 94 S.E.2d 245, 248 (1956)).

317. *Id.* at 101, 597 S.E.2d at 64.

318. *Id.*

319. 268 Va. 209, 597 S.E.2d 87 (2004).

contact automobile tort case.<sup>320</sup> The facts at trial demonstrated that a motorist continually and aggressively bumped, harassed, and veered across lanes toward Etherton while driving adjacent to her.<sup>321</sup> Finally, Etherton was forced to slam on her brakes, causing Etherton's car to slam into a curb.<sup>322</sup> As a result of the crash, Etherton suffered an infection in her abdominal wall requiring surgery.<sup>323</sup>

Etherton filed a motion for judgment against John Doe, as the driver was never identified, on three counts: negligence, assault, and willful and wanton conduct justifying punitive damages.<sup>324</sup> At trial, the circuit court sustained defense motions to strike plaintiff's evidence with regard to assault and willful and wanton conduct.<sup>325</sup> Etherton appealed the circuit court's actions striking the evidence with regard to those two claims.<sup>326</sup>

The Supreme Court of Virginia held that a court can only grant a motion to strike the plaintiff's evidence "when it plainly appears that the court would be compelled to set aside any verdict . . . as being without evidence to support it."<sup>327</sup> Citing *Koffman v. Garnett*,<sup>328</sup> the court stated that to establish assault, the plaintiff must prove that the defendant performed an act intended to cause either harmful or offensive contact or apprehension of immediate battery.<sup>329</sup> There is no requirement that the victim be physically touched.<sup>330</sup> The court held that the evidence at trial was sufficient to warrant the inference that Doe's actions intended to cause harmful contact or apprehension of such contact, and created in Etherton's mind a reasonable apprehension of imminent battery.<sup>331</sup>

With regard to the willful and wanton conduct, the court also held that Etherton had provided sufficient evidence for a jury to

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320. *Id.* at 211, 597 S.E.2d at 88.

321. *Id.* at 211-12, 597 S.E.2d at 88-89.

322. *Id.* at 212, 597 S.E.2d at 89.

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. 265 Va. 12, 574 S.E.2d 258 (2003).

329. *Etherton*, 268 Va. at 213, 597 S.E.2d at 89.

330. *Id.*

331. *Id.*

find that Doe acted willfully and wantonly.<sup>332</sup> Quoting *Booth v. Robertson*,<sup>333</sup> the court held that punitive damages are available for “negligence which is so willful or wanton as to evince a conscious disregard of the rights of others.”<sup>334</sup> Actions are willful and wanton if the defendant is conscious of his actions, is aware of the dangers or probable consequences of proceeding with the action, and decides to proceed notwithstanding that awareness.<sup>335</sup> The court held that the plaintiff provided sufficient evidence for a jury to find that Doe acted willfully and wantonly.<sup>336</sup> Therefore, the court reversed the judgment and remanded the case to the trial court.<sup>337</sup>

#### XIV. DECLARATORY JUDGMENTS

In *Green v. Goodman-Gable-Gould Co.*,<sup>338</sup> Joyce Green and John Gural’s home was destroyed by fire.<sup>339</sup> They then hired the defendant, Goodman-Gable-Gould (“GGG”), to help them process a fire loss claim with their insurer.<sup>340</sup> Green and Gural signed a contract with GGG, agreeing to pay GGG ten percent of the amount adjusted or recovered.<sup>341</sup>

After a period of time, the plaintiffs became dissatisfied with GGG’s performance and requested that GGG withdraw from adjustment of the fire loss claim.<sup>342</sup> GGG disagreed, and demanded that it be paid on any amount recovered from the insurance company.<sup>343</sup> GGG then filed a lawsuit seeking a declaratory judgment that GGG had an interest in the insurance proceeds and that

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332. *Id.*, 597 S.E.2d at 89–90.

333. 236 Va. 269, 374 S.E.2d 1 (1988).

334. *Etherton*, 268 Va. at 213, 597 S.E.2d at 90 (quoting *Robertson*, 236 Va. at 273, 374 S.E.2d at 3).

335. *Id.* at 213–14, 597 S.E.2d at 90; see also *Griffin v. Shively*, 227 Va. 317, 321, 315 S.E.2d 210, 213 (1984).

336. 268 Va. at 214, 597 S.E.2d at 90.

337. *Id.*

338. 268 Va. 102, 597 S.E.2d 77 (2004).

339. *Id.* at 104, 597 S.E.2d at 78.

340. *Id.*

341. *Id.*, 597 S.E.2d at 78–79.

342. *Id.* at 105, 597 S.E.2d at 79.

343. *Id.*



GGG was owed a fee of ten percent on any money recovered.<sup>344</sup> GGG also claimed breach of contract and quantum meruit, but nonsuited those claims prior to trial.<sup>345</sup> Green and Gural filed a summary judgment motion on the only remaining claim for a declaratory judgment, but that was overruled by the trial court.<sup>346</sup>

On appeal, “[t]he sole issue [was] whether the circuit court abused its discretion in allowing this case to proceed as a declaratory judgment action after GGG nonsuited its other claims.”<sup>347</sup> Citing primarily *USAA Casualty Insurance Co. v. Randolph*<sup>348</sup> and *Williams v. Southern Bank of Norfolk*,<sup>349</sup> the Supreme Court of Virginia distinguished between an appropriate use of declaratory judgments to determine the rights of parties versus the inappropriate use of declaratory judgments versus final adjudication of the merits of future litigation.<sup>350</sup> Upon the facts of the case at bar, the court determined that GGG’s declaratory judgment proceeding was really a determination of a disputed issue—whether the contract was violated—rather than an adjudication of rights.<sup>351</sup> Therefore, the court held that the circuit court inappropriately allowed the declaratory judgment action to continue.<sup>352</sup>

## XV. CHARITABLE IMMUNITY

*Cowan v. Hospice Support Care, Inc.*,<sup>353</sup> dealt with whether the plaintiff’s claims of gross negligence and willful and wanton negligence against a charity are barred by the doctrine of charitable immunity.<sup>354</sup> Cowan’s mother was placed in the defendant’s care for a period of time.<sup>355</sup> While defendant’s employees were moving

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344. *Id.*

345. *Id.*

346. *Id.* at 106, 597 S.E.2d at 79.

347. *Id.*, 597 S.E.2d at 80.

348. 255 Va. 342, 497 S.E.2d 744 (1998).

349. 203 Va. 657, 125 S.E.2d 803 (1962).

350. *Green*, 268 Va. at 107–08, 597 S.E.2d at 80.

351. *Id.* at 108, 597 S.E.2d at 80–81.

352. *Id.* at 110, 597 S.E.2d at 82.

353. 268 Va. 482, 603 S.E.2d 916 (2004).

354. *Id.* at 484, 603 S.E.2d at 917.

355. *Id.*

Cowan's mother, her leg became caught in the bed.<sup>356</sup> The defendant only provided painkillers and did not provide any other medical treatment.<sup>357</sup>

A week later, Cowan visited her mother and found that her leg was severely swollen.<sup>358</sup> Cowan took her mother to a nearby hospital, where she was diagnosed with a shattered femur, requiring amputation of the leg.<sup>359</sup> During surgery, the mother died from complications.<sup>360</sup>

Cowan filed a motion for judgment against the Hospice for wrongful death of her mother based on claims of negligence, gross negligence, willful and wanton negligence, and negligent hiring and retention.<sup>361</sup> The simple negligence count was dismissed upon consent of both parties.<sup>362</sup> The Hospice then filed a plea in bar of charitable immunity to the counts of gross negligence and willful and wanton negligence, and demurrer to the negligent hiring and retention claims.<sup>363</sup> The circuit court sustained the plea in bar and the demurrers.<sup>364</sup>

On appeal, the Supreme Court of Virginia held that charitable institutions are only immune from liability to its beneficiaries for acts of simple negligence.<sup>365</sup> The court differentiated between simple negligence, gross negligence, and willful and wanton negligence.<sup>366</sup> While simple negligence usually arises from the routine performance of a charity's activities, gross and willful and wanton negligence do not.<sup>367</sup> Public policy immunizes charities from claims for simple negligence to allow charities to perform public functions.<sup>368</sup> This public policy is inapplicable where the conduct is gross negligence or willful and wanton negligence, because it is not an attempt to carry out the mission of the charity to serve its

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356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at 484–85, 603 S.E.2d at 917.

362. *Id.* at 485, 603 S.E.2d at 917.

363. *Id.*

364. *Id.*

365. *Id.* at 488, 603 S.E.2d at 919.

366. *Id.* at 486–88, 603 S.E.2d at 918–19.

367. *Id.* at 487–88, 603 S.E.2d at 919.

368. *Id.* at 488, 603 S.E.2d at 919.

beneficiaries.<sup>369</sup> Therefore, the court held that the charitable immunity doctrine only shields charities from claims for simple negligence.<sup>370</sup>

## XVI. ATTORNEY'S FEES

In *Lee v. Mulford*,<sup>371</sup> the Supreme Court of Virginia addressed the procedure necessary to recover attorney's fees.<sup>372</sup> Lee sued Mulford on a promissory note, seeking damages plus attorney's fees.<sup>373</sup> During the resulting trial, Lee offered no evidence of attorney's fees.<sup>374</sup> The promissory note did state that upon default on the note, the non-defaulting party would be entitled to attorney's fees.<sup>375</sup> Nevertheless, the jury returned a verdict providing that each party split attorney's fees.<sup>376</sup> Following trial, the trial court held a hearing to determine attorney's fees.<sup>377</sup> Following written and oral arguments, the trial court entered a final order denying attorney's fees.<sup>378</sup>

On appeal, Lee argued that the trial court erred by failing to award his attorney's fees in light of the unambiguous contract language mandating the award of such fees.<sup>379</sup> Lee's assignment of error was predicated on the "assertion that 'it is customary to argue the issue of fees post-trial.'"<sup>380</sup>

The Supreme Court of Virginia was not persuaded. Quoting *Mullins v. Richlands National Bank*,<sup>381</sup> the court held that where a promissory note provides for attorney's fees but does not specify an amount, "a fact finder is required to determine from the evidence what are reasonable fees under the facts and circumstances

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369. *Id.*

370. *Id.*

371. 269 Va. 562, 611 S.E.2d 349 (2005).

372. *Id.* at 565, 611 S.E.2d at 350.

373. *Id.* at 564, 611 S.E.2d at 350.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.* at 564-65, 611 S.E.2d at 350.

379. *Id.* at 565, 611 S.E.2d at 350.

380. *Id.*

381. 241 Va. 447, 403 S.E.2d 334 (1991).

of the particular case.”<sup>382</sup> Therefore, absent evidence at trial concerning attorney’s fees, the jury could not award attorney’s fees.<sup>383</sup> Parties are allowed with the concurrence of the trial court, to bifurcate the case to allow for a separate fact-finding hearing on attorney’s fees after trial.<sup>384</sup> As the court stated, however, “[a]bsent agreement . . . or pursuant to contract or statute with specific provisions [concerning bifurcation], a litigant is not entitled to bifurcate the issues and have the matter of attorney’s fees decided by the trial court in post-verdict proceedings.”<sup>385</sup>

## XVII. SUPREME COURT RULE AMENDMENTS

On September 30, 2004, the Supreme Court of Virginia ordered a number of amendments to the Rules of the Supreme Court, most of which took effect on January 1, 2005.<sup>386</sup> Among these was an amendment to Rule 4:9(b) adding the following language:

When one party to a civil proceeding subpoenas documents concerning another party, the subpoenaing party, upon receipt of the subpoenaed documents, shall, if requested, provide true and full copies of the same to any party or to the attorney for any other party in accordance with Code § 8.01-417(B).<sup>387</sup>

For many years, all subpoenas were issued by the clerk and returnable to the clerk’s office.<sup>388</sup> Subpoenaed documents could be reviewed by any party in the clerk’s office or checked out, usually overnight, for copying.<sup>389</sup> In order to relieve the clerks from becoming depositories for discovery material, the Supreme Court of Virginia amended Rule 4:9 to permit the attorney requesting issuance of the subpoena to designate the place where the subpoena would be returnable.<sup>390</sup> Usually, the place designated

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382. *Lee*, 269 Va. at 565, 611 S.E.2d at 350–51.

383. *See id.* at 565–66, 611 S.E.2d at 351.

384. *Id.*, 611 S.E.2d at 351–52.

385. *Id.* at 567–68, 611 S.E.2d at 352.

386. *See* Virginia’s Judicial System, Supreme Court of Virginia, Amendments to the Rules of Court, at <http://www.courts.state.va.us/amend.htm> (last visited Oct. 1, 2005).

387. VA. SUP. CT. R. 4:9(b) (Repl. Vol. 2005).

388. *Id.*

389. *Id.*

390. *Id.* At the time of this amendment, all subpoenas were still issued by the clerk. Virginia Code section 8.01-407 now permits attorneys to issue most subpoenas. *See* VA. CODE ANN. § 8.01-407 (Cum. Supp. 2005).

would be the offices of the attorney requesting issuance of the subpoena. This practice gave rise to some debate as to whether other parties would continue to have access to the subpoenaed documents. The General Assembly foreclosed any debate on this issue in 2004 by adding an express requirement to this effect in Virginia Code section 8.01-417(B).<sup>391</sup> This amendment conforms Rule 4:9 to the new statutory language.<sup>392</sup>

Other September 30, 2004 rule changes included amendments to Rules 5:20, regarding denial of appeal and petition for rehearing;<sup>393</sup> 5:39, regarding rehearing;<sup>394</sup> 5A:15, regarding denial of appeal and petition for rehearing in the Court of Appeals of Virginia;<sup>395</sup> 5A:33, regarding rehearing on motion of a party;<sup>396</sup> and 5A:34, regarding rehearing en banc.<sup>397</sup> The rule changes added new Rules 5:20A, regarding petition for rehearing filed as a PDF document;<sup>398</sup> 5:39A, regarding notice of intent to apply for a rehearing filed as a PDF document;<sup>399</sup> 5A:15A, regarding denial of a petition for appeal in the Court of Appeals of Virginia;<sup>400</sup> 5A:33A, regarding rehearing on motion of a party in the Court of Appeals of Virginia;<sup>401</sup> and 5A:34A, regarding rehearing en banc in the Court of Appeals of Virginia.<sup>402</sup> These changes generally follow the amendment to Rule 5:20 relating to petitions for rehearing following denial of a petition for appeal by the Supreme Court of Virginia.<sup>403</sup> Previously, this rule provided that following denial of a petition for appeal, the petitioner could move for a rehearing.<sup>404</sup> The petition was to be in traditional hard copy form "not [to] exceed 15 typed or printed pages in length."<sup>405</sup> Rule 5:20 has been

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391. VA. CODE ANN. § 8.01-417(B) (Cum. Supp. 2005).

392. See VA. SUP. CT. R. 4.9(b) (Repl. Vol. 2005). The General Assembly enacted additional amendments to Virginia Code § 8.01-417(B) in 2005 which are discussed in the legislative portion of this article. See *infra* notes 497–99 and accompanying text.

393. VA. SUP. CT. R. 5:20 (Repl. Vol. 2005).

394. VA. SUP. CT. R. 5:39 (Repl. Vol. 2005).

395. VA. SUP. CT. R. 5A:15 (Repl. Vol. 2005).

396. VA. SUP. CT. R. 5A:33 (Repl. Vol. 2005).

397. VA. SUP. CT. R. 5A:34 (Repl. Vol. 2005).

398. VA. SUP. CT. R. 5:20A (Repl. Vol. 2005).

399. VA. SUP. CT. R. 5:39A (Repl. Vol. 2005).

400. VA. SUP. CT. R. 5A:15A (Repl. Vol. 2005).

401. VA. SUP. CT. R. 5A:33A (Repl. Vol. 2005).

402. VA. SUP. CT. R. 5A:34A (Repl. Vol. 2005).

403. See VA. SUP. CT. R. 5:20 (Repl. Vol. 2005).

404. *Id.*

405. *Id.*

rewritten to require all petitions for rehearing, except those filed by pro se prisoners or by leave of court, to be filed electronically as a PDF document attached to an e-mail as further specified in new Rule 5:20A.<sup>406</sup>

Rule 5:20A contains the technical requirements of the new electronic petitions for rehearing.<sup>407</sup> Documents are to be formatted to print out on 8 1/2 x 11-inch pages, double-spaced, with twelve-point type or larger and with a word count not exceeding 7500 words.<sup>408</sup> The petition must contain a certificate of service and a certificate of compliance with the word-count limit.<sup>409</sup> The petition must be attached to an e-mail sent to scvpfr@courts.state.va.us and reciting in the subject line the style of the case and the court record number.<sup>410</sup> The body of the message should contain a statement that a petition for rehearing is attached, identify counsel filing the petition and include an e-mail address for opposing counsel if the petition is being served electronically.<sup>411</sup> The petition for rehearing is considered timely filed if received by the clerk's office by 11:59 p.m. on the due date.<sup>412</sup> Upon receipt, the clerk will send an acknowledgement by return e-mail.<sup>413</sup>

Comparable amendments were made to Rule 5:39 relating to rehearings following decisions of the full Supreme Court of Virginia,<sup>414</sup> Rule 5A:15 relating to appeals of criminal and traffic cases to the Court of Appeals of Virginia,<sup>415</sup> Rule 5A:33 relating to civil appeals to the Court of Appeals of Virginia,<sup>416</sup> and Rule 5A:34 relating to rehearings en banc by the Court of Appeals of Virginia.<sup>417</sup> New Rules 5:39A, 5A:15A, 5A:33A, and 5A:34A were added with technical requirements generally per the above discussion.<sup>418</sup> Counsel filing a petition for rehearing in any of these

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406. *Id.*

407. VA. SUP. CT. R. 5:20A (Repl. Vol. 2005).

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. VA. SUP. CT. R. 5:39 (Repl. Vol. 2005).

415. VA. SUP. CT. R. 5A:15 (Repl. Vol. 2005).

416. VA. SUP. CT. R. 5A:33 (Repl. Vol. 2005).

417. VA. SUP. CT. R. 5A:34 (Repl. Vol. 2005).

418. *See supra* notes 414–17.

cases should obviously review these new rules carefully. All are set to expire on December 31, 2005 unless extended by further order of the Supreme Court of Virginia.<sup>419</sup>

On December 22, 2004, the Supreme Court of Virginia amended a number of additional rules.<sup>420</sup> Most of these amendments took effect on April 1, 2005.<sup>421</sup> One amendment, which took effect immediately, related to appeals under the Administrative Process Act ("APA").<sup>422</sup> Rule 2A:1 authorizing such appeals<sup>423</sup> and Rule 2A:2 relating to notices of appeal<sup>424</sup> were amended to refer to the correct Virginia Code sections following recodification of the APA from Title 9 to Title 2.2. Prior references to Virginia Code section 9-6.14:14 are now to Virginia Code section 2.2-4023 and references to Virginia Code section 9-6.14:16 are now to Virginia Code section 2.2-4026.<sup>425</sup> It does not appear that any substantive changes were intended.

A new Rule 1:1A was added addressing recovery of attorney's fees and costs incurred on appeal.<sup>426</sup> It provides that notwithstanding Rule 1:1, any "appellee who has recovered attorneys' fees, costs or both in the circuit court pursuant to a contract, statute or other applicable law may" seek an assessment of additional fees or costs incurred on appeal.<sup>427</sup> This procedure may be invoked by filing in the circuit court an application within thirty days after denial of a petition for appeal or petition for rehearing.<sup>428</sup> The rule provides that the prior action be reinstated on the docket, that no new action seeking recovery of fees and costs need be filed and that the circuit court has continuing jurisdiction over the case for purposes of adjudicating the application.<sup>429</sup> Rule 5:20 was amended to refer to this new procedure.<sup>430</sup>

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419. *See supra* notes 406–17.

420. *See Virginia Judicial System, Supreme Court of Virginia, Amendments to the Rules of Court*, at <http://www.courts.state.va.us/amend.htm> (last visited Oct. 1, 2005).

421. *Id.*

422. *See* VA. CODE ANN. §§ 2.2-4000 to -4033 (Repl. Vol. 2005).

423. VA. SUP. CT. R. 2A:1 (Repl. Vol. 2005).

424. VA. SUP. CT. R. 2A:2 (Repl. Vol. 2005).

425. *See supra* notes 423–24.

426. VA. SUP. CT. R. 1:1A (Repl. Vol. 2005).

427. *Id.*

428. *Id.*

429. *Id.*

430. VA. SUP. CT. R. 5:20 (Repl. Vol. 2005).

Rules 2:16<sup>431</sup> and 3:15,<sup>432</sup> both relating to the substitution of parties, were amended with the addition of language specifically requiring a copy of any proposed amended pleading substituting parties to be served along with the motion for substitution on the party being substituted and requiring the party being substituted to file a responsive pleading within twenty-one days of service of the motion and proposed amended pleading.<sup>433</sup> Previously, the rule required service of the motion only and did not specify any requirements regarding a response to the motion.<sup>434</sup>

Finally, Rule 5A:4 regarding the form of briefs filed with the Courts of Appeals of Virginia, formerly permitted briefs in eleven-point type.<sup>435</sup> That rule has now been amended to require a minimum of twelve-point type.<sup>436</sup> Other provisions relating to the form of briefs were unchanged.

## XVIII. RECENT LEGISLATION

Easily the most significant legislation relating to civil litigation in many years is Chapter 681 of the 2005 Acts of Assembly, which has the effect of unifying law and equity procedure.<sup>437</sup> This necessitated amendments to forty-seven statutes and the repeal of two statutes.<sup>438</sup> No longer does the Virginia Code refer to suits in equity or the chancery side of the court.<sup>439</sup> Motions for judgment and bills of complaint will be replaced by a single form of action referred to as a complaint.<sup>440</sup> A comprehensive revision to the Rules of the Supreme Court of Virginia will obviously follow to complete this process.

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431. VA. SUP. CT. R. 2:16 (Repl. Vol. 2005).

432. VA. SUP. CT. R. 3:15 (Repl. Vol. 2005).

433. *See supra* notes 431–32.

434. *See supra* notes 431–32.

435. VA. SUP. CT. R. 5A:4 (Repl. Vol. 2005).

436. *Id.*

437. Act of Mar. 23, 2005, ch. 681, 2005 Va. Acts 957 (codified as amended at VA. CODE ANN. §§ 1-13.23:1 (Repl. Vol. 2005), 3.1-358, -389, 8.01-2, -23, -33, -272, -282 to -283, -331, -336, -426, -670, 9.1-406, 15.2-4119, 16.1-296, 17.1-124, -131, -213, -240, -249, -275, -278 to -279, -513, -520, 18.2-500, -507, 19.2-385, -386.13, 20-96, 26-21, -29, 31-8.1, 40.1-49.4, 43-62 (Cum. Supp. 2005), 51.5-46, 53.1-70 (Repl. Vol. 2005), 55-19, -277, 56-521 to -522, 57-9, -16, 58.1-1727, 64.1-106, -179 (Cum. Supp. 2005)).

438. *Id.*

439. *Id.*

440. VA. CODE ANN. § 8.01-2 (Cum. Supp. 2005).



Subsections B and C of Virginia Code section 2.2-2639 create a statutory cause of action in favor of any employee of a firm or business employing more than five but less than fifteen employees who is discharged "on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions," or age if the employee is forty years old or older.<sup>441</sup> Formerly, the statute of limitations on bringing such a claim was 180 days from the date of discharge.<sup>442</sup> The statute of limitations has been increased to 300 days.<sup>443</sup> If the employee has filed a complaint with the Human Rights Council or a local human rights or human relations agency or commission within 180 days of the discharge, then the action must be brought within ninety days of the final disposition of the complaint.<sup>444</sup>

The judgment rate of interest provided by Virginia Code section 6.1-330.54 has been clarified to state that the rate applicable to the judgment at the time of entry shall continue to apply until the judgment is paid or otherwise satisfied and shall not be affected by subsequent amendments to the judgment rate.<sup>445</sup> Currently, the judgment rate of interest is six percent.<sup>446</sup>

A new Virginia Code section 8.01-4.3 provides that in a judicial proceeding or administrative hearing any matter requiring a sworn written declaration, verification, certificate, statement, oath, or affidavit may be evidenced "with like force and effect" by an unsworn written declaration which is subscribed to by the maker under penalty of perjury.<sup>447</sup> The statute does not apply to depositions, an oath of office, or an oath required to be taken before a specified official other than a notary public.<sup>448</sup> Virginia Code section 18.2-434, the criminal statute regarding perjury, was amended to include unsworn declarations pursuant to Virginia Code section 8.01-4.3.<sup>449</sup>

Virginia Code section 8.01-15.2 provides that default judgment shall not be entered unless the plaintiff files an affidavit stating

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441. *Id.* § 2.2-2639 (Repl. Vol. 2005).

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.* § 6.1-330.54 (Cum. Supp. 2005).

446. *Id.*

447. *Id.* § 8.01-4.3 (Cum. Supp. 2005).

448. *Id.*

449. *Id.* § 18.2-434 (Cum. Supp. 2005).

whether or not the defendant is in military service or that “plaintiff is unable to determine whether or not the defendant is in military service.”<sup>450</sup> The General Assembly recently amended the statute to provide that “[f]ailure to file an affidavit shall not constitute grounds to set aside an otherwise valid default judgment against a defendant who was not, at the time of service of process or entry of default judgment, a servicemember.”<sup>451</sup>

Likewise, the General Assembly amended Virginia Code section 8.01-428 dealing with setting aside default judgments to state affirmatively that proof that the defendant was entitled to relief under the Act is grounds for setting aside a default judgment.<sup>452</sup> Conversely, that section now states that “[n]othing in this section shall constitute grounds to set aside an otherwise valid default judgment against a defendant who was not, at the time of service of process or entry of judgment, a servicemember.”<sup>453</sup>

Virginia Code section 8.01-251 governs enforcement of circuit court judgments.<sup>454</sup> The section previously provided that no execution shall be issued on a judgment after twenty years “from the date of such judgment.”<sup>455</sup> It now expressly contemplates judgments rendered by another state or country and provides that in such case the twenty years shall run from “domestication of such judgment.”<sup>456</sup> The limitation on enforcement of judgments of the general district courts is generally governed by Virginia Code section 16.1-94.1; however, upon docketing of the judgment in the circuit court, Virginia Code section 8.01-251 becomes applicable.<sup>457</sup>

A plaintiff in a circuit court action may now request the defendant to waive service.<sup>458</sup> The request is required to allow the defendant a reasonable time in which to respond.<sup>459</sup> If the defendant

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450. *Id.* § 8.01-15.2 (Cum. Supp. 2005).

451. Act of Apr. 6, 2005, ch. 909, 2005 Va. Acts 1603 (codified as amended at VA. CODE ANN. § 8.01-15.2 (Cum. Supp. 2005)).

452. *Id.* (codified as amended at VA. CODE ANN. § 8.01-428 (Cum. Supp. 2005)).

453. VA. CODE ANN. § 8.01-428 (Cum. Supp. 2005).

454. *Id.* § 8.01-251 (Cum. Supp. 2005).

455. *Id.* (Repl. Vol. 2000).

456. *Id.* § 8.01-251 (Cum. Supp. 2005).

457. *Id.*

458. *Id.* § 8.01-286.1(A) (Cum. Supp. 2005).

459. *Id.* § 8.01-286.1(B)(6) (Cum. Supp. 2005).

declines to accept service, the plaintiff may serve the defendant through other means, and the Supreme Court of Virginia shall award the plaintiff its costs in doing so, unless defendant can show good cause for failing to waive service.<sup>460</sup> The plaintiff is also entitled to attorneys' fees incurred in collecting these costs.<sup>461</sup> A defendant who waives service as provided is allowed sixty days from the date of request (ninety days for out of state defendants) to file its grounds of defense or other initial responsive pleading.<sup>462</sup> Waiver of service does not waive any defenses going to venue or jurisdiction of the Supreme Court of Virginia.<sup>463</sup> The basic procedure will appear as Virginia Code section 8.01-286.1; however, a number of other statutes are affected by this change.<sup>464</sup>

A new Virginia Code section 8.01-379.3 authorizes the Supreme Court of Virginia in complex cases to propound interrogatories to the jury as to the basis of its verdict.<sup>465</sup> Previously, the authority of the Supreme Court of Virginia to ask the jury to render anything other than a general verdict was in doubt. Where the jury's interrogatory answers are in conflict with its verdict, the Supreme Court of Virginia may refer the case back to the jury for further deliberations or grant a new trial.<sup>466</sup> This procedure is not available in personal injury or wrongful death cases.<sup>467</sup>

Pre-existing Virginia Code section 8.01-398 prohibited testimony of private communications between husband and wife absent affirmative consent of the other spouse.<sup>468</sup> The only exception was "where the law of this Commonwealth confers upon a spouse a right of action against the other spouse."<sup>469</sup> Thus, such testimony was rendered incompetent where the other spouse was unable due to death or disability to consent even if the testimony was favorable.<sup>470</sup> On the other hand, its prohibition extended only

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460. *Id.* § 8.01-286.1(B)(7) (Cum. Supp. 2005).

461. *Id.* § 8.01-286.1(E) (Cum. Supp. 2005).

462. *Id.* § 8.01-286.1(C) (Cum. Supp. 2005).

463. *Id.* § 8.01-286.1(F) (Cum. Supp. 2005).

464. *Id.* § 8.01-286.1 (Cum. Supp. 2005) (affecting services provisions in Virginia Code sections 8.01-296, -299, -301 to -306, and -320).

465. *Id.* § 8.01-379.3 (Cum. Supp. 2005).

466. *Id.*

467. *Id.*

468. *Id.* § 8.01-398 (Cum. Supp. 2005).

469. *Id.* (Repl. Vol. 2000).

470. *See id.*

to the husband and wife and would not, for example, prevent disclosure by a third party who overheard their conversation.<sup>471</sup> Finally, and most importantly, it related only to testimony and did not prevent introduction of written confidential communications between husband and wife.<sup>472</sup> These and other issues were addressed by the General Assembly in the amendment as follows: "In any civil proceeding, a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication between his spouse and him during their marriage."<sup>473</sup> The foregoing privilege is not capable of assertion "in any proceeding in which the spouses are adverse parties, or in which either spouse is charged with a crime or tort against the person or property of the other or against the minor child of either spouse."<sup>474</sup>

The General Assembly also adopted significant new procedures regarding medical malpractice actions.<sup>475</sup> These acts amended Virginia Code sections 8.01-399 and 8.01-581.1 and added new Virginia Code sections 8.01-20.1, 8.01-50.1, 8.01-52.1, 8.01-581.20:1, 16.1-83.1, 38.2-2228.2 and 54.1-2912.3.<sup>476</sup> All of the foregoing center around two fundamental changes. As exemplified by the new Virginia Code section 8.01-20.1, the service of a motion for judgment alleging medical malpractice is deemed to be a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness, a written opinion signed by the expert that, "based upon a reasonable understanding of the facts, the defendant . . . [has] deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed."<sup>477</sup>

The "certification is not necessary if the plaintiff, in good faith, alleges . . . a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the

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471. *See id.*

472. *See id.*

473. Act of Mar. 26, 2005, ch. 809, 2005 Va. Acts 1342 (codified as amended at VA. CODE ANN. § 8.01-398 (Cum. Supp. 2005)).

474. VA. CODE ANN. § 8.01-398 (Cum. Supp. 2005).

475. Act of Mar. 23, 2005, ch. 649, 2005 Va. Acts 905 (codified as amended at VA. CODE ANN. §§ 8.01-399, -581.1, -20.1, -50.1, -52.1, -581.20:1, 16.1-831, 38.2-2228.2 (Cum. Supp. 2005), 54.1-2912.3 (Repl. Vol. 2005)).

476. *Id.*

477. VA. CODE ANN. § 8.01-20.1 (Cum. Supp. 2005).

range of the jury's common knowledge and experience."<sup>478</sup> The certifying expert is not required to be an expert witness at trial, and the defendant is not entitled to discover the identity of the certifying expert or the nature of the certifying expert's opinions.<sup>479</sup> If the certifying expert is identified as an expert expected to testify at trial, then the expert's opinions are discoverable as provided in Supreme Court of Virginia Rule 4:1 with the exception of the expert's status as a certifying expert.<sup>480</sup>

Upon written request of the defendant, the plaintiff is required within ten days to provide written affirmation that plaintiff had obtained the necessary certification prior to requesting service or that plaintiff did not need to obtain a certifying opinion.<sup>481</sup> Failure to comply with this section is grounds for imposition of sanctions under Virginia Code section 8.01-271.1, and, more importantly, the court is empowered to "dismiss the case with prejudice."<sup>482</sup> Comparable provisions were made with respect to wrongful death actions<sup>483</sup> and malpractice cases in the general district courts.<sup>484</sup>

The second major change relates to expressions of sympathy by health care providers. New Virginia Code section 8.01-581.20:1 provides that "statements, writings, affirmations, benevolent conduct, or benevolent gestures" which constitute an expression of sympathy or "general sense of benevolence" made by a health care provider or agent of a health care provider to a patient, relative of a patient, or representative of a patient "shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest" in any action arising out of an "unanticipated outcome of health care."<sup>485</sup> Significantly, "[a] statement of fault that is part of or in addition to any of the above shall not be made inadmissible by this section."<sup>486</sup> Similar provisions were added with respect to wrongful death actions by new Virginia Code section 8.01-52.1.<sup>487</sup>

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478. *Id.*

479. *Id.*

480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.* § 8.01-50.1 (Cum. Supp. 2005).

484. *Id.* § 16.1-83.1 (Cum. Supp. 2005).

485. *Id.* § 8.01-581.20:1 (Cum. Supp. 2005).

486. *Id.*

487. *Id.* § 8.01-52.1 (Cum. Supp. 2005).

There was also a revision to Virginia Code section 8.01-399 regarding information subject to discovery. Formerly, the statute provided that the “diagnosis or treatment plan” documented in the medical record was subject to discovery.<sup>488</sup> This language has been expanded to include “diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan.”<sup>489</sup> Such information must be “contemporaneously documented during the course of the practitioner’s treatment.”<sup>490</sup>

The General Assembly added new Virginia Code section 8.01-413.02 dealing with admissibility of blood alcohol tests in civil cases.<sup>491</sup> Previously, Virginia Code section 19.2-187.02 permitted introduction of such records under the business records exception to the hearsay rule in certain criminal cases involving intoxication.<sup>492</sup> That rule has now been extended to “any civil proceeding.”<sup>493</sup> Moreover, Virginia Code section 19.2-187.02 had referenced “written results” of blood alcohol tests.<sup>494</sup> Both statutes now provide that written “reports or records” of such tests may be admitted.<sup>495</sup> Both statutes also contain a provision providing that the patient’s consent or authorization is not required and exempting such disclosure from all laws relating to confidentiality of patient records.<sup>496</sup>

Virginia Code section 8.01-417 has long provided that an injured party can obtain a copy of his own witness statement provided to any other party.<sup>497</sup> In 2004, the statute was amended to add subsection B relating to documents obtained by subpoena duces tecum.<sup>498</sup> The General Assembly amended the statute by inserting “[u]nless otherwise ordered for good cause shown” and

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488. *Id.* § 8.01-399 (Repl. Vol. 2000).

489. *Id.* (Cum. Supp. 2005).

490. *Id.*

491. Act of Mar. 26, 2005, ch. 801, 2005 Va. Acts 1337 (codified as amended at VA. CODE ANN. § 8.01-413.02 (Cum. Supp. 2005)).

492. VA. CODE ANN. § 19.2-187.02 (Repl. Vol. 2004).

493. *Id.* § 8.01-413.02 (Cum. Supp. 2005).

494. *Id.* § 19.2-187.02 (Cum. Supp. 2005).

495. *Id.* §§ 8.01-413.02, 19.2-187.02 (Cum. Supp. 2005).

496. *Id.*

497. *Id.* § 8.01-417 (Cum. Supp. 2005).

498. *Id.*

by deleting the description of the documents subject to the statute as “concerning another party.”<sup>499</sup>

Virginia Code section 8.01-506 relates to conducting interrogatories of a debtor to ascertain his estate subject to execution in satisfaction of a judgment.<sup>500</sup> A new Virginia Code section 8.01-506.2 has been added permitting a debtor’s interrogatories to be conducted in a county or city where the debtor resides or in any county or city contiguous thereto.<sup>501</sup> In order to invoke this procedure, the judgment creditor is required to file in the court in which the debtor’s interrogatories will be conducted an abstract of the judgment and pay any fees required under Virginia Code section 16.1-69.48:2 or 17.1-275.<sup>502</sup> The court is then empowered to issue a summons for the debtor’s interrogatories and any subsequent executions on the judgment.<sup>503</sup> The creditor must file any releases or certificates of satisfaction with both courts.<sup>504</sup>

Virginia Code section 8.01-607 now provides that commissioners may be appointed by agreement of the parties, motion of either party or on the court’s own motion, but in any event with a finding of good cause made in the individual case.<sup>505</sup> This statute overturns prevalent local practices of automatically referring certain types of cases, e.g., equitable distribution, to Commissioners in Chancery.<sup>506</sup>

Virginia Code section 16.1-69.55 deals with retention of records and enforcement of judgments of the general district courts.<sup>507</sup> The general rule as specified in subsection (B)(2) is that general district court judgments are valid and enforceable for ten years.<sup>508</sup> Subsection (B)(4) was substantially rewritten by the General Assembly.<sup>509</sup> The statute previously provided that a judgment creditor may docket a general district court judgment on the judgment

499. Act of Mar. 20, 2005, ch. 211, 2005 Va. Acts 304 (codified as amended at VA. CODE ANN. § 8.01-417(B) (Cum. Supp. 2005)).

500. VA. CODE ANN. § 8.01-506 (Cum. Supp. 2005).

501. *Id.* § 8.01-506.2 (Cum. Supp. 2005).

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.* § 8.01-607 (Cum. Supp. 2005).

506. *Id.*

507. *Id.* § 16.1-69.55 (Cum. Supp. 2005).

508. *Id.*

509. Act of Mar. 20, 2005, ch. 135, 2005 Va. Acts 231 (codified as amended at VA. CODE ANN. § 16.1-69.55(B)(4) (Cum. Supp. 2005)).

lien docket of the circuit court.<sup>510</sup> The statute was unclear as to when and for how long the executions would continue to issue from the general district court after the judgment had been docketed with the circuit court. Executions may now continue to be issued by the general district court for the remaining time permitted by Virginia Code section 16.1-94.1 without limitation and thereafter by filing with the general district court an abstract of the judgment from the circuit court.<sup>511</sup> In all other respects, the docketing of a general district court judgment with the circuit court confers upon the judgment the same status as a circuit court judgment.<sup>512</sup>

Virginia Code section 16.1-88.03 regulates the filing of pleadings and other papers by pro se parties.<sup>513</sup> The General Assembly added subsection D, which requires a pro se party to promptly inform the court where the litigation is pending of any change of address and to provide that, in the absence of such notification, mailing to, or service at, the most recent address contained in the court file shall be deemed effective.<sup>514</sup>

The General Assembly also enacted certain modifications to eminent domain procedures under Title 25.1 of the Virginia Code. Most significantly, where a landowner is awarded thirty percent over the condemnor's pre-condemnation offer, in addition to just compensation for the take and damages, if any, to the residue, the landowner is entitled to recovery of fees and costs of expert appraisers and engineers in the case.<sup>515</sup> A provision for recovery of attorneys' fees where the condemnor has made a grossly inadequate pre-condemnation offer was defeated.

Virginia Code section 34-29 sets forth limitations on the maximum portion of disposable earnings subject to garnishment.<sup>516</sup> Previously, the limitation was the lesser of twenty-five percent of disposable earnings or the amount in excess of thirty times the

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510. VA. CODE ANN. § 16.1-69.55(B)(4) (Repl. Vol. 2003).

511. *Id.* (Cum. Supp. 2005).

512. *Id.*

513. *Id.* § 16.1-88.03 (Cum. Supp. 2005).

514. Act of Mar. 20, 2005, ch. 136, 2005 Va. Acts 232 (codified as amended at VA. CODE ANN. § 16.1-88.03(D) (Cum. Supp. 2005)).

515. VA. CODE ANN. § 25.1-203(E), -245(C) (Cum. Supp. 2005).

516. *Id.* § 34-29 (Repl. Vol. 2005).



federal minimum wage.<sup>517</sup> The latter limitation has now been increased to forty times the federal minimum wage.<sup>518</sup>

Finally, the General Assembly modified the procedural deadlines applicable to actions before the Workers Compensation Commission under the Birth Injury Compensation Program.<sup>519</sup> Previously, the program filed its response within thirty days of service.<sup>520</sup> Now it is not required to respond until ten days after submission of the three-physician panel report with the Commission.<sup>521</sup> After the program files its response, the hearing date is set, no sooner than fifteen days, nor more than ninety days after the filing of the Program's response.<sup>522</sup> Previously, these deadlines were keyed to the filing date of the petition and were forty-five and 120 days, respectively.<sup>523</sup>

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517. *Id.*

518. *Id.* § 34-29(a)(2) (Repl. Vol. 2005).

519. Act of Mar. 20, 2005, chs. 50, 52, 2005 Va. Acts 124, 125 (codified as amended at VA. CODE ANN. §§ 38.2-5004, -5006 (Cum. Supp. 2005)).

520. VA. CODE ANN. § 38.2-5004(D) (Repl. Vol. 2002).

521. *Id.* (Cum. Supp. 2005).

522. *Id.* § 38.2-5006 (Cum. Supp. 2005).

523. *Id.* (Repl. Vol. 2002).