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Annual Survey of Virginia Law: Civil Procedure and Practice

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CIVIL PRACTICE AND PROCEDURE

*George J. Dancigers**
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I. INTRODUCTION

This article reviews recent developments and changes in legislation, case law, and Virginia Supreme Court Rules affecting civil litigation. The scope of the paper does not extend to criminal procedure or topics unique to equity practice.

II. NONSUITS

A. *Wrongful Death Actions*

The most controversial issue in the area of civil procedure this year was whether the general nonsuit statute¹ and the tolling provisions of section 8.01-229(E)(3)² of the Code of Virginia ("Code") apply to wrongful death actions.

The tolling provisions of section 8.01-229(E)(3) of the Code provide that when a plaintiff takes a nonsuit under section 8.01-380, he may refile his action either within six months from the date he took the nonsuit, or within the remainder of the original limitation period, whichever is longer.

In *Dodson v. Potomac Mack Sales & Service, Inc.*,³ the Supreme Court of Virginia held that a wrongful death action, which is purely a creature of statute,⁴ is not subject to the tolling provisions of section 8.01-229(E)(3) of the Code. Rather, wrongful death actions are governed by the specific, particularized statute of limitations and tolling provisions set out in section 8.01-244(B) of the Code as it existed prior to recent amendment.⁵ The *Dodson* court

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1. VA. CODE ANN. § 8.01-380 (Cum. Supp. 1991).

2. *Id.* § 8.01-229(E)(3).

3. 241 Va. 89, 400 S.E.2d 178 (1991).

4. VA. CODE ANN. §§ 8.01-50 to 8.01-56 (Repl. Vol. 1984).

5. Former § 8.01-244(B) of the Code provided:

unanimously affirmed the dismissal of two wrongful death actions where the plaintiffs had taken nonsuits and then refiled their actions before the two-year wrongful death limitation period expired, but not within the six months specified in the statute.⁶

In response to *Dodson*, the General Assembly passed an amendment to section 8.01-244(B) of the Code which allows a plaintiff in a wrongful death action to recommence his action either within six months from taking the nonsuit or within the remaining statutory period, whichever is longer.⁷

The drafters of the amendment, which became effective July 1, 1991, stated that the provisions were "declaratory of the original intent of the General Assembly in enacting Chapter 617 of the 1977 Acts of Assembly," which includes section 8.01-244 of the Code.⁸ This "declaration of original intent" language has been construed as the General Assembly's attempt to make the revised act retroactive to actions time-barred under the *Dodson* rule.

The passage of the new tolling provisions for wrongful death actions prompted plaintiffs in four cases to attempt to revive time-barred wrongful death actions in the circuit courts. Unsuccessful in the circuit courts, these plaintiffs filed petitions for appeal with the Supreme Court of Virginia. The supreme court, by order of July 31, 1991, refused all four petitions for appeal.⁹

In denying the petitions for appeal, the supreme court stated that the respective circuit courts had properly held that the tolling

Every action under § 8.01-50 shall be brought by the personal representative of the decedent within two years after the death of the injured person. If any such action is brought within such period of two years after such person's death and for any cause abates or is dismissed without determining the merits of such action, the time such action is pending shall not be counted as any part of such period of two years and another action may be brought within the remaining period of such two years as if such former action had not been instituted.

VA. CODE ANN. § 8.01-244(B) (Repl. Vol. 1984 & Cum. Supp. 1991). As of July 1, 1991, the following provision was added to § 8.01-244(B): "[h]owever if a plaintiff suffers a voluntary nonsuit pursuant to § 8.01-380, the nonsuit shall not be deemed an abatement nor a dismissal pursuant to this subsection, and the provisions of subdivision (E)(3) of § 8.01-229 shall apply to such a nonsuited action." *Id.* § 8.01-244(B) (Cum. Supp. 1991).

6. *Dodson*, 241 Va. at 95, 400 S.E.2d at 181.

7. VA. CODE ANN. § 8.01-244(B) (Cum. Supp. 1991); see *supra* note 5.

8. VA. CODE ANN. § 8.1-244(B) (ed. note).

9. *Brewer v. Miller*, No. 910638 (City of Norfolk Cir. Ct. writ denied July 31, 1991); *Flanagan v. Virginia Beach Gen. Hosp.*, No. 910586 (City of Va. Beach Cir. Ct. writ denied July 31, 1991); *Hendrix v. Children's Hosp. of the King's Daughters*, No. 910587 (City of Norfolk Cir. Ct. writ denied July 31, 1991); *Peppers v. Anthony*, No. 910831 (County of Chesterfield Cir. Ct. writ denied July 31, 1991).

provisions of the nonsuit statute were inapplicable to these wrongful death actions because section 8.01-244(B), as it read prior to the amendments effective July 1, 1991, controlled.¹⁰ However, the court did not address the "declaration of original intent" language of the new tolling provisions of section 8.01-244.

B. *Nonsuits and Rule 3:3(c)*

*Clark v. Butler Aviation-Washington National, Inc.*¹¹ laid to rest the apparent conflict between Rule 3:3 of the Rules of Supreme Court of Virginia¹² and the nonsuit statute.¹³ Rule 3:3(c) requires dismissal of an action if the defendant is not served within one year of the action being filed, unless the plaintiff can show that he exercised "due diligence" when attempting service.¹⁴

Section 8.01-380(A) of the Code entitles the plaintiff to take a nonsuit as to any cause of action either "before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision."¹⁵ In addition, section 8.01-229(E)(3) of the Code provides that a plaintiff who has nonsuited may refile his action either within six months or the period remaining under the applicable statute of limitations, whichever period is longer.¹⁶ This section also tolls the statute of limitations during the pendency of the first action.

In *Clark v. Butler Aviation-Washington National, Inc.*,¹⁷ the plaintiff filed suit on the eve of the expiration of the statute of limitations, delayed service for one year, nonsuited the first suit, and then re-filed a new case on the same claim within six months of the nonsuit. After being served in the second case, the defendant filed a plea asserting that the plaintiff's claim was barred by Rule 3:3(c). The trial court sustained the plea and dismissed the plaintiff's motion for judgment with prejudice.¹⁸

On appeal, the supreme court reversed the trial court. In its de-

10. *Id.*

11. 238 Va. 506, 385 S.E.2d 847 (1989).

12. VA. SUP. CT. R. 3:3(c).

13. VA. CODE ANN. § 8.01-380 (Cum. Supp. 1991).

14. VA. SUP. CT. R. 3:3(c).

15. VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 1991).

16. *Id.* § 8.01-229(E)(3).

17. 238 Va. 506, 385 S.E.2d 847 (1989).

18. *Id.* at 508, 385 S.E.2d at 847.

cision, the court attempted to resolve the "rule-statute dichotomy" created by the dismissal language in Rule 3:3(c) and the nonsuit statute.¹⁹ The court held that section 8.01-229(E)(3) of the Code tolled the statute of limitations during pendency of the first action; but because the defendant was not served in a timely fashion, "Rule 3:3 forbade entry of any judgment" against him in that action. Thus, the plaintiff terminated the first action by nonsuit pursuant to section 8.01-380 of the Code, and then as dictated by section 8.01-229(E)(3).²⁰

In the *Clark* case, the supreme court resolved the conflict between section 8.01-229(E)(3) of the Code and Rule 3:3(c) by holding, in effect, that when a nonsuit is taken, the dismissal mandated by Rule 3:3(c) is without prejudice. However, the supreme court has dismissed a case with prejudice under Rule 3:3(c). This occurred where the plaintiff had obtained a default judgment through what was found to be ineffective service on the defendant. In *Dennis v. Jones*,²¹ the plaintiff filed an affidavit with the Department of Motor Vehicles (DMV) claiming that the defendant was a nonresident, and thus served process on the DMV as statutory agent for the defendant.²² However, the defendant was not a non-resident, she had merely moved to another part of town. The court held that the plaintiff failed to use the diligence required for service under section 8.01-316 since the plaintiff could have easily ascertained the defendant's address. As a result, the court ruled the default judgment void and dismissed the suit with prejudice.²³

C. Nonsuits and Dispositive Motions

At least one circuit court has held that where a demurrer is sustained and the trial court has granted leave to amend the motion for judgment, the plaintiff is entitled to take a nonsuit at any time up until the case is submitted to the court after an argumentary motion to dismiss, even if the deadline for filing the amended pleadings has expired.²⁴ Although this case had indisputably been

19. 238 Va. at 511, 385 S.E.2d at 849.

20. *Id.* at 511-512, 385 S.E.2d at 849-850.

21. 240 Va. 12, 393 S.E.2d 390 (1990).

22. *Id.* at 18, 393 S.E.2d at 393.

23. *Id.* at 19-20, 393 S.E.2d at 394.

24. *Chandler v. Signet Bank/Va.*, 20 Va. Cir. 447 (City of Richmond Cir. Ct. 1990). The opinion in this case contains an interesting discussion of *Wells v. Lorcum House Condominiums' Council of Co-Owners*, 237 Va. 247, 377 S.E.2d 381 (1989); *City of Hopewell v. Cogar*, 237 Va. 264, 377 S.E.2d 385 (1989); and *Khanna v. Dominion Bank*, 237 Va. 242, 377 S.E.2d

“submitted to the court for decision” under section 8.01-380(A) of the Code, the court allowed the plaintiff to take a nonsuit, reasoning that it had ruled on the demurrer in such a manner that the plaintiff’s claims remained pending.²⁵ Furthermore, a second circuit court has held that a plaintiff can take a nonsuit after a commissioner’s report, and exceptions to it have been filed.²⁶

Additionally, in a medical malpractice action, the supreme court held that when the plaintiff has improperly filed the original suit, within ninety days of the notice of claim, and the defendant has responded with a motion to dismiss, the plaintiff may suffer a voluntary nonsuit and recommence her claim within six months pursuant to section 8.01-229(E)(3) of the Code.²⁷

In *Homeowners Warehouse, Inc. v. Rawlings*,²⁸ presently on appeal, the supreme court will decide whether the case had been “submitted to the court for decision.”²⁹ During the trial, the defendant moved to strike the plaintiff’s evidence in open court; the court then heard full argument on the motion and retired to consider its decision. The court returned sometime later to announce its decision to grant the motion to strike. While the trial judge was explaining the court’s rationale, the plaintiff’s counsel motioned for a nonsuit. The trial court granted the plaintiff’s motion before actually announcing its ruling on the motion to strike.³⁰

III. VENUE

Section 8.01-265 of the Code now permits the court, upon motion of the defendant, to dismiss an action without prejudice upon determining that a more convenient forum exists outside of Virginia. This occurs where the alternate forum has jurisdiction over all the parties, the plaintiff is a non-resident, and the cause of action arose outside of Virginia.³¹ Upon granting a motion to dismiss under this statute, the court must impose a condition which pro-

378 (1989). These three cases were decided on the same day and interpreted the “submitted to the court for decision” language of § 8.01-380(A) of the Code.

25. *Chandler*, 20 Va. Cir. at 452.

26. *Nelson-White Constr. Mfg. Corp. v. Foster, Inc.*, 18 Va. Cir. 345 (County of Chesterfield Cir. Ct. 1989).

27. *Morrison v. Bestler*, 239 Va. 166, 387 S.E.2d 753 (1990).

28. Record No. 901353 (City of Va. Beach Cir. Ct. argued June 3, 1991).

29. See VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 1991).

30. Appellant’s Brief at 4-5, *Homeowners Warehouse, Inc. v. Rawlings*, Record No. 901353 (June 3, 1991).

31. VA. CODE ANN. § 8.01-265 (Cum. Supp. 1991).

hibits the defendant from raising the statute of limitations to bar the action in the new forum. This section applies only to actions filed after July 1, 1991.³²

If a plaintiff recommences an action in an improper venue after suffering a nonsuit, section 8.01-380(A) of the Code specifies that the case is not to be dismissed, but rather, is to be transferred to the proper venue.³³ Section 8.01-264(D) of the Code grants the trial court judge the authority to transfer suits for divorce or annulment to the proper venue *sua sponte*.³⁴

In *Norfolk & Western Railway Co. v. Williams*,³⁵ the supreme court held that the trial court abused its discretion when it refused to grant the defendant's motion to transfer a personal injury case to the forum where the accident occurred. The court found that the venue where the case was filed was "proper" because the railroad conducted business there. However, because that forum had "no practical nexus whatsoever" with the plaintiff's action, the court concluded that the case should have been transferred to a more convenient forum under section 8.01-265 of the Code.³⁶

While the plaintiff generally has the discretion to file suit in a permissible venue, once he has filed the action he cannot request a transfer of venue to a more convenient forum.³⁷ Additionally, a

32. VA. CODE ANN. § 8.01-265. Former § 8.01-265 of the Code, which prohibited dismissal of actions from a permissible venue when a more convenient forum existed outside the state, was held to be constitutionally sound. See *Caldwell v. Seaboard Sys. R.R.*, 238 Va. 148, 380 S.E.2d 910 (1989), *cert. denied*, 110 S. Ct. 1169 (1990).

33. VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 1991).

34. *Id.* § 8.01-264(D).

35. 239 Va. 390, 389 S.E.2d 714 (1990) (plaintiff, a railroad employee injured while working in an office in Roanoke, brought an FELA action in Portsmouth where the railroad conducted business).

36. *Id.* at 396, 389 S.E.2d 717-718. *Williams* was followed in *Grubbs v. Southern Ry. Co.*, 19 Va. Cir. 367 (City of Richmond Cir. Ct. 1990); *Virginia Radiology Ass'n v. Culpeper Memorial Hosp.*, 21 Va. Cir. 157 (County of Fairfax Cir. Ct. 1990); *Slone v. Hickcock*, 20 Va. Cir. 325 (City of Roanoke Cir. Ct. 1990); *Nales v. Southern Ry. Co.*, 20 Va. Cir. 393 (City of Richmond Cir. Ct. 1990). *Williams* is discussed in *Dominion Leasing Corp. v. Bella Pasta, Ltd.*, 20 Va. Cir. 331 (City of Roanoke Cir. Ct. 1990) (where the court gave effect to forum selection clauses contained in the contracts sued upon); *Honeycutt v. Southern Ry. Co.*, 21 Va. Cir. 427 (City of Richmond Cir. Ct. 1990) (forum to which defendant sought transfer held no more inconvenient than the plaintiff's chosen forum); see also *Thompson v. Robertshaw Controls Co.*, 19 Va. Cir. 370 (City of Richmond Cir. Ct. 1990); *Marshall v. Frawner*, 19 Va. Cir. 258 (County of Albemarle Cir. Ct. 1990).

37. Compare *Ellis v. Robertson*, 18 Va. Cir. 417 (County of Chesterfield Cir. Ct. 1990) with *Brammer v. State Highway Comm'r*, 2 Va. Cir. 18 (City of Richmond Cir. Ct. 1980) (where the court granted plaintiff's motion to transfer to a "preferred venue" under § 8.01-261 of the Code).

motion objecting to venue cannot be made on an appeal to the circuit court, where no such motion was made in the general district court.³⁸

IV. APPEALS

Rule 5:25 of the Supreme Court of Virginia provides that the supreme court will not sustain error to any ruling of the trial court unless "the objection was stated with reasonable certainty at the time of the ruling."³⁹ While formal exceptions to rulings or orders are unnecessary, section 8.01-384 of the Code requires that at the time the ruling or order is made or sought, the party must inform the court of the action which he desires the court to take, or of his objections and the grounds therefor.⁴⁰

When interpreting Rule 5:25 and section 8.01-384 of the Code, the supreme court has held that where a party has endorsed a final order as "Seen," yet fails to make further objection or endorsement, there is not sufficient action to preserve the party's right to appeal.⁴¹ However, the supreme court reached a different conclusion in *Weidman v. Babcock*.⁴² In *Weidman*, the plaintiff's counsel endorsed as "SEEN" an order sustaining the defendant's motion to dismiss.⁴³ During the twenty-one day period after the order was entered, the plaintiffs filed a motion for rehearing, which the court denied. The order denying the motion for rehearing was endorsed "SEEN: and all Exceptions noted."⁴⁴ The supreme court found that the "all Exceptions noted" language on the final order, coupled with the plaintiff repeatedly making his position known to the trial court during oral argument on the motion to dismiss, was sufficient to preserve the plaintiff's right of appeal.⁴⁵

In a slightly different situation, when an appellate court reverses the trial court on an issue of law, and there is nothing in the record

38. *Dehkordi v. Kelley*, 21 Va. Cir. 375 (County of Fairfax Cir. Ct. 1990) (court also held that a motion objecting to venue must state where venue would be proper).

39. VA. SUP. CT. R. 5:25.

40. VA. CODE ANN. § 8.01-384 (Repl. Vol. 1984).

41. *Langley v. Meredith*, 237 Va. 55, 61-62, 376 S.E.2d 519, 522 (1989).

42. 241 Va. 40, 400 S.E.2d 164 (1991).

43. *Id.*

44. *Id.* at 43, 400 S.E.2d at 166.

45. *Id.* at 44, 400 S.E.2d at 167; see also *Reid v. Baumgardner*, 217 Va. 769, 773, 232 S.E.2d 778, 780 (1977) (holding that the main purpose of requiring timely, specific objections is to afford the trial court an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals).

to contradict the plaintiff's evidence supporting his claim, section 8.01-681 of the Code⁴⁶ allows the appellate court to enter final judgment without the necessity of further proceedings.⁴⁷ However, in reversing the trial court, the appellate court may not reweigh the evidence or substitute its factual judgment for that of the trial court.⁴⁸

After twenty-one days from entry of a final order, the trial court loses its jurisdiction to disturb the judgment,⁴⁹ except under the special circumstances described in section 8.01-428 of the Code.⁵⁰ Neither the filing of post-trial motions, the filing of post-judgment motions, nor the court's consideration of such motions is sufficient to toll the twenty-one-day finality period or the thirty-day notice of appeal period set forth in Rule 5:9.⁵¹

V. RES JUDICATA AND COLLATERAL ESTOPPEL

The principles of res judicata and collateral estoppel are often confusing to practitioners. To help alleviate this confusion, the supreme court attempted, in *Snead v. Bendigo*,⁵² to define the distinction between the two defenses. According to the court, a party may avail himself of the defense of res judicata where he can show that a given cause of action or issue has been, or could have been, litigated in a previous lawsuit.⁵³ Collateral estoppel, on the other hand, applies when *different* causes of action are involved.⁵⁴ Under the principles of collateral estoppel, a party cannot re-litigate any issue of fact which was "actually litigated" in a previous action,

46. VA. CODE ANN. § 8.01-681 (Repl. Vol. 1984).

47. *Tyson's Int'l v. Board of Supervisors*, 241 Va. 5, 400 S.E.2d 151 (1991).

48. *School Bd. v. Beasley*, 238 Va. 44, 380 S.E.2d 884 (1989) (supreme court reversed judgment of court of appeals).

49. VA. SUP. CT. R. 1:1.

50. VA. CODE ANN. § 8.01-428 (Cum. Supp. 1984).

51. *School Bd. v. Caudill Rowlett Scott Inc.*, 237 Va. 550, 556, 379 S.E.2d 319, 323 (1989); see VA. SUP. CT. R. 5:5(a) and 5A:3(a).

52. 240 Va. 399, 397 S.E.2d 849 (1990); see also *Pugh v. Minter*, 21 Va. Cir. 263 (City of Charlottesville Cir. Ct. 1990) (res judicata and collateral estoppel distinguished).

53. *Caudill Rowlett Scott, Inc.*, 237 Va. at 401, 397 S.E.2d at 850 (emphasis in original); see also *Hampton Roads Sanitation Dist. v. City of Va. Beach*, 240 Va. 209, 396 S.E.2d 656 (1990); *Nottingham v. Weld*, 237 Va. 416, 377 S.E.2d 621 (1989) (previous federal court action barred claim); *Wright v. Castles*, 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986); *Bates v. Devers*, 214 Va. 667, 671, 202 S.E.2d 917, 920-21 (1974); *Mowry v. City of Va. Beach*, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956); *Darling v. Upton*, 21 Va. Cir. 161 (County of Fairfax Cir. Ct. 1990) (suit held barred by res judicata where claim should have been litigated as compulsory counterclaim in previous federal court action).

54. *Snead*, 240 Va. at 401, 397 S.E.2d at 850.

provided that the issue was "essential to a valid, final, personal judgment in the first action."⁵⁵

Snead involved a physician who obtained a judgment for unpaid fees in general district court. At the trial, the defendant told the court that he did not owe the debt because, when treating the defendant's broken leg, the physician had caused him more damage than good. Without ruling on the issue of the propriety of the physician's treatment, the court entered judgment for the physician.⁵⁶ When the patient later filed a medical malpractice action against the same physician in circuit court, the physician argued that the patient was collaterally estopped from raising the issue of the physician's negligence because it had been previously litigated in the general district court and decided adversely to the patient.⁵⁷ The trial court sustained the plea and dismissed the malpractice case.⁵⁸

The supreme court, reversing the trial court, held that defenses to affidavits of account must be in writing.⁵⁹ Thus, the defendant's oral allegations of the physician's negligence were not properly "in issue" at the general district court trial.⁶⁰ Since a matter not in issue cannot be "actually litigated," the doctrine of collateral estoppel did not apply and the medical malpractice case was therefore remanded for further proceedings.⁶¹

In another case, the supreme court held that a second action is not barred by the doctrine of res judicata where the first action was erroneously dismissed before the plaintiff had an opportunity to prove the elements of his case.⁶² When the first action is reversed on appeal, no final judgment exists, and therefore the principles of res judicata do not apply.⁶³

55. *Id.*

56. *Id.* at 400-401, 397 S.E.2d at 850.

57. *Id.* at 401, 397 S.E.2d at 850.

58. *Id.*

59. *Id.* at 402, 396 S.E.2d at 851. Section 8.01-28 of the Code, effective July 1, 1991, now provides that defendant's denial, in response to plaintiff's affidavit and statement of account, need not be in writing; thus appearing to reverse the holding in *Snead v. Bendigo*. See VA. CODE ANN. § 8.01-28 (Cum. Supp. 1991).

60. *Snead*, 240 Va. at 402, 397 S.E.2d at 851.

61. *Id.*

62. *Lucas v. HCMF Corp.*, 238 Va. 446, 384 S.E.2d 92 (1989).

63. *Id.* at 450-451; 384 S.E.2d at 94.

VI. SANCTIONS UNDER SECTION 8.01-271.1 OF THE CODE OF VIRGINIA

Since the enactment of section 8.01-271.1 of the Code⁶⁴ in 1987, the Supreme Court of Virginia has issued two opinions interpreting the act.⁶⁵ In both of those cases the supreme court reversed the sanctions which had been imposed by the trial court pursuant to the act.

In the first case, *Tullidge v. Board of Supervisors*,⁶⁶ the court held that when determining whether an attorney has violated the "warranted by existing law" portion of section 8.01-271.1 of the Code, the court must apply an objective standard of reasonableness.⁶⁷ In other words, the party seeking sanctions must show that "a competent attorney, after reasonable inquiry could not have formed a reasonable belief that [his client's] contention was warranted by existing law."⁶⁸ The court further stated that any doubts regarding the reasonableness of a claim should be resolved in favor of the attorney against whom sanctions are sought; and that the court should avoid using the wisdom of hindsight in its decision.⁶⁹

When the supreme court applied this objective standard in *Tullidge*, it concluded that under legal precedent existing at the time the appellant attorney presented his case, he could have reasonably believed that his client had a valid claim. The court, therefore, reversed the trial court's sanctions against the attorney.⁷⁰

In *County of Prince William v. Rau*,⁷¹ decided the same day as *Tullidge*, the supreme court applied the same objective standard to a party litigant as it did to an attorney. Again, the court concluded that sanctions imposed by the trial court were improper because the party had acted reasonably under the law and the existing

64. Section 8.01-271.1 of the Code requires attorneys and parties not represented by counsel to certify to the court that all pleadings and motions are made in good faith and not for any improper purpose. The statute requires the judge, upon finding a violation, to impose appropriate sanctions, including reasonable attorneys' fees, upon the offending party, or lawyer, or both. See VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1991).

65. *Tullidge v. Board of Supervisors*, 239 Va. 611, 391 S.E.2d 288 (1990); *County of Prince William v. Rau*, 239 Va. 616, 391 S.E.2d 290 (1990).

66. *Id.*

67. *Tullidge*, 239 Va. at 614, 391 S.E.2d at 289-90.

68. *Id.* at 614, 391 S.E.2d at 290.

69. *Id.*

70. *Id.* at 614-615, 391 S.E.2d at 290.

71. 239 Va. 616, 391 S.E.2d 290 (1990).

circumstances.⁷²

In recent years, the circuit courts have imposed sanctions against: (1) an attorney who repeatedly filed motions not well grounded in fact or in law;⁷³ (2) a plaintiff who filed a frivolous custody suit;⁷⁴ and, (3) an attorney who prosecuted a medical malpractice claim against a hospital without expert testimony to support his client's claim.⁷⁵ However, a court denied sanctions in a case where the plaintiff's attorney filed suit against the wrong defendant because the attorney was found to have reasonably relied on information furnished by his client.⁷⁶

Also, circuit courts have held that a motion for sanctions under section 8.01-271.1 of the Code survives a nonsuit of the underlying action.⁷⁷ Thus, a party may seek sanctions under the act in an action separate from that in which the allegedly prohibited conduct took place.⁷⁸

VII. CHANGES IN THE SUPREME COURT RULES

This section of the article reviews the important changes in the Rules of Supreme Court of Virginia that apply to civil practice and procedure during the period from July 1, 1989 to July 1, 1991.

Effective September 1, 1990, Rule 4:1,⁷⁹ which covers the general discovery provisions, underwent extensive modifications. First, Rule 4:1(b)(1)⁸⁰ now gives the circuit court broad authority to restrict and control discovery in civil litigation. It provides that the court shall limit the frequency or extent of use of all discovery methods whenever the court determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from a more convenient, less burdensome or less expensive source; (ii) the party seeking discovery has had ample op-

72. *Id.* at 620-621, 391 S.E.2d at 293.

73. *Bremner, Baber and Janus v. Morrissey*, 19 Va. Cir. 324 (City of Richmond Cir. Ct. 1990).

74. *Day v. Day*, 19 Va. Cir. 14 (County of Fairfax Cir. Ct. 1989).

75. *Dolan v. Barnes*, 19 Va. Cir. 76 (City of Alexandria Cir. Ct. 1989).

76. *Frantz's Auto. Serv. v. Crabtree*, 21 Va. Cir. 443 (County of Fairfax Cir. Ct. 1990).

77. *Community Bank & Trust Co. of Va. v. Turk*, 20 Va. Cir. 378 (County of Loudoun Cir. Ct. 1990).

78. *Surovell, Jackson, Colten & Dugan, P.C. v. Dawson*, 18 Va. Cir. 392 (County of Fairfax Cir. Ct. 1990).

79. VA. SUP. CT. R. 4:1.

80. *Id.* 4:1(b)(1).

portunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.⁸¹

The court may impose limitations under Rule 4:1(b)(1) upon its own motion or by motion of a party.⁸²

Prior to this amendment to Rule 4:1(b)(1), the court was not authorized to limit the use and frequency of discovery, except under special circumstances where protective orders were mandated by Rule 4:1(c).⁸³

Second, Rule 4:1(g)⁸⁴ was rewritten to authorize the trial court to impose sanctions similar to those provided for in section 8.01-271.1 of the Code.⁸⁵ Due to the importance of Rule 4:1(g), it is set forth in its entirety as follows:

(g) *Signing of Discovery Requests, Responses, and Objections.* — Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection, and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these Rules and warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with re-

81. VA. SUP. CT. R. 4:1(b)(1).

82. *Id.*

83. *Id.* 4:1(c).

84. *Id.* 4:1(g).

85. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1991).

spect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.⁸⁶

Although all pleadings, including discovery documents, are still governed by section 8.01-271.1 of the Code, Rule 4:1(g) imposes additional obligations and requirements for certification of discovery requests, responses and objections.⁸⁷

In another area, Rule 3:17,⁸⁸ which governs judgments by default, was amended effective September 1, 1990. The rule now provides that when a defendant fails to file responsive pleadings within the required time, he is not entitled to notice of any further proceedings in the case, "*except that written notice of any further proceedings shall be given to defendant's counsel of record, if any.*"⁸⁹ Prior to the amendment, it was not necessary to notify the defendant's counsel of record of further proceedings when the defendant was in default. "Counsel of record" is defined in Rule 1:5.⁹⁰

As of July 1, 1989, Rule 5:19 was amended to provide that on appeal to the supreme court the appellee may, "*without waiving oral argument,*" file a reply brief addressing any cross-error assigned to the trial court.⁹¹ Despite this addition, the rule retains the language of former Rule 5:19, which provided that when an appellee files a brief in opposition to the petition for appeal, the appellee waives oral argument.⁹²

Rule 5:11(b) was amended to clarify that on appeal to the supreme court the appellant must, within five days after the transcript is filed, give written notice to all counsel of the date the transcript was filed, and file a copy of that notice with the trial

86. VA. SUP. CT. R. 4:1(g).

87. Compare VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1991) with VA. SUP. CT. R. 4:1(g).

88. VA. SUP. CT. R. 3:17.

89. *Id.* (emphasis added).

90. *Id.* 1:5.

91. *Id.* 5:19 (emphasis added).

92. Compare *Id.* 5:19 (Repl. Vol. 1991) with *Id.* 5:19 (Repl. Vol. 1989).

court clerk.⁹³ However, when the transcript is filed prior to the entry of judgment, the appellant must give notice within five days after the notice of appeal is filed.⁹⁴ The same amendment was made to Rule 5A:8(b) for appeals to the court of appeals.⁹⁵

Rule 5A:8(a) was also amended, effective January 1, 1990, to allow a court of appeals judge to extend the sixty-day period for filing of a transcript where good cause is shown, provided that the appellant motions the court for the extension within sixty days after entry of the final judgment.⁹⁶ Also, Rule 5A:8, effective April 1, 1991, provides that the mailing provisions of Rule 5A:3(c) do not apply to Rule 5A:8 motions for extension of time to file the transcript.⁹⁷

An amendment to Rule 5:11(d) dovetails with the change in the Rule for filing of transcripts. The amendment provided that where the transcript is filed prior to the filing of the notice of appeal, the notice of errors or deficiencies in the transcript must be filed within ten days after the notice of appeal has been filed with the trial clerk.⁹⁸ The same amendment was made to Rule 5A:8(d) for appeals to the court of appeals.⁹⁹

Effective July 1, 1991, Rule 5:17(c) is amended to provide that if a petition for appeal does not contain assignments of error, the appeal may be dismissed. The court will only take notice of errors assigned in the petition.¹⁰⁰

VIII. OTHER RECENT DEVELOPMENTS IN LEGISLATION AND CASE LAW

Important legislation and case law has developed in many other areas of law pertaining to civil practice and procedure. For instance, pursuant to section 8.01-229(B)(2) of the Code, where a plaintiff files suit against a defendant in a timely manner, and the defendant subsequently dies, the plaintiff may amend the suit to name the decedent's personal representative either before the expiration of the applicable limitation, or within one year after the

93. VA. SUP. CT. R. 5:11(b).

94. *Id.*

95. *Id.* 5A:8(b).

96. *Id.* 5A:8(a).

97. *Id.*

98. *Id.* 5:11(d).

99. *Id.* 5A:8(d).

100. *Id.* 5:17(c).

qualification of such personal representative, whichever occurs later.¹⁰¹

Section 8.01-6 of the Code allows an amendment, correcting a failure to name a proper party, to relate back to the original filing date of the pleading for purposes of the statute of limitations.¹⁰² However, the back-dated amendment is permissible only where: (1) the added party received notice of the action within the original limitation period; (2) the added party is not prejudiced in maintaining a defense on the merits; (3) the added party knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him; and, (4) the amended pleading asserts a claim arising out of the same situation.¹⁰³

As of July 1, 1990, the statute of limitations will be tolled during any period where the defendant obstructs filing of a suit.¹⁰⁴ Previously, the tolling provision applied only where the defendant avoided service after the plaintiff filed action.¹⁰⁵ "Obstruction" of filing; however, is not defined by the new statute.¹⁰⁶

In actions for injuries resulting from sexual abuse which occurred during the plaintiff's infancy or incompetency, section 8.01-249 of the Code now provides that the two-year statute of limitation period does not begin to run until the plaintiff is informed by a physician or psychologist of the abuse and that it caused the injury.¹⁰⁷ However, the action must be brought within ten years of either the last act of abuse or the removal of the disability, incompetency or infancy, whichever is later.¹⁰⁸

Section 8.01-326.1 of the Code provides that a statutory agent (e.g. Secretary of the Commonwealth, Department of Motor Vehicles, State Corporation Commission) who is served with process or notice must mail a copy of the process or notice to the defendant and file a certificate of compliance with the court. The statute further specifies that service is effective as of the date the certificate

101. VA. CODE ANN. § 8.01-229(B)(2) (Cum. Supp. 1991).

102. *Id.* § 8.01-6 (Cum. Supp. 1991).

103. *Id.*

104. *Id.* § 8.01-229(D).

105. *Id.* § 8.01-229(D) (Repl. Vol. 1984), amended by *id.* § 8.01-229(D) (Cum. Supp. 1991).

106. *Id.* § 8.01-229(D) (Cum. Supp. 1991).

107. *Id.* § 8.01-249.

108. *Id.*

is filed with the appropriate clerk.¹⁰⁹

In the general district court, the follow-up mailing requirement for posted service may be satisfied by mailing a copy of the pleading before or after filing it in the court.¹¹⁰ In the circuit court, the follow-up mailing requirement is satisfied by mailing a copy of the notice of motion for judgment and motion for default judgment, along with a notice that a default judgment may be entered upon expiration of the statutory period.¹¹¹

Section 8.01-377.1 of the Code now authorizes partial summary judgment on severable, uncontested issues.¹¹² However, this is not a change in procedure because prior to the statute's enactment, this authority already existed under Supreme Court Rules 2:21 and 3:18.¹¹³

In a more specific area, interested insurance carriers, the decedent's personal representative, and/or any potential defendant to a wrongful death claim may petition the court to approve a compromise of the claim.¹¹⁴ Previously, only the personal representative could file such a petition.¹¹⁵ Similarly, interested insurers may request court approval of a compromise in claims involving a personal injury of a person under a disability.¹¹⁶ The General Assembly passed these amendments to avoid the potential ethical problem with having defense counsel draft pleadings on behalf of plaintiffs not represented by counsel.¹¹⁷

Section 8.01-424 of the Code has also been amended to allow a judge, when approving a structured settlement for a minor, to designate that payments be placed in trust with a court-designated trustee — a parent or guardian. The trust may be terminated after the minor reaches the age of majority.¹¹⁸

In the area of discovery, section 8.01-420.4 of the Code authorizes depositions to be taken in a county or city within the Commonwealth where a non-party witness resides, is employed, or has

109. VA. CODE ANN. § 8.01-326.1.

110. *Id.* § 8.01-296(2)(b).

111. *Id.*

112. *Id.* § 8.01-377.1.

113. *See* VA. SUP. CT. R. 2:21, 3:18.

114. VA. CODE ANN. § 8.01-55 (Cum. Supp. 1991).

115. *Id.* § 8.01-55 (Repl. Vol. 1984), amended by *id.* § 8.01-55 (Cum. Supp. 1991).

116. *Id.* § 8.01-424 (Cum. Supp. 1991).

117. DIGEST OF ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, at 6 (1991).

118. VA. CODE ANN. § 8.01-424 (Cum. Supp. 1991).

his principal place of business.¹¹⁹ However, this statute conflicts with Supreme Court Rule 4:5(a1), which requires that such depositions be taken where the suit is pending or in an adjacent city or county, except by agreement of the parties or designation by the court where good cause for taking the depositions in another location is shown.¹²⁰ It is presumed that section 8.01-420.4 of the Code will control to the extent that it conflicts with Rule 4:5(a1).

Section 8.01-384.2 of the Code allows parties, without court order, to waive all the deadlines for discovery and responsive pleadings in civil litigation which are mandated by the Rules of Supreme Court of Virginia, unless the court had previously entered an order establishing deadlines for filing or discovery.¹²¹

Also, the plaintiff now has authority to motion the court to set aside a default judgment or decree *pro confesso* if the judgment was proved satisfied.¹²² Prior to July 1, 1991, only the judgment debtor could make this motion.¹²³

In the area of medical malpractice, an amendment to section 8.01-581.9 of the Code specifies that the sixty-day tolling period for the statute of limitations begins to run when the notice of rescission of a request for a medical malpractice review panel is posted by registered or certified mail to the claimant or health care provider, or is delivered by registered or certified mail to the chief justice of the supreme court.¹²⁴ Additionally, the General Assembly amended the definition of "health care provider" to include partnerships, so long as all of the partners are licensed health care providers.¹²⁵

The medical malpractice cap, now set at one million dollars per claim,¹²⁶ has been upheld as constitutional.¹²⁷ The cap applies when the injury is caused by the concurring negligence of two or more health care providers,¹²⁸ regardless of the number of legal theories upon which the claim is based.¹²⁹

119. *Id.* § 8.01-420.4.

120. VA. SUP. CT. R. 4:5(a1).

121. VA. CODE ANN. § 8.01-384.2 (Cum. Supp. 1991).

122. *Id.* § 8.01-428(A).

123. *Id.* § 8.01-428(A) (Repl. Vol. 1984), amended by *id.* § 8.01-428(A) (Cum. Supp. 1991).

124. *Id.* § 8.01-581.9 (Cum. Supp. 1991).

125. *Id.* § 8.01-581.1.

126. *Id.* § 8.01-581.15 (Repl. Vol. 1984).

127. *Etheridge v. Medical Center Hosp.*, 237 Va. 87, 376 S.E.2d 525 (1989).

128. *See Id.*

129. *Bulala v. Boyd*, 239 Va. 218, 389 S.E.2d 670 (1990).

In an action on contract or note in the general district court, section 8.01-28 of the Code¹³⁰ clarifies that a defendant's denial in response to the plaintiff's affidavit and statement of account need not be in writing. The General Assembly apparently passed this amendment in response to *Snead v. Bandigo*,¹³¹ where the supreme court held that the plea under oath required by the statute must be in writing.

Finally, in the area of evidence, copies of documents, including checks and drafts, may now be admitted into evidence, in lieu of originals, if they have been received or transmitted and copied in the regular course of business by a member of the profession or a business, regardless of whether the original exists or not.¹³² Furthermore, section 8.01-413 of the Code provides that copies of medical records kept by any health care provider can be obtained by a patient and his attorney and are admissible into evidence in civil actions, if the records are otherwise admissible under the rules of evidence.¹³³

130. VA. CODE ANN. § 8.01-28 (Cum. Supp. 1991).

131. 240 Va. 399, 402, 397 S.E.2d 849, 851 (1990).

132. VA. CODE ANN. § 8.01-391 (Cum. Supp. 1991).

133. *Id.* § 8.01-413.