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CIVIL PRACTICE AND PROCEDURE

*David D. Hopper**

I. INTRODUCTION

Virginia courts and the General Assembly have effected several changes in civil practice and procedure during the past year. This article focuses on some significant developments and interests to the general litigation attorney.

II. RECENT DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Juries*

The Supreme Court of Virginia has now directly addressed the appropriate response of a trial court when a juror has been removed by unconstitutional use of a preemptory challenge. The defendant in *Coleman v. Hogan*¹ used two of his three preemptory challenges to strike two women, one of whom, Nayamka Thomas, was the only black woman on the jury panel.² When the plaintiff challenged that strike as racially motivated in violation of the Equal Protection Clause of the United States Constitution under *Edmonson v. Leesville Concrete Co.*,³ defendant's counsel explained that both women were students, and he wanted to strike all three students who were on the panel. However, he reached that decision when he only had two strikes remaining; therefore defendant's counsel used those two strikes to remove the women students and left the remaining

* Director, Mezzullo & McCandlish, P.C., Richmond, Virginia. A.B., 1983, magna cum laude, Harvard University; J.D., 1989, Order of the Coif, University of Virginia.

1. 254 Va. 64, 486 S.E.2d 548 (1997).

2. See *id.* at 548.

3. 500 U.S. 614, 628 (1991).

male student on the panel, "basically on the supposition that [the women] may be more sympathetic to the female plaintiff."⁴

The trial court concluded those two strikes were based on the stricken panel members' gender and therefore violated the Fourteenth Amendment of the United States Constitution under *J.E.B. v. Alabama ex rel. T.B.*⁵ The trial court then reseated the two women, acknowledged that status as a student was a valid basis for striking a potential juror, and advised the defendant he could "strike one of them, but [not] both of them."⁶ Defendant then struck the male student and Thomas, the black woman. The plaintiff again challenged the defendant's strike of the black woman, at which point the defendant claimed that he decided to leave the white female student on the panel because "she was extremely soft-spoken and meek and . . . between the two women, we think she'll have less of an [e]ffect on the jury."⁷

The trial court then held that the defendant offered a racially neutral reason for his second strike of Thomas.⁸ The supreme court granted an appeal to determine whether the trial court properly allowed the defendant a second preemptory strike of the reinstated juror.

Agreeing with the majority of states to consider the issue,⁹ the supreme court first held that the particular remedy for the unconstitutional exercise of a preemptory challenge should be left to the discretion of the trial court. "A number of factors, such as the point at which the challenge to the strike is sustained and the knowledge of the jurors regarding the improper strike, affect the determination of which remedy to choose."¹⁰

4. *Coleman*, 254 Va. at 66, 486 S.E.2d at 548.

5. 511 U.S. 127, 145 (1994).

6. *Coleman*, 254 Va. at 66, 486 S.E.2d at 548.

7. *Id.* at 66, 486 S.E.2d at 549.

8. *See id.*

9. *See id.* at 67, 486 S.E.2d at 549 (citing *Jefferson v. State*, 595 So. 2d 38, 41 (Fla. 1992); *Jones v. State*, 683 A.2d 520, 529 (Md. 1996); *Commonwealth v. Fruchtman*, 633 N.E.2d 369, 373 (Mass. 1994); *Ezell v. State*, 909 P.2d 68, 72 (Okla. Crim. App. 1995); *State ex rel. Curry v. Bowman*, 885 S.W.2d 421, 425 (Tex. Crim. App. 1993)).

10. *Id.* at 67-68, 486 S.E.2d at 549-50.

The supreme court then went on to address the status of a reseated juror and held that “[o]nce the trial court determines that the basis for a preemptory strike is unconstitutional, any other reasons proffered at the same time, or subsequently, cannot erase the discriminatory motivation underlying the original challenge.”¹¹ The supreme court explained that the defendant’s position would allow a constitutionally proper reason for a strike to “override” an unconstitutional reason if the acceptable reason were given at a later point in time.¹² The supreme court concluded that adopting the defendant’s suggested procedure would allow a party whose use of a preemptory challenge was contested to create successive, multiple rationales for the strike and would improperly restrict the trial court’s ability to evaluate the legitimacy of the proffered rationales.¹³

B. Amendments to Pleadings

1. Variations Between Evidence and Allegations

In *Smith v. Smith*,¹⁴ the Supreme Court of Virginia analyzed Virginia Code section 8.01-377,¹⁵ which permits a trial court to allow pleadings to be amended “at the trial of any action” in order to promote substantial justice and in the absence of prejudice to the opposing party.¹⁶ The plaintiff in *Smith* made her motion to amend nine days after the trial court granted the defendant’s motion to strike the evidence and concluded the case. The supreme court held that, based upon the plain language of the statute, the motion was too late.¹⁷

2. Amendment to Change Defendant

In *Lake v. Northern Virginia Women’s Medical Center, Inc.*,¹⁸ the Supreme Court of Virginia reversed as an abuse of discre-

11. *Id.* at 68, 486 S.E.2d at 550.

12. *See id.*

13. *See id.*

14. 254 Va. 99, 487 S.E.2d 212 (1997).

15. VA. CODE. ANN. § 8.01-377 (Repl. Vol. 1992).

16. *Id.*

17. *Smith*, 254 Va. at 106, 487 S.E.2d at 216.

18. 253 Va. 255, 483 S.E.2d 220 (1997).

tion a trial court's denial of a motion for leave to amend to substitute a proper corporate defendant where the plaintiff had been misled as to the identity of the corporate defendant.¹⁹ In an amended motion for judgment, the plaintiff alleged that she had suffered injuries during an abortion procedure in April 1991 at Northern Virginia Women's Medical Center, Inc. (the Medical Center) in Fairfax, Virginia.²⁰ In response, the Medical Center and two individuals who were the sole stockholders of the Medical Center filed grounds of defense in which they admitted the allegations of the motion for judgment identifying the parties.²¹ After extensive discovery, the plaintiff nonsuited the action and subsequently filed a new motion for judgment against the same parties, asserting the same facts set forth in the first amended motion for judgment.²²

After the plaintiff was allowed to amend her refiled motion for judgment in response to a demurrer, the defendants participated in discovery and pretrial proceedings without making an express assertion that the Medical Center was not the clinic where the plaintiff received her abortion.²³ However, the defendants later admitted they had been aware from the inception of the original 1993 action that the plaintiff's abortion had been performed at a clinic owned by Fairfax Square Medical Associates, Inc. (Fairfax Square), which operated another medical clinic in Fairfax, was owned by the same individual defendants and did business under the name "NOVA Women's Medical Center."²⁴ Relevant discovery contained representations by the defendants that "the Medical Center owned and operated the clinic where [plaintiff] received her abortion and that its principals exercised administrative control over the clinic's policies and personnel."²⁵

A week before trial was scheduled, defendants filed a motion to dismiss claiming for the first time that the plaintiff's abortion had been performed at the Fairfax Square clinic. During

19. *See id.* at 262-63, 483 S.E.2d at 224.

20. *See id.* at 257-58, 483 S.E.2d at 221.

21. *See id.* at 258, 483 S.E.2d at 221.

22. *See id.*

23. *See id.*

24. *Id.*

25. *See id.*

argument on that motion, three days before trial, the defendants' attorney claimed that his conduct was appropriate because the plaintiff's attorney never asked specifically who owned the clinic in question.²⁶ During the hearing on the defendants' motion to dismiss, the plaintiff moved to amend her motion for judgment or, in the alternative, for a second nonsuit without prejudice.²⁷ The trial court ruled that the case would proceed to trial as scheduled, at which point the plaintiff admitted that she had dismissed her expert witnesses and could not proceed to trial.²⁸ At that time, on defendants' motion, the trial court granted judgment for the defendants.²⁹

The plaintiff obtained an order suspending final judgment and filed motions to set aside the judgment, to permit amendment of her pleadings, and to have the trial court consider imposing sanctions on the defendants and their counsel.³⁰ At a hearing on these post-trial motions, the trial court stated that it was troubled by defendants' counsel's behavior, but given the plaintiff's own failure to ascertain the true corporate ownership of the clinic initially, and her refusal to go to trial after the court's ruling on the motion to dismiss, it denied plaintiff's motions.³¹

On appeal, the supreme court observed that although the plaintiff had the duty to name the proper party, and although the defendants and their counsel had no affirmative duty to inform the plaintiff or the trial court of the plaintiff's mistake, the defendants and their counsel were subject to the requirement that their pleadings and other papers be "well grounded in fact . . . and . . . not interposed for any improper purpose."³² Thus, the defendants and their counsel had an obligation to make sure the pleadings and their behavior throughout the case were consistent with their knowledge that the plaintiff named the wrong corporate defendant.³³ The supreme court

26. *See id.* at 259, 483 S.E.2d at 222.

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.* at 260, 483 S.E.2d at 222.

31. *See id.*

32. *Id.* at 261, 483 S.E.2d at 223 (quoting VA. CODE ANN. § 8.01-271.1 (Repl. Vol. 1992)).

33. *See id.*

concluded that the defendants and their counsel violated that obligation and the plaintiff's "failure to discover [her] error in a timely manner was occasioned by acts of the defendants, either deliberate or careless."³⁴ Thus, although the issue of amending pleadings is a matter for the sound discretion of the trial court, the supreme court concluded that the trial court's refusal to allow amendment was an abuse of discretion under the circumstances, due to the behavior of the defendants and their counsel.³⁵ The supreme court also remanded the case for reconsideration by the trial court of its denial of the plaintiff's motion for sanctions.³⁶

C. *Expert Witnesses*

In *Lawson v. Elkins*,³⁷ the Supreme Court of Virginia examined circumstances under which a medical expert may properly testify as to the relevant standard of care. Virginia Code section 8.01-581.20 states, in relevant part:

[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 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.³⁸

In *Lawson*, the plaintiff sued Dr. Robert W. Elkins, an orthopaedic surgeon, who she claimed had improperly prescribed a procedure known as chemonucleolysis, during which an enzyme is injected into a vertebral disc to shrink the disc and relieve pressure and pain.³⁹ The plaintiff sought to qualify Dr. James Jackson, a neurosurgeon, as an expert in order to testify re-

34. *Id.*

35. *See id.* at 262, 483 S.E.2d at 223.

36. *See id.* at 263, 483 S.E.2d at 224.

37. 252 Va. 352, 477 S.E.2d 510 (1996).

38. VA. CODE ANN. § 8.01-581.20 (Repl. Vol. 1992).

39. *See Lawson*, 252 Va. at 353, 477 S.E.2d at 510.

garding the standard of care that should have been used by plaintiff's orthopaedic surgeon.⁴⁰

The supreme court affirmed the trial court's decision not to allow Dr. Jackson's qualification as an expert witness on the defendant's specialty because Dr. Jackson had never performed the chemonucleolysis procedure on a patient, nor had he observed an actual procedure being performed.⁴¹ The supreme court did not, however, rule that a neurosurgeon may never render an expert opinion on the standard of care imposed upon an orthopaedic surgeon.⁴²

In *Chapman v. City of Virginia Beach*,⁴³ the Supreme Court of Virginia held that a "human factors psychologist" improperly testified as to matters of common experience when he opined that the physical properties, configuration, and unsecured condition of a gate created a hazard, and that it was reasonably foreseeable that a child could become entrapped in the gate.⁴⁴

In *Dickerson v. Fatehi*,⁴⁵ the Supreme Court of Virginia held that expert testimony was not necessary when a jury could use its own common knowledge and experience to determine negligence and proximate cause where the plaintiff claimed that a defendant neurosurgeon negligently left a hypodermic needle inside the plaintiff after surgery.⁴⁶ Therefore, it was improper for the trial court to grant summary judgment to the defendants.⁴⁷

On the other hand, in *R.K. Chevrolet v. Hayden*,⁴⁸ the Supreme Court of Virginia found error in a trial court's refusal to allow an accounting expert to offer an opinion that the departure of a car dealership's manager caused the dealership's lost profits.⁴⁹ The supreme court found sufficient foundation for the expert's opinion in the accountant's analysis of the

40. See *id.* at 353, 477 S.E.2d at 510-11.

41. See *id.* at 355, 477 S.E.2d at 511.

42. See *id.* at 355, 477 S.E.2d at 512.

43. 252 Va. 186, 475 S.E.2d 798 (1996).

44. See *id.* at 191-92, 475 S.E.2d at 801-02.

45. 253 Va. 324, 484 S.E.2d 880 (1997).

46. See *id.* at 326, 484 S.E.2d at 881.

47. See *id.* at 328, 484 S.E.2d at 881.

48. 253 Va. 50, 480 S.E.2d 477 (1997).

49. See *id.* at 58, 480 S.E.2d at 482.

dealership's financial statements before and after the manager's departure, the profits of other area dealerships, and the profits of the general industry.⁵⁰

D. *Remittitur*

In *Schwartz v. Brownlee*,⁵¹ the Supreme Court of Virginia addressed the application of statutory medical malpractice liability limits to a professional corporation that employed and was owned by the individual defendant physician.⁵² After the trial court ruled as a matter of law that Dr. Schwartz was, at all relevant times, the agent of Metropolitan Medical Care, Inc., (MMC), a jury returned a verdict in favor of the plaintiff against Dr. Schwartz individually and also against MMC.⁵³ The jury awarded damages against Dr. Schwartz and MMC jointly and severally in the amount of \$1,850,000.⁵⁴ Pursuant to the medical malpractice cap established by the Virginia Code,⁵⁵ the trial court ordered a remittitur of the verdict against Dr. Schwartz⁵⁶ to \$1,000,000. The trial court refused, however, to order remittitur of the verdict against MMC.

Virginia Code section 8.01-581.15 states:

In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after October 1, 1983, which is tried by a jury, or in any judgment entered against a health care provider in an action that is tried without a jury, the total amount recoverable for any injury to, or death of, a patient, shall not exceed \$1 million.⁵⁷

Defendants conceded that MMC was not a "health care provider" as defined by Virginia Code section 8.01-581.1, but argued that because MMC was joint and severally liable for the indi-

50. *See id.*

51. 253 Va. 159, 482 S.E.2d 827 (1997).

52. *See id.* at 161, 482 S.E.2d at 828.

53. *See id.*

54. *See id.*

55. *See* VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 1992).

56. *See Schwartz*, 253 Va. at 161, 482 S.E.2d at 828.

57. VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 1992).

supreme court held that by enacting Virginia Code section 8.01-581.15, the Virginia General Assembly plainly manifested its intent to abrogate the common law rule of respondeat superior in the medical malpractice context.⁶⁷ The supreme court explained that abrogation of the common law rule in this context was a "rule of reason" because the General Assembly's intent in enacting the medical malpractice cap was to allow "licensed health care providers to secure medical malpractice insurance at affordable rates."⁶⁸ The supreme court concluded that extending the protection of the malpractice cap to non-health care providers by the application of respondeat superior would not serve the legislative purpose behind the cap.⁶⁹

E. Limitations

1. Actions on Notes

In *Union Recovery Ltd. Partnership v. Horton*,⁷⁰ the Supreme Court of Virginia joined the majority of courts⁷¹ to consider the issue in holding that the assignee of a promissory note from the Resolution Trust Corporation (RTC) was entitled to an extension of the applicable statute of limitations under federal law⁷² which favored the RTC.⁷³ Thus, the supreme court rejected the position taken by the U.S. District Court for the Eastern District of Virginia in *Wamco, III, Ltd. v. First Piedmont Mortgage Corp.*⁷⁴

67. *See id.*

68. *Id.* at 167, 482 S.E.2d at 832 (citing *Etheridge v. Medical Ctr. Hosp.*, 237 Va. 87, 93-94, 376 S.E.2d 525, 527-28 (1989)).

69. *See id.*

70. 252 Va. 418, 477 S.E.2d 521 (1996), *cert. denied*, 117 S. Ct. 1430 (1997).

71. *See id.* at 423-24, 477 S.E.2d at 523-24 (citing *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993)); *see also* *Remington Invs., Inc. v. Kadenacy*, 930 F. Supp. 446 (C.D. Cal. 1996); *White v. Moriarty*, 19 Cal. Rptr. 2d 200 (Cal. Ct. App. 1993); *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo. 1994); *Twenty First Century Recovery, Ltd. v. Mase*, 665 N.E.2d 573 (Ill. Ct. App. 1996); *Cadle Co. II v. Lewis*, 864 P.2d 718 (Kan. 1993); *Central States Resources Corp. v. First Nat'l Bank*, 501 N.W.2d 271 (Neb. 1993).

72. *See* 12 U.S.C. § 1821(d)(14)(A), (B) (1994).

73. *See Union Recovery*, 252 Va. at 424, 477 S.E.2d at 524.

74. 856 F. Supp. 1076 (E.D. Va. 1994).

vidual doctor, who was subject to the cap, the plaintiff's total recovery should have been limited to his allowable recovery against Dr. Schwartz.⁵⁸

On appeal, the supreme court held that the cap did not apply to MMC. The supreme court distinguished *Bulala v. Boyd*,⁵⁹ which applied a single malpractice cap limit to an indivisible injury caused by the negligence of two or more defendants, by observing that both the defendants in *Bulala* were health care providers.⁶⁰ The supreme court also distinguished its prior holding in *Fairfax Hospital System v. Nevitt*,⁶¹ in which the supreme court observed that, for purposes of applying Virginia Code section 8.01-35.1, which provides that the amount recovered against one tortfeasor shall be reduced by the amount paid in settlement by a joint tortfeasor, it was "wholly immaterial" that one of the tortfeasors was not a health care provider.⁶²

Instead, the supreme court found analogous *Taylor v. Mobil Corp.*,⁶³ where both a negligent physician who had allowed his license to lapse and his employer, a non-health care provider, claimed to be entitled to the benefit of the medical malpractice cap.⁶⁴ In *Taylor*, the supreme court held that the trial court erred by applying the medical malpractice cap to the verdict because an unlicensed physician "was not a health care provider within the purview of the statute."⁶⁵

To escape the effect of the supreme court's holding in *Taylor*, MMC argued that its only liability was derivative under the doctrine of respondeat superior and that, under common law, the amount of a judgment against a principal cannot exceed the amount of the judgment against his agent.⁶⁶ Nevertheless, the

58. See *Schwartz*, 253 Va. at 164, 482 S.E.2d at 830.

59. 239 Va. 218, 389 S.E.2d 670 (1990).

60. See *Schwartz*, 253 Va. at 165, 482 S.E.2d at 830.

61. 249 Va. 591, 457 S.E.2d 10 (1995).

62. *Schwartz*, 253 Va. at 165, 482 S.E.2d at 830 (quoting *Fairfax Hosp. Sys. v. Nevitt*, 249 Va. 591, 598, 457 S.E.2d 10, 14 (1995)).

63. 248 Va. 101, 444 S.E.2d 705 (1994).

64. See *Schwartz*, 253 Va. at 165-66, 482 S.E.2d at 831; *Taylor*, 248 Va. at 105, 444 S.E.2d at 707.

65. *Schwartz*, 253 Va. at 165, 482 S.E.2d at 831 (citing *Taylor*, 248 Va. at 109, 444 S.E.2d at 709).

66. See *id.* at 166, 482 S.E.2d at 831.

2. Medical Malpractice

In *St. George v. Pariser*,⁷⁵ the Supreme Court of Virginia identified when an injury occurs in a medical malpractice case based upon misdiagnosis where the plaintiff complained that the defendant physician had failed in 1991 to diagnose a mole as cancerous.⁷⁶ Over two years later, after the cancer became more serious, making treatment more difficult and the likelihood of cure less certain,⁷⁷ the plaintiff filed suit. Defendant physician responded with a plea of the statute of limitations, which the trial court refused to strike as a matter of law.⁷⁸ The jury returned a verdict for the defendant.

After noting that a cause of action accrues on "the date the injury is sustained in the case of injury to the person,"⁷⁹ the supreme court explained that in a misdiagnosis case, "the injury upon which the cause of action is based is not the original detrimental condition; it is the injury which later occurs because of the misdiagnosis and failure to treat."⁸⁰ Thus, the supreme court concluded that the injury occurred for purposes of the statute of limitations at some point after the misdiagnosis, when the plaintiff's medical condition changed from a benign tumor to a malignant melanoma.⁸¹ Although the defendant physician had the burden of proving the date on which the injury was sustained with a reasonable degree of medical certainty,⁸² the supreme court held the issue should not have been submitted to the jury because no testimony was presented to show when after the misdiagnosis the plaintiff's change in condition occurred.⁸³

75. 253 Va. 329, 484 S.E.2d 888 (1997).

76. *See id.* at 331, 484 S.E.2d at 889.

77. *See id.* at 333, 484 S.E.2d at 890-91.

78. *See id.* at 332, 484 S.E.2d at 889-90.

79. *Id.* at 332, 484 S.E.2d at 890 (quoting VA. CODE ANN. § 8.01-230 (Cum. Supp. 1997)).

80. *Id.* at 334, 484 S.E.2d at 891.

81. *See id.*

82. *See id.* at 332, 484 S.E.2d at 890 (citing *Lo v. Burke*, 249 Va. 311, 316, 455 S.E.2d 9, 12 (1995)).

83. *See id.* at 335, 484 S.E.2d at 891.

3. Computation of Time

In *Ward v. Insurance Co. of North America*,⁸⁴ the Supreme Court of Virginia held that for statute of limitations purposes, a "year" is to be measured as a calendar year and not a 365-day period.⁸⁵ The issue arose when Ward, the plaintiff, initiated a contract action five calendar years after the cause of action accrued.⁸⁶ Ward nonsuited the action on June 10, 1994, and filed a new motion for judgment for the same cause of action on December 12, 1994.⁸⁷ The defendants filed a special plea in bar asserting that Ward's cause of action was barred by the statute of limitations because an intervening leap year prevented her original motion for judgment from having been filed within five 365-day periods from the date the cause of action arose.⁸⁸

The defendants based their argument that a year is a 365-day period on *Frey v. Jefferson Homebuilders, Inc.*⁸⁹ In *Frey*, the plaintiffs filed a motion for judgment against the defendant on November 12, 1993.⁹⁰ One year and two days later, plaintiffs caused service to be made upon the defendant, who responded with a motion to dismiss the action as barred because plaintiffs failed to serve the defendant within one year from the commencement of the action.⁹¹ On appeal, the plaintiffs in *Frey* argued that because the clerk's office had been closed on Friday, November 11, 1994, and did not reopen until Monday, November 14, 1994, they were entitled to the statutory extension of time provided by Virginia Code section 1-13.3:1.⁹² The supreme court in *Frey* agreed, holding that Rule 3:3 effectively fixes the 365th day after the commencement of the action as the last day for the motion for judgment to be served or deliv-

84. 253 Va. 232, 482 S.E.2d 795 (1997).

85. See *id.* at 235, 482 S.E.2d at 797.

86. See *id.* at 233, 482 S.E.2d 795-96; see also VA. CODE ANN. § 8.01-246(2) (Repl. Vol. 1992).

87. See *Ward*, 253 Va. at 233, 482 S.E.2d at 796.

88. See *id.* at 234, 482 S.E.2d at 796.

89. 251 Va. 375, 467 S.E.2d 788 (1996).

90. See *id.* at 377, 467 S.E.2d at 789.

91. See *Ward*, 253 Va. at 235, 482 S.E.2d at 797 (citing *Frey*, 251 Va. at 378-79, 467 S.E.2d at 790); VA. SUP. CT. R. 3:3.

92. VA. CODE ANN. § 1-13.3:1 (Repl. Vol. 1995).

ered, thereby subjecting the one-year period of Rule 3:3 to the saving provision in Code section 1-13.3:1.⁹³

In *Ward*, the supreme court explained that the defendants misinterpreted *Frey* and observed that an interpretation of the word "year" as equivalent to 365 days ignores the fact that a leap year contains 366 days.⁹⁴ Moreover, the defendants' interpretation of *Frey* ignored the definition of year contained in Virginia Code section 1-13.33,⁹⁵ which states, "unless otherwise expressed, the word 'year' shall be construed to mean a calendar year."⁹⁶ Accordingly, the supreme court held in *Ward* that for statute of limitation purposes, a year is a calendar year and not a 365-day period.⁹⁷

4. Tolling

In *Swann v. Marks*,⁹⁸ the Supreme Court of Virginia held that a suit filed against a decedent's estate was a nullity because Virginia statutes authorize an action only against a decedent's personal representative and not directly against an estate.⁹⁹ Thus, the supreme court concluded that a suit against an estate is a nullity and therefore cannot toll the statute of limitations.¹⁰⁰

The supreme court also concluded that the substitution of a personal representative for the estate as the named defendant cannot be considered a correction of a misnomer.¹⁰¹ The supreme court stated that a misnomer arises only when the right person is incorrectly named, not where the wrong defendant is identified.¹⁰²

93. See *Ward*, 253 Va. at 235, 482 S.E.2d at 797 (citing *Frey*, 251 Va. at 378-79, 467 S.E.2d at 790).

94. See *id.*

95. VA. CODE ANN. § 1-13.33 (Repl. Vol. 1995).

96. *Id.*

97. See *Ward*, 253 Va. at 235, 482 S.E.2d at 797.

98. 252 Va. 181, 476 S.E.2d 170 (1996).

99. See *id.* at 184, 476 S.E.2d at 171 (citing VA. CODE ANN. § 8.01-229(B)(2)(a), (B)(4) (Cum. Supp. 1997)).

100. See *id.* at 184, 476 S.E.2d at 171-72.

101. See *id.* at 184, 476 S.E.2d at 172.

102. See *id.* (citing *Rockwell v. Allman*, 211 Va. 560, 561, 179 S.E.2d 471, 472 (1971)).

F. *Res Judicata*

In *Straessle v. Air Line Pilots Ass'n*,¹⁰³ the plaintiff brought suit in state court for tortious interference with prospective contractual relations.¹⁰⁴ The plaintiff's claims arose out of activities which were also the subject of litigation in federal court in Florida.¹⁰⁵ The plaintiff's claims in the federal case were dismissed, although the case remained pending as to the claims of other plaintiffs and the counterclaims of defendant.¹⁰⁶ The Virginia circuit court granted the summary judgment motion of the defendant on the ground that the plaintiff's action was barred by *res judicata*.¹⁰⁷

On appeal, the plaintiff argued for the first time that the dismissal order in the federal case was not a final order because it did not dispose of all claims involving all parties as required by Federal Rule of Civil Procedure 54(b).¹⁰⁸ The defendant objected to the Supreme Court of Virginia entertaining the argument on appeal because of plaintiff's conceded failure to raise the issue below.¹⁰⁹ Nevertheless, the supreme court held that Virginia Supreme Court Rule 5:25, which requires objections to be "stated with reasonable certainty at the time of the ruling, except for due cause shown or to enable this Court to attain the ends of justice,"¹¹⁰ could not be used to force the supreme court to grant full faith and credit to an order which was not final.¹¹¹ Therefore, the supreme court concluded that because the order entered in the federal case was not a final order, it was error for the circuit court to dismiss the plaintiff's action on *res judicata* grounds.¹¹²

103. 253 Va. 349, 485 S.E.2d 387 (1997).

104. *See id.* at 351, 485 S.E.2d at 388.

105. *See id.*

106. *See id.* at 352, 485 S.E.2d at 389.

107. *See id.*

108. *See id.* at 353, 485 S.E.2d at 389; *see also* FED. R. CIV. P. 54(b).

109. *See Straessle*, 253 Va. at 354, 485 S.E.2d at 390.

110. *Id.* (quoting VA. SUP. CT. R. 5:25).

111. *See id.*

112. *See id.*

G. *Motions to Strike*

In *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. Partnership*,¹¹³ the Supreme Court of Virginia held that a trial court erred in granting defendants' motion to strike evidence at the conclusion of opening statements.¹¹⁴ The issue arose in a suit by a law firm to collect legal fees from a former client.¹¹⁵ At a pretrial conference in the case, the trial court entered an order requiring the parties to identify expert witnesses at least ninety days before trial.¹¹⁶ On the morning of trial, after opening statements, defendants' counsel moved to strike the plaintiff's evidence on the ground that the plaintiff, having failed to comply with the pretrial order identifying experts, would be unable to present testimony to establish the reasonableness of the fees charged.¹¹⁷ The trial court granted the motion to strike and, on appeal, the supreme court stated:

We are of opinion that a trial court should not grant a motion to strike the plaintiff's evidence before the plaintiff has had an opportunity to present evidence in support of the allegations in the motion for judgment. Indeed, we have stated on several occasions that we disapprove the grant of motions which "short circuit" the legal process thereby depriving a litigant of his day in court and depriving this Court of an opportunity to review a thoroughly developed record on appeal.¹¹⁸

According to the rule announced in *Tazewell Oil Co. v. United Virginia Bank*,¹¹⁹ expert testimony is not required in every case to prove the reasonableness of attorney's fees¹²⁰ and therefore, the trial court in *Seyfarth* should have allowed plaintiff to present its evidence, which would have been sufficient to

113. 253 Va. 93, 480 S.E.2d 471 (1997).

114. *See id.* at 95, 480 S.E.2d at 472.

115. *See id.* at 94, 480 S.E.2d at 471.

116. *See id.* at 95, 480 S.E.2d at 472.

117. *See id.*

118. *Id.* (citing *Carson v. LeBlanc*, 245 Va. 135, 139-40, 427 S.E.2d 189, 192 (1993); *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993); *Renner v. Stafford*, 245 Va. 351, 353, 429 S.E.2d 218, 220 (1993)).

119. 243 Va. 94, 413 S.E.2d 611 (1992).

120. *See Seyfarth*, 253 Va. at 96, 480 S.E.2d at 473.

go to the jury. That evidence would have included testimony from an attorney at the firm about the nature of the legal services, the complexity of the services, and the value of those services.¹²¹ In addition, the attorney would have testified that the services were necessary and appropriate, and that the fees incurred were fees ordinarily charged in similar types of legal representation.¹²² Such evidence would have been sufficient for a fact finder to infer that the law firm's fees were reasonable, even in the absence of expert testimony.¹²³

H. Evidence

1. Accident Reports

In *Cherry v. D.S. Nash Construction Co.*,¹²⁴ the Supreme Court of Virginia held that a statute barring the introduction into evidence of an accident report¹²⁵ does not also bar the introduction of otherwise admissible evidence contained in the report.¹²⁶ In *Cherry*, a statement contained in a policeman's field notes was admissible in evidence, although the official accident report into which they were incorporated was not admissible under the statute.¹²⁷

In reaching this conclusion, the supreme court cited the holdings of *Moore v. Warren*¹²⁸ and *Galbraith v. Fleming*¹²⁹ to illustrate the distinction between admissible and inadmissible evidence. In *Moore*, the supreme court held that admission of a diagram made by an investigating officer was not barred by the predecessor statute to Virginia Code section 46.2-379, although the diagram was identical to one included in the accident report.¹³⁰ On the other hand, in *Galbraith*, the supreme court

121. See *id.* at 97, 480 S.E.2d at 473.

122. See *id.*

123. See *id.*

124. 252 Va. 241, 475 S.E.2d 794 (1996).

125. See VA. CODE ANN. § 46.2-379 (Repl. Vol. 1996 & Cum. Supp. 1997) ("All [motor vehicle] accident reports made by investigating officers . . . shall not be used as evidence in any trial, civil or criminal, arising out of any accident.")

126. See *Cherry*, 252 Va. at 245, 475 S.E.2d at 797.

127. See *id.* at 245-46, 475 S.E.2d at 797.

128. 203 Va. 117, 122 S.E.2d 879 (1961).

129. 245 Va. 173, 427 S.E.2d 187 (1993).

130. See *Cherry*, 252 Va. at 245, 475 S.E.2d at 797 (citing *Moore*, 203 Va. at 124,

held inadmissible a portion of an accident report containing the actual diagram made by the investigating officer, even though the jury was not informed that the diagram was part of a report.¹³¹ The supreme court explained that this distinction is based upon the danger that a jury could attach more weight to an official report simply because of its official nature.¹³² Thus, the supreme court concluded that Virginia Code section 46.2-379 bars any use of the actual accident report itself.¹³³

2. Treatises

In *Weinberg v. Given*,¹³⁴ the Supreme Court of Virginia noted that Virginia Code section 8.01-401.1 provides, in certain circumstances, that "statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay."¹³⁵ Therefore, a factfinder is permitted to consider articles relied upon by experts as substantive evidence so long as no other evidentiary rule would bar their admission.¹³⁶

3. Use of Depositions on Summary Judgment

In *Gay v. Norfolk & Western Railway Co.*,¹³⁷ the Supreme Court of Virginia held that a plaintiff's deposition was not properly used as a basis for entry of summary judgment absent evidence that he agreed to its use as contemplated by Virginia Code section 8.01-420 and Virginia Supreme Court Rule 3:18, even though he failed to raise his objection until after the motion for summary judgment was made, briefed and argued.¹³⁸

122 S.E.2d at 885).

131. *See id.* (citing *Galbraith*, 245 Va. at 174-75, 427 S.E.2d at 188).

132. *See id.* at 246, 475 S.E.2d at 797 (citing *Davis v. Colgin*, 219 Va. 5, 7, 244 S.E.2d 750, 751 (1978)).

133. *See id.* at 245, 475 S.E.2d at 797.

134. 252 Va. 221, 476 S.E.2d 502 (1996).

135. VA. CODE ANN. § 8.01-401.1 (Cum. Supp. 1997).

136. *See Weinberg*, 252 Va. at 226, 467 S.E.2d at 504.

137. 253 Va. 212, 483 S.E.2d 216 (1997).

138. *See id.* at 214, 483 S.E.2d at 218. Virginia Code section 8.01-420 and Virginia Supreme Court Rule 3:18 specifically require the parties to agree to the use of depositions before they may serve as the basis for summary judgment. VA. CODE ANN. §

The supreme court observed, however, "that the better practice would have been for [Plaintiff] to have made his objection known earlier in the proceedings."¹³⁹

III. RECENT LEGISLATION AFFECTING CIVIL PRACTICE

The General Assembly enacted several measures during the 1997 session which affect civil litigation in state courts.¹⁴⁰ For ease of reference, the discussion of these enactments is classified by subject matter.

A. *Jurisdiction*

The maximum jurisdictional amount for General District Courts has been raised to \$15,000. Additionally, upon removal or appeal to circuit court by the defendant, the circuit court may permit a plaintiff's claim to be increased above the \$15,000 limit.¹⁴¹

B. *Venue*

The statute governing venue for suits on certain construction contracts in the Commonwealth was amended to provide for venue "where the construction project is located, or such other jurisdiction where the venue is proper under the provisions of this chapter."¹⁴²

8.01-420 (Repl. Vol. 1992); VA. SUP. CT. R. 3:18.

139. See *Gay*, 253 Va. at 214, 483 S.E.2d at 218.

140. Unless otherwise indicated, all provisions discussed herein became effective on July 1, 1997.

141. See VA. CODE ANN. §§ 16.1-77, -114.1 (Cum. Supp. 1997).

142. VA. CODE ANN. § 8.01-262.1(A) (Cum. Supp. 1997). The statute formerly provided that "a cause of action arising under such contract may be brought in the jurisdiction where the work is to be performed, notwithstanding any contract provision to the contrary." *Id.* § 8.01-262.1(A) (Repl. Vol. 1992).

C. *Immunity*

1. Emergency Care Providers

The statute governing immunity to those providing emergency care has been amended to include a grant of immunity for physicians serving without compensation as medical advisors to E-911 systems, where medical advice is rendered in good faith.¹⁴³ The statute was also amended to grant immunity to telecommunication service providers from liability for acts or omissions in connection with rendering such services related to emergency calls in the absence of gross negligence or willful misconduct.¹⁴⁴

2. Church Members

A new statute grants immunity from liability in tort or contract to members of religious bodies for the actions of officers, employees, leaders, or other members of the religious body. However, the statute is not intended to "prevent any person from being held liable for his own actions."¹⁴⁵

3. Architects

Architects who act in good faith and without compensation in providing rescue or relief assistance in connection with disasters or other life-threatening emergencies have been granted immunity from civil damages in the absence of gross negligence or willful misconduct.¹⁴⁶

4. Teachers

A new statute grants teachers employed by local school boards immunity from civil damages in the absence of gross

143. *See id.* § 8.01-225(B)(1) (Cum. Supp. 1997).

144. *See id.* § 8.01-225(B)(2) (Cum. Supp. 1997).

145. *Id.* § 8.01-220.1:3 (Cum. Supp. 1997).

146. *See id.* § 8.01-226.2 (Cum. Supp. 1997).

negligence or willful misconduct for acts or omissions resulting from the supervision, care or discipline of students, so long as the acts or omissions are within the teacher's scope of employment and are taken in good faith.¹⁴⁷

D. *Interest on Judgments*

Virginia Code section 8.01-382 has been modified to provide that a judgment entered on a negotiable instrument will accrue interest on the principal amount at the rate specified in the instrument or, if no rate is specified, at the judgment rate, notwithstanding the other provisions of the section governing interest.¹⁴⁸

E. *Evidence*

1. Medical Expenses

The statute governing authenticity and reasonableness of medical bills has been amended to provide that, in actions for personal injuries, wrongful death, or for medical expense benefits payable under a motor vehicle insurance policy, where no medical bill has been rendered or specific charge made by a health care provider to the insured, an insurer, or any other person, "the usual and customary fee charged for the service rendered may be established by the testimony or the affidavit of an expert having knowledge of the usual and customary fees charged for the services rendered."¹⁴⁹

If an affidavit is used, it must be submitted to the opposing party at least twenty-one days prior to trial.¹⁵⁰ The testimony or affidavit is subject to rebuttal and "may be admitted in the same manner as an original bill or authenticated copy as described in subsection A of the statute."¹⁵¹

147. *See id.* § 8.01-220.1:2 (Cum. Supp. 1997).

148. *See id.* § 8.01-382 (Cum. Supp. 1997).

149. *Id.* § 8.01-413.01(B) (Cum. Supp. 1997).

150. *See id.* § 8.01-413.01(A) (Cum. Supp. 1997).

151. *Id.* § 8.01-413.01(B) (Cum. Supp. 1997).

2. Determination of Employment Status

A new statute makes clear that a final, unappealed order entered by a Virginia circuit court which determines that a person "is or is not an employee of another for the purpose of obtaining jurisdiction" will estop either party from asserting otherwise in a subsequent action between the parties on the same claim or cause of action.¹⁵²

F. *Limitations*

The statute governing accrual of causes of action based on sexual abuse during infancy or incompetency has been amended to provide for accrual upon removal of the disability of infancy or incompetency.¹⁵³ If the fact of injury and its causal connection to sexual abuse is not known upon the removal of the disability, a cause of action will accrue when that information is communicated to the plaintiff by a licensed physician, psychologist, or clinical psychologist.¹⁵⁴

G. *Service of Process*

1. Service by Private Person

The Virginia Code section governing who may serve process has been amended to clarify that, although private persons may serve process generally, they may not serve writs of possession or *capias* and may not levy upon property.¹⁵⁵

2. Service Outside the Commonwealth

The statute governing personal service outside the Commonwealth has been amended to provide that personal service on a

152. *See id.* § 8.01-420.5 (Cum. Supp. 1997).

153. *See id.* § 8.01-249(6) (Cum. Supp. 1997).

154. *See id.* Formerly, a cause of action based upon sexual abuse accrued only when the information was communicated to the plaintiff by a licensed physician, psychologist or clinical psychologist. *See id.* § 8.01-249(6) (Repl. Vol. 1992).

155. *See id.* § 8.01-293(B) (Cum. Supp. 1997).

non-resident outside the Commonwealth is the equivalent of personal service on a non-resident within the Commonwealth, so long as the court would have personal jurisdiction over the non-resident under the long-arm statute.¹⁵⁶

3. Juries

The General Assembly has added to the list of persons who may claim exemption from jury service “[a]ny person who is the only person performing services for a business, commercial or agricultural enterprise and whose services are so essential to the operations of the business, commercial or agricultural enterprise that such enterprise must close or cease to function if such person is required to perform jury duty.”¹⁵⁷

H. Collections

1. Penalty for Serving Notice of Lien Without Reasonable Basis

A new Virginia Code section provides a \$100 civil penalty for any notice of lien wrongfully served on a financial institution without “a reasonable basis for believing that the judgment debtor is entitled to a payment from such institution.”¹⁵⁸ The statute also provides that a financial institution’s location in an area where the judgment debtor resides, works, or has a place of business is not, standing alone, a reasonable basis for believing that the judgment debtor is entitled to a payment from the financial institution.¹⁵⁹ In any action to recover under the new statute, the judgment creditor or attorney causing the notice of lien to be served has the burden of showing the reasonable basis for believing the judgment debtor was entitled to a payment from the financial institution bringing suit.¹⁶⁰

156. *See id.* § 8.01-320(A) (Cum. Supp. 1997); *see also id.* § 8.01-328.1 (Repl. Vol. 1992).

157. *Id.* § 8.01-341.1(12) (Cum. Supp. 1997).

158. *Id.* § 8.01-502.1 (Cum. Supp. 1997).

159. *See id.*

160. *See id.*

2. Service of Garnishment Summons

Judgment creditors may no longer serve garnishment summons on the corporate garnishee's officers or managing employees. Instead, all garnishment summons must now be served upon the corporation's registered agent or upon the clerk of the State Corporation Commission as otherwise provided by law.¹⁶¹

I. *Striking Cases from the Docket*

The statute governing removal of stale cases from the docket has been amended to provide that cases pending for more than three years where there has been no order or proceeding except a continuance, may be discontinued without notice to the parties, but may be reinstated on motion for cause within one year after an order of discontinuance has been entered.¹⁶²

161. *See id.* § 8.01-513 (Cum. Supp. 1997).

162. *See id.* § 8.01-335(B) (Cum. Supp. 1997).

