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## Annual Survey of Virginia Law: Civil Practice and Procedure

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## CIVIL PRACTICE AND PROCEDURE

*George J. Dancigers\**  
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### I. INTRODUCTION

This article reviews some of the recent developments and changes effected by the Supreme Court of Virginia and the Virginia General Assembly which affect and involve civil litigation. The scope of this paper does not extend to criminal procedure. This paper is not intended to be an all inclusive compilation, but rather a sampling of case law and legislative enactments of interest to the civil litigation attorney.

### II. RECENT DECISIONS OF THE SUPREME COURT OF VIRGINIA

#### A. *Statute of Limitations*

In a number of cases this year, the Supreme Court of Virginia analyzed the commencement of statutes of limitations on various causes of action, including wrongful conception, breach of contract for construction, wrongful death, and defamation.

The most notable Supreme Court of Virginia decision was the case of *Nunnally v. Artis*.<sup>1</sup> In *Nunnally*, the supreme court addressed the issue of commencement of the statute of limitations in actions for wrongful conception.<sup>2</sup>

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1. 254 Va. 247, 492 S.E.2d 126 (1997).

2. See *id.* at 249, 492 S.E.2d at 126.

Valerie Nunnally filed a motion for judgment against Danville Memorial Hospital and Dr. Avis A. Artis, alleging that Dr. Artis negligently performed a tubal ligation on February 6, 1989. As a result of the negligent tubal ligation, Ms. Nunnally became pregnant on November 1, 1993, and gave birth to a healthy child. She sued Danville Memorial Hospital and Dr. Avis under the tort of wrongful conception.<sup>3</sup> Virginia has recognized and accepted the tort of wrongful pregnancy or wrongful conception since 1986, when the Supreme Court of Virginia decided *Miller v. Johnson*.<sup>4</sup>

Prior to *Nunnally*, the Supreme Court of Virginia decided *Scarpa v. Melzig*,<sup>5</sup> holding that the cause of action began to run at the time the negligent sterilization procedure was performed.<sup>6</sup> In *Scarpa*, Justice Lacy and Chief Justice Carrico dissented, stating that although a legal wrong may have occurred at the time the negligent sterilization procedure was performed, there was no injury because Ms. Scarpa had suffered no "positive, physical or mental hurt" until she became pregnant.<sup>7</sup>

In *Nunnally*, the supreme court revisited the question of when the statute of limitations should run with regard to wrongful conception actions.<sup>8</sup> In analyzing the statute of limitations, the supreme court examined Virginia Code section 8.01-243(A), which provides in pertinent part that "every action for personal injuries, whatever the theory of recovery . . . shall be brought within two years after the cause of action accrues."<sup>9</sup> The supreme court also examined Virginia Code section 8.01-230, which provides that "[i]n every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person."<sup>10</sup>

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3. *See id.*

4. 231 Va. 177, 343 S.E.2d 301 (1986).

5. 237 Va. 509, 379 S.E.2d 307 (1989).

6. *See id.* at 513, 379 S.E.2d at 310.

7. *See id.* at 515, 379 S.E.2d at 311 (Lacy J., dissenting).

8. *See* 254 Va. at 249, 492 S.E.2d at 126.

9. VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1998).

10. *Id.* § 8.01-230 (Cum. Supp. 1998).

The supreme court in *Nunnally*, referring back to its decision in *Locke v. Johns-Manville Corp.*,<sup>11</sup> construed injury, as used in Virginia Code section 8.01-230, to mean "positive, physical or mental hurt to the claimant, not legal wrong to him in the broad sense that his legally protected interests have been invaded."<sup>12</sup>

The supreme court further noted that the running time for the statute of limitations "is tied to the fact of harm to the plaintiff, without which no cause of action would come into existence; it is not keyed to the date of the wrongful act, another ingredient of a personal injury cause of action."<sup>13</sup> The supreme court recognized that Ms. Nunnally was complaining of the consequences of the wrongful conception and the subsequent pregnancy which, for medical reasons, she sought to avoid.<sup>14</sup> In fact, the supreme court stated that they failed to understand how a plaintiff could have a cause of action for wrongful conception if there had been no conception.<sup>15</sup>

Based on the aforementioned facts, the court in *Nunnally* held that under the definition of "injury" as delineated in *Locke*, no injury occurred at the time of the negligent tubal ligation because Nunnally had suffered no "positive, physical or mental hurt" related to the wrongful conception cause of action.<sup>16</sup> In so holding, the supreme court stated that *Scarpa* was wrongfully decided and, therefore, expressly overruled.<sup>17</sup> The supreme court reversed the judgment of the trial court and remanded the case for further proceedings consistent with its opinion.<sup>18</sup>

Notably, Chief Justice Carrico, along with Justices Compton and Stephenson, dissented in *Nunnally*.<sup>19</sup> Although Chief Justice Carrico's dissent in *Nunnally* is opposed to his previous position in the 1989 *Scarpa* case,<sup>20</sup> the *Nunnally* dissent is

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11. 221 Va. 951, 275 S.E.2d 900 (1981).

12. *Nunnally*, 254 Va. at 252, 492 S.E.2d at 128 (quoting *Locke*, 221 Va. at 957-58, 275 S.E.2d at 904).

13. *Id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.* at 250, 492 S.E.2d at 130.

19. *See id.* (Carrico, C.J., dissenting).

20. *See Scarpa v. Melzig*, 237 Va. 509, 515, 379 S.E.2d 307, 311 (1989) (Carrico,

based on Chief Justice Carrico's acknowledgment of the existence and importance of the doctrine of stare decisis and the stability which it brings to the laws of the Commonwealth of Virginia.<sup>21</sup>

The Supreme Court of Virginia again addressed the issue of commencement of the statute of limitations under Virginia Code section 8.01-230,<sup>22</sup> this time focusing on an action for breach of a construction contract in the case of *Suffolk City School Board v. Conrad Bros.*<sup>23</sup> In *Suffolk City School Board*, the supreme court addressed the issue of when the applicable five-year statute of limitations, as established by Virginia Code section 8.01-246(2),<sup>24</sup> begins to run when read in conjunction with the provisions of Virginia Code section 8.01-230.

The Suffolk City School Board filed a motion for judgment against Conrad Brothers alleging that they had failed to meet the terms of the contract and had installed a defective and leaky roof.<sup>25</sup> Conrad Brothers alleged that the school board was barred by the statute of limitations because the school board had notice of the defective conditions of the roof on or before September 12, 1990, but failed to file the Motion for Judgment until February 13, 1996.<sup>26</sup> The school board, however, alleged that the architects issued to the board a certification for payment of Conrad Brothers on March 13, 1991, and that marked the completion of the construction project. Therefore, the school board alleged they were within the five-year statute of limitations when they filed the action on February 13, 1996.<sup>27</sup>

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C.J., dissenting) (arguing that the statute of limitations should not run from the time the negligent sterilization procedure is performed).

21. See *Nunnally*, 254 Va. at 255, 492 S.E.2d at 130 (Carrico, C.J., dissenting).

22. VA. CODE ANN. § 8.01-230 (Cum. Supp. 1998).

23. 255 Va. 171, 495 S.E.2d 470 (1998).

24. Virginia Code section 8.01-246(2) provides in pertinent part: "In actions on any contract which is not otherwise specified and which is in writing and signed by the party to be charged thereby, or by his agent, within five years whether such writing be under seal or not . . ." VA. CODE ANN. § 8.01-246(2) (Repl. Vol. 1992).

25. See *Suffolk City Sch. Bd.*, 255 Va. at 172, 495 S.E.2d at 470-71.

26. See *id.* at 173, 495 S.E.2d at 471.

27. See *id.*

The supreme court noted that

in the case of an indivisible or entire contract, a party seeking to recover for a breach committed while the contract remained executory, or for an anticipatory breach committed before expiration of the time agreed upon for full and final performance, has the election of pursuing [a] remedy when the breach occurs, or of awaiting the time fixed by the contract for full and final performance.<sup>28</sup>

The supreme court further noted that the right of election as to the time of pursuing such action for breach in conjunction with Virginia Code section 8.01-230 commences the statute of limitations at whichever time the aggrieved party chooses.<sup>29</sup> In this case, because the Suffolk City School Board and Conrad Brothers fixed the time for final completion of the contract as the date of issuance of a "final certificate for payment," the statute of limitations began running as of March 13, 1991, the date that the architects issued certifications for payment.<sup>30</sup> Because the motion for judgment was filed on February 13, 1996, the Suffolk City School Board was within the statute of limitations for filing an action for breach of contract. The supreme court reversed the judgment order of the trial court, sustaining the Conrad Brothers' plea of statute of limitations, and remanded the case for trial on the merits.<sup>31</sup>

Next, the Supreme Court of Virginia addressed the issue of the statute of limitations as it pertains to wrongful death actions that have been nonsuited. In the case of *Riddett v. Virginia Electric and Power Co.*,<sup>32</sup> the supreme court affirmed the trial court's granting of the defendant's motion to dismiss the action with prejudice because the action was untimely filed after the nonsuit order.<sup>33</sup>

In *Riddett*, chronology is important. On July 3, 1987, Clifford Riddett was fatally electrocuted while attempting to install ground anchors adjacent to his mobile home. On June 29, 1989,

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28. *Id.* at 174-75, 495 S.E.2d at 472 (quoting *Roberts v. Coal Processing Corp.*, 235 Va. 556, 561, 369 S.E.2d 188, 190 (1988) (internal quotations omitted)).

29. *See id.* at 175, 495 S.E.2d at 472.

30. *See id.* at 173-75, 495 S.E.2d at 471-73.

31. *See id.* at 176, 495 S.E.2d at 473.

32. 255 Va. 23, 495 S.E.2d 819 (1998).

33. *See id.*

with four days left on the applicable two-year statute of limitations, Patricia Riddett, administratrix of Clifford Riddett's estate, filed a wrongful death action against Virginia Electric and Power Company.<sup>34</sup> On January 11, 1991, while the action was still pending, the supreme court decided the case of *Dodson v. Potomac Mack Sales and Service, Inc.*,<sup>35</sup> in which it held that former Virginia Code section 8.01-244(B) prescribed a limitation period with a discrete tolling position applicable to nonsuits of wrongful death actions.<sup>36</sup> In *Dodson*, the supreme court said that former Virginia Code section 8.01-229(E)(3), dealing generally with the tolling of statute of limitations with regard to nonsuit orders, was inapplicable to wrongful death actions because former Virginia Code section 8.01-244(B), dealing specifically with the subject, controlled.<sup>37</sup> On July 1, 1989, the Virginia General Assembly amended Virginia Code section 8.01-244(B)<sup>38</sup> to provide a six-month tolling provision for nonsuited wrongful death actions pursuant to Virginia Code section 8.01-229(E)(3).<sup>39</sup>

On January 20, 1995, the plaintiff nonsuited the original action. On June 20, 1995, the plaintiff filed another wrongful death action against Virginia Power and others, making essentially the same allegations that had been made in the original action. Virginia Power filed a motion for summary judgment on the grounds that the action was untimely. Following a hearing, the trial court granted the defendant's motion and dismissed the action with prejudice.<sup>40</sup>

The supreme court in *Riddett* held that the changes and amendments to Virginia Code section 8.01-244(B) made in July 1991 were substantive and not procedural.<sup>41</sup> Therefore, the

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34. *See id.* at 25, 495 S.E.2d at 820.

35. 241 Va. 89, 400 S.E.2d 178 (1991).

36. *See Riddett*, 255 Va. at 25, 495 S.E.2d at 820.

37. *See Dodson*, 241 Va. at 94, 400 S.E.2d at 181.

38. Virginia Code section 8.01-244(B) provides in part: "However, 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." VA. CODE ANN. § 8.01-244(B) (Repl. Vol. 1992).

39. *See Riddett*, 255 Va. at 26, 495 S.E.2d at 820.

40. *See id.*

41. *See id.* at 28, 495 S.E.2d at 821.

plaintiff in *Riddett* was bound by the substantive provisions of the statute as it was written at the time of the incident.<sup>42</sup> Because Virginia Code section 8.01-244(B), as it was written prior to the 1991 amendment, did not provide for a six-month tolling provision, the plaintiff in *Riddett* was not entitled to the benefit of the six-month tolling provision as prescribed by the 1991 amended Virginia Code section 8.01-244(B). Therefore, the plaintiff in *Riddett* did not timely file her action.<sup>43</sup>

The plaintiff argued that the General Assembly meant the 1991 amendment to be retroactive; however, the supreme court did not find any support for the plaintiff's contentions and denied the retroactivity of the modification.<sup>44</sup> Because there were only four days left on the two-year statute of limitations when the plaintiff filed the wrongful death action, she only had four days to file again after she nonsuited in January 1995. Patricia Riddett did not file the second action until some five months later; therefore, the supreme court affirmed the trial court's decision.<sup>45</sup>

In *Jordan v. Shands*,<sup>46</sup> the Supreme Court of Virginia addressed the issue of the statute of limitations on a motion for judgment, alleging false imprisonment, defamation, and intentional infliction of emotional distress. In *Jordan*, the defendants asserted that the statute of limitations barred Jordan's claims of false imprisonment and defamation because Jordan filed her action after the two-year statute of limitations for personal injury had elapsed. The defendants also filed a demurrer asserting that Jordan failed to plead a cause of action for emotional distress and that they were entitled to qualified immunity. The trial court dismissed Jordan's claims holding that they were all time-barred.<sup>47</sup> On appeal, the supreme court affirmed in part, reversed in part, and remanded the case. The supreme court affirmed the trial court's decision that an action for false imprisonment is an action for personal injury subject to a two-year statute of limitations under Virginia Code section 8.01-

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42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. 255 Va. 492, 500 S.E.2d 215 (1998).

47. *See id.* at 496, 500 S.E.2d at 217.



243(A)<sup>48</sup> and, therefore, was time-barred.<sup>49</sup> The supreme court affirmed the trial court's judgment as to the defamation claim on the ground that defamatory acts occurred on the date of Jordan's wrongful arrest, rather than on the date of the Juvenile and Domestic Relations Court dismissal of the charges against her. Therefore, the claim was time-barred.<sup>50</sup> Finally, the supreme court reversed the trial court and held that Jordan failed to plead a cause of action for intentional infliction of emotional distress against any of the defendants and remanded the case for further proceedings.<sup>51</sup>

### B. *Weight of Opinions by Chancellors and Commissioners in Equity*

The Supreme Court of Virginia heard a number of equity cases which dealt with the weight and authority of chancellors and commissioners in equity. In *Willis v. Magette*,<sup>52</sup> the supreme court reviewed the weight of a chancellor's opinion after the chancellor presided over an ore tenus hearing at which testimonial and documentary evidence was presented.<sup>53</sup> The chancellor in *Willis* ruled in favor of the plaintiff's establishing a thirty-foot easement on the defendant's land. The supreme court held that a chancellor's finding based on "conflicting evidence, heard ore tenus, carries the same weight as a jury verdict. Such a finding will not be disturbed on appeal unless it is plainly wrong and without evidence to support it."<sup>54</sup>

In *Chesapeake Builders, Inc. v. Lee*,<sup>55</sup> the court held that "[a] decree which approves a commissioner's report will be affirmed

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48. Virginia Code section 8.01-243(A) provides:

Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1992).

49. See *Jordan*, 255 Va. at 497, 500 S.E.2d at 218.

50. See *id.* at 498, 500 S.E.2d at 218.

51. See *id.* at 499, 500 S.E.2d at 219.

52. 254 Va. 198, 491 S.E.2d 735 (1997).

53. See *id.* at 200, 491 S.E.2d at 737.

54. *Id.* at 201, 491 S.E.2d at 738.

55. 254 Va. 294, 492 S.E.2d 141 (1997).

unless plainly wrong and without evidence to support it."<sup>56</sup> In *Chesapeake Builders*, there was a dispute as to whether or not the Lees understood that the contract for sale which they had signed was for three lots rather than one. The chancellor referred the matter to a commissioner in chancery who heard the evidence.<sup>57</sup> The commissioner, after hearing all of the evidence, recommended that Chesapeake Builders be allowed to choose between two remedies. Both Chesapeake Builders and the Lees filed exceptions to the report. The chancellor, after having a hearing on the exceptions, "entered an order overruling both parties' exceptions" and affirmed the commissioner's report.<sup>58</sup>

"While the report of a commissioner in chancery does not carry the weight of a jury verdict . . . the report should be sustained by the chancellor if the commissioner's findings are supported by the evidence."<sup>59</sup> The supreme court, in looking at the recommendation of the commissioner, concluded that it was supported by the record in the case; however, the supreme court disagreed with part of the conclusions of law and, therefore, affirmed in part and reversed in part.<sup>60</sup>

The supreme court looked at both the issue of a right to a jury trial and the discretion of the chancellor in an equity action in the case of *Angstadt v. Atlantic Mutual Insurance Co.*<sup>61</sup> In *Angstadt*, the "Atlantic Mutual Insurance Company . . . filed a declaratory judgment suit against Keith Edward Angstadt, Raymond Rask and Multicomm Telecommunications, Inc. ("Multicomm"), seeking relief from any duty to pay a \$2,000,000.00 judgment Angstadt had obtained against Atlantic's insureds, Multicomm and Multicomm's employee, Rask."<sup>62</sup> The defendant requested a jury trial to determine the

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56. *Id.* at 299, 492 S.E.2d at 147.

57. *See id.* at 296, 492 S.E.2d at 144.

58. *Id.* at 298, 492 S.E.2d at 146.

59. *Chesapeake Builders*, 254 Va. at 299, 492 S.E.2d at 147 (citing VA. CODE ANN. § 8.01-610 (Repl. Vol. 1992)). Virginia Code section 8.01-610 provides:

The report of a commissioner in chancery shall not have the weight given to the verdict of a jury on conflicting evidence, but the court shall confirm or reject such report in whole or in part, according to the view which it entertains of the law and the evidence.

VA. CODE ANN. § 8.01-610 (Repl. Vol. 1992).

60. *See Chesapeake Builders*, 254 Va. at 299, 492 S.E.2d at 147.

61. 254 Va. 286, 492 S.E.2d 118 (1997).

62. *Id.* at 288, 492 S.E.2d at 119.

issues of fact pursuant to Virginia Code section 8.01-188.<sup>63</sup> The trial court granted the motion and requested that the parties frame "the issue out of chancery [that] the jury is going to decide."<sup>64</sup> Additionally, the trial court indicated that the verdict of the jury would be an "advisory decision by the jury."<sup>65</sup>

The "sole question to be presented to the jury was whether [Raymond] Rask[,] [the employee of Multicomm,] willfully failed to cooperate with Atlantic by not appearing at a scheduled deposition on April 26, 1993."<sup>66</sup> After hearing the evidence, "the jury concluded that Rask did not willfully fail to cooperate by failing to attend the April 26, 1993 deposition."<sup>67</sup> After hearing the jury's verdict,

Atlantic requested the chancellor to enter judgment in its favor on the basis that the jury verdict was merely advisory, or in the alternative, on the ground that the verdict was contrary to the evidence. The chancellor held that since the jury was impaneled to decide an issue out of chancery, the verdict was advisory and non-binding.<sup>68</sup>

Additionally, the chancellor "ruled that the verdict was contrary to law and the evidence because 'there is no question . . . on the facts that the insured willfully failed to cooperate.'"<sup>69</sup>

On appeal, the defendants argued that it had a statutory right to a jury trial pursuant to Virginia Code section 8.01-188<sup>70</sup> and that the chancellor abused his discretion.<sup>71</sup> The supreme court held that there was "no merit in the defendants' argument that they were entitled to a binding jury verdict

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63. See *id.* Virginia Code section 8.01-188 provides:

When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

VA. CODE ANN. § 8.01-188 (Repl. Vol. 1992).

64. *Angstadt*, 254 Va. at 290-91, 492 S.E.2d at 119 (quoting the trial court).

65. *Id.* at 289, 492 S.E.2d at 119.

66. *Id.*

67. *Id.* at 290, 492 S.E.2d at 120.

68. *Id.* at 291, 492 S.E.2d at 120.

69. *Id.*

70. VA. CODE ANN. § 8.01-188 (Repl. Vol. 1992).

71. See *Angstadt*, 254 Va. at 291, 492 S.E.2d at 121.

under [Virginia] Code § 8.01-188.<sup>72</sup> Additionally, the supreme court ruled that “[a] chancellor has discretionary authority under [Virginia] Code § 8.01-336(E)<sup>73</sup> to impanel a jury to decide the issue out of [a] chancery.”<sup>74</sup> Furthermore, the supreme court stated that the “jury verdict is advisory or persuasive, and serves to inform the conscience of the chancellor.”<sup>75</sup> For the above reasons, the supreme court affirmed the chancellor’s judgment.<sup>76</sup>

The Supreme Court of Virginia again addressed the issue of the weight of a commissioner in chancery’s findings in equity in the case of *Orgain v. Butler*.<sup>77</sup> This case was an appeal from a decree of sale entered in a partition suit. The supreme court was asked to consider whether the chancellor “abused his discretion in ordering property to be sold at public auction, rather than through a real estate broker as was recommended by the commissioner in chancery.”<sup>78</sup>

In *Orgain*, siblings John Barbour Orgain, III and Norvell Orgain Butler owned a forty-acre tract of land in Chesterfield County as tenants in common. Butler filed a bill of complaint seeking either partition or sale of the property. The chancellor referred the case to the commissioner in chancery.<sup>79</sup>

The commissioner, after reviewing the evidence and finding the property to be unique in nature due to its large and undeveloped resources, recommended that the property be “marketed through a reputable commercial real estate brokerage firm agreed to by the parties.”<sup>80</sup> Neither Butler nor Orgain filed any exceptions to the commissioner’s report. After the report was filed by the commissioner, the chancellor heard argument

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72. *Id.* at 292, 492 S.E.2d at 121.

73. Virginia Code section 8.01-336 provides in pertinent part: “In any suit in equity, the court may, of its own motion or upon motion of any party, supported by such party’s affidavit that the case will be rendered doubtful by conflicting evidence of another party, direct an issue to be tried by a jury.” VA. CODE ANN. § 8.01-336(E) (Repl. Vol. 1992).

74. *Angstadt*, 254 Va. at 292, 492 S.E.2d at 121 (footnote added).

75. *Id.*

76. *See id.*

77. 255 Va. 129, 496 S.E.2d 433 (1988).

78. *Id.* at 131, 496 S.E.2d at 434.

79. *See id.*

80. *Id.*

of counsel concerning the commissioner's report. The chancellor "rejected the commissioner's recommendation that the property be sold privately."<sup>81</sup> In making his rejection, the chancellor noted "that the parties had refused private offers, and . . . ruled that a public auction was 'the only alternative' due to the likelihood that the parties would be unable to agree upon any price or method for conducting a private sale."<sup>82</sup>

Upon reviewing this case, the supreme court stated that "although the report of the commissioner in chancery does not carry the weight of a jury verdict, Virginia Code section 8.01-610, the report should be sustained unless the chancellor concludes that the commissioner's findings were not supported by the evidence."<sup>83</sup> The court further noted that "[Virginia] Code section 8.01-610 gives the chancellor substantial discretion in the manner of reviewing the commissioner's report. While the recommendations of the commissioner are merely advisory, the statute does not allow the chancellor to ignore the commissioner's report or portions thereof."<sup>84</sup>

The supreme court stated that "when the chancellor has disapproved the commissioner's findings, [the supreme court] must review the evidence and determine whether, under a correct application of the law, the evidence supports the commissioner's findings" or the chancellor's conclusions.<sup>85</sup> In reviewing the evidence, the court noted that under Virginia Code section 8.01-83,<sup>86</sup> the chancellor "may order a sale of the

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81. *Id.*

82. *Id.*

83. *Id.* at 132, 496 S.E.2d at 435. Virginia Code section 8.01-610 provides:

The report of a commissioner in chancery shall not have the weight given to the verdict of a jury on conflicting evidence, but the court shall confirm or reject such report in whole or in part, according to the view which it entertains of the law and the evidence.

VA. CODE ANN. § 8.01-610 (Repl. Vol. 1992).

84. *Orgain*, 255 Va. at 132, 496 S.E.2d at 435.

85. *Id.*

86. Virginia Code section 8.01-83 provides:

When partition cannot be conveniently made, the entire subject may be allotted to any one or more of the parties who will accept it and pay therefor to the other parties such sums of money as their interest therein may entitle them to; or in any case in which partition cannot be conveniently made, if the interest of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, the court, notwithstanding any of

entire property if such sale will promote the interests of the parties who are entitled to the subject property or its proceeds."<sup>87</sup>

After reviewing all of the evidence, the supreme court ruled that the evidence did not support the chancellor's conclusions.<sup>88</sup> The court "reverse[d] the chancellor's decree, enter[ed] final judgment . . . confirming the commissioner's report, and remand[ed] the case to the chancellor for further proceedings."<sup>89</sup>

### C. Doctor/Patient Privilege

The Supreme Court of Virginia heard two cases late in 1997 involving the privilege with regard to communications between physicians and patients. While both cases addressed the doctor/patient privilege as it pertains to cases where malpractice litigation is pending, the two cases resulted in rather different outcomes.

In September, 1997, the Supreme Court of Virginia ruled in *Archambault v. Roller*<sup>90</sup> that Virginia Code section 8.01-399(F)<sup>91</sup> "does not require that the physician be an actual or

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those entitled may be a person under a disability, may order such sale, or an allotment of a part thereof to any one or more of the parties who will accept it and pay therefor to the other parties such sums of money as their interest therein may entitle them to, and a sale of the residue, and make distribution of the proceeds of sale, according to the respective rights of those entitled, taking care, when there are creditors of any deceased person who was a tenant in common, joint tenant, or coparcener, to have the proceeds of such deceased person's part applied according to the rights of such creditors.

VA. CODE ANN. § 8.01-83 (Repl. Vol. 1992).

87. *Orgain*, 255 Va. at 132-33, 496 S.E.2d at 435.

88. *See id.* at 133, 496 S.E.2d at 435.

89. *Id.* at 133, 496 S.E.2d at 435-36.

90. 254 Va. 210, 491 S.E.2d 729 (1997).

91. Virginia Code section 8.01-399(F) provides in pertinent part:

Nothing herein shall prevent a duly licensed practitioner of the healing arts from disclosing any information which he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with the care of the patient, the protection or enforcement of the practitioner's legal rights including such rights with respect to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

potential party to a medical malpractice action” for the doctor to be permitted to disclose patient information with respect to the medical malpractice action.<sup>92</sup>

In *Archambault*, Dr. Jane performed spinal surgery on Colleen Roller, and Dr. Schwenger administered anesthesia. The two physicians were covered by the Piedmont Liability Trust for legal representation and medical malpractice liability insurance. Mr. Archambault was staff counsel for the Trust and also served as counsel for the attending physicians.<sup>93</sup> Mr. Archambault “not only provided legal advice and representation to the physicians but also supervised and monitored all litigation” involving the physicians under the trust.<sup>94</sup>

After Colleen Roller filed a malpractice action against Dr. Jane, Ms. Roller’s counsel wanted to depose Dr. Schwenger. Mr. Archambault, in accordance with his duties as trust staff counsel, contacted Dr. Schwenger and informed her of the request for her deposition.<sup>95</sup> During Mr. Archambault’s preparation of Dr. Schwenger for her deposition, Dr. Schwenger informed Mr. Archambault about her recollections of the events during Ms. Roller’s surgery.<sup>96</sup>

Ms. Roller contended that Archambault violated Virginia Code section 8.01-399(D)<sup>97</sup> by disclosing privileged information absent a legal compulsion.<sup>98</sup> Archambault contended that Virginia Code section 8.01-399(F) “expressly allows a physician to disclose information acquired in attending a patient where such disclosure is necessary in connection with the protection or enforcement of the physician’s legal rights.”<sup>99</sup> The supreme

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VA. CODE ANN. § 8.01-399(F) (Cum. Supp. 1998).

92. *Archambault*, 254 Va. at 213, 491 S.E.2d at 731.

93. *See id.* at 211, 491 S.E.2d at 730.

94. *Id.*

95. *See id.*

96. *See id.* at 212, 491 S.E.2d at 730.

97. Virginia Code section 8.01-399(D) provides in pertinent part:

Neither a lawyer, nor anyone acting on the lawyer’s behalf, shall obtain, in connection with pending or threatened litigation, information from a practitioner of any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of the Court as herein provided.

VA. CODE ANN. § 8.01-399(D) (Cum. Supp. 1998).

98. *See Archambault*, 254 Va. at 212, 491 S.E.2d at 731.

99. *Id.* at 212, 491 S.E.2d at 731; *see* VA. CODE ANN. § 8.01-399(F) (Cum. Supp.

court, in reviewing Roller and Archambault's contentions, agreed with Archambault.<sup>100</sup> The supreme court stated in its decision that Virginia Code section 8.01-399(F)<sup>101</sup> "clearly permits Dr. Schwenger's disclosure of patient information 'in connection with . . . the protection or enforcement of her legal rights.'"<sup>102</sup> The supreme court further stated, "[t]hese 'legal rights' include, but are not limited to, such rights 'with respect to medical malpractice actions' and, thus, include such rights with respect to being deposed."<sup>103</sup> Further, the supreme court stated that Virginia Code section 8.01-399(F) "does not require that the physician be an actual or potential party to a medical malpractice action."<sup>104</sup> The supreme court finally concluded that Archambault was "the recipient of properly disclosed information, [and as such] could not have violated [Virginia] Code [section] 8.01-399(D)."<sup>105</sup> Therefore, the supreme court "reverse[d] the trial court's judgment and enter[ed] final judgment in favor of Archambault."<sup>106</sup>

Unlike *Archambault*, in *Fairfax Hospital v. Curtis*,<sup>107</sup> the Supreme Court of Virginia stated that "notice of claim that the plaintiff forwarded to the Hospital and others, in her capacity as administrator of her daughter's estate, simply did not manifestly place [the plaintiff's] medical condition at issue."<sup>108</sup> In *Fairfax Hospital*, Patricia Curtis received prenatal care, was eventually admitted, and gave birth to Jessie Curtis on February 13, 1989. During the course of her treatment, Ms. Curtis "communicated personal information, including her medical history, to Fairfax Hospital employees. Jessie Curtis later suffered cardiopulmonary arrest and died."<sup>109</sup> In March 1990, Ms. Curtis, "in her capacity as administrator of the estate of Jessie

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1998).

100. See *Archambault*, 254 Va. at 213, 491 S.E.2d at 732.

101. VA. CODE ANN. § 8.01-399(F) (Cum. Supp. 1998).

102. *Archambault*, 254 Va. at 213, 491 S.E.2d at 731.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. 254 Va. 437, 492 S.E.2d 642 (1997).

108. *Id.* at 443, 492 S.E.2d at 645.

109. *Id.* at 440, 492 S.E.2d at 643.



Curtis, filed a notice of claim against Fairfax Hospital System, [Nurse] Linda Beckett, and others, pursuant to the Virginia Medical Malpractice Act."<sup>110</sup>

After having received the Notice of Claim, the director of legal affairs of the hospital's parent company requested that the hospital provide a complete copy of Patricia Curtis's medical records to the attorney for the hospital. This attorney directed that the records be copied and provided to Nurse Beckett for her to review in preparation for a discovery deposition. "The medical records contained very personal information about [Patricia Curtis's] medical history before and after her pregnancy with Jessie Curtis."<sup>111</sup>

In deciding this case, the supreme court used Virginia Code section 8.01-399<sup>112</sup> before its amendment in 1993, which "permitted disclosure of information that a patient had conveyed to a health care provider when the patient's physical or mental condition was *at issue in a civil action in certain circumstances*."<sup>113</sup> Additionally, the supreme court noted that the pre-amendment version of the Virginia Code specifically stated "disclosure may be required."<sup>114</sup> Thus, the "statute did not automatically compel disclosure of the patient's confidential information in all instances, but permitted a court, in the exercise of its discretion, to require disclosure of such information."<sup>115</sup>

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110. *Id.*

111. *Id.* at 440, 492 S.E.2d at 644.

112. Virginia Code section 8.01-399 provides in pertinent part:

Except at the request of, or with the consent of, the patient, no duly licensed practitioner of any branch of the healing arts shall be required to testify in any civil action, respecting any information which he may have acquired in attending, examining or treating the patient in a professional capacity if such information was necessary to enable him to furnish professional care to the patient; provided, however, that when the physical or mental condition of the patient is at issue in such action . . . no fact communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be privileged and disclosure may be required.

VA. CODE ANN. § 8.01-399 (Repl. Vol. 1992).

113. *Fairfax Hosp.*, 254 Va. at 443, 492 S.E.2d at 645.

114. *Id.*

115. *Id.*

### Therefore

if the patient did not manifestly place . . . her medical condition at issue in a civil proceeding, then the statute required a determination by a judicial officer whether the patient's condition was at issue in the civil action before the health care provider was entitled to disseminate the patient's confidential communications to third persons.<sup>116</sup>

The supreme court determined that Ms. Curtis's notice of claim, filed by her in her capacity as administrator of her daughter's estate, "did not manifestly place [Ms.] Curtis's medical condition at issue."<sup>117</sup> Therefore, "before disseminating such information, the Hospital was required, in accordance with the aforementioned version of the [Virginia] Code [section] 8.01-399 to obtain permission either from a court or the patient."<sup>118</sup>

Fairfax Hospital contended that the later rulings of the medical malpractice proceedings demonstrated that Ms. Curtis's medical condition was at issue; therefore, she had no privilege protecting the disseminated medical records.<sup>119</sup> The hospital's contentions, however, were not persuasive to the supreme court, which noted that the hospital disseminated the patient's medical records before the "rulings of the medical malpractice panel and the trial court in the subsequent civil action."<sup>120</sup> As there was no civil action pending at the time, "an independent judicial officer, not the hospital or director of legal affairs for the hospital's parent company, was the appropriate person to make the determination whether Curtis's physical condition was at issue."<sup>121</sup> Because under the pre-1993 version of Virginia Code section 8.01-399 an actual civil action is necessary, absent the determination of a independent judicial officer or the permission of the patient (of which the hospital in this action had neither), the supreme court affirmed the trial court's entry of judgment in favor of the plaintiff, Patricia Curtis, in the amount of \$100,000.<sup>122</sup>

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116. *Id.*

117. *Id.*

118. *Id.*

119. *See id.* at 444-45, 492 S.E.2d at 646.

120. *Id.* at 445, 492 S.E.2d at 646.

121. *Id.*

122. *See id.* at 440, 448, 492 S.E.2d at 643, 648.

#### D. *Jurisdictional Limits in General District Court*

In the case of *Afify v. Simmons*,<sup>123</sup> the Supreme Court of Virginia held that when a case is removed from general district court to circuit court, the amount of the claims cannot be amended in the circuit court to exceed the jurisdictional limits of the general district court.<sup>124</sup>

In *Afify*, the Simmonses filed three warrants in detinue in general district court against Afify. In each of the three warrants, the Simmonses sought to recover property and/or damages of less than \$10,000. Afify removed the case to the City of Virginia Beach Circuit Court, at which time the Simmonses filed a motion to amend the warrants in detinue into one consolidated motion for judgment and sought additional damages for a total amount of \$60,000 in compensatory damages and \$330,000 in punitive damages. In a jury trial, the Simmonses were awarded compensatory damages of \$20,800 for loss of personal property and unreimbursed expenses and punitive damages of \$300,000. "Afify filed a post-trial motion seeking . . . to have the verdict reduced to comport with the civil jurisdictional limits of the general district court, asserting that those limits applied to claims removed to the circuit court."<sup>125</sup> The circuit court subsequently denied Afify's motion, entering judgment on the jury's verdict.<sup>126</sup>

The supreme court, in reviewing Afify's appeal, noted that it is well-settled law in Virginia that "when a *judgment* is rendered in general district court, the jurisdictional limits of that court carry over to the appeal of that judgment in the circuit court."<sup>127</sup> The supreme court noted that it had never before considered whether Virginia Code section 16.1-92,<sup>128</sup> as it was

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123. 254 Va. 315, 492 S.E.2d 138 (1997).

124. *See id.* at 319, 492 S.E.2d at 141.

125. *Id.* at 317, 492 S.E.2d at 140.

126. *See id.*

127. *Id.* at 317-18, 492 S.E.2d at 140 (citing *Hoffman v. Stewart*, 188 Va. 785, 794, 51 S.E.2d 239, 244 (1949)). *See Stacy v. Mullins*, 185 Va. 837, 844, 40 S.E.2d 260, 265 (1946).

128. Virginia Code section 16.1-92 provides in pertinent part:

On the trial of the case in the circuit court the proceedings shall confirm as nearly as may be to proceedings prescribed by the Rules of Court for

in effect at the time of *Afify* (prior to the 1997 amendments), “permitted . . . plaintiffs to increase the amount of their claims beyond the civil jurisdictional limits of the general district court following removal of the claims by the defendant to the circuit court.”<sup>129</sup> The supreme court concluded that Virginia Code section 16.1-92 did not permit the plaintiffs to increase the amount of their claims beyond the jurisdictional limits of the general district court.<sup>130</sup> The supreme court stated that there was an express limitation on the circuit court’s discretion in granting leave to amend.<sup>131</sup>

Further, the supreme court noted that nothing in the statute in effect at the time “expressly permitted the Simmonses to take advantage of the jurisdiction of the circuit court in order to increase the amount of the claims made in the general district court.”<sup>132</sup> Finally, the supreme court noted that “none of the additions made by the Simmonses in the[ir] original motion for judgment or the subsequent amended motion for judgment were necessary to correct a defect, irregularity, or omission in the warrants in detinue.”<sup>133</sup> Therefore, the supreme court ruled that “it was error to permit the Simmonses to amend their original claims to increase the damages sought to amounts in excess of the jurisdictional limits of the general district court.”<sup>134</sup>

### E. *Interest on Awards*

In the case of *County of Fairfax v. Century Concrete Services, Inc.*,<sup>135</sup> the Supreme Court of Virginia addressed the issue of pre- and post-judgment interest on awards granted against

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other actions at law, but the court may permit all necessary amendments, enter such orders, and direct such proceedings as may be necessary or proper to correct any defects, irregularities and omissions in the pleadings and bring about a trial of the merits of the controversy.

VA. CODE ANN. § 16.1-92 (Repl. Vol. 1996).

129. *Afify*, 254 Va. at 319, 492 S.E.2d at 140-41.

130. *See id.* at 319, 492 S.E.2d at 141.

131. *See id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. 254 Va. 423, 492 S.E.2d 648 (1997).

counties. The supreme court had to weigh conflicting statutes. Virginia Code section 15.1-549, which has since been repealed, stated in relevant part:

No board of supervisors shall order any warrant issued for any purpose other than the payment of a claim received, audited and approved as required by § 15.1-547.

...

No interest shall be paid on any county warrant.

Any clerk, deputy clerk, or member of any board of supervisors who shall violate or become a party to the violation of any of the provisions of this section shall be guilty of a misdemeanor, and in addition thereto shall be guilty of malfeasance in office.<sup>136</sup>

This code section conflicted with Virginia Code section 8.01-382, which provides that the court may give interest on any principal sum awarded in a judgment or decree by the court.<sup>137</sup>

In *Century Concrete Services, Inc.*, "Century [Concrete] filed a motion for judgment against the County and was awarded judgment in the amount of \$60,340.00 plus pre-judgment and [post-judgment interest]."<sup>138</sup> The county appealed the portion of the judgment awarding interest, arguing that the trial court erred by ordering the county to pay interest in contravention of Virginia Code section 15.1-549, which prohibits a county from paying interest on a judgment.<sup>139</sup>

The supreme court agreed with the county, stating that contrary to Century Concrete's assertion, Virginia Code section 8.01-382 had no application in the case.<sup>140</sup> The supreme court went on to state that it was required to apply Virginia Code

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136. *Id.* at 425, 492 S.E.2d at 649 (quoting VA. CODE ANN. § 15.1-549 (Repl. Vol. 1996) (repealed 1997)).

137. Virginia Code section 8.01-382 provides in pertinent part:

[I]n any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence.

VA. CODE ANN. § 8.01-382 (Repl. Vol. 1992).

138. *Century Concrete Services, Inc.*, 254 Va. at 424, 492 S.E.2d at 649.

139. *See id.*

140. *See id.* at 427, 492 S.E.2d at 650.

section 15.1-549 in the appeal because the statute was one of specific application, taking precedence over Virginia Code section 8.01-382, a statute of general application.<sup>141</sup> The supreme court, citing *Dodson v. Potomac Mack Sales & Service*, extrapolated on this point in stating, "when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner . . . where they conflict, the latter prevails."<sup>142</sup>

In *Century Concrete Services, Inc.*, the judgment award was against a county and, as such, was specifically precluded from either pre- or post-judgment interest under Virginia Code section 15.1-549. The supreme court reversed that portion of the trial court's judgment which awarded interest against the county, modified the judgment accordingly, and entered final judgment in favor of Century Concrete.<sup>143</sup>

#### F. *Additur*

The Supreme Court of Virginia analyzed the constitutionality of Virginia Code section 8.01-383.1(B)<sup>144</sup> in *Supinger v. Stakes*.<sup>145</sup> *Supinger* arose out of an automobile accident between Laurie Ann Supinger and Gloria Stakes. Supinger filed a motion for judgment, alleging that Stakes's negligence caused the collision between the two automobiles. After hearing the evidence, the jury returned a verdict in favor of Supinger and awarded her damages in the amount of \$515.50. Following the entry of the court's order, Supinger moved the trial court to set aside the jury verdict and to award her a new trial, contending that the jury's damage award was inadequate as a matter of

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141. *See id.*

142. *Id.* (quoting *Virginia Nat'l Bank v. Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)).

143. *See id.*

144. Virginia Code section 8.01-383.1(B) provides in pertinent part:

In any action at law when the Court finds as a matter of law that the damages awarded by the jury are inadequate, the trial Court may (i) award a new trial or (ii) require the defendant to pay an amount in excess of the recovery of the plaintiff found in the verdict. If either the plaintiff or the defendant declines to accept such additional award, the trial court shall award a new trial.

VA. CODE ANN. § 8.01-383.1(B) (Cum. Supp. 1998).

145. 255 Va. 198, 495 S.E.2d 813 (1998).

law.<sup>146</sup> The trial court denied Supinger's motion for new trial and instead used the additur provisions of Virginia Code section 8.01-383.1(B) to increase the jury's damage award to \$5,000, which the court stated would "fairly compensat[e] Supinger for her pain and suffering, her time lost from work, and any inconvenience caused by the accident."<sup>147</sup> The trial court gave Stakes the option of either paying the \$5,000 to Supinger or submitting to a new trial.<sup>148</sup> However, Supinger objected to the additur ruling by the trial court and filed a motion to reconsider, arguing that Virginia Code section 8.01-383.1(B) violated her right to a jury trial because the statute allowed the trial court to use the additur without her consent.<sup>149</sup> The trial court denied Supinger's motion and upheld the constitutionality of Virginia Code section 8.01-383.1(B), stating that the court "must presume the constitutionality of acts of the General Assembly in the absence of a clear indication that the legislative act is unconstitutionally unsound."<sup>150</sup>

The supreme court, in considering Supinger's constitutional challenge, stated, "we adhere to the well-settled principle that all actions of the General Assembly are presumed to be constitutional."<sup>151</sup> Furthermore, the supreme court stated that it "will declare the legislative judgment null and void only when the statute is plainly repugnant to some provision of the state or federal constitution."<sup>152</sup> Article I, section 11, of the Constitution of Virginia provides, *inter alia*, "[t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."<sup>153</sup>

In determining whether the additur provisions of Virginia Code section 8.01-383.1(B) violate the Constitution of Virginia,

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146. *See id.* at 201, 495 S.E.2d at 814.

147. *Id.* at 202, 495 S.E.2d at 814.

148. *See id.* at 202, 495 S.E.2d at 814-15.

149. *See id.* at 202, 495 S.E.2d at 815.

150. *Id.* (citation omitted in original).

151. *Id.* (citing *Etheridge v. Medical Ctr. Hosps.*, 237 Va. 87, 94, 376 S.E.2d 525, 528 (1989)).

152. *Id.* (quoting *Blue Cross of Virginia v. Commonwealth*, 221 Va. 349, 358, 269 S.E.2d 827, 832-33 (1980)).

153. *Id.* at 202-03, 495 S.E.2d at 815 (quoting VA. CONST. art. I, § 11).

the supreme court contrasted remittitur to additur.<sup>154</sup> In remittitur, the trial court reduces an excessive verdict to an amount supported by the evidence.<sup>155</sup> The amount of damages eventually awarded by the trial court is an amount that the jury has actually passed on in arriving at the verdict.<sup>156</sup> Therefore, the resulting award is one which the jury has deliberated on after ascertaining the facts and assessing the damages. This procedure fulfills the constitutional mandate of article I, section 11, of the Constitution of Virginia.<sup>157</sup>

In contrast to remittitur, when the trial court uses additur, the increased award is not an amount passed on by the jury in arriving at its verdict; therefore, it is an amount never assessed by the jury.<sup>158</sup> The supreme court held that this violates the constitutional mandate of article I, section 11, and that the plaintiff was denied the right to a jury trial.<sup>159</sup> The supreme court further stated that for the additur process to be constitutional, it must give the plaintiff the option of having a new trial or submitting to the additur process.<sup>160</sup> Finally, the court noted that

if additur is done with the consent of the defendant alone, the plaintiff is compelled to forego his "constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess."<sup>161</sup>

The supreme court in *Supinger* held that "[section] 8.01-383.1(B) as written is clear on its face; therefore, in interpreting the statute this Court will look no further than the plain meaning of the statute's words."<sup>162</sup> The supreme court determined that the statute gives the trial court two options once it rules the verdict to be inadequate as a matter of law—"the trial court may (i) award a new trial or (ii) either require the defen-

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154. *See id.* at 203-04, 495 S.E.2d at 816.

155. *See id.* at 203, 495 S.E.2d at 816.

156. *See id.* at 203-04, 495 S.E.2d at 816.

157. *See id.* at 204, 495 S.E.2d at 816.

158. *See id.*

159. *See id.*

160. *See id.*

161. *Id.* (quoting *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935) (citation omitted)).

162. *Id.* at 205-06, 492 S.E.2d at 817 (citing *City of Winchester v. American Woodmark Corp.*, 250 Va. 451, 457, 464 S.E.2d 148, 152 (1995)).



dant to pay the amount in excess of the recovery of the plaintiff found in the verdict or submit to a new trial."<sup>163</sup> The supreme court noted that the words of the statute as chosen by the Virginia General Assembly do not give the plaintiff the option of consenting to or declining to accept the use of additur.<sup>164</sup>

Therefore, the supreme court concluded that in cases involving unliquidated damages, Virginia Code section 8.01-383.1(B), as written, violates article I, section 11, of the Constitution of Virginia because it does not require the plaintiff's consent to additur.<sup>165</sup> For the above reasons, the supreme court reversed the judgment of the circuit court and remanded the case for further proceedings consistent with the supreme court's opinion.<sup>166</sup>

### G. *Parties Incapable of Testifying—Dead Man's Statute*

In *Diehl v. Butts*,<sup>167</sup> the supreme court of Virginia addressed Virginia Code section 8.01-397<sup>168</sup> as it pertains to the doctor-patient relationship. In *Diehl*, Francis Dunlap fell off his bicycle and suffered a head injury.<sup>169</sup> After the bicycle accident, Mr. Dunlap experienced headaches. Mr. Dunlap saw a number of physicians and eventually was referred to Dr. Butts. Dr. Butts

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163. *Id.* at 206, 495 S.E.2d at 817 (quoting VA. CODE ANN. § 8.01-383.1(8) (Cum. Supp. 1997)).

164. *See id.*

165. *See id.* at 207, 495 S.E.2d at 818.

166. *See id.*

167. 255 Va. 482, 499 S.E.2d 833 (1998).

168. Virginia Code section 8.01-397 provides:

In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitations those to which a person under a disability is a party. The phrase "from any cause" as used in this section shall not include situations in which the party who is incapable of testifying has rendered himself unable to testify by an intentional self-inflicted injury.

VA. CODE ANN. § 8.01-397 (Repl. Vol. 1992).

169. *See Diehl*, 255 Va. at 484, 499 S.E.2d at 835.

treated Mr. Dunlap and performed a computerized tomography ("CT") scan on Mr. Dunlap.<sup>170</sup> The CT scan was interpreted by a radiologist who noted that a subdural hematoma was present on the right side of Mr. Dunlap's head and that he suffered a cranial skeletal fracture. Additionally, Mr. Dunlap's subdural hematoma measured approximately twelve centimeters in length and one centimeter in thickness. Dr. Butts allegedly failed to inform Mr. Dunlap about the size of the hematoma and the existence of the skull fracture.<sup>171</sup>

After some treatment, Mr. Dunlap was seen by Dr. Butts in his office. Dr. Butts claimed that during that visit, he told Mr. Dunlap that he was not to return to work and should not travel as scheduled to New Orleans but should come back for more evaluation in a week and a half. According to Mr. Dunlap, however, Dr. Butts informed Mr. Dunlap that he could travel to New Orleans for work.<sup>172</sup>

Mr. Dunlap went to New Orleans and commenced work.<sup>173</sup> After experiencing some discomfort in New Orleans for three days, Mr. Dunlap returned home. Mrs. Dunlap met her husband at the airport and, upon seeing his condition, called Dr. Holland immediately. After having some discussions with Dr. Holland, Mr. and Mrs. Dunlap returned to their home after picking up a prescription at a local pharmacy.<sup>174</sup> The next morning, Mrs. Dunlap could not wake her husband so she called emergency response personnel who took him to the hospital.<sup>175</sup> Mrs. Dunlap was notified that her husband had less than a five percent chance of surviving an operation to relieve the pressure on his brain caused by the hematoma. Mr. Dunlap survived the operation but was in a coma for two months. He eventually was placed in a health care facility for two years.<sup>176</sup>

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170. *See id.*

171. *See id.* at 485, 499 S.E.2d at 835-36.

172. *See id.* at 486, 499 S.E.2d at 836.

173. *See id.*

174. *See id.* at 487, 499 S.E.2d at 836-37.

175. *See id.* at 487-88, 499 S.E.2d at 837.

176. *See id.* at 488, 499 S.E.2d at 837.

During the trial, Dr. Butts testified as to his conversation with Mr. Dunlap.<sup>177</sup> The plaintiff argued that because Mr. Dunlap was incapable and incompetent to testify under Virginia Code section 8.01-397, Dr. Butts ought to be precluded from testifying as to the conversations between Mr. Dunlap and Dr. Butts without a higher degree of corroboration.<sup>178</sup> Dr. Butts reported corroboration of the statements through the testimony of Mr. Dunlap's former neighbor and Mr. Dunlap's brother, both of whom testified as to statements made to them by Mr. Dunlap.<sup>179</sup>

The trial court allowed the testimony of Dr. Butts, and the jury awarded a verdict in favor of the plaintiff, Mr. Dunlap, for zero dollars.<sup>180</sup> The supreme court, in reviewing the trial court's ruling, found that the doctor-patient privilege which existed between Dr. Butts and Mr. Dunlap required that Dr. Butts provide a higher degree of corroboration as required by Virginia Code section 8.01-397 in order to present testimony as to the conversations between Dr. Butts and Mr. Dunlap.<sup>181</sup>

The supreme court ruled that the corroboration provided by Dr. Butts was not sufficient to provide the higher degree of corroboration required by Virginia Code section 8.01-397.<sup>182</sup> The supreme court reversed the judgment of the trial court and remanded the case for a new trial on all issues.<sup>183</sup> The supreme court further stated that upon remand, the trial court could not "admit any testimony of Dr. Butts concerning conversation that he had with Mr. Dunlap unless Dr. Butts corroborate[s] the conversations to a higher degree required by their confidential relationship."<sup>184</sup> Furthermore, the trial court was directed not to admit any opinion testimony of the defendant's expert witnesses which relied upon conversations that Dr. Butts had with Mr. Dunlap, unless a higher degree of corroboration was shown as to the substance of the conversations.<sup>185</sup>

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177. *See id.* at 487-88, 499 S.E.2d at 837.

178. *See id.* at 488, 499 S.E.2d at 837.

179. *See id.* at 490, 499 S.E.2d at 838.

180. *See id.* at 487, 499 S.E.2d at 837.

181. *See id.* at 489, 499 S.E.2d at 838.

182. *See id.* at 490, 499 S.E.2d at 838.

183. *See id.* at 491, 499 S.E.2d at 839.

184. *Id.*

185. *See id.*

### H. *Defamation and Insulting Words*

The final case reviewed in this article is a shot in the arm for the First Amendment and free speech. In *Yeagle v. Collegiate Times*,<sup>186</sup> the Supreme Court of Virginia reviewed Virginia Code section 8.01-45,<sup>187</sup> involving the use of insulting words.

In *Yeagle*, Sharon Yeagle was employed as an assistant to the Vice President of Student Affairs at Virginia Polytechnic Institute and State University. The student newspaper, *The Collegiate Times*, published an article describing the university's successful placement of students in the 1996 Governor's Fellow's Program. In the article, *The Collegiate Times* put a block quotation from Ms. Yeagle and, underneath the block quotation, printed the phrase "Director of Butt Licking."<sup>188</sup>

Yeagle sued *The Collegiate Times* alleging that "Director of Butt Licking" constituted common law defamation, defamation per se, and use of insulting words under Virginia Code section 8.01-45. *The Collegiate Times* filed a demurrer on all counts and the trial court dismissed the case.<sup>189</sup> On appeal, the supreme court ruled that "because the phrase at issue could not reasonably be considered as conveying factual information about Yeagle . . . [it] could not support a cause of action."<sup>190</sup> Therefore, the supreme court affirmed the judgment of the trial court.<sup>191</sup>

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186. 255 Va. 293, 497 S.E.2d 136 (1998).

187. Virginia Code section 8.01-45 provides:

All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace.

VA. CODE ANN. § 8.01-45 (Repl. Vol. 1992).

188. *Yeagle*, 255 Va. at 245, 497 S.E.2d at 137.

189. *See id.*

190. *Id.* at 298, 497 S.E.2d at 139.

191. *See id.*

### III. RECENT DEVELOPMENTS IN LEGISLATION AFFECTING CIVIL PRACTICE

This section outlines some important statutory changes enacted during the 1998 Legislative Session. It does not purport to be all inclusive and only attempts to highlight legislation of general interest to all civil practitioners. Unless otherwise provided, the provisions discussed are effective as of July 1, 1998.

#### A. *Next of Friend*

House Bill 18, relating to "suit by minor's next of friend,"<sup>192</sup> amends Virginia Code section 8.01-8 to allow both parents to sue together on behalf of a minor as his next of friend.<sup>193</sup>

#### B. *Immunity*

House Bill 277, relating to "Virginia Tort Claims Act: Immunity from claims based on certain computer failures,"<sup>194</sup> amends Virginia Code section 8.01-195.3 to provide complete immunity to the Commonwealth's agencies and employees from civil claims based on "failure of a computer, software program, database, network, information system, firmware or any other device, whether operated by or on behalf of the Commonwealth . . . or one of its agencies, to interpret, produce, calculate, generate, or account for a date which is compatible with the Year 2000 date change."<sup>195</sup>

House Bill 1113 and Senate Bill 265, relating to "immunity for ski patrol emergency assistance,"<sup>196</sup> amend Virginia Code section 8.01-225 to provide that any member of a volunteer ski patrol who administers emergency care to an injured or ill

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192. H.B. 18, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 12, 1998, ch. 402, 1998 Va. Acts 548).

193. See VA. CODE ANN. § 8.01-8 (Cum. Supp. 1998).

194. H.B. 277, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 12, 1998, ch. 820, 1998 Va. Acts 2010).

195. VA. CODE ANN. § 8.01-195.3 (Cum. Supp. 1998).

196. H.B. 1113, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 15, 1998, ch. 500, 1998 Va. Acts 1227); S.B. 265, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 15, 1998, ch. 493, 1998 Va. Acts 1213).

person shall be immune from civil liability in the absence of gross negligence or willful misconduct.<sup>197</sup>

Senate Bill 629, relating to "immunity for those rendering emergency care to animals,"<sup>198</sup> adds to Virginia Code section 8.01-225.2 to provide civil immunity to persons who in good faith provide care or treatment to animals at the scene of an accident or emergency.<sup>199</sup>

### C. *Jury Duty and Jury Selection*

House Bill 560, relating to jury duty,<sup>200</sup> amends Virginia Code section 8.01-341 to exempt superintendents and jail officers of regional jails from jury duty.<sup>201</sup>

Senate Bill 196, relating to "additional jurors,"<sup>202</sup> amends Virginia Code section 8.01-360 to provide that, when one additional juror is desired, three veniremen shall be drawn, and each side is allowed one peremptory challenge.<sup>203</sup> When two or more additional jurors are desired, twice as many veniremen as the number of jurors desired shall be drawn.<sup>204</sup>

### D. *Structured Settlement*

House Bill 566 and Senate Bill 105, relating to "approval of compromises on behalf of persons under a disability"<sup>205</sup> in suits or actions to which they are parties, amend Virginia Code section 8.01-424 to revise the Best's Insurance Reports rating criteria for selection of an insurance company for periodic pay-

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197. See VA. CODE ANN. § 8.01-225 (Cum. Supp. 1998).

198. S.B. 629, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 16, 1998, ch. 669, 1998 Va. Acts 1531).

199. See VA. CODE ANN. § 8.01-225.2 (Cum. Supp. 1998).

200. H.B. 560, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Mar. 13, 1998, ch. 83, 1998 Va. Acts 153).

201. See VA. CODE ANN. § 8.01-341 (Cum. Supp. 1998).

202. S.B. 196, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 8, 1998, ch. 279, 1998 Va. Acts 409).

203. See VA. CODE ANN. § 8.01-360 (Cum. Supp. 1998).

204. See *id.*

205. H.B. 566 Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 15, 1998, ch. 607, 1998 Va. Acts 1414); S.B. 105, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 15, 1998, ch. 584, 1998 Va. Acts 1376).

ments in the compromise of personal injury claims involving persons under a disability to a rating of A or better.<sup>206</sup>

#### E. Appeals from General District Court

House Bill 642, relating to the Virginia Residential Landlord and Tenant Act and appeals from general district court,<sup>207</sup> amends Virginia Code sections 8.01-129 and 16.1-106 to provide a process for appeals from general district court similar to existing law under sections 16.1-106 through 16.1-118.1, except where the judgment is by default.<sup>208</sup>

House Bill 1267, relating to "security required upon appeal from judgment of general district court,"<sup>209</sup> amends Virginia Code section 8.01-129 to provide that no transportation district shall be required to post an appeal bond when it appeals a decision of a district court to a circuit court.<sup>210</sup>

#### F. Service

House Bill 1145 and Senate Bill 327, relating to service of garnishments on corporations,<sup>211</sup> amend Virginia Code section 8.01-513 to allow service upon officers and designated managing employees.<sup>212</sup> Service may be had upon the registered agent and the clerk of the State Corporation Commission only after the judgment creditor certifies that he has failed to locate an officer or authorized person or if the designated managing employee is also the judgment debtor.<sup>213</sup>

House Bill 777, relating to service of process on foreign defendants,<sup>214</sup> amends Virginia Code sections 8.01-329 and 14.1-

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206. See VA. CODE ANN. § 8.01-424 (Cum. Supp. 1998).

207. H.B. 642, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 16, 1998, ch. 750, 1998 Va. Acts 1813).

208. See VA. CODE ANN. §§ 8.01-129, 16.1-106 (Cum. Supp. 1998).

209. H.B. 1267, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 3, 1998, ch. 266, 1998 Va. Acts 397).

210. See VA. CODE ANN. § 8.01-129 (Cum. Supp. 1998).

211. H.B. 1145, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 16, 1998, ch. 723, 1998 Va. Acts 1726); S.B. 327, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 16, 1998, ch. 737, 1998 Va. Acts 1785).

212. See VA. CODE ANN. § 8.01-513 (Cum. Supp. 1998).

213. See *id.*

214. H.B. 777, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 7,

103 to require that service of process on foreign defendants over whom the court has personal jurisdiction shall be by certified mail, return receipt requested. The bill also raises the fee collectable by the Secretary of the Commonwealth for such service.<sup>215</sup>

### G. *Lien*

House Bill 791, relating to "lien for medical services,"<sup>216</sup> amends Virginia Code section 8.01-66.5 to remove provisions that receipt of a medical bill creates a lien.<sup>217</sup>

### H. *Remittitur*

House Bill 961, relating to "revision of civil verdict,"<sup>218</sup> amends Virginia Code section 8.01-383.1 to provide that where the court requires a plaintiff to remit part of his recovery or submit to a new trial, the plaintiff may remit and accept judgment for the reduced sum under protest.<sup>219</sup> Notwithstanding such remittitur and acceptance, if under protest, the plaintiff may seek review of the judgment requiring remittitur by the Supreme Court of Virginia.<sup>220</sup> Where an appeal is awarded to a defendant, the judgment of the court requiring remittitur may be reviewed by the supreme court regardless of the amount.<sup>221</sup>

Additionally, in light of the decision earlier this year in *Supinger v. Stakes*,<sup>222</sup> as is discussed earlier in this article, Virginia Code section 8.01-383.1(B) was revised in the 1998 Legislative Session because the Supreme Court of Virginia ruled that it was unconstitutional.<sup>223</sup> The new revised section

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1998, ch. 259, 1998 Va. Acts 389).

215. See VA. CODE ANN. §§ 8.01-329, 14.1-103 (Cum. Supp. 1998).

216. H.B. 791, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Mar. 30, 1998, ch. 183, 1998 Va. Acts 297).

217. See VA. CODE ANN. § 8.01-66.5 (Cum. Supp. 1998).

218. H.B. 961, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 22, 1998, ch. 861, 1998 Va. Acts 2111).

219. See VA. CODE ANN. § 8.01-383.1 (Cum. Supp. 1998).

220. See *id.*

221. See *id.*

222. 255 Va. 198, 495 S.E.2d 813 (1998); see *supra* text accompanying note 165.

223. See *Supinger v. Stakes*, 255 Va. 198, 207, 495 S.E.2d 813, 818 (1998).



allows either the plaintiff or defendant to decline acceptance of the additional award, at which time, the court shall award a new trial.<sup>224</sup>

### I. *Exemplary Damages*

House Bill 1144, relating to "exemplary damages for persons injured by intoxicated drivers,"<sup>225</sup> amends Virginia Code section 8.01-44.5 to provide that when a DUI "defendant has unreasonably refused to submit to a test of his blood alcohol content," his conduct

"shall be deemed as sufficiently willful or wanton" to give rise to an action for exemplary damages "when the evidence proves that (i) when the incident causing the injury or death occurred the defendant was intoxicated, (ii) at the time the defendant . . . was . . . drinking alcohol, he knew he was going to operate a motor vehicle, . . . and (iii) the defendant's intoxication was a proximate cause of the injury . . . or death."<sup>226</sup>

### J. *Disposal of Exhibits*

House Bill 1403, relating to "disposal of exhibits in civil cases,"<sup>227</sup> amends Virginia Code section 8.01-452.1 to provide that after sixty days have elapsed from the entry of judgment in a civil case, the Clerk of Court may dispose of or donate the exhibits filed in the case.<sup>228</sup> The notification mailing by the

224. Virginia Code section 8.01-383.1(B) provides in pertinent part:

If either the plaintiff or defendant declines to accept such additional award, the trial court shall award a new trial.

If additur pursuant to this subsection is accepted by either party under protest, it may be reviewed on appeal.

VA. CODE ANN. § 8.01-383.1(B) (Cum. Supp. 1998).

225. H.B. 1144, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 16, 1998, ch. 722, 1998 Va. Acts 1725).

226. H.B. 1144 *Exemplary Damages for Persons Injured by Intoxicated Drivers* (visited Aug. 11, 1998) <<http://leg1.state.va.us/cgi-bin/legp504.exe?ses=981&typ=bil&val=hb144>>; see VA. CODE ANN. § 8.01-44.5 (Cum. Supp. 1998).

227. H.B. 1403, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 22, 1998, ch. 886, 1998 Va. Acts 2242).

228. See VA. CODE ANN. § 8.01-452.1 (Cum. Supp. 1998).

Clerk of Court to the owner of the exhibits or attorney need not be certified, return receipt requested.<sup>229</sup>

### K. *Name Change*

Senate Bill 343, relating to “docketing of judgments; name change of debtor,”<sup>230</sup> amends Virginia Code section 8.01-451 to provide that the clerk may require a judgment debtor who has changed his name to submit a form indicating the new name.<sup>231</sup>

### L. *Privileges*

Senate Bill 414, relating to attorney-physician communications,<sup>232</sup> amends Virginia Code section 8.01-399 to create exemptions to the statutory ban on any communication between attorneys and practitioners of the healing arts.<sup>233</sup> “The added exceptions are intended to facilitate litigation while maintaining confidentiality.”<sup>234</sup>

In particular, Virginia Code section 8.01-399(D) was amended to state that the law prohibiting a lawyer or anyone acting on behalf of a lawyer from obtaining a patient’s information without their expressed consent, except through discovery provisions, shall not apply to three areas dealing with communication with a lawyer.<sup>235</sup>

First, Virginia Code section 8.01-399(D) shall not apply to

[c]ommunication between a lawyer retained to represent a practitioner of the healing arts, or that lawyer’s agent, and that practitioner’s employers, partners, agents, servants, employees, co-employees or others for whom, at law, the

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229. *See id.*

230. S.B. 343, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 16, 1998, ch. 639, 1998 Va. Acts 1487).

231. *See* VA. CODE ANN. § 8.01-451 (Cum. Supp. 1998).

232. S.B. 414, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 9, 1998, ch. 314, 1998 Va. Acts 434).

233. *See* VA. CODE ANN. § 8.01-399 (Cum. Supp. 1998).

234. S.B. 414 *Attorney-Physician Communications* (visited Aug. 11, 1998) <<http://leg1.state.va.us/cgi-bin/legp504.exe?ses=981&typ=bil&val=sb414>>.

235. VA. CODE ANN. § 8.01-399(D)(1) (Cum. Supp. 1998).

practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions.<sup>236</sup>

Second, Virginia Code section 8.01-399(D) shall not apply to "information about a patient provided to a lawyer or his agent by a practitioner of the healing arts employed by that lawyer to examine or evaluate the patient in accordance with Rule 4:10 of the Rules of the Supreme Court [of Virginia]."<sup>237</sup>

Third, Virginia Code section 8.01-399(D) shall not apply to

[c]ontact between a lawyer or his agent and a non-physician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons which the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place which he is or will be summoned to give testimony.<sup>238</sup>

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236. *Id.*

237. *Id.* § 8.01-399(D)(2) (Cum. Supp. 1998).

238. *Id.* § 8.01-399(D)(3) (Cum. Supp. 1998).