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Civil Practice and Procedure

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ARTICLES

CIVIL PRACTICE AND PROCEDURE

Christopher S. Dadak *

This article addresses changes and notable analyses in approximately a year's worth of Supreme Court of Virginia opinions, passed legislation, and revisions to the Rules of the Supreme Court of Virginia affecting Virginia civil procedure.¹ This article is not meant to be all-encompassing, but it does endeavor to capture the highlights of changes or analyses regarding Virginia civil procedure. The opinions discussed throughout this article do not all reflect changes in Virginia jurisprudence on civil procedure. Some address clarifications or reminders from the court on certain issues it has deemed worthy of addressing (and that practitioners continue to raise). The article first addresses opinions of the supreme court, then new legislation enacted during the 2018 General Assembly Session, and finally approved revisions to the Rules of the Supreme Court of Virginia.

I. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Attorney's Fees*

The supreme court in *Denton v. Browntown Valley Associates* addressed several common issues regarding attorney's fees.² The plaintiff, James T. Denton, owned a large property in Warren

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1. Due to the publishing schedule, the relevant "year" is approximately June 2017 through June 2018.

2. 294 Va. 76, 80, 803 S.E.2d 490, 493 (2017).

County, Virginia.³ In June 2005, Denton entered into a contract to sell the property to Browntown Valley Associates (“BVA”).⁴ The contract included a \$500 purchase money deposit that was placed in escrow with a purchasing agent, a provision for attorney’s fees for the prevailing party in litigation, and a timeline for the sale settlement.⁵ Through several amendments to the contract, the settlement date was postponed to October 2005.⁶ BVA, however, refused to settle the sale and notified Denton’s agent in December 2005 that it was abandoning the purchase “because it was unable to reach an agreement with the owner of an adjacent parcel about improvements to a right-of-way.”⁷ Denton’s and BVA’s respective agents each put together release agreements which differed as to the receiver of the deposit: BVA or Denton.⁸

However, Denton refused to sign either release agreement. He stated that “he had accepted BVA’s offer instead of competing offers because it alone had included no contingencies for settlement,” that the offer had been made in bad faith based on the low figure of the purchase money deposit, that the sale was enforceable, and that “he intended to enforce it unless he received a better offer.”⁹ He thereafter filed suit seeking specific performance and attorney’s fees.¹⁰ During litigation, BVA filed a counterclaim for its attorney’s fees and costs incurred.¹¹ BVA prevailed in circuit court and was awarded its attorney’s fees; Denton appealed to the Supreme Court of Virginia.¹²

The merits of the case are outside the subject matter of this article, but the supreme court’s analysis of the attorney’s fees issue is germane. One of Denton’s points on appeal was “that the circuit court erred by awarding BVA the attorney’s fees that it incurred while countering his objections to its award of attorney’s fees on the merits of his specific performance claim.”¹³ Specifically, he argued that “he had reasonable challenges to BVA’s evidence and the

3. *Id.* at 80, 803 S.E.2d at 493.

4. *Id.* at 80, 803 S.E.2d at 493.

5. *Id.* at 80, 803 S.E.2d at 493.

6. *Id.* at 80, 803 S.E.2d at 493.

7. *Id.* at 80, 803 S.E.2d at 493.

8. *Id.* at 80, 803 S.E.2d at 493.

9. *Id.* at 80–81, 803 S.E.2d at 493.

10. *Id.* at 81, 803 S.E.2d at 493.

11. *Id.* at 81, 803 S.E.2d at 493.

12. *Id.* at 82, 803 S.E.2d at 494.

13. *Id.* at 90, 803 S.E.2d at 498.

amount of the award of attorney's fees it sought, so the attorney's fees BVA incurred while proving the reasonableness of the award should not have been included in it."¹⁴

The court made short work of this argument. It held that Denton "conflated the standard for awarding attorney's fees" as sanctions as opposed to a prevailing party pursuant to a relevant contractual provision.¹⁵ "In a case where the prevailing party is entitled to an award of attorney's fees, the reasonableness of the award it seeks becomes an issue to be adjudicated in the case."¹⁶ "The attorney's fees that the prevailing party incurs while litigating the issue of attorney's fees are no different from those it incurs while litigating any other issue on which it prevails."¹⁷ A prevailing party is thus entitled to all reasonable attorney's fees incurred in the litigation, including fees incurred proving those fees.

Practitioners in Virginia often feel that state courts are "safer" with less exposure to a client as it relates to attorney's fees. The author has also often heard from fellow practitioners that fees incurred in determining and proving such fees are not recoverable. The current trend of cases, however, is making clear that such a view is mistaken. Combined with recent case law awarding high-figure attorney's fees in low-figure verdicts,¹⁸ it is apparent that a party faced with a statutory or contractual basis for attorney's fees to the opposing side faces substantial exposure in state court. Not only can the fees greatly outweigh the verdict, but a party will also be liable for the opposing side's fees in every step of the litigation, including the steps required to prove the fees and any unsuccessful appeals.

B. *Res Judicata* for Attorney's Fees

The supreme court also analyzed the application of *res judicata* to claims for attorney's fees. Heather Graham was the CEO for

14. *Id.* at 90, 803 S.E.2d at 498.

15. *Id.* at 90, 803 S.E.2d at 498.

16. *Id.* at 90, 803 S.E.2d at 498.

17. *Id.* at 90, 803 S.E.2d at 498.

18. *See, e.g., Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245, 798 S.E.2d 177 (2017) (holding that the court cannot limit attorney's fees solely because a verdict awarded low damages); *see also* Christopher S. Dadak, *Annual Survey of Virginia Law: Civil Practice and Procedure*, 52 U. RICH. L. REV. 1, 7–11 (2017) (analyzing the opinion in *Lambert*).

Community Management Corporation (“CMC”).¹⁹ As might be expected, Graham’s employment contract contained a confidentiality clause.²⁰ The parties also executed a separate agreement providing that the prevailing party in any action brought under the confidentiality clause “shall be entitled to an award of its attorney’s fees.”²¹ After Graham left CMC for another job, CMC filed a lawsuit “alleg[ing] that Graham had breached her obligation of confidentiality with respect to [CMC’s] proprietary information.”²² CMC requested the recovery of its attorney’s fees.²³ In response, Graham filed “two demurrers, several pleas in bar, and an answer.”²⁴ However, in none of her responsive pleadings did Graham request her incurred attorney’s fees.²⁵

The trial resulted in a defense verdict in favor of Graham.²⁶ She then filed a new action seeking attorney’s fees she incurred in defending herself against CMC’s earlier action.²⁷ CMC demurred, “arguing that Rule 3:25 required Graham to seek fees in the first suit, and her failure to ask for them in that case constituted a waiver.”²⁸ The circuit court agreed and dismissed Graham’s suit, and she ultimately appealed.²⁹

Rule 3:25 of the Supreme Court of Virginia applies to claims for attorney’s fees, and its terms are unambiguous. The rule states in relevant part:

A. *Scope of Rule.* This rule applies to claims for attorney’s fees, excluding (i) attorney’s fees under § 8.01-271.1 of the Code of Virginia, and (ii) attorney’s fees in domestic relations cases.

B. *Demand.* A party seeking to recover attorney’s fees shall include a demand therefor in the complaint filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, in a third-party pleading filed pursuant to Rule 3:13, or in a responsive pleading filed pursuant to Rule 3:8. The demand must identify the basis upon which the party relies in requesting attorney’s fees.

19. Graham v. Cmty. Mgmt. Corp., 294 Va. 222, 225, 805 S.E.2d 240, 241 (2017).

20. *Id.* at 225, 805 S.E.2d at 241.

21. *Id.* at 225, 805 S.E.2d at 241.

22. *Id.* at 225, 805 S.E.2d at 241.

23. *Id.* at 225, 805 S.E.2d at 241.

24. *Id.* at 225, 805 S.E.2d at 241.

25. *Id.* at 225, 805 S.E.2d at 241.

26. *Id.* at 225, 805 S.E.2d at 241.

27. *Id.* at 225, 805 S.E.2d at 241.

28. *Id.* at 225, 805 S.E.2d at 241.

29. *Id.* at 225, 805 S.E.2d at 241.

C. *Waiver*. The failure of a party to file a demand as required by this rule constitutes a waiver by the party of the claim for attorney's fees, unless leave to file an amended pleading seeking attorney's fees is granted under Rule 1:8.³⁰

Graham attempted to avoid the application of this rule by arguing that under Virginia Code section 8.01-230, "she could not have pled a claim for recovery of attorney's fees until a defense verdict was rendered in the prior action."³¹ The court clarified that "[s]tatutes of limitation [governed by Code § 8.01-230's accrual concepts] do not affect a cause of action; they bar a right of action,' and while '[t]he two may accrue at the same time,' they 'will not of necessity do so.'"³² Any "injury or damage, however slight,' is enough to trigger a claim."³³ In this case, "Graham suffered an injury when she was required to retain counsel to defend against [CMC's] action under the Confidentiality Agreement."³⁴ So, "[h]er right of action was not complete for statute of limitations purposes until she prevailed before the jury and—if no Rule had required her to plead the fee claim—it would not have been time-barred until five years after that verdict."³⁵

As discussed earlier in the analysis of *Denton v. Browntown Valley Associates*, attorney's fees can drastically increase a client's exposure and are an important variable in assessing a case. As a plaintiff, one must plead attorney's fees and the basis of the fees in the complaint. Thus, one must diligently review if there is any basis for claiming attorney's fees when preparing a lawsuit.³⁶ On the defense side, if the plaintiff has identified a basis for attorney's fees, then the defendant's task is half-done. All that is left is to simply review the plaintiff's basis and determine whether it also provides a basis for the defendant's attorney's fees. In a contractual situation, "prevailing party" language should immediately result in a defendant requesting attorney's fees and identifying the same

30. VA. SUP. CT. R. 3:25(A)–(C) (Repl. Vol. 2018).

31. *Graham*, 294 Va. at 227, 805 S.E.2d at 241–42.

32. *Id.* at 227–28, 805 S.E.2d at 242 (alterations in original) (quoting *Thorsen v. Richmond SPCA*, 292 Va. 257, 278, 786 S.E.2d 453, 465 (2016)).

33. *Id.* at 228, 805 S.E.2d at 242 (quoting *Van Dam v. Gay*, 280 Va. 457, 463, 699 S.E.2d 480, 482 (2010)).

34. *Id.* at 228, 805 S.E.2d at 242–43.

35. *Id.* at 228, 805 S.E.2d at 243.

36. Plaintiffs will often request such relief as part of routine pleading; however, without identifying the basis, such practice is of minimal, if any, benefit.

contractual basis as well. If the plaintiff does not request attorney's fees or identify the basis, then defense counsel, when reviewing any relevant contracts or statutes for affirmative defenses, should also look for any potential basis for an award of attorney's fees.³⁷

C. *Spoliation*

Along with attorney's fees and sanctions, spoliation is another pitfall that keeps practitioners awake at night. The court issued an important opinion in *Emerald Point, LLC v. Hawkins* on spoliation, which attracted significant attention.³⁸ Co-tenants ("Tenants") of an apartment located in Virginia Beach filed a personal injury suit seeking compensatory and punitive damages against the landlord, Emerald Point, LLC ("Emerald"), and the property management company, The Breeden Company, Inc. ("Breeden") (collectively the "Landlord").³⁹

On November 26, 2012, the carbon monoxide ("CO") detector in the Tenants' apartment went off.⁴⁰ Breeden sent a maintenance worker who "replaced the batteries in the device, indicating to the [T]enants that he believed the alarm was merely due to low battery power in the detector, rather than a malfunction in the furnace."⁴¹ However, the alarm went off again after the worker left.⁴² The following morning, one of the Tenants called Virginia Natural Gas ("VNG") about the detector.⁴³ "VNG dispatched an inspector" who "measured the CO levels in the apartment at 37 parts per million (ppm), a rate significantly higher than the normal range and hazardous to human health."⁴⁴ The inspector then "turned off the gas supply to the furnace and 'red tagged' it as the suspected source of

37. Defendants often request attorney's fees in stock language regarding relief in responsive pleadings. However, just like in a complaint, without identifying the basis such a request is likely insufficient.

38. See 294 Va. 544, 808 S.E.2d 384 (2017). The 2018 General Assembly session included an attempt to introduce legislation effectively overturning the court's decision. H.B. 1336, Va. Gen. Assembly (Reg. Sess. 2018). Expect the issue to reappear in the next General Assembly session.

39. *Emerald Point*, 294 Va. at 549–51, 808 S.E.2d at 387–88.

40. *Id.* at 549, 808 S.E.2d at 387.

41. *Id.* at 549, 808 S.E.2d at 387.

42. *Id.* at 549, 808 S.E.2d at 387.

43. *Id.* at 549, 808 S.E.2d at 387.

44. *Id.* at 549, 808 S.E.2d at 387.

the CO leak.”⁴⁵ The inspector specifically “indicated [on the red tag] that the issue might be a cracked heat exchanger in the furnace.”⁴⁶

Then, “[l]ater that day, Breeden sent [a] maintenance worker . . . to the [T]enants’ apartment to assess the problem.”⁴⁷ The worker “declared on a City code enforcement corrective action form that he had [c]hecked furnace for CO[] leaks, checked vent pipes for leaks, found vent pipe in attic to 2163, loose[.] Reattached and secured, rechecked CO[] level it was at 0.”⁴⁸ The worker was “not licensed to make repairs to heating systems,” but nonetheless he “repaired the vent pipe by using zip screws to secure the sections of the pipe together, which is contrary to manufacturer specifications.”⁴⁹ He “later returned to the apartment with . . . a code enforcement officer from the City, who likewise determined that the CO levels were within the acceptable range.”⁵⁰ The enforcement officer “did not go into the attic or otherwise inspect the furnace, flue or vents.”⁵¹ The red tag was subsequently removed with the enforcement officer’s approval.⁵²

Then, “[i]n the early morning hours of January 4, 2013, the alarm in the apartment’s carbon monoxide detector sounded again.”⁵³ At first, the “maintenance worker found no elevated CO readings” but “later that day a VNG inspector found that the CO readings were beyond the acceptable range and again red tagged the furnace.”⁵⁴ “The same day, Breeden hired a heating and air conditioning contractor to replace the furnace,” but that did not lower the CO levels.⁵⁵ The attic above the Tenants’ apartment revealed “that the flue of the furnace in the adjoining apartment was not properly connected and was venting exhaust, including CO, into the attic.”⁵⁶ “When this flue was repaired, CO levels in the [T]enants’ apartment returned to an acceptable level.”⁵⁷

45. *Id.* at 549, 808 S.E.2d at 387–88 (footnote omitted).

46. *Id.* at 549, 808 S.E.2d at 388.

47. *Id.* at 550, 808 S.E.2d at 388.

48. *Id.* at 550, 808 S.E.2d at 388 (alterations in original).

49. *Id.* at 550, 808 S.E.2d at 388.

50. *Id.* at 550, 808 S.E.2d at 388.

51. *Id.* at 550, 808 S.E.2d at 388.

52. *Id.* at 550, 808 S.E.2d at 388.

53. *Id.* at 550, 808 S.E.2d at 388.

54. *Id.* at 550, 808 S.E.2d at 388.

55. *Id.* at 550, 808 S.E.2d at 388.

56. *Id.* at 550, 808 S.E.2d at 388.

57. *Id.* at 550, 808 S.E.2d at 388.

“[T]he old furnace was removed from the [T]enants’ apartment on January 4, 2013.”⁵⁸ The Landlord stored the furnace “in a maintenance bay for more than one year and . . . later disposed of [it] well before the November 13, 2014 date when the complaint . . . was filed.”⁵⁹ The Tenants filed a motion to have the court provide “a jury instruction which would have directed the jury to accept as an undisputed fact that the furnace had a ‘burned through’ combustion chamber and that this was the principal source of CO entering their apartment.”⁶⁰ The circuit court denied the motion but

decided to give, over the landlord’s objection, the following spoliation instruction:

If a party has exclusive possession of evidence which a party knows, or reasonably should have known would be material to a potential civil action and the party disposes of that evidence, then you may infer, though you are not required to do so, that if that evidence had been available it would be detrimental to the case of the party that disposed of it[.]. You may give such inference whatever force or effect you think is appropriate under all the facts and circumstances.⁶¹

In denying the motion while providing the above instruction, the court held “that the landlord ‘did nothing in bad faith’ in disposing of the furnace.”⁶²

The “issue of first impression” before the Supreme Court of Virginia was “whether to warrant . . . the granting of an adverse inference instruction, the destruction of the evidence must be undertaken with the deliberate intent to deprive the other party of its use at trial in a pending or reasonably foreseeable litigation between the parties.”⁶³ Specifically, the court analyzed

whether a party who is either aware or should reasonably be aware of the relevance of evidence in its possession or under its control to either probable or pending litigation, and fails to preserve such evidence without bad faith shall be penalized by having the jury instructed that it may infer that the missing evidence would have been unfavorable to that party.⁶⁴

58. *Id.* at 555, 808 S.E.2d at 391.

59. *Id.* at 555, 808 S.E.2d at 391.

60. *Id.* at 555, 808 S.E.2d at 391.

61. *Id.* at 555–56, 808 S.E.2d at 391.

62. *Id.* at 556, 808 S.E.2d at 391.

63. *Id.* at 556, 808 S.E.2d at 391.

64. *Id.* at 556, 808 S.E.2d at 391.

The Landlord focused on two arguments on appeal. First, the Landlord argued that “a spoliation instruction is not permissible when the record demonstrates that the party charged with failing to preserve the evidence was not reasonably on notice that the evidence was likely to be the subject of litigation.”⁶⁵ Second, the Landlord argued that a spoliation instruction is not appropriate “in the absence of an express finding that the responsible party acted in bad faith by failing to preserve evidence with deliberate intent to deprive the other party of its use at trial.”⁶⁶ The supreme court decided the second argument was dispositive and therefore it did not “need [to] address the issue whether the evidence was sufficient to establish that the [L]andlord was reasonably on notice that the evidence of the condition of the furnace was likely to be the subject of litigation.”⁶⁷

The supreme court began its analysis with a history of its prior decisions and federal law on spoliation. The supreme court stated that in *Gentry v. Toyota Motor Corp.*, it held that “destruction of the evidence . . . undertaken by a third party and . . . [without] ‘bad faith’ by the party in control of the evidence” was insufficient to warrant an adverse instruction.⁶⁸ In analyzing federal jurisprudence, the court found that “several federal courts applying common law principles had held that an adverse inference instruction and certain other sanctions for spoliation are proper only where the party has acted in bad faith or with intentional conduct calculated to suppress the truth.”⁶⁹

The supreme court also found federal rules and analysis of the use of electronically stored information to be instructive. “Federal Rule of Civil Procedure 37(e)(2)(B) has since December 1, 2015 required a finding by the court that a party acted with the intent to deprive another party of the use of that information in the litigation before an adverse inference instruction may be given to the jury.”⁷⁰

65. *Id.* at 556, 808 S.E.2d at 391.

66. *Id.* at 556–57, 808 S.E.2d at 391.

67. *Id.* at 557, 808 S.E.2d at 392.

68. *Id.* at 557, 808 S.E.2d at 392 (citing *Gentry v. Toyota Motor Corp.*, 252 Va. 30, 34, 471 S.E.2d 485, 488 (1996)).

69. *Id.* at 558, 808 S.E.2d at 392 (citing *Bull v. UPS*, 665 F.3d 68, 79 (3d Cir. 2012); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007); *King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003); *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1294 (11th Cir. 2003)).

70. *Id.* at 557, 808 S.E.2d at 392 (citing FED. R. CIV. P. 37(e)(2)(B)).

The rule's advisory notes "provide[d] clear insight to its application" and were "helpful" to the court.⁷¹ In relevant part, the advisory notes state:

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference.⁷²

The supreme court adopted this analysis for "all forms of spoliation evidence."⁷³ It held that "the evidence must support a finding of intentional loss or destruction of evidence in order to prevent its use in litigation before the court may permit the spoliation inference."⁷⁴ The dispositive element is "the determination that a party intentionally failed to preserve evidence in order to prevent its use in litigation where the party knew or reasonably should have known under the totality of the circumstances that the evidence would be material in a pending or reasonably probable litigation."⁷⁵ But, the court cautioned that this analysis "is highly fact specific."⁷⁶

"In this case, however, the evidence showed that the furnace was disposed of only after it sat for more than one year in a maintenance bay before being discarded."⁷⁷ To the court, the destruction of evidence "resulted at worst from negligence" and the record "did not demonstrate that it was motivated by any desire to deprive [the Tenants] of access to the furnace as material evidence in probable litigation."⁷⁸

As previously mentioned, spoliation is an unpleasant thought for every attorney, and particularly those on the defense.⁷⁹ The analysis in this opinion shows that it is a difficult area for jurists as well. The "highly fact specific" nature of the holding likely means

71. *Id.* at 558, 808 S.E.2d at 392.

72. *Id.* at 558, 808 S.E.2d at 392 (quoting FED. R. CIV. P. 37 advisory committee's note to 2015 amendment).

73. *Id.* at 558, 808 S.E.2d at 392.

74. *Id.* at 559, 808 S.E.2d at 392–93.

75. *Id.* at 559, 808 S.E.2d at 393.

76. *Id.* at 559, 808 S.E.2d at 393.

77. *Id.* at 559, 808 S.E.2d at 393.

78. *Id.* at 559, 808 S.E.2d at 393.

79. However, practitioners should be mindful that there can be risk for plaintiffs as well, particularly with the rise of electronic communications and social media.

that any case with potential spoliation will be vigorously litigated. Undoubtedly, proving a desire to deprive the other side of relevant evidence is a high burden. This burden, however, reflects the reality that with the greater ability and capacity to maintain records, documents, etc. comes the greater risk that some evidence (that historically never would have existed) is accidentally destroyed. The court seems to have found that the balance between the high sanction of a spoliation instruction and the broad category of potential evidence requires that destruction of that evidence be done with the intent to avoid its use in litigation. Expect to see more legislative activity and more appeals on this contentious issue that could swing a case.

D. Appeals from General District Court

In *Robert & Bertha Robinson Family, LLC v. Allen*, a case of first impression, the Supreme Court of Virginia clarified procedural requirements for appeals from general district court (“GDC”) when counterclaims are involved. The procedural and substantive history of the case is surprisingly complex and even includes an attorney’s least favorite topic: sanctions.

A landlord filed “a warrant in debt against the tenants in the GDC alleging breach of a lease agreement.”⁸⁰ “The landlord sought an award for unpaid rent pursuant to a holdover provision in the lease agreement and for property damage.”⁸¹ In 2005, the parties had a written lease agreement with a five-year term.⁸² The contract’s holdover provision

stated that if the tenants remained on the leasehold premises after the expiration of the lease agreement’s five-year term, the landlord “[had] the right, at its sole option and discretion, to [deem]” that the tenants were “occupying” the premises on a “month to month” basis “at double the annual minimum rent.”⁸³

The holdover provision “also stated that the tenants would remain subject to all other applicable provisions of the lease agreement.”⁸⁴ Further, the tenants were not entitled to any notice if the

80. *Robert & Bertha Robinson Family, LLC v. Allen*, 295 Va. 130, 135, 810 S.E.2d 48, 50 (2018).

81. *Id.* at 135, 810 S.E.2d at 50.

82. *Id.* at 136, 810 S.E.2d at 51.

83. *Id.* at 136, 810 S.E.2d at 51 (alterations in original).

84. *Id.* at 136, 810 S.E.2d at 51.

holdover applied and the lease automatically became month-to-month.⁸⁵ The lease

required the tenants to surrender the leasehold premises “broom clean, in good order and condition,” and to “remove alterations, additions and improvements not desired by Landlord, [to] repair all damage to the [Leasehold] Premises caused by such removal, and [to] restore the [Leasehold] Premises to the condition which [it was] in prior to the installation of the articles so removed.”⁸⁶

Finally the lease, as can be expected, required that any modification be in writing and signed by all parties and that lease provisions could only be waived if in writing and “signed by the party against whom [the waiver] is sought to be enforced.”⁸⁷

The tenants occupied the premises for another four years after the expiration of the original five-year term.⁸⁸ They “did not pay ‘double the annual minimum rent’ pursuant to the holdover provision.”⁸⁹ Instead, in 2015, a year after the tenants left the premises, “the landlord filed the GDC warrant in debt seeking \$4,410 in unpaid holdover rent and \$20,590 for damage to the leasehold premises.”⁹⁰ The landlord nonsuited its claims and then refiled. The tenants then “filed a counterclaim seeking to recover their security deposit.”⁹¹

At trial, the GDC ruled against the landlord on its claims and against the tenants on their counterclaim.⁹² “[T]he landlord filed a notice of appeal of the GDC’s denial of its claim for unpaid rent and property damage,” but “[t]he tenants did not file a notice of appeal challenging the GDC’s denial of their counterclaim, nor did they file any additional pleadings in the circuit court asserting their counterclaim.”⁹³

“[T]he landlord filed a motion to dismiss the counterclaim arguing that it was not properly before the circuit court.”⁹⁴ Before that

85. *Id.* at 136, 810 S.E.2d at 51.

86. *Id.* at 136, 810 S.E.2d at 51 (alterations in original).

87. *Id.* at 136–37, 810 S.E.2d at 51.

88. *Id.* at 137, 810 S.E.2d at 51–52.

89. *Id.* at 137, 810 S.E.2d at 52.

90. *Id.* at 137, 810 S.E.2d at 52.

91. *Id.* at 135, 810 S.E.2d at 50.

92. *Id.* at 135, 810 S.E.2d at 50–51.

93. *Id.* at 135, 810 S.E.2d at 51.

94. *Id.* at 135, 810 S.E.2d at 51.

motion was heard and decided, the landlord “filed a motion to withdraw its appeal pursuant to [Virginia] Code § 16.1-106.1(A).”⁹⁵ The motion to withdraw was based on the fact “that neither the acting manager for the landlord, which was a family-owned limited liability company, nor the acting manager’s wife wished to continue the suit due to health complications.”⁹⁶ The tenants, meanwhile, filed for sanctions arguing that the “landlord’s claims [were] ‘completely and utterly frivolous’ and not asserted ‘in good faith.’”⁹⁷

The tenants argued that the landlord had never treated the tenants as holdovers, that the parties had created a new oral lease by which all parties abided, and that pursuant to the oral lease the landlord “had agreed to accept the vacated premises without further restoration.”⁹⁸ The tenants also claimed that the landlord should not have filed suit without having all of his evidence for trial.⁹⁹ The landlord in response “maintained that the express language of the lease agreement . . . forbidding non-written modification or waiver of contractual rights, and requiring restoration of the leasehold premises to its original condition . . . established a good-faith basis for the landlord’s claims.”¹⁰⁰

“The circuit court granted the landlord’s motion to withdraw and the tenants’ motion for sanctions.”¹⁰¹ “[T]he circuit court elaborated on its holding, stating that the landlord had violated its ‘duty to have *all evidence* upon which it planned to rely on before ever filing suit.”¹⁰² Because “the landlord’s lawsuit would be ‘a per se violation of Federal Rule of Civil Procedure 11(b),’” then “similarly such filing of a lawsuit without *all evidence in hand* in Virginia is . . . a violation of [Code] § 8.01-271.1.”¹⁰³

The circuit court denied the landlord’s motion to dismiss the tenants’ counterclaim and “summarily awarded the tenants \$2,600 on their counterclaim without hearing evidence on the matter.”¹⁰⁴ Unsurprisingly, “[t]he landlord filed a motion to reconsider” which the

95. *Id.* at 135, 810 S.E.2d at 51.

96. *Id.* at 135, 810 S.E.2d at 51.

97. *Id.* at 137, 810 S.E.2d at 52.

98. *Id.* at 137–38, 810 S.E.2d at 52.

99. *Id.* at 138, 810 S.E.2d at 52.

100. *Id.* at 138, 810 S.E.2d at 52 (citations omitted).

101. *Id.* at 135, 810 S.E.2d at 51.

102. *Id.* at 138, 810 S.E.2d at 52.

103. *Id.* at 138, 810 S.E.2d at 52–53 (second alteration in original).

104. *Id.* at 135–36, 810 S.E.2d at 51.

circuit court denied and then “awarded \$10,000 in attorneys fees against the landlord as sanctions for the landlord’s withdrawn claims.”¹⁰⁵ The landlord appealed to the Supreme Court of Virginia.¹⁰⁶

The Supreme Court of Virginia first tackled the circuit court’s award of sanctions. In reviewing such an award for abuse of discretion, the court applies

an objective standard of reasonableness in determining whether a litigant and his attorney, after reasonable inquiry, could have formed a reasonable belief that the pleading was well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for an improper purpose.¹⁰⁷

The supreme court looked at the text of Virginia Code section 8.01-271.1 and found that it “does not, as the circuit court ruled, place a ‘duty’ on a claimant ‘to have *all evidence* upon which it planned to rely on before ever filing suit.”¹⁰⁸ The court held that rather than requiring that a claim be “exhaustively supported with every conceivable fact that the party may plan to use at trial,” the statute requires that a “claim must be ‘well grounded in fact.’”¹⁰⁹

The Supreme Court of Virginia also found that the circuit court failed to analyze the legal sufficiency “of the landlord’s claims at the time that the landlord filed the notice of appeal.”¹¹⁰ The landlord’s claims “relied on clearly worded provisions of the lease agreement: one increasing the rent if the tenants became holdovers and the other requiring the tenants to restore the leasehold premises to its original condition.”¹¹¹ The fact “that the tenants believed, not without reason, that they had a strong factual argument either that the parties had entered into a new oral lease or that the landlord had waived the terms of the original lease” was not dispositive for sanctions.¹¹² “[U]nless an expected defense is so irrefutable as

105. *Id.* at 136, 810 S.E.2d at 51.

106. *Id.* at 134, 810 S.E.2d at 50.

107. *Id.* at 139, 810 S.E.2d at 53 (quoting *Kambis v. Considine*, 290 Va. 460, 466, 778 S.E.2d 117, 120 (2015)).

108. *Id.* at 139, 810 S.E.2d at 53 (citing VA. CODE ANN. § 8.01-271.1 (Repl. Vol. 2015 & Cum. Supp. 2017)).

109. *Id.* at 139, 810 S.E.2d at 53 (quoting VA. CODE ANN. § 8.01-271.1 (Repl. Vol. 2015 & Cum. Supp. 2017)).

110. *Id.* at 139–40, 810 S.E.2d at 53.

111. *Id.* at 140, 810 S.E.2d at 53.

112. *Id.* at 140, 810 S.E.2d at 53.

to render a claimant's theory of relief frivolous, 'claims which are recognized under Virginia law, and as to which the essential elements were pled, are not sanctionable even if they do not prevail on the merits.'"¹¹³

The supreme court found that the landlord had a viable, if ultimately unlikely to succeed, Statute of Frauds response to the tenants' defense of waiver.¹¹⁴ Because "[t]he landlord reasonably contested the tenants' assertions of a new oral lease and a waiver of the written lease terms . . . , the landlord's claims were well-grounded in fact and warranted by existing law."¹¹⁵

After finding that the circuit court's statutory and legal sufficiency bases were lacking, the supreme court addressed the tenants' alternative grounds for sanctions. The tenants argued that sanctions were alternatively warranted because of "the protracted history of the litigation . . . , namely the nonsuit" and the GDC's dismissal of the landlord's claims.¹¹⁶ The court reflected that "[p]rotracted litigation is a regrettable reality in the modern adversarial process" and noted that the landlord's procedural actions in this case were "not intrinsic badges of bad faith."¹¹⁷ Instead, there was nothing in the record to "warrant the inference that the landlord acted with an improper purpose."¹¹⁸ The supreme court thus reversed and dismissed the circuit court's award of sanctions.¹¹⁹

The supreme court then turned to the procedural issue of whether the tenants' counterclaim was even properly before the circuit court for an award. The landlord claimed the tenants' failure to appeal the GDC's dismissal of the counterclaim was fatal.¹²⁰ The tenants argued that the landlord's appeal of the GDC's dismis-

113. *Id.* at 140, 810 S.E.2d at 53.

114. *Id.* at 140–41, 810 S.E.2d at 53–54.

115. *Id.* at 140–41, 810 S.E.2d at 54.

116. *Id.* at 141, 810 S.E.2d at 54.

117. *Id.* at 142, 810 S.E.2d at 54. However, the court cautioned that it is conceivable that a litigant could initiate litigation, nonsuit and refile the claim, and then fight to the bitter end, all for the singular purpose of harassing an opponent and depleting his resources. If that were the case, it would not matter that the litigant's "pleadings were 'well grounded in fact' and 'warranted by existing law'" because even facially legitimate pleadings cannot be filed for "an improper purpose."

Id. at 142, 810 S.E.2d at 54.

118. *Id.* at 142, 810 S.E.2d at 54.

119. *Id.* at 152, 810 S.E.2d at 60.

120. *Id.* at 142, 810 S.E.2d at 55.

sal of its claim also served as an appeal of the counterclaim's dismissal.¹²¹ The court noted that "[a] leading scholar of Virginia procedural law, Judge J.R. Zepkin, observed years ago that, in GDC cases involving consolidated claims by several parties, '[t]here is no clear guidance on what happens . . . if one of multiple losing parties wishes to appeal'" and also observed that the subject litigation "present[ed] an opportunity to provide that guidance."¹²²

The supreme court began with the history and progression of the "modern American appellate system" from the "ancient world."¹²³ "The current process governing appeals from the GDC to the circuit court originated with the courts of record exercising supervisory oversight over courts not of record."¹²⁴ "Prior to 1973, courts not of record fell under the umbrella of the justice-of-the-peace system, which was composed of a variety of inferior courts with limited jurisdiction."¹²⁵ "In 1973, courts not of record were brought under a unified system of district courts."¹²⁶

The supreme court repeated that "[i]n case after case' involving appeals from courts not of record, [it has] 'in clear, unequivocal, and emphatic language repeatedly said that "[t]he right of appeal is statutory and the statutory procedural prerequisites must be observed.'"¹²⁷ "Absent a statutory authorization or a constitutional mandate, no party has a right to a de novo appeal of the GDC's judgment in the circuit court."¹²⁸ Practices among attorneys, such as the "piggyback" theory, "by themselves, cannot create this right."¹²⁹ Without a constitutional or statutory basis, "the GDC's adverse judgment on [the tenants'] counterclaim was not properly before the circuit court."¹³⁰

The supreme court then analyzed the relevant statutory provisions. Virginia Code section 16.1-106 "grants 'an appeal of right'

121. *Id.* at 142, 810 S.E.2d at 55.

122. *Id.* at 142-43, 810 S.E.2d at 55 (second and third alterations in original) (quoting J.R. Zepkin, *The Rules of Court for the General District Courts of Virginia*, 23 U. RICH. L. REV. 809, 829 n.43 (1989)).

123. *Id.* at 143, 810 S.E.2d at 55.

124. *Id.* at 144, 810 S.E.2d at 56.

125. *Id.* at 144, 810 S.E.2d at 56.

126. *Id.* at 144, 810 S.E.2d at 56.

127. *Id.* at 144, 810 S.E.2d at 56 (alterations in original) (quoting *Covington Virginian, Inc. v. R.C. Woods*, 182 Va. 538, 543, 29 S.E.2d 406, 409 (1944)).

128. *Id.* at 145, 810 S.E.2d at 56.

129. *Id.* at 145, 810 S.E.2d at 56.

130. *Id.* at 145, 810 S.E.2d at 56.

to a litigant from ‘any order entered or judgment rendered in a court not of record in a civil case’ when the ‘matter in controversy’ exceeds \$20.”¹³¹ Virginia Code section 16.1-107 “states that no appeal ‘shall be allowed unless and until the party applying for the same’ provides an appropriate bond ‘sufficient to satisfy the judgment of the court in which it was rendered.’”¹³² It “also requires the ‘party applying for appeal’ to pay a writ tax to the circuit court.”¹³³

Under the tenants’ argument, “a notice of appeal filed by one litigant appeals the entire case on behalf of all other litigants in the GDC case, even the claims of those litigants against whom the appealing party prevailed.”¹³⁴ “In other words, an appeal by one party converts all other parties into de facto appellants on every adverse ruling of the GDC.”¹³⁵ The supreme court did not agree with the tenants’ statutory interpretation.¹³⁶

The supreme court noted that Virginia Code section 16.1-106 “does not require the appealing party to appeal *every* adverse ruling of the GDC” but, instead, allows a party to appeal any adverse ruling as a matter of right.¹³⁷ The court also noted the tenants’ statutory interpretation would have certain undesirable and illogical results.¹³⁸ “Under the tenants’ contrary view, a party cannot appeal a loss on one claim without forfeiting his wins on other claims against other parties.”¹³⁹ This means that when “the losing defendant in the GDC files a notice of appeal but neither the plaintiff nor the winning defendant do, under the tenants’ view of the appellate process, the winning defendant loses his victory even though the losing plaintiff never appealed that loss.”¹⁴⁰

The supreme court also explained that the tenants’ position was incompatible with the bond and writ requirements and the same

131. *Id.* at 145, 810 S.E.2d at 56 (quoting VA. CODE ANN. § 16.01-106 (Repl. Vol. 2015 & Cum. Supp. 2017)).

132. *Id.* at 145, 810 S.E.2d at 56 (quoting VA. CODE ANN. § 16.1-107 (Cum. Supp. 2017)).

133. *Id.* at 145, 810 S.E.2d at 56 (quoting VA. CODE ANN. § 16.1-107 (Cum. Supp. 2017)).

134. *Id.* at 145–46, 810 S.E.2d at 56.

135. *Id.* at 145, 810 S.E.2d at 56.

136. *Id.* at 145, 810 S.E.2d at 56.

137. *Id.* at 145, 810 S.E.2d at 56 (citing VA. CODE ANN. § 16.106 (Repl. Vol. 2015 & Cum. Supp. 2017)).

138. *See id.* at 145–46, 810 S.E.2d at 56–57.

139. *Id.* at 145, 810 S.E.2d at 56–57.

140. *Id.* at 146, 810 S.E.2d at 57.

appeal process if a counterclaim was filed as a separate suit.¹⁴¹ Applying the tenants' logic, "a circuit court may review an unappealed judgment on a counterclaim but cannot review an unappealed judgment on the same cause of action when filed as a separate GDC action rather than a counterclaim."¹⁴² This result is contrary to the law's preference for counterclaims "in an effort to avoid a multiplicity of lawsuits and the danger of inconsistent judgments."¹⁴³ Further, the court found that the tenants' interpretation would mean that not only can a party "piggyback" an appeal on its counterclaim but it must also be able to "piggyback" on the opposing side's payment of the bond and writ.¹⁴⁴ "[U]nder the tenants' view, the party filing the notice of appeal must strictly comply with the statutory bond requirement, while the party filing no notice of appeal does not."¹⁴⁵ The court found that such a result was unfair and not supported by the relevant statutes.¹⁴⁶

The supreme court next addressed the tenants' reliance on Virginia Code section 16.1-88.01 which "authorizes counterclaims and grants discretion to the GDC to try claims and counterclaims together or separately."¹⁴⁷ The tenants point to the requirement that the court enter "such final judgment on the whole case as the law and the evidence require" as proof that "the only thing that can be appealed by any party is the 'whole case.'"¹⁴⁸ The court characterized the argument as "superficially attractive" but a "fail[ure] as a non sequitur."¹⁴⁹ The court explained that the "whole case" language simply reflects the requirement that an appeal must be of a "final judgment," which in turn by definition must dispose of an

141. *Id.* at 146–47, 810 S.E.2d at 57–58.

142. *Id.* at 146, 810 S.E.2d at 57.

143. *Id.* at 146, 810 S.E.2d at 57 (quoting W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 6.04[1], at 6-85 (5th ed. 2017)).

144. *Id.* at 146–47, 810 S.E.2d at 57.

145. *Id.* at 147, 810 S.E.2d at 57.

146. *Id.* at 147, 810 S.E.2d at 57. The court also noted that the statute on withdrawing an appeal "dissuades [the court] from adopting the tenants' position" because it refers to the "party who has appealed a final judgment or order" . . . as distinguished from "the party who did not appeal." *Id.* at 147, 810 S.E.2d at 57 (quoting VA. CODE ANN. § 16.1-106.1 (Repl. Vol. 2015 & Cum. Supp. 2017)).

147. *Id.* at 147, 810 S.E.2d at 58 (citing VA. CODE ANN. § 16.1-88.01 (Repl. Vol. 2015)).

148. *Id.* at 147–48, 810 S.E.2d at 58 (citing VA. CODE ANN. § 16.1-88.01 (Repl. Vol. 2015)).

149. *Id.* at 148, 810 S.E.2d at 58.

“entire action” or “whole case.”¹⁵⁰ The court did not find that Virginia Code section helpful in “answer[ing] the question before [it].”¹⁵¹

The supreme court continued its analysis by assessing the tenants’ argument that a circuit court’s *de novo* review requires that it “adjudicate both appealed and unappealed rulings in order to conduct a proper . . . review.”¹⁵² The tenants pressed that “the destruction of a lower court judgment necessarily results in some collateral consequences, including the continuation of litigation over aspects of the judgment that were not specifically appealed by any party.”¹⁵³ However, the supreme court noted that “[t]he scope of appellate review is not determined by the standard of review” as “[t]he two are very different concepts.”¹⁵⁴ Finally, the tenants’ “destruction theory” went “too far.”¹⁵⁵ Procedurally, the GDC’s judgment is intact until “a trial *de novo* has commenced on the merits of the case.”¹⁵⁶ Similarly, abandoned counterclaims cannot be resurrected at the circuit court stage, contradicting the “destruction” theory.¹⁵⁷

The supreme court concluded that the statutory “appeal of right belongs [only] to the party applying for the same.”¹⁵⁸ It explicitly held that “any party seeking on appeal to change or modify an unfavorable disposition of a claim [including counterclaims, cross-claims, or third-party claims] asserted by or against him must file a notice of appeal.”¹⁵⁹ Otherwise, “the GDC’s judgment on the claim [remains] intact and subject to *res-judicata* principles.”¹⁶⁰

This case clarifies the appellate procedure for multiparty and multiclaim actions in GDCs. It exposes a potential pitfall for unwary practitioners. Attorneys will often settle or attempt to settle

150. *Id.* at 148, 810 S.E.2d at 58. Specifically, the court noted the terms are essentially interchangeable. *Id.* at 148, 810 S.E.2d at 58.

151. *Id.* at 148, 810 S.E.2d at 58.

152. *Id.* at 148, 810 S.E.2d at 58.

153. *Id.* at 149, 810 S.E.2d at 59.

154. *Id.* at 149, 810 S.E.2d at 58.

155. *Id.* at 149, 810 S.E.2d at 59.

156. *Id.* at 150, 810 S.E.2d at 59 (quoting *Commonwealth v. Diaz*, 266 Va. 260, 266, 585 S.E.2d 552, 555 (2003)).

157. *Id.* at 150, 810 S.E.2d at 59.

158. *Id.* at 151, 810 S.E.2d at 60 (citations omitted).

159. *Id.* at 151–52, 810 S.E.2d at 60.

160. *Id.* at 152, 810 S.E.2d at 60.

cases after a GDC verdict. Now, however, if such settlement discussions are not finalized within ten days of judgment, a party may not note an appeal of its claim, while the opposing party does note an appeal and its claim survives.¹⁶¹ Of course, the risk is mainly with verdicts that are either unfavorable or not the full extent of the relief sought.

An example may be best. A plaintiff sues for damages, and the defendant files a counterclaim. The court enters judgment in favor of both but for less than the amounts sought. If the plaintiff fails to appeal but the defendant does appeal, then the defendant has greatly increased his or her leverage for settlement. Not only is the plaintiff's judgment (at least temporarily) gone, the plaintiff is (at least theoretically) also facing a risk of a lesser verdict in circuit court and the defendant's right to collect on its (now final) verdict.

E. *Res judicata in Pending Claims*

In *Kellogg v. Green*, the supreme court addressed the effect that the pendency of an issue or claim has on res judicata analysis.¹⁶² Connie Kellogg and Christopher B. Green were married from August 1998 until April 2015.¹⁶³ A final decree of divorce was entered on April 9, 2015, which incorporated two pre-marital agreements and a provision that the case be "stricken from the docket."¹⁶⁴

Kellogg filed a motion to amend the order to change a date in the order and also a petition for a rule to show cause.¹⁶⁵ The petition argued that pursuant to one of the pre-marital agreements, "Green was 'indebted to [Kellogg] in the sum of \$5,000.00 for each year [Kellogg and Green] were married,' which totaled \$82,949.44 for their sixteen-and-one-half-year marriage."¹⁶⁶ On September 16, 2015, the circuit court entered an amended final order stating that "[t]he sole purpose for the entry of [the Amended Final Decree] is to correct the date the [Amended] Pre-Marital Agreement was signed by the parties from March 18, 2004 to March 18, 2003" and that "this cause shall remain on the docket of [the circuit court] for

161. *Id.* at 151, 810 S.E.2d at 60.

162. 295 Va. 39, 43–44, 809 S.E.2d 631, 634 (2018).

163. *Id.* at 41, 809 S.E.2d at 632–33 (2018).

164. *Id.* at 41–42, 809 S.E.2d at 633.

165. *Id.* at 42, 809 S.E.2d at 633.

166. *Id.* at 42, 809 S.E.2d at 633 (alterations in original).

the purposes of enforcing the terms of the Agreements.”¹⁶⁷ “On October 1, 2015, the circuit court entered an order which memorialized the granting of the motion to amend . . . and dismissed the . . . Petition.”¹⁶⁸

On April 29, 2016, Kellogg filed a separate action seeking the same \$82,949.44 and attorney’s fees.¹⁶⁹ Kellogg again claimed that a pre-marital agreement entitled her to \$5000 “for each year of their sixteen-and-one-half-year marriage.”¹⁷⁰ Her complaint also alleged that “Green’s liability ‘became liquidated and due and payable’ as of the entry of the [final order].”¹⁷¹ In response, Green filed a plea of res judicata, arguing that “pursuant to Rule 1:6, Kellogg was barred from bringing the [claim] because she had sought identical relief in the . . . [p]etition . . . and the circuit court had dismissed that petition [in the October 2015 order], which was a final order.”¹⁷² The circuit court agreed and dismissed the action with prejudice.¹⁷³ The circuit court denied Kellogg’s motion for reconsideration holding that “pursuant to Rule 1:6, and the *Lee v. Spoden* case, . . . the issues that were raised by the filing of the breach of contract [are] the same issues that were raised in the contempt proceeding,’ and for those reasons, ‘res judicata applies”¹⁷⁴ Kellogg appealed, arguing that there was no relevant final order.¹⁷⁵

The parties’ arguments hinged on the relevance of the divorce action pending throughout the litigation. Kellogg argued that “the element of finality [was] missing” because the circuit court expressly retained jurisdiction for enforcement and since the divorce was still pending, “she could not appeal the [October 2015 order], and to find that res judicata bars her from bringing a collateral action ‘would produce an absurd, and inequitable, result.’”¹⁷⁶ Green meanwhile argued that the October 2015 order “was a final, con-

167. *Id.* at 42, 809 S.E.2d at 633 (alterations in original). Notably this order was amended nunc pro tunc to April 9, 2015. *Id.* at 42, 809 S.E.2d at 633.

168. *Id.* at 42, 809 S.E.2d at 633.

169. *Id.* at 43, 809 S.E.2d at 633.

170. *Id.* at 43, 809 S.E.2d at 633.

171. *Id.* at 43, 809 S.E.2d at 633.

172. *Id.* at 43, 809 S.E.2d at 633.

173. *Id.* at 43, 809 S.E.2d at 633.

174. *Id.* at 43, 809 S.E.2d at 634 (alterations in original) (citation omitted) (citing *Lee v. Spoden*, 290 Va. 235, 776 S.E.2d 798 (2015)).

175. *Id.* at 43, 809 S.E.2d at 634.

176. *Id.* at 43–44, 809 S.E.2d at 634.

clusive order that disposed of all of Kellogg's claims for relief, regardless of whether the [divorce] remains pending" and that "Lee stands for the proposition that 'if the claimant moves on a cause of action and is denied, then the same claimant is barred from future actions based on the same cause of action.'"¹⁷⁷ Green further argued that the October 2015 order "was still an appealable final order because it concerned a 'domestic relations matter' and Code § 17.1-405 'permits an appeal upon the denial of a matter raised under Title 20,' which governs domestic relations."¹⁷⁸

The supreme court began its analysis by reviewing the definition of a "final judgment":

A decree that enters judgment for a party is not final if it "expressly provides that the court retains jurisdiction to reconsider the judgment or to address other matters still pending in the action before it" . . . A decree is final only when it disposes of the whole subject, gives all the relief that is contemplated and leaves nothing to be done by the court in the cause except its ministerial execution. Where further action of the court in the cause is necessary to give completely the relief contemplated by the court, the decree is not final but interlocutory.¹⁷⁹

Notably to the court, the April 2015 order provided that the action remain on the docket for the court's ability to enforce the premarital agreements.¹⁸⁰ Meanwhile, the October 2015 order "did not contain any language to indicate that it was a final order regarding the enforceability of the Agreements; there was no language indicating that there was nothing further to be done in the action" nor was there language "which would bar the filing of a subsequent show cause petition or the attempted enforcement of the Agreements in some other manner."¹⁸¹ And while the court had jurisdiction, it was "empowered to change a legal determination" and had "the ability to not only reverse [the October 2015 order] but also to grant a subsequent show cause petition."¹⁸² Hence, the October 2015 order could not be a "final judgment on the merits" and could not serve as the basis for *res judicata*.¹⁸³

177. *Id.* at 44, 809 S.E.2d at 634.

178. *Id.* at 44, 809 S.E.2d at 634 (citing VA. CODE ANN. § 17.1-405 (Repl. Vol. 2015)).

179. *Id.* at 45, 809 S.E.2d at 635 (citation omitted).

180. *Id.* at 46, 809 S.E.2d at 635.

181. *Id.* at 46, 809 S.E.2d at 635.

182. *Id.* at 46, 809 S.E.2d at 635.

183. *Id.* at 46, 809 S.E.2d at 635.

There are two main practical takeaways from this case. First, if additional claims or refile of claims is a factor, make sure that the order addressing the claim or requested relief has specific language addressing the merits and all the requested relief, and preferably strikes the case from the docket. Second, if a court retains jurisdiction over the matter and it remains pending, a party will face an uphill battle to show *res judicata* through an order in the matter.

II. NEW LEGISLATION

A. *Pro Se Minor Signatures*

The General Assembly amended Virginia Code section 8.01-271.1 to clarify requirements regarding signatures by pro se minors.¹⁸⁴ The statute now provides that a pro se minor “shall sign his pleading, motion, or other paper by his next friend.”¹⁸⁵ The statute further provides that one or both parents may sign on behalf of the minor.¹⁸⁶ The exception to this provision is if such a signature would violate the provisions of Virginia Code section 64.2-716 which, in relevant part, only allows a parent to sign when a “guardian of the estate or guardian for the child has not been appointed.”¹⁸⁷ This change codifies a common-sense approach and practical analysis of the previous language.

B. *Unlawful Detainer Procedural Changes*

There have been several procedural changes relating to unlawful detainers. This article solely describes the procedural changes and not the substantive changes.

First, upon entry of judgment and request from the plaintiff, the court shall immediately issue a writ of possession.¹⁸⁸ But, certain limitations still apply. First, the actual eviction cannot occur before the defendant’s ten-day window to appeal expires.¹⁸⁹ Second, the

184. Act of Feb. 28, 2018, ch. 59, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 2018)).

185. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 2018).

186. *Id.*

187. *Id.*; *id.* § 64.2-716 (Repl. Vol. 2017).

188. *Id.* § 8.01-129 (Cum. Supp. 2018).

189. *Id.*

sheriff must provide written notice of the scheduled eviction, at least seventy-two hours in advance of the execution.¹⁹⁰ The written notice must comply with Virginia Code section 8.01-470.¹⁹¹ These changes simplify a procedural area that has been amended several times in the past.¹⁹² As a result of multiple changes and some ambiguity, the author has experienced certain courts that would never issue a writ for immediate possession, some that would issue one only upon default, and others that would not grant immediate possession if rent had been awarded for the month during which judgment was granted. The change simplifies the process without encumbering a defendant's right to appeal.

Second, the General Assembly also amended Virginia Code section 8.01-126 to specifically address the situation of a former owner in a single-family residential dwelling occupying the premises after a foreclosure.¹⁹³ Such a former owner is now considered a "tenant at sufferance."¹⁹⁴ The new owner may terminate that tenancy "by a written termination notice," which must be "given to such tenant at least three days prior to the effective date of termination."¹⁹⁵ After the three-day period expires, the new owner "may file an unlawful detainer."¹⁹⁶ Note that this period differs from the usual five-day pay or quit notice.¹⁹⁷

Finally, the General Assembly clarified the required notice for accepting rent with reservation.¹⁹⁸ A landlord must provide a written notice to the tenant that "any and all amounts owed to the landlord by the tenant, including payment of any rent, damages, money judgment, award of attorney fees, and court costs, would be accepted with reservation and would not constitute a waiver of the landlord's right to evict the tenant from the dwelling unit."¹⁹⁹ If this notice is provided in the written termination notice, then no

190. *Id.*

191. *Id.*

192. Compare *id.* § 8.01-129 (Cum. Supp. 2018), with *id.* § 8.01-129 (Repl. Vol. 2017).

193. See Act of Mar. 9, 2018, ch. 255, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-126(C)(4) (Cum. Supp. 2018)).

194. VA. CODE ANN. § 8.01-126(C)(4) (Cum. Supp. 2018).

195. *Id.*

196. *Id.*

197. Compare *id.* § 8.01-126(C)(4) (Cum. Supp. 2018), with *id.* § 55-225 (Repl. Vol. 2017 & Cum. Supp. 2018).

198. See Act of Mar. 9, 2018, ch. 220, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 55-225.47, -248.34:1 (Cum. Supp. 2018)).

199. VA. CODE ANN. §§ 55-225.47(A), -248.34:1(A) (Cum. Supp. 2018).

subsequent notice is required after the landlord receives a payment.²⁰⁰ This change simplifies the process and specifically eliminates the previous concern that a landlord waives the eviction process if they do not provide a written notice with each payment.

C. *Motion or Petition for Show Cause for Violation of Court Order*

The General Assembly enacted Virginia Code section 8.01-274.1 establishing a procedure for filing a motion or petition for a show cause order for violation of a court order.²⁰¹ The motion or petition must allege “facts identifying with particularity the violation of a specific court order” and must “be sworn to or accompanied by an affidavit setting forth such facts.”²⁰² As can be expected, the “rule to show cause entered by the court shall be served on the person alleged to have violated the court order, along with the accompanying motion or petition and any affidavit filed with such motion or petition.”²⁰³

III. AMENDMENTS TO RULES OF COURT

There have not been major changes to the Rules of the Supreme Court of Virginia over the past year. Rule 5:1 was amended to add subparagraph (g) requiring that filings and transmissions comply with the Rules and specifically that pleadings or objects “shall not be filed with or transmitted to any justice of this Court, unless expressly authorized by the Court.”²⁰⁴ Hopefully, no practitioners were running afoul of this practice before this amendment. Breaching the new rule could result in the “imposition of penalties.”²⁰⁵

Rule 5:33, regarding oral argument on appeal, was amended to handle the use of demonstrative exhibits at oral argument. The newly added subparagraph (f) states that the use of demonstrative exhibits requires “the prior consent of the Court.”²⁰⁶ To obtain such consent, a party, at least five business days before the argument,

200. *Id.*

201. Act of Mar. 29, 2018, ch. 522, 2018 Va. Acts __, __ (codified at VA. CODE ANN. § 8.01-274.1 (Cum. Supp. 2018)).

202. VA. CODE ANN. § 8.01-274.1 (Cum. Supp. 2018).

203. *Id.*

204. VA. SUP. CT. R. 5:1(g), www.courts.state.va.us/courts/scv/rulesofcourt.pdf (last visited Oct. 1, 2018).

205. *Id.*

206. R. 5:33(f) (Repl. Vol. 2018).

must send a letter to the clerk “with a copy to all other parties, . . . describ[ing] the proposed demonstrative exhibit and the manner in which it will be used.”²⁰⁷ “The Court, in its discretion, may refuse to allow the use of the demonstrative exhibit.”²⁰⁸

Finally, the court amended Rule 4:12(d) to specify that any motion regarding discovery sanctions “must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.”²⁰⁹ This revision codifies a long-standing practice among Virginia attorneys.

207. *Id.*

208. *Id.*

209. R. 4:12(d) (Repl. Vol. 2018).