VIRGINIA PRACTICE AND PROCEDURE

Part Two

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A. Basic Response Requirements

As noted in an earlier Chapter of these Readings, the governing Rule today provides a clear roadmap for determining when response is due:

**Rule 3:8. Answers, Pleas, Demurrers and Motions.**

(a) *Response Requirement.*—A defendant shall file pleadings in response within 21 days after service of the summons and complaint upon that defendant, or if service of the summons has been timely waived on request under Code § 8.01-286.1, within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside the Commonwealth. A demurrer, plea, motion to dismiss, and motion for a bill of particulars shall each be deemed a pleading in response for the count or counts addressed therein. If a defendant files no other pleading than the answer, it shall be filed within said time. An answer shall respond to the paragraphs of the complaint. A general denial of the entire complaint or plea of the general issue shall not be permitted.

(b) *Response After Demurrer, Plea or Motion.*—When the court has entered its order overruling all motions, demurrers and other pleas filed by a defendant, such defendant shall, unless the defendant has already done so, file an answer within 21 days after the entry of such order, or within such shorter or longer time as the court may prescribe.

**General Timetable for Response.** Under Rule 3:8(a) the defendant must file pleadings in response to the complaint within 21 days after service upon that defendant. By statute, if service is "waived" by the defendant a period of 60 days from the date of mailing of the waiver request will be afforded to the defendant in which to answer (90 days if the defendant is outside the geographical boundaries of the Commonwealth). These principles are set forth in detail in Code § 8.01-286.1.

**Responsive Pleadings Defined.** Rule 3:8(a) defines the responsive pleadings that will satisfy a defendant's obligations within the 21-day period for a response to include: "A demurrer, plea, motion to dismiss, and motion for a bill of particulars." Each of these devices is "deemed a pleading in response for the count or counts addressed therein." As was true under amendments made in recent years to prior practice, under the Rule if a defendant "files no other pleading than the answer," it must be filed within the basic 21-day period after service of process upon that defendant.

**Timetable After Other Filings.** Where a defendant has interposed a demurrer, plea or motion in the first instance, in lieu of lodging the answer itself, Rule 3:8(b) continues prior practice by setting up an automatic 21-day grace period that starts to run on the day following the entry of an order overruling the other pleadings that have been interposed. Rule 3:8(b) provides that "[w]hen the court has entered its order overruling all motions, demurrers and other pleas filed by a defendant, such defendant shall, unless the defendant has already done so, file an answer within 21 days after the entry of such
order, or within such shorter or longer time as the court may prescribe."

This pre-established commencement of the 21-day period for filing an answer under Rule 3:8(b) means that it is not necessary for the court in denying a plea or demurrer to expressly declare that a defendant's time to answer has started to run. Rather, the time period is set by the Rule itself, and no separate court order is needed. As a result, when there is a plea, dispositive motion or demurrer sub judice, counsel for the defendant will need to monitor the court's activities so as to become aware of any ruling in a timely fashion, in order to meet the short period thereafter for filing the answer.

Rule 3:8(b) does empower the trial court to fix a different period for filing the answer. By contrast, there is no power conferred under the Rules for the Court to shorten the period for response when there has been no special plea, motion, or demurrer lodged. Rule 1:9, which deals with deadlines under the pleading rules, allows the court to extend timetables, but does not provide any express authority for the trial judge to shorten the basic periods for response as established in other rules. Thus it appears that only in the situation where a plea or motion has been interposed can the court can take cognizance of the parties' submissions and perhaps presence at court proceedings to direct a shorter or longer period for filing a response as the circumstances appear to require.

The response may take the form of a dispositive motion or plea attacking the case on fundamental grounds or a responsive pleading admitting or denying the averments of the complaint. The responsive pleadings recognized in Virginia include a variety of motions and pleas, and the core responsive instrument (now called the answer in all cases).
Defendant's Response.

The Basic Response Requirement. In all legal and equitable causes in the Circuit Court where service of process has been either completed or waived, a response is required. In equity this was traditionally referred to as the answer, and at law the "grounds of defense." Under the 2006 reforms, the responsive pleading in all civil litigation is called the Answer.

Responses. In Circuit Court a defendant must serve a response within 21 days after being served with the complaint. Rule 3:7. The response may take the form of a dispositive motion attacking the case on fundamental grounds, a motion for lesser relief, or a responsive pleading admitting or denying the averments of the complaint. If it is the latter, counterclaims and cross-claims may be pled, and non-parties may be impleaded as third-party defendants.

Admissions and Denials. Allegations of fact in a pleading that are not denied by the adverse pleading are deemed admitted, pursuant to the provisions of Rule 1:4(e), which were not amended in the 2006 revisions of the Rules of Court. As is true in federal practice, however, a party may admit or deny averments, and may aver that the party lacks information sufficient to admit or deny.

Inconsistent Defenses. In both legal and equitable claims inconsistent defenses may be asserted.

Verification of Pleadings

The present Rules make no changes in the general practice in Virginia that pleadings are not sworn. Former Rule 2:2 contained language that appeared to allow a plaintiff to demand verification of the answer, but that language has not been continued into revised Part Three of the Rules. Thus only where some statute requires verification it will not be required in practice under the Rules. The statutes which do make such an obligation for the defendant include Code § 8.01-28, which provides that if plaintiff in a motion for judgment on a contract action also swears to the amount due, how it is due, and when it is due, the plaintiff's allegations are admitted unless the defendant presents a sworn denial.

When a statute requires verified pleading, it often requires only one party to accompany his pleading with an oath. Section 8.01-279 dispenses with the necessity of plaintiff's proving certain allegations unless the defendant denies them under oath. Thus, a presumption of authenticity may be established for a signature or handwritten document mentioned in a pleading unless challenged by a sworn plea; if a negotiable instrument is involved, the same presumption exists but is challenged by a specific denial, not a sworn plea. See generally Code § 8.01-279 and Code §8.01-28, which requires a defendant in an action on a contract for the payment of money to deny under oath allegations made by plaintiff, where such allegations are supported by affidavit.

If a pleading alleges ownership or control of property or an instrumentality or the existence of a partnership or corporation, these allegations need be proved only if the other party puts them in issue by a sworn pleading which informs the party of the controverted matter.
Equitable Defenses in Actions at Law

Generally, since 1977 equitable defenses have been available in actions at law upon a contract, under § 8.01-422. Thus fraud, failure of consideration, mistake and unreasonableness or unconscionability may be pled even if there is no other equitable issue in the case.

§ 8.01-422. Pleading equitable defenses.

In any action on a contract, the defendant may file a pleading, alleging any matter which would entitle him to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter arising under the contract, existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the pleading. If the amount claimed by the defendant exceed the amount of the plaintiff's claim the court may, in a proper case, give judgment in favor of the defendant for such excess.

The broad freedom under the statute goes as far as actions "ex contractu," those sounding in contract theories. To some extent the Rules of Court may purport to go farther than that, in allowing a pleader freedom to assert defenses. Consider the following provision of Rule 1:4, which was not amended in the 2006 revisions of procedure, and which articulates a number of general provisions with respect to pleadings:

(k) A party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may plead alternative facts and theories of recovery against alternative parties, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds.

The highlighted language at the end of Rule 1:4(k) could be read to authorize a party to assert equitable defenses to any claim. To date, case law has not recognized that option. Indeed, even in contact cases, one rarely sees equitable defenses other than unconscionability. Particularly where monetary relief is sought it is not likely that equitable defenses will be applied. The general origin of those defenses was to moderate the availability of the unusual and creative remedies available only from an equity court long ago. "Unclean hands" for example is a doctrine suited to a body of law that makes the granting of a remedy deeply discretionary, as almost all equitable relief is by tradition. It seems highly doubtful that that doctrine could be used to bar a claim for money due under a note, for example.
Affirmative Defenses

Professor Hamilton Bryson has identified at least two dozen defenses that are "affirmative defenses" in the sense that a defendant must plead each such doctrine at the answer stage in order to have the right to rely on these doctrines in fighting the case.¹

☑ Accord and satisfaction (a prior compromise or settlement).²

☑ Arbitration and award, which asserts that the plaintiff's claim has been resolved out of court by the award of an arbitrator.³

☑ Assumption of the risk.⁴

☑ Contributory negligence on the part of the plaintiff.⁵

☑ Discharge of the defendant's obligation by a bankruptcy court.⁶

☑ Duress or undue influence invalidating the consent or agreement of the defendant to the obligation.⁷

☑ Fraud perpetrated upon the defendant.⁸

☑ Gambling or other statutory illegality making a claim void as against public policy.⁹

☑ The minority of the defendant at the time the contract was made.¹⁰

☑ Injury by a fellow servant.¹¹

☑ Failure of consideration.¹²

☑ Failure of the plaintiff to mitigate the damages.¹³

☑ Impossibility of the performance of a contract.¹⁴

¹ See H. Bryson, Bryson on Virginia Civil Procedure, Chapter VI.
³ M. P. BURKS, PLEADING AND PRACTICE, p. 19 (1952); see Edge Hill Stock Farm v. Morris, 155 Va. 103, 154 S.E. 473 (1930).
⁴ See generally 13B M.J., Negligence, § 43; note also Code § 65.2-300(D).
⁸ C. & O. Ry. v. Osborne, 154 Va. 477, 507, 153 S.E. 865 (1930); Scott v. Boyd, 101 Va. 28, 34, 42 S.E. 918 (1902); see generally 8B M.J., Fraud and Deceit, § 54.
¹⁰ J. B. MINOR, INSTITUTES, vol. 4, p. 782 (1893); W. BLACKSTONE, COMMENTARIES, vol. 3, p. 306 (1768); see also 9B M.J., Infants, § 8.
¹¹ See generally 12B M.J., Master and Servant, §§ 65-78; Code § 65.2-300(D).
¹² See generally 4B M.J., Contracts, § 38.
¹³ Paddock v. Mason, 187 Va. 809, 818, 48 S.E.2d 199 (1948); see generally 5C M.J., Damages, §§ 16-17, 49.
¹⁴ Paddock v. Mason, 187 Va. 809, 816-17, 48 S.E.2d 199 (1948); see generally 4B M.J., Contracts, §
LEGAL DEFENSES

- License or permission for the defendant to use real property.15
- Payment of the debt or obligation.16
- Prior release of the claim.17
- Res judicata.18
- Self-defense.19
- Statute of frauds.20
- Statute of limitations.21
- Tender of payment or performance of the obligation.22
- Truth, justification or privilege in a defamation case.23
- Usury.24
- Workers' compensation as the sole remedy for an injury.25

Note that in thinking about these defenses counsel should be aware that it would be safest in modern Virginia practice to plead affirmative defenses under a separate heading in the answer, centered and all capitals: AFFIRMATIVE DEFENSES. In this fashion there can be no doubt on the part of the trial court, or an appellate court, that the issue was properly preserved in the answer.

Sanctions Available. The sanction provisions of Code § 8.01-271.1 apply to the decision whether to assert affirmative defenses. In Ford v. Benitez, 273 Va. 242, 639 S.E.2d 203 (2007) the Supreme Court found no abuse of discretion where the trial court imposed monetary sanctions against an attorney under Code § 8.01-271.1, under an objective standard of reasonableness, because the attorney had knowledge at the time of signing a pleading, formed after reasonable inquiry, that there was no factual support for several affirmative defenses asserted therein. The case had been nonsuited previously, and discovery depositions in the first iteration of the case put defense counsel on notice that some of the affirmative defenses were baseless.

69. See generally 12A M.J., License to Real Property, § 9.
15 See generally 12A M.J., License to Real Property, § 9.
16 Code § 8.01-421(A); see generally M.P. BURKS, PLEADING AND PRACTICE, pp. 387-89 (1952); 14B M.J., Payment, § 38; e.g., Norvell v. Little, 79 Va. 141, 146 (1884); Colley v. Sheppard, 72 Va. (31 Gratt.) 312, 317 (1879); Hawkins v. Barclay, Misc. Va. 101, 117 (1805).
17 Ruble v. Turner, 12 Va. (2 Hen. & M.) 38 (1808); see generally 16 M.J., Release.
18 See generally 8B M.J., Former Adjudication or Res Judicata, §§ 75-78.
19 W. BLACKSTONE, COMMENTARIES, vol. 3, p. 306 (1768); see generally 2A M.J., Assault and Battery, § 7.
20 Robertson v. Smith, 94 Va. 250, 253, 26 S.E. 579 (1897); see generally 8B M.J., Frauds, Statute of, § 44.
21 Code §§ 8.01-235, 8.01-195.7; see Sexton v. Aultman, 92 Va. 20, 21, 22 S.E. 838 (1895).
22 Virginia Fire & Marine Ins. Co. v. Buck, 88 Va. 517, 519, 13 S.E. 973 (1891); Skipwith v. Morton, 6 Va. (2 Call) 227 (1800); Downman v. Downman, 1 Va. (1 Wash.) 26 (1791); see generally 18 M.J., Tender, § 15.
23 See generally 12A M.J., Libel and Slander, §§ 41-43.
Pleading Contributory Negligence

The modern Rules continue the tradition set forth in the prior rules that contributory negligence, which is an affirmative defense that will be lost unless it is timely pled by a defendant, may be pled "generally," without spelling out the particulars of the negligence. Rule 3:18(c) provides:

(c) Contributory negligence as a defense. — Contributory negligence shall not constitute a defense unless pleaded or shown by the plaintiff's evidence.

You could always tell when Judge Cracken was going to slam your case with a discretionary ruling.
Further Pleading Notes

Limitations Defenses. A defendant may plead bar by the statute of limitations in a general fashion: the answer need only state that the action is barred by a statute of limitations -- it is not necessary for the defendant to identify the statutory provisions that applies. Rule 3:18(d) provides:

(d) Pleading the statute of limitations. — An allegation that an action is barred by the statute of limitations is sufficient without specifying the particular statute relied on.

Challenging Signatures. In a suit seeking specific performance of a contract to sell real estate comprising a corporation's sole asset, the chancellor did not err in striking the plaintiff's evidence and denying specific performance, where the corporation's president lacked authority to sign the contract on its behalf, no corporate resolution authorizing the sale had ever been adopted, and the terms of the contract were unclear, uncertain, incomplete and indefinite. Code § 8.01-279 provides that when any pleading alleges that any person made, endorsed, assigned, or accepted any writing, no proof of the handwriting shall be required, unless it be denied by an affidavit accompanying the plea putting it in issue. In this case, while the corporation's answer to plaintiff's bill of complaint put the corporation's president's signature on the contract in issue, the answer was neither sworn to nor accompanied by an affidavit denying the handwriting. The chancellor's ruling that an affidavit was unnecessary and that the corporation would be allowed to deny the signature at trial because the signature question had "been the issue all through discovery" was held error. However, the chancellor's error in ruling that, despite the requirement imposed by Code § 8.01-279(A), the corporation could deny the signature at trial was harmless error in this case. The chancellor did not deny plaintiff specific performance on the ground that the corporation's president had not signed the contract. Rather, the chancellor denied specific performance on entirely different grounds.
B. Defendant v. Plaintiff -- Counterclaims

General Principles

Statutory provisions govern counterclaims in General District Court. See the INTRODUCTION to these materials. In the Circuit Courts, the Rules govern. See Rule 3:9, § 8.01-272. In general, any claim which defendant has at law may be brought against the plaintiff -- it need not grow out of the transaction which plaintiff has put at suit in the complaint.

All counterclaims in Virginia practice are "permissive" in that failure to bring them will not bar a separate action on the omitted claim after the first litigation is completed. Thus it is not necessary to parse the possible claims of a defendant, as it is in federal practice, to determine which are so intimately related to the present suit that omission will be deemed forfeiture of a "mandatory" counterclaim, leading to a res judicata bar. In Virginia there is the risk of collateral estoppel, but only if an issue on which the possible counterclaim turns will be fully and fairly litigated in the first suit on plaintiff's claim. See discussion of collateral estoppel in Chapter 15. Recoupment and setoff claims would be affected.

Subject Matter. The claim may be for liquidated or unliquidated damages. Counterclaims may exceed the amount sought in plaintiff's ad damnum in the complaint. A counterclaim need not arise out of the conduct, transaction or occurrence that is the subject of the plaintiff's claim. Nor is it necessary that the counterclaim sound in the same domain of law: a defendant may assert tort counterclaims in a contract action, or vice versa. If the subject matter seems to warrant, the trial court has discretion to order a separate trial on the counterclaim. While plaintiff may only assert related contract and tort claims, if the defendant has unrelated claims in both fields of law against the plaintiff who has sued, defendant may raise the unrelated claims as counterclaims in the same action.

Against all Plaintiffs. The one restriction on the freedom of a defendant to pursue a counterclaim at law is that where there are multiple plaintiffs, the counterclaim must lie against all plaintiffs jointly to be permitted. If the putative counterclaim is directed at fewer than all plaintiffs, it must be asserted in a separate action.

Timing. Counterclaims must be served within 21 days after defendant is served with the complaint. Service is by mail upon counsel, rather than through formal service procedures. In General District Court, a counterclaim may be filed at any time prior to the hearing. Code § 16.1-88.01. Under the "waiver of service" procedure, if service of the summons has been timely waived on request under Code § 8.01-286.1, the counterclaim may be filed within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside the Commonwealth. Rule 3:9(b) expressly notes that the provisions of Rule 1:9 apply to the initiation of counterclaims, and thus an extension of time with permission of the court may be sought. Service of the counterclaim is also required, but since the plaintiff has already become subject to the jurisdiction of the court by invoking its power through filing the complaint itself, service of process is not required and the counterclaim may be served by ordinary mail or other mechanisms as approved in Rule 1:12.
Plaintiff's Reply to a Counterclaim. Rule 3:9(c) continues the timetable with which Virginia practitioners are familiar: The plaintiff must file a responsive pleading with respect to the counterclaim "within 21 days after it is served."

Statute of Limitations? If the counterclaim does arise from the same transaction put at suit in plaintiff's complaint, the statute of limitations is deemed to have been tolled upon the filing of the complaint.

Counterclaims may be pled in a separate pleading or as part of the defendant's grounds of defense, separately identified as counterclaims.

Plaintiff must respond to the counterclaim in the role of a defendant, within 21 days "after it is served."

Two key rules are these:

**Rule 1:4 [excerpt]**

. . . . (k) A party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may plead alternative facts and theories of recovery against alternative parties, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds.

**Rule 3:9. Counterclaims.**

(a) Scope.— A defendant may, at that defendant's option, plead as a counterclaim any cause of action that the defendant has against the plaintiff or all plaintiffs jointly, whether or not it grows out of any transaction mentioned in the complaint, whether or not it is for liquidated damages, whether it is in tort or contract, and whether or not the amount demanded in the counterclaim is greater than the amount demanded in the complaint.

(b) Time for initiation. --

(i) A counterclaim shall, subject to the provisions of Rule 1:9, be filed within 21 days after service of the summons and complaint upon the defendant asserting the counterclaim, or if service of the summons has been timely waived on request under Code §8.01-286.1, within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside the Commonwealth.

(ii) If a demurrer, plea, motion to dismiss, or motion for a bill of particulars is filed within the period provided in subsection (b)(i) of this Rule, the defendant may file any counterclaim at any time up to 21 days after the entry of the court's order ruling upon all such motions, demurrers and other pleas, or within such shorter or longer time as the court may prescribe.
(c) **Response to counterclaim.** — The plaintiff shall file pleadings in response to such counterclaim within 21 days after it is served.

(d) **Separate trials.** — The court in its discretion may order a separate trial of any cause of action asserted in a counterclaim.

Notice that to deal with situations in which a defendant does not file an answer, but files a demurrer, motion to stay and compel arbitration, or other dilatory pleading, the provisions of Rule 3:9(b) were amended in 2009 to make it clear that the pleader is not required to file a counterclaim or be at risk of a court at a later time, say when an answer is filed after the demurrer is overruled, not granting leave to file the counterclaim. Because a defendant may want to pursue the counterclaim only if the dilatory pleading is unsuccessful, Rule 3:9(b) was conformed by the amendment to be consistent with Rule 3:8(b), such that in 3:9(b) a counterclaim may be filed at the same time an answer is to be filed, as is currently set forth 3:8(b) for the filing of an answer.
Note on Counterclaims and Removability to Federal Court

Removal to Federal Court. Note that filing a counterclaim has the consequence of waiving a defendant's right to remove an action to federal court, as defendant becomes a plaintiff, in effect, on the counterclaim. See Sood v. Advanced Computer Techniques Corp., 308 F.Supp. 239 (E.D. Va. 1969).

Code Sections Relevant to Scope of Counterclaims

Recall the "landmark" status given to the following two Code sections in the discussion by the Supreme Court of Virginia in Fox v. Deese, set forth earlier in these readings:

§ 8.01-272. Pleading Several Matters; Joining Tort and Contract Claims; Separate trial in Discretion of Court; Counterclaims.

In any civil action, a party may plead as many matters, whether of law or fact, as he shall think necessary. A party may join a claim in tort with one in contract provided that all claims so joined arise out of the same transaction or occurrence. The court, in its discretion, may order a separate trial for any claim. Any counterclaim brought in an action under Part Three of the Rules of Court shall be governed by such Rules.

§ 8.01-281 Pleading in Alternative; Separate trial on Motion of Party.

A. A party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may plead alternative facts and theories of recovery against alternative parties, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence. Such claim, counterclaim, cross-claim, or third-party claim may be for contribution, indemnity, subrogation, or contract, express or implied; it may be based on future potential liability, and it shall be no defense thereto that the party asserting such claim, counterclaim, cross-claim, or third-party claim has made no payment or otherwise discharged any claim as to him arising out of the transaction or occurrence.

B. The court may, upon motion of any party, order a separate trial of any claim, counterclaim, cross-claim, or third-party claim, and of any separate issue or of any number of such claims; however, in any action wherein a defendant files a third-party motion for judgment alleging that damages to the person or property of the plaintiff were caused by the negligence of the third-party defendant in the operation of a motor vehicle, the court shall, upon motion of the plaintiff made at least five days in advance of trial, order a separate trial of such third-party claim.
JUSTICE LACY delivered the opinion of the Court.

... League Construction Company, Inc. (League) was a subcontractor providing cement work to the general contractor, Piland Corporation (Piland) on two projects: Langley Air Force Base (Langley project) and Old Dominion University (ODU project). League sued Piland for $25,300, allegedly due under the Langley project contract. In its response, Piland admitted it withheld the retainage on the Langley project, $25,300, but alleged that, under the contract, it was entitled to certain back charges and delay damages from League. Piland maintained that the dispute should be arbitrated pursuant to the contract terms and sought a stay pending such arbitration.

Piland included a counterclaim in its answer and grounds of defense which alleged that League caused approximately $85,000 in damages for faulty work performed on the ODU project. Piland asserted the right to set off its damages on the ODU project against League's claim on the Langley project. . . .

[Rule 3:9], adopted in 1971, states in pertinent part:

[A] defendant may . . . plead as a counterclaim any cause of action at law for a money judgment in personam that he has against the plaintiff . . . whether or not it grows out of any transaction mentioned in the [complaint], whether or not it is for liquidated damages. . . . (Emphasis supplied.)

The language of this rule explicitly allows a defendant to plead, as a counterclaim, any cause of action at law whether or not it is for liquidated damages. It would be patently illogical for the Rules of Court, as a matter of procedure, to encourage a defendant to plead unliquidated damages as a set-off, while not recognizing, as a matter of substance, his right to set off the unliquidated damages against the plaintiff's liquidated damages. We hold, therefore, pursuant to [Rule 3:9] and in the interests of judicial economy, that there is no requirement in Virginia that a debt be liquidated in order to be raised as a set-off in a counterclaim.

Accordingly, we will reverse the holding of the trial court, and remand the case for further proceedings consistent with this opinion.
Note on Federal Counterclaim Practice & "Full Faith and Credit"

In Nottingham v. Weld, 237 Va. 416, 377 S.E.2d 621 (1989) the Supreme Court of Virginia held that Virginia courts must give judgments of other courts, state and federal, the same preclusive effect as the rendering court would accord to them. As a result, while counterclaims are permissive in Virginia, transactionally-related claims must be brought in a federal proceeding, and hence Virginia will bar claims that "should" have been brought pursuant to the compulsory counterclaim rules of another jurisdiction.

Classic Counterclaims
C. Cross-Claims Between Co-Parties

Cross-claims are permitted under Rule 3:10. In general cross-claims must grow out of the subject matter tendered in the complaint, but may assert any cause of action against other defendants presently in the case. Cf. Masters v. Hart, 189 Va. 969; 55 S.E.2d 205 (1949).

Cross-claims may be filed within 21 days after service of the complaint upon the cross-claiming defendant (or later, with permission of court; Rule 1:9). It appears that the cross-claim cause of action need not have existed at the moment plaintiff sued, but may arise thereafter. Wingo v. Norfolk & W. Ry., 638 F. Supp. 107 (W.D. Va. 1986).

The statute of limitations on a defendant's cross-claim arising from the transaction pleaded by plaintiff is deemed tolled from the date of plaintiff's filing. § 8.01-233(B) provides:

§ 8.01-233. When action deemed brought on counterclaim or cross-claim; when statute of limitations tolled; defendant's consent required for dismissal

A. A defendant who pleads a counterclaim or cross-claim shall be deemed to have brought an action at the time he files such pleading.

B. If the subject matter of the counterclaim or cross-claim arises out of the same transaction or occurrence upon which the plaintiff's claim is based, the statute of limitations with respect to such pleading shall be tolled by the commencement of the plaintiff's action.

The Rule does not specifically state whether a cross-claim must be served as though it were a new complaint, though there is no writ tax or filing fee due. The cross-claim defendant pleads to the cross-claim as to any complaint. See Rule 3:10:

Rule 3:10 Cross-Claims.

(a) Scope. — A defendant may, at that defendant's option, plead as a cross-claim any cause of action that such defendant has or may have against one or more other defendants growing out of any matter pled in the complaint. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(b) Time for initiation. — A cross-claim shall, subject to the provisions of Rule 1:9, be filed within 21 days after service of the summons and complaint on the defendant asserting the cross-claim.

(c) Response to cross-claim. — The cross-claim defendant shall file pleadings in response to such cross-claim within 21 days after it is served.

(d) Separate trials. The court in its discretion may order a separate trial of any cause of action asserted in a cross-claim.
D. Third Party Practice.

Overview

Under Rule 3:13 defendants in actions in the Circuit Court may bring in third-party defendants. (Regarding the addition of parties in the General District Court, see § 16.1-93). The purpose for impleading third parties is generally to dispose of all of the plaintiff's claims among various defendants in a single proceeding, if possible.

At any time within 21 days after a defendant serves a grounds of defense to plaintiff's complaint (or to a cross-claim pled by a co-defendant) a defendant may serve a third party complaint in the role of third-party plaintiff. If the third-party pleading is served in this time frame, no motion is required. After the expiration of this period, leave to bring in a third-party defendant may be obtained upon motion to the court. Any third-party who is, or may be, liable for all or part of the claim against the third-party plaintiff may be brought in as a third-party defendant. A third-party action is permitted where a claim for contribution or indemnity asserted before it technically accrues (because the principal defendant has not been held liable to plaintiff). § 8.01-249(5). Since jurisdiction over the third-party defendant is necessary, the third-party complaint must be served.

Must plaintiff in the original action have a cause of action against the putative third-party defendant? See VEPCO v. Wilson, 221 Va. 979, 277 S.E.2d 149 (1981)(yes).

Since the process of impleading third-party defendants is permissive, a principal defendant may elect to wait until found liable to plaintiff and then assert a separate action against the third party.

A person impleaded as a third-party defendant makes defenses to the third-party plaintiff's claims under Rule 3:8, and may assert counterclaims or cross-claims under Rules 3:9 and 3:10, just as any defendant. The third-party defendant may also assert any defense held against plaintiff's claim, and any claim which the third-party has arising out of the transaction which plaintiff has put in suit. The third-party may itself bring in fourth-party defendants, and so on.

Plaintiff may, within 21 days after service of the third-party complaint upon a third-party defendant assert against this third-party any claim arising out of the transaction plaintiff pleaded in the original complaint. The third-party defendant may respond to such claims with defenses as to any complaint.

As the complexity of an action grows, any party may move to strike the third-party complaint, for severance of it, or for a separate trial of the claims there asserted.
The "roadmap" for third-party practice in circuit court is set forth in full in the following Rule of Court:

**Rule 3:13 Third-Party Practice.**

(a) *When Defendant May Bring in Third Party.* — At any time after commencement of the action a defending party, as a third-party plaintiff, may file and serve a third-party complaint upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave therefore if the third-party complaint is filed not later than 21 days after the third-party plaintiff serves an original pleading in response. Otherwise the third-party plaintiff must obtain leave therefore on motion after notice to all parties to the action. The person served with the third-party complaint, hereinafter called the third-party defendant, shall make defenses to the third-party plaintiff's claim as provided in Rules 3:7 and 3:8. The third-party defendant may plead counterclaims against the third-party plaintiff and cross-claimes against other third-party defendants as provided in Rules 3:9 and 3:10. The third-party defendant may assert against the plaintiff any defenses that the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may, at plaintiff's option, within 21 days after service of the third-party complaint upon the third-party defendant, assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert defenses as provided in Rules 3:7 and 3:8 and any counterclaims and cross-claims, including claims against the plaintiff, as provided in Rules 3:9 and 3:10. Any party may move to strike the third-party complaint, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

(b) *When Plaintiff May Bring in Third Party.* — When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances that under this rule would entitle a defendant to do so.
JUSTICE HARRISON delivered the opinion of the Court.

Old Dominion University (ODU or owner) filed an action against Valley Landscape Company, Inc. (Valley or contractor) and its surety, alleging the breach of a construction contract. Valley filed a third party [complaint] against Peter G. Rolland (Rolland or architect). Rolland filed a demurrer which was sustained by the trial court. Valley was granted leave to and filed an amended motion. Rolland then successfully demurred to Valley's amended motion, the trial court holding that:

"the amended third party [complaint] fails to state sufficient facts which, if true, would entitle [Valley] to a judgment against [Rolland]."

Valley has appealed this judgment on the ground that its motion sufficiently alleged that it was entitled to recover as a third-party beneficiary of a contract between ODU and Rolland.

Valley, a landscaping contractor, was awarded a contract by ODU to construct the mall improvement project at the college's Norfolk campus. Rolland was the landscape architect employed by ODU to provide plans and specifications for, and to supervise the construction of, this project. Prior to completion, Valley ceased performance and terminated its contract with ODU. Thereafter ODU employed another contractor to complete the work and instituted an action to recover $400,000 damages from Valley and the surety on the payment and performance bond given by the contractor. Valley then attempted to add Rolland as a third-party defendant to the action under Rule of Court 3:10.

Valley bases its right to recover against Rolland on the theory that it was a third-party beneficiary of the contract between Rolland and ODU. The only paragraph of the amended [complaint] which addresses this question is paragraph 4, which states:

"4. That certain provisions of [Rolland's] contract with [ODU] were for the benefit of the general contractor."

The amended motion does not set forth any such "provisions", and the contract between ODU and Rolland was not made a part of the record. While ODU contracted with the architect Rolland to draw plans and specifications and to make periodic site inspections, their contract was made prior to the employment by ODU of a contractor to build the project. It was a separate and independent construction contract that was thereafter made by ODU and Valley.

The right to sue as a third-party beneficiary is governed by Code § 55-22, which provides, in relevant part, that:

"[I]f a covenant or promise be made for the benefit, in whole or in part, of a person with whom it is not made, or with whom it is made jointly with others, such person, whether named in the instrument or not, may maintain in his own name any action thereon which he might maintain in
case it had been made with him only and the consideration had moved from him to the party making such covenant or promise. ..."

Valley concedes that in order to maintain an action under this section "it must be shown that the contract was intended at least in part to benefit the non-contracting party".

The question whether a building contractor is a third-party beneficiary of a contract between the architect and the owner is one of first impression for this Court. Nonetheless, we have on numerous occasions applied the third-party beneficiary doctrine, and we are guided by certain well established principles.

"The third party beneficiary doctrine is subject to the limitation that the third party must show that the parties to the contract clearly and definitely intended it to confer a benefit upon him. . . ." Professional Realty v. Bender, 216 Va. 737, 739, 222 S.E.2d 810, 812 (1976). . . .

Appellant argues that the conclusionary allegation, that "certain provisions" of the architect's contract with ODU "were for the benefit of" Valley, was sufficient to meet the above standards. Appellant also contended in oral argument that the standard owner-architect contract gives rise to a third-party beneficiary contract in favor of the contractor.

On the other hand, Rolland contends that facts must be alleged in a [complaint] which tend to prove that the architect and owner, in reaching their agreement, intended to bestow a direct benefit upon the contractor. It is a matter of common knowledge that any contract for construction is usually of incidental benefit to numerous persons. However, the crucial question in this case is whether the standard owner-architect contract, without any special provisions inuring to the direct benefit of the contractor, is intended to, and directly benefits, the contractor. [The court then reviewed the general functions of architects in these circumstances, and the authorities. Discussion omitted here. Ed.]

A review of the authorities makes it clear that it is not sufficient that Valley would be incidentally benefitted by a proper performance of duties on the part of the architect. We find no allegation of facts in Valley's third-party [complaint] from which we could draw a conclusion that the owner-architect agreement was "clearly and definitely intended" and made to bestow a direct benefit on Valley.

Under [Rule 3:13] a defendant can bring in a third-party defendant only for the purpose of passing through to the third-party defendant all or part of the liability which might be imposed on the defendant by the plaintiff as the result of the conduct of the third-party defendant. [Rule 3:13] is the state counterpart of Rule 14 of the Federal Rules of Civil Procedure. In the discussion of when a third-party action is proper, 6 Wright & Miller, Federal Practice and Procedure, § 1446, p. 245-50 (1971), states:

"Rule 14(a) authorizes defendant to bring into a lawsuit any person 'not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him'. This language does not compel defendant to bring third parties into the litigation; rather, it simply permits the addition of anyone who meets the standard set forth in the rule. In many instances tactical considerations will lead a party to
pursue an independent action against a possible third-party defendant rather than resorting to impleader. (Footnote omitted).

"A third-party claim may be asserted under Rule 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant. The secondary or derivative liability notion is central and it is irrelevant whether the basis of the third-party claim is indemnity, subrogation, contribution, express or implied warranty, or some other theory. But impleader is proper only when a right to relief exists under the applicable substantive law...." (Footnotes omitted).


The allegations of Valley's [complaint] do not show that Rolland was potentially liable for all or a part of ODU's claims against Valley and therefore are not sufficient to state a case against Rolland. A third-party [complaint] is not proper under the circumstances. . . .
E. Intervention

A non-party wishing to join an existing suit in equity may assert a claim or defense germane to the subject matter of the existing suit. A motion will be made to the court seeking permission to intervene. The trial court has considerable discretion in weighing the feasibility of the request. See Layton v. Seawall Enters., Inc., 231 Va. 402, 344 S.E.2d 896 (1986), below.


A new party may by leave of court file a pleading to intervene as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding.

All provisions of these Rules applicable to civil cases, except those provisions requiring payment of writ tax and clerk’s fees, shall apply to such pleadings. The parties on whom such pleadings are served shall respond thereto as provided in these Rules.

Case Law Synthesis. Rule 3:14 provides that a new party may by leave of court file a pleading to intervene as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding. The intervention rules require that an intervenor intervene specifically as a plaintiff or as a defendant. This addition reinforced the interpretation of former Rule 2:15 that an intervenor must be asserting an interest that is part of the subject matter of the litigation. The Supreme Court has held that even though leave to amend should be granted liberally by the trial court in furtherance of the ends of justice, a new party may not intervene and assert a claim in a pending suit unless the claim is germane to the subject matter of the suit. In order for a stranger to become a party by intervention, he must assert some right involved in the suit.

The Supreme Court of Virginia has also held that while intervention under what is now numbered Rule 3:14 is within the discretion of the trial court, intervention must meet the requirements of the Rule. The Rule's history includes a strong adherence to limiting intervention to those parties who are legitimately plaintiffs or defendants in litigation because the nature of their claim includes some right that is involved in the litigation. Where the claims of the intervenors fail to meet these conditions, the trial court will commit error in granting motions to intervene under Rule 3:14.

Classic case. In Layton v. Seawall Enterprises, 231 Va. 402, 344 S.E.2d 896 (1986) the Supreme Court found intervention improper (the proposed intervenors' claims were not "germane" to the pending suit) where they were landowners in the same neighborhood as the parties to the pending suit, and the intervenors' property values would have had some impact from one possible outcome of the pending suit between other parties as to title to a strip of land bordering a lake.
Note on Adding or Dropping Parties Relying on the Statutes

Addition or Dropping of Parties by the Court. The court is involved in the misjoinder and non-joinder issues discussed above. In addition, under § 8.01-5 the court may upon affidavit take action as the ends of justice require. And under § 8.01-7 the court may act *sua sponte* in cases where justice cannot be achieved without presence of new parties.
F. Interpleader

Virginia has a general interpleader statute allowing a "stakeholder" to commence a suit that requires all claimants to the property to present their claims to it in a single proceeding.

§ 8.01-364. Interpleader.

A. Whenever any person is or may be exposed to multiple liability through the existence of claims by others to the same property or fund held by him or on his behalf, such person may file a pleading and require such parties to interplead their claims. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant in an action who is exposed to similar liability may likewise obtain such interpleader. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in § 8.01-5.

B. The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by any other section of this Code.

C. In any action of interpleader, the court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of the Commonwealth affecting the property involved in the interpleader action until further order of the court. Such court shall hear and determine the case and may discharge the appropriate party from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

D. A person interpleading may voluntarily pay or tender into court the property claimed, or may be ordered to do so by the court; and the court may thereupon order such party discharged from all or part of any liability as between the claimants of such property.

REVISERS' NOTE

Section 8.01-364 is a new section in Title 8.01. . . The purpose of the statute is to provide Virginia with a comprehensive modern statutory method of interpleader comparable to those which exist in most other jurisdictions, including the federal system.

Despite the expression of apprehension to the contrary by some critics when the section was being considered, it is not intended to authorize the bringing of "class actions." Neither its content nor its structure is adaptable to such actions.

Like most modern interpleader statutes, § 8.01-364 is patterned in large part upon 28 U.S.C. § 1335 and FRCP 22. While the statute does not expressly supersede the traditional equity suit for interpleader it is believed that in practice the equity procedure will be displaced because of the greater availability, simplicity, and completeness of remedy which the statute affords. Cf. Bell Storage Company v. Harrison, 164 Va. 278, 180 S.E. 320 (1935).

It is to be noted that the statute expressly provides in subsection B "The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by any other section of this Code." (Emphasis added.) This provision is significant because of the statutory interpleader procedure provided for in the Uniform Commercial Code (§ 8.7-603) for the benefit of bailees as defined in Article 7 of the U.C.C. and which is applicable principally to
warehousemen and carriers. The fact that a rule of the Supreme Court of Virginia has been added to Part Two of the Rules, designed to implement § 8.01-364, should not be interpreted as adding to the statute the restrictions of the traditional equity suit for interpleader which the statute itself does not require.
A. Sovereign Immunity is "Alive and Well" in Virginia

Basic Principles for Governments and Workers

MESSINA v. BURDEN

JUSTICE THOMAS delivered the opinion of the Court.

These two appeals present the same issue from slightly different perspectives. Both appeals concern whether the doctrine of sovereign immunity extends to government employees such as those involved in these cases. They differ in that William W. Burden, the appellee in the first appeal, was an employee of Tidewater Community College, part of the Virginia Community College System, and thus, in
essence, an employee of the State, while Dennis R. Johnson, the appellee in the second appeal, was an employee of Arlington County. These appeals give us the opportunity to reexamine the complex law of sovereign immunity as it has evolved in the

Commonwealth.

In the first appeal, Frank Messina was injured when he tripped and fell on a stairway located behind the stage of the College Theater on the Frederick Campus of Tidewater Community College. At the time of his injury Messina was an actor in a play being performed at the theater.

Messina first sued the community college. However, that action was nonsuited and an amended motion for judgment was filed against William W. Burden, the college's superintendent of buildings. In the amended motion for judgment, Messina made several allegations against Burden including the following:

On or about March 11, 1979, the Defendant, William W. Burden, was the Superintendent of Buildings for the Defendant Tidewater Community College, was its employee, and was acting within the scope of his employment; and as the Superintendent of Buildings it was his duty to maintain and supervise the maintenance of the buildings of the Tidewater Community College.

Burden filed a demurrer in which he contended that the action against him was barred by the doctrine of sovereign immunity. The court sustained the demurrer with leave to Messina to amend.

Messina filed a second amended motion for judgment. This time Messina was careful not to set forth Burden's job title. Moreover, in his new pleading, Messina did not allege that Burden was acting within the scope of his employment or that he had supervisory responsibilities. In response, Burden filed a plea of sovereign immunity. The court sustained the plea.

On appeal, Messina contends that the trial court erred in two particulars: first by sustaining the demurrer to the first amended motion for judgment, second by sustaining the plea to the second amended motion for judgment.

Leonard Armstrong was injured when he stepped on a defective manhole cover located in a street in Arlington County. Armstrong sued Dennis R. Johnson and, in his motion for judgment, alleged that Johnson was "Chief of the Operations Division of the Department of Public Works in Arlington County, Virginia." Johnson filed a special plea of immunity and a demurrer. Thereafter, the parties entered into a stipulation of facts in which they agreed that at the time of Armstrong's injury, Johnson was Chief of the Operations Division as alleged. They further agreed that there were eleven sections within Johnson's division and that he administered all of them. They also agreed that Johnson's work required the application of engineering knowledge and skills to solve highway construction and maintenance problems. They agreed further that Johnson had "wide latitude in exercising independent judgment, subject only to administrative
review by the Director of the Department of Transportation."

The trial court sustained the demurrer and the plea of immunity. In a memorandum opinion, the trial court first stated that Arlington County shared the sovereign immunity of the Commonwealth, then reasoned that the county "is not a 'local government agency' as that term has been used in several of the decisions denying immunity to employees of such agencies." The trial court also stated that Johnson's duties were "analogous to the 'executive officers' in Lawhorne v. Harlan [214 Va. 405, 200 S.E.2d 569 1973] who were charged with the operation of a vast hospital complex." The court noted further that the charge against Johnson was one of simple negligence, not gross negligence or intentional misconduct.

On appeal, Armstrong contends that the trial court made two errors. He says the court erred in holding that Johnson "while acting as Chief . . . of Operations . . . was not acting as an employee of a local government agency." He also says the trial court erred in sustaining Johnson's demurrer and plea.

A. Issues Common to Both Appeals

At least two common themes run through both appeals. One theme is that the doctrine of sovereign immunity has been so eroded that it has lost its vitality and should be done away with completely by this Court. The other theme concerns the difficulty in determining which government employees are entitled to immunity.

1. Vitality of The Doctrine

Contrary to the suggestions of the appellants, the doctrine of sovereign immunity is "alive and well" in Virginia. Though this Court has, over the years, discussed the doctrine in a variety of contexts and refined it for application to constantly shifting facts and circumstances, we have never seen fit to abolish it. Nor does the General Assembly want the doctrine abolished. In 1981, the General Assembly enacted the Virginia Tort Claims Act. Had it so chosen, the legislature could have used that act as a vehicle to abolish sovereign immunity. It did just the contrary. In a 1982 amendment to the act the General Assembly provided as follows:

[N]or shall any provision of this article . . . be so construed as to remove or in any way diminish the sovereign immunity of any county, city, or town in the Commonwealth.

Code § 8.01-195.3. Thus, the complexity that exists in the law of sovereign immunity cannot be eliminated by the simple expedient of doing away with the doctrine by judicial fiat.

2. Determining Employee Immunity

The more important question raised by the two appeals is under what circumstances an employee of a governmental body is entitled to the protection of sovereign
immunity. In order to resolve this question, we must focus upon what the doctrine of sovereign immunity was meant to achieve.

One of the most often repeated explanations for the rule of state immunity from suits in tort is the necessity to protect the public purse. See *Hinchey v. Ogden*, 226 Va. 234, 307 S.E.2d 891 (1983). However, protection of the public purse is but one of several purposes for the rule. In *Board of Public Works v. Gannt*, 76 Va. 455 (1882), we said that sovereign immunity is a privilege of sovereignty and we then explained that without the doctrine there would exist inconvenience and danger to the public in the form of officials being fearful and unwilling to carry out their public duties. We also stated that without sovereign immunity public service might be threatened because citizens might be reluctant to take public jobs. We said further that if the sovereign could be sued at the instance of every citizen the State could be "controlled in the use and disposition of the means required for the proper administration of the government." 76 Va. at 462 (quoting *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868)).

More recently, in *Hinchey*, we rejected the idea that protection of the public purse is or ever was the sole basis of the doctrine. There, we said that while maintenance of public funds is important, another equally important purpose of the rule is the orderly administration of government. In *Hinchey*, we relied upon 72 Am. Jur. 2d States, Territories, and Dependencies § 99, which described sovereign immunity "as a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities." 226 Va. at 240, 307 S.E.2d at 894.

From these several sources it is apparent that the doctrine of sovereign immunity serves a multitude of purposes including but not limited to protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation. Given the several purposes of the doctrine, it follows that in order to fulfill those purposes the protection afforded by the doctrine cannot be limited solely to the sovereign. Unless the protection of the doctrine extends to some of people who help run the government, the majority of the purposes for the doctrine will remain unaddressed. For example, limiting protection to the State itself does nothing to insure that officials will act without fear. If every government employee is subject to suit, the State could become as hamstrung in its operations as if it were subject to direct suit. The reason for this is plain: the State can act only through individuals. See *Sayers v. Bullar*, 180 Va. 222, 22 S.E.2d 9 (1942).

At least twice in the past, we have acknowledged the importance of affording immunity to certain government employees. In one case we approached the question on the basis of policy:

It would be an unwise policy to permit agents and employees of the State to be sued in their personal capacity for acts done by them at the express direction of the State, unless they depart from that direction.

*Sayers v. Bullar*, 180 Va. at 229, 22 S.E.2d at 12. To the same effect is *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 79, 301 S.E.2d 8, 12 (1983), where we said that...

There is very little debate regarding the extension of the doctrine to those who operate at the highest levels of the three branches of government. Governors, judges, members of state and local legislative bodies, and other high level government officials have generally been accorded absolute immunity. W. Prosser, Handbook of the Law of Torts § 132 at 987-988 (4th ed. 1971). General agreement breaks down, however, the farther one moves away from the highest levels of government. Nevertheless, on a case-by-case basis, this Court has extended immunity to other governmental officials of lesser rank.

In Sayre v. The Northwestern Turnpike Road, 37 Va. (10 Leigh) 454 (1839), we held the president and directors of the Northwestern Turnpike Road to be immune against a claim that a bridge built by their company was negligently constructed. In Sayers v. Bullar, 180 Va. 222, 22 S.E.2d 9 (1942), we held that workers who performed blasting operations for the State were immune from liability because there was no evidence that in blasting they did anything other than exactly what they were required to do by the sovereign. We stated that the "defendants were simply carrying out instructions given them by" a state agency. Id. at 230, 22 S.E.2d at 12. We said in Sayers that the workers "were acting solely in their representative capacity as lawful and proper agents of the State and not in their own individual right." Id. at 229, 22 S.E.2d at 12. In Kellam v. School Board, 202 Va. 252, 117 S.E.2d 96 (1960), we held that a city school board was immune when charged with negligence in failing to keep the aisles clear in a high school auditorium that had been rented to a third party for a program. Accord Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979); Crabbe v. School Board and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968).

In Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973), we held that two hospital administrators and a surgical intern at the University of Virginia hospital were immune in a suit brought by the representative of a patient who died while in the hospital. In Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982), we held that a division school superintendent and a high school principal were immune in a suit alleging that their failure to provide a safe environment resulted in plaintiff's being stabbed. In Bowers v. Commonwealth, 225 Va. 245, 302 S.E.2d 511 (1983), we held that a highway department resident engineer was immune from a suit where plaintiff sustained an injury on a culvert that was constructed by the highway department. Most recently we held that the Superintendent of the Norfolk-Virginia Beach Expressway was immune when sued for failing to provide adequate barriers and traffic control which led to a collision. Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983).

Deciding which government employees are entitled to immunity requires line-drawing. Yet, given the continued vitality of the doctrine, the Court must engage in this difficult task. Yet, by keeping the policies that underlie the rule firmly fixed in our analysis, by distilling general principles from our prior decisions, and by examining the facts and circumstances of each case this task can be simplified.

Analysis of Messina and Armstrong
Messina and Armstrong do not involve officials at the very highest levels of government who have generally been accorded absolute immunity. Thus, to decide the question of immunity in these appeals, we must make a close examination of the facts and circumstances.

1. **Messina**

In Messina, the trial court did not err in sustaining the demurrer to the first amended motion for judgment. In that pleading, Messina pleaded himself out of court. Messina alleged that the college was part of the Community College System, that Burden was employed by the college, that Burden was the "Superintendent of Buildings," that Burden had the "duty to maintain and supervise the maintenance of the buildings" at the college, and that Burden "was acting within the scope of his employment." It is clear from the first amended motion for judgment that Burden was a supervisory employee of the State of Virginia who was operating within the scope of his employment in doing or failing to do the act of simple negligence complained of by Messina; as such he was entitled to immunity. See *Bowers v. Commonwealth*, 225 Va. 245, 302 S.E.2d 511 (1983); *Banks v. Sellers*, 224 Va. 168, 294 S.E.2d 862 (1982); *Lawhorne v. Harlan*, 214 Va. 405, 200 S.E.2d 569 (1973).

In support of his second assignment of error, Messina relies heavily upon *Short v. Griffitts*, 220 Va. 53, 255 S.E.2d 479 (1979). Messina contends that the allegations in his case were virtually the same as in Short where this Court ruled that the doctrine of sovereign immunity did not bar the claim. However, *Short* is distinguishable. The most telling difference is that in the instant appeal Messina alleged that Burden was acting within the scope of his employment with regard to the act complained of. No such allegation was made in *Short*. One of the critical factors in deciding whether a government employee is entitled to immunity is whether he was acting within or without his authority at the time of doing or failing to do the act complained of. In Messina this critical point must be resolved in favor of Burden. The fact that he is said by the plaintiff to have been operating within the scope of his employment together with the allegation of the supervisory nature of his work and the absence of any claim of gross negligence or intentional misconduct demonstrates the correctness of the trial court's decision to sustain the plea of sovereign immunity.

2. **Armstrong**

In support of his first assignment of error, Armstrong argues that Johnson was a county employee rather than an employee of the Commonwealth as the trial court found, and hence, that he was not eligible to claim sovereign immunity. He relies upon a passing comment in *James v. Jane*, 221 Va. 43, 51, 267 S.E.2d 109, 112 (1980), where we said that "[w]e make a distinction between the Sovereign Commonwealth of Virginia and its employees, and local governmental agencies and their employees."

Armstrong construes that comment and similar language in *Short v. Griffitts*, 220 Va. 53, 55, 255 S.E.2d 479, 481 (1979), as the pronouncement of a per se rule that the doctrine of sovereign immunity never applies to an employee of a local governmental agency. We disavow such a construction. The distinction we mentioned in *James* and *Short* is one of degree rather than kind. A state employee has a closer nexus to the sovereign. And the identity of the employer is one of the factors to be considered in determining whether a government employee is entitled to the protection of the
immunity doctrine. Where an employee works for the sovereign itself, an entity we know to be immune, we can eliminate the step in the analysis which otherwise would require us to ascertain whether the employee who asserts immunity works for an immune governmental entity. As must be obvious from the decision reached in Banks v. Sellers (handed down after the trial court's ruling in Armstrong), where we held a school superintendent and a principal immune, employees of governmental entities other than the Commonwealth itself can receive the benefits of sovereign immunity.

Given our analysis of this appeal, it was unnecessary to attempt to turn Johnson into a quasi-state employee in order for him to be entitled to the protection of sovereign immunity. It would place an unnecessary strain on the English language and on the creative genius of attorneys to require transformation of an employee of a local immune body into a state employee in order to entitle him to immunity. The more workable rule is the one here announced: If an individual works for an immune governmental entity then, in a proper case, that individual will be eligible for the protection afforded by the doctrine. In his second assignment of error, Armstrong contends that even if Johnson is a person who can secure, in a proper case, the benefits of sovereign immunity, that immunity should be withheld in the instant case because Johnson fails to meet the test set forth in James v. Jane. James involved suits against doctors at the University of Virginia Medical School. At trial, plaintiff alleged that he was injured as the result of negligent acts on the part of the doctors in performing a myelogram. All of the doctors were full-time faculty members of the University of Virginia Medical School. They were required to teach, to do research, and to take care of patients. They were all fully licensed physicians. They all pleaded sovereign immunity. The trial court held that they were immune. We reversed. In our view, the doctors were essentially independent contractors as far as their relationship with their patients was concerned. We concluded that since matters of treatment were left up to them individually, the State had no control over the doctor-patient relationship and, therefore, the State's immunity had no application to the doctors with regard to claims of negligent medical treatment.

In James we developed a test to determine entitlement to immunity. Among the factors to be considered are the following:

1. the nature of the function performed by the employee;
2. the extent of the state's interest and involvement in the function;
3. the degree of control and direction exercised by the state over the employee; and
4. whether the act complained of involved the use of judgment and discretion.

221 Va. at 53, 267 S.E.2d at 113. Armstrong contends that Johnson does not meet the James analysis because the State had no control over him and the State had no interest in Johnson's work. The response to Armstrong's contention is simple: the word "state" was used in this test only because in James the State was the immune body for which the doctors worked. Our use of the word "state" did not mean that in cases where the individual seeking immunity was not a State employee the State's interest in and control over the individual still had to be examined. Had the doctors in James worked for another immune governmental entity, that entity's name would have been used in the test. Thus, in applying the James test to employees of other immune governmental entities, the word "state" should be deleted and the proper description of the governmental entity substituted.
Consequently, in Armstrong, in applying the *James* test, the first question is whether Johnson works for an immune body. Since Johnson works for Arlington County and since counties share the tort immunity of the Commonwealth, *Mann v. County Board*, 199 Va. 169, 98 S.E.2d 515 (1957), then Johnson is eligible for immunity if other applicable criteria are met. When the *James* test is modified to insert the word "county" in the place of the word "state," it is apparent that Johnson must be afforded immunity. His activities clearly involved judgment and discretion. The county exercised administrative control over Johnson and his department. The county had a clear interest in the work performed by Johnson.

**CONCLUSION**

For all the foregoing reasons, we hold that there was no error in the judgments appealed from. Therefore, the judgments in both appeals will be affirmed.

**POFF, J., concurring.**

I concur in the result, and I have decided to join in the majority opinion in the hope that it will contribute to uniformity in the application of the law of sovereign immunity in this Commonwealth. I must add, however, that I have a somewhat different view of what the law ought to be.

The complexity the majority finds in the case law results mainly from historical confusion over the differences between the doctrine of sovereign immunity and the doctrine of public-servant immunity (sometimes imprecisely labeled "official immunity"). The confusion stems, I believe, from undue reliance upon the truism that government can act only through the acts of its employees.

The two doctrines are akin but different in concept and effect. The doctrine of sovereign immunity, rooted originally in the tenuous theory that the King of England could do no wrong, finds its most legitimate justification in the right of government to protect its assets, owned in common by the people at large, and to promote the welfare and safety of the body politic by assuring orderly administration of governmental functions.

On the other hand, the primary purpose of the doctrine of public-servant immunity, while related to those underlying the doctrine of sovereign immunity, is to encourage citizens, including those of modest means, to enter government service and, once employed, to carry out their assigned missions responsibly without fear of personal liability for accidental injuries resulting from acts or omissions committed in the exercise of their discretionary powers. Public-servant immunity does not attach merely because the level of government for which the employee works enjoys sovereign immunity.

The rules I suggest would dispense with certain distinctions, invoked in earlier cases, which I consider artificial and illogical. For purposes of the sovereign-immunity analysis, I see no valid reason to distinguish between a county and a city; both administer laws and programs which affect the people's interests in the integrity of the public purse and the welfare and safety of the body politic. As an examination of the case law will reveal, it is all but impossible, with any degree of consistency, to determine the difference between a governmental function and a proprietary function,
and I would abandon the requirement that courts make the attempt. And, while I would grant no immunity from intentional torts to any employee at any level of government, I would abolish the nebulous distinction we have drawn between simple civil negligence and gross civil negligence.

Having in mind the public-policy purposes of the doctrines of sovereign immunity and public-servant immunity, I favor the following rules:

(1) Absent express waiver, the Commonwealth, counties of the Commonwealth, cities chartered by the Commonwealth, and towns incorporated by the Commonwealth are immune from suit arising out of a tort committed in the discharge of a lawful public function.

(2) Departments, agencies, and other public bodies created by any level of government and authorized to exercise a lawful power of that government enjoy the same immunity.

(3) Chief executive officers and legislators at every level of government, and judicial officers, such as judges, magistrates, and commissioners in chancery, are immune from liability for damages arising out of unintentional torts committed within the scope of their employment.

(4) All other employees of every level of government or of a lawful creature of government are immune from liability from damages arising out of unintentional torts committed in the performance of a judgmental or discretionary duty within the scope of their employment, without regard to whether the misfeasance or nonfeasance is simple or gross.

These rules, like those precipitated by the majority opinion, may not be the ideal solution. Government continues to grow in size and power, and the danger of tortious injury to private citizens by government employees expands apace. Some say the legislature should abolish the judge-made doctrine of sovereign immunity, grant absolute immunity to every government employee for every kind of tort arising out of and during the course of his employment, and, applying the rule of respondeat superior, impose liability solely upon the master for the tortious conduct of the servant, with no right of indemnity against the servant.

I would not go so far. Doubtless, such a legislative package would simplify the body of the law for the benefit of legitimate claimants. But it would inevitably tend to curtail an employee's incentive to perform his duties faithfully, invite frivolous and vexatious litigation, and disrupt the orderly administration of governmental functions, all at the expense of the people.

COCHRAN, J., dissenting.

The majority opinion has attempted to lay down a rule of sovereign immunity which reconciles our prior decisions. In my view, the attempt fails because the decisions cannot be reconciled. The result is that the tent of sovereign immunity is now to be stretched to protect from liability far more negligent individuals than ever before. What appears to be the critical test is whether the employee of an immune employer was acting within or without the scope of his employment. The effect of the majority opinion, in my view, is to overrule at least three of our recent decisions on this subject.

In *Kellam v. School Board*, 202 Va. 252, 117 S.E.2d 96 (1960) and *Crabbe v.*
School Board, 209 Va. 356, 164 S.E.2d 639 (1968), we held that a school board, in the performance of its duties, was an arm of the Commonwealth and, in the absence of waiver by statute, immune from liability for negligence. In Crabbe, however, we laid down a different rule for a teacher who was employed by a county school board and performing his duties when a pupil in his class was injured in using a power saw. We held that the fact that the teacher was "performing a governmental function for his employer" did not exempt him from liability "for his own negligence in the performance of such duties." 209 Va. at 359, 164 S.E.2d at 641.

Twice we have followed Crabbe and held that employees of exempt employers were liable for their own acts of negligence. James v. Jane, 221 Va. 43, 267 S.E.2d 109 (1980); Short v. Griffits, 220 Va. 53, 255 S.E.2d 479 (1979). In Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973), a majority relied on the distinction between discretionary and ministerial acts to hold an intern and administrators of a state hospital immune because they exercised discretion in their work. Id. at 407, 200 S.E.2d at 571-72. But in James, the court, without overruling Lawhorne, held full-time members of the medical faculty at the same hospital subject to liability for their acts of negligence because they exercised complete discretion in their work. 221 Va. at 52-55, 267 S.E.2d at 113-14.

The majority opinion in James repeated the language of Short that in our decisions "[w]e make a distinction between the Sovereign Commonwealth of Virginia and its employees, and a governmental agency, created by the Commonwealth, and its employees." I do not consider that the use of that language was casual or inadvertent.

In Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982), a school's division superintendent and principal were held to be immune because of the supervisory and discretionary nature of their work. Id. at 172-73, 294 S.E.2d at 864-65. But, in Crabbe and Short, immunity had been denied a shop teacher, an athletic director, a coach, and a buildings and grounds supervisor. The Crabbe and Short decisions did not rely on the distinction between discretionary and ministerial functions, as the defendants in those cases clearly exercised discretion by the very nature of their work but were nonetheless subject to liability for negligence. Later decisions relying on this distinction are a clear departure from the Crabbe rule of individual liability.

In the present cases, the majority finds each defendant to be a supervisory employee exercising discretion in his work. This puts the court in the position of endorsing the distinction relied on in Lawhorne and Banks and contravening the clear mandate of Crabbe, Short, and James. Accordingly, I dissent. To immunize employees of local arms or agencies of the state government is to regress from established principles of law. In Short, we held that whether the employees' duties included supervision, maintenance, and inspection of facilities and whether they breached such duties thereby proximately causing plaintiff's injuries were questions of fact to be decided at trial. 220 Va. at 55, 225 S.E.2d at 480. Similarly, Messina and Armstrong should be entitled to try the questions whether Burden and Johnson had duties to inspect and maintain the premises under their supervision, whether they breached such duties, and whether their breach proximately caused injuries to their respective plaintiffs.

STEPHENSON, J., joins in this dissent.
The Michelin Man discovers the lucrative field of expert consulting in defective tire cases.
JUSTICE COMPTON delivered the opinion of the Court

The sole issue in this appeal is whether the trial court erred in ruling that a city employee, operating a city truck and spreading salt during a snowstorm, is protected by the doctrine of sovereign immunity from a negligence action arising from a collision between the truck and another vehicle.

Appellants Ronald Stanfield, a minor, and Sharon Stanfield, his mother, jointly sued the City of Alexandria and appellee Tracy Delmar Peregoy seeking recovery in damages. According to plaintiffs' allegations, they were injured while riding on a bus that collided with a city-owned truck negligently operated by Peregoy, a city employee acting within the scope of his employment.

Responding, the defendants filed a special plea of sovereign immunity. They asserted that the accident occurred when Peregoy was operating "a combination snow plow/salt truck" and "was spreading salt on the streets during a snow emergency." The defendants contended that "the maintenance of streets free from ice and snow is a governmental function." Accordingly, the defendants asserted, the City is immune from liability in tort based upon its employee's negligent performance of this function. The defendants also contended that because the employee was performing a governmental function requiring the exercise of judgment and discretion, he likewise is immune from liability in this action.

In support of its plea, the defendants filed a memorandum of law reciting facts relevant to the issue presented. Later, the trial court considered oral argument of counsel on the plea at which time the plaintiffs conceded the City is immune from any liability based upon the employee's negligence. In a subsequent letter opinion, the trial court stated that it assumed there had been a stipulation "as to the facts alleged by the City" because the "Plaintiffs [had] not objected" to such factual recitations.

Sustaining the plea, the court noted that the defense of sovereign immunity applies only to an employee's acts of judgment and discretion necessary to the performance of the governmental function. The court ruled that the employee is immune from suit because his driving of the vehicle "was an integral part of the governmental function and did involve 'special risks arising from the governmental activity,'" quoting Heider v. Clemons, 241 Va. 143, 145, 400 S.E.2d 190, 191 (1991). The court concluded, "Since the facts do not show and Plaintiffs have not alleged gross negligence the [plea] will be sustained." The plaintiffs appeal as to the defendant Peregoy only from the March 1992 order dismissing the action with prejudice.

The facts in the record relied upon by the trial court show that the City "was hit" with a major snowstorm during the early morning of the day in question. Defendant Peregoy was an employee of the City's Department of Transportation and Environmental Services qualified to operate the City's "snow emergency removal equipment." At the time, the defendant had completed a special course of instruction
given to the employees selected to operate the equipment. These drivers were required to obtain a chauffeur's license, to learn defensive driving techniques, and to complete a minimum of 16 hours of on-the-job training. In performing their emergency duties, the selected employees initially had to determine whether a particular street needed to be salted, plowed, or a combination of both. Based on the employee's assessment of the street conditions, the employee had to decide whether to spread salt on the entire street, or only a section, and had to ascertain the amount of salt to be spread.

Snow began to fall on the day of the accident about 6:00 a.m. and ended near 10:00 p.m., accumulating between four and eight inches in the area. At the time of the accident, near 7:00 a.m., the City emergency personnel mainly were concerned about ice forming on the streets due to low temperatures.

Prior to the accident, the defendant had spread salt along three streets. As he was salting a fourth street, he approached an intersection and, faced with a stop sign, attempted to stop his truck. According to defendant, his truck skidded on ice into the intersection and collided with the bus carrying the plaintiffs.

We have developed a four-factor test to be employed when we engage in the necessary "line-drawing" exercise to determine if government employees are entitled to immunity. The factors to be considered include: (1) the nature of the function the employee performs; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion. Lentz v. Morris, 236 Va. 78, 82, 372 S.E.2d 608, 610 (1988); Messina v. Burden, 228 Va. 301, 313, 321 S.E.2d 657, 663 (1984). In the present case, we are concerned with the fourth factor only.

The plaintiffs argue that the defendant is liable for injury caused by his negligent driving because the "operation of the snowplow/salt truck is a ministerial duty which does not require the exercise of judgment or discretion, nor does it involve any special risks arising from the governmental activity." We disagree.

Recently, the Court has decided three cases in which the issue was whether the operation of a vehicle was a ministerial act, not a discretionary act to which sovereign immunity applies. In Colby v. Boyden, 241 Va. 125, 400 S.E.2d 184 (1991), the Court held that a city police officer pursuing a fleeing lawbreaker was immune from civil liability for negligence when he drove his police vehicle into an intersection against a red traffic light and collided with a vehicle operated by the plaintiff.

The Court said that unlike a driver "in routine traffic," a police officer engaged in vehicular pursuit is required to make "difficult judgments about the best means of effectuating the governmental purpose," and that such situations necessarily involve decisions requiring the exercise of discretion; the officer must balance personal and public safety concerns "to achieve the governmental objective." Id. at 129-30, 400 S.E.2d at 187.
Likewise, in *National Railroad Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402, 404 S.E.2d 216 (1991), we held that a fireman operating a fire truck en route to a fire was immune from civil liability for negligence when he drove across a railroad track without stopping and collided with a train. We said, referring to *Colby*: "We cannot logically distinguish the act of crossing a railroad track without stopping in order to extinguish a fire from running a red light in order to apprehend a traffic offender. We think both acts involve the exercise of judgment and discretion." Id. at 413, 404 S.E.2d at 222.

Conversely, in *Heider*, supra, we held that a deputy sheriff who had completed serving process at a residence was not immune from liability for negligence when he drove his vehicle from a parked position and collided with a motorcycle on the street near the residence. We said that under the circumstances of that case, "the simple operation of an automobile did not involve special risks arising from the governmental activity, or the exercise of judgment or discretion about the proper means of effectuating the governmental purpose of the driver's employer." *Heider*, 241 Va. at 145, 400 S.E.2d at 191.

In the present case, we hold that the trial court correctly ruled that the defendant Peregoy was immune from suit. The operation of the truck in snow and ice to effectuate a governmental purpose clearly involved, at least in part, the exercise of judgment and discretion by the driver. See *Lentz*, 236 Va. at 83, 372 S.E.2d at 611. For example, he had to decide whether the conditions of a particular street or intersection required plowing or salting, or both. When spreading the salt, the defendant's activity at the time of the accident, he was required to determine the amount of salt to be applied and the area over which it should be spread. Indeed, the exercise of discretion was involved even in the initial decision to undertake the plowing and salting at all. See *Colby*, 241 Va. at 130, 400 S.E.2d at 187.

At the time of the accident, this defendant was not involved in "the simple operation" of the vehicle, *Heider*, 241 Va. at 145, 400 S.E.2d at 191, nor was he driving "in routine traffic." *Colby*, 241 Va. at 129, 400 S.E.2d at 187. Perhaps if this accident had happened as defendant was driving his truck en route to the area he was assigned to plow and salt, or if it occurred when he was returning to his Department's headquarters after completing his function of plowing and salting, he would have been engaged in "the simple operation" of the truck "in routine traffic," a ministerial act. But in this case, the conduct of driving and spreading salt combined as an integral part of the governmental function of rendering the city streets safe for public travel. Manifestly, the operation of this vehicle involved special risks arising from the governmental activity and the exercise of judgment or discretion about the proper means of effectuating the governmental purpose of the defendant's employer. See *Heider*, 241 Va. at 145, 400 S.E.2d at 191.

In *Heider*, we cited *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938), a case upon which the plaintiffs rely. An analysis of *Wynn*, however, confirms that the line we have drawn in this case is properly placed. There, a school bus driver had taken a county bus to be serviced. As he drove the empty bus from the service station toward a county school, children began crowding around and running after the moving bus as it neared the entrance to the school building. Before the bus stopped and before any children had boarded the bus, a child was injured when he fell or was pushed to the ground beneath a
wheel of the bus.

In a negligence action brought on behalf of the child against the driver, this Court first ruled that the issue of defendant's primary negligence was a question for the jury. Id. at 593, 197 S.E. at 528. Next, the Court considered defendant's contention that he was immune from suit because he was operating a county vehicle "which was used for the transportation of children." Id. at 595, 197 S.E. at 529. The Court decided that the driver was not immune and, without elaborating, merely set forth the general rule that public officers are liable for injury resulting from their negligence in the performance of duties that do not involve judgment or discretion but are purely ministerial. Id.

In Wynn, however, unlike the present case, the defendant was engaged in "the simple operation" of the bus, approaching the place where he would embark on his governmental duty of transporting children. Similarly, the deputy sheriff in Heider was engaged in "the simple operation" of his vehicle, leaving the place where he had completed the performance of his governmental duty of serving process.

In Wynn, noteworthy is the fact that the defendant claimed immunity merely because he was operating a government vehicle "used" or utilized for the transportation of children, not because he was actually engaged in their transportation at the time. In the present case, the defendant was not just operating a government vehicle utilized for salting snow and ice. Rather, the defendant was actually performing the governmental function while operating such vehicle.

Accordingly, we conclude there is no error in the judgment below, and it will be Affirmed.
Driving Rescue Vehicles

The Supreme Court has had occasion to apply the four-factor James v. Jane test in determining whether an individual working for an immune governmental entity, who allegedly commits negligence while driving a rescue vehicle is entitled to the protection of sovereign immunity. The Court noted that sovereign immunity is not available with respect to the performance of duties which do not involve judgment or discretion in their performance but which are purely ministerial. On facts involving travel in response to a call reporting a child in a locked car, the Court found that the facts did not support the conclusion that the defendant's driving involved the exercise of judgment and discretion beyond that required for ordinary driving in routine traffic situations. The Court further concluded that the special skill and training required to operate a fire truck under these circumstances is not the exercise per se of judgment and discretion for purposes of sovereign immunity. To find otherwise would not comport with prior decisions which have held that sovereign immunity does not extend to "ordinary driving situations" in "routine traffic." Thus, there were no "special risks" inherent in defendant's task here, unlike prior emergency response cases in which sovereign immunity was held to apply. Friday-Spivey v. Collier, 268 Va. 384, 601 S.E.2d 591 (2004).
JUSTICE LACY delivered the opinion of the Court.

In this case we consider whether an attending physician employed by the state is entitled to sovereign immunity for alleged acts of simple negligence.

Eartha K. Lee was admitted to the high risk pregnancy service at the University of Virginia Hospital (University Hospital) on September 23, 1985, when she was approximately 28 weeks pregnant. Dr. Siva Thiagarajah, Lee's attending physician, prescribed a management plan for her medical treatment. Dr. Thiagarajah's plan was to stop preterm labor with drugs and to monitor Lee for infection. When Dr. Thiagarajah went off duty on the afternoon of September 27, 1985, Dr. Francis John Bourgeois took over as Lee's attending physician. [Problems ensued and the] baby's spinal cord was traumatically injured and she is permanently paralyzed.

The infant, Trinica Ann Lee, filed a motion for judgment by her mother and next friend, Lee, naming the Commonwealth and seven doctors, including Drs. Thiagarajah and Bourgeois as defendants. . . The trial court held that Dr. Bourgeois was entitled to sovereign immunity and dismissed Dr. Bourgeois from the case with prejudice.

. . . In James v. Jane, we determined that three physicians employed by the Commonwealth as faculty members at the Medical School of the University of Virginia were not entitled to sovereign immunity in actions for negligence based on allegations that they failed to exercise reasonable care in attending a patient. 221 Va. at 55, 267 S.E.2d at 114. The rationale of the decision was two-fold. First, the Commonwealth's paramount interest was that the University of Virginia operate a good medical school staffed with competent professors. The Commonwealth's interest in quality patient care was the same whether that patient was being treated in a public teaching hospital or in a private medical institution. Since the actions complained of related to the provision of patient care, not the educational function of the faculty members, the state's interest was slight. Second, a physician's exercise of professional skill and judgment in treating a patient is not subject to the control of the Commonwealth. 221 Va. at 54-55, 267 S.E.2d at 114; Lohr v. Larsen, 246 Va. 81, 85-86, 431 S.E.2d 642, 644-45 (1993).

Since James v. Jane, we have considered other cases involving allegations of negligence against physicians who were employed by the Commonwealth. In Gargiulo v. Ohar, 239 Va. 209, 387 S.E.2d 787 (1990), a board-certified physician was employed by a state hospital as a fellow in a medical research and training program run by the hospital. We held the employee was entitled to immunity in an action alleging that she negligently treated a patient participating in the research program. In discussing the nature of the employee's function, we concluded that the alleged negligent acts were performed by the employee in her capacity as a student which was a function "essential
Subsequently in *Lohr*, we concluded that a physician treating a patient for breast cancer in a public health clinic was entitled to sovereign immunity for alleged acts of simple negligence. Analyzing the function of the physician employee and the state's interest, we concluded that treating the patient was "an essential part of the clinic's delivery of its health care services" and that the state had a substantial interest in providing quality medical care for citizens in certain areas of the state who are economically unable to secure such services from the private sector. 246 Va. at 86, 431 S.E.2d at 644-45.

In analyzing the employee's function and the Commonwealth's interest and involvement in that function in this case, the trial court found that Dr. Bourgeois' function at the time of the alleged negligent acts was to be "available for consultation by any member of the obstetrical house staff." Because no member of the house staff consulted Dr. Bourgeois concerning Lee's pregnancy and delivery and he had no other personal contact with her, the trial court concluded that Dr. Bourgeois' function was that of "a teacher and consultant to residents, as opposed to a treating physician administering medical care to patients." The trial court held that in this role Dr. Bourgeois was furthering the paramount interest of the University Hospital as set out in *James v. Jane*, that is, operating a good medical school staffed with competent professors.

Our review of the record, however, indicates that Dr. Bourgeois' function at the time of the alleged negligent acts was more than simply being available to consult with residents or other members of the obstetrical staff. In his role as attending physician, his primary function related to the treatment of patients and is analogous to that of Dr. Hakala, the attending physician in *James v. Jane*. We conclude that Dr. Bourgeois, like Dr. Hakala, is not entitled to sovereign immunity under the circumstances of this case...

As the trial court noted, the role of the attending physician includes teaching responsibilities, particularly when responding to questions raised by residents or other members of the house staff. However, the hospital policy requiring an attending physician for each patient at all times is not primarily directed to the goal of good teaching practices, but to insuring that patients receive competent care. Furthermore, the General Assembly has required that all persons in the category of house staff be responsible and accountable to a licensed member of the hospital staff. Code §§ 54.1-2960, -2961. The care of the patient could not be, and was not, left solely to the house staff. Thus, the function of Dr. Bourgeois as attending physician was directly related to assuring that the patient, in this case Lee, received the proper care, whether delivered directly by him or indirectly through a member of the house staff. . .

Because we find that Dr. Bourgeois' function as an attending physician in this case was related to patient care and that acts taken regarding patient care are within the professional medical judgment of the physician, we conclude that the state's interest and degree of involvement are slight. Id. Therefore, Dr. Bourgeois is not entitled to sovereign immunity for the alleged negligent acts raised in this action. Accordingly, the judgment of the trial court will be reversed and the case remanded for further proceedings.
JUSTICE LACY delivered the opinion of the Court:

[Plaintiff Linhart was injured when the vehicle he was driving was struck by a school bus driven by an employee of the school board, and filed a complaint against both the driver and the board. Defendants filed special pleas in bar asserting the defense of sovereign immunity. The trial court granted those pleas and dismissed the case, holding that the bus driver was entitled to sovereign immunity for acts of simple negligence and that, because the school board's liability is entirely dependent upon and derived from the employee's alleged negligence, the complaint failed because it did not allege gross negligence against both the school board and defendant employee.]

I. IMMUNITY OF THE SCHOOL BOARD

Linhart first argues that pursuant to Code § 22.1-194, the School Board is not entitled to the defense of sovereign immunity under the circumstances of this case. That section provides, in pertinent part, that

if a school board is the owner, or operator through medium of a driver, of, or otherwise is the insured under the policy upon, a vehicle involved in an accident, the . . . school board shall be subject to action up to, but not beyond, the limits of valid and collectible insurance in force to cover the injury complained of or, [if self-insured under] § 22.1-190, up to but not beyond the amounts of insurance required under subsection A of § 22.1-190 and the defense of governmental immunity shall not be a bar to action or recovery. . . . The . . . school board may be sued alone or jointly with the driver, provided that in no case shall any member of a school board be liable personally in the capacity of a school board member solely.

We have held that this statute abrogates the immunity of a school board for acts of simple negligence "to a limited degree" and when the conditions of the statute are met, the defense of sovereign immunity will "not bar an action . . . for recovery of damages in an amount up to the limits of the insurance policy." Wagoner v. Benson, 256 Va. 260, 262-64, 505 S.E.2d 188, 188-90 (1998). At the time of the accident in this case, the School Board was self-insured in the amount of at least $50,000 for injury to one person pursuant to Code § 22.1-190. Therefore, the doctrine of sovereign immunity does not bar this action against the School Board to the extent of the limits of the School Board's self-insurance.

The School Board argues, however, that the trial court nevertheless was correct in dismissing the motion for judgment against the School Board. Any liability it may have is solely
vicarious liability, the School Board argues, and, under common law principles, the standard of liability applied to Lawson and the School Board must be the same. Because Lawson can only be liable for acts of gross negligence, the School Board argues that it too can only be liable for gross negligence. Therefore, the School Board concludes, the trial court correctly dismissed the motion for judgment because the motion did not allege gross negligence against the School Board or Lawson. We disagree.

The common law principle that the liabilities of principals and agents are coterminous is not applicable when altered by the General Assembly. Schwartz v. Brownlee, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997). In Schwartz, we considered Code § 8.01-581.15, which imposes a cap on medical malpractice recovery but limits the cap to health care providers. Therefore, even though the employer's liability was predicated on the acts of its employee, a health care provider, the non-health care employer was not entitled to the limitation of the cap. Code § 8.01-581 abrogated the common law principle that the liabilities of agent and principal are coterminous. Schwartz, 253 Va. at 166-67, 482 S.E.2d at 831-32.

In this case, as we have said, Code § 22.1-194 subjects the School Board to limited liability for injuries incurred through the acts of its employee school bus drivers. The statute does not require that the school board and its employee be sued jointly and in fact allows a plaintiff to proceed solely against a school board. As in Schwartz, we conclude that, in enacting Code § 22.1-194, the General Assembly created an exception to the common law principle recited above and imposed liability on a school board for simple negligence, even if its employee is liable only for acts of gross negligence. Therefore, the trial court erred in dismissing Linhart's motion for judgment against the School Board for failure to plead gross negligence.

II. IMMUNITY OF BUS DRIVER

Linhart argues that Lawson was not immune from liability for acts of simple negligence because, in addition to abrogating the immunity of the School Board, Code § 22.1-194 also abrogated the immunity of Lawson, the School Board's employee. Linhart bases his position on the statutory language which provides that the school board may be sued alone "or jointly with the driver" and on the fact that the only exception to personal liability set out in the statute relates to that of a school board member in his official capacity. We disagree with Linhart.

Abrogation of the common law requires that the General Assembly plainly manifest an intent to do so. Schwartz, 253 Va. at 166, 482 S.E.2d at 831. Nothing in Code § 22.1-194 clearly and unambiguously removes the common law protection of sovereign immunity from bus drivers employed by school boards. Governmental employees have always been subject to suit for gross negligence and thus the language in the statute authorizing a suit against employee and school board jointly does no more than recognize that such an employee is amenable to suit. Without more, the language of the statute is insufficient to convey a plainly manifest intent to abrogate a governmental employee's immunity for acts of simple negligence.

We are cognizant of the fact that in enacting the Virginia Tort Claims Act, Code §§ 8.01-195.1 to -195.9, the General Assembly included language specifically preserving the immunity of governmental employees. Code § 8.01-195.3. We do not believe that the failure to use similar language in Code § 22.1-194 requires the conclusion that the
immunity of the school bus driver was not preserved. An affirmative statement of
immunity reinforces a legislative intent not to abrogate such immunity. However, such
language does not impose an additional condition that immunity is abrogated in the
absence of an affirmative statement preserving such immunity.

In light of this holding, the question next arises whether the legislation effectively
precludes school bus drivers from claiming the protection of sovereign immunity when
the school board employer is not entitled to claim governmental immunity under the
specific circumstances detailed in the statute. As Linhart notes, in both Messina v.
Burden and James v. Jane, 221 Va. 43, 282 S.E.2d 864 (1980), we stated that, an
individual claiming sovereign immunity must be employed by an immune governmental
entity. However, we conclude that neither our prior decisions nor the enactment of Code
§ 22.1-194 requires the result advocated by Linhart.

As a general matter, school boards are immune governmental entities. Kellam v.
Sch. Bd. of the City of Norfolk, 202 Va. 252, 256, 117 S.E.2d 96, 98-99 (1960). The
limited abrogation of this immunity in the specific circumstances described in Code §
22.1-194 does not affect the general status of a school board as a governmental entity
ettitled to the immunity of the sovereign. Applying the tests enunciated in Messina v.
Burden and James v. Jane to preclude Lawson's immunity because the School Board is
not an "immune governmental entity" under Code § 22.1-194 would be inconsistent
with our determination that Code § 22.1-194 does not abrogate an employee bus driver's
immunity. Furthermore, such a conclusion would effectively abrogate the employee's
immunity by implication, a result that we have rejected. See Schwartz, 253 Va. at 166.

Finally, Linhart argues that the trial court erred in its application of the four-part
test set out for employee immunity recited in Messina v. Burden. Again we disagree. As
the trial court observed, the transportation of children in a school bus is a governmental
function in which the government has a substantial interest and over which the
government exercises significant control as reflected in the regulations issued regarding
the qualifications for and requirements of the job. Furthermore, the act complained of,
Peregoy, 245 Va. 339, 344-45, 429 S.E.2d 11, 14 (1993). Accordingly, we reject
Linhart's challenge to the trial court's determination that Lawson was entitled to
immunity for acts of simple negligence under the standards set out in Messina v.
Burden.

III. CONCLUSION

In summary, we conclude that the trial court erred in sustaining the School Board's
plea of sovereign immunity because Code § 22.1-194 subjects a school board to suit for
acts of simple negligence under the limited circumstances outlined by that statute. The
trial court correctly concluded that Lawson's immunity from liability for his acts of
simple negligence was not abrogated by Code § 22.1-194. Finally, the trial court did not
err in concluding that under the standards set out in Messina v. Burden and James v.
Jane, Lawson was entitled to immunity for his acts of simple negligence. Accordingly,
we will reverse the judgment of the trial court sustaining the School Board's plea of
sovereign immunity and remand the case for further proceedings against the School
Board. We will affirm the judgment of the trial court sustaining Lawson's plea of
sovereign immunity.
"Independent Contractors" and Sovereign Immunity

**Independent Contractors.** In *Atkinson v. Sachno*, 261 Va. 278, 541 S.E.2d 902 (2001) the plaintiff filed a medical malpractice case against a physician, who claimed that he was protected by sovereign immunity because of work performed for the Commonwealth. The Court found that his relationship (shown by the terms of his engagement and his independence, and payment provisions) was as an independent contractor. The Court had defined an independent contractor in *Epperson v. De Jarnette*, 164 Va. 482, 486, 180 S.E. 412, 413 (1935), as a "person who is employed to do a piece of work without restriction as to the means to be employed, and who employs his own labor and undertakes to do the work according to his own ideas, or in accordance with plans furnished by the person for whom the work is done, to whom the owner looks only for results." In *Atkinson*, the Court conceded that "there are abundant tests and criteria that can be used to determine whether the relationship between the individual and the Commonwealth is that of an independent contractor or an employee. See *Ross v. Schneider*, 181 Va. 931, 939, 27 S.E.2d 154, 157 (1943)(noting numerous criteria to determine relationship); *The Texas Co. v. Zeigler*, 177 Va. 557, 566, 14 S.E.2d 704, 707 (1941)(recognizing that many potential tests exist for determining whether a person should be classified as an independent contractor). A survey of the many tests and cases "makes it clear that the individual circumstances of each case play an important part in answering the query." *The Texas Co.*, 177 Va. at 566, 14 S.E.2d at 707.

In *Hadeed*, a case involving the issue of a physician's status as an employee or independent contractor, the Court used four factors to resolve that issue: (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual. It is well established that the fourth factor, the power of control, is determinative. 237 Va. at 288, 377 S.E.2d at 594-95. In *Atkinson*, the doctor conducted his full-time practice of internal medicine in his private office, using his own equipment, and employing his own support staff. The number of examinations he may perform in a given week for DDS is not substantial when compared to the volume of his regular patients. Dr. Sachno is not obligated to accept any referrals from DDS. He is paid a fixed fee for the examination of each claimant referred to him by DDS. No withholdings of any form are deducted from his compensation received from the Commonwealth for conducting these examinations. Dr. Sachno considers himself to be "an independent physician that is asked to do certain work for the State." The Court found that these facts weigh heavily in support of the conclusion that Dr. Sachno is an independent contractor and not an employee or agent of the Commonwealth. However, consideration of the fourth factor, the power of control, established in *Hadeed* compelled that conclusion in *Atkinson*: numerous regulations, protocols, and procedures were imposed upon Dr. Sachno but did not constitute control by DDS of the means and methods by which he performs the examinations and tests. Rather, he was to exercise his professional judgment in making the medical assessments of a particular claimant's condition in order to accurately produce the report requested. Because the defendant doctor was an independent contractor he was not entitled to the protection of sovereign immunity with regard to the plaintiff's claim against him for medical malpractice.
Other Sovereign Immunity Issues "As it is Applied"

**Representation of Indigents.** In *Adkins v. Dixon*, 253 Va. 275, 482 S.E.2d 797 (1997) the Court held that private counsel representing an indigent criminal defendant did not have a qualified form of sovereign immunity under the *James v. Jane* test.

**Agencies Immune.** The Court has held that the limited waiver provided for in the Act is strictly construed because the Act is in derogation of the common law. Under the plain language of the Act, the Commonwealth and certain transportation districts are the only entities for which sovereign immunity is waived. For agencies as to which the Act contains no express provision waiving sovereign immunity, sovereign immunity still applies. *Rector and Visitors of the University of Virginia v. Carter*, 267 Va. 242, 591 S.E.2d 76 (2004).

**Degree of control by the Commonwealth.** See generally *McCloskey v. Kane*, 268 Va. 685, 604 S.E.2d 59 (2004), where the Court held that the greater the control of an employee's actions by the Commonwealth, the greater the likelihood of immunity. The record in this case revealed that a mental hospital exercised some control over which patients the defendant physician would see because he was expected to see patients that the nurses requested him to see. Otherwise, however, the defendant was free to exercise his judgment and discretion about seeing patients, and he was not under anyone's supervision. The exercise by an attending physician of his professional skill and judgment in treating his patient, and the means and methods used, from the very nature of things, are not subject to the control and direction of others. Hence the Commonwealth's control over the defendant was slight, at best. Therefore, defendant was not entitled to the protection of the doctrine of sovereign immunity from liability for his alleged negligent acts in treating the decedent, and the trial court erred in sustaining the plea of sovereign immunity.

**Example of governmental functions.** Planning and design decisions regarding upgrading of a water treatment plant and dissemination of information to the public regarding temporary health hazards associated with consuming municipal drinking water during the upgrade process were governmental functions of the municipality. *City of Chesapeake v. Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004)

**"Legislative Functions" Exception.** There are exceptions to the Commonwealth’s waiver of sovereign immunity under the Tort Claims Act. One such limitation is the exception under Code § 8.01-195.3(2) for “[a]ny claim based upon an act or omission of the General Assembly or district commission of any transportation district, or any member or staff thereof acting in his official capacity, or to the legislative function of any agency subject to the provisions of this article.” Code § 8.01-195.3(2) preserves the Commonwealth’s immunity from liability in tort for any act or omission in the exercise of the legislative function of an agency of the Commonwealth. In one case the Supreme Court considered whether the alleged acts or omissions by an agency of the Commonwealth in regard to design and maintenance of a sidewalk fall within the “legislative function” exception to the Commonwealth’s waiver of immunity. The Court noted that resolution of that issue did not turn on the theory of tort liability asserted by the plaintiff (whether involving nuisance theories or not). See generally *Maddox v. Commonwealth*, 267 Va. 657, 594 S.E.2d 567 (2004).
The Court observed that when a governmental entity selects and adopts a plan for the construction of its public streets, it acts in a governmental capacity. Determining the need for such devices as traffic lights, blinking lights, warning signals, roadway markings, railings, barriers, guardrails, and curbings, and the decision to install or not to install them, calls for the exercise of discretion. In exercising that discretion, a municipality is performing a governmental function and is not liable for its negligent performance of the function. It then held that the rationale underlying decisions holding that a municipality’s planning and designing its streets is a governmental function also supports the conclusion that the design of a sidewalk by an agency of the Commonwealth is a legislative function. The Court stated: "In either instance, the decision-making process by the municipality or the state agency entails the exercise of discretion. Deciding whether the plan and design of the sidewalk at issue would include installing a guardrail along the edge of the sidewalk and/or backfilling the area adjacent to the sidewalk necessarily called for the exercise of discretion by an agency of the Commonwealth. It required the agency to determine whether public funds should be expended to install those particular safety features. Thus, the alleged acts or omissions in this case were a legislative function." In preserving the Commonwealth’s absolute immunity for claims arising out of its agencies’ exercise of legislative functions, the Virginia Tort Claims Act does not distinguish among theories of tort liability or the adjectives used in the complaint. Because nuisance claims in one case reviewed by the Supreme Court were predicated on the acts or omissions of an agency of the Commonwealth in the design of the sidewalk, those claims were barred by the “legislative function” exception to the Commonwealth’s waiver of sovereign immunity. See Maddox v. Commonwealth, 267 Va. 657, 594 S.E.2d 567 (2004).
Sharkheimer asked the judge to order Waxman to quit referring to him as “The Shark” in front of the jury.
B. Recreational Facilities Statute

LOSTRANGIO v. LAINGFORD
261 Va. 495, 544 S.E.2d 357 (2001)

JUSTICE KOONTZ delivered the opinion of the Court:

In this appeal, we consider whether the trial court erred in sustaining a plea in bar of sovereign immunity under Code § 15.2-1809 in a personal injury lawsuit filed against a locality.

BACKGROUND

The case was submitted to the trial court on the pleadings. Under well settled principles, where no evidence is taken in support of a plea in bar, the trial court, and the appellate court upon review, consider solely the pleadings in resolving the issue presented. In doing so, the facts stated in the plaintiff's motion for judgment are deemed true. Tomlin v. McKenzie, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996).

On February 26, 1999, Marie F. Lostrangio filed a motion for judgment against Valerie Laingford, the Cape Charles Chamber of Commerce (the Chamber of Commerce), and the Town of Cape Charles (the Town). Relevant to the issue raised in this appeal, Lostrangio alleged that on July 4, 1997, the Town and the Chamber of Commerce jointly "sponsored and operated a July 4, 1997 celebration" within the Town. Lostrangio alleged that as part of that event, Laingford operated a petting zoo upon property owned by the Chamber of Commerce within the Town.

Lostrangio further alleged that, while in the vicinity of the petting zoo to attend the celebration, she tripped and fell over a feed bucket that negligently had been left outside the petting zoo's fence. Lostrangio alleged that as a result of her fall she suffered permanent disability, great physical pain, and mental anguish. Lostrangio sought $250,000 in damages from Laingford, the Chamber of Commerce, and the Town.

On March 15, 1999, the Town filed a plea in bar of sovereign immunity. The Town asserted that "Lostrangio's alleged injuries and damages stem from her participation at a recreational event in the Town of Cape Charles, for which the Town enjoys sovereign immunity under [ Code § 15.2-1809]." In a brief filed in support of the plea in bar, the Town asserted that "the Town of Cape Charles operated a July 4, 1997 celebration. . . . This 'celebration' was a recreational facility as contemplated by Code § 15.2-1809." Accordingly, the Town maintained that it is entitled under Code § 15.2-1809 to immunity from liability for ordinary negligence and that Lostrangio's motion for judgment failed to allege facts that would support a claim for gross negligence.

In a responding brief, Lostrangio asserted that Code § 15.2-1809 "should be interpreted according to its terms" and that the Town's sponsoring of a "celebration" does not fall within the meaning of the language of the statute providing sovereign immunity for acts of ordinary negligence occurring at a recreational facility. She further asserted that, even if Code § 15.2-1809 does apply to the Town's sponsoring of this celebration, her motion for judgment alleged facts sufficient to support a finding of gross negligence for which there was no immunity from liability under the statute.
The trial court heard argument from the parties and, by order dated February 25, 2000, sustained the plea in bar, dismissing the Town from the suit with prejudice. Lostrangio subsequently took a voluntary nonsuit as to Laingford and the Chamber of Commerce. We awarded Lostrangio this appeal.

DISCUSSION

In pertinent part, Code § 15.2-1809 provides:

No city or town . . . shall be liable in any civil action or proceeding for damages resulting from any injury to the person . . . caused by any act or omission constituting ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any . . . recreational facility . . . . Every such city or town shall, however, be liable in damages for the gross negligence of any of its officers or agents in the maintenance or operation of any such . . . recreational facility . . . .

We have held that the statutory term "recreational facility" contained in Code § 15.2-1809 is unambiguous and means "a place for citizens' diversion and entertainment." Frazier v. City of Norfolk, 234 Va. 388, 392, 362 S.E.2d 688, 690 (1987). In prior cases where we have considered the application of this statute or its predecessor, however, the "recreational facility" in question generally has been property owned by a locality with fixed improvements maintained and operated by the locality. See, e.g., Decker v. Harlan, 260 Va. 66, 69, 531 S.E.2d 309, 310 (2000) (city-owned coliseum); Hawthorn v. City of Richmond, 253 Va. 283, 287, 484 S.E.2d 603, 605 (1997) (city-owned park containing paths designed for bicycling, running, and walking); Chapman v. City of Virginia Beach, 252 Va. 186, 189, 475 S.E.2d 798, 800 (1996) (city-owned boardwalk); Frazier, 234 Va. at 392, 362 S.E.2d at 690 (city-owned municipal auditorium).

In the present case, based upon the allegations in the motion for judgment, the Town neither owned the property on which Lostrangio was injured, nor did it own, maintain, or operate the petting zoo that was temporarily established on that property. The Town's claim of immunity, therefore, is premised solely upon its having been a joint sponsor of a recreational event, the "July 4, 1997 celebration," of which the petting zoo was a part. Accordingly, the rationale of our prior cases is inapplicable to the facts of this case, and we are required based on this record to consider whether the Town's "recreational event" was a "recreational facility" contemplated by the provisions of Code § 15.2-1809.

As we noted above, Code § 15.2-1809 is unambiguous. Thus, we will apply the plain meaning of the words used in this statute without resort to other rules of construction. City of Winchester v. American Woodmark Corp., 250 Va. 451, 457, 464 S.E.2d 148, 152 (1995).

The plain meaning of "facility," as that word is used in Code § 15.2-1809, is something "that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." Webster's Third New International Dictionary 812-13 (1993). It was in this context that in the Frazier case we held the term "recreational facility" to mean "a place, like a bathing beach, swimming pool, park, or playground, where members of the public are entertained and diverted, either by their own activities or by the activities of others." 234 Va. at 392, 362 S.E.2d
at 690. While we are of opinion that it is not necessary to establish a comprehensive
definition here, we simply note that the term "facility" contained in Code § 15.2-1809
contemplates something tangible with a purpose of diverting and entertaining the
public.

By contrast, an "event" is "something that happens . . . a noteworthy occurrence or
happening." Webster's Third New International Dictionary 788. Applying that
definition in the context of this case, a "recreational event" would be simply an
occurrence of limited scope and duration intended to provide persons attending with
entertainment and diversion. Clearly, there is a significant distinction between
something that "happens" and something that is "built, constructed, [or] installed."
Moreover, we find nothing within the provisions of Code § 15.2-1809 that evinces a
legislative intent that this distinction be disregarded.

Accordingly, we hold that the July 4, 1997 celebration sponsored by the Town,
while undoubtedly intended to provide the public with entertainment and diversion, is
not a "recreational facility" contemplated by the provisions of Code § 15.2-1809. Thus,
we further hold that the trial court erred in sustaining the Town's plea in bar of
sovereign immunity.

Susan worried that the jury wasn't taking her case seriously.
Public Recreational Facilities; Nuisance. Code § 15.2-1809 provides that no city operating a park or recreational facility shall be liable in any civil action for damages resulting from an injury caused by an act or omission constituting simple or ordinary negligence by an officer or agent of the city in the maintenance and operation of the facility. The General Assembly intended this code section to limit the civil liability of municipalities in the maintenance and operation of any recreational facility to cases of gross or wanton negligence. Thus, the Supreme Court has held that where the acts or omissions by a city are pled only as simple or ordinary negligence, the city is entitled to the grant of immunity provided by the recreational facilities statutes. The relationship between general exposure of municipalities to liability for nuisance and the immunity provided by the recreational facilities section has been elucidated by the Court as well. While, ordinarily, a municipal corporation has no immunity from liability for injury caused by a nuisance, the recreational facilities statute created a clear exception to the no-immunity rule in nuisance actions against municipalities so far as recreational facilities are concerned and thus has abrogated the common law to that extent. The immunity granted in the statute applies to "any civil action or proceeding," and this language is broad enough to encompass actions for both negligence and nuisance. See *Hawthorn v. City of Richmond*, 253 Va. 283, S.E.2d (1997); *Chapman v. City of Virginia Beach*, 252 Va. 186, 475 S.E.2d 798 (1996).

In *Decker v. Harlan*, 260 Va. 66, 69, 531 S.E.2d 309, 310 (2000), cited in *Lostrangio* above, the Supreme Court of Virginia extended the application of the statute to provide immunity from an accident claim where the staff of a city-owned coliseum collected trash and got into an accident driving several miles away from the facility while headed for the local landfill to dump the trash. The Court held that because "taking out the trash" was an essential part of keeping the facility in operation, performing that trash removal function was part of "operation" of the facility within the meaning of the statute, and hence the statutory immunity from claims of ordinary negligence applied.

Recreational Use of Private Land. Code § 29.1-509(B) provides that a landowner shall owe no duty of care to keep land or premises safe for entry or use by others for recreational purposes and shall not be required to give warning of hazardous conditions on the land to any person entering the land for such purposes. The Code section defines "landowner" as "the legal title holder, lessee, occupant or any other person in control of land or premises," and the requisite control may be exercised by public bodies. The clear legislative intent of Code § 29.1-509 is to encourage the opening of private land to public recreational use. A city's actions in providing and maintaining public access over private land for recreational purposes is entirely consistent with the purpose of Code § 29.1-509 and the conclusion that the legislature intended a broad interpretation of the definition of the term "landowner" contained therein. *City of Virginia Beach v. Flippen*, 251 Va. 358, 467 S.E.2d 471 (1996).
C. Intentional Torts of Governmental Employees

In Niese v. City of Alexandria, 264 Va. 230, 564 S.E.2d 127 (2002), a case in which a woman was repeatedly raped over a period of weeks by a local police officer ostensibly visiting her to pursue an investigation about her son, the Supreme Court said:

In general, a municipality is immune from liability for negligence associated with the performance of "governmental" functions, but can be held liable for negligence associated with the performance of "proprietary" functions. Id., see also Burson v. City of Bristol, 176 Va. 53, 63, 10 S.E.2d 541, 545 (1940). A function is governmental if it is "directly tied to the health, safety, and welfare of the citizens." Edwards v. City of Portsmouth, 237 Va. 167, 171, 375 S.E.2d 747, 750 (1989). Stated another way, a governmental function involves "the exercise of an entity's political, discretionary, or legislative authority." Carter v. Chesterfield County Health Comm'n, 259 Va. 588, 591, 527 S.E.2d 783, 785 (2000).

"[A] municipal corporation acts in its governmental capacity in . . . maintaining a police force." Hoggard, 172 Va. at 148, 200 S.E. at 611. Accordingly, a municipality is immune from liability for a police officer's negligence in the performance of his duties as a police officer.

Although this Court has not addressed the issue of a municipality's liability for an intentional tort committed by an employee in the performance of a governmental function, other courts have addressed the issue. For example, in Carter v. Morris, 164 F.3d 215 (4th Cir. 1999), Carter sued the City of Danville and others, asserting both federal claims under 42 U.S.C. § 1983 and state law tort claims arising out of her treatment by officers of the City of Danville Police Department. Id. at 217. The United States District Court for the Western District of Virginia granted summary judgment to the City on all of Carter's claims. Id. With respect to Carter's state law tort claims against the City, the United States Court of Appeals for the Fourth Circuit affirmed and held that a City is immune from liability for the intentional torts of its employees. Id. at 221. The court explained that it could "find no authority that this immunity has been waived." Id. Furthermore, the court noted that the Virginia Tort Claims Act, which waives the state's immunity for certain claims, unequivocally states that the Act cannot be so construed as "to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth." Id.; see Code § 8.01-195.3.

We agree with the reasoning of the Fourth Circuit and hold that a municipality is immune from liability for intentional torts committed by an employee during the performance of a governmental function. In the present case, Harsley committed the alleged intentional torts against Niese during the ongoing investigation of her complaint concerning her son. The investigation of a citizen's complaint is certainly part of the governmental function of providing a police force. Accordingly, the City cannot be held liable for the alleged intentional torts committed by Harsley.
Niese next asserts that the City's retention of Harsley as a police officer, after receiving notice of his alleged misconduct, is negligence which is not protected by sovereign immunity. Niese correctly notes that the independent tort of negligent retention is recognized in Virginia. *Southeast Apartments Mgmt., Inc. v. Jackman*, 257 Va. 256, 260, 513 S.E.2d 395, 397 (1999). However, the doctrine of sovereign immunity protects municipalities from liability for negligence in the performance of governmental functions. As stated previously, the maintenance of a police force is a governmental function. *Hoggard*, 172 Va. at 148, 200 S.E. at 611. The decision to retain an individual police officer is an integral part of the governmental function of maintaining a police force. Accordingly, we hold that the City is immune from liability for any negligence associated with its decision to retain a specific police officer.

Niese urges this Court to adopt an exception to the rule of sovereign immunity for the tort of negligent retention, as we did with respect to the doctrine of charitable immunity for the tort of negligent hiring. See *J. . . v. Victory Tabernacle Baptist Church*, 236 Va. 206, 210, 372 S.E.2d 391, 394 (1988) (holding that the independent tort of negligent hiring "operates as an exception to the charitable immunity of religious institutions"). In *Messina*, 228 Va. at 307-08, 321 S.E.2d at 660, we explained the purpose behind sovereign immunity as follows:

One of the most often repeated explanations for the rule of state immunity from suits in tort is the necessity to protect the public purse. However, protection of the public purse is but one of several purposes for the rule. . . . Sovereign immunity is a privilege of sovereignty and . . . without the doctrine there would exist inconvenience and danger to the public in the form of officials being fearful and unwilling to carry out their public duties. . . . If the sovereign could be sued at the instance of every citizen the State could be 'controlled in the use and disposition of the means required for the proper administration of the government.'

The same purposes do not underlie the doctrine of charitable immunity and we decline to create an exception to the protection afforded by sovereign immunity for the independent tort of negligent retention.

Finally, Niese maintains that the reporting requirement in Code § 63.1-55.3 is "ministerial," and the City is not protected by sovereign immunity. The 1998 version of Code § 63.1-55.3(A) requires social workers, mental health professionals, and others "who [have] reason to suspect that an adult is an abused, neglected or exploited adult" to "immediately" report the suspected abuse to the local department of the city or county where the abuse was believed to have occurred. Similarly, Code § 63.1-55.3(C) states that any person required to make a report in Code § 63.1-55.3(A) who has "reason to suspect" that an adult has been sexually abused "shall immediately report" the sexual abuse to the local law enforcement agency.
We have addressed the liability of cities and towns on numerous occasions and have never retreated from the rule articulated in *Burson v. City of Bristol*, 176 Va. 53, 63, 10 S.E.2d 541, 545 (1940), wherein we held:

In this State, we have long determined the liability or non-liability of a city for acts committed by it according to whether the act was done in its governmental or proprietary character. If the act be done in carrying out a governmental function, the city is not liable; if it be done in the exercise of some power of a private, proprietary or ministerial nature, the city is liable.

Niese's characterization of the reporting requirement as "ministerial" is incorrect. The words, "who has reason to suspect that an adult is an abused, neglected or exploited adult," in Code § 63.1-55.3(A), require the exercise of judgment and discretion in concluding that a report must be made. While individual cases may present patently obvious circumstances where reporting must take place, other cases may be subtle and more questionable. We must focus upon the statute and not the circumstances in this case to determine whether the statutory duty is ministerial. We hold that the provisions of Code § 63.1-55.3 applicable to this case impose a discretionary duty and not a ministerial duty upon those individuals with reporting requirements.

Accordingly, we will affirm the judgment of the trial court sustaining the City's plea of sovereign immunity.

Penelope had been warned that her client would look like a snake on the stand, but she never expected that to be literally true.
D. Other Immunity Doctrines

The General Assembly has created forms of immunity for over 20 categories of persons, such as physicians rendering emergency roadside aid. Key common law immunities relate to charities and the family:

1. CHARITABLE IMMUNITY

**Bhatia v. Mehak**
262 Va. 544, 551 S.E.2d 358 (2001)

SENIOR JUSTICE WHITING delivered the opinion of the Court:

In this appeal of consolidated personal injury actions, we consider whether a restaurant business and its "co-owners" are entitled to the protection of a religious organization's charitable immunity when donating restaurant catering services at one of the charity's religious ceremonies.

Nakul Bhatia and Natasha Bhatia, then four and nine years old respectively, went with their parents to a religious ceremony conducted by a Hindu religious organization known as Rajdhani Mandir (Mandir). While in a room adjacent to that in which the ceremony was being conducted, both children were scalded by hot tea, being served with food and other refreshments, that spilled from an overturned urn used by employees of Mehak, Inc. (Mehak), the caterer. Mandir's minister testified that these refreshments were an essential part of the extended religious service which involved considerable physical exertion.

Praveendra Dhingra, a devotee of Mandir and one of the two self-described "co-owners" of Mehak, an Indian restaurant in the area, had agreed to the request of Mandir's minister that Dhingra arrange for the provision, preparation, and service of the necessary food and refreshments as a donation to Mandir. Dhingra thus had Mehak and its employees cater the event without compensation from Mandir, an organization that all parties agree is a charitable one.

Both children, by their father and next friend, Sanjeev Bhatia, brought actions seeking compensation for their injuries against Mehak and its "co-owners" Dhingra and Kashmira Singh. In their motions for judgment, the plaintiffs charged that Mehak was acting "through its agents, employees, and/or owners" and that they "negligently caused scalding hot tea to be served."

The three defendants filed pleas in bar asserting the defense of charitable immunity.

On motion of the plaintiffs, the cases were consolidated. After briefs were filed on the issue of charitable immunity and evidence was heard, the court found that all defendants were engaged in the work of the charity without compensation at the time the tea urn overturned. Therefore, the court sustained the pleas and entered final judgment for the defendants. The plaintiffs appeal.
The doctrine of charitable immunity in Virginia "precludes a charity's beneficiaries from recovering damages from the charity for the negligent acts of its servants or agents if due care was exercised in the hiring and retention of those servants." *Moore v. Warren*, 250 Va. 421, 422-23, 463 S.E.2d 459, 459 (1995) (citing *Straley v. Urbanna Chamber of Commerce*, 243 Va. 32, 35, 413 S.E.2d 47, 49 (1992)). Additionally, "a volunteer of a charity is immune from liability to the charity's beneficiaries for negligence while the volunteer was engaged in the charity's work." *Moore*, 250 Va. at 425, 463 S.E.2d at 461 (unpaid volunteer driver entitled to charitable immunity from damages for alleged negligence while driving beneficiary of American Red Cross's services to medical facility for treatment). However, an agent or servant of a charity only shares the charity's immunity from liability if the agent or servant is acting directly for the benefit of the charity. See *Mooring v. Virginia Wesleyan College*, 257 Va. 509, 512, 514 S.E.2d 619, 621 (1999).

In *Mooring*, a college professor who taught a recreational and leisure studies class, volunteered the assistance of his students at a program of a local Boys and Girls Club. While observing one of his volunteer-students conducting a class, the professor responded to her request that he close a door to keep other children out of the class. While closing the door, the professor injured one of those children. Even though the professor incidentally benefitted the charity by acting as "doorkeeper" to enable his students to properly conduct the class, we concluded that he was not entitled to the charity's immunity.

In *Mooring*, we noted that "Moore requires an individual seeking the cloak of a charity's immunity to establish [1] that he was an agent or servant of the charity at the time of the alleged negligence and [2] that the alleged negligence for which he seeks immunity occurred while he was actually doing the charity's work." Id. at 512, 514 S.E.2d at 621. We denied charitable immunity in Mooring on the second ground that the professor was "not there to directly perform any of the Club's work; rather he was carrying out his duties as a professor." Id. Implicit in our holding was the fact that the professor was acting as the agent of the college, not of the charity.

Here, Mehak, its "co-owners," and its employees were neither acting as agents or servants of the charity in preparing and serving the food and beverages, nor were they directly performing the work of the charity. Instead, they were acting directly for Mehak in preparing and delivering its charitable donation. In this respect, they were like the college professor in Mooring who was acting as the college's agent in promoting the college's interest, and unlike the volunteer driver in Moore who was acting solely as the charity's agent in promoting the charity's interest.

Applying the rationale of *Mooring* and *Moore*, we conclude that none of the defendants was acting as Mandir's agents and servants at the time the children were injured. Even though the facts are considered in the light most favorable to the defendants who prevailed in the trial court, we conclude that the court erred in sustaining the defendants' pleas of charitable immunity.
Applying Charitable Immunity

Scope of Protections Immunity from Ordinary Negligence Claims. The public policy rationale shielding a charity from liability for acts of simple negligence does not extend to acts of gross negligence or acts of willful and wanton negligence. Under the doctrine of limited immunity applied to charities in this Commonwealth, a charitable institution is immune from liability to its beneficiaries for negligence caused by acts or omissions of its servants and agents, provided that the charity has exercised due care in their selection and retention. While this immunity shields a charity from claims made by its beneficiaries, it does not extend to protect the charity from claims made by persons who have no beneficial relationship to the charity but are merely invitees or strangers.

Virginia law recognizes three levels of negligence. The first level, simple negligence, involves the failure to use the degree of care that an ordinarily prudent person would exercise under similar circumstances to avoid injury to another. The second level of negligent conduct, gross negligence, is a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness. The third level of negligent conduct is willful and wanton negligence, defined as acting consciously in disregard of another person’s rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.

The Supreme Court has concluded that there are fundamental distinctions separating acts or omissions of simple negligence from those of gross negligence and willful and wanton negligence. Acts or omissions of simple negligence may cause serious consequences, but they ordinarily do not involve an extreme departure from the charity’s routine actions in conducting its activities. In contrast, gross negligence involves conduct that shocks fair-minded people, and willful and wanton negligence involves such recklessness that the actor is aware that his conduct probably would cause injury to another, an unusual and marked departure from the routine performance of a charity’s activities. The Court noted that, as a practical matter, a charity’s performance of its mission may be thwarted by litigation directed at the charity’s failure to perform its activities in accordance with standards of ordinary care. For this reason, our Commonwealth’s public policy in favor of promoting the activities of charitable organizations has been employed to shield charities from liability for their acts of simple negligence. The public policy rationale, however, is inapplicable to conduct involving gross negligence and willful and wanton negligence. Unlike acts or omissions giving rise to claims of simple negligence, such conduct can never be characterized as an attempt, albeit ineffectual, to carry out the mission of the charity to serve its beneficiaries. Therefore, the public policy rationale shielding a charity from liability for acts of simple negligence does not extend to acts of gross negligence and willful and wanton negligence. *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 603 S.E.2d 916 (2004).

Note that, consistent with this general level of protection, the General Assembly
has provided civil immunity for the acts or omissions of hospice volunteers who render care to terminally ill patients, provided that the volunteers act in good faith and in the absence of gross negligence or willful misconduct. In enacting this section, the General Assembly has expressed a clear preference for excluding from the protection of charitable immunity acts or omissions of gross negligence and willful misconduct. Code § 8.01-226.4.

**Charitable Immunity for the Entity AND its Workers.** Under the doctrine of charitable immunity, a volunteer working for a charity is immune from liability to the charity's beneficiaries for negligence while the volunteer was engaged in the charity's work. The doctrine of charitable immunity adopted in Virginia precludes a charity's beneficiaries from recovering damages from the charity for the negligent acts of its servants or agents if due care was exercised in the hiring and retention of those agents and servants. It is in the public interest to encourage charitable institutions in their "good work." Thus, if a charity's servants and agents are not under the umbrella of immunity given the institution itself and they are exposed to negligence actions by the charity's beneficiaries, the "good work" of the charity will be adversely impacted, which result would manifestly be inconsistent with the Commonwealth's policy underlying the doctrine of charitable immunity. *Moore v. Warren*, 250 Va. 421, 463 S.E.2d 459 (1995) (the defendant, an unpaid volunteer for a charity, was driving a patient to a medical facility for routine medical care when the vehicle was involved in a collision with another vehicle and the patient was injured. The patient later died of other causes. The administrator of her estate filed a motion for judgment against the defendant, alleging that his negligent operation of the vehicle was the proximate cause of the patient's injuries. The defendant filed a plea of charitable immunity, asserting that he was cloaked with the immunity of the charity. The trial court sustained the defendant's plea and the Supreme Court affirmed).

**Modern Example – What is A "Charitable Organization"?** In *Ola v. YMCA of South Hampton Roads*, 270 Va. 550, 621 S.E.2d 70 (2005) the plaintiff, a minor, was abducted and sexually assaulted in a bathroom on the premises of a membership-based recreational facility owned and operated by the defendant while using the swimming pool at that facility. Soon after, by and through her parents and next friends, plaintiff sued for negligent failure to prohibit her assailant, a nonmember, from entering the premises, failure to provide adequate staffing, and failure to repair a broken lock on the bathroom, resulting in her attack and injuries. Defendant filed a special plea in bar of charitable immunity. In support of its plea, defendant presented evidence of its not-for-profit status, charitable mission and related activities, and, based on the stipulations that plaintiff and her family were members of the defendant's recreational facilities as a result of a subsidized membership prior to and at the time of the assault, and that plaintiff had been participating in a swimming program conducted by the defendant at the time of her injury, the defendant contended that plaintiff could not recover from it for her injuries. The Supreme Court held that to establish charitable immunity as a bar to tort liability, an entity must prove at least two distinct elements. The absence of either element makes the bar of charitable immunity inapplicable. First, the entity must show it is organized with a recognized charitable purpose and that it operates in fact in accord with that purpose. In conducting this inquiry, Virginia courts apply a two part test, examining (1) whether the organization's articles of incorporation have a charitable or eleemosynary purpose and (2) whether the organization is in fact operated consistent
with that purpose. Second, assuming the entity has met the foregoing test, it must then establish that the tort claimant was a beneficiary of the charitable institution at the time of the alleged injury.

**Factors Bearing on Whether the Entity is Charitable in Nature.** The Court stated that in order to determine whether an entity is entitled to charitable immunity, the powers and purposes set forth in the entity's charter must first be examined. If the charter sets forth a charitable or eleemosynary purpose, there is a rebuttable presumption it operates as a charitable institution in accordance with that purpose. However, if the manner in which the organization actually conducts its affairs is not in accord with the charitable purpose, then the presumption may be rebutted and the bar of charitable immunity did not apply. Prior cases have established a number of factors that are indicative of whether a charitable organization operates in fact with a charitable purpose, including (1) whether the entity's charter limits the entity to a charitable or eleemosynary purpose, (2) whether the charter contains a not for profit limitation, (3) whether the entity's financial purpose is to break even or earn a profit, (4) whether and how often the entity earns a profit (a surplus beyond expenses), (5) whether any profit earned must be used for charitable purposes, (6) whether the entity depends on contributions and donations for a substantial portion of its existence, (7) whether the entity exempt from federal income tax and/or local real estate tax, (8) whether the entity's provision of services takes into consideration a person's ability to pay for such services, (9) whether the entity has stockholders or others with an equity stake in its capital, and (10) whether the directors and officers of the entity are compensated for their services and if so, on what basis. These factors are not exclusive, however, and the presence or absence of any particular factor is not determinative. In the final analysis, whether an entity operates as a charity turns on the facts of each case and not on the particular type of institution.

In *Ola*, the Supreme Court found that the trial court's determinations that the defendant was a charitable organization operating in accordance with its charitable purpose at the time of the plaintiff's injury, and its conclusion that plaintiff was a beneficiary of the defendant's charity at the time of her injury, are well reasoned and amply supported by the evidence. The argument that the YMCA was not a charitable organization because of its alleged manner of operation as a private health club, and that the presumption of its charitable status was rebutted by its actual operation, were rejected. The Court reviewed various public service activities of the organization, and found that the failure to account for these separately as line items in the defendant's financial statements was of no consequence. Similarly the fact that the Y carried liability insurance was not a barrier to immunity.

Nor did the fact that defendant generated an operational surplus in some years strip it of its charitable status. The Supreme Court noted that the important consideration is whether any profit or surplus is used to further the charitable purpose of the organization. It commented that "prudence and the exercise of fiduciary responsibility fully justify a nonprofit organization accumulating a surplus, provided it continues to invest in the organization's charitable purpose or otherwise expends the surplus for a charitable purpose. Indeed, a charitable institution's inability to sometimes post a surplus may doom its existence and end its work of charity when nonsurplus years arrive."
A Fee-Paying Plaintiff as Beneficiary of the Charity. In *Ola* the Court also rejected plaintiff's contention that she was not a beneficiary of the defendant's charitable bounty at the time she was abducted and sexually assaulted. The trial court had noted that plaintiff was a recipient of the defendant's charitable bounty because she paid a discounted membership fee. The Supreme Court finds that the fact that an organization receives compensation from those who are able to pay for services received did not remove its charitable immunity. In Virginia, a person is a beneficiary of charity if he or she has a "beneficial relationship" to the charitable organization. However, mere membership in a class eligible to receive future benefits, conditioned upon circumstances which might never occur, was too remote and speculative to merit beneficiary status. The Court held: "A beneficiary of a charitable organization is a person who receives something of value, which the organization by its charitable purpose, undertakes to provide. An individual is a beneficiary of an organization's charitable bounty if that individual's interaction with the organization is related to its charitable purpose."

Thus a person who pays the full price for services performed by a charitable organization is still a beneficiary of the charitable work of the charitable organization because that entity could not provide those services without charitable contributions. The Supreme Court states that "paying clients as well as those who do not pay are the beneficiaries of charitable bounty because but for the charitable gifts made to the organizations and the charitable work which they are carrying on they would not exist to serve anyone." Whether a member pays the full or discounted membership fee, that member is barred by the doctrine of charitable immunity from recovering against the organization for simple negligence because all members of the organization are beneficiaries of its charitable bounty. Thus, whether plaintiff paid a full or reduced membership fee, she was a beneficiary of the charitable bounty of the defendant in the instant case because she actually used the defendant's facilities which depend on charity for their existence and operation.

"Let's dismiss the jury and go with a real roll of the dice."
2. INTRAFAMILIAL IMMUNITY

PAVLICK v. PAVLICK
254 Va. 176, 491 S.E.2d 602 (1997)

CHIEF JUSTICE CARRICO delivered the opinion of the Court:

The question for decision in this appeal is whether the doctrine of intra-family immunity bars recovery of damages for the death of an unemancipated child as a result of a parent's negligent or intentional act. The question stems from a motion for judgment filed by Shari G. Pavlick, Administratrix of the Estate of Justin Robert Pavlick, deceased, against the defendant, Thomas Matthew Pavlick, Jr., seeking damages for the wrongful death of the deceased, the infant son of Shari Pavlick and the defendant.

The defendant filed a plea to the motion for judgment asserting that he was "immune from suit under the doctrine of intra-family immunity." The trial court sustained the plea and dismissed the plaintiff's motion for judgment. We awarded the plaintiff an appeal.

Justin was born June 24, 1994. He died August 18, 1994, when less than two months old, allegedly from injuries sustained while in the care and custody of the defendant.

In her two-count motion for judgment, the plaintiff alleged that Justin died as a result of the defendant's negligence or, alternatively, that the death resulted from the defendant's intentional act. 26

In sustaining the plea of immunity, the trial judge noted that there is no Virginia precedent "supporting a denial of the plea." The plaintiff responds on appeal with a request that we abrogate the rule of intra-family immunity completely or, alternatively, that we recognize an exception to the rule allowing recovery for the death of a child resulting from the intentional act of a parent.

Citing numerous out-of-state cases, the plaintiff says that "courts in the majority of states which have considered the matter in recent years have found that the doctrine of intra-family immunity can not be justified and have abolished parental tort immunity." In abolishing parental immunity, the plaintiff states, courts have rejected the several factors that prompted adoption of intra-family immunity in the first place, viz., "(1) the wish for domestic peace and tranquility; (2) the desire to allow the parent to discipline and control the child; (3) the wish not to allow family resources to be depleted; [and] (4) the wish to avoid possible fraud or collusion." Quoting Kirchner v. Crystal, 15 Ohio St. 3d 326, 474 N.E.2d 275 (Ohio 1984), the plaintiff asserts that "these rationalizations [are] outdated, highly questionable and unpersuasive." 474 N.E.2d at 276.

With respect to injuries caused by the intentional acts of a parent, the plaintiff says that "virtually every reported case that has considered [the issue] has held that the bar of intra-family immunity should not apply to such [acts]." In so holding, the plaintiff

26 The defendant states on brief that he has been convicted of second-degree murder as a result of Justin's death and is serving time in the penitentiary.

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states, courts "have recognized that to permit a child to maintain a suit against a parent [for injuries] resulting from an intentional or willful tort is no more disruptive to the family peace and tranquility than depriving the child of the right to bring such a suit."

The defendant argues, on the other hand, that "the doctrine of intra-family/parental immunity is alive and well in Virginia." There are no cases in Virginia, the defendant states, "which allow suit by a deceased unemancipated child's estate against [a] living parent [for the parent's allegedly negligent or intentional acts.] given the instant circumstances." The defendant asserts that while there are several exceptions to the doctrine in Virginia, none is applicable here.

The considerations prompting the initial adoption of intra-family immunity are still viable, the defendant maintains, especially when, as here, the family includes another child of the parents' marriage. The defendant submits that "to allow one child's cause of action to take assets of the family required to support the entire family unit is certainly cause for disharmony in the family unit, even where the parent responsible for the egregious conduct is no longer an integral part of that unit."

Quoting from *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (Miss. 1891), the defendant maintains that "the state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand." 9 So. at 887. This is sufficient reason, the defendant submits, to forbid a minor child from asserting a civil claim to redress personal injuries suffered at the hands of a parent. Other courts have followed this rationale, the defendant states, "and to this date the majority of states have not completely abrogated the [intra-family immunity] Rule."

Finally, the defendant asserts that there is a strong public policy in Virginia against the complete abrogation of the rule. Accordingly, the defendant concludes, we should refrain from abrogating the rule in the interest of maintaining "parental discipline and control and family harmony." This Court first considered the doctrine of intra-family immunity in *Norfolk Southern R.R. v. Gretakis*, 162 Va. 597, 174 S.E. 841 (1934). There, Gretakis's infant daughter was injured as the result of the concurring negligence of her father and a railroad company. The daughter recovered judgment against the railroad company, and the latter sought contribution from the father, who demurred on the ground that "an infant daughter cannot sue her parent and there can be no contribution." Id. at 599, 174 S.E. at 842. The trial court sustained the demurrer. We affirmed, stating that "according to the great weight of authority an unemancipated minor child cannot sue his or her parent to recover for personal injuries resulting from an ordinary act of negligence." Id. at 600, 174 S.E. at 842.

We soon recognized an exception to the intra-family immunity rule. In *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939), a father owned and operated a bus company as a common carrier, and his daughter was injured while a passenger on one of his buses. She recovered a judgment against him for her injuries, and he sought reversal in this Court on the ground that the daughter, "being an unemancipated minor, could not recover against her father." Id. at 15, 4 S.E.2d at 344. We affirmed, holding that the doctrine of intra-family immunity did not bar the daughter's recovery because "the action was brought against the father, in his vocational capacity, as a common carrier, not against the father for the violation of a moral or parental obligation, in the exercise of his parental authority." Id. at 27, 4 S.E.2d at 349.
We next considered the intra-family immunity rule in Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953), involving an action brought by an infant against her father for injuries allegedly resulting from his gross negligence. We noted that "it is well settled . . . that an emancipated infant may maintain a tort action against a parent." Id. at 580, 74 S.E.2d at 173. We held, however, that because the infant in Brumfield was unemancipated, she was precluded from maintaining the action against her father under the rule announced in Gretakis, supra. We said in Brumfield it made no difference in that gross negligence was alleged as the basis for recovery. 194 Va. at 583, 74 S.E.2d at 174.

Later, in Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971), this Court abrogated the intra-family immunity rule with respect to "an action by [a] child against [a] parent to recover for injuries sustained in a motor vehicle accident." Id. at 186, 183 S.E.2d at 194. The rationale for our decision was that "the very high incidence of liability insurance covering Virginia-based motor vehicles . . . has made our rule of parental immunity anachronistic when applied to automobile accident litigation [and] the rule can be no longer supported as generally calculated to promote the peace and tranquility of the home and the advantageous disposal of the parents' exchequer." Id. at 185, 183 S.E.2d at 194.

Finally, in Wright v. Wright, 213 Va. 177, 191 S.E.2d 223 (1972), we considered the question whether an unemancipated child could maintain an action for the simple negligence of her father in failing to provide a safe place for her to play in the yard of the family home. We answered the question in the negative because the injury was not "sustained in [a] motor vehicle accident" and "the alleged negligence was incident to the parental relationship of the father with his unemancipated child, and not to a business or vocational relationship." Id. at 179, 191 S.E.2d at 225.

This examination of our prior decisions on the rule of intra-family immunity establishes two propositions. First, the rule is "alive and well in Virginia," as the defendant maintains, at least to the extent it still bars recovery by an unemancipated child against a parent for negligence in a non-automobile or non-business related situation. See Gretakis, Brumfield, and Wright. Second, as the plaintiff observes on brief, "no Virginia case has ever held that the bar of intra-family immunity applies to intentional, wilful, or malicious torts." This brings us to the question whether we should abrogate the rule of intra-family immunity completely, as the plaintiff requests, refuse to alter the rule in any way, as the defendant urges, or recognize an exception to the rule to allow recovery for injuries to an unemancipated child resulting from the intentional act of a parent, as the plaintiff asks alternatively.

In order to abrogate the rule completely, we would be required to overrule Gretakis, Brumfield, and Wright. Yet, those decisions were accepted as correct when made, they have been relied upon since by the bench, the bar, and the public, and nothing has occurred, such as the advent of "the very high incidence of liability insurance covering Virginia-based motor vehicles," noted in Smith, 212 Va. at 185, 183 S.E.2d at 194, to make the rule "anachronistic" when applied to non-automobile, non-business litigation. Id.

Furthermore, we are not satisfied that the considerations which prompted the adoption of the intra-family immunity rule in the first place have become "outdated, highly questionable and unpersuasive" in all instances. When applied in negligence
cases similar to *Gretakis, Brumfield*, and *Wright*, the rule may still work to maintain peace and tranquility within the family unit.

The "doctrine of stare decisis is more than a mere cliché" in Virginia; it "plays a significant role in the orderly administration of justice by assuring consistent, predictable, and balanced application of legal principles." *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 265, 355 S.E.2d 579, 581 (1987). Giving the doctrine full effect, we decline to overrule *Gretakis, Brumfield*, and *Wright*, and we deny the plaintiff's request to abrogate the rule of intra-family immunity completely.

We are not inclined, however, to respond favorably to the defendant's urging that we refuse to alter the rule in any way. Rather, we think the proper course is to recognize an exception to the rule of intra-family immunity when, as is alleged here, a child's death results from the intentional act of a parent.

As noted supra, no Virginia case has ever applied the rule of intra-family immunity to an intentional tort committed by a parent against a child. Therefore, to recognize an exception with respect to an intentional tort by a parent resulting in the death of a child would neither disturb established precedent nor offend principles of stare decisis.

Furthermore, such an exception would be supported by logic and common sense. The factors which prompted adoption of intra-family immunity in the first place are totally irrelevant when considered in the context of the death of a child caused by the intentional act of a parent. Indeed, such an act defeats the very purpose of the immunity rule. Paraphrasing the opinion of the Supreme Court of Oregon in *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445 (Or. 1950), it is absurd to talk about maintaining the peace and tranquility of the home when it has already been disrupted by such a monstrous crime as the murder of a child by a parent. 218 P.2d at 450. Or, paraphrasing the opinion of the Court of Appeals of Maryland in *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (Md. 1951), there can be no basis for the contention that a suit against a father for the murder of his child would be contrary to public policy, for the simple reason that there is no home at all in which discipline and tranquility are to be preserved. 77 A.2d at 926.

Finally, we do not overlook the defendant's argument based upon *Hewellette v. George*, supra, that "the state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand." However, while enforcement of the criminal laws may serve the public interest in protecting children from parental violence, such enforcement does not serve to redress the loss suffered by the survivors of a child whose death results from the intentional act of a parent. They have the right to demand more. Furthermore, to allow recovery against the parent here may also serve as a deterrent against similar conduct by other parents.

For these reasons, we refuse to abrogate the rule of intra-family immunity completely. Accordingly, we will affirm the trial court's judgment to the extent it sustained the plea intra-family immunity with respect the defendant's alleged negligence. However, we will reverse the judgment to the extent it failed to recognize an exception to the rule of intra-family immunity that would have allowed recovery against the defendant for the death of his unemancipated child as a result of his allegedly intentional act, and we will remand the case for further proceedings consistent
with the views expressed in this opinion.

Note on Abolition of Inter-Spousal Immunity


The Q&A degenerated to a primal level.
Additional Immunity Issues

**Immunity of Prosecutors and Judges.** An absolute immunity from civil liability applies for prosecutors with respect to acts within the scope of their duties and intimately associated with the judicial phase of the criminal process. It is derivative of judicial immunity. The Supreme Court has reiterated that it is clear that judges enjoy absolute immunity from civil liability, even when they act maliciously or corruptly or in excess of their jurisdiction. Judges can be held liable only when they act in clear absence of all jurisdiction. The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. The Virginia Court has noted that under federal law a prosecutor's actions "intimately associated with the judicial phase of the criminal process" were functions to which the reasons for absolute immunity apply with full force. Later, the United States Supreme Court held that absolute prosecutorial immunity from suit did not extend to giving advice to police officers, concluding that the concern to avoid harassment and intimidation justifies immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct. In Virginia, our Supreme Court has held that it is not compelled to follow the federal authority on this issue: The determination whether absolute prosecutorial immunity is extended to a prosecutor is a matter of state common law not federal law.

The Virginia Supreme Court has said that the process by which an accused may be charged with a criminal offense in Virginia includes indictment, presentment, information, arrest warrant, or summons. Thus, when a prosecutor is involved in the initiation of the criminal process, it may take the form of preparation of an indictment for consideration by a Grand Jury, direction to a law enforcement officer to obtain a warrant or summons, or advice to a law enforcement officer that sufficient probable cause exists for the obtaining of a warrant or a summons. The Court has held, however, that "[f]or the purposes of determining a prosecutor's absolute immunity from suit, these are distinctions without a material difference. In each case where a prosecutor is involved in the charging process, under Virginia law, that action intimately connected with the prosecutor's role in judicial proceedings and the prosecutor is entitled to absolute immunity from suit for such actions." See Andrews v. Ring, 266 Va. 311, 585 S.E.2d 780 (2003). Consequently, a Commonwealth's Attorney is entitled to absolute immunity from suit on counts alleging malicious prosecution. However, the Court reserved the issue whether actions of a prosecutor in the role of investigator or administrator are entitled to absolute immunity.

**Quasi-judicial immunity** may extend to certain non-judicial public officials acting within their jurisdiction, in good faith, and while performing judicial functions. In conducting this analysis, the "functional comparability" test established by the United States Supreme Court in Butz v. Economou, 438 U.S. 478 (1978) is applied. Whether the act in question shares enough of the characteristics of the judicial process to justify immunity is examined. In a Virginia case, a county building inspector's duties were held more akin to those of a police officer in the enforcement of laws, rules and regulations,
than a prosecutor in the judicial process, and as a matter of law, the county building inspector was not entitled to the absolute immunity afforded by quasi-judicial immunity. The Virginia Supreme Court has also held that a defendant who asserts the qualified immunity defense – not the plaintiff – must allege and prove the elements comprising this defense. See generally *Andrews v. Ring*, 266 Va. 311, 585 S.E.2d 780 (2003).

**Hypothetical**

1. After an ice storm felled dozens of trees one evening, city work crews were dispatched to remove several from roadways. The workers set up an unlighted barricade on a residential street and began sawing up a large tree lying across the street. V was driving to work on the night shift at a local factory, turned the corner and struck the barricade. V's car careened into the woodpile and V was injured. V sues for personal injuries. After V's evidence is presented at trial, the defendant city moved to strike that evidence on the ground that the city was performing a governmental function at the time of the accident and was thus immune from suit, even if its workers were negligent. How should the court rule?
Chapter 13

Summary Judgment

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A. Summary Judgment Summary

A motion for summary judgment may be made at any time after the parties are at issue. It is available in all cases except actions for divorce or annulment and may be used by plaintiff or defendant. Since plaintiff normally shoulders the burden of proof, successful motions by plaintiff are far less common than those by defendants.

Standard. The court must enter a summary judgment if it is clear that a party is entitled to judgment on one or more of the claims or defenses of an action in light of the pleadings, pretrial orders, admissions, and affidavits filed. In addition, if a motion to strike the evidence has been sustained (and hence there is no evidence on one side of the proceeding) summary judgment may be entered. See e.g., City of Newport News v. Anderson, 216 Va. 791, 223 S.E.2d 869 (1976) (no negligence). If any material fact is in dispute on an issue which bears on a party's entitlement to judgment as a matter of law, summary judgment is inappropriate. Rule 3:18. See e.g., Slone v. General Motors, below; Gilmore v. Basic Industries, Inc., 233 Va. 485, 489, 357 S.E.2d 514 (1987).

Deposition bases. Virginia provides that when an application for summary judgment is based in whole of in part on discovery depositions taken under Rule 4:5, summary judgment may not be granted unless all parties agree to the utilization of the depositions. See § 8.01-420.

Partial Summary Judgment. Partial summary judgment may be entered on a portion of the contested claims though there be disputes as to other aspects, or on the issue of liability even though there are disputed issues as to damages.
Key Statute and Rule

The text of the statute and Rule of Court on summary judgment are important:

§ 8.01-420. Depositions as basis for motion for summary judgment or to strike evidence

No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used.


Any party may make a motion for summary judgment at any time after the parties are at issue, except in an action for divorce or for annulment of marriage. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in that party’s favor. Summary judgment, interlocutory in nature, may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute. No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the action shall agree that such deposition may be so used.

Name partners in the law firm of Roundup, Rope & Brand fared particularly poorly before Judge Longhorn “Bull” Freerange.
B. General Operation of the Doctrine Exemplified/Vilified

*Unattainable Goal?*

**SLONE v. GENERAL MOTORS CORPORATION**  
249 Va. 520, 457 S.E.2d 51 (1995)

JUSTICE HASSELL delivered the opinion of the Court:

In this appeal of a judgment in a product liability action, we consider whether a plaintiff, who was injured when a dump truck he was operating "rolled over," has a viable cause of action against the manufacturers of the truck and the dump truck bed sufficient to withstand a motion for summary judgment.

The appellate record is presented to us in an unfamiliar procedural posture. The trial court granted the defendants' joint motion for summary judgment at the pleading stage of this proceeding; accordingly, there has been no trial on the merits. The trial court relied upon facts developed from the plaintiff's responses to the defendants' interrogatories and requests for admissions. Presumably, the trial court also relied upon factual allegations contained in the plaintiff's amended motion for judgment.

As we have recently stated, "in our discovery rules, we have cautioned that discovery ordinarily should not supplant the taking of evidence at a trial." *Carson v. LeBlanc*, 245 Va. 135, 137, 427 S.E.2d 189, 190 (1993). Additionally, we have recently observed that "the decision to grant a motion for summary judgment is a drastic remedy which is available only where there are no material facts genuinely in dispute." *Turner v. Lotts*, 244 Va. 554, 556, 422 S.E.2d 765, 766 (1992).

We will state the facts and adopt inferences from those facts in the light most favorable to Dolor D. Slone, the non-moving party, "unless the inferences are strained, forced, or contrary to reason." *Bloodworth v. Ellis*, 221 Va. 18, 23, 267 S.E.2d 96, 99 (1980).

In November 1986, Slone purchased a dump truck bed from Helms Stone Yard in Roanoke. The dump bed was manufactured and designed by Fontaine Body and Hoist Company. A cab shield, also described as an overhang, which was not manufactured by Fontaine, was affixed to the dump bed sometime after the dump bed left Fontaine's possession. The cab shield was manufactured and installed on the dump bed by an unknown party.

Slone purchased a 1978 truck, consisting of a cab and chassis, from Jack Quesenberry in February 1987. The truck was manufactured and designed by General Motors. Slone and Quesenberry installed the dump bed on the truck.
On July 2, 1987, about 3:50 p.m., Slone drove the truck, with the dump bed attached, to a depot maintained by the Virginia Department of Transportation at Eagle Rock in Botetourt County. As Slone was preparing to dump a load of gravel, he "backed the truck up" to a gravel ramp.

Slone described the accident in his sworn answers to interrogatories. "Several feet from the edge of the dump site, the gravel began to crumble from beneath the subject vehicle. As the ground gave way, the subject vehicle flipped backwards and slid down the side of the dump site for a distance of approximately 60 feet. The subject vehicle came to rest upside down with its grill, hood, roof of the cab, and top of the dump bed all impacting with the ground." Slone "was crushed and trapped in the truck cab" and received serious permanent injuries, including brain damage.

Slone filed his amended motion for judgment against Stephen Ray Hickock, General Motors Corporation, and Fontaine Body and Hoist Company. Slone settled his claims with Hickock, an employee at the depot, and proceeded against General Motors and Fontaine.
Slone asserted numerous claims against General Motors. He alleged that General Motors was negligent and breached certain implied warranties because General Motors designed the truck body "with inadequate bracing and support thereby significantly increasing the risk that, in a foreseeable rollover of the truck body, the roof would easily cave in and cause passengers to suffer serious, painful and grievous bodily injuries." Slone alleged that General Motors' design of "the cab of the 1978 GMC truck body [failed to include] any type of crash padding that, in a foreseeable rollover of the truck body, would have prevented and/or mitigated the kind of serious, painful and grievous injuries suffered by Plaintiff Dolor Slone." Slone also alleged that General Motors failed to conduct adequate testing and failed to warn "of the unreasonably dangerous condition of the cab roof lacking adequate supports and braces that greatly increase the possibility of serious bodily injuries in the event of a foreseeable rollover."

Slone stated, in his answers to interrogatories propounded to him by General Motors that there is a design defect in the construction of the cab of the truck in which Mr. Slone was injured. The cross sections of the roof support pillars and the windshield header are inadequate to support the weight of the inverted truck. This allowed the partial collapse of the roof when the vehicle dropped over or slid down the ramp on its roof. This partial collapse caused Mr. Slone['s] head to be trapped and crushed between the rim of the steering wheel and the windshield header.

Slone alleged that Fontaine was negligent and breached certain warranties related to the manufacture and design of the dump bed. Slone alleged that Fontaine "designed the . . . dump bed with an unsupported, unbraced and extraneous overhang that significantly increased the risk that, in a foreseeable rollover of the truck to which the dump bed was intended to be attached, the overhang would crush the truck cab and cause passengers serious, painful and grievous bodily injuries like the ones suffered by Plaintiff Dolor Slone." Slone also alleged that Fontaine failed to warn of "the unreasonably dangerous unsupported, unbraced and extraneous dump bed overhang that greatly increases the possibility of serious bodily injuries in the event of a foreseeable rollover." Further, Slone alleged that Fontaine "failed to conduct adequate testing to determine the unreasonable risk of foreseeable truck passenger injury due to the unsupported, unbraced and extraneous dump bed overhang."

General Motors and Fontaine filed a joint motion for summary judgment, asserting that they were entitled to judgment, as a matter of law, because Virginia does not recognize the doctrine of "crashworthiness." The trial court considered memoranda of law and argument of counsel and granted the motion for summary judgment. The trial court held that Fontaine could not be liable to Slone because the dump truck was modified after it left Fontaine's possession. Further, the court held that even assuming that Virginia recognizes the doctrine of "crashworthiness," General Motors has no liability to Slone. We awarded Slone an appeal.

Slone argues that the trial court erred by granting summary judgment because there are material facts in dispute, and summary judgment may not be used as a substitute for trial. Slone also argues that the trial court erred in granting the motion for summary judgment because "in the hauling and dumping industry, roll-over accidents are foreseeable; consequently, whether . . . [General Motors] properly designed its truck cab to withstand a foreseeable drop/roll-over, whether . . . Fontaine properly designed its dump bed without a cab shield and whether . . . [General Motors] or Fontaine gave
adequate warnings regarding use of the truck and dump bed are questions of fact for the jury."

General Motors contends that, even assuming Virginia recognizes the doctrine of "crashworthiness," the trial court properly found that General Motors did not breach any duties owed to Slone. General Motors also argues that this Court should not recognize the so-called "crashworthiness" doctrine.

Fontaine argues that the trial court properly granted summary judgment to Fontaine because the undisputed facts show that it did not manufacture any product that caused Slone's injuries. Fontaine also asserts that Virginia does not recognize a cause of action for "crashworthiness."

We have repeatedly articulated the relevant principles that govern whether a manufacturer of a product owes a duty to a person injured by that product. We find no reason to confuse our well-settled jurisprudence by injecting the doctrine of "crashworthiness" and, therefore, we reject this doctrine. Rather, we will apply the principles articulated in our precedent to ascertain whether the trial court properly granted the motion for summary judgment.


In Logan v. Montgomery Ward, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975), we stated several principles which are pertinent here:

The standard of safety of goods imposed on the seller or manufacturer of a product is essentially the same whether the theory of liability is labeled warranty or negligence. The product must be fit for the ordinary purposes for which it is to be used. . . . Under either the warranty theory or the negligence theory the plaintiff must show, (1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some other reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the goods left the defendant's hands.

In Featherall v. Firestone, we restated the principles that we applied in Logan, and we implicitly recognized that a manufacturer may be held liable for the foreseeable misuse of its product. We stated, "and there can be no recovery against the manufacturer for

180"A crashworthy vehicle is defined as 'one which, in the event of a collision, resulting accidentally or negligently from the act of another and not from any defect or malfunction in the vehicle itself, protects against unreasonable risk of injury to the occupants.' The concept, in the main, concerns the dangers posed by the vehicle occupants' collision with the interior of the vehicle upon collision, or the intrusion of moving or standing objects, upon collision, into the passenger area.

The crashworthiness doctrine does not, however, impose a duty on the manufacturer to design a car which is safe for all collisions. Rather, the theory of liability obligates the manufacturer to design a vehicle that protects the passenger from unreasonable risk of harm. The factors to be considered in determining whether the risk is unreasonable include the likelihood of the harm, the obviousness of the danger, the purpose for which the vehicle is to be used, the styling, the cost of reducing the risk, and the circumstances of the accident." Madden, Products Liability § 8.4 (2d ed. 1988).
breach of these implied warranties when there has been an unforeseen misuse of the 
article supplied." Featherall, 219 Va. at 964, 252 S.E.2d at 367.

Applying the aforementioned principles, we hold that the trial court erred by 
granting General Motors' motion for summary judgment against Slone. As required 
by our precedent in Logan, Besser, and Featherall, Slone pled, in his negligence and 
breach of warranty claims, that the truck cab was unreasonably dangerous, that the 
unreasonably dangerous condition existed when it left General Motors' possession, and 
that the possibility of a "rollover," a misuse, was reasonably foreseeable on the part of 
General Motors.

It is true, as General Motors asserts, that the facts surrounding the accident are 
unique because the truck flipped over and slid 60 feet. However, we cannot say, based 
upon the pre-trial record before us, that there was a misuse that was unforeseeable as a 
matter of law. Further, we cannot speculate or guess what evidence Slone may or may 
not be able to adduce at a trial on the merits to support his allegations.

We also hold that Slone's amended motion for judgment contains sufficient 
allegations against General Motors to support his claim of failure to warn. In 
Featherall, we adopted the following test:

   The manufacturer of a chattel will be subject to liability when he
   (a) knows or has reason to know that the chattel is or is likely to be
   dangerous for the use for which it is supplied, and
   (b) has no reason to believe that those for whose use the chattel is supplied
   will realize its dangerous condition, and
   (c) fails to exercise reasonable care to inform them of its dangerous 
   condition or of the facts which make it likely to be dangerous.

219 Va. at 962, 252 S.E.2d at 366 (quoting Restatement (Second) of Torts § 388 
(1965)).

Slone asserted in his amended motion that the truck's roof was defective because it 
lacked supports and braces, that General Motors knew of the defect, and that the defect 
greatly increased the possibility of serious bodily injuries in the event of a "rollover." 
Slone also alleged that a "rollover" was foreseeable, and General Motors failed to 
exercise reasonable care to warn him of the truck's dangerous condition. Again, 
because the case was decided without a trial, we cannot speculate about what evidence 
Slone may or may not be able to present to support this allegation. We hold, therefore, 
that the trial court erred by granting General Motors' motion for summary judgment

We hold that the trial court properly granted summary judgment on behalf of 
Fontaine. As we previously mentioned, Slone is required to show under either his 
negligence or breach of warranty claims that Fontaine's product was unreasonably 
dangerous and that the unreasonably dangerous condition existed when the dump bed 
left Fontaine's possession. Logan v. Montgomery Ward, 216 Va. at 428, 219 S.E.2d at 
687.

Even though Slone alleges that the cab shield contributed to his injuries, he 
admitted in the trial court that Fontaine did not manufacture or install the cab shield, 
and it was installed and manufactured by an unknown third party. Slone does not allege
in his amended motion for judgment that Fontaine knew or should have known that a

cab shield would be added to the dump bed once it left Fontaine's possession.

Therefore, as a matter of law, Slone is unable to show that an unreasonably dangerous

case for further proceedings against General Motors.

condition existed in the dump bed at the time it left Fontaine's possession.

Accordingly, we will affirm that part of the judgment of the trial court that entered

summary judgment on behalf of Fontaine. We will reverse that portion of the judgment

of the trial court that entered summary judgment on behalf of General Motors, and we

will remand this case for further proceedings against General Motors.

JUSTICE COMPTON and JUSTICE WHITING, dissenting in part.

We agree with the majority that the trial court properly entered summary judgment

in behalf of the defendant Fontaine. We disagree, however, with the majority's

conclusion that summary judgment should not have been entered for General Motors.

The motion for judgment alleges that:

Near the top of the ramp and several feet from the edge thereof, the

ramp began to crumble from beneath the Truck, and the Truck toppled

and flipped backward down the steep side of the ramp for a distance of

approximately sixty (60) feet.

In our opinion, this allegation is insufficient to allege a foreseeable use or misuse of

the dump truck. Contrary to the majority, we do not think this is an allegation of the

possibility of a "rollover" in the use of the truck as a dump truck. Rather, we read this

allegation, coupled with the other allegations described by the majority, as a claim that

the truck should have been manufactured to withstand a collapse of the ground beneath

the truck, projecting the truck "down the steep side" of a 60-foot ramp.

The accident described in the pleading is one that could have happened to any

vehicle next to such a ramp; nothing in the pleading indicates that the truck's use as a

dump truck had anything to do with the collapse of the ramp. Accordingly, we read the

allegation as one seeking to charge General Motors with the duty of supplying an

accident-proof vehicle. And, as the majority notes, there is no such duty upon General

Motors.

The majority concludes that a "rollover" qualifies as a "misuse" of this vehicle. In

Featherall v. Firestone Tire and Rubber Co., 219 Va. 949, 252 S.E.2d 358 (1979), the

Court said, when there was an allegation of negligent failure to warn, the manufacturer

of a product will be subject to liability if it knows or has reason to know that the chattel

is or is likely to be dangerous for the use for which the chattel is supplied. Id. at 966,

252 S.E.2d at 369. The Court held the manufacturer of a pressure regulator "could have

reasonably foreseen the danger which was inherent in the product when sold, that is,

that the regulator would likely be used not as manufactured but without the locknut,
given the facility with which the nut could be removed from the instrument." Id.

Continuing, the Court stated that, as to the manufacturer, "misuse was foreseeable." Id.
As we have just pointed out, the claim that the plaintiff’s truck turned over because earth crumbled beneath it is not an allegation of a foreseeable misuse of the truck as a dump truck. In *Featherall*, the pressure regulator was supplied by the manufacturer with the locknut affixed to an adjusting screw. The nut performed a distinct safety function and, along with the screw, could be easily removed from the device. The fact that the regulator would likely be used without the locknut was a foreseeable misuse of the product, giving rise to a duty to warn. That situation is entirely unlike the present case, in which nothing involving the use of the truck as a dump truck had anything to do with the collapse of the ramp, as we have stated.

According to the majority's reasoning, a jury should be permitted to decide that foreseeably a truck could be negligently driven into water, thus requiring the manufacturer to equip the vehicle with pontoons to avoid injury to occupants. Thus, we would affirm the judgment in all respects.

Looking on the upside, Sylvia thought to herself that at least they weren’t playing ball.
In this case, we consider whether a deposition was properly used as a basis for entering summary judgment and the proper standard for determining the accrual date of a cause of action under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 through 60. On February 1, 1994, Gordon Gay filed a motion for judgment against his former employer, Norfolk and Western Railway Company (N&W), pursuant to FELA. Gay claimed that he was injured by exposure to diesel fumes and exhaust emitted by N&W's locomotives during his employment from September 8, 1956 to December 9, 1993. N&W filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction based on Gay's deposition and pleadings. N&W claimed that Gay's motion for judgment was not filed within FELA's three-year statute of limitation period, 45 U.S.C. § 56, because his cause of action arose in 1989 when he was diagnosed with myelodysplasia, a form of leukemia, or chronic anemia. [In responsive papers, no objection was made to the use of depositions in the moving papers. Ed.]

At the hearing on N&W's motion, Gay argued that the motion was "essentially a motion for summary judgment" and objected to the use of his deposition in considering the motion. The trial court held that Gay had waived his objection to the use of the deposition, that the cause of action accrued when Gay was diagnosed in 1989, and, therefore, the three-year limitations period barred his action. We awarded Gay an appeal.

During the hearing on N&W's motion, Gay objected to the use of his deposition as a basis for summary judgment, relying on Rule 3:18 and Code § 8.01-420. The trial court held that Gay waived his objection because he did not raise it until after the motion was made, briefed, and argued. That ruling was error.

[Rule 3:20] and § 8.01-420 impose a very specific condition; namely, the parties must agree to the use of depositions before they may serve as a basis in whole, or in part, for the entry of summary judgment. This condition requires some showing of acquiescence in the use of a deposition. The record in this case cannot support a finding that Gay agreed to the use of his deposition. Cf. Parker v. Elco Elevator Co., 250 Va. 278, 281 n.2, 462 S.E.2d 98, 100 n.2 (1995) (no objection made at any time to use of deposition). Gay unequivocally objected to the use of his deposition before the trial court entered judgment. We agree that the better practice would have been for Gay to have made his objection known earlier in the proceedings. Nevertheless, in the absence of any basis to conclude that Gay agreed to the use of his deposition, the trial court could not enter summary judgment based in whole, or in part, on that deposition.

Accordingly, the trial court erred in holding that Gay waived his objection to the trial court's use of his deposition and in entering summary judgment based on the deposition without agreement by the parties as required by Rule 3:18 and § 8.01-420.181

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181 N&W also argues that the trial court's use of the deposition testimony was not error because its motion was not a motion for summary judgment but a "Motion to Dismiss for Lack of Subject Matter Jurisdiction" and, therefore, Rule 3:18 and § 8.01-420 do not apply. This argument is disingenuous. Regardless of the label N&W placed on it, this motion was functionally a motion for summary judgment and subject to Rule 3:18 and § 8.01-420.
This conclusion requires that we reverse the judgment of the trial court and remand the case for further proceedings. . .

Admissions May be Used to Support Summary Judgment

VICARS v. FIRST VIRGINIA BANK-MOUNTAIN EMPIRE
250 Va. 103, 458 S.E.2d 293 (1995)

JUSTICE LACY delivered the opinion of the Court:

In this appeal, we consider whether general language in a deed was sufficient to convey mineral interests in a tract of land which was not specifically identified in the deed.

This controversy arose when Dennis Barnette, trading as Kodiak Mining Company (Kodiak), removed coal from a 71.75-acre tract of land in Wise County. Kodiak paid First Virginia Bank-Mountain Empire (the Bank) $189,799.59 in production royalties based on the Bank's claim that it owned the mineral interests in the tract. The Bank's ownership claim was disputed by the appellants (the Baker family). The Baker family maintained that the Bank had only a one-half interest in the tract's mineral rights and that they owned the other one-half interest. The Baker family filed suit against Kodiak and the Bank, alleging that the coal was removed without the Baker family's permission and seeking damages for intentional trespass and waste.

Prior to trial, Kodiak and the Bank filed a motion for partial summary judgment on the issue of damages. The trial court granted the motion, holding that the Baker family consented to the mining of the coal and agreed to the royalty rate paid by Kodiak mining. Based on this holding, the Baker family's potential damages were limited to damages based on their claimed ownership interest only: fifty percent of the royalties paid by Kodiak mining for the removal of the coal from the disputed tract, calculated to be $94,899. . . The Baker family contends that "material facts were in dispute concerning the issue of trespass or waste damage." We disagree.

As the basis for granting the motion for partial summary judgment, the trial court relied on a January 6, 1992 letter from the Baker family's attorney to the Bank's attorney.182 That letter stated, in part, "my clients do not wish to impede the mining on the tract while these title questions are being reviewed." Kodiak received a copy of this letter.

The Baker family states on brief that they agreed that they "would not stop efforts to strip mine the tract," but qualified that agreement by limiting it to "a short time while counsel for the Bank provided proof that the Baker family did not own a one-half interest in the subject mineral tract." This limitation, however, is not contained or

182 This correspondence was attached to the Baker family's response to the Bank's request for admissions. These responses were before the trial court for determination of the motion for partial summary judgment.
reflected in the January 6, 1992 letter, and subsequent correspondence between counsel for the Bank and the Baker family contained no reference to, or indication of, any change in the position taken in the letter regarding the mining operation. The focus of the entire correspondence concerned the title dispute. Furthermore, the Baker family does not claim that they told the Bank or Kodiak that they had changed their position and wanted the mining operations terminated.

We agree with the trial court that the statement in the January 6, 1992 letter, as a matter of law, constituted consent by the Baker family to the mining operations. It is axiomatic that a party cannot collect damages based on theories of waste or trespass when the party consented to the very actions alleged to constitute trespass or waste. See, e.g., Cooper v. Horn, 248 Va. 417, 423, 448 S.E.2d 403, 406 (1994)("trespass is an unauthorized entry"); Chosar Corp. v. Owens, 235 Va. 660, 664, 370 S.E.2d 305, 308 (1988)(mining without consent of all co-tenants constituted waste). Accordingly, any dispute in material facts relating to the issue of trespass or waste damages was irrelevant.

For the reasons stated, we will reverse the trial court's judgment denying the Baker family's claim to an undivided one-half interest in the minerals and mineral rights on the 71.75-acre tract, affirm the judgment with respect to the damage issue, and enter final judgment.
C. Cross-Motions for Summary Judgment

JUSTICE RUSSELL delivered the opinion of the Court.

This appeal turns upon the question of the necessity of an evidentiary hearing when cross-motions for summary judgment are filed. We also consider the nature of certiorari proceedings under Code § 15.1-497 challenging a decision by a Board of Zoning Appeals.

Ashland Investment Co., Inc. (the company), owned a motel in Hanover County, outside the Town of Ashland. A large, free-standing sign on the premises had been erected in compliance with all laws and ordinances in effect in the county at the time of its construction. Later, however, the area was annexed by the town and became subject to the town's zoning ordinance, which prohibited signs of that height and area. By 1983, the company's sign was a "nonconforming sign" under the town's ordinance.

In September 1983, the company employed a contractor to make certain changes in the sign; specifically, to change the words "DAYS INN" to "QUALITY INN" and to remove a semicircle or arch extending above the sign which contained a "sunburst" design described as a "Days Inn logo." The company took the position that those alterations would have no effect on the sign's nonconforming status and, therefore, made no application to the town for any sign permit or variance allowing the alterations.

The town manager, by letter dated September 8, 1983, informed the company that because the sign was nonconforming, it could not be altered without the issuance of a sign permit, and that the company's alterations had constituted a violation of the zoning ordinance. The letter demanded that the sign be removed within ten days. The company appealed the town manager's decision to the town's Board of Zoning Appeals (the BZA). After several hearings, the BZA affirmed the town manager's decision.

The company filed a petition for certiorari in the circuit court pursuant to Code § 15.1-497, challenging the decision of the BZA. The town filed a motion for summary judgment, supported by an affidavit from the town manager, on the grounds that the company had failed to exhaust its administrative remedies. The town asserted that the company should have requested a variance from the BZA, and that any alteration in a
nonconforming sign was unlawful, under the town's zoning ordinance, unless a sign permit or a variance were first obtained. The company countered with its own motion for summary judgment, relying on its verified petition for certiorari and the affidavit of a sign contractor attached thereto. The company's motion stated that the sign had conformed to all applicable laws when first erected, that the company had made no structural alterations, but had merely "changed information and removed a logo displayed on the sign," that the company had a vested right to maintain the sign pursuant to Code § 15.1-492, and that no material facts were genuinely in dispute.

The court heard the motions for summary judgment in September 1984. The town moved the court to refer the case to a commissioner in chancery for the taking of evidence concerning the nature of the alteration made to the sign. The court, however, concluded that no factual issues requisite for decision were in dispute and granted the company's motion for summary judgment, reversing the decision of the BZA. We granted the town an appeal.

At trial, the town relied on its ordinance, Town Code § 21-213(g), which provided, in pertinent part: "Any sign existing prior to the adoption of the article which does not meet the requirements of this article is declared a nonconforming sign, and shall not be altered, replaced or relocated unless it then conforms with the requirements of this article."

The company, invoking the Dillon Rule (see Commonwealth v. Arlington County Bd., 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977)), points out that the foregoing ordinance, as read by the town, purports to restrict the vested rights of owners of nonconforming signs more narrowly than state law would permit. The company relies on [a Code provision stating that existing uses could not be impaired unless there were "structural" changes.]

Thus, the company argues, the town ordinance, if interpreted as the town contended below, would mandate the removal of a nonconforming sign if it were altered in any respect, while the enabling statute would require such removal only if the alterations were of a structural nature. [The Virginia Code] must govern the case, the company argues, because a local ordinance is invalid to the extent that it purports to grant greater powers to local governments than authorized by the General Assembly.

On appeal, the town no longer takes issue with the foregoing argument, and concedes on brief that the town's powers are circumscribed by the statute. Nevertheless, the town contends that it was denied a day in court to attempt to prove that the alterations made to the sign were in fact structural in nature, notwithstanding the company's assertions.
On the theory of the case adopted by the company, that issue was dispositive, but the company offered no evidence on the issue and contended that no material facts were in dispute. The court had before it only the self-serving assertions in the company's verified petition and the ex-parte affidavit of the sign contractor employed by the company, which stated the conclusion that "no structural or other modifications were made to the sign itself."

The company argues on appeal that the taking of evidence was unnecessary for two reasons: first, that the parties' cross-motions for summary judgment had the effect of submitting the case to the court as a question of law, and second, that a certiorari petition . . . is not a trial *de novo*.


By moving for summary judgment under Rule 3:18, both parties represented to the trial court there was no material fact genuinely in dispute. But merely because both litigants believed the evidence was sufficiently complete to decide the case does not relieve the trial judge of the responsibility and duty to make an independent evaluation of the record on that issue. A court's duty to ascertain whether facts remain in dispute or whether there are sufficient facts to decide the question presented is not obviated by cross motions for summary judgment.

Thus, it may be erroneous to dispense with the requirements of proof even when the opposing parties urge the court to do so, unless all essential facts are stipulated. The present case illustrates the problem. Under the theory adopted by the town in the trial court, any alteration of the sign would have been sufficient to bring the sign within the ordinance. Because there was no dispute that some alteration had occurred, the town contended that it was entitled to summary judgment. Under the theory adopted by the company, structural alterations were necessary to trigger the ordinance. The company's affidavit asserted that no structural alterations had occurred. The company therefore contended that it was entitled to summary judgment. Thus, the cross-motions, being based upon different theories, rush past each other without meeting, like trains on parallel tracks.
The town contended at the hearing, and still insists, that if the trial court were to adopt the company's legal theory, then the town should have the opportunity to cross-examine the company's witnesses on the subject of structural alterations, and to offer evidence of its own in refutation. We agree. The procedure adopted at the hearing deprived the town of its right to present its case.

We do not agree with the company's contention that certiorari proceedings under Code § 15.1-497 render the taking of evidence discretionary with the court in every case. It is true that such a proceeding is not a trial *de novo*. *Packer v. Hornsby*, 221 Va. 117, 120, 267 S.E.2d 140, 141 (1980). That is the result of the rule that the decision of the BZA is entitled to a presumption of correctness, placing the burden on the petitioner to overcome the presumption. That burden may be carried by showing that the BZA applied erroneous principles of law to the facts of the case. But the facts are crucial, and must either be set forth in undisputed findings made by the BZA and transmitted to the circuit court, stipulated by the parties, ascertained by *ore tenus* hearing, or determined by reference to a commissioner. See Code § 15.1-497; *Packer*, 221 Va. at 121, 267 S.E.2d at 142. Accordingly, the court erred by granting summary judgment without taking evidence.

The town's remaining assignment of error, that the company failed to exhaust its administrative remedies, lacks merit. The company took the position that the alterations it made to the sign did not offend the zoning ordinance and, therefore, did not affect the sign's nonconforming status. If that position should ultimately prevail, it follows that the company was under no obligation to apply for a sign permit or a variance under the town ordinance. But if the company were to make such application, as the town contends it should, it would necessarily concede that the ordinance was applicable. The company was under no obligation to concede the dispositive legal question in the case as the price of defending itself against the town's claims. The company exhausted the only remedies available to it which were applicable: it appealed the town manager's order to the BZA and then petitioned the circuit court for certiorari to the adverse decision which followed.

For the foregoing reasons, we will reverse the order appealed from and remand the case for further proceedings consistent with this opinion.
Notes on Summary Judgment

Shadings and Interpretations. The Virginia Supreme Court held in a decision rendered in 1954 that scienter issues or delicate assessments, such as evaluation of innuendo, must be left to the jury. Carwile v. Richmond Newspapers, 196 Va. 1 (1954).


One for the Gipper. In Thurmond v. Prince William Professional Baseball Club, 265 Va. 59, 574 S.E.2d 246 (2003), the Supreme Court upheld the granting of summary judgment on the theory of “assumption of the risk” where a patron in the stands at a baseball game was hit by a foul ball and sustained injuries to her jaw: “We conclude that reasonable persons could not disagree that Thurmond, who conceded that she remained alert throughout the game and observed hitters and batted balls for more than seven innings before being injured, was familiar with the game of baseball, knew the risk of being injured by a batted ball, and voluntarily exposed herself to that risk by remaining seated in an unscreened area.”

So, next I suppose you’ll expect the jury to believe in the Easter Bunny, won’t you?
Chapter 14
Sanctions in Virginia Law

A. Basic Statutory Text
Section 8.01-271.1 is set forth below. By its enactment in 1987, the Legislature imported into Virginia practice many of the notions of the then-applicable version of "Rule 11" governing such motions in the federal courts. While the federal sanction provisions in Rule 11 have been completely overhauled since then, the Virginia statute is still in the original form.

Aspirations of professionalism make the bar of Virginia slow to invoke this remedy. Nonetheless, sanction motions are increasingly made under this Code provision. In the cases that follow the Supreme Court has begun to define the contours of the sanction doctrines. There is no sanction provision in the Rules of Court for Virginia, since this statute provides the governing content:

§ 8.01-271.1. Signing of Pleadings, Motions, and other Papers; Oral Motions; Sanctions.
Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading.
filed by that attorney in the action. A party who is not represented by an attorney, including a person confined in a state or local correctional facility proceeding pro se, shall sign his pleading, motion, or other paper and state his address.

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.
“Remember, we can only afford to do all this pro bono because of how much the anti bono pays.”
B. Standards Set in Case Law

TULLIDGE v. BOARD OF SUPERVISORS OF AUGUSTA COUNTY
239 Va. 611, 391 S.E.2d 288 (1990)

JUSTICE WHITING delivered the opinion of the Court.

In this appeal from an order imposing sanctions pursuant to Code § 8.01-271.1, the dispositive issue is whether a pro se litigant's construction of a Virginia statute was "warranted by existing law."

On December 30, 1987, Augusta County (the county) bought approximately 165 acres of land within the county for relocation of many of its administrative offices from the City of Staunton, where they had been for a number of years. On March 10, 1988, Thomas H. Tullidge, an attorney and registered voter in the county, brought a declaratory judgment action against the Board of Supervisors of Augusta County (the board), seeking an adjudication that the board's power to move the "county seat" from the City of Staunton was circumscribed by Code § 15.1-559. On March 29, 1988, the board filed a demurrer and a motion for sanctions under Code § 8.01-271.1.

On May 23, 1988, Tullidge filed a memorandum in support of his declaratory judgment action in which he claimed that the county's administrative offices were a part of the "county seat" or "courthouse," and thus that Code § 15.1-559 was implicated. As pertinent, that section provides:

Whenever one third of the registered voters of any county shall petition the circuit court of such county . . . for an election in such county on the question of the removal of the courthouse to one or more places specified in the petition . . . such court shall issue a writ of election. . . .

In support of his argument, Tullidge cites Couk v. Skeen, 109 Va. 6, 63 S.E. 11 (1908), and Ingles v. Straus, 91 Va. 209, 21 S.E. 490 (1895), in which we construed statutes closely analogous to Code § 15.1-559. There, the statutes at issue spoke of the removal of courthouses in their titles but described courthouses as "county seats" in their texts. Both statutes were attacked as violative of the Virginia constitutional prohibition against a statute embracing an object which was not expressed in its title. See Va. Const. art. IV, § 12. We held, however, that the terms "courthouse" and "county seat" are synonymous and, consequently, that the statutes at issue were not unconstitutional. Couk, 109 Va. at 11-12, 63 S.E. at 13-14; Ingles, 91 Va. at 222, 21 S.E. at 494.

The trial court sustained the board's demurrer, but delayed ruling on the sanctions issue until we disposed of Tullidge's appeal. We denied Tullidge's appeal on January 25, 1989.

On May 24, 1989, after argument, the court concluded that Tullidge had violated Code § 8.01-271.1 because "the allegations of law by the plaintiff did not meet the statutorily required standard of 'objective reasonableness. . . .'" The court then imposed the sanction of a private reprimand upon Tullidge. He appeals. . . Because the issue is
one of law, and not fact, we do not accord the trial court's ruling the same weight it would be accorded if reached upon conflicting factual evidence. *Madbeth, Inc. v. Weade*, 204 Va. 199, 202, 129 S.E.2d 667, 669 (1963).

We agree with the trial court's application of an objective standard of "reasonableness" in determining whether the "warranted by existing law" portion of Code § 8.01-271.1 has been violated. Because Tullidge is an attorney, it must be shown that a competent attorney, after reasonable inquiry, could not have formed a reasonable belief that Tullidge's contention was warranted by existing law. In addition, any doubts should be resolved in favor of Tullidge's contention. However, if it is clear that Tullidge's claim had no chance of success under existing law, his conduct was appropriately punished. See *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985).

In resolving such an issue, the wisdom of hindsight should be avoided. Thus, even though we refused to grant Tullidge an appeal from the trial court's order sustaining the county's demurrer, it need not follow that Tullidge, at the trial court level, had no chance of persuading a court to accept his premise. We must gauge the reasonableness of Tullidge's claim by the precedents existing at the time he presented his case.

For a number of reasons, we conclude that a competent attorney reasonably could have believed that the decisions of *Couk* and *Ingles* controlled in the construction of Code § 15.1-559. First, *Couk* and *Ingles* dealt specifically with the removal of courthouses or county seats. Second, we made no mention of *Couk* or *Ingles* in the two later cases relied upon by the board in its demurrer;²⁷ this might reasonably be taken by an attorney as an indication that the earlier cases were distinguishable. Third, a "courthouse" is defined in part as "the principal building in which county offices are housed and in which county administrative affairs are conducted. . . ." Webster's Third New International Dictionary 523.

Thus, we hold as a matter of law that Tullidge's contention was reasonable under the circumstances. Accordingly, we will reverse the judgment of the trial court insofar as it imposed the sanction and remand the case with direction to expunge the private reprimand from the record.

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²⁷ The board relies principally upon Bd. of Supervisors v. Com. of Accounts, 215 Va. 722, 214 S.E.2d 137 (1975), and Egerton v. Hopewell, 193 Va. 493, 69 S.E.2d 326 (1952), decided after Couk and Ingles. In dealing with the extent of a circuit judge's control over other portions of the courthouse not devoted to the judicial function, Bd. of Supervisors and Egerton limited the meaning of "courthouse" to the area of the court building devoted to the judicial function. Bd. of Supervisors, 215 Va. at 723-24, 214 S.E.2d at 138; Egerton, 193 Va. at 501, 69 S.E.2d at 331.
COUNTY OF PRINCE WILLIAM v. RAU  
239 Va. 616, 391 S.E.2d 290 (1990)

JUSTICE WHITING delivered the opinion of the Court.

In this case, we decide whether sanctions were properly imposed upon a litigant for an alleged violation of the provisions of Code § 8.01-271.1 . . .

Seeking to have a rezoning ordinance declared invalid, Morton Rau, Anita Rau, and Reinhold C. Dedi (collectively Rau) filed a petition for a declaratory judgment, attorney's fees, and other relief against the Board of Supervisors of Prince William County (the board) and others. The petition averred that because of procedural irregularities, the board had no jurisdiction to rezone approximately 24 acres near Rau's land in Prince William County and, therefore, that its rezoning ordinance was void. In response, the board's attorney filed pleadings contending that the rezoning action was valid.

On February 7, 1989, after hearing evidence and argument, the trial court ruled orally that the rezoning ordinance was invalid. On June 12, 1989, it imposed sanctions upon the board for a violation of Code § 8.01-271.1, and awarded Rau a judgment against the board for $6,078, based on his attorney's fees incurred in prosecuting the suit. The board appeals only the award of sanctions, which was included in the final order deciding the merits of the case. . . .

We must determine whether the board's defense was unreasonable in light of the alleged irregularities which occurred during the commission's meeting on September 16. To establish a basis for sanctions, the record and existing law must be sufficient to establish that, after reasonable inquiry, the board could not have formed a reasonable belief that its defense was "warranted by existing law."28

We need not decide whether the board's position was actually "warranted by existing law." In assessing conduct which is allegedly in violation of Code § 8.01-271.1, we apply an objective standard of reasonableness. Tullidge v. Board of Supervisors, 239 Va. 611, 613, 391 S.E.2d 288, 289 (1990) (this day decided). We also resolve any doubts in favor of the board, and eschew the wisdom of hindsight. Id. at 613, 391 S.E.2d at 290. Furthermore, as "the issue is one of law, and not fact, we do not accord the trial court's ruling the same weight it would be accorded if reached upon conflicting factual evidence." Id. at 614, 391 S.E.2d at 289.

We think that the board reasonably could have concluded that the September 16 resolution was a valid recommendation. Ample authority exists for the principle that "[m]ere failure to conform to parliamentary usage will not invalidate [an] action when the requisite number of members have agreed to the particular measure." 4 E. McQuillin, The Law of Municipal Corporations § 13.42a (3d ed. 1985 & Supp. 1989); see also 1 J. Sutherland, Statutes and Statutory Construction § 7.04 (4th ed. 1985 & Supp. 1989). Therefore, at the very least, the board had reasonable cause to believe that the commission could and did waive one of its parliamentary rules, based on the commission's September 16 resolution recommending denial.

28 We are not concerned with the issue of improper motive. On brief, Rau indicates that he does not know why the board decided to what it did. He cites, and we find, nothing in the record which indicates an improper motive under Code § 8.01-271.1.
Furthermore, although Rau argues that the commission's October 7 meeting resulted in "no recommendation," the record does not show that the commission rescinded or modified its September 16 recommendation. We consider the commission's "no recommendation" of October 7 to be in conflict with its previous recommendation of denial. Opinion 34 of the American Institute of Parliamentarians indicates that "[a]ccording to Robert, a motion is out of order and, if adopted, null and void if it conflicts with a motion previously adopted which has not been rescinded, or rejected after consideration." V. Schlotzhauer, W. Evans, J. Stipp, Parliamentary Opinions 16 (1982) (published by the American Institute of Parliamentarians).

In summary, we conclude that the trial court erred in imposing sanctions. Under existing law, it was reasonable for the board to believe that it could treat the commission's September 16 resolution as a valid recommendation under Code § 15.1-493. Because the board reasonably believed that it was authorized to act on the rezoning request, it was justified in filing its defensive pleadings in this suit. Therefore, we will reverse the trial court's judgment insofar as it imposed the sanction of payment of attorney's fees, will order the sanction expunged from the record, and will enter final judgment for the board on that issue.

OXENHAM v. JOHNSON

JUSTICE WHITING delivered the opinion of the Court:

In this case, we consider whether a trial court properly imposed a sanction upon a lawyer who brought an unsuccessful action and failed to conduct any pretrial investigation of allegedly adverse information. Specifically, we decide whether, and under what circumstances, the Code § 8.01-271.1 duty of "reasonable inquiry" required the lawyer to investigate information opposing counsel gave him indicating that the lawyer's client might not prevail in the litigation.

On July 8, 1988, Virginia Johnson, a licensing inspector for the Virginia Department of Social Services, accompanied by Barbara Ann Gestwick, the licensing administrator, and William Davidson, a zoning officer of the City of Richmond, sought permission from Ralph M. Montecalvo to inspect his residence in Richmond for possible violation of Code [provisions prohibiting] the operation of a home for the care of more than four aged, infirm or disabled adults without obtaining a license therefor from the Virginia Department of Social Services.

Upon advice of counsel, Montecalvo refused to permit an inspection. Whereupon, Johnson, Gestwick and Davidson went to a magistrate and got a search warrant.29

29 The inspection confirmed that Montecalvo was operating an adult home without a license, and he later pleaded guilty to a violation of [the Code of Virginia] in this regard.
Although allegedly not requested to do so, the magistrate also issued an arrest warrant charging Montecalvo with the statutory violation of interfering with Johnson in the performance of her duties (the interference charge). The arrest warrant showed that the magistrate found probable cause for the interference charge "based on the sworn statements of Virginia Johnson . . . Complainant."

Johnson appeared pursuant to subpoena and was the only prosecution witness who testified at the trial of the interference charge. Montecalvo was found not guilty.

Shortly thereafter, Thomas H. Oxenham, III, Montecalvo's counsel in the criminal proceeding, filed this malicious prosecution action on behalf of Montecalvo against Johnson because of her alleged instigation of the interference charge. In a pretrial deposition, Montecalvo testified that he had never talked to Johnson, that he had not felt "harassed" by Johnson, and that he had no reason to believe she bore him any ill will. Prior to trial, opposing counsel advised Oxenham orally, in responsive pleadings, and in legal memoranda filed in the case, that Gestwick, not Johnson, had executed the affidavit for the search warrant, and that no one had requested the arrest warrant to be issued against Montecalvo for interfering with them in the performance of their duties. Nevertheless, Oxenham continued to press Montecalvo's claim by filing and signing two memoranda of law and his client's answers to Johnson's interrogatories.

At trial, Montecalvo's evidence that linked Johnson to the institution of the interference charge consisted of the magistrate's notation on the warrant and Montecalvo's testimony that Johnson was the only prosecution witness who appeared at the interference charge trial. Johnson's evidence confirmed her counsel's pretrial information to Oxenham. After only 10 minutes' deliberation, a jury returned a verdict for Johnson and judgment was entered on the verdict.

Invoking Code § 8.01-271.1, Johnson filed a "Motion to Assess Attorneys' Fees and Costs" against Oxenham and Montecalvo, alleging violations of a duty to make reasonable inquiry regarding Johnson's role in the issuance of the arrest warrant. [The Court then quoted Code § 8.01-271.1].

Oxenham's failure, after being told by opposing counsel that Johnson had nothing to do with the issuance of the arrest warrant, led the trial court "to the inevitable conclusion that the purpose of filing the motion for judgment was not to prevail on the merits but to harass the defendant."

The court also found that Oxenham failed in his duty to "continually review and re-evaluate his position" by failing to "follow up with investigation or . . . conduct any discovery."

Accordingly, the court assessed a sanction against Oxenham in the sum of $4,500, representing a part of Johnson's counsel's projected billings of $10,383. Oxenham appeals.

First, we review some of the policy considerations in sanction cases. The possibility of a sanction can protect litigants from the mental anguish and expense of

30 [The Code] provides in part that "[a]ny person who interferes with any authorized agent of the Commissioner of Social Services in the discharge of his duties . . . shall be guilty of a misdemeanor."
31 Concluding that there was no evidence that Montecalvo had participated in "the frivolous filing and prosecution of this suit," the trial court denied the motion for a sanction against him.
frivolous assertions of unfounded factual and legal claims and against the assertions of valid claims for improper purposes. And, sanctions can be used to protect courts against those who would abuse the judicial process. Yet the threat of a sanction should not be used to stifle counsel in advancing novel legal theories or asserting a client's rights in a doubtful case. Finally, courts should take care that the litigation of a sanction issue does not itself defeat one purpose of Code §8.01-271.1, that of reducing the volume of unnecessary litigation.

Because of the harm that can be caused by an unjustified imposition of a sanction, Oxenham argues that the standard of review applicable in a sanction case in Virginia is "somewhat deferential . . . [but] appears more closely akin to a de novo review" than to an abuse-of-discretion standard. Oxenham notes that in Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), the United States Supreme Court held that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." Oxenham, however, contends that this Court has adopted a standard "somewhat at odds" with the federal standard, citing County of Prince William v. Rau and Tullidge v. Board of Sup. of Augusta County. These cases do not support Oxenham's contention.

Tullidge merely held that where the issue underlying the imposition of a sanction "is one of law, and not fact, we do not accord the trial court's ruling the same weight it would be accorded if reached upon conflicting factual evidence." 239 Va. at 614, 391 S.E.2d at 289; see Rau, 239 Va. at 620, 391 S.E.2d at 293. This holding does not differ in substance from the statement in Cooter & Gell that "[a trial] court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Thus, we apply an abuse-of-discretion standard in reviewing a trial court's award or denial of a sanction.

We now turn to this case. To create a factual issue in his malicious prosecution action against Johnson, Montecalvo was required to present credible evidence: (1) that the prosecution was set on foot by Johnson and that it terminated in a manner not unfavorable to Montecalvo; (2) that it was instituted or procured by the cooperation of Johnson; (3) that it was without probable cause; and (4) that it was malicious. See Bain v. Phillips, 217 Va. 387, 393, 228 S.E.2d 576, 581 (1976). Legal malice, inferred from the circumstances, suffices for an award of compensatory damages, but actual malice must be shown to recover punitive damages. F.B.C. Stores, Inc. v. Duncan, 214 Va. 246, 252, 198 S.E.2d 595, 600 (1973).

Johnson contends that Montecalvo had no evidence that she instituted the prosecution or that her actions were malicious. According to Johnson, if Oxenham had complied with his duty of "reasonable inquiry" and interviewed her witnesses at any time before trial, he would have discovered that he could not have established that Johnson "instituted or procured" the prosecution or that she acted with malice. Therefore, Johnson argues, Oxenham's pleadings and oral motions violated Code § 8.01-271.1 because they were frivolous and were filed for an improper purpose.

Because no cross-error was assigned to the trial court's ruling that the initial filing was justified, we are concerned only with Oxenham's conduct after the action was filed.

32 Rule 11 of the Federal Rules of Civil Procedure and Code § 8.01-271.1 are similar in the respects material here.
Although we agree with Oxenham's contention that Code § 8.01-271.1 imposes no continuing duty upon a lawyer to "update his pleadings in light of any new findings," see Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 454 (7th Cir. 1987) (construing Federal Rule of Civil Procedure 11), we reject his contention that he had no further duty to investigate Johnson's role after filing the motion for judgment.

The duty of "reasonable inquiry" arises each time a lawyer files a "pleading, motion, or other paper" or makes "an oral motion." Code § 8.01-271.1. If Oxenham had filed any paper or made any motion in the case after he knew, or reasonably should have known, that he could not create a factual issue of Johnson's involvement and malice, the court would have been justified in imposing a sanction against him.

Because different levels of malice are required in the recovery of compensatory and punitive damages for malicious prosecution, we consider first Montecalvo's claim for compensatory damages. Initially, the trial court found that the documentary and circumstantial evidence of Johnson's role in the institution of the criminal action against Montecalvo was sufficient to justify filing Montecalvo's malicious prosecution action. Apparently, the same evidence also justified submission of the case for jury consideration. Indeed, the jury may not have believed the three witnesses who, in contradiction to the language in the arrest warrant, denied Johnson's role in instituting the interference charge against Montecalvo. Juries are not required to accept testimony which is contradicted by credible documentary or circumstantial evidence. See Chaves v. Johnson, 230 Va. 112, 122-23, 335 S.E.2d 97, 104 (1985) (circumstantial and documentary evidence); Drake v. National Bank of Commerce, 168 Va. 230, 243-44, 190 S.E. 302, 308 (1937) (circumstantial evidence).

Additionally, the appearance of Johnson's name as the complainant on the arrest warrant sufficed to support an inference that she acted with legal malice in instigating the interference charge against Montecalvo. Whoever caused the arrest warrant to issue had no probable cause to claim an unlawful interference with Johnson's performance of her duties because Montecalvo had a constitutional right to require a search warrant before such an inspection. This lack of probable cause was sufficient to support an inference of Johnson's legal malice. Giant of Virginia, Inc. v. Pigg, 207 Va. 679, 685, 152 S.E.2d 271, 276 (1967). Accordingly, the trial court's conclusion that this claim was frivolous was erroneous and an abuse of discretion.

Next, we consider whether the evidence supports the trial court's finding that Oxenham's failure to investigate Montecalvo's claim for compensatory damages demonstrated an intent "not to prevail on the merits but to harass [Johnson]." Although a number of adverse inferences might be drawn from Oxenham's failure to make any investigation after filing the motion for judgment, an intent to harass is not one of them. The record contains no evidence of threats or expressions of ill will on Oxenham's part, no pattern of persistent and harassing pleadings, and nothing to show that Oxenham was not attempting to recover damages for his client. Under these circumstances, we conclude that the trial court's inference of an intent to harass from a failure to

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33 Citing Brown v. Koulikakis, 229 Va. 524, 331 S.E.2d 440 (1985), the trial court said that "[t]he only reason the case survived the motion to strike was the court's policy against striking the evidence in order to preserve a full record on appeal . . . ." However, in conformity with Brown, the court must have concluded that the evidence did not make it "conclusively apparent that plaintiff ha[d] proven no cause of action against defendant." Id. at 531, 331 S.E.2d at 445
investigate was based on a clearly erroneous assessment of the evidence and, therefore, was an abuse of discretion.

For these reasons, we hold that the trial court erred in basing its award, in whole or in part, upon Oxenham's continued assertion of Montecalvo's claim for compensatory damages.

We now consider whether the sanction might have been justified because of Oxenham's continued assertion of the punitive damage claim. Johnson's legal malice in instigating the arrest warrant would not have authorized an award of punitive damages. In malicious prosecution actions, evidence of "misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others" is required. *Giant of Virginia*, 207 Va. at 685, 152 S.E.2d at 277.

Montecalvo's pretrial discovery testimony established conclusively that Johnson was not guilty of misconduct or actual malice. Furthermore, if Oxenham had made "reasonable inquiry," he would have known, or reasonably should have known, that he had no evidence that Johnson had acted in reckless and wanton disregard of Montecalvo's rights. Therefore, Oxenham should not have asserted Montecalvo's frivolous claim for punitive damages at trial.

However, the trial court did not distinguish between the two damage claims in its award of an attorneys' fee sanction. Attorneys' fee sanctions have been imposed under Federal Rule 11 for asserting a frivolous claim with nonfrivolous ones, where the defense of the frivolous claim was essentially unrelated to the defenses of the nonfrivolous claims. *Patterson v. Aiken*, 841 F.2d 386, 387 (11th Cir. 1988) (suing a party who had no conceivable liability in a separate count of a multiple count complaint); *Frantz v. U.S. Powerlifting Fed'n*, 836 F.2d 1063, 1067 (7th Cir. 1987) (assertion of baseless legal theory in multiple count antitrust complaint containing other counts with colorable legal theories).

Here, however, any award of damages, compensatory and punitive, would have turned largely upon what inferences a jury might draw from Johnson's actions in instigating the arrest warrant. Indeed, Johnson's liability for punitive damages depended upon an award of compensatory damages, *Valley Acceptance Corp. v. Glasby*, 230 Va. 422, 432, 337 S.E.2d 291, 297 (1985), and any such award would have had to bear a reasonable relation to the award of compensatory damages. *Philip Morris Inc. v. Emerson*, 235 Va. 380, 414, 368 S.E.2d 268, 287 (1988).

Here, the elements of Montecalvo's claim for compensatory damages are subsumed in his claim for punitive damages. Additionally, the sanction requested and imposed was an award of attorneys' fees. Therefore, Johnson's attorneys' time spent in defending the punitive damage claim should have been segregated and the sanction based only on the time taken in defending that claim. Although the trial court did not award the full amount of the attorneys' fees claimed, it based its award upon a projection of the time Johnson's attorneys spent in defending the entire case. In doing so, it based its conclusion upon an erroneous application of the law and thereby abused its discretion.

We further are of opinion that any effort to segregate the additional expense and anguish occasioned by Oxenham's continued assertion of a frivolous claim for punitive damages would impose additional and unnecessary burdens upon Johnson and the trial
court. Under these circumstances, we will reverse the trial court's sanction of the payment of attorneys' fees and enter final judgment for Oxenham on that issue.

Reversed and final judgment.

Senior Justice Poff, with whom Justice Russell and Justice Hassell join, dissenting:

Because I cannot agree that the trial court abused its discretion, I must dissent. The resolution of the issue raised in this case requires a thorough comparison of the facts as alleged in the motion for judgment, as revealed in pretrial proceedings, and as developed in sworn testimony at trial. The motion for judgment alleged that Montecalvo "rented out rooms to boarders." Johnson, "a licensing inspector for the Virginia Department of Social Services, presented herself at the plaintiff's residence . . . and requested permission to enter and inspect the premises." Montecalvo refused permission unless "the defendant present[ed] a valid search warrant". A magistrate, "[a]t the initiative of the defendant . . . issued a search warrant . . . and an arrest warrant for the plaintiff for interfering with the defendant in the performance of her duties." The arrest warrant "was so totally lacking in probable cause as to infer a spirit of malice." After hearing evidence at the criminal trial "consisting entirely of the testimony of the defendant", the judge "struck the Commonwealth's evidence and dismissed the criminal charges". The motion for judgment demanded compensatory and punitive damages "[d]ue to the malicious prosecution . . . set on foot by the defendant".

The record of the pretrial proceedings shows that Johnson, in a memorandum of law filed in support of her demurrer and motion for summary judgment, stated that she "did not ask for the issuance of the arrest warrant", that she "assumed they had simply gotten a search warrant", and that she "was surprised when Officer Stachura executed the arrest warrant. "In that memorandum, Johnson averred that Oliver Norrell, an assistant Commonwealth's Attorney, "will testify that the inspectors sought his assistance in securing a search warrant, and that they never mentioned the need for an arrest warrant". The affidavit in support of the search warrant, attached as an exhibit to Johnson's memorandum of law, stated that Montecalvo had "acknowledged . . . that he was operating a home for Adults without the required license". Although Johnson, Gestwick, and William Davidson, a zoning officer, were named (in that order) as those who had heard the confession, the affidavit was executed, not by Johnson but by Barbara Gestwick.

Martha Parrish, the assistant Attorney General who represented Johnson in pre-trial proceedings, filed an affidavit declaring that "[o]n at least two occasions during the motions stage of this case, I advised counsel for the plaintiff that Ms. Johnson had no role in instigating the prosecution of the plaintiff. One of these occasions was immediately following our oral argument on the defendant's demurrer or in the alternative motion for summary judgment."

On March 6, 1989, Oxenham filed a memorandum of law in opposition to the demurrer and motion. Reaffirming allegations made in the motion for judgment filed four months earlier, Oxenham insisted that it was Johnson who "obtained a search warrant"; that Johnson "had no reasonable grounds to institute these criminal
proceedings”; and that "[t]he facts before the Court clearly show that the . . . prosecution for interfering with [Johnson] was 'set on foot' by [Johnson]."

On May 3, 1989, Oxenham signed "Plaintiff's Memorandum in Opposition to Defendant's Plea of Sovereign Immunity and Motion to Strike Punitive Damages". Consistent with the allegations made in the Motion for Judgment, the memorandum asserted that Johnson had "committed the intentional tort of malicious prosecution" and had "acted without regard to the plaintiff's legal rights".

In answers signed May 15, 1989 to interrogatories posed by Johnson, the plaintiff said that Johnson "acted without regard for the plaintiff's constitutional rights." Explaining his allegation that Johnson was the person who initiated the arrest warrant, he said that "[t]he arrest warrant was issued by the magistrate after the defendant complained to the magistrate" and "[t]he defendant's name appears on the warrant as the complainant."

In her grounds of defense, filed May 18, 1989, Johnson repeated her statement that "she did not in any way initiate the arrest warrant . . . and had no knowledge of the obstruction of justice charge". In answer to an interrogatory propounded by Montecalvo whether "anyone from the Office of the Richmond Commonwealth's Attorney or the Richmond Bureau of Police contacted [her] prior to the plaintiff's [criminal] hearing and discussed [her] testimony", Johnson replied that no one had contacted her and that she had testified because she was "under subpoena."

In a pretrial deposition taken by Johnson, Montecalvo testified that he had never held any conversation with Johnson; that it was Barbara Gestwick, Johnson's superior in the department, with whom he had talked about the search; and that he had not felt "harassed" by Johnson and had no reason to believe she bore him any ill will.

The trial court overruled Johnson's demurrer, special pleas, and motion for summary judgment and seated a jury for trial of the malicious-prosecution suit. The evidence adduced at that trial is relevant to the sanctions issue before this Court.

The plaintiff's evidence consisted of Montecalvo's testimony, that of Johnson, and the two warrants admitted as exhibits. Montecalvo testified that Gestwick, in company with Johnson and Davidson, came to his residence on June 8, 1988. Gestwick requested permission to inspect his home. After conferring by telephone with Oxenham, his attorney, Montecalvo told Gestwick that they could not enter his home without a search warrant. The three inspectors left and returned later with two police officers. Officer Stachura served both a search warrant and an arrest warrant, and the inspectors searched the home. At the criminal trial, Montecalvo pled guilty to the charge of operating a home for adults without a license. The charge of interfering with the discharge of official duties was dismissed. Asked on cross-examination if he had been "harassed in any way by Virginia Johnson" and if he had "exchanged any words with her at all", Montecalvo replied, "No, sir; just Ms. Gestwick."

Johnson, called by Montecalvo as an adverse witness, testified that she had accompanied Gestwick and Davidson on the visit to Montecalvo's residence; that "Ms. Gestwick and Mr. Montecalvo had the conversation" about the request to search; that she attended the meeting at the magistrate's office when Gestwick executed the affidavit for the search warrant; that she, Johnson, "had no correspondence or conversation with the magistrate whatsoever"; and that she did not know that an arrest warrant had been
issued until it was served. Explaining why her name appeared on the face of the arrest warrant as the complaining witness, Johnson said she assumed that the magistrate "took my name from the search warrant affidavit because it was first in a series of names."

Montecalvo rested, and Johnson moved to strike his evidence. Commenting for the record, the trial judge said, "I can't comprehend how the jury can come back with a plaintiff's verdict, but let's see what they do." Accordingly, pursuant to the "the court's policy against striking the evidence in order to preserve a full record on appeal", the court took Johnson's motion under advisement.

Johnson then called Gestwick to the stand. Gestwick testified that it was she, and not Johnson, who had talked with Montecalvo; that she had contacted the magistrate and consulted with an assistant Commonwealth's Attorney and an assistant Attorney General about a search warrant; that she had executed the affidavit for the search warrant; and that she had never requested or discussed an arrest warrant and was unaware that one had been issued until Officer Stachura served it. Joi Jeter, the assistant Attorney General mentioned by Gestwick, confirmed her testimony that their conversation concerned only the need for a search warrant and that no mention had been made of an arrest warrant.

At the conclusion of all the evidence, Johnson renewed her motion to strike, and the trial court, reaffirming its previous ruling, submitted the case to the jury. As the court noted for the record, the jury "required just ten minutes to return a verdict for the defendant." Invoking Code § 8.01-271.1, Johnson filed a motion for sanctions against Oxenham and Montecalvo. In a letter opinion, the court approved the motion as to Oxenham. The court rested its decision upon two findings of violations of the duty imposed upon an attorney by the statute: (1) that Oxenham failed to make "reasonable inquiry" to determine whether the civil suit against Johnson was "well-grounded in fact"; and (2) that the suit was brought and maintained "for an improper purpose".

The court explained the reason for its first finding. Although the court believed that, initially, Oxenham "was entitled to rely on the information contained in the warrant . . . as a basis for the preparation and filing of the motion for judgment", the court concluded that Oxenham violated his duty under the statute when he failed to conduct an investigation which would have disclosed that none of the prospective witnesses would testify at trial in support of the facts alleged in the pleading. Specifically, the court found: Plaintiff conducted no investigation nor discovery after the filing of the motion for judgment, notwithstanding being repeatedly told by defense counsel that the defendant was not the source of the issuance of the arrest warrant, that she merely accompanied her supervisor to the magistrate's office . . . . At trial there was no evidence to the contrary. In fact, all the evidence was that defendant had nothing to do with the issuance of either warrant. In explanation of its second finding, the court said:

To file a motion for judgment and do nothing that was reasonably calculated to produce a favorable result leads the court to the inevitable conclusion that the purpose of filing the motion for judgment was not to prevail on the merits but to harass the defendant.

Basing its decision upon these findings, the court entered final judgment confirming the jury's verdict and imposing a monetary sanction upon Oxenham.
I agree with the majority that, contrary to Oxenham's theory, the abuse of discretion standard is the appropriate standard of appellate review in a sanctions case. Oxenham's chief complaint in this Court is that the trial court erred in construing Code § 8.01-271.1 to impose a "continuing duty" upon an attorney or a litigant who signs the initial pleading. As he points out, courts in the federal jurisdiction appear to be deeply divided over the question whether Rule 11 of the Federal Rules of Civil Procedure contemplates a continuing duty.

As I read these opinions, the appearance of diversity is largely a matter of semantics, resulting primarily from the disparate use of the term "continuing duty". I do not disagree with the statement Oxenham quotes from Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 454 (7th Cir. 1987) (finding no continuing duty) that nothing in Rule 11 "requires a lawyer to . . . update his pleading in light of any new findings." Our statute imposes no "continuing duty" as the term is used in that sense; nothing in Code § 8.01-271.1 requires an attorney to "update" the initial pleading. That is not to say, however, that a lawyer has no duty extending beyond the filing of the initial pleading.

Although his duty to list his address applies only to "the first pleading filed", his duty to make a "reasonable inquiry" does not stop at that point. In the express language of the statute, that duty continues to the signing and filing of "[e]very pleading, written motion, and other paper" and to the making of "[a]n oral motion", to the end that the lawyer certify, advisedly and creditably, that each such pleading, paper, or motion is "well-grounded in fact". See Thomas, 836 F.2d at 875 ("Rule 11 . . . requires that each filing reflect a reasonable inquiry.").

Even if Oxenham's examination of the arrest warrant bearing Johnson's name as the complainant constituted an inquiry sufficiently reasonable to avoid sanctions for the signing and filing of the motion for judgment, the record of the proceedings conducted thereafter reflects no such inquiry before the signing of the several "papers" Oxenham drafted and filed with the court. During the course of those proceedings, Oxenham was advised, verbally and in writing, unequivocally and repeatedly, that Johnson was not the person who obtained the search warrant and instigated the criminal prosecution. While, as the majority says, he was not required to accept as truth what opposing counsel, Gestwick, and Johnson had told him, the statute required him, before each new filing, to conduct a reasonable inquiry to determine whether the facts basic to the cause of action asserted were well-grounded. Yet, failing for six months awaiting trial to depose, or simply to interview, any of the several persons present in the magistrate's office when the arrest warrant was issued, Oxenham persisted in signing and filing

34 It is difficult to see, however, how any inference of malice, one of the essential elements of a malicious prosecution suit, could be gleaned from the face of the arrest warrant, especially when Oxenham knew, or should have learned, that his own client did not believe that Johnson bore him any ill will.

The majority holds that Oxenham was relieved of his duty to conduct a reasonable inquiry on the issue of legal malice by our decision in Giant of Virginia, Inc. v. Pigg, 207 Va. 679, 685, 152 S.E.2d 271, 276 (1967), where we said that malice "may be inferred from the want of probable cause." Giant went on to say that the existence of malice must be determined under "all the circumstances of the case. The circumstances must warrant the inference . . . ." Id. (citations omitted) (emphasis added). Oxenham conducted no investigation into "the circumstances of the case" and, hence, the inference of malice is not warranted.
papers for the record, reaffirming allegations made in the original pleading. I cannot endorse the majority's conclusion that this constituted a "reasonable inquiry".

Because it was not clearly erroneous, we should uphold the trial court's first finding of fact. The question then occurs whether the record supports the court's finding that Oxenham filed and persisted in litigating the malicious-prosecution suit "for an improper purpose", that is, "not to prevail on the merits but to harass the defendant."

The majority overrules that finding because the record "contains no evidence of threats or expressions of ill will on Oxenham's part." However, ill will is not the only reason a person might have to harass a defendant. It is an unfortunate fact of life that many defendants, wanting to escape the inherently vexatious nature of litigation, will settle frivolous claims for their "nuisance value", i.e., an amount approximating the costs necessary to defend against the claim. Although the filing and litigation of such claims once may have been acceptable practice, that practice now is sanctionable under Code § 8.01-271.1.

The statute authorizes courts to impose sanctions whenever a "pleading, motion, or other paper" is "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." "If a complaint is not filed to vindicate rights in court, its purpose must be improper." In re Kunstler, 914 F.2d 505, 518 (4th Cir. 1990). As the trial court said, the only proper purpose of filing papers and making motions in court "would be to have the trier of fact vindicate [the party's] position; to support his assertion of rights. How could any reasonable person assume to accomplish this purpose without some investigation into the facts?"

Applying the same standard of review, this Court should affirm the trial court's second finding of fact.

Finally, Oxenham contends that "[e]ven if sanctions were appropriate, the trial judge failed to consider alternatives to monetary sanctions." Pursuing the point, he says that "the public rebuke which he has received [on account of news reports] is more than adequate to deter him from such conduct in the future". And, he continues, even if monetary sanctions were justified, they were excessive in this case. I find no merit in these arguments.

Manifestly, the public policy goal of sanctions statutes is to expedite final adjudication of legitimate causes of actions by eliminating frivolous litigation from the overburdened dockets of nisi prius and appellate courts. The secondary goal, rooted in equity, is to compensate victims of frivolous claims and spurious defenses for the time, trouble, trauma, and expense suffered on account of such vexatious practices. These goals can be achieved only by the imposition of sanctions sufficient to deter such practices. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).

Code § 8.01-271.1 provides that, in the event of a "violation of this rule, the court . . . shall impose . . . an appropriate sanction, which may include . . . the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee." Thus, our statute vests a trial court with broad discretion; what kind and what quantity of sanctions may be appropriate depends upon the circumstances in each case.
The trial judge made a balanced analysis of the sanctions issue. With measured restraint, he remarked that sanctions are "not favored by this court [and] are never to be imposed lightly." Although the evidence showed that $10,383 was a "reasonable estimate of the economic losses caused by the filing and prosecution of this frivolous suit", the trial judge, noting that Oxenham "enjoys a good reputation for professional competence" and that he had not "previously engaged in practices such as found here", concluded that "a sanction of $4,500 would meet the purposes of the law in serving as a deterrent to [Oxenham] and others from filing frivolous suits."

Considering the facts and circumstances disclosed by the record of the pretrial proceedings and confirmed by the evidence at trial, and applying the standard of review applicable here, I would hold that the trial court did not abuse its discretion in imposing this sanction upon Oxenham and affirm the judgment.35

35 While I concur fully with the majority's determination that the punitive-damage claim was frivolous from its inception, I can find no precedent for the refusal to remand this case for further proceedings on that issue. Although the majority's concern for the "unnecessary burdens upon Johnson and the trial court" is commendable, I believe any additional burdens would be gladly borne by both. Furthermore, even if the trial court found the task of apportioning attorney's fees between frivolous and non-frivolous claims to be unworkable, a public censure or other "appropriate sanction" could be imposed to "give effect to the [statute's] central goal of deterrence." Cooter & Gell, U.S. at , 110 S.Ct. at 2454.
The Supreme Court of Virginia has held a lawfirm may be sanctioned for acts of its employees. In the leading case, the trial court sanctioned a lawfirm arising from a paper signed by one member. *Cardinal Holding Co. v. Deal*, 258 Va. 623, 522 S.E.2d 614 (1999). Noting that the Virginia Code provisions now set forth in Code § 1-230 direct that the word "'person' shall include any individual, corporation, . . . or other legal entity," the Court found "no manifest intention in the sanctions statute to limit the application of the word 'person' to individuals, thereby excluding corporations" such as the lawfirm P.C. before it. As a separate rationale the Court noted that the sanctions statute does not manifest an intention to abrogate the general rule that a principal is liable for its agent's acts that are performed within the scope of the agency. It may be relevant in that regard whether the "the corporate employer was shown as counsel of record" for the client, as indicated on pleadings. Thus, where the individual is "acting for his employer . . . and within the scope of that employment" his or her act is "therefore the act of the law firm. See Harris v. McKay, 138 Va. 448, 457, 122 S.E. 137, 140 (1924)("[t]he act of the agent is the act of the principal") The Supreme Court concluded in *Cardinal Holding Co.*:

Thus, the firm itself, a person under the provisions of [Code § 1-230] and, as such, covered by the provisions of Code § 8.01-271.1, effectively signed the pleadings. Hence, we conclude that the court did not err in awarding sanctions against the law firm.
JUSTICE KEENAN delivered the opinion of the Court:

[In a complex commercial context the Supreme Court shows us that the task is to go count by count through the pleading, and see whether it is worse then a loser; it must be objectively unreasonable to think it viable in order to merit sanctions:]

. . . . Nedrich contends that the trial court abused its discretion in ordering him to pay sanctions pursuant to Code § 8.01-271.1. . . In considering whether Nedrich's conduct violated Code § 8.01-271.1, we apply an objective standard of reasonableness. County of Prince William v. Rau, 239 Va. 616, 620, 391 S.E.2d 290, 292(1990). Therefore, we need not decide whether the motion for judgment actually was warranted by existing law. See id. Rather, we must determine whether, after reasonable inquiry, Nedrich could have formed a reasonable belief that the motion for judgment was warranted by existing law. See id. In reviewing the trial court's decision, we apply an abuse-of-discretion standard. Oxenham v. Johnson, 241 Va. 281, 287, 402 S.E.2d 1, 4 (1991). We shall examine the legal theories that Nedrich relied upon in accordance with these principles.

A. AWARD TO LES JONES, DOROTHY JONES, AND DULLES

In earlier paragraphs incorporated by reference into Count I, Weber alleged that the Joneses used Dulles and Limited III as financial shells for their personal benefit and that Dulles and Limited III were "designed and executed [by the Joneses] with the purpose and effect of defrauding [their] creditors . . . ." Although inartfully pleaded, Weber alleged facts from which he could argue that the doctrine of corporate separateness may be ignored here, because the Joneses so organized and controlled Dulles and Limited III that each was a mere agent of the other. Lewis Trucking Corp. v. Commonwealth, 207 Va. 23, 32, 147 S.E.2d 747, 753-54 (1966). Therefore, we hold that Count I was objectively reasonable.

Count II alleged that the Joneses converted Dulles' corporate funds to their own use. However, when read as a whole, Count II does not appear to set forth a common law conversion claim. Rather, it alleges that the Joneses, who were the sole directors of Dulles, improperly converted funds and other assets of Dulles to their personal benefit in violation of their duties as directors of the corporation.

Although poorly drafted, Count II essentially asked the trial court to pierce the corporate veil and hold the Joneses personally liable for Dulles' debt to Weber. This Court has recognized the remedy of piercing the corporate veil as an exception to stockholder immunity; it is permitted when necessary to secure justice. See Cheatle v. Rudd's Swimming Pool Supply Co., 234 Va. 207, 212, 360 S.E.2d 828, 831 (1987) . . . . Since Count II appears to be grounded on that principle, we conclude that it was objectively reasonable.

. . . . Count XI alleges that Les Jones, Dorothy Jones, Dulles, and unnamed others conspired to injure Weber and other creditors of Dulles by preventing them from obtaining the monies lawfully owed them. Count XI also asked for treble damages under Code §§ 18.2-499 to -500.
In *Bowman v. State Bank*, 229 Va. 534, 541, 331 S.E.2d 797, 801 (1985), this Court stated that "there must be two persons to comprise a conspiracy, and a corporation, like an individual, cannot conspire with itself." In *Bowman*, we treated the directors of a corporation as a group, acting for the corporation and not acting individually. Id. at 541, 331 S.E.2d at 802. However, unlike the facts presented here, the dispute in *Bowman* involved a formal vote of a corporation's board of directors. Further, in *Bowman*, there was no allegation that the corporation was a mere financial shell operated for the personal benefit of those directors. Therefore, based on these factual differences, we conclude that Nedrich could have made a good faith argument distinguishing *Bowman* to the effect that, if the trial court pierced the corporate veil and held the Joneses personally liable for their actions, the Joneses would be individually accountable as conspirators.

Code § 18.2-500 provides for an award of treble damages against those who conspire to injure others in their business in violation of Code § 18.2-499. This Court has held that civil damages under Code § 18.2-500 are appropriate in suits for conspiracy to procure a breach of contract. *Chaves v. Johnson*, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985). Based on the facts alleged here, we conclude that, upon reasonable inquiry, Nedrich could have formed a reasonable belief that his request for treble damages was warranted by existing law.

Finally, based on all the facts alleged in the motion for judgment against the Joneses and Dulles, we hold that, after reasonable inquiry, Nedrich reasonably could have concluded that existing law warranted a claim for punitive damages against these three defendants. Having held that all the above counts were objectively reasonable, we reverse the trial court's award of sanctions in favor of Les Jones, Dorothy Jones, and Dulles.

C. AND D. AWARD TO FIRST SOURCE; AWARD TO JET TECH AND DAHLBERG

In Count VI, Weber named First Source, Jet Tech, and Dahlberg as defendants, based on their alleged involvement in Les Jones's plan to sell Dulles' Lear jet. Weber asked the court to impose a constructive trust on the jet, or proceeds from its sale, in order to satisfy any judgment he obtained against Dulles or Les Jones.

Although Weber alleges that Jones was pursuing this scheme with the "aid and assistance" of First Source, Jet Tech, and Dahlberg, he does not assert that there was a conversion of the jet. Since under the facts as pleaded, Jet Tech, Dahlberg, and First Source are innocent third parties, who have not received the jet or any proceeds from the jet, there is no basis in fact to support a cause of action for conversion or constructive fraud against these defendants. Therefore, Count VI was not objectively reasonable and we hold that the trial court did not abuse its discretion in awarding [$2,500 in] sanctions.

E. AWARD TO TRAFALGAR

In Count IX, Weber asserted that Trafalgar rendered Jones conscious aid and assistance in hindering, delaying, and defrauding Dulles' creditors. Weber alleged that Trafalgar knew that Les Jones was using Dulles' funds to make his rent payments. Weber also alleged that Les Jones used over $100,000 of Dulles' funds to improve the
leased dwelling, which was owned by Trafalgar. However, Weber does not state to whom these monies were paid.

While poorly pleaded and demurrable, Count IX does set forth some elements of a conspiracy claim, including an allegation that Trafalgar knowingly assisted Les Jones in an unlawful diversion of Dulles' assets. See Glass v. Glass, 228 Va. 39, 47, 321 S.E.2d 69, 74 (1984). Further, upon a proper allegation of conspiracy, Weber validly could seek a constructive trust on the Trafalgar property. See Greenspan v. Osheroff, 232 Va. at 399-400, 351 S.E.2d at 36-37. For these reasons, we hold that Count IX was objectively reasonable and that the trial court abused its discretion in awarding sanctions in favor of Trafalgar.

**F. AWARD TO RIGGS NATIONAL BANK**

The final sanctions award provided $3,500 to Riggs National Bank. In Count X, Weber sought recovery of the alleged amount of his bonus from Riggs under a theory of implied contract. Weber asserted that Riggs, or entities it controlled, had received the benefit of the lease agreement with GSA.

We hold that this claim was not objectively reasonable. One may not recover under a theory of implied contract simply by showing a benefit to the defendant, without adducing other facts to raise an implication that the defendant promised to pay the plaintiff for such benefit. Mullins v. Mingo Lime & Lumber Co., 176 Va. 44, 51, 10 S.E.2d 492, 495 (1940). Here, Weber alleged no facts indicating that Riggs promised to pay him, or that Riggs even knew of his efforts in leasing the property.

For these reasons, we will affirm in part, and reverse in part, the judgment of the trial court and enter final judgment in accordance with our holdings above.
C. Good Faith Arguments to Change Existing Law

JORDAN v. CLAY'S REST HOME
253 Va. 185, 483 S.E.2d 203 (1997)

[In this decision the Court rejected application in Virginia wrongful employment discharge cases of the burden-shifting procedures used in federal and many state courts, under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Having rejected the plaintiff’s theory completely, it considered whether commencing the action on that basis had been sanctionable. The Court reiterated that in considering whether an attorney's conduct violates the foregoing provisions of §8.01-271.1, "we apply an objective standard of reasonableness" in order to determine whether the trial court abused its discretion in imposing sanctions. Nedrich v. Jones, 245 Va. 465, 471-72, 429 S.E.2d 201, 204 (1993). Thus, "we must determine whether, after reasonable inquiry, the attorney could have formed a belief that the motion for judgment was warranted by a good faith argument for modification of existing law." The Court held that the trial court abused its discretion in imposing sanctions because]

Our research has disclosed that appellate courts in at least 20 states have adopted the McDonnell Douglas framework. It has been discussed in employment-law treatises. One author labels it a "popular paradigm." 2 Henry H. Perritt, Jr., Employee Dismissal Law and Practice § 7.22, at 98 (3d ed. 1992). Thus, we believe the plaintiff and her attorney could have formed a belief, after reasonable inquiry, that the motion for judgment was warranted by a good faith argument for modification of existing law.
D. Nonsuits, the "21-Day Rule" and Sanctions

WILLIAMSBURG PEKING CORP. v. XIANCHIN KONG
270 Va. 350, 619 S.E.2d 100 (2005)

[In a case where the plaintiff alleged that the defendant oriental restaurant improperly terminated her employment as a waitress, defendant moved for sanctions because of plaintiff's "inordinately voluminous" and "redundant" filings. When plaintiff, who had been proceeding pro se, was confronted with the motion for sanctions, she retained counsel and moved for a nonsuit. Over defendant's objections, the trial court granted the nonsuit and refused to consider the pending motion for sanctions, concluding that it no longer had jurisdiction over the motion for sanctions.]

We perceive the issue in this appeal to be two-fold:

First, whether the nonsuit order is subject to the provisions of Rule 1:1 and, second, whether the nonsuit order precluded the trial court from considering the pending motion for sanctions. In the present case, the trial court had scheduled Peking's motion for sanctions for a hearing on July 9, 2004. Immediately upon the trial court's convening of the July 9 hearing, Kong moved for a nonsuit. The trial court granted the motion, and, when counsel for Peking stated that he "assumed that the motion for sanctions remained for consideration," the trial court ruled that it no longer had jurisdiction over the motion for sanctions. The order granting the nonsuit was entered on the same day.

We first consider whether the nonsuit order is subject to the provisions of Rule 1:1. This inquiry is answered by our recent decision in James v. James, 263 Va. 474, 562 S.E.2d 133 (2002). In James, we noted that a nonsuit order "is sufficiently imbued with the attributes of finality to satisfy the requirements of Rule 1:1." Therefore, we opined that, "from its very nature, an order granting a nonsuit should be subject to the provisions of Rule 1:1." Id. at 481, 562 S.E.2d at 137. Thus, the nonsuit order in the present case, like all final judgments, remained under the control and jurisdiction of the trial court for 21 days after the date of entry.

We next consider whether the nonsuit order precluded the trial court from considering the previously pending motion for sanctions. Code § 8.01-380 gives a plaintiff an absolute right to one nonsuit. Upon the entry of a nonsuit order, "the case becomes 'concluded as to all claims and parties,' and 'nothing remains to be done.' " Id., quoting Dalloul v. Agbey, 255 Va. 511, 515, 499 S.E.2d 279, 282 (1998).

In the present case, the trial court ruled that, because the nonsuit order was final as to all claims and parties, the court was without jurisdiction to rule upon the pending motion for sanctions. We do not agree.

[Rule 1:1 provides, in pertinent part, that "all final judgments, orders, and decrees . . . shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer."
A motion for sanctions is an application made to a court for the imposition of a penalty for alleged misconduct of a party or lawyer or for alleged abuse of the system. The motion has no bearing on the facts giving rise to a right to seek judicial remedy. Thus, the entry of a nonsuit order does not conclude a case as to any pending motion for sanctions.

Additionally, the trial court's ruling undermines the public policy expressed by the General Assembly in Code § 8.01-271.1. In enacting that Code section, the General Assembly sought to prevent a litigant from filing pleadings and other papers that are "interposed for any improper purpose, such as to harass or to cause . . . needless increase in the cost of litigation." Manifestly, the General Assembly never intended that a nonsuit order could exonerate a litigant's misconduct. We agree with Peking's assertion that, "if, upon grant of a nonsuit, jurisdiction over pending sanctions motions were to evaporate, litigants would be left to abuse of process without remedy, effectively nullifying the purposes of the statute."

We conclude, therefore, that where, as here, a motion for sanctions pursuant to Code § 8.01-271.1 is pending when a plaintiff moves for a first nonsuit, the trial court is empowered to consider the sanctions motion either before the entry of the nonsuit order or within 21 days after the entry of the nonsuit order. In failing to consider the pending motion for sanctions in the present case, the trial court erred. Therefore, we will reverse the trial court's ruling, set aside and vacate the nonsuit order, and remand the case to the trial court with directions that it consider and decide the motion for sanctions and thereafter enter an order granting Kong's motion for a nonsuit.

Reversed and remanded.

The expert witness had to be tethered to the witness stand because of the "hot air" effect.
E. Narrow Tailoring Requirement for Sanctions

In 2007 the Supreme Court reversed a sanction imposed by the Court of Appeals of Virginia because it was not narrowly tailored to redress the particular conduct warranting punishment. *Switzer v. Switzer*, 273 Va. 326, 641 S.E.2d 80 (2007). In a protracted custody dispute involving mental health issues, which led to multiple proceedings, the Court began its analysis with the established proposition that the imposition of a sanction will not be reversed on appeal unless the court abused its discretion in its decision to sanction the litigant, or in the court’s choice of the particular sanction employed. And in the case under review, the record was undisputed that plaintiff previously had filed frivolous appeals in the circuit court and in the Court of Appeals. The Supreme Court stated that a major purpose of the sanction remedy is to spare victims of frivolous claims the time, effort, and expense suffered as a result of such vexatious litigation. Thus, the *imposition of a particular sanction must be sufficient to deter such practices when they have occurred*. In a case where a prior monetary award had not been paid by the sanctioned party, imposition of an additional monetary sanction against plaintiff was unlikely to have had any effect. However, the Court noted that in dealing with litigants who have filed repeated frivolous appeals, although the remedies imposed often differ, appellate courts generally are in agreement that courts may not completely prohibit future pro se filings by litigants who have filed repeated frivolous cases or motions. The Supreme Court then held that the Court of Appeals' dismissal of pending appeals because plaintiff failed to pay a monetary sanction imposed in another case was an *unduly severe sanction and was not narrowly tailored to correct the problem presented*. The terms of that order barred all future appeals, regardless of their subject matter or merit, until the previous monetary sanction was paid, effectively closing the doors of the Court of Appeals to plaintiff for any appeal involving any subject. This the Supreme Court held was an abuse of the Court of Appeals’ discretion. These were appeals of right under the provisions of Code § 17.1-405. Thus, dismissal of these appeals as a sanction denied plaintiff his statutory right to have his appeals considered by a panel of the Court of Appeals, pursuant to Code §17.1-410(A). Because the Court of Appeals abused its discretion in dismissing the appeals, its judgment was reversed.
F. Pushing, Shoving, Contempt of Court and the "Inherent Power" of a Trial Judge to Control the Courtroom.

In a courtroom, as the jury was marching out for a break in a long trial, an 84-year-old partner in a well-known firm (which recently merged into a national firm) used his arm to shove opposing counsel who had implied that the shover's partner had been less than candid with the Court. A courtroom bailiff tattled to the judge about the pushing incident. Three months and two hearings later, the attorney was: (1) held in contempt, (2) fined $250 for that contempt (because the Court had warned all counsel – prior to the pushing incident – not to behave like school kids), (3) the attorney and his entire lawfirm were removed as counsel in the large personal injury case that was on trial (preventing a possible huge fee after 4 years of work), and (4) he was sanctioned $53,000, representing the opposing party's attorneys' fees. The Supreme Court vacated #4 since no rule or sanction statute authorized it in this context, but affirmed the other sanctions since contempt and removal of an attorney from practice in any court is a judge's option. The Supreme Court offered an extensive review of sanction policy, and the law of contempt in particular, in the context of sanctions imposed when a lawyer was warned to avoid physical contact with adversary counsel and thereafter apparently elbowed opposing counsel. It proceeds from a basic premise that the courts of this Commonwealth have the inherent power to supervise the conduct of attorneys practicing before them and to discipline any attorney who engages in misconduct. A court's inherent power to discipline an attorney practicing before it includes the power not only to remove an attorney of record in a case, but also in a proper case to suspend or annul the license of an attorney practicing in the particular court. However, prior case law addressing a trial court's inherent power to discipline a litigant by assessing attorney's fees rejected use of the trial court's inherent power to award attorney's fees as a means of disciplining the offending litigant because the award was at odds with the "American rule" and the Commonwealth's strong adherence to it. Under that rule, ordinarily, attorneys' fees are not recoverable by a prevailing litigant in the absence of a specific contractual or statutory provision to the contrary. The Supreme Court stated that a court's inherent power to take disciplinary actions in response to misconduct is constrained by established legal principles. In Nusbaum v. Berlin, 273 Va. 385, 641 S.E.2d 494 (2007), the monetary sanction assessed against the attorney was not in accord with the purpose of a trial court's inherent power to discipline an attorney, which is not to punish the attorney, but to protect the public. In the absence of authority granted by a statute, such as Code § 8.01-271.1, or a rule of court, such as Rule 4:12, a trial court's inherent power to supervise the conduct of attorneys practicing before it and to discipline an attorney who engages in misconduct does not include the power to impose as a sanction an award of attorneys' fees and costs to the opposing parties. Thus the circuit court erred, as a matter of law, by concluding that it had the inherent power to impose the monetary sanction against the attorney as a means of disciplining him for his misconduct. The conviction of the attorney for contempt of court in violation of Code § 18.2-456(1), which permits a court or judge to punish contempts summarily in cases involving "[m]isbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice," was affirmed because a bailiff's testimony about a pushing and shoving incident was sufficient basis for the trial court's finding.
“One more outburst like that counsellor, and I’ll hold you in contempt and have my bailiff paste you one in the kisser.”
G. Motions for Recusal and Accusations Against a Judge.

Hard-boiled litigators from DC get pro hac vice admission to handle the defense of a case by People for the Ethical Treatment of Animals against their client, a Circus Owner, for making Dumbo the Elephant stand on a pedestal his ankles were never intended to use for support.

**Discovery Disputes and a Draft "Rule to Show Cause."** Plaintiff's counsel, a colorful character in his own right, wants to hold defense counsel in contempt for disobedience to discovery orders the judge has entered. He appears in the judge's chambers one day and leaves with the law clerk a draft "Rule to Show Cause" bringing on a hearing to determine whether defense counsel should be held in contempt of court and fined for disobedience to the discovery rulings.

The draft "Rule to Show Cause" was never served on the defense counsel, plaintiff's attorney apparently planning to do so once the judge had signed it.

**The Ex Parte Talk.** Two weeks go by and the Rule to Show Cause is not issued. So one day plaintiff's counsel is appearing before the judge on another case, and after that conference is done, he steps up to the bench and has a whispered ("ex parte") conversation with in which he reminds the judge about the need to issue the Rule to Show Cause to nip the defendants' bad behavior in the bud. The next business day the Judge signs the order, and plaintiff then serves it.

"**Motion to Recuse.**" Defense counsel learn that the draft Rule to Show Cause was left in chambers, and believe that it was secret submission, accepted by the judge but never filed in the records, and that – coupled with the admitted ex parte conversation – leads them to file a "Motion to Recuse" the Judge, in which they accuse him of (1) ethical violations in having ex parte communications with one litigant in the absence of the other, and (2) accuse him of having "actual bias" against the defendants.

It turns out that the draft Rule to Show Cause was filed with the clerk of court by the Judge's staff shortly after it was left in Chambers. This was in the public record. The draft paper was never served on the defense, but that's not the Judge's responsibility – plaintiff's counsel was supposed to do that. It also turns out that the Judicial Canons of Conduct allow ex parte communications if the only topic is the schedule of future proceedings, nothing on the merits is discussed, and the adversary is promptly notified.

**Sanctions.** Based on this record the trial judge sanctioned 5 attorneys for the defense $40,000 (jointly) and revoked the pro hac vice admission of a couple of the DC attorneys who should have known better. Local counsel in Northern Virginia, said the judge, could have told the DC attorneys that it was the practice of the Circuit to issue Rules to Show Cause ex parte, just to schedule motions. A non-published trial court level opinion explaining that fact is available on Lexis (but not WestLaw – I checked) and the Clerk of Court would have told the attorneys about the normalcy of the practice insofar as that court is concerned, if counsel had only dropped by or called on the telephone.

The second paragraph of Code § 8.01-271.1 sets forth the three certifications made by an attorney upon signing a pleading: that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after
reasonable inquiry, it is well grounded in fact and is warranted by existing law or a
good faith argument for the extension, modification, or reversal of existing law, and (iii)
it is not interposed for any improper purpose, such as to harass or to cause unnecessary
delay or needless increase in the cost of litigation. A court’s authority to award
sanctions under Code § 8.01-271.1 is explicitly stated in the statute: If a pleading,
motion, or other paper is signed or made in violation of this rule, the court, upon motion
or upon its own initiative, shall impose upon the person who signed the paper or made
the motion, a represented party, or both, an appropriate sanction, which may include an
order to pay to the other party or parties the amount of the reasonable expenses incurred
because of the filing of the pleading, motion, or other paper or making of the motion,
including a reasonable attorney’s fee. In a recent case, these provisions were applied to
approve sanctions imposed on attorneys involved in a challenge to the judge presiding

The Supreme Court has repeatedly noted that the three enumerated certifications
contained in the second paragraph of Code § 8.01-271.1 are stated in the conjunctive.
Thus, under the terms of the statute, an attorney makes all three representations when
signing the described documents. With regard to acts of attorneys, the manifest purpose
of the statute is to hold attorneys, who are officers of the court, responsible for specified
failures involving the integrity of the documents that they have signed. Because an
attorney certifies compliance with all three enumerated clauses of the second paragraph
of Code § 8.01-271.1 when signing a motion, pleading, or paper, the attorney’s failure
to comply with any one of these statutory requirements invokes the sanctions provisions
of the statute. Under the plain language of the statute, a court “shall impose” an
appropriate sanction when the record shows that a pleading, motion, or other paper is
signed or made in violation of this rule.

Since an “objective standard of reasonableness” is employed in evaluating the
written representations the attorneys made in the subject motions, the test focuses on
whether after reasonable inquiry, counsel could have formed a reasonable belief that the
pleadings were 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. In a recent case the sanctioned attorneys used language that
directly accused the trial judge unethical conduct. The Supreme Court in *Williams &
Connolly* also stated that the fact that attorneys are seeking the recusal of the trial judge does not permit them to
use language that was derisive in character. Thus where a motion to recuse alleged that
the judge “ignor[ed] basic tenets of contempt law,” “create[d] an appearance, at the very
least, that [he] will ignore the law in order to give a strategic advantage to PETA,” and
“ignored his ethical responsibilities . . . [and] acted directly counter to them,” the
Supreme Court held that this record demonstrated that the sanctioned attorneys’
motions were filed for an improper purpose and, thus, violated clause (iii) of the second
paragraph of Code § 8.01-271.1. Contemptuous language and distorted representations
in a pleading never serve a proper purpose and inherently render that pleading as one
“interposed for [an] improper purpose,” within the meaning of clause (iii) of the second paragraph of Code § 8.01-271.1. Such language and representations are wholly gratuitous and serve only to deride the court in an apparent effort to provoke a desired response. It found that clause (iii) of the second paragraph of Code § 8.01-271.1 is designed to ensure dignity and decorum in the judicial process. This provision deters abuse of the legal process and fosters and promotes public confidence and respect for the rule of law. Clause (iii) in the second paragraph of the statute also is intended to prevent use of intemperate language that serves no objective purpose other than to ridicule or deride a court. Because the language found in the sanctioned attorneys’ motion clearly falls within this proscription, their motions were filed with an “improper purpose,” within the meaning of clause (iii).
H. "Derision" of the Courts as an Emerging Theme

Landmark Ruling Against Landlords/Innkeepers. A motel guest is mugged in the parking lot, and sues the motel owner, who allegedly had notice that a spate of assaults had been taking place. The trial court applied black letter law and threw out the case because there is no duty on property owners in Virginia to warn invitees about possible criminal acts of third-persons. Dancing around 200 years of precedent, the Supreme Court issued a landmark decision holding that there is a cause of action available where the landlord has a "special relationship" with an invitee because it is on notice of a series of attacks arguably creating an imminent danger to invitees.

An Emotional Motion for Reargument. Counsel for the landlord (owner of the motel) filed a motion for reargument in the Supreme Court along the theme of "you can't really have meant this; there are drastic consequences, and no basis in Virginia law for this ridiculous new rule." The attorney, an experienced and well-respected litigator, former chair of various Bar sections and disciplinary bodies:

made numerous assertions in the petition for rehearing regarding this Court's opinion. [He] described this Court's opinion as "irrational and discriminatory" and "irrational at its core." He wrote that the Court's opinion makes "an incredible assertion" and "mischaracterizes its prior case law." [He] stated: "George Orwell's fertile imagination could not supply a clearer distortion of the plain meaning of language to reach such an absurd result." [This attorney] argued in the petition that this Court's opinion "demonstrates graphically the absence of logic and common sense."

[The attorney] wrote in boldface type that "Ryan Taboada may be the unfortunate victim of a crazed criminal assailant who emerged from the dark to attack him. But [this motel owner] will be the unfortunate victim of a dark and ill-conceived jurisprudence." [He] also included the following statement in the petition: "[I]f you attack the King, kill the King; otherwise, the King will kill you."

The Supreme Court sua sponte entered a rule to show cause that directed the attorney who wrote these words to appear in person before the Court and show cause sanctions should not be imposed against him pursuant to Code §8.01-271.1.

The Court ultimately held that the sanction statute penalizes papers submitted for "an improper purpose" and that the vituperative material submitted on the motion for reconsideration was:

interposed the petition for rehearing for an improper purpose which was to ridicule and deride the Court by the repeated use of intemperate language to express his displeasure with the Court's opinion. His use of intemperate phrases [quoted above] serves no objective purpose that would assist this Court in its determination whether to grant the petition for rehearing that he had filed. **Ridicule and derision** of the Court in this context is an improper purpose within the meaning of clause (iii) in Code §8.01-271.1.

Penalty. Because of "the very serious nature of his conduct, and the potential impact of that conduct upon the administration of justice," the Court felt that it must
impose "a meaningful sanction" so it suspended the attorney's right to appear before it for one year, and fined him $1,000.

**Client's Application.** The client (motel owner) was permitted to file a politely worded substitute motion for reconsideration (even though the 10 days for seeking reargument of the February decision was long gone) but ultimately the Court refused to change the landmark ruling on the merits. As the discussion above indicates, intemperate language that can be construed as belittling or disparaging the courts may be subject to sanctions. In one recent case, a Virginia-licensed attorney was found by the Supreme Court to have violated Code § 8.01-271.1 by filing a petition for rehearing on behalf of a client, using intemperate language critical of the Court's prior opinion issued in the underlying appeal. Since, measured under an objective standard of reasonableness, the ranting language used in the petition did not assist the Court in determining whether to grant or deny the petition, the Court concluded that the attorney interposed the petition for an improper purpose under the statute, to ridicule and deride the Court, and an appropriate sanction was entered against him. *Taboada v. Daly Seven, Inc.*, 272 Va. 211, 636 S.E.2d 889 (2007). The client was granted leave to file another petition for rehearing.

Thus in Virginia today, use of intemperate phrases is deemed to serve no objective purpose that would assist the Court in its determinations. Rather, ridicule and derision of the Court in such contexts is viewed as an improper purpose within the meaning of Code § 8.01-271.1(iii). This conclusion is in accord with the provision in Code § 8.01-271.1 prohibiting an attorney or party from interposing a pleading, motion, or other paper for any improper purpose because that provision is designed to ensure dignity and decorum in the judicial process. This provision deters abuse of the legal process and fosters and promotes public confidence and respect for the rule of law. Thus the Supreme Court commented that sanctions can be used to protect courts against those who would abuse the judicial process.
I. Revocation of Pro Hac Vice Admission.

In Virginia, the admission of attorneys on a pro hac vice basis is governed by Rule 1A:4, which authorizes courts to permit counsel who are not licensed or admitted to practice law in this jurisdiction, but are licensed to practice law in another state or in the District of Columbia, to appear as counsel in a particular case. An attorney who is not licensed or admitted to practice law in the Commonwealth does not have a right to appear as counsel but may request permission to do so on a limited and temporary basis related to the conduct of a particular case. Such a pro hac vice admission is considered a privilege that is solely permissive in nature.

In its recent sanction decision in *Williams & Connolly*, the Supreme Court held that Virginia courts have broad discretion in determining whether to revoke an attorney’s pro hac vice admission. A court may revoke the pro hac vice admission of counsel at any stage of court proceedings when it appears that counsel’s conduct adversely impacts the administration of justice. In deciding to revoke the pro hac vice admission of one of the attorneys in the case before the Supreme Court, the circuit court had explained that conduct of the defense in this case reflected a very inadequate understanding of Virginia’s ethical requirements, much less an understanding of the level of professionalism that our Chief Justices, the current one and the previous one, as well as many others in the State have worked so hard to instill. The circuit court’s conclusion that the sanctioned attorneys’ pleadings did not reflect the level of professionalism expected of attorneys in Virginia demonstrates that the court carefully considered the issue before revoking the out-of-state attorney's pro hac vice admission. In the case heard by the Supreme Court, it found that all the sanctioned attorneys were equally responsible for the pleadings they filed. Therefore the circuit court was held to be acting within its discretion in imposing sanctions on attorneys for pleadings they have filed in violation of Code § 8.01-271.1, and the circuit court does not abuse its discretion in revoking the pro hac vice admission of one of the attorneys who filed those pleadings.

However, in *Petrosinelli v. People for the Ethical Treatment of Animals, Inc.*, 273 Va. 700, 643 S.E.2d 151 (2007) the Court made it very clear that in imposing a sanction such as revocation of pro hac vice status, the trial court must have issued express directions that were clearly violated, particularly where contempt is the basis for the punitive action. Because the judicial contempt power is a potent weapon, jurisprudence has long provided that contempt lies for disobedience of what is decreed, not for what may be decreed. Before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied. Thus, there must be an express command or prohibition which has been violated in order for a proceeding in contempt to lie. In *Petrosinelli*, because the order finding the attorney to be in contempt did not identify which order or orders of the trial court were the source of the contempt, on appeal the language of the three orders refusing to consolidate discovery was reviewed to determine whether the trial court abused its discretion in adjudging the attorney to be in contempt. Each of the three orders was short, with the pertinent adjudication of the court stated in one sentence. In reviewing the three orders, the Supreme Court found no express prohibition on the issuance of a subpoena to the witness at issue by the
principal or by any other party is found. The three orders did not expressly command or prohibit the attorney who issued the subpoena from acting to depose a witness, and the attorney issued the subpoena only in the second case involving the principal. Since a court generally speaks through its written orders, and it is presumed that the written orders accurately reflect what transpired during a court’s proceedings. Thus in the case reviewed by the Supreme Court, if there was any prohibition upon the foreign attorney against subpoenaing the aforementioned witness for a deposition in the second case, such a duty was, at best, an implication from general remarks of the court made in prior hearings. The foreign attorney was never explicitly prohibited by a court order from issuing that subpoena. Yet, mere implication of a duty cannot form the basis of a contempt judgment.
Chapter 15

Finality and Relitigation

A. Introduction to the Finality Considerations: Claims and Issues

It is important to focus on the relationship between claims in thinking about pleading and the structuring of lawsuits in Virginia, since the decision to join or omit claims, made at the pleading stage, may have profound consequences under the doctrines of Res Judicata and Collateral Estoppel (not to mention statutes of limitations).
at a later point, when nothing can be done about the situation. Thus the issues should be faced and resolved at the pleading stage if at all possible.

A thumbnail summary of the two principal doctrines operating in this area would be this:

**Res Judicata** is the doctrine which bars all subsequent proceedings on the same cause of action between the same parties (or those in privity with parties to the first action), whether or not all potential issues were actually litigated in the first proceeding.

**Collateral Estoppel**, sometimes called "issue preclusion", bars relitigation of issues actually contested and decided in the first case when a second proceeding is brought, even if the second case is premised on a different cause of action, so long as the party against whom the issue is now pressed was a party to the first proceeding (or one in privity with a party). Mutuality was seemingly abandoned in one narrow fact situation, but more recently has been reaffirmed as a requirement for collateral estoppel. See cases below.

These notions are not significantly different from the basic concepts applicable in federal practice. Compare, *Cromwell v. Sac County*, 94 U.S. 351 (1876) with *Ward v. Charlton*, 177 Va. 101, 12 S.E.2d 791 (1941). As noted below, however, Virginia adheres generally to the requirement of "mutuality", which limits the application of the rules to parties who have litigated the issues before, or those in privity with such parties.

It becomes a priority under these doctrines to identify the cause of action to be litigated in any case and, more specifically, to determine whether the case presents a single or multiple causes of action. For if there is only one claim under Virginia law, an attempt to "split" it by proceeding on only a part in the first instance may result in any contemplated follow-on suit being forever barred. See *Jones v. Morris Plan Bank of Portsmouth*, 168 Va. 284, 191 S.E. 608 (1937); *Shepherd v. Richmond Engineering Co.*, 184 Va. 802, 36 S.E.2d 531 (1946). Conversely, if there are separable causes of action, a later suit will be permitted but it is possible that specific fact issues will be determined in the earlier proceeding which end up controlling the later case.

Several basic situations have been resolved in Virginia law. It is held that there are multiple, severable causes of action in at least these circumstances:

- where a single tort injures both person and property. Rare among American jurisdictions, Virginia allows a party to bring separate proceedings for the personal injuries and the claim for property damage. See *Carter v. Hinkle*, set forth below in section A.

- where there are several different accounts between a plaintiff and defendant, even if for the same product, if defendant has requested that
the accounts be separated. See *Deal v. C.E. Nix*, 206 Va. 57, 141 S.E.2d 683 (1965).

On the other hand, there is deemed to be one, unsplitable cause of action in these circumstances:


The development of the rules for the application of the doctrines of Res Judicata and Collateral Estoppel has been largely in the case law, which is set forth below in sections B and C of this Chapter.
B. Splitting the Cause of Action -- Generally

CARTER v. HINKLE
189 Va. 1, 52 S.E.2d 135 (1949)

JUSTICE GREGORY delivered the opinion of the court.

A taxicab owned and driven by Hinkle was involved in a head-on collision with an automobile owned by the defendant, Smith, and operated by his agent, the defendant, Carter. The collision occurred in Alleghany county, on U.S. Route 60, near the town of Covington, on December 20, 1946, and it is conceded that it was the proximate result of the negligence of the defendant, Carter. The taxi was damaged and an action was instituted by the plaintiff, Hinkle, against the defendant, Smith, for $1,000, $750 of which represented damage to the taxi and $250 damages for the loss of the use of it. Judgment was recovered, the full amount paid thereon and it was marked satisfied.

Later, Hinkle instituted another action against the two named defendants seeking to recover for personal injuries received by him by reason of the collision. The defendants pleaded that the judgment and its satisfaction in the first action was a bar to Hinkle's right to bring the second action for the personal injuries. The court overruled that contention and permitted the case to go to the jury. A verdict was returned in favor of the plaintiff for the sum of $1,000, and judgment was entered, from which this writ of error was obtained.

The question involved is one of law: May one who has suffered both damage to his property and injury to his person as the result of a single wrongful act maintain two separate actions therefor, or is a judgment obtained in the first action a bar to the second? We have no Virginia decision upon the point.

The question has been presented to the courts many times and there is a direct conflict of American authority on the subject. The majority of the American courts of last resort are of the view that but one single cause of action exists and that but one action may be brought therefor. [The court then reviews the cases implementing this view in numerous states, and the older authorities in England and going back to Roman law. The Court identifies a significant minority view allowing separate suits, especially where the common law plays a role in the pleading system of the jurisdiction. Ed.].

Our conclusion is to align Virginia with the minority view because we think it more logical and better adapted to our conditions. We have many similar cases arising almost daily from the consequences of injury to person and property from the same wrong following automobile accidents. Questions involving the rights of automobile insurance carriers, both liability and collision, rights of assignees, receivers, trustees in bankruptcy, and subrogees, render it essential in certain cases to allow one action for personal injury and another for property damage. In addition, in the background is the fact that in Virginia we still have as a part of our law, the common law, including common law pleading and practice. Under that system, originally, two actions could have been maintained and still can be maintained today because the General Assembly has not, in its wisdom, seen fit to change or alter the common law in that respect.
Under [Title] 2 of the Code the common law touching this subject remains the law of Virginia.

Affirmed.

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**Note on Lessors’ Options**

In *Virginia Dynamics v. Payne*, 244 Va. 314 (1992) the Supreme Court interpreted Code § 8.01-128 to allow “lessors the right to file subsequent actions for rent not claimed in earlier unlawful detainer actions.” The Court also held that the lessor can seek eviction in one action, and rent deficiency in a later claim. Even the presence of an “acceleration clause” in the lease did not alter this result, where the statutory rights of a landlord were not expressly waived.

"Your Honor, I object!
This line of questioning is making my client look really bad."
C. Res Judicata

Basic Operation of the Doctrine

Res judicata doctrine prevents relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. The same transaction may, however, give rise to more than one cause of action, even between the same parties. If it does, the doctrine of res judicata does not apply; but the doctrine of collateral estoppel may preclude relitigation of issues common to the two proceedings and which the party to the second proceeding, sought to be estopped, has actually litigated or had a full and fair opportunity to litigate.

Res judicata embodies a strong public policy to avoid multiple litigations, and is a fundamental concept in every legal system. It protects not only individual and corporate litigants from the burdens of trying the same case twice, but also protects society from having to pay for multiple proceedings arising from the same facts. Claim preclusion bars the assertion of legal or equitable rights of action even if they were not specifically resolved in earlier litigation. A claimant is required to bring all claims relating to the dispute in the first litigation, on pain of being precluded from trying again on a different "theory" in a later action against the same defendant arising from the same facts. Called "merger" when the claimant wins the first suit and "bar" when the claimant loses it, claim preclusion under the doctrine of res judicata treats unasserted claims as being subsumed in the disposition of the related, previously adjudicated, claims. In essence, you can't have two bites at the apple. The law should afford one full, fair hearing relating to a particular problem — but not two.

Same Parties. The preclusive effect of a judgment upon a cause of action arises only where the parties to the first suit (or their privies) are the same as the parties to the second (or their privies, as noted in a case below). There is no single fixed definition of privity for purposes of res judicata. The Supreme Court has held that whether privity exists is determined on a case by case examination of the relationship and interests of the parties. It is said that the touchstone of privity for purposes of res judicata is that a party's interest is so identical with another that representation by one party is representation of the other's legal right.

Same Cause of Action. Res judicata bars relitigation of a cause of action. It is consequently important, initially, in considering whether either doctrine applies, to determine: what causes of action grew out of the transaction or transactions affecting the parties (if res judicata is asserted) or one or more of the parties (if collateral estoppel is asserted); and whether there has been an effort to split a cause of action.

Recent Crisis. The Supreme Court of Virginia's most recent plenary examination of res judicata in Davis v. Marshall Homes, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003), sharply divided the Court -- not only on the core question of Virginia's formulation of the doctrine -- but also on how case law has historically applied it. In Davis, the same transaction (a real estate financing plan) spawned two theories of recovery: one in tort, the other in contract. Because the tort claim (lender v. debtors alleging fraud in the inducement arising out of promissory notes) involved different
elements of proof than the contract claim (lender v. debtors for nonpayment of the same promissory notes). *Davis* held (four-to-three over a long and bitter dissent) that res judicata did not apply. Thus, the lender could file the tort suit, lose on the merits, and then file a second suit on the contract claim. Whether different "claims are part of a single cause of action," the Court held, can only be determined by considering "whether the same evidence is necessary to prove each claim." And because the lender in *Davis* limited her first suit to a fraud claim, it did not bar her—after losing the fraud case—from later filing a second suit against the same borrowers alleging breach of contract arising out of the same loan transaction.

The bar became very confused over the application of res judicata in Virginia using the "same evidence" approach. Attorneys with 30 years of experience reported to the Advisory Committee on Rules that they could determine when res judicata applies under the current approach. Experienced trial judges with heavy and hotly-contested dockets report that attorneys are struggling in pending cases to apply the current Virginia law on res judicata. The same evidence approach is closely tied with the label "claim-splitting" which often in Virginia means that sometimes a second suit is permitted and sometimes it is not. The perception of attorneys and others is that the "claim-splitting" labels are often arbitrary and that predictability is not strong under the current law. One reason for the confusion is that the same evidence test, if applied literally, precludes res judicata in Virginia, making every claim splittable without any bar to later re-litigation. Another source of confusion is that the "same evidence" test is designed to enforce res judicata bars when the evidence is the same, but may be used in Virginia to prevent res judicata where the evidence is different.

The "same evidence" test operates contrary to the basic principle of res judicata in Virginia that all claims relating to a single nucleus of facts should be presented in the first litigation between two parties. The "same evidence" test—particularly in its Virginia variant, which looks at the evidence one would use to prove each element of each cause of action—almost assures that a plaintiff will never be barred in bringing a second suit in Virginia, because each cause of action has different elements and one can almost always identify proof variations that would follow.

Virginia cases can be read to apply the "same evidence" test in the opposite fashion from that for which the rule was designed in the late 1800's. The "same evidence" test was established as one of several ways to show that a subsequent claim was the same as a prior claim, it was not developed to demonstrate the opposite: that if any evidence is different in the second suit, the litigation can go forward. As the rule was originally applied, cases could be barred by several showings, one of which was that the evidence would be identical in a later action.

A fair reading of Virginia law prior to 2006 was that it turned the basic goal on its head, holding that a subsequent claim cannot be found barred if any of the evidence on any of the elements of the later case would be different from that required under the prior litigation. The Committee has been unable to find any other jurisdiction in America that ever adhered to this rule, which takes the narrowest possible test, turns it around, and makes it into an assurance that a second or subsequent litigation will not be barred if any portion of the proof would be different. As applied in all other jurisdictions when this rule was accepted (1880's through the 1950's), under the same evidence test claim preclusion applied "if the evidence needed to sustain the second
action would have sustained the first action" filed by the plaintiff. But the Restatement equally made clear that "the negative is not true. Although the evidence needed to sustain the second action would not have sustained the first. Put another way, the same evidence test operated best as a test of inclusion rather than as a test for exclusion.

Thus, if taken literally, the same evidence test as applied in Virginia came close to abandoning the goal that—where pleading rules allow setting for a variety of the party's claims—the system should call for a single legal proceeding to ventilate aspects of the claim. In contrast, most states recognized early in the 20th century that the fact that "a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief."

Under the Virginia approach prior to July 1, 2006, where application of res judicata turned on whether evidence varies given the elements of the legal rights asserted, the doctrine would bar only those legal rights based on the same legal theory and asserting the same grounds for relief using exactly the same evidence. A claim that "could have been litigated" would seldom, if ever, be barred. In one example discussed in case law, a plaintiff could assert claims alleging intentional interference with contract and business expectancies, and conspiracy to injure another in trade or business in separate proceedings without fear of the second proceeding being barred by the principles of res judicata even though the same events gave rise to both claims.

Another example: In any business dispute that spawns multiple theories of recovery, present Virginia law permits separate and successive lawsuits between the same parties on such theories of breach of contract, breach of fiduciary duty, common law conspiracy, statutory conspiracy, common law fraud, constructive fraud, and conversion. Eventually, the statute of limitations will call a halt to successive lawsuits, but that could take years. In general under present law unless all of the elements are identical, res judicata would not prohibit successive suits between the same parties. This was not good public policy for the business community in Virginia, and not good service to individuals residing in the Commonwealth either. Other American jurisdictions do not allow abusive re-litigation of the same facts with a different label on them, and have rejected that abuse for over a century.
Rule 1:6 To the Rescue

Effective July 1, 2006 the Supreme Court adopted the "same transaction" test for determining whether a claim is barred by a prior litigation—not by case law but in a Rule of Court, the only jurisdiction in the country to proceed in this fashion. The new doctrine (well, new to Virginia let's say) is embodied in a new Rule of Court discussed in this subsection of the Chapter. Rule 1:6 now provides:


(a) Definition of Cause of Action. A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought. A claim for relief pursuant to this rule includes those set forth in a complaint, counterclaim, cross-claim or third-party pleading.

(b) Effective Date. This rule shall apply to all Virginia judgments entered in civil actions commenced after July 1 (2006).

(c) Exceptions. The provisions of this Rule shall not bar a party or a party's insurer from prosecuting separate personal injury and property damage suits arising out of the same conduct, transaction or occurrence, and shall not bar a party who has pursued mechanic's lien remedies pursuant to Virginia Code § 43-1 et seq. from prosecuting a subsequent claim against the same or different defendants for relief not recovered in the prior mechanic's lien proceedings, to the extent heretofore permitted by law.

(d) Privity. The law of privity as heretofore articulated in case law in the Commonwealth of Virginia is unaffected by this Rule and remains intact. For purposes of this Rule, party or parties shall include all named parties and those in privity.

In a fascinating twist, while the Court was divided 4-to-3 in the Davis decision in 2003 over these issues, it unanimously adopted Rule 1:6 in the year 2005.

Rule 1:6 has three provisions that merit special note. First, the Rule uses the concept of the "conduct, transaction or occurrence" litigated in the first case as the definition of the essence of the prior claim for res judicata purposes. This accords with the original report of the Bar study group, and is by far the best summary of the governing principles. The Advisory Committee was unanimous in concluding that the complete phrase, "conduct, transaction or occurrence," is well tested in American law as well as Virginia practice, and is the phrase used in the two most recent statutes passed by the General Assembly in the last decade where the scope of a cause of action is defined: Code § 8.01-6 (misnomer and adding parties in a suit on the same claim) and
Code § 8.01-6.1 (amendment of pleadings will "relate back" to the time of the original filing if it's the same cause of action, defined as the "same conduct, transaction or occurrence" set forth in the initial pleading). The Committee felt strongly that using this established three-part definition would be the most clear and readily applied formula, lending predictability and stability to the doctrine. The Judicial Council unanimously agreed and the Court adopted this Rule. This test, however, has not been applied in a direct decision by the Court since it was adopted.

Second, subparagraph (b) adopts a phase-in date of July 1, 2006: it provides that any judgment entered in a Virginia proceeding commenced on and after that date will be preclusive of future claims based on the same conduct, transaction or occurrence.

Third, the Rule contains in subparagraph (c) two express reservations about the splitting of claims. Research has shown that there is recognized in other jurisdictions, and the Restatements, the doctrine articulated decades ago in Virginia by the case of *Carter v. Hinkle*, that resolving the property damage claims arising from an accident separate from the personal injury claims from the same event does not render the operation of res judicata unworkable, and has some advantages in an era of mandatory auto insurance. Hence the proposed rule leaves that option undisturbed (the claims can be joined but need not be). Also, it appears that the policy of the General Assembly under the Mechanics' Lien laws allows multiple claims relating to work and materials and there is no intention to disturb existing practice in that detailed statutory regime, hence there is a provision stating that present practice is preserved.

Subparagraph (d) similarly heads off any implication that the Virginia law of privity is altered in any way by the adoption of the conduct, transaction or occurrence test. The doctrine of privity is fairly narrow in Virginia, and case specific. No bar study—and, indeed, no anecdotal reports—have ever suggested that the present Virginia doctrine of privity, as explicated in cases such as *Nero v. Ferris*, causes any difficulties in applying claim preclusion doctrines in Virginia, and hence the Rule states that the operation of this doctrine is unaffected.
Consider the following classic case in light of the developments and doctrines sketched above, and how this case might come out under Rule 1:6:

**DOUMMAR v. DOUMMAR**  

JUSTICE CARRICO delivered the opinion of the court.

This appeal presents the question whether the trial court erred in sustaining a plea of res judicata in the second of two proceedings involving the estate of Toufic Doummar, an incompetent. The controversy pits the incompetent who sues by a son as his next friend against a daughter and another son who are his committees.

In the first proceeding, brought in the Circuit Court of the City of Virginia Beach, Claire Doummar Berny and Maurice Doummar, committees of Toufic Doummar, filed a bill of complaint seeking the sale of certain unimproved property owned by the incompetent. Named as parties defendant were the incompetent and his children, namely, Habib E. Doummar, Henry Doummar, Claire Berny, and Maurice Doummar. The cause was referred to a commissioner in chancery who held a hearing and recommended sale of the property because the income of the incompetent was insufficient for his maintenance and support. The report of the commissioner was confirmed, and the sale was ordered by the court.

In the second proceeding, brought in the Circuit Court of the City of Norfolk, the complainant Toufic Doummar, an incompetent, by Habib Doummar, his court-appointed next friend, filed a bill of complaint against the defendants Maurice Doummar and Claire Berny, individually and as committees of Toufic Doummar. In the bill, the complainant sought to have declared void a lease of improved property between Toufic Doummar as owner and lessor and Maurice Doummar as lessee.

The defendants filed a "Special Plea of Res Adjudicata" in the second proceeding. The plea asserted that "the lease referred to in the Bill of Complaint in the instant suit was adjudicated to be a valid lease" in the first proceeding.

The trial court, after a hearing, sustained the plea of res judicata and dismissed the bill of complaint. The complainant was granted an appeal.

The bill of complaint filed in the present suit alleged that the lease between Toufic Doummar and his son Maurice was a forgery because although it was dated in 1959 and purportedly executed by Toufic Doummar before he was declared incompetent in 1960, it was not in fact executed until long thereafter. At the hearing on the plea of res judicata, the complainant asserted that the lease could be proved a forgery because the paper on which it was written bore a secret watermark showing that the paper was not manufactured until 1963, or four years after the lease was purportedly executed.

The defendants contend that the issue of the validity of the lease was litigated and determined in the first proceeding, or could have been so litigated and determined, and that the second proceeding is, therefore, barred. They point to the record of the first proceeding where Habib Doummar, one of the parties defendant in that litigation, introduced the lease into evidence in the hearing before the commissioner in chancery. The defendants also point out that Habib Doummar filed exceptions to the
commissioner's report stating that "the Commissioner erred in failing to find that the lease . . . is a nullity."

The complainant contends that the issue of the validity of the lease was not litigated and determined in the first proceeding and that since the second proceeding is upon a different cause of action, it is not barred. The complainant says that the lease was introduced in evidence before the commissioner in chancery because it was an asset of the estate and its inspection was necessary in determining whether the income of the incompetent was sufficient for his support.

The complainant further says that the defendants admitted in the first proceeding that the question of the validity of the lease was not there involved. In this regard, the complainant points to the fact that the defendants filed a motion to strike Habib Doummar's exceptions to the commissioner's report, which motion stated that "the validity of the lease referred to in the said exceptions was not in question."

The principles applicable to the resolution of a dispute such as this are well settled. In *Kemp v. Miller*, 166 Va. 661, 674-675, 186 S.E. 99, 103-104 (1936), it is stated:

> When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties . . .

> This doctrine does not apply, however, where the second action between the same parties is upon a different claim or demand. . .

> . . . [Where] the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

The question thus posed is whether the cause of action asserted in the present suit is the same as that advanced in the first proceeding. Obviously, the causes of action involved in the two proceedings are not the same. The first was a statutory proceeding for the sale of certain property of the incompetent. The second, to have declared void a lease of other property owned by the incompetent, is an equitable proceeding sounding in fraud and predicated upon an alleged breach of the fiduciary duty owed by a committee to his ward.
In order, therefore, for the decree in the prior suit to be conclusive of the issue of
the validity of the lease, it must appear from the record of the earlier proceeding that
such issue was "actually litigated and determined." We have searched the record of the
prior suit and find that the issue was not there litigated and determined.

In the bill of complaint filed in the first suit, in the answers filed in response
thereto, in the decree referring the cause to the commissioner in chancery, in the report
of the commissioner, and in the decree confirming the report and ordering the sale of
the incompetent's unimproved property, no mention is made of the lease in question.
The transcript of the hearing before the commissioner contains general references to the
lease, but the transcript also shows that no evidence was submitted to the commissioner
concerning the alleged forgery of the lease.

The only indication in the record of the first suit that the commissioner and the
court took any cognizance of the lease appears from the facts that the commissioner
admitted it into evidence and that the court stated in a letter opinion that it had "read . . .
the lease." It was proper and necessary, however, that the lease be admitted into
evidence before the commissioner and that it be read by the court. But that does not
mean that either the commissioner or the court determined the validity of the lease.

The lease was valid on its face, and it was an asset of the incompetent's estate. It
called for a rental of $100 per month. The real issue before the commissioner and the
court, as stated in the decree of reference, was whether the income of the incompetent
was insufficient for his maintenance and support, necessitating the sale of a portion of
his property. The income of the incompetent, which included the rental under the lease
and Social Security payments, was shown to be not sufficient to meet the fixed
expenses of his care. And so, the sale was ordered -- an action the court properly could
take without determining the actual validity of the lease.

We do not overlook the fact that Habib Doummar filed exceptions to the
commissioner's report in which he stated that "the Commissioner erred in failing to find
that the lease . . . is a nullity." From that and the lack of anything else in the record of
the first suit, the only inference that may be drawn is that Habib Doummar attempted to
make an issue of the validity of the lease. In any event, whatever effect the filing of the
exceptions might have had, such effect was nullified by the declaration of the
committees in their motion to strike that "the validity of the lease referred to in the said
exceptions was not in question."

It is obvious from the record of the first suit that the court agreed with the
committees and left to another day and another proceeding the determination of the
issue of the validity of the lease. The court merely overruled Habib Doummar's
exceptions and confirmed the commissioner's report without making any ruling
concerning the lease other than was necessary in finding that the income of the
incompetent was insufficient for his support.

The decree in the first suit did not, therefore, bar inquiry into the validity of the
lease in the second proceeding. It was error for the trial court to sustain the plea of res
judicata. For that error, the decree appealed from will be reversed.
"We can't agree on a verdict, so we've decided to use one of our lifelines."
How Does One Prove Prior Adjudication of a Claim?

BERNAU v. NEALON  
219 Va. 1039, 254 S.E.2d 82 (1979)

JUSTICE HARRISON delivered the opinion of the Court.

Claire Bernau, appellant, filed her motion for judgment in the court below seeking to recover from her former husband, Joseph P. Nealon Jr., appellee, certain amounts expended by her in payment of taxes, improvements, debts and other items on real property owned by Nealon. Bernau alleged that when these payments were made, she was under the mistaken belief that she owned the property and that as a result Nealon has been unjustly enriched, thereby entitling her to restitution. Nealon filed a plea of res judicata which was sustained and appellant's motion was dismissed.

Claire Bernau and Joseph P. Nealon, Jr., formerly husband and wife, were divorced by decree of the lower court in October 1969. Prior thereto the parties entered into a property settlement agreement under which Nealon conveyed appellant his interest in their residence property in Hampton in which the parties had lived as husband and wife. Appellant occupied the dwelling until June 1970 when she moved out and Nealon moved in. Nealon lived in the residence from June 1970 until March 1973. He claims that he left because he learned that appellant had listed the home for sale with a real estate agent, and because she threatened him with eviction.

In April 1973 appellee filed a bill of complaint in the court below under the style, Joseph P. Nealon Jr. v. Claire B. Nealon, alleging an agreement by appellant to convey the subject property to him. A lis pendens, filed at the time suit was brought, was later removed upon agreement that the net proceeds to be received from a sale of the property would be placed in escrow. The property was sold by appellant in May 1974 for $30,000 and conveyed by her to the purchaser. By decree entered on March 3, 1976, the trial court held that there was an oral agreement between the parties that appellant would reconvey to appellee the property involved, and that Joseph P. Nealon, Jr., was entitled to the escrowed net proceeds ($12,826.05) from the sale. Mrs. Bernau's petition for appeal was denied by this Court on October 13, 1976.

Thereafter, appellant filed the case under review seeking restitution of $3,739.66 that she allegedly expended on the property between March 1973 when she reoccupied the property, and May 1974 when the property was sold.

Appellee argues that this case is an attempt by his former wife to retry a matter that had been ended by final order in Joseph P. Nealon, Jr. v. Claire B. Nealon. He says that both parties had the opportunity to litigate their claim to all or to any part of the money in escrow. He claims he did present evidence of the monies he expended during the months he occupied the real estate, "just in case he may not have prevailed as to the whole fund". Appellee contends there was nothing to prevent the appellant from doing the same. Appellant argues that until the entry of the decree in Nealon v. Nealon on March 3, 1976, she felt secure in her belief that she was the owner in fee of the property, and that, laboring under this belief, she expended funds in connection therewith and for which she claims restitution should be made. She says that an
independent action for restitution is proper because until it was determined that she was not the true owner of the property, she was not entitled to bring action against appellee.

Our problem here is that we have no record before us from which we can determine the essential elements necessary to sustain appellee's plea of res judicata. The only information that we have of the proceedings had in the chancery suit of Nealon v. Nealon is a copy of the final decree, entered on March 3, 1976, which was attached to appellee's plea. Nevertheless, Nealon sought in the case under review to rely affirmatively upon facts which were allegedly determined in the prior proceeding brought by him against appellant. He alleged that prior determination as a bar to appellant's motion for judgment although he neither filed the record as an exhibit with his plea nor offered it in evidence at trial. His failure to do so is fatal for "[w]hether the former adjudication is affirmatively or defensively asserted, the record of the prior action must be offered in evidence". Burk's Pleading and Practice, § 357 at 675 (4th ed. 1952).

The fact that the adjudication relied upon by appellee was made by the same judge who sustained his plea of res judicata is not sufficient. Individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record. The consideration of facts outside of and not made a part of the record is improper. *Newton v. Newton*, 202 Va. 96, 116 S.E.2d 94 (1960); *Darnell v. Barker*, 179 Va. 86, 18 S.E.2d 271 (1942). . . .

Appellant says that the former suit by her husband dealt solely with title to real estate, and that the only issue was whether there was an oral agreement by her to convey the property to him. Appellee claims that when he agreed to a sale of the property and to the placement of the proceeds of sale in escrow, the issue became one of entitlement to the money. He says that each party had an opportunity to introduce evidence to show his or her claim to the escrowed funds or to any part thereof. However, we have no record before us to show what evidence was presented or what exhibits were filed in Nealon v. Nealon, either before the court or the Commissioner in Chancery. Further, it appears from the final decree entered in Nealon v. Nealon that after hearing ore tenus appellee's evidence on his petition to rehear, the trial court concluded that appellee had proven his allegation of an oral agreement by his former wife to convey to him the property involved. The trial court then gave appellant "the opportunity to present any further evidence in this cause". The decree recites that she declined this invitation. In the absence of evidence of what occurred at that time, we are unable to determine whether this invitation to the former Mrs. Nealon was to give her an opportunity to present any further evidence bearing on the alleged agreement to reconvey, or whether this was an invitation for her to introduce any evidence showing any claim she had to all or any portion of the proceeds of the money being held in escrow.

The general rule which controls our decision, taken from *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977), is found in 7 M.J., Evidence, § 14 at 13 (1978) Cum. Supp.), and is there stated as follows:

The general rule is that the court will not travel outside the record of the case before it in order to take notice of the proceedings in another case, even between the same parties and in the same court, unless the
proceedings are put in evidence. The reason for the rule is that the decision of a cause must depend upon the evidence introduced. If the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case at hand, conclusive against the opposing party; while if they had been properly introduced they might have been met and overcome by him.

Counsel for Nealon correctly maintains that it was the responsibility of Bernau, the losing party, to designate a proper record in accordance with the Rules of Court. But she has brought to us the entire record that was before the court below in the instant case. What is lacking is the record in Nealon v. Nealon, without which no determination can be made by us of the validity of Nealon's plea of res judicata. Had that record been introduced in the court below it would have been the responsibility of appellant to designate it as a part of the record for our consideration here. The absence of this record leaves us with insufficient information to determine the correctness of the court's judgment. However, the duty to introduce the record rested on Nealon, not on Bernau. As we said in Feldman v. Rucker, 201 Va. 11, 18, 109 S.E.2d 379, 384 (1959):

One who asserts the defense of res adjudicata has the burden of proving that the very point or question was in issue and determined in the former suit.

Accordingly, and for the reasons stated in this opinion, the action of the lower court in sustaining appellee's plea of res judicata is reversed. The cause is remanded with direction that it be reinstated on the docket of the court below for a trial on its merits if the parties be so advised.
REED v. LIVERMAN
250 Va. 97, 458 S.E.2d 446 (1995)

JUSTICE LACY delivered the opinion of the Court.

In this appeal, we consider whether an order dismissing with prejudice an action to collect on a promissory note is conclusive as to a subsequent action on the same promissory note.

On March 4, 1991, Randolph O. Reed and David C. Eanes, Jr., executed a promissory note payable to Lewis S. Liverman, Sr., in the amount of $74,000. Eanes and Reed failed to meet their payment obligation and, on July 3, 1991, Liverman filed a motion for judgment against them, jointly and severally. This motion for judgment alleged that Reed and Eanes "failed and refused to pay the balance due on [the] indebtedness after repeated demands for payment."

On August 23, 1991, the action was settled by an agreement between the parties, but the case was not removed from the docket. Pursuant to the agreement, Eanes was to transfer certain real estate in settlement of his obligation and Reed was to pay Liverman the sum of $37,000. It is undisputed, however, that Reed did not pay Liverman at the time the agreement was executed nor did he pay Liverman at any time thereafter.

On May 22, 1992, Liverman filed a second motion for judgment again seeking recovery on the 1991 promissory note. In this motion for judgment, Liverman alleged that although Eanes had paid Liverman $37,000 on the note, Reed had "failed to pay the balance of the note or any part thereof . . . and has continued to fail to so pay up to the present." Only Reed was named as a defendant in Liverman's second motion for judgment.

Reed filed a demurrer, stating, in part, that Liverman's action was prohibited because his first lawsuit was still pending in the same court. In response to the demurrer, Liverman initially, but unsuccessfully, attempted to unilaterally nonsuit his first action. He then moved the trial court to dismiss the action "with prejudice." On March 3, 1993, the trial court entered an order pursuant to which the first action was "dismissed against all parties, with prejudice." Liverman personally signed the order with the notation "I ask for this."

Reed then filed a plea of res judicata, alleging that Liverman's second action on the note was barred by dismissal of the first action with prejudice. The trial court denied this plea, finding that there were no facts "either on the face of the record or shown by extrinsic evidence which support a finding that Suit No. 1 was determined on its merits." The trial court further found that Liverman's "obvious reason for moving for the dismissal of Suit No. 1 was the filing of the Demurrer to Suit No. 2 on the ground of two suits pending on the same promissory note" and stated that "the phrase, 'with prejudice', does not terminate Liverman's right to have his day in court upon the merits of his case." The case against Reed proceeded to a bench trial and final judgment for Liverman in the amount of $37,000 was entered on July 26, 1994.

On appeal, Reed asserts that the trial court erred in failing to sustain his plea of res judicata. In response, Liverman argues that the trial court correctly determined that his second action was not barred because a determination on the merits had not been reached in the first action. Liverman also contends that the expression "with prejudice"
in a dismissal order should not be conclusive when it is included erroneously, as he alleges was done in this case.

Dismissal of a suit with prejudice is defined as "an adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause." Black's Law Dictionary 469 (6th ed. 1990) The record in this case shows that both the first and second motions for judgment sought recovery from Reed based solely on the March, 1991 promissory note. The question before us is whether the dismissal with prejudice of Liverman's first action stemming from settlement of the dispute, rather than from an adjudication of the claim, bars prosecution of his second motion for judgment.

We considered this issue in Virginia Concrete Co. v. Board of Supervisors, 197 Va. 821, 91 S.E.2d 415 (1956), and stated that "as a general proposition a judgment of dismissal which expressly provides that it is 'with prejudice' operates as res judicata and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final disposition adverse to the plaintiff." Id. at 825, 91 S.E.2d at 418. The Virginia Concrete opinion also noted that such a dismissal commonly implies "not only the termination of the particular action or proceeding then before the court but also the right of action upon which it is based." Id. Nevertheless, the words "with prejudice" are not always a bar to a subsequent action, but must be considered in light of the circumstances in which they are used. In Virginia Concrete, the res judicata bar was not applicable because the attorneys for the appellee did not have the authority to consent to the entry of the decree in issue. Id. at 825, 829, 91 S.E.2d at 418, 421.

In this case, Liverman's counsel prepared a draft order which specifically included the language "with prejudice" and which was circulated to opposing counsel 13 days in advance of its presentment to the trial court. Significantly, Liverman had prepared an earlier draft order with which he hoped to nonsuit his action "without prejudice." Furthermore, the order indicates that Liverman himself appeared before the trial court and signed the dismissal order. While Liverman's purposeful actions in seeking dismissal of his action with prejudice may have been ill-advised and the consequences of his actions unintended, there is no justification in this record to support Liverman's contention that the phrase "with prejudice" was erroneously or inadvertently chosen. Accordingly, the trial court erred in concluding that the order terminating the first action was not res judicata as to this subsequent action on the same promissory note.

Because we find that Liverman's second action on the promissory note is barred by the doctrine of res judicata, we do not address Reed's additional assignments of error. The decision of the trial court will be reversed and final judgment will be entered for Reed.
"Do you swear to spin the truth, the whole truth, and nothing but the truth?"
D. Collateral Estoppel

Fundamentals

SNEAD v. BENDIGO
240 Va. 399, 397 S.E.2d 849 (1990)

JUSTICE RUSSELL delivered the opinion of the Court.

This appeal requires us to decide whether a judgment in favor of a physician in an action to collect fees operates as a collateral estoppel bar against a later malpractice action by the patient against the physician. We conclude that it does not.

The essential facts are undisputed. In 1984, Guy Finney Snead (the patient) suffered a broken leg in an automobile accident. He obtained medical treatment from Leopoldo L. Bendigo, M.D. In 1987, after the patient had failed to pay the physician's bill for these services, Dr. Bendigo filed a notice of motion for judgment against him in the General District Court of Russell County. The notice of motion simply advised the patient that the sum of $2,782 was "justly due the undersigned by open account." The pleading was accompanied by a statement of account verified by an affidavit, all of which were served on the patient. The patient filed no pleadings.

On the return day of the notice of motion, the physician's attorney appeared and the patient appeared without counsel. No witnesses were sworn and no testimony was taken. The judge asked the patient if he owed the physician the money claimed, and the patient replied: "I didn't feel like I owed it, . . . he had done me more damage than he did good." The court asked the physician's attorney to discuss the matter with the patient outside the courtroom. At that point, the attorney ascertained that $100 had been paid on the account and agreed to reduce the claim by that amount. The two returned to the courtroom and the court entered judgment against the patient for $2,682. No appeal was taken, and the judgment is final.

Four months later, the patient brought the present action against the physician in the Circuit Court of Russell County, claiming $200,000 in damages for alleged medical malpractice arising out of the treatment of his leg injury. The physician filed a plea of collateral estoppel. The court, in a written opinion, held that the issue of the physician's negligence had been litigated in the general district court and decided adversely to the patient. Sustaining the plea, the court dismissed the malpractice case by order entered January 11, 1990. We awarded the patient's administrator an appeal.

Because the physician's action to recover a debt due on open account and the patient's action to recover for malpractice arose out of different causes of action, no contention is made that the bar of res judicata applies. Rather, the physician argued, and the trial court found, that the second action was barred by the principles of collateral estoppel.

Under those principles, which apply when different causes of action are involved, the parties to the first action and their privies are barred from re-litigating any issue of fact actually litigated and essential to a valid, final, personal judgment in the first

When the facts of the present case are examined in light of that requirement, it becomes apparent that the issue of the physician's negligence was not actually litigated in the debt-collection case in the district court. Although district court procedures are comparatively informal, certain requirements are imposed by statute. Code § 8.01-28 provides that when, in an action on a note or contract, express or implied, an affidavit is filed with the plaintiff's pleading and served with a copy of any account sued on, the plaintiff "shall be entitled to a judgment on such affidavit and statement of account without further evidence unless the defendant appears and *pleads under oath* denying that the plaintiff is entitled to recover . . . ." (Emphasis added.) The final sentence of the statute and the appended revisers' note make it evident that the legislative purpose is to place upon the defendant the burden of filing a written pleading under oath, denying his indebtedness, if he wishes to preclude the entry of judgment on the affidavit without further evidence. [Editors Note: this Code section was later amended to permit oral denial, under oath in open court.]

In the present case, the defendant patient in the debt-collection case neither filed a pleading under oath denying his indebtedness nor filed a counterclaim putting the physician's negligence in issue. Although a sworn, written denial based on negligence might have put negligence in issue defensively and a counterclaim asserting negligence might have put it in issue affirmatively, the defendant did not put it in issue at all. A matter not in issue cannot be "actually litigated."

Under Code § 8.01-28, the general district court had no alternative but to enter judgment on the affidavit in the plaintiff's favor, less the acknowledged credit. The judgment was in the nature of a default. In the absence of a sworn denial in writing, no issues of fact were presented to the district court for adjudication except those appearing on the face of the plaintiff's pleadings, account, and affidavit. Negligence was not among them.

Because the issue of the physician's negligence was not "actually litigated" in the debt-collection case, the trial court erred in holding the malpractice case barred by collateral estoppel.

Accordingly, we will reverse the judgment and remand the malpractice case for further proceedings.
JUSTICE STEPHENSON delivered the opinion of the Court.

In this appeal, we decide whether certain claims against a deputy sheriff are barred by the doctrines of collateral estoppel and sovereign immunity.

Christopher Glasco filed the present personal injury action against Ronald Ballard, a deputy sheriff, seeking damages resulting from claims of (1) assault and battery and (2) negligence, both simple and gross. Glasco also filed an action against Ballard in the United States District Court for the Eastern District of Virginia (the federal action), claiming Ballard was guilty of excessive use of force, in violation of 42 U.S.C. § 1983. Glasco also asserted claims of assault and battery and gross negligence in that action. The present personal injury action and the federal action arise out of a single incident between the parties.

In the federal action, the district court granted summary judgment in favor of Ballard with respect to Glasco's § 1983 claim, concluding that Ballard's conduct was accidental, not intentional. The court dismissed Glasco's other claims on the ground that it no longer had pendent jurisdiction.

Thereafter, Glasco pursued his claims of negligence and assault and battery in the present action. The trial court granted summary judgment in favor of Ballard, ruling that Glasco's claims were barred by the doctrine of collateral estoppel because of the facts conclusively determined in the federal action. The trial court also ruled that the claims were barred by the doctrine of sovereign immunity. We awarded Glasco an appeal.

In the federal action, the district court made the following findings of fact. On January 1, 1991, shortly before 11:00 p.m., Officer Ballard, a deputy sheriff of Hanover County, was on vehicular patrol in the Town of Ashland when he received a radio report of a shoplifting incident at a nearby store. A few minutes later, Ballard saw two men walking along Randolph Street. One of the men matched the shoplifting suspect's description.

Ballard drove his car beside the two men, both of whom had their hands in their pockets. Ballard noticed that one of the men, later identified as Glasco, was wearing a sweater or a jacket with a front pocket in which Ballard observed a shiny, metallic, oblong object and a plastic-wrapped object.

Ballard, while still in the patrol car, asked Glasco what was in his pocket. Ballard did not understand Glasco's response and, at that point, drew his pistol and started to exit the car. As Ballard stepped from the car, however, it rolled forward. Endeavoring to stop the car, Ballard leaned into it, put his foot on the brake pedal, and reached to put the gear control in "park." As he did so, his pistol accidentally discharged, and the bullet struck Glasco in the neck.

The doctrine of collateral estoppel precludes the same parties to a prior proceeding from litigating in a subsequent proceeding any issue of fact that was actually litigated
and essential to a final judgment in the first proceeding. Bates v. Devers, 214 Va. 667, 671, 202 S.E.2d 917, 921 (1974). The doctrine applies even when the subsequent proceeding involves a different claim for relief. Pickeral v. Federal Land Bank, 177 Va. 743, 750, 15 S.E.2d 82, 85 (1941). However, the following requirements must be met: (1) the parties to the two proceedings must be the same, (2) the issue of fact sought to be litigated must have been actually litigated in the prior proceeding, (3) the issue of fact must have been essential to the prior judgment, and (4) the prior proceeding must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied. Bates, 214 Va. at 671, 202 S.E.2d at 921.

In the present case, we conclude that all four of these requirements have been met. First, the parties are the same in both actions. Second, the factual issues pertaining to the circumstances of the shooting were actually litigated in the federal action. Third, the facts determined in the federal action and sought to be precluded from litigation in the present case were essential to the district court's judgment. In order to rule against Glasco on his § 1983 claim, the district court had to find that Ballard's actions were accidental, not intentional, and the court so found. Finally, with respect to the § 1983 claim, the district court rendered a valid, final judgment against Glasco.

Therefore, we agree that collateral estoppel applies in the present case to preclude Glasco from again litigating whether Ballard's actions were intentional. Thus, the doctrine bars Glasco's claim of assault and battery, which is an intentional tort. See Russo v. White, 241 Va. 23, 26, 400 S.E.2d 160, 162 (1991); F.B.C. Stores, Inc. v. Duncan, 214 Va. 246, 249, 198 S.E.2d 595, 598 (1973).

We also agree that the facts establish, as a matter of law, that Ballard, at the time of the shooting, was engaged in an essential governmental function involving the exercise of discretion and judgment. Therefore, unless Ballard's conduct amounted to gross negligence, he is immune from suit. See, e.g., Colby v. Boyden, 241 Va. 125, 128, 400 S.E.2d 184, 186 (1991).

We do not agree, however, that the district court's factual findings establish, as a matter of law, that Ballard's conduct was not grossly negligent. We think that, in considering all the facts and circumstances surrounding the incident, reasonable minds could differ whether Ballard's conduct amounted to gross negligence.

Consequently, we hold that Glasco is collaterally estopped from asserting his assault and battery claim in the present case. We further hold that Ballard is immune from Glasco's negligence claim, unless a fact finder, based upon sufficient evidence, should conclude that Ballard's actions, in light of all the facts and circumstances, constituted gross negligence. Accordingly, we will affirm the trial court's judgment in part, reverse the judgment in part, and remand the case for further proceedings consistent with this opinion.

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5 The prior federal court judgment is accorded the preclusive effect in subsequent state litigation that the federal courts would have attached thereto. See Nottingham v. Weld, 237 Va. 416, 419-20, 377 S.E.2d 621, 622-23 (1989). In the federal system, the entry of summary judgment is a disposition on the merits entitled to preclusive effect in later cases. See, e.g., Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313, 1319 (5th Cir. 1970), cert. denied, 400 U.S. 991, 27 L. Ed. 2d 439, 91 S. Ct. 454 (1971).
The "Mutuality Requirement"

NORFOLK & WESTERN RAILWAY v. BAILEY LUMBER CO.
221 Va. 638., 272 S.E.2d 217 (1980)

JUSTICE COMPTON delivered the opinion of the Court.

[Collateral estoppel] is the focus of this appeal. Specifically, we consider whether, under the circumstances of this case, the doctrine of mutuality should be renounced as applied to a plea of collateral estoppel.

On July 9, 1976, in the Town of Tazewell, a locomotive of appellant Norfolk & Western Railway Company collided at a grade crossing with a loaded gasoline tanker motor vehicle of appellee Dayton Transport Corporation. The collision caused an explosion that killed bystander Jesse Lawrence Sparks, damaged a nearby building and other property of appellee Bailey Lumber Company, and caused additional extensive damage in the vicinity.

At least 17 claims have arisen from this accident.

In August of 1976, Sparks' personal representative brought a wrongful death action in the court below against N & W and Dayton, alleging the negligence of both caused Sparks' death. Each defendant denied it was guilty of any negligence which proximately caused the accident. In a June 1977 trial, the jury found in favor of plaintiff against both defendants and awarded damages accordingly. The trial court entered judgment on the verdict and we denied N & W's petition for appeal. Norfolk & Western Ry. Co. v. Sparks, 218 Va. cxxvii.

In December of 1976, Bailey Lumber Company filed the present action against N & W and Dayton seeking recovery for property damages allegedly caused by the negligence of both defendants. Following the jury verdict in the Sparks case, N & W and Dayton entered into a written agreement in July of 1977 stipulating Bailey's damages, agreeing Bailey was entitled to recover against one or both defendants, continuing the case generally, reserving for trial the determination of the question of liability, and agreeing to obtain a trial date soon after this Court decided the Sparks appeal.

In June of 1978, after we decided Sparks, Bailey and Dayton filed in the present case a joint plea of collateral estoppel asserting N & W was prevented from relitigating the issues of negligence between N & W and Dayton because such issues had been resolved by the final judgment in Sparks. The court below sustained the plea, finding that "it is compellingly clear that N & W fully and fairly litigated and lost the issues pertaining to its alleged negligence in connection with the accident of July 9, 1976, issues which were essential to the prior adjudication, and that N & W is thereby precluded from again litigating those same issues in the instant case." We awarded N & W an appeal from the July 1978 final order, which entered judgment in favor of Bailey against N & W and Dayton for $183,600.
Under the concept of collateral estoppel, "the parties to the first action and their privies are precluded from litigating [in a subsequent suit] any issue of fact actually litigated and essential to a valid and final personal judgment in the first action." *Bates v. Devers*, 214 Va. 667, 671, 202 S.E.2d 917, 921 (1974). The principle of mutuality, however, serves to keep the influence of the initial adjudication within proper bounds by requiring that to be effective the estoppel of the judgment must be mutual. Moore and Currier, Mutualy and Conclusiveness of Judgments, 35 Tul. L. Rev. 301 (1961).

Thus, according to the principle of mutuality, to which there are exceptions, a litigant is generally prevented from invoking the preclusive force of a judgment unless he would have been bound had the prior litigation of the issue reached the opposite result. *Bates v. Devers*, 214 Va. at 671 n.7, 202 S.E.2d at 921 n.7.

The dispositive question in this case, therefore, is whether the requirement of mutuality should be enforced under these facts.

Arguing that the doctrine should be disregarded here, Bailey and Dayton note the so-called "modern trend" to abrogate the mutuality rule, either entirely or in a great majority of cases. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Bernhard v. Bank of America Nat'l Trust & Savings Ass'n.*, 19 Cal.2d 807, 122 P.2d 892 (1942); *Eagle, Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927). Emphasizing they are not advocating abandonment of mutuality in every case, irrespective of the circumstances, Bailey and Dayton contend there is no sound reason to require the litigant asserting collateral estoppel to have been a party or in privity with a party to the prior suit when, as here, the litigant against whom the estoppel is pleaded has already fully and fairly litigated the present issue. They say that relaxing the mutuality requirement is necessitated under these facts, considering the underlying policy of res judicata to bring an end to pointless litigation and establish certainty in legal relationships.

Mindful of the trend, we decline to spurn the necessity for mutuality in this case.

In Virginia, the established rule is that collateral estoppel requires mutuality, *Bates v. Devers*, supra; *Aetna Casualty & Surety Co. v. Czoka*, 200 Va. 385, 389-90, 105 S.E.2d 869, 872-73 (1958), especially when the estoppel is used "offensively." *Anderson v. Sisson*, 170 Va. 178, 196 S.E. 688 (1938); *Rhines v. Bond*, 159 Va. 279, 165 S.E. 515 (1932). In defensive use of collateral estoppel without mutuality, the defendant, a stranger to the prior proceeding, attempts to preclude the plaintiff, a party to the former proceeding, from relitigating an issue plaintiff lost in the earlier case. See *Ferebee v. Hungate*, 192 Va. 32, 63 S.E.2d 761 (1951). In offensive use of the estoppel without mutuality, a plaintiff, who was a stranger to the former litigation, seeks to preclude the defendant, a party to the prior action, from relitigating an issue defendant lost in the prior case. The latter tactic is employed here. Bailey, joined by Dayton, seeks to estop N & W from trying the issues of negligence arising in the *Sparks* proceeding, even though Bailey was not a party in *Sparks*.

This Court's decisions in *Rhines* and *Anderson*, not addressed on brief by Bailey and Dayton, guide our determination of this case. In *Rhines*, an automobile owned and driven by Bond collided with another owned and operated by William C. Rhines, Sr. At the time, Rhines' three children, all under seven years of age, and his wife were riding in the Rhines vehicle. One child was killed and the other occupants claimed to
have been injured. Rhines, Sr. brought suit as the personal representative of the deceased infant against Bond alleging that Bond's negligence caused the death. A final, unappealed judgment was entered on a jury verdict for the plaintiff. Thereafter, another Rhines child sued Bond seeking recovery for personal injuries negligently caused by Bond. In that action, the plaintiff's pleading recited the circumstances and result of the first suit. We sustained the trial court's action in striking, at Bond's request, references to the prior trial, verdict and judgment, and in dismissing the action. Relying on the mutuality requirement, this Court held that since the injured child would not have been precluded by the result in the wrongful death action had Bond prevailed in that case, Bond was likewise not bound by the prior decision and was entitled, in the subsequent action, to an opportunity to litigate the issue of his negligence.

In *Anderson*, two minor children, while walking on a city sidewalk, were struck and injured by an automobile driven by Sisson. Each minor sued Sisson separately. Trial of the first case resulted in a final judgment for the child. Subsequently, the second child's case resulted in a verdict for defendant, after the trial court had denied pleas of estoppel and res judicata filed by plaintiff in an attempt to hold defendant guilty of negligence as a matter of law. On appeal, this Court affirmed, stating the operation of the estoppels must be mutual. The Court answered in the negative the question: "If two people are injured by one defendant in an accident, does a final judgment in favor of one of the injured parties conclusively establish the same defendant's liability for damages sustained by the other injured party?" 170 Va. at 182, 196 S.E. at 689.

We have reexamined *Rhines* and *Anderson* and have concluded not to abandon the mutuality requirement when, as here, offensive use of collateral estoppel is sought to be invoked in one of a series of damage suits arising from a common disaster. One example of the anomalous and unfair results likely, should we abrogate the rule, will illustrate why we choose to maintain the opportunity for substantial justice in such situations, and not to sacrifice that opportunity in an effort to promote judicial economy. In a bus collision, 50 injured passengers bring separate suits against the bus company. The defendant wins the first 25 suits, but a plaintiff wins suit 26. The offensive use of collateral estoppel should not be applied to permit plaintiffs 27 through 50 automatically to recover. See Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281, 286, 304 (1957); Restatement (Second) of Judgments § 88(4) (Tent. Draft No. 2, 1975). . .

For these reasons, we hold the trial court erred in sustaining the joint plea of collateral estoppel. Consequently, the order appealed from will be reversed as to N & W and the case remanded.

Dayton, of course, did not appeal from the judgment order, so it has become final as to that defendant. Thus, upon remand Bailey may proceed against N & W or, if Dayton satisfies the judgment, Dayton may proceed against N & W for contribution.
JUSTICE COMPTON delivered the opinion of the Court.

In Virginia, the settled rule is that "a judgment of conviction or acquittal in a criminal prosecution does not establish in a subsequent civil action the truth of the facts on which it was rendered" and "such judgment of conviction or acquittal is not admissible in evidence" in the civil case. *Smith v. New Dixie Lines*, 201 Va. 466, 472, 111 S.E.2d 434, 438 (1959). "The reason for the rule is that the parties in a criminal proceeding are not the same as those in a civil proceeding and there is a consequent lack of mutuality." Id. In this dispute about insurance coverage, the insurer asks us not to apply the foregoing rule and to create an "exception" for the particular facts of this case. We deny this request.

On February 7, 1981, appellee William Monroe Dean injured appellee Annette Berry when he drove his truck into her while she was standing on a sidewalk in the City of Richmond. As a result, Dean was charged criminally under the maiming statute, Code § 18.2-51, and was sued civilly by Berry. In the civil suit, Berry sought recovery of damages, alleging Dean was guilty of careless, reckless, and negligent conduct which caused her injuries.


In September 1982, appellant Selected Risks Insurance Company filed the present proceeding naming Dean and Berry as defendants. In a [suit] for declaratory judgment, the insurer asserted that on the day of the incident Dean was the named insured in a policy of motor vehicle liability insurance issued by the company. The insurer contended that Dean had intentionally struck Berry and that its policy contract excluded intentional acts from the liability coverage. The insurer asked the trial court to declare the rights of the parties under the policy and to rule that Dean was not entitled to coverage for the claims made against him by Berry as a result of the incident in question. . . .

The case was tried before a jury and no reference to the criminal proceeding was permitted by the trial court. The jury found that Dean did not intentionally strike Berry. The court entered judgment on the verdict and declared that Dean was covered under the policy with respect to Berry's claims against him. We awarded the insurer an appeal from the November 1983 judgment.

On appeal, the insurer contends "that based upon the full criminal trial and subsequent conviction" of Dean, its insurance contract "clearly provided no coverage" for Dean. Thus, the insurer argues, the trial court should have "judicially relieved" it in this declaratory judgment proceeding from the duty of providing a defense in the damage suit and of paying any sums awarded Berry against Dean.

The insurer points out that the finding of intent was specifically disputed by Dean in the criminal trial and notes there is no dispute in this case that "this specific criminal intent is the same intent involved in a civil insurance setting." In addition, the insurer
observes that the evidence at the two trials was substantially the same and that the same eyewitnesses to the incident testified at both hearings. The primary differences between the two proceedings, the insurer argues, were its involvement in the declaratory judgment trial and the fact the jury in the present proceeding reached a different result from that of the judge in the criminal trial.

Relying on *Eagle, Star and British Dominions Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927), the insurer notes that this Court "early-on carved out an exception" to the foregoing general rule and insists that a further exception is justified here where Dean has been "convicted of a serious criminal offense in a full and fair trial before an impartial and equivalent trier of fact which necessarily determined the 'intent' issue beyond a reasonable doubt." Citing cases from other jurisdictions, the insurer urges that no "logical reason suggests itself for requiring another submission of the same facts to another trier of fact . . . in the same Court employing a lesser standard of proof." This argument would have merit if it were not contrary to the established law of the Commonwealth.

For at least 118 years, this Court, in dealing with the preclusive effect of a criminal judgment upon a subsequent civil action arising from the same transaction, has recognized that the criminal charge and the civil action, "though founded on the same fact, are distinct remedies, prosecuted by different parties and for different purposes," and that there is a "want of mutuality." *Honaker v. Howe*, 60 Va. (19 Gratt.) 50, 51, 56 (1869). The reasons for the rule "that a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered," *Aetna v. Czoka*, 200 Va. 385, 388, 105 S.E.2d 869, 872 (1958), have also been articulated as follows: "(1) The parties are different in a criminal proceeding from those in a civil action; (2) the objects of the two proceedings are different; (3) the results and procedures of the two trials are different; and (4) there is a lack of mutuality." Id. at 389, 105 S.E.2d at 872.

In urging us to create an exception in this case, the insurer does not focus on the entire rule relating to criminal-civil preclusion. Instead, the insurer limits the discussion to an attack on the mutuality requirement within the doctrine of collateral estoppel.

According to that doctrine, the parties and their privies in a first action are precluded from litigating in a subsequent action any factual issue "actually litigated and essential to a valid and final personal judgment in the first action." *Bates v. Devers*, 214 Va. 667, 671, 202 S.E.2d 917, 921 (1974). The principle of mutuality limits the influence of the initial adjudication "by requiring that to be effective the estoppel of the judgment must be mutual." *Norfolk and Western Ry. Co. v. Bailey*, 221 Va. 638, 640, 272 S.E.2d 217, 218 (1980). Thus, "a litigant is generally prevented from invoking the preclusive force of a judgment unless he would have been bound had the prior litigation of the issue reached the opposite result." Id. As recently as 1980, this Court made a considered, unanimous decision to resist the so-called "modern trend" and not to abrogate the mutuality requirement. Id. at 641, 272 S.E.2d at 219. Since that decision, other courts, including the Supreme Court of the United States in *Haring v. Prosise*, 462 U.S. 306, 317 n. 10 (1983), have been guided by our position on this subject.

Nevertheless, the insurer argues the doctrine of mutuality should not be enforced in this case, correctly acknowledging that mutuality does not exist. Of course, had Dean
been acquitted in the criminal trial, the insurer would not have been precluded from claiming Dean committed an intentional act. The acquittal merely would evidence that the trier of fact was unable to find guilt beyond a reasonable doubt, but would leave open the question whether, by a preponderance of the evidence, Dean acted intentionally. The insurer says that a decision not to impose the mutuality requirement here, and ostensibly in other like cases, "would avoid wasteful relitigation of judicially determined identical issues with the prospect of inconsistent findings on the same facts in the same court as occurred in this case."

Even if the insurer had mounted an attack on every reason underpinning the criminal-civil preclusion rule, which it has not, we would not be persuaded to disregard the mutuality element of that rule to accommodate the facts of this case. The urge to promote judicial economy by permitting criminal judgments to preclude determination of issues in civil cases should not override the obligation of the courts to maintain the opportunity for litigants to have their civil rights adjudicated in a forum suited for that purpose.

In Virginia, the doctrine of stare decisis is more than a mere cliché. That doctrine plays a significant role in the orderly administration of justice by assuring consistent, predictable, and balanced application of legal principles. And when a court of last resort has established a precedent, after full deliberation upon the issue by the court, the precedent will not be treated lightly or ignored, in the absence of flagrant error or mistake. *Kelly v. Trehy*, 133 Va. 160, 169, 112 S.E. 757, 760 (1922). We perceive no error, flagrant or otherwise, or mistake committed by the Court in 1980 in *Bailey* when we declined to follow a "trend" and abrogate the requirement of mutuality. Thus, we will follow our established precedent.

The insurer's reliance on *Heller* is misplaced. In that case, the Court refused to apply the general rule. The Court held that proof of a conviction of arson was admissible in evidence as a bar to a civil action. There, the arsonist sought to recover on a fire insurance policy covering the same property which he had been convicted of willfully burning with intent to defraud the insurer. The Court applied a logical exception to the general rule in that case where the arsonist sought to recover damages for his own wrong. Such is not the situation here and there is no compelling reason to create an exception under the facts of this case.

Therefore, we hold the trial court correctly decided the criminal conviction was not conclusive evidence that Dean intentionally injured Berry. From that ruling, it necessarily follows the trial court likewise correctly excluded the conviction both as prima facie evidence and as some evidence on the question of intention.6

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6 See Code § 8.01-418 dealing with the manner of proof, in a civil action, of a guilty plea, of a plea of nolo contendere, and of a forfeiture in a criminal proceeding. Enacted in 1970, this statute deals with the evidentiary question of admissions and apparently was enacted to change the rule enunciated in Fulcher v. Whitlow, 208 Va. 34, 41, 155 S.E.2d 362, 368 (1967). Acts 1970, ch. 354.
POFF, J., dissenting.

I dissent from the majority's holding. That is not to say that I advocate abandonment of the mutuality requirement of the collateral-estoppel doctrine. Rather, I believe that the requirement should be applied selectively and never ritualistically and that its application here is ill justified.

The mutuality question arises in two distinct procedural situations: (1) where a plea of collateral estoppel is raised by a party who was a litigant in a prior action against a party who was a stranger to the prior action, and (2) where the plea is raised by a party who was a stranger to a prior action against a party who was a litigant in that action. In the first situation, the mutuality requirement should always be applied for the reason that the stranger should not be deprived of his property without due process of law. The latter situation poses no such constitutional concern; although a person is entitled to his day in court on a particular issue, he is not entitled to a day in court against a particular adversary.

I would hold that when a party has fully and fairly litigated an issue of fact essential to a valid judgment and a judgment against him has become final, he is estopped to relitigate that issue in a subsequent action. Such a rule, I believe, has special validity when, as here, the successful party in the prior action was required to bear a heavier burden of proof than that required in the later action. And, if courts are to honor the ancient maxim that a valid final judgment is a verity and immune from collateral attack, then the doctrine of collateral estoppel, once invoked, must be applied, even if the party who invokes it was a stranger to the prior action.

The majority suggests that the application of the doctrine in this case would offend the doctrine of *stare decisis*. I find what seems to me to be compelling precedent in a decision of this Court rendered more than half a century ago. In *Eagle, Etc., Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927), Heller, a man convicted of the crime of willfully burning his own stock of goods, brought a civil suit against his insurer to recover the value of the goods. The insurer filed a plea of estoppel. The trial court rejected the plea and entered judgment for Heller. On appeal, this Court considered the mutuality requirement on which Heller relied but concluded that "a rigid adherence to a general rule . . . would be a reproach to the administration of justice." Id. at 85, 140 S.E. at 315. We reversed the judgment and entered final judgment for the insurer on the ground that "the precise finding of fact, that the accused was criminally responsible for the fire . . . is conclusive upon the plaintiff, Heller". Id. at 111-12, 140 S.E. at 323.

In every significant particular, *Heller* is indistinguishable from this case. In *Heller*, the issue of fact adjudicated in the criminal prosecution was intent to burn; here, it was intent to wound. In both cases, proof of criminal intent was essential to a valid judgment of conviction. And, in both cases, the plea of estoppel to relitigate the issue of criminal intent was invoked in a civil action by a party who was a stranger to the criminal action. The majority attempts to distinguish *Heller* on the ground that "the arsonist sought to recover damages for his own wrong" and "[s]uch is not the situation here". Although it is true that the convict in this case, unlike the convict in *Heller*, is not seeking to recover damages, he stands to gain substantial benefits when Berry's personal injury claim goes to trial, because the effect of the majority's decision is to require his insurer to defend the action and, within the limits of coverage in his insurance policy, to pay any damages assessed against him.
Finally, the majority observes that "had Dean been acquitted in the criminal trial, the insurer would not have been precluded from claiming Dean committed an intentional act." Therefore, the majority reasons, "mutuality does not exist" and the doctrine of collateral estoppel should not apply in this case. The *Heller* court rejected such reasoning. Id. at 88-90, 140 S.E. at 316.

I would reaffirm the principles applied in *Heller*, reverse the judgment below, and enter final judgment declaring that Dean is estopped to deny that his tort was intentional and, hence, that he is not entitled to insurance coverage for the claim Berry has against him.

THOMAS, J., dissenting.

The majority opinion is a fairly dramatic example of the way in which the mechanistic, unanalytical application of general legal principles can lead to absurd results. [A long, impassioned, dissent is omitted here; Justice Thomas left the Court shortly thereafter. He ended the dissent with]:

*Stare decisis* does not stand in our way in this case. That doctrine was never meant to supplant logic and reason. It was never meant to prevent a careful evolution of the law. *Stare decisis*, pushed to extremes, would mean the law, once stated by the courts, could never be changed by the courts. In reality, this is a case of first impression for the Commonwealth. For the reasons stated above, I would reverse the decision of the trial court and enter final judgment here.

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"Everything that other guy said is a bunch of lies.
Thank you very much."
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JUSTICE COMPTON delivered the opinion of the Court.

In this civil action, the plaintiff seeks to domesticate a foreign judgment. The proceeding has generated issues involving collateral estoppel and full faith and credit.

In April 26, 1974, plaintiff-appellant Annie Nero, a California resident, was hit by a truck while walking in a crosswalk at a street intersection in San Francisco. She sustained an injury to her lower back and left side. After striking the plaintiff, the truck driver stopped his vehicle momentarily, backed up, and drove from the scene.

In 1975, the plaintiff filed a damage suit in the Superior Court of the State of California, In and For the City and County of San Francisco, against Gleason Refrigerated Services, Inc., a Massachusetts corporation, U-Haul Company, a Virginia corporation, and "Does One Through Ten, inclusive." The "Does" were designated as fictitious parties who were then unknown to the plaintiff and as to whom the plaintiff reserved the right to substitute their true names when known to her. The complaint alleged the corporate defendants owned and operated a large silver-colored truck bearing Virginia license "TRH 403." The pleading further alleged that defendants negligently caused injuries and damages to the plaintiff for which she sought recovery in general damages of $25,000 plus additional amounts to cover medical expenses, lost wages and suit costs.

Subsequently, Gleason filed an answer and U-Haul Company filed a motion for summary judgment. Gleason also filed a cross-claim against U-Haul, Noah Ferris, and appellee William Ferris. Gleason, denying it owned or operated the vehicle in question, alleged that the cross-defendants, all residents of Virginia, owned and operated the vehicle described in Nero's complaint. Gleason further alleged that the cross-defendants' negligence caused plaintiff's damages and it sought judgment against the cross-defendants in the event Gleason was found liable to the plaintiff. The Ferrises were served with process under California's non-resident motorist statutes providing for Notice to the California Director of the Department of Motor Vehicles and subsequent registered mailing to the defendants. The registered mail receipts showed the Ferrises, residents of Roanoke County, received the registered mail in November of 1975. The Ferrises made no appearance in the California proceeding.

Later, the plaintiff, identifying the Ferrises as "Does One and Two," moved for a judgment by default against them. Notices of the plaintiff's Request To Enter Default were sent to the Ferrises by registered mail under the California Code of Civil Procedure and received by them in May of 1976. They still made no appearance in the California proceeding.

A brief hearing was held on the default motion on January 19, 1977, by one of the judges of the Superior Court. The evidence consisted of representations made by plaintiff's counsel. No testimonial evidence was offered to establish personal jurisdiction over either of the Ferrises. Thereafter, default judgments were entered against both Ferrises in the amount of $10,000 plus costs.
Subsequently, the plaintiff filed separate suits in Virginia against each Ferris in the court below in August of 1977 to domesticate the California judgments. Service of process was obtained almost immediately on Noah but William was not served until July 19, 1978, the date of the trial of the action against Noah, William's father.

In the suit against Noah, he took the position that the California judgment was null and void because the California court did not have in personam jurisdiction over him. He asserted that in order for the California court to acquire jurisdiction under the applicable statute, Section 17451, it was necessary for him either to have been the owner of a motor vehicle which caused injury to the plaintiff in California; or to have been the employer of an employee who was operating his motor vehicle which caused injuries to the plaintiff; or to have himself been operating a motor vehicle which caused injuries to the plaintiff. Noah presented evidence at the trial which negated the foregoing jurisdictional facts.

During his trial, at which the plaintiff did not appear, Noah testified that in April of 1974 he owned a tractor-trailer unit and that William drove the vehicle for him throughout the United States hauling produce. Although the evidence indicated there was a "good chance" William was operating a truck for his father in California in April of 1974, the trial judge specifically found "that neither Noah Ferris nor his son and employee, William Ferris, were in San Francisco, California on April 26, 1974, nor was Noah Ferris or his son and employee, William Ferris, involved in the accident which caused personal injury to the plaintiff." Consequently, the trial court ruled the California court did not have personal jurisdiction over Noah Ferris, decided the default judgment was null and void, and refused to domesticate the judgment in Virginia. That order, entered July 26, 1978, became final and was not appealed.

Thereafter, in the present action against William, the defendant filed a "plea of res judicata or estoppel by judgment." He contended the decision and findings in the suit against Noah that William was not in San Francisco on April 26, 1974 and was not involved in the accident causing injury to the plaintiff were binding on the plaintiff in the present action. Following argument of counsel and filing of memoranda of law, the trial court, in a letter opinion, sustained defendant's plea, and dismissed the suit in a final order entered in April of 1979, from which we awarded plaintiff this appeal.

On appeal, plaintiff contends that the trial court erred in sustaining defendant's effort in the present case, based on the decision in Noah's case, to employ collateral estoppel defensively. Under the doctrine of collateral estoppel, "the parties to the first action and their privies are precluded from litigating [in a subsequent suit] any issue of fact actually litigated and essential to a valid and final personal judgment in the first action." Norfolk and Western Ry. Co. v. Bailey, 221 Va. 638, 640, 272 S.E.2d 217, 218 (1980), . . . [P]laintiff contends, "[i]t is clear that while Noah Ferris was in privity with William Ferris (i.e. Noah's liability was initially derivative from William), it is not true that William was ever in privity with Noah. . . ."

The plaintiff has misconstrued the concept of privity in the context of these facts. Under these circumstances, we hold that William Ferris was in privity with Noah Ferris, his employer.

There is no fixed definition of privity that automatically can be applied to all cases involving res judicata issues. While privity generally involves a party so identical in
interest with another that he represents the same legal right, a determination of just who are privies requires a careful examination into the circumstances of each case. *Storm v. Nationwide Ins. Co.*, 199 Va. 130, 134-35, 97 S.E.2d 759, 762 (1957). Here, as defendant contends, the focus is on the relationship of the Ferrises as it affects the question of jurisdiction of the California court. Just as the tort liability of Noah would have been derivative of the tort liability of William, his agent, the alleged jurisdiction of the California court over Noah, as nonresident, could only have been derived from the jurisdictional fact of William's operation of Noah's vehicle in California. In other words, to support the jurisdictional grounds claimed, the plaintiff would have been required to prove that William as agent operated Noah's vehicle in California. Because of this relationship of the parties vis-à-vis jurisdiction, a finding of no jurisdiction over William necessarily was required for the court to have determined in the first case that California had no jurisdiction over Noah. Hence, we apply collateral estoppel here on the narrow basis of privity and find it unnecessary to consider the invitation of the parties that the issue be decided on a broader ground, the so-called "nonmutuality rule," that would not require a showing of privity...

Consequently, we hold the plaintiff in the present case is collaterally estopped and is bound by the findings of jurisdictional fact made by the trial court in her former suit against Noah Ferris. . .

"Your Honor, we've agreed upon a verdict. We're not really sure whether defendant should be liable or not, but we are ready to head home and see what's on TV tonight."
Proving Actual Decision of an Issue for Collateral Estoppel Purposes

REID v. AYSCUE
246 Va. 454, 436 S.E.2d 439 (1993)

JUSTICE LACY delivered the opinion of the Court.

The primary issue in this appeal is whether the trial court properly held that the doctrine of collateral estoppel precluded further litigation between the parties on the issue of contributory negligence.

In 1985, Gwendolyn S. Reid was driving her car when she swerved to avoid hitting a pickup truck and collided with a barrier. Gwendolyn's mother, Gladys C. Reid, was a passenger in Gwendolyn's car and died as a result of injuries she sustained in the collision. Ronald D. Reid, Gwendolyn's brother and administrator of Gladys's estate, brought a wrongful death suit against the driver and owner of the pickup truck, Ralph Lee Ayscue and Allegheny Pepsi-Cola Bottling Company (Allegheny), respectively. Ronald alleged that Ayscue was negligent in the operation of the pickup truck and that this negligence resulted in Gladys's death. Ayscue and Allegheny filed grounds of defense alleging that the sole proximate cause of Gladys's death was Gwendolyn's negligent driving.

Ayscue and Allegheny also filed a third-party motion for judgment against Gwendolyn seeking contribution. That claim was severed from the wrongful death suit. In the wrongful death suit, the jury found in favor of the estate and awarded damages of $76,633.29. The jury allocated the damages as follows: $26,633.29 for medical and
funeral expenses; $ 50,000 to Ronald; and $ 0 to Gwendolyn. Judgment was entered on this verdict. That judgment was not appealed and is now final.

Ayscue and Allegheny paid the judgment and subsequently moved for summary judgment on their contribution claim. Ayscue and Allegheny argued that they were entitled to summary judgment because Gwendolyn was collaterally estopped from seeking to prove that she was not contributorily negligent since the jury determined this issue against her by apportioning her $ 0 in damages. The trial court agreed and, by order entered October 13, 1992, granted summary judgment against Gwendolyn for $ 38,316.65 plus interest, but denied Ayscue and Allegheny's request for prejudgment interest. We awarded Gwendolyn an appeal and also awarded Ayscue and Allegheny an appeal on their cross-error challenging the trial court's denial of prejudgment interest.


In this case, the trial court found that the "real plaintiffs in the Reid v. Ayscue wrongful death action were the statutory beneficiaries, Ronald and Gwendolyn Reid," and that "had there been an award in favor of Gwendolyn Reid in the wrongful death suit, she could have used that judgment in her favor against Ayscue and Allegheny . . . as a defense against the third-party claim for contribution." Gwendolyn does not challenge these conclusions, but argues that the issue of her contributory negligence was not conclusively decided in the wrongful death case and, therefore, that collateral estoppel is not available here because there was no identity of issues. We disagree.

Identity of issues is satisfied if the proponent of collateral estoppel establishes that the issue was actually litigated and determined by a final judgment in a prior proceeding. Bates, 214 Va. at 671, 202 S.E.2d at 921.

A review of the record, including the pleadings and transcript from the wrongful death trial, shows that the issue of Gwendolyn's negligence was raised and vigorously litigated in that proceeding. Gwendolyn testified that she did not apply her brakes when Ayscue pulled in front of her car. She stated that she looked at her speedometer and when she looked back at the road, she saw that Ayscue had applied his brakes. At that point her vehicle veered to the left and collided with a barrier. This collision caused the injuries resulting in Gladys's death.

The jury was not required to make a separate, specific finding regarding whether Gwendolyn was negligent. However, the jury was required to consider the issue of Gwendolyn's negligence in awarding damages. Instruction 14 provided:

The Court instructs the jury that Gwendolyn Reid is one of two lawful beneficiaries of the estate of Gladys Reid. You are further instructed, however, that if Gwendolyn Reid was guilty of any negligence which proximately caused or contributed to the accident in which Gladys Reid died, then any such negligence would bar a recovery by Gwendolyn Reid.
Therefore if you find from the evidence and the instructions of the Court that Gwendolyn Reid was guilty of negligence which proximately caused or contributed to the accident, you should not award any damages to Gwendolyn Reid.

The uncontradicted evidence as to damages in the wrongful death trial showed that both beneficiaries had similar close and loving relationships with their mother and suffered equally from her death. In determining the damage award the jury was instructed as follows:

INSTRUCTION NO. 13

The Court Instructs the Jury:

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you may consider, but are not limited to, any of the following which you believe by the greater weight of the evidence were caused by the negligence of defendant, Ralph Lee Ayscue, as damages suffered by the beneficiaries:

any sorrow, mental anguish, and loss of solace suffered by the beneficiaries. Solace may include society, companionship, comfort, guidance, kindly offices, and advice of the decedent.

If you award damages, you may distribute these damages between Ronald D. Reid and Gwendolyn S. Reid, subject to the other instructions of this Court.

If you find your verdict for the plaintiff, you shall award damages for:

(1) any expenses for the care, treatment, and hospitalization of Gladys C. Reid incident to the injury resulting in her death; and

(2) reasonable funeral expenses.

The jury returned a verdict awarding $50,000 to Ronald but nothing to Gwendolyn. We must assume that the jury complied with the instructions given by the trial court and based its determinations on the evidence in accordance with those instructions. Buckland v. Commonwealth, 229 Va. 290, 296, 329 S.E.2d 803, 807 (1985). While Instruction 13 was permissive and did not require the jury to distribute damages to both beneficiaries, the uncontradicted evidence regarding the relationships between Gwendolyn, her mother, and her brother and the losses the children suffered as a result of their mother's death, simply does not support allocating damages to Ronald, but not to Gwendolyn. Instruction 13, however, required that the allocation of damages be made "subject to the other instructions." The only rational interpretation of the jury's failure to award damages to Gwendolyn is that the jury believed she was negligent and, consequently, pursuant to Instruction 14, denied any damages to Gwendolyn.

Therefore, we find that the trial court did not err in determining that the issue whether Gwendolyn was negligent was litigated and resolved against her in the wrongful death action. Ayscue and Allegheny met their burden of establishing the requisites of collateral estoppel by a preponderance of the evidence and the trial court properly entered summary judgment in their favor.
Notes on Finality Issues

Subsequently Arising Claims. In Groh v. B. F. Saul Real Estate, 224 Va. 156, 294 S.E.2d 859 (1982), the Court noted that neither res judicata nor collateral estoppel bars a party to prior proceedings from instituting action on a claim which arose after the close of the prior proceeding, even if connected with the subject matter previously litigated.

Which Courts? Any court appears to have stature sufficient for res judicata or collateral estoppel, and the second court need not be the same or of equal rank or jurisdiction with the first. Petrus v. Robbins, 195 Va. 861, 80 S.E.2d 543 (1954), revised, 196 Va. 322, 83 S.E.2d 408 (1954).


Consent Judgments. Consent Judgments are judgments, and hence if the requirements of Res Judicata are present a consent decree can and will have preclusive effect. It seems doubtful that a consent resolution would meet the full and fair litigation requirement for issue preclusion under the doctrine of collateral estoppel, though some federal cases have suggested that this is possible. Many consent decrees have recitals which affect their utility in subsequent cases, either setting aside disputed issues or noting that the defendant makes no confession of wrongful conduct by entering the decree, all of which reduce the likelihood that collateral estoppel effect would be given to the decree.

Privity. The preclusive effect of a prior adjudication normally applies where the parties are the same, or are privies. See Storm v. Nationwide Mutual Insurance, 199 Va. 130, 97 S.E.2d 759 (1957)("There is no generally prevailing definition of privity which can be automatically applied to all cases involving the doctrine of res adjudicata. Who are privies requires careful examination into the circumstances of each case as it arises. In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right.")

Finality Required. In Faison v. Hudson, 243 Va. 413, 417 S.E.2d 302 (1992), set forth in connection with various venue and trial topics elsewhere in these materials, the Supreme Court had occasion to review a litigation in which two cases arising from a traffic accident were filed in different circuits almost simultaneously. The victor in the first case to reach judgment sought and obtained a res judicata ruling in the slower case, before the appeal of the first case was completed. The Court held: "Although we previously have not decided the precise question presented, we conclude that the better rule, which we now adopt, is that a judgment is not final for the purposes of res judicata or collateral estoppel when it is being appealed or when the time limits fixed for perfecting the appeal have not expired." Hence the matters were remanded (with the
gentle suggestion that they be consolidated in one proceeding for hearing upon remand). It appears that similar notions would inform the finality required for imposition of collateral estoppel.

**Using the Evidence.** In *Dorn v. Commonwealth*, 3 Va.App. 110, 348 S.E.2d 412 (1986), the court of appeals noted that regardless of the applicability of collateral estoppel, a party may use the same evidence offered in a prior proceeding to prove a fact *other* than that for which it was previously offered.

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“Your Honor, we feel that the trial failed to live up to the pretrial publicity.”

E. “Judicial Estoppel”
The Supreme Court of Virginia has noted that terms "doctrine of estoppel by inconsistent position" and "judicial estoppel" are often used interchangeably. Essentially, judicial estoppel forbids parties from assuming successive positions in the course of a suit or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory. It derives from the prohibition in Scottish law against approbation and reprobation. Judicial estoppel is often confused with the concepts of res judicata and collateral estoppel. However, it differs from both by the elements required for its invocation and its effect.

Unlike res judicata and collateral estoppel, the doctrine of judicial estoppel does not require a prior final judgment to be invoked. The doctrine of judicial estoppel may bar a party from taking inconsistent positions within a single action. Additionally, judicial estoppel may act as a bar to maintaining a new cause of action.

The doctrine of judicial estoppel applies where the position taken is inconsistent relative to the same fact or state of facts. However, under this doctrine a person who has taken an erroneous position on a question of law is ordinarily not estopped from later taking the correct position, provided his adversary has suffered no harm or prejudice by reason of the change.

The doctrine of estoppel by inconsistent position, or judicial estoppel, does not apply to a prior proceeding in which the parties are not the same.

An exception to this general rule may exist where the liability of one defendant is derivative of the liability of another; for example, where the relation between defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee.

While an assertion of fact in a judicial proceeding may be introduced, subject to certain conditions, as a party admission in a subsequent proceeding, the doctrine of judicial estoppel will not act as a preclusive bar to the subsequent proceeding unless the parties are the same.

In the recent case reviewed by the Supreme Court, the defendant and plaintiff's attorneys were not related parties. Accordingly, defendant was not permitted to invoke the doctrine of judicial estoppel against plaintiff. See generally Lofton Ridge, LLC v. Norfolk Southern Railway Company, 268 Va. 377, 601 S.E.2d 648 (2004) (Plaintiff brought separate actions against its attorneys and land surveyor, on the one hand, and against the defendant, on the other, arising out of its purchase of certain real property. In its suit against defendant, plaintiff sought a judgment declaring that it had an easement over an unpaved road crossing over portions of the defendant's property to an adjoining state highway and the entry of a permanent injunction prohibiting defendant from interfering with plaintiff's use and enjoyment of the unpaved road and its recently acquired property. In its suit against its attorneys and its land surveyor, plaintiff sought damages for false representations regarding the access to the property that led it to purchase the property and attempt to develop it. Following mediation, plaintiff settled its claims against its attorneys pursuant to the terms of a confidentiality agreement. Based in part on plaintiff's allegations underlying these settled claims, defendant filed a plea in bar alleging that plaintiff's claims against it regarding the unpaved road were barred under the doctrines of judicial estoppel and election of remedies. Instead of reaching the merits of plaintiff's claims, the trial court sustained defendant's plea in bar
and dismissed plaintiff's amended bill of complaint with prejudice based on the doctrine of judicial estoppel. The Supreme Court held that the trial court erred in dismissing with prejudice, based on the doctrine of judicial estoppel, plaintiff's suit for declaratory and injunctive relief concerning an easement across land owned by the defendant, where the parties in plaintiff's separate action against its attorneys and land surveyor were not the same as the parties in the present action).
F. Correction and Finality of Judgments

NETZER v. REYNOLDS
231 Va. 444, 345 S.E.2d 291 (1986)

JUSTICE RUSSELL delivered the opinion of the Court.

This appeal involves the authority of a court to correct its own final decree, "nunc pro tunc," more than twenty-one days after its entry. More specifically, we must decide whether the court may so amend an erroneous recital in a final decree, in order to conform it to the true state of the record, where the erroneous recital appears to deprive the court of subject-matter jurisdiction.

The question arises in the context of a domestic relations dispute. Arlene Gilbert and Julian Reynolds were married in 1950. They established a marital home at 1116 Portner Road, in the City of Alexandria, in March 1960, and lived there with their three children until some time in 1962, when the husband left the marital home and returned to his mother's home in Danville, Virginia.

During the week of Christmas, 1964, the wife went to Danville and stayed in the husband's mother's home for about a week in an effort to persuade her husband to return to the marital home. Her effort was unsuccessful, and she returned to Alexandria without him.

In December 1965, the wife filed a divorce suit in the Corporation Court (now the Circuit Court) of the City of Alexandria. Her bill of complaint alleged that "[t]he parties last residence as man and wife was in Alexandria, Virginia" and that "[t]he Complainant is an actual bona fide resident of and domiciled in the State of Virginia, City of Alexandria and has been for more than one year next preceding the filing of this Bill." The bill of complaint, however, also contained the following allegations:

4. The parties last cohabited together as man and wife in Danville, Virginia on January 2, 1965.

8. That the Complainant and the Defendant last cohabited in Danville, Virginia on January 2, 1965 when the Complainant . . . spent Christmas at the home of the Defendant's mother in an attempt to get the Defendant to return to Alexandria, Virginia and resume his role as husband and supporter of the family. That the defendant on the date aforesaid told the wife to leave and refused to resume a marital relationship in either Alexandria or Danville.

Substituted service of process was made on the husband in Danville. In February 1966, the parties entered into a written property settlement agreement in which the husband agreed to convey to the wife sole title to the Alexandria home. The wife filed the agreement among the suit papers, but the husband entered no appearance in the divorce suit. The suit was referred to a commissioner in chancery who held a hearing in April 1966. In May 1966, the commissioner filed his report finding that the court "has jurisdiction and venue to hear and determine this cause" and recommending that the wife be awarded a divorce on the ground of desertion. The commissioner stated that the
complainant had been a bona fide resident of 1116 Portner Road, Alexandria and had been domiciled in that city for more than one year next preceding the filing of the suit. The commissioner's report further stated, however, "that the parties hereto last cohabited as husband and wife in Danville, Virginia, on January 2, 1965."

A final decree of divorce, prepared and endorsed by Martin Fogle, the wife's attorney, was presented to the court and was entered on July 19, 1966. It contained recitals similar to those in the bill of complaint and the commissioner's report, including "it appearing to the court . . . that the parties last cohabited as husband and wife in Danville, Virginia on January 2, 1965 . . . ." The decree awarded the wife a final divorce on the ground of desertion and ratified, affirmed, and incorporated the property settlement agreement. In 1968, Arlene Gilbert Reynolds married Murry H. Netzer in Montgomery County, Maryland.

In 1970, Arlene Netzer, represented by new counsel, sought a rule to show cause against Julian Reynolds for his failure to convey his interest in the Alexandria home to her pursuant to the ratified property settlement agreement. The rule was personally served on Julian Reynolds in Danville, but the court apparently took it under advisement. The record shows no further proceedings on the rule.

In 1982, Arlene Netzer filed a motion for the appointment of a special commissioner to convey Julian Reynolds' interest in the Alexandria property to her. The judge who had entered the 1966 divorce decree was deceased in 1982. The court appointed a guardian ad litem, who answered that Julian Reynolds was incapacitated. Reynolds also appeared by his present counsel, who defended the motion for appointment of a special commissioner by alleging that the 1966 final decree of divorce was "invalid, void, and of no force or effect, by reason of improper venue, apparent on the face of the Bill of Complaint for Divorce and on the record."

Mrs. Netzer responded by filing a motion for the entry of an order nunc pro tunc, correcting the 1966 divorce decree to "conform the decree herein to the evidence taken upon the trial of this matter." The court, in a letter opinion issued September 13, 1982, determined there was no evidence in the transcript that Julian Reynolds was a resident of Alexandria when the suit was filed; that the judge who entered the 1966 divorce decree had found on the basis of the evidence that the parties had last cohabited in Danville; that the court, even if it were to agree that the last-mentioned finding was in error, lacked the power to correct it; that no alternative basis of venue is shown by the record; and that because the final decree shows on its face that venue was improper, the decree was void for lack of jurisdiction. The court entered decrees on November 1 and November 30, 1982, overruling several post-trial motions and dismissing the suit on the grounds stated in the letter opinion. This appeal followed.

Code § 20-96 (B) provides, in pertinent part, that divorce suits shall be brought "in the county or corporation in which the parties last [cohabited], or at the option of the plaintiff, in the county or corporation in which the defendant resides, if a resident of this State." [The Court noted that under the law at the time, such venue rules were jurisdictional; more recently this has been changed. Ed.] Accordingly, the 1966 divorce decree appears on its face to be void for lack of subject-matter jurisdiction. Such decrees are subject to attack "anywhere, at any time, in any way, by anybody. It is immaterial whether the assault be direct or collateral." Slaughter v. Commonwealth, 222 Va. 787, 793, 284 S.E.2d 824, 827 (1981).
The divorce decree, however, does not accurately set forth the undisputed jurisdictional facts proved and shown by the record. In Colley, we construed the word "cohabit," as used in the divorce venue statute (then Code § 20-98, repealed by 1977 Acts, c. 624, replaced in pertinent part by present Code § 20-96 (B)) to mean "having dwelled together under the same roof with more or less permanency . . . . The term imports a dwelling together for some period of time, and does not include mere visits or journeys." 204 Va. at 228, 129 S.E.2d at 632 (emphasis added) (citations omitted). In Colley, we also quoted with approval language from West Virginia authority construing the phrase "county in which the parties last cohabited," as used in the similar divorce venue statute in that state: "[it] necessarily means the place where the parties ceased to live together as husband and wife in the same house, and ordinarily carries with it the idea of a substantial measure of temporal continuity." 204 Va. at 229, 129 S.E.2d at 633 (emphasis added) (quoting Jennings v. McDougle, 83 W. Va. 186, 190, 98 S.E. 162, 164 (1919)).

Applying the construction of the venue statute mandated by Colley, it is clear from the uncontroverted record before us that Arlene and Julian Reynolds last cohabited in Alexandria, the place of their permanent marital home, not in Danville, the place they stayed during a brief visit. Thus, the commissioner's report set forth an erroneous conclusion of law, which echoed the erroneous allegation contained in the bill of complaint. The final decree perpetuated that error. It was clearly within the power of the court, during the twenty-one day period following entry of the decree, upon proper application, to have amended it to conform to the proof and to have allowed a corresponding amendment to the bill of complaint. Rules 1:1 and 1:8. The court was not bound by the erroneous conclusion of law in the commissioner's report. Hill v. Hill, 227 Va. 569, 577, 318 S.E.2d 292, 296 (1984). The decree would then have been unquestionably valid, adequately supported by the record and clearly within the court's jurisdiction. The question before us is whether such curative amendments may be made now.

Before 1956, Virginia adhered to the common-law rule, then shared by only six other states, which held that after the end of a term of court, the judge was powerless to change the record with respect to judicial acts performed within the ended term, with one exception: where there was sufficient record evidence to support the change, the court might enter a nunc pro tunc order to make the record "speak the truth." Council v. Commonwealth, 198 Va. 288, 291, 94 S.E.2d 245, 247 (1956). This was an inherent power of the court, independent of statute. Id. at 293, 94 S.E.2d at 248. In Council, we adopted the majority rule that the court has the inherent power, based upon any competent evidence, to amend the record at any time, when "the justice and truth of the case requires it," so as to cause its acts and proceedings to be set forth correctly. Id. at 292, 94 S.E.2d at 248. We continue to adhere to the rule adopted in Council. Harris v. Commonwealth, 222 Va. 205, 209-10, 279 S.E.2d 395, 398 (1981).

In our view, the case before us meets the requirements of the rule in Council, as well as those of the more restrictive common-law rule which preceded it, because there is ample unrefuted "record evidence" that the last place of marital cohabitation, as we have defined that term in the context of the divorce venue statute, between Arlene and Julian Reynolds, was in the City of Alexandria. Accordingly, the trial court had, at all times, and still has, the inherent power to allow an appropriate amendment to the bill of complaint, to disregard the erroneous conclusion of law contained in the commissioner's
report, and to amend its final decree of divorce *nunc pro tunc*, in order to make the record "speak the truth." The court erred in determining that it lacked such power.

The orders appealed from will be reversed, and the case remanded for entry of a *nunc pro tunc* order and for further proceedings consistent with this opinion.

“Objection very overruled!”
G. Bill of Review

A bill of review in equity is available under § 8.01-623. Where the ground for relief in the equitable action is after-discovered evidence, leave of court is required. Where the bill seeks to correct error on the face of the record, no leave is required to file such an action. Section 8.01-623 provides:

A court allowing a bill of review may award an injunction to the decree to be reviewed. But no bill of review shall be allowed to a final decree, unless it be exhibited within six months next after such decree, except that a person under a disability as defined in § 8.01-2 may exhibit the same within six months after the removal of his or her disability. In no case shall such a bill be filed without the leave of court first obtained, unless it be for error of law apparent upon the face of the record.

This statute was not abrogated in the 2006 reformulation of civil litigation, and remains on the books today. While having disparaging things to say about this procedure as an unneeded anachronism, the Supreme Court in the case below gives it considerable power by its interpretation of what an "error of law" is for purposes of seeking relief many months after a decision in an equitable claim.

BLUNT v. LENTZ

JUSTICE HASSELL delivered the opinion of the Court:

The primary issue that we consider in this appeal is whether a separation agreement executed between a husband and wife terminated the husband's right to inherit property as a beneficiary of the wife's will.

Mason and Mildred Blunt were married in 1943. Three children, Delores M. Lentz, M. Allen Blunt, and Sharon B. Williamson, were born of the marriage. Mildred executed a holographic will dated October 22, 1974, and designated Mason as her sole beneficiary and "administrator" of her estate. Marital difficulties occurred, and on May 5, 1986, Mason and Mildred executed a separation agreement.

Mildred died in Henrico County on April 10, 1987. At the time of Mildred's death, Mason and Mildred were married, but they lived separate and apart. Neither had instituted divorce proceedings. Mildred's holographic will was probated in the Circuit Court of Henrico County on June 22, 1987. Mason qualified as the executor of Mildred's estate.

The children filed an amended bill of complaint in the Circuit Court of Henrico County against Mason, individually and in his capacity as executor. They sought a declaratory judgment, specific performance, and an injunction. Mason, individually and as executor, filed an answer to the amended bill of complaint. He also filed a cross-bill in which he requested the advice and guidance of the court regarding the effect of the separation agreement on the will and a determination of the lawful beneficiaries of the
In his report, the commissioner concluded that when Mason executed the separation agreement, he waived any rights to inherit as a beneficiary of Mildred's will and that the children were the statutory beneficiaries of her estate. On September 5, 1989, the trial court entered a final decree confirming the commissioner's report. For reasons not apparent, Mason, who was represented by counsel not involved in this appeal, did not seek an appeal from that decree.

On January 2, 1990, Mason, through his current counsel, filed a bill of review and alleged that there were errors of law apparent on the face of the final decree and the record. The children filed a demurrer which was overruled. Subsequently they filed an answer. The trial court denied the bill of review because it failed to show any errors of law on the face of the final decree.

Mason argues that the trial court erred when it denied his bill of review because there were errors of law apparent on the face of the final decree and record. The children, however, argue that a bill of review is not an appropriate procedural mechanism to examine the validity of the September 1989 final decree and that Mason's sole remedy was an appeal from that decree. We disagree.

It is true that a bill of review is limited in scope and is rarely utilized in Virginia procedure. Indeed, in modern appellate practice wherein most litigants have a statutory right to appeal from judgments of trial courts, use of a bill of review is discouraged. Nonetheless, it remains an available procedural device until abolished by the General Assembly.

Code § 8.01-623 states that "in no case shall [a bill of review] be filed without the leave of court first obtained, unless it be for error of law apparent upon the face of the record." We have consistently stated that:

The principles of law which determine whether a bill of review will lie for errors of law apparent on the face of the record are well settled . . . . A bill of review does not lie to review or correct errors of judgment in the determination of facts. If there be error in this particular, after a final decree, it can be corrected only by an appellate court. But if error of law be apparent from an inspection of the record in the cause, and a final decree has been entered, a proper case for a bill of review is prima facie presented.

Harrington v. Woodfin, 193 Va. 320, 325, 68 S.E.2d 882, 885 (1952) (citations omitted) (emphasis in original); See also Stamps v. Williamson, 190 Va. 145, 150, 56 S.E.2d 71, 73 (1949); Barnhardt v. Smith, 150 Va. 1, 7-8, 142 S.E. 424, 426 (1928).

Mason's bill of review identifies, with the requisite degree of accuracy and definiteness, errors of law which he alleges are contained in the record and in the September 1989 decree. The trial court was required to examine both the record and the September 1989 decree to determine whether errors of law existed. However, the trial court limited its examination to whether errors of law existed upon "the face of the decree." We hold that the trial court erred because it failed to examine both the decree
and the record. See Powers v. Howard, 131 Va. 275, 278, 108 S.E. 687, 688 (1921) (error of law apparent upon face of the decree "embraces all that appears upon the face of the proceedings, including whatever was embodied in the issue").

Mason argues that the separation agreement did not terminate his right to inherit as a beneficiary of Mildred's will. We agree.

The separation agreement is complete on its face, and the language is plain and unambiguous. Therefore, we must ascertain the intent of the parties by examining the four corners of the agreement. Ross v. Craw, 231 Va. 206, 212, 343 S.E.2d 312, 316 (1986). One of the "whereas" clauses in the agreement states, "the parties desire to adjust, terminate and settle all rights, interest and obligations between them and to obtain a full, complete and final property settlement." The agreement identifies property that Mason and Mildred owned and provided for the division of that property between them. Paragraph 6 of the agreement states:

Husband hereby releases Wife and Wife hereby releases Husband of all claims and demands of whatever kind, nature or name, including all liability now or at any time hereafter existing or accruing either on account of dower or curtesy, either statutory or arising at common law, incident to the marriage relations, each intending to and hereby releasing the other completely of all personal claims and demands from any that may hereinafter arise or attached from the relation of husband-wife, and further do hereby release the other of all claims, homestead rights, or interest whatsoever in any property, real or personal, other than as herein provided, which the other may now separately own or that the other may at any time hold or acquire an interest in, either through devise, bequest, purchase or otherwise, it being understood that this settlement is a total and complete release of him by her and her by him of all matters and charges whatsoever and that each shall, after this settlement, require nothing whatsoever of the other as though the marriage relation had never existed between them.

The intent of the parties to the separation agreement was to agree upon the division of property which they owned and terminate certain legal obligations associated with the marital relationship. Nothing in the agreement affects the husband's capacity to inherit as a beneficiary of the wife's will. Had the parties intended that the separation agreement terminate the rights of either party to inherit property, they could have easily included express covenants in the agreement to that effect. As we have repeatedly stated:

It is the function of the court to construe the contract made by the parties, not to make a contract for them. The question for the court is what did the parties agree to as evidenced by their contract. The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.

7 The order which overruled and denied the bill of review states, "the Defendant failed to show error of law on the face of the Final Decree formerly entered on September 5, 1989."
Great Falls Hardware v. South Lakes Village Center, 238 Va. 123, 125-26, 380 S.E.2d 642, 643-44 (1989). Accordingly, the judgment of the trial court will be reversed and this proceeding will be remanded for the entry of a decree consistent with this opinion.

“Oh yeah? Why aren’t pedestrians in their cars where they belong?!”
Notes on Judgments and Dispositions, Adult and Minor

Other Forms of Relief from a Judgment. Recall that Code § 8.01-428 provides for relief from a default or other judgment on a variety of grounds, and that there is now some definition to the oft-mentioned possibility of an independent action in equity to obtain relief from a judgment. See Section 5(H) of these materials.

Full Faith and Credit. The Virginia courts will give res judicata effect to the rulings of other jurisdictions, state and federal. This doctrine requires that Virginia accord to the foreign decree the conclusive effect that the rendering jurisdiction would give it. This includes, on occasion, application of the compulsory counterclaim rule of the rendering jurisdiction, even though Virginia does not treat counterclaims as compulsory in domestic litigation even where the counterclaim arises from the same transaction or occurrence as plaintiff’s claim. Balbir Brar Associates v. Consolidated Trading and Services Corporation, 252 Va. 341, 477 S.E.2d 743(1996). It also entails consideration of whether the foreign judgment is “final” under the rules of that jurisdiction. See Straessle v. Air Line Pilots’ Assoc., 253 Va. 349, 485 S.E.2d 387 (1997) (considering finality under Federal Rule 54(b) in assessing whether a federal order was entitled to Full Faith and Credit). A second requirement for according a foreign judgment full faith and credit is that it be based on personal jurisdiction in accord with minimum contacts and the notions of Due Process. See Orchard Management Company v. Soto, 250 Va. 343, 463 S.E.2d 839 (1995) (set forth in part in the sections of Chapter 6 dealing with service of process and the reach of the Long Arm statute).

Confessed Judgments & Attorney Fees. Code § 8.01-432 provides that any indebted person, or any attorney-in-fact pursuant to a power of attorney, may at any time confess judgment in the clerk's office of any circuit court, whether a suit is pending therefor or not, for only such principal and interest as his creditor may be willing to accept a judgment for, which judgment, when so confessed, shall be forthwith entered of record by the clerk in whose office it is confessed, in the proper order book of his court. Such judgment shall be as final and as binding as though confessed in open court or rendered by the court, subject to the control of the court in the clerk's office of which the same shall have been confessed.

Code § 8.01-436 provides a suggested form to be used by the clerk of the court for a confession of judgment which contains the language, present on the form used in this case, that the judgment debtor may, in addition to the principal and interest due, confess judgment in favor of the creditor for "the cost of this proceeding (including the attorney's fees and collection fees provided for in the instrument on which the proceeding is based)." The Supreme Court has noted that it is "readily apparent that this statutory scheme does not address the manner in which attorney's fees provided for in the instrument that forms the basis of a debt underlying a confessed judgment are to be determined when that instrument does not provide for a liquidated amount or other mechanism for establishing those fees at the time the confession of judgment is entered." The Attorney General had previously opined that when a confession of judgment is entered pursuant to Code § 8.01-432 and the underlying instrument does not establish the amount of the attorney's fees, the clerk of court should file the confessed judgment with a provision for reasonable attorney's fees and defer to the
court for a judicial determination of the amount that is reasonable under the facts. However, the Attorney General was not asked to address, and did not address, how or when such judicial determination is to be made. Further, the Court had not previously addressed this specific circumstance.

In reviewing the issues the Court found that the plain and unambiguous language of Code § 8.01-432 makes clear that a confessed judgment is to be treated in all respects as a final judgment rendered by the court. It has long been held that although no adjudication is in fact required in entering a judgment of confession without action, yet it has all the qualities, incidents and attributes of any other judgments. The provisions of Rule 1:1 are mandatory in order to assure the certainty and stability that the finality of judgments brings. Once a final judgment has been entered and the 21 day time period of Rule 1:1 has expired, the trial court is thereafter without jurisdiction in the case. Thus, only an order within the 21 day time period that clearly and expressly modifies, vacates, or suspends the final judgment will interrupt or extend the running of that time period so as to permit the trial court to retain jurisdiction in the case.

Thus, when an instrument forms the basis of a debt and authorizes an award of attorney's fees, but does not provide a formula for liquidating the amount of those fees at the time of entry of a judgment, no award of fees may be made except for fees actually incurred. The use of the term "if incurred" in the creditor's note in the case reviewed on appeal is consistent with this principle, and is a clear expression of the parties' intent to limit any entitlement of attorney's fees to those actually incurred by it in the event of a default by the debtor. The use of that term in the note, however, does not equate with a clear intent of the parties to provide a continuing reservation of the trial court's jurisdiction over the confessed judgment for more than 21 days after entry.

Similarly, the Court held that there was no merit in the creditor's contention that the application of the limitation of Rule 1:1 in this case would effectively render the parties' agreement regarding attorney's fees a nullity. In drafting the promissory note, the creditor had the opportunity to afford itself various remedies for a breach, including the option of obtaining a confession of judgment by the debtor's attorney-in-fact. When that breach occurred, the creditor elected to obtain a confession of judgment as the terms of the note permitted it to do. However, it did not assert a claim for liquidated attorney's fees at that time. Nevertheless, it became bound by the finality of that judgment under the provisions of Code § 8.01-432.

The Supreme Court observed that obtaining a judgment by confession pursuant to Code § 8.01-432 is an extraordinary remedy that permits a creditor to obtain an enforceable judgment against a debtor without the need to file suit or to establish any fact other than the existence of a valid instrument permitting the creditor to direct an attorney-in-fact to confess the judgment. When the creditor obtains a confessed judgment, that judgment is subject to the same rules governing all judgments including the limitation imposed by Rule 1:1.

Accordingly, the Court held that the trial judge erred in reinstating a judgment confessed against the debtor on its docket and entering an award of liquidated attorney's fees in favor of the creditor because the trial court was without jurisdiction to do so more than 21 days after the judgment became final. See generally Safrin v. Travaini Pumps USA, Inc., 269 Va. 412, 611 S.E.2d 352 (2005) (A borrower executed a promissory note with provisions for confession of judgment upon default, as well as
recovery of reasonable attorney's fees by the creditor. Several months later, after default, one of the attorneys-in-fact named in the note filed a confession of judgment against the debtor in the amount of the unpaid principal under the note, using a pre-printed form which also recited that the creditor was awarded attorney's fees and collections costs in an unspecified amount. No objection or motion challenging the judgment was lodged by the debtor. No motion by the creditor to suspend the judgment was filed, and proceedings were begun in Virginia and Ohio to enforce the judgment. Several months later the creditor made a motion to reinstate the matter on the trial court's docket and to permit it to file a motion to liquidate attorney's fees. The debtor objected that the judgment was final and not subject to modification more than 21 days after entry, but the trial court ruled that it had jurisdiction to determine the reasonable amount of attorney's fees, and entered an order fixing the amount of fees to be recovered. The judgment debtor appealed, and the Court held that more than 21 days after the entry of a confessed judgment pursuant to Code § 8.01-432, the trial court lacked jurisdiction to modify that judgment by entering an award of liquidated attorney's fees. The judgment is reversed and final judgment is entered for the judgment debtor).
Release of Claims: Parents and Minors. A recent case provided an object lesson in the release of claims by minors and their parents. Plaintiffs, as next friends of their 17-year-old son, filed a motion for judgment seeking to recover, in addition to other damages, approximately $46,000 expended for medical services on their son's behalf that were alleged to have been proximately caused by defendant's tortious acts. Plaintiffs' son attained the age of majority shortly before trial and soon thereafter agreed to settle his claims against the defendant. Plaintiffs' son executed a "full and final release of all claims" with defendant's insurance company for this purpose, but plaintiffs were not a party thereto. Subsequent to the circuit court's dismissal of the son's case against defendant, plaintiffs filed a new motion for judgment against defendant on their own behalf, seeking to recover medical expenses and costs, plus interest, that they had incurred on behalf of their son as a result of injuries he received as a result of the defendant's tortious conduct. Defendant filed a plea in bar asserting that plaintiffs' claim had been settled, paid, and dismissed in the prior case and that the present action was "barred by legal doctrines of accord and satisfaction, waiver, release, novation, collateral estoppel, unclean hands, estoppel, assignment, emancipation and fraud." After considering the pleadings in both lawsuits, the release, certain exhibits, and memoranda of law submitted by the litigants, the circuit court concluded that the plaintiffs had waived their claims to recover medical expenses in favor of their son, sustained the defendant's plea in bar and entered a judgment dismissing the plaintiffs' case with prejudice.

The Supreme Court noted that it is well-settled that in case of an injury to an unemancipated minor by wrongful act, two causes of action ordinarily arise. One cause of action is on behalf of the minor to recover damages for pain and suffering, permanent injury and impairment of earning capacity after attaining majority. The other is on behalf of the parent for loss of services during minority and necessary expenses incurred for the minor's treatment.

A minor is not entitled to recover medical expenses from a tortfeasor unless: (I) the minor has paid or has agreed to pay the medical expenses; (ii) the minor is responsible for the medical expenses by reason of emancipation or the death or incompetency of the infant's parents; (iii) the parents have waived their right of recovery in favor of the minor; or (iv) the recovery of the medical expenses is permitted by statute. In the case at bar, the only issue is whether the plaintiffs have impliedly waived their claim to recover medical expenses that they incurred on behalf of their minor child.

In this case, plaintiffs were entitled to recover medical expenses that they incurred on behalf of their minor son for injuries caused by the tortfeasor's conduct unless they waived their right of recovery in their son's favor. Waiver, however, is strictly construed: it is the voluntary, intentional abandonment of a known legal right, advantage or privilege. Essential elements of the doctrine include both knowledge of the facts basic to the exercise of the right and the intent to relinquish that right.

While different legal phrases have been used to describe the burden of proof necessary to establish an implied waiver, in order to promote clarity and uniformity, in this case, and in future cases, a litigant relying on an implied waiver will be required to prove the elements of such waiver by clear and convincing evidence.
In the case at bar, even though one of the plaintiffs signed an interrogatory in the initial litigation in her capacity as next friend that identified as damages medical bills that she and the son's father had incurred while their son was a minor, the parents lost control of that litigation when their son reached the age of majority and signed a release that resulted in the settlement of that lawsuit. Plaintiffs in this appeal were not parties to the release, and they had not filed a lawsuit in their own name to recover damages that they had incurred. Accordingly, the defendant failed to prove by clear and convincing evidence that the plaintiffs impliedly waived their right to recover any medical expenses that they incurred for the treatment of their son proximately caused by the defendant's alleged tortious conduct. See generally *Baumann v. Capozio*, 269 Va. 356, 611 S.E.2d 597 (2005) (The trial court erred in ruling that parents of a minor child injured by the defendant's tortious conduct had, by implication, waived their cause of action against defendant for recovery of medical expenses incurred on the child's behalf where defendant failed to prove such waiver by clear and convincing evidence).
Chapter 16

Limitation of Actions

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A. Overview and Introduction

Virginia, like every other jurisdiction, has a wide variety of statutes of limitation and related doctrines. Most causes of action at law are governed by one or more of the statutory provisions. Since law and equity are not merged in Virginia, there are a small number of "pure" equitable causes of actions for which there is no limitation period, only the looming bar of the doctrine of laches. In between the purely legal and the purely equitable, are causes of action enforced in equity which have an analogue at law.

Limitation doctrine seeks generally to bar the litigation of stale claims. The statutes of limitation work to avoid the loss of important evidence or witnesses by
requiring that suit be commenced within a specified period, thus helping assure that the
quality of fact finding is not diminished by degradation in the quality of proof.
Limitations doctrine to some extent inhibits fraudulent claims by requiring notice close
enough to the events to permit a defendant to collect information needed to respond to
any charge.

**Statutes of Limitation.** The core statutes of limitation prescribe a period within
which a prospective plaintiff must commence a lawsuit. Failure to begin the litigation
within the applicable period effectively ends a possible plaintiff's rights to proceed with
the claim. Unless the running of the statutory period is "tolled" (deferred or interrupted)
by a circumstance recognized in the statutes or caselaw as warranting protection from
the impending expiration of time to sue [see section G], the period will commence when
the cause of action "accrues" and run continuously until the time provided by the
applicable legal rules has expired. Commonly encountered limitations periods include:

**Contracts:** if oral or implied, 3 years under § 8.01-246(4), if written, 5 years under
§ 8.01-246(2). Certain UCC sales contracts will be governed by a 4 year period [§
8.01-246; 8.2-725] and may be reduced to one year if the agreement of the parties so
provided.

**Torts:** personal injury actions must be brought within 2 years (§8.01-243(A). Parental claims for injury to a child are governed by a 5 year period. Property damage
claims must be brought within 5 years. §8.01-243(B). NOTE: other personal actions
for which no other period is specified are governed by a 2 year period. § 8.01-248.
This presumably includes such causes of action as malicious prosecution. *Defamation*
is governed by a one year period of limitation, set forth in 1995 in Code § 8.01-247.1
(libel, slander, insulting words and other defamation).

**Wrongful death:** 2 years from date of death (if death was within two years from
the date the cause of action accrued). § 8.01-244(B).

**Fraud:** 2 years. § 8.01-243(A).

**Defamation:** 1 year. This provision, Code § 8.01-247.1, applies to all actions for
“injury resulting from libel, slander, insulting words or defamation”.

**Adverse Possession of Real Property:** 15 years (§ 8.01-236).

**Enforcement of Judgments:** Circuit Court judgments must be enforced within 20
years, but there is a procedure to revitalize the judgment for another 20 years on motion.
§ 8.01-251(A). General District Court judgments must be enforced within 10 years
unless extended or docketed with the Circuit Court. § 16.1-94.1. Foreign judgments
must be enforced within the period provided by the foreign state, or 10 years, whichever
is shorter. §8.01-252. However, if the foreign judgment becomes the basis for a
Virginia domestic judgment, the creditor will have up to 30 years to enforce the decree.

“Catchall”: Code § 8.01-248 provides a limitation period applicable to all
personal actions for which no other limitation is specified:
Every personal action accruing on or after July 1, 1995, for which no limitation is otherwise prescribed, shall be brought within two years after the right to bring such action has accrued.

**Statutes of Repose.** Virginia also has certain "statutes of repose", provisions which set a sunset period extinguishing potential causes of action in certain circumstances. The principal area covered by such a provision is Virginia is construction services (§ 8.01-250). See § G of this Chapter.

**General Approach to Limitations Issues.** The four central issues in any limitation of actions analysis are:

- how many causes of action does plaintiff have and what are they?
- what is the statutory period for each such cause of action?
- when do(es) the period(s) commence to run for each claim?
- are any tolling doctrines applicable to suspend or extend the running of the statutory periods?

Subsequent sections of this chapter provide case discussion and statutory provisions which assist in analyzing these issues.

**What is a year?** Code § 1-223 defines the word "year" to mean a "calendar year." Thus a calendar year, rather than 365 days, must be used in computing the applicable limitations deadlines. *Ward v. Insurance Company of North America*, 253 Va. 232, 482 S.E.2d 795 (1997).

**Foreign Judgments.** Contrary to prior policy, in 2005 the General Assembly acted to amend Code § 8.01-251, which addresses the period of limitations on enforcement of judgments so that it now includes not only domestic Virginia judgments, but also any "judgment rendered in another state or country. The 20-year period of that Code provision applies to both. The prior separate Code provision in § 8.01-252 was repealed that same year.

**Declaratory Relief.** The Supreme Court has held that fact that a litigation is structured as declaratory judgment action does not affect analysis of the statute of limitations. The period of limitations for declaratory judgment actions is determined by the object of the litigation and the substance of the complaint, not the form in which the litigation is filed. As a result, the Court has held that a complainant will not be permitted to use the declaratory judgment statute as a vehicle to circumvent the statute

**Inverse Condemnation Actions.** An inverse condemnation action is a specific type of proceeding based on a constitutionally created right connected to the "taking" or "damaging" of property by the government. To take or damage property in the constitutional sense does not require that the sovereign actually invade or disturb the property. Taking or damaging property in the constitutional sense means that the governmental action adversely affects the landowner's ability to exercise a right connected to the property. The Supreme Court has held that an inverse condemnation action is based on an implied contract that the government will justly compensate landowners for land it has taken. Therefore the cause of action is subject to the three-year limitations period of Code § 8.01-246(4). The Court specifically rejected the argument that the longer "injury to property" period applied. The Court found that "the act giving rise to the breach of implied contract is not an act aimed at the property, but rather an act that limits the landowner's ability to exercise his property rights without paying the landowner for that limitation. The mere fact that the measurement of that compensation may be based on a decline in the value of the subject property does not make the action one for injury to property." Richmeade v. City of Richmond, 267 Va. 598, 594 S.E.2d 606 (2004).
B. Commencing Suit on "The Claim" to Stop the Clock

An action is commenced in Virginia when it is filed, not at the later date on which service is effected upon the defendant. See Chapter 6. This is now also true in General District Court whether the action is commenced by a civil warrant or by motion for judgment. The normal procedure for stopping the running of the statute of limitations is to commence a lawsuit on the claim at issue. As the following old case indicates, however, unless there is a recognized excuse for delay, a plaintiff must sue with a claim that directly advances the rights of action at stake in order effectively to end the running of the statutory period.

BRUNSWICK LAND CORPORATION v. PERKINSON
153 Va. 603, 151 S.E. 138 (1930)

Per Curiam.

[Two adjoining land owners claimed title to a boundary area, and plaintiff was upset that defendant cut timber from it. Plaintiff sued in 1922 seeking only a ruling on title to the disputed patch of land. After trial and appeal the title was held to reside in plaintiff in rulings final in 1926. In 1927 plaintiff sued to recover damages for the timber cut prior to 1922].

The opinion of the trial judge, Hon. M. R. Peterson, sufficiently states the issue and the reasons which support the judgment. It follows:

. . . . "The stipulation between the parties is as follows:

It is agreed that if the statute of limitations commenced to run upon the completion of the cutting and removal of the timber and ran continually from that date, with no interruptions or suspensions, then the cause was barred. . . .

"The question, therefore, stated specifically and in its strictest terms, is whether. . . the statute began to run from the time of the commission of the trespass, whether the institution of the [boundary proceeding], or the subsequent proceeding in the appellate court, tolled or suspended its operation until the final determination of that proceeding.

. . . "It is well settled, and needs the citation of no authority to that effect, that the statute begins to run when the right of action accrues. It is equally well settled that in its terms the statute is absolute, admitting of no exception which itself does not recognize, unless under certain extraordinary circumstances, wherein the positive and plain requirements of an equitable estoppel preclude its application. For instance, the pendency of a suit to enforce a right of action, however long protracted, suspends its effect. This, of course, is obvious. . .

"In order that the time during which a former action while pending may be available in repelling the statute in a subsequent case between the parties, it accordingly appears that the cause of action in the two cases must be substantially identical. . . .
"In fine, the plaintiff's action to try the right of possession by means of its petition [for a boundary determination] was not incompatible with a concomitant action by it for the defendant's trespass. Had it chosen ejectment as its remedy, it might have claimed such damages in that action. At all events, it could have brought the independent action for the tort. But [the code section under which plaintiff proceeded in the boundary action] makes no provision for the incidental ascertainment of the plaintiff's damages unless the defendant, after the final judgment against him, should file a special petition . . . as was not the case. The gist of the matter is that the plaintiff's right of possession was declared by the judgment of the Special Court of Appeals, in a specific proceeding, limited to a particular object -- the determination of a common boundary. The plaintiff might, in addition, by an action of trespass, or on the case, have also sought damages for the defendant's antecedent trespass. It elected to embrace the one, but not the other, remedy. Failing in its object in the former proceeding, it might possibly have failed in the latter, as success in the former augured success in the latter. It might naturally have thought to avoid a speculation on the event of the proceeding to determine the boundary, and rather to await the issue of that case before undertaking its action for damages, nevertheless this is merely another form of the argument ab inconvenienti. A sufficient answer to the argument here is that without resorting at the time to any possessory action, it might forthwith have brought its action for the tort, and have successfully maintained it on evidence, perhaps less cogent than that necessary to establish its claim of title in fee simple to the premises. In other words, its claim to the right of possession of the land in dispute, while related to its claim for damages for the defendant's trespass, constitutes a distinct and independent subject of action.

..."I am hence of opinion that the defendant's plea of the statute of limitations is a sufficient defense to the plaintiff's claim, and will enter judgment accordingly."
C. Causes of Action and Accrual Generally

The following important Code section states the general rule of "accrual," which determines when the statute of limitations "clock" begins to run:

§ 8.01-230. Accrual of Cause of Action.

In 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 or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.
D. The Common Subject Matters

Personal Injuries

As noted above, the limitation period prescribed by Code § 8.01-243A for personal injury claims is 2 years. This period applies, under the express terms of the statute, "whatever the theory of recovery". This provision is consistent with the prior case law, which looked to the "object" of the action and not to the legal form or theories advanced. The key is apparently whether the gravamen of the suit is a personal injury. If so, the two year period will apply no matter what pigeonhole of law the suit sounds in. A case predating this codification makes the point quite clearly. In Friedman v. Peoples Drug Store, 208 Va. 700, 160 S.E.2d 563 (1968), plaintiff sued for personal injuries sustained as a result of error or defect in the filling of a prescription. The suit alleged causes of action under theories of negligence, breach of warranty and breach of contract. The Virginia Supreme Court, however, held that the thrust of the action was to redress personal injuries suffered as a result of the medication, and that the personal injury period of limitation thus governed all of the claims.

The application of the personal injury period has proven surprisingly intricate, and the cases later in this Chapter under the heading for the “discovery rule” and “injury in fact” spell this out. The key Code section provides:

§ 8.01-243. Personal action for injury to person or property generally; extension in actions for malpractice against health care provider.

A. 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.

B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years after the cause of action accrues.

C. The two-year limitations period specified in subsection A shall be extended in actions for malpractice against a health care provider as follows:

1. In cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient's body, for a period of one year from the date the object is discovered or reasonably should have been discovered; and

2. In cases in which fraud, concealment or intentional misrepresentation prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exercise of due diligence, reasonably should have been discovered.

3. In a claim for the negligent failure to diagnose a malignant tumor or cancer, for a period of one year from the date the diagnosis of a malignant tumor or cancer is communicated to the patient by a health care provider, provided the health care provider’s underlying act or omission was on or after July 1, 2008. Claims under this section for the negligent failure to diagnose a malignant tumor or cancer, where the health care provider’s underlying act or
omission occurred prior to July 1, 2008, shall be governed by the statute of limitations that existed prior to July 1, 2008.

However, the provisions of this subsection shall not apply to extend the limitations period beyond ten years from the date the cause of action accrues, except that the provisions of § 8.01-229 A 2 shall apply to toll the statute of limitations in actions brought by or on behalf of a person under a disability.

Other Torts

JORDAN v. SHANDS

JUSTICE HASSELL delivered the opinion of the Court:

Gwendolyn L. Jordan filed her amended motion for judgment against Samuel Shands, Jerry Oliver, D.L. Wright, Cecil Richardson, C.V. Townsend, John Doe, and Mary Doe. The plaintiff alleged the following facts.

On June 21, 1995, the plaintiff was involved in an automobile accident in Richmond. Wright, a City of Richmond police officer, investigated the accident. The plaintiff sustained injuries during the accident, and she was transported by an ambulance to a hospital.

After the plaintiff arrived at the hospital, a nurse informed a physician, in the plaintiff's presence, that the plaintiff "was wanted and would be picked up by the Richmond Police Department." Subsequently, Richardson, a police officer employed by the City of Richmond, arrived at the hospital and arrested the plaintiff "on information about an outstanding capias" issued by the Dinwiddie County Juvenile and Domestic Relations Court. The plaintiff asked Richardson why the capias had been issued, and he responded that "he wasn't sure." The plaintiff informed Richardson that "he was making a mistake." The plaintiff was escorted from the hospital and taken to a police station in a "paddy wagon." Subsequently, she was transported to the Richmond City Jail.

When Richardson attempted to place the plaintiff in the custody of the jail, the jail personnel refused to accept custody because Richardson did not have a warrant. "Richardson produced a paper described as a 'hit' and the jail personnel contacted the Dinwiddie Sheriff's office and asked that [it submit a facsimile of] the warrant to [the Richmond City Jail]."

When the Richmond police received the warrant, it contained "information from Jordan's driver's license inserted in a warrant issued for Gwendolyn M. Jordan, [and identified her address as] 231-B S. Jefferson Street, Petersburg, Virginia 23803." The plaintiff's address is Route 1, Box 128-C, Blackstone, Virginia 23824. According to the plaintiff's allegations, a "simple examination of her driver's license should have alerted Richardson to the fact that he had arrested the wrong person . . . ." The plaintiff was
"searched, fingerprinted and her personal belongings were taken." After being detained for about four hours, the plaintiff was finally released in the custody of her aunt.

Upon her release from jail, the plaintiff was told to report to the Dinwiddie County Juvenile and Domestic Relations Court on July 11, 1995. She later received a letter commanding her appearance on that date. When she appeared in the Dinwiddie County Juvenile and Domestic Relations Court, the plaintiff was informed that Gwendolyn M. Jordan did not have a social security number and that the Richmond police personnel had placed the plaintiff's social security number on the warrant. The Juvenile and Domestic Relations Court judge apologized to the plaintiff and dismissed the charges against her.

The plaintiff filed her motion for judgment on June 27, 1996. She alleged, among other things, that Townsend placed the incorrect information on the warrant issued for her arrest and that he was acting within the course and scope of his employment with Shands, Sheriff of Dinwiddie County. She also alleged that Wright and Richardson were acting within the course and scope of their employment with Jerry Oliver, Chief of the Richmond Police.

The plaintiff further alleged that Richardson falsely imprisoned her "without any sufficient legal excuse" and that he made defamatory statements about her. She alleged that Townsend intentionally inflicted emotional distress upon her by entering her personal and confidential data on a warrant that he knew, or should have known, was intended for another person. She alleged that Wright intentionally inflicted emotional distress upon her by transferring her personal and confidential data from her driver's license to Townsend, when Wright knew or should have known that the plaintiff was not Gwendolyn M. Jordan and that this information would be affixed to a warrant that would be the basis of a false arrest and imprisonment.

The defendants filed responsive pleadings, including special pleas of the statute of limitations and demurrers. The defendants asserted in their special pleas that the plaintiff's causes of action for false imprisonment, intentional infliction of emotional distress, and defamation were barred by Code §8.01-248 which, at the time the plaintiff's cause of action accrued, contained a one-year statute of limitations. The defendants also filed a demurrer asserting, among other things, that the plaintiff failed to sufficiently plead a cause of action for intentional infliction of emotional distress and that the defendants are entitled to qualified immunity.

The defendants filed responsive pleadings, including special pleas of the statute of limitations and demurrers. The defendants asserted in their special pleas that the plaintiff's causes of action for false imprisonment and defamation were barred by Code §8.01-248 which, at the time the plaintiff's cause of action accrued, contained a one-year statute of limitations. The defendants also filed a demurrer asserting, among other things, that the plaintiff failed to sufficiently plead a cause of action for intentional infliction of emotional distress and that the defendants are entitled to qualified immunity.

The trial court considered memoranda and argument of counsel and entered an order dismissing plaintiff's alleged causes of action for false imprisonment, intentional infliction of emotional distress, and defamation because those claims were barred by the one-year statute of limitations in Code §8.01-248. The court also stated in its judgment order that even though the plaintiff failed to state a cause of action against Chief Oliver or Sheriff Shands, the court would not rule on this issue since its rulings on the statute of limitations were dispositive of this proceeding.

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8 Code §8.01-248 was amended, effective July 1, 1995, and it now provides a two-year statute of limitations for all personal actions accruing on or after that date, for which no other limitation period is prescribed.
The plaintiff appeals the judgment, and Chief Oliver and Richardson assign cross-
error to the trial court's failure to sustain their demurrers. The plaintiff does not,
however, assign error to the trial court's judgment dismissing John Doe and Mary Doe.

Code §8.01-243(A) states in relevant part:

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

Code §8.01-248, in effect when the plaintiff's cause of action arose, stated:

"every personal action, for which no limitation is otherwise prescribed,
shall be brought within one year after the right to bring such action has
accrued."

Plaintiff argues that her cause of action for false imprisonment which is asserted
against Richardson is an action for personal injuries and, thus, this claim is governed by
the two-year statute of limitations. Richardson asserts that the plaintiff's claim is a
"personal action" for which no limitation was prescribed and, thus, is governed by the
one-year statute of limitations.

We agree with the plaintiff. We have defined false imprisonment as "the direct
restraint by one person of the physical liberty of another without adequate legal
We have also observed that "false imprisonment is a wrong akin to the wrongs of
assault and battery, and consists in imposing by force or threats an unlawful restraint
upon a man's freedom of locomotion." Id. (quoting *Gillingham v. Ohio River Ry. Co*.,
35 W. Va. 588, 14 S.E. 243, 245 (W.Va. 1891)).

We are of opinion that the deprivation of an individual's freedom by physical
restraint or the threat of such restraint is a tort committed against an individual's body
because that individual's body is actually confined to an area and deprived of physical
liberty. Accordingly, we hold that an action for false imprisonment is an action for
personal injuries and, thus, subject to the two-year statute of limitations in Code §8.01-
243(A).

Plaintiff concedes that her cause of action alleging defamation is governed by a
one-year limitation period, but argues that the period did not commence to run on June
21, 1995, the date she was arrested. The plaintiff says that Richardson based his arrest
on a confirmation response which he obtained from Townsend. This document, which
allegedly contained false statements that the plaintiff was wanted in Dinwiddie County
for failure to appear on a non-support charge, provided the basis for plaintiff's
defamation count. The plaintiff contends that the one-year statute of limitations does not
bar her defamation action because she filed her motion for judgment within one year
from July 11, 1995, the date the Juvenile and Domestic Relations Court dismissed the
charges.

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9 Effective July 1, 1995, a cause of action for defamation has been governed by a one-year period of limitation
prescribed by Code §8.01-247.1. Before that date, an action for defamation was not addressed by a specific
limitation provision in the Code, and hence was governed by the catch-all provisions of §8.01-248 which, as
noted previously, prescribed a one-year period for causes of action arising before July 1, 1995.
We disagree with the plaintiff's contentions. Any cause of action that the plaintiff may have had for defamation against any of the defendants accrued on June 21, 1995, which is the date she alleges in her motion for judgment that the defamatory acts occurred. We have held that when an injury is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy, the statute of limitations immediately attaches. *Westminster Investing Corp. v. Lamps Unlimited*, 237 Va. 543, 546, 379 S.E.2d 316, 317-18 (1989); *Caudill v. Wise Rambler*, 210 Va. 11, 14-15, 168 S.E.2d 257, 260 (1969). According to the plaintiff's pleadings, the alleged acts of defamation occurred on June 21, 1995, and she purportedly sustained damages on that date. Thus, her cause of action accrued on June 21, 1995, and she was required to file her motion for judgment within one year of that date. She failed to do so and, thus, her claim is barred.

The plaintiff argues that the trial court erred by holding that her claims for intentional infliction of emotional distress were barred by the statute of limitations. Responding, Chief Oliver and Richardson state that we need not consider this contention because, as these defendants assert in their assignment of cross-error, the plaintiff failed to allege sufficient facts in her amended motion to support a cause of action for emotional distress.

In *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974), we stated that "a cause of action will lie for emotional distress, unaccompanied by physical injury, provided four elements are shown: One, the wrongdoer's conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a causal connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe." In *Ely v. Whitlock*, 238 Va. 670, 677, 385 S.E.2d 893, 897 (1989), we held that a plaintiff must allege all facts necessary to establish a cause of action for intentional infliction of emotional distress.

We hold that the plaintiff failed to plead a cause of action for intentional infliction of emotional distress with the requisite degree of specificity against any of the defendants. Rather, the plaintiff's allegations are merely conclusional.

In summary, the plaintiff's cause for false imprisonment is governed by the two-year statute of limitations. The plaintiff failed to plead a cause of action for intentional infliction of emotional distress against any of the defendants. The plaintiff's purported cause of action for defamation is barred by the statute of limitations.

Accordingly, we will reverse the trial court's judgment in favor of Richardson and will remand this proceeding to permit the plaintiff to pursue her cause of action for false imprisonment against him, and we will affirm the trial court's judgment in favor of the remaining defendants.
Contracts

The well-known three and five year periods of limitations governing oral and written contracts, respectively, are set forth in an often-cited section of the Code:

§ 8.01-246. Personal actions based on contracts.

Subject to the provisions of § 8.01-243 regarding injuries to person and property and of § 8.01-245 regarding the application of limitations to fiduciaries, and their bonds, actions founded upon a contract, other than actions on a judgment or decree, shall be brought within the following number of years next after the cause of action shall have accrued:

1. In actions or upon a recognizance, except recognizance of bail in a civil suit, within ten years; and in actions or motions upon a recognizance of bail in a civil suit, within three years, omitting from the computation of such three years such time as the right to sue out such execution shall have been suspended by injunction, supersedeas or other process;

2. 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;

3. In actions by a partner against another for settlement of the partnership account or in actions upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, within five years from the cessation of the dealings in which they are interested together;

4. In actions upon any unwritten contract, express or implied, within three years.

Provided that as to any action to which § 8.2-725 of the Uniform Commercial Code is applicable, that section shall be controlling except that in products liability actions for injury to person and for injury to property, other than the property subject to contract, the limitation prescribed in § 8.01-243 shall apply.
There is an important "borrowing" statute which governs those situations where a contract action is to be litigated in Virginia but may be governed substantively by the law of another jurisdiction:

§ 8.01-247. When action on contract governed by the law of another state or country barred in Virginia.

No action shall be maintained on any contract which is governed by the law of another state or country if the right of action thereon is barred either by the laws of such state or country or of this Commonwealth.

Under this provision, the shorter of the two limitations periods will govern.

Finally, note that in contracts for the sale of goods, the U.C.C. as adopted in the Virginia Code has its own – four year – statute of limitations:

§ 8.2-725. Statute of limitations in contracts for sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.
YOU WERE SUPPOSED TO COME BACK WITH A VERDICT, NOT VOTE SOMEONE OFF THE JURY...
E. Professional Malpractice

MACLELLAN v. THROCKMORTON

JUSTICE RUSSELL delivered the opinion of the Court.

In this appeal, we again consider which statute of limitations applies to a claim for legal malpractice and when the applicable statute begins to run.

On December 4, 1984, John F. MacLellan, M.D. (MacLellan), a physician formerly practicing as an anesthesiologist, brought a bill in equity for declaratory judgment and monetary damages against Thomas B. Throckmorton (Throckmorton), a licensed attorney practicing in Winchester. Throckmorton filed a plea of the statute of limitations, a demurrer, and an answer. After reviewing the bill of complaint and hearing the arguments of counsel, the chancellor sustained the plea of the statute of limitations and dismissed the action. We granted MacLellan an appeal.

The bill of complaint alleges that MacLellan had engaged Throckmorton as his attorney in 1979 in connection with his divorce case, which included the negotiation of a property settlement agreement; that MacLellan told Throckmorton, before signing the agreement, that he would not agree to any provisions with regard to spousal support unless they could later be modified in the event of a change in his circumstances; that Throckmorton erroneously advised him that the provisions in the agreement would be subject to modification upon proof of change in circumstances; that in reliance on that advice, MacLellan signed an agreement on December 6, 1979, which obligated him to pay Mrs. MacLellan $2,000 per month as spousal support, along with other benefits; that Throckmorton presented the agreement to the court for incorporation pursuant to Code § 20-109.1; and that the court entered a final decree in the divorce suit on December 30, 1980, incorporating the agreement.

The bill further alleges that MacLellan suffered a permanent physical disability in March 1984 which totally prevented him from continuing his medical practice; that this would result in a substantial reduction of his income warranting a reduction in his spousal support obligation; but that Throckmorton's erroneous advice had led to the entry of a decree incorporating a contract not subject to any modification by the court. MacLellan pleaded that Throckmorton's erroneous advice "constitute[d] a breach of defendant's contractual duty. . . ." Another part of the pleading refers to "breach of [Throckmorton's] duty" which MacLellan characterizes on brief as referring to a "general legal duty giving rise to tort liability." The chancellor ruled that the three-year contract limitation period applied, that it began to run in 1979, and that this suit, filed in 1984, was time-barred.

On appeal, MacLellan argues that the applicable statute of limitations is the five-year period provided by Code § 8.01-243(B) for tortious injury to property. Throckmorton argues that the three-year limitation provided by Code § 8.01-246(4) for breach of oral contract applies. We held in Oleyar v. Kerr, 217 Va. 88, 225 S.E.2d 398 (1976), that the statute of limitations applicable to breach of contract governs actions for legal malpractice, although the action may sound in tort, because "[b]ut for the contract no duty . . . would have existed." 217 Va. at 90, 225 S.E.2d at 399. . . .
We adhere to the rule that actions for legal malpractice are governed by the limitation periods applicable to actions for breach of contract. The trial court correctly applied the three-year limitation to the present case, because the bill of complaint did not allege that the contract between attorney and client was in writing. Code § 8.01-246(4).

The second question before us is the determination of the time when the statute began to run, based on the facts alleged in the bill. Code § 8.01-230, effective October 1, 1977, provides, in pertinent part: "In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date . . . when the breach of contract or duty occurs in the case of damage to property. . . ."

In oral argument on appeal, MacLellan contended that if the above-quoted language is construed to bar a plaintiff's claim before his right of action accrues (through injury to his property interests resulting from the defendant's breach), then the statute would be unconstitutional as applied, violating the plaintiff's due-process rights. We are fully aware of this concern; see Harbour Gate Owners' Association v. Berg, 232 Va. 98, 107 n.3, 348 S.E.2d 252, 258 n.3 (1986); Keller v. Denny, 232 Va. 512, 516 and 520 (Stephenson, J., concurring), 352 S.E.2d 327, 329 and 331-32 (1987). In the present case, however, the constitutional question was never raised in the trial court, is not embraced within any assignment of error, and was not briefed. Therefore, as in Harbour Gate and Keller, we do not reach the constitutional question here. Rules 5:17(c), 5:25, 5:27(c).

In Keller, we were called upon to decide when the statute of limitations begins to run on a legal malpractice claim, in the light of Code § 8.01-230. We held:

when malpractice is claimed to have occurred during the representation of a client by an attorney with respect to a particular undertaking or transaction, the breach of contract or duty occurs and the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have terminated, notwithstanding the continuation of a general attorney-client relationship, and irrespective of the attorney's work on other undertakings or transactions for the same client.

232 Va. at 518, 352 S.E.2d at 330. When that rule is applied to the present case, it is apparent from the allegations of the bill of complaint that the "particular undertaking or transaction," which Throckmorton was engaged to handle for MacLellan, terminated on December 30, 1980, when the divorce case was ended by the entry of a final decree incorporating the property settlement agreement. The limitation period then began to run and expired three years later. Thus, the chancellor correctly held that this suit, filed in December 1984, was time-barred.
Notes on Accrual of Claims

**Efforts to Ameliorate the Error.** Efforts of a professional to rectify an error may put off the running of the statutory period. This "continuous treatment" notion applies in legal work, *Keller v. Denny*, 232 Va. 512, 352 S.E.2d 327 (1987) and other spheres as well. See section M of this Chapter, "Continuous Treatment".

**Fee Suits.** A corresponding sense of when claims arise is applied in suits by attorneys to enforce fee debts. The Supreme Court has held that the period for bringing collection suits on fees due and owing (the same three year period in the case of oral agreements, five years if the undertaking is in writing) runs from the completion of the transaction, rather than from the date of items of services rendered along the way. *Wood v. Carwile*, 231 Va. 320 (1986).

**Other Professionals.** The three year and five year contract period of limitations is applied to claims involving accountants and other professionals. Only medical claims, which are viewed as a species of injury to the person, are governed by the shorter two-year period. See discussion of the continuous treatment rule, later in this Chapter.

**Recent Clarification.** Code § 8.01-230 dictates the right of action shall accrue at the time of the breach. Thus, in an attorney malpractice case the plaintiffs' right of action comes into existence and their cause of action accrues contemporaneously with the taking of steps that cause them injury. However, the right to bring an action does not necessarily establish the date the statute of limitations began to run for purposes of a legal malpractice action. When malpractice is claimed to have occurred during the representation of a client by an attorney with respect to a particular undertaking or transaction, the breach of contract or duty occurs and the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have terminated. See *Shipman v. Kruck*, 267 Va. 495, 593 S.E.2d 319 (2004).

**“Payment Rule” Rejected.** The Supreme Court has overruled prior authority applying a "payment rule" to the accrual of certain claims under which the cause of action did not accrue until the client actually paid a cost caused by the defendant's conduct. Since even slight damage sustains a cause of action, the Court in reassessing the accrual of certain claims found that "it is difficult to discern how the existence of a cause of action can be postponed until some payment in partial or whole satisfaction of the client's damage has occurred under the 'payment rule'." The Court observed that the infirmities of a "payment rule" in limitations determinations are obvious. "It would vest the aggrieved client with the power to forestall the running of the statute of limitations by the deferral of payment, regardless of whether he has already suffered damages sufficient to give rise to his cause of action. It is the legislature that decides when causes of action shall accrue, not plaintiffs." Second, a "payment rule" does not protect
a client who, due to bankruptcy or insolvency, cannot afford to pay whatever damage he has suffered. If the client has no cause of action until he has paid the judgment against him, then the larger the judgment, the greater the client's burden and the lawyer's impunity; the greater the injury wrongfully inflicted, the less the liability of the wrongdoer.

Finally, the Supreme Court was persuaded that a "payment rule", in a statute of limitations context involving attorney malpractice claims in particular, would work an injustice on attorneys who may be forced to defend allegations of malpractice brought many years after the alleged breach occurred, dependent entirely upon the ability or whim of the complaining client to pay the resulting damages. Thus it was thought that the "payment rule" defeats the primary objectives of statutes of limitations, such as compelling the exercise of a right of action within a reasonable time, preventing surprise, and avoiding problems incident to the gathering and presentation of evidence when claims have become stale. Thus, while prior case law had held that, in the context of a judgment entered against a client by virtue of his attorney's purported negligence, the client has suffered no actual loss or damage until he has made a payment on that debt, the Court has overruled this determination, finding it an incorrect statement of law. "To the contrary, a client who suffers the entry of a judgment against him indeed suffers a legal injury or damage." See *Shipman v. Kruck*, 267 Va. 495, 593 S.E.2d 319 (2004).
F. "Injury to Property"

[See notes after the following case for subsequent history on the limitation period applicable to fraud specifically. The case, however, is nonetheless remains informative in attempting to understand the topics covered by the statutory limitation period for injuries to property.]

PIGOTT v. MORAN
231 Va. 76, 341 S.E.2d 179 (1986)

JUSTICE COMPTON delivered the opinion of the Court.

. . . .This action was instituted by the purchasers of a house and lot against the real estate agent with whom the purchasers dealt. . . .

The purchasers assert the agent was guilty of constructive fraud because she misrepresented to them that unimproved land in Botetourt County abutting their property to the rear was zoned for residential uses when, in fact, the land was zoned for industrial and commercial uses. (During her deposition, the agent vehemently denied the charges of misrepresentation, but, of course, the allegations are taken as true for the limited purpose of ruling on the pleas.)

"About a week or so" after signing the contract, the purchasers were informed by prospective neighbors that the property abutting the house and lot in question was zoned for use as an industrial park. A "couple of weeks before . . . April 23, 1980," Mrs. Pigott informed the agent that she and her husband had learned the abutting property was not zoned residential and that they wished to rescind the sale. On April 22, 1980, the purchasers went to the Clerk's Office of the Circuit Court of Botetourt County and ascertained from the Clerk that since 1976 the abutting land had been zoned for commercial and industrial uses. The real estate transaction was closed on May 23, 1980 and the purchasers took possession of the property.

This action was filed April 17, 1981. In the meantime, commercial development had taken place on the adjacent property. A warehouse had been built 30 feet from the purchasers' property line and another building had been constructed about 200 yards from their property.

[At the time, there was no statute of limitations provision specifically for claims of fraud. The Court addressed the question whether this was an "injury to property" for which a 5-year period is applicable in Virginia, or a miscellaneous personal action for which the "catch-all" provision of Code § 8.01-248 is applicable:]

Was this an action for "injury to property" within the meaning of § 8.01-243(B)? We hold it was not. . . . Fraud is a tort. Jefferson Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 833, 27 S.E.2d 198, 202 (1943). The wrongful act is aimed at the person and, when sued upon at law, fraud will support a recovery for financial damage personal to the individual. This is the gist of the plaintiffs' claim. The fraud allegedly committed by the realtor had no impact on the real property itself. The purchasers' land was in the same condition and was available for the same use after the alleged fraud as it was
before. The defendants' conduct was directed at the plaintiffs personally and not their property, real or personal. Consequently, the trial court correctly decided the [then applicable catch-all] limitation governs an action for fraud.

The court below likewise was correct in determining the cause of action accrued in March 1980 when the purchasers were told by prospective neighbors about the industrial use applicable to the adjacent property. Code § 8.01-249 provides, as pertinent here, that a cause of action for fraud shall be deemed to accrue "when such fraud . . . is discovered or by the exercise of due diligence reasonably should have been discovered." Discovery of the alleged fraud manifestly occurred when plaintiffs received the information in March, and not on April 22, 1980, as the plaintiffs argue, when the Clerk of Court confirmed that the information was accurate.

For these reasons, the judgment of the trial court dismissing plaintiffs' action will be affirmed.

Notes on Fraud and "Injury to Property"

**Fraud.** General Assembly reacted to the Pigott by amending the statutes, such that fraud is now treated under the 2 year limitation provision provided by amending § 8.01-243(A) to list fraud as a cause of action expressly governed by a two-year period. Judge J. R. Zepkin, perhaps the most seasoned commentator on the limitations doctrine of Virginia, has asked whether the new language means that any contract action will be governed by the two year period if fraud is alleged in any respect, instead of the 3 or 5 year periods otherwise applicable? Further, he mused,

"if one were to bring a products liability action that falls under the Uniform Commercial Code and to allege fraudulent misrepresentation as part of the inducement to enter the contract, yet claim only damages, which period of limitation would apply? Va. Code § 8.01-246 in the last paragraph dictates that § 8.2-275 [the UCC four year period of limitation] would apply, yet the new language of § 8.01-243 would require a two year period of limitation." Zepkin, *Limitations of Actions in Virginia: Do Too Many Clocks Spoil the Broth?*, 14 VBA Journal 4 (Winter 1988).

**Injury to Property?** A bankruptcy court in Virginia concluded that a claim of tortious interference against an intervening party that induces or causes breach or termination of a relationship or expectancy between other parties is governed by the five-year statute of limitations for actions for injury to property. *Welch v. Kennedy Piggly Wiggly Stores, Inc.*, 63 Bankr. 888 (W.D. Va. 1986).

**Direct and Immediate Property Injury.** Attempting to divine the meaning of these provisions, the U.S. Court of Appeals for the Fourth Circuit has suggested that the Virginia Supreme Court has been extremely technical in its determination of whether the damage for which a plaintiff seeks to recover is a direct injury to property and thereby qualifies for the benefit of the five-year statute of limitations. In order for the
five-year statute to apply, the following facts, among other things, must be found: (1) the injury must be against and affect directly the plaintiff's property, (2) the plaintiff must sue only for the direct injury, and (3) the injury, to qualify as a direct injury, must be the very first injury which results from the wrongful act. And where the injury to property is an indirect or consequential injury resulting from a direct injury to the person, the one or two-year statute of limitations for personal injury applies. *Brown v. ABC*, 704 F.2d 1296 (4th Cir. 1983).

**Unauthorized use of Name.** In *Lavery v. Automation Management Consultants, Inc.*, 234 Va. 145, 360 S.E. 336 (1987) the Court held that an action under Code § 8.01-40 for the unauthorized use of a person's name was one for property damage, and that the five-year limitation period of § 8.01-243B therefore applied.

**Trespass to Chattels.** Recall that in *Vines v. Branch*, 244 Va. 185, 418 S.E.2d 890 (1992), reprinted elsewhere in these materials, the Court held:

In the trespass count, Vines seeks money damages for the loss of use of the vehicle resulting from the alleged trespass to her personal property. She does not seek return of the vehicle in that count. Where a person has illegally seized the personal property of another and converted it to his own use, the owner may bring an action in trespass, trover, detinue, or assumpsit. *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 542, 39 S.E.2d 231, 235 (1946). Here, Vines has chosen to assert a trespass action.

One who commits a trespass to a chattel is liable to its rightful possessor for actual damages suffered by reason of loss of its use. *Zaslow v. Kroenert*, 29 Cal.2d 541, 551-52, 176 P.2d 1, 7 (1946). Since Branch's alleged conduct was directed at Vines's property, and not at Vines personally, it constitutes an injury to property. See *Pigott v. Moran*, 231 Va. 76, 81, 341 S.E.2d 179, 182 (1986). Accordingly, the five-year limitation period of Code § 8.01-243(B) governs. Id. Because Vines's cause of action is alleged to have accrued within five years of the date of the amended motion for judgment, we hold that the trial court erred in dismissing the trespass count set forth therein.

**Conversion of a Bank Account.** In *Bader v. Central Fidelity Bank*, 245 Va. 286, 427 S.E.2d 184 (1993), a husband forged the wife's name on checks and negotiated for payment by the defendant bank. The Supreme Court held that her claims stated the tort of conversion, which it held involves an injury to property for limitations purposes. Conversion is any wrongful exercise or assumption of authority, personally or by procurement, over another's goods. The Court found that the cause of action asserted by the plaintiff was that the bank wrongfully exercised authority over her funds and, thus, she was deprived of possession and use of those monies; accordingly, the five-year period of limitations under § 8.01-243(B) was applicable to the conversion claim against the bank.
ISN'T IT TRUE THAT YOU HAD PLANS TO SMOOTHER MY CLIENT?
G. Construction Services – The "Statute of Repose"

The building industry benefits from a "statute of repose" which sets a five year sunset period for any exposure to liability for goods or services in the construction of improvements to real estate. Unlike a Virginia statute of limitations, no "injury" is necessary to start the running of the five year period: it begins when the services are finished or the goods are supplied, and the exposure window closes five years later, whether or not any injury has happened by that time.

§8.01-250. Limitation on certain actions for damages arising out of defective or unsafe condition of improvements to real property. --

No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.

The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, nor to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought; rather each such action shall be brought within the time next after such injury occurs as provided in §§ 8.01-243 and 8.01-246.

LUEBBERS v. FORT WAYNE PLASTICS, INC.

JUSTICE KOONTZ delivered the opinion of the Court:

The issue we consider in this appeal is whether certain items used in the construction of a swimming pool are ordinary building materials rather than "equipment" within the meaning of Code §8.01-250, a statute of repose.

The essential facts are not in dispute. Fort Wayne Plastics, Inc., doing business as Fort Wayne Pools, Inc. (Fort Wayne), was a manufacturer of various structural component materials for in-ground swimming pools. These items included steel panels, braces, and vinyl liners used in conjunction with aluminum coping, for which Fort Wayne was a distributor, to form the walls and bottoms of the pools.10

10 In general terms, individual steel panels are bolted together to produce the form for the walls in the desired dimensions and perimeter shape of a particular pool. Vinyl liners of the same dimensions are shaped to form an
Prestige Industries, Inc. (Prestige) was a distributor of swimming pool kits and related materials. Prestige purchased in bulk steel panels, braces, and vinyl liners from Fort Wayne and held them in its warehouse until it resold them as parts of pool kits to local swimming pool contractors or individuals. Prestige also ordered in bulk specification guides and installation manuals produced by Fort Wayne that described the proper use of its materials in the construction process. In addition, Prestige purchased other items to be used in the construction of swimming pools, such as fitters, pumps, diving boards, and pool slides, from other sources.

In mid-1985, Prestige received an order for the component materials necessary for the construction of a 16 1/2 foot x 35 1/2 foot "Grecian style" in-ground swimming pool from Crystal Pools of Petersburg, a swimming pool retail and construction company. Prestige supplied materials, including the steel panels, braces, and a vinyl liner manufactured by Fort Wayne, that were ultimately incorporated into the swimming pool in question at a private residence. Prestige also provided Crystal Pools with a custom specification sheet that it had developed in order to accommodate design modifications or requested changes by the homeowner. Although it contained specifications similar to those found in Fort Wayne's publications, this specification sheet was designed expressly for the construction of this pool. In addition to the materials manufactured by Fort Wayne, Crystal Pools purchased through Prestige the vermiculite material for the pool bottom, pumps, filters, hydrotherapy equipment, steps, and main drains necessary to construct the finished swimming pool in conformity with the specifications and requirements of the homeowner.

Thereafter, sometime in early 1986, Crystal Pools completed the construction of the swimming pool. On June 12, 1994, Dennis Gerard Luebbers was a guest at the home of Kathryn E. Hedrick where Crystal Pools had constructed this pool. On that day, Dennis Luebbers died as a result of an accident that occurred while he was swimming in her pool.\(^\text{12}\)

On November 6, 1995, Hope T. Luebbers, administratrix of Dennis Luebbers' estate, filed suit against Fort Wayne, Prestige, Crystal Pools, and Hedrick. Relevant to this appeal, the suit charged that the liability of Fort Wayne and Crystal Pools arose from the negligent design, manufacture, and installation of the component parts incorporated into the finished swimming pool. Fort Wayne and Crystal Pools filed affirmative pleas in bar asserting that the five-year limitation provided by Code §8.01-250 barred the plaintiff's cause of action. The trial court sustained the pleas and granted summary judgment for Fort Wayne and Crystal Pools, finding that the materials manufactured by Fort Wayne and used in the construction of the pool by Crystal Pools were not "equipment" within the meaning of Code §8.01-250. We awarded plaintiff this appeal. . . .

There is no dispute that the swimming pool in question constitutes "an improvement to real property" contemplated by this statute. Additionally, there is no

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\(^{12}\) Hedrick was not the homeowner when the pool in question was constructed. However, she was the homeowner at the time of the death of Dennis Luebbers, and she is a party defendant in the underlying suit in this case. She is not a party to this appeal.
dispute that plaintiff's suit was filed more than five years after the construction of this pool was completed. Accordingly, the focus of our analysis is on the exclusion provided by the second paragraph of this statute.

We have previously addressed the application of Code §8.01-250 in *Cape Henry Tower*...

In the present case, plaintiff contends that the prefabricated structural component materials manufactured by Fort Wayne and installed by Crystal Pools to construct the finished swimming pool were not ordinary building materials, but, rather, were "equipment" within the meaning of Code §8.01-250. 5 Plaintiff contends that this is so because these materials were subject to close quality control at Fort Wayne's factory and to post-manufacture control of their installation through the manufacturer's specifications and installation manuals. We disagree.

In the present case, the steel panels, braces, and vinyl liners manufactured by Fort Wayne are interchangeable in the swimming pool construction industry with component materials made by other manufacturers. Such materials are purchased by distributors in bulk to be used in the construction of swimming pools according to the dimensions and shapes desired by particular customers. Fort Wayne exercises no oversight over the construction of the pools. Fort Wayne merely warrants that its steel panels will be free from defects of workmanship and that its vinyl liners will be free from defective welding. Fort Wayne sells the specification guides and installation manuals as general guides for the construction of generic vinyl pools. Moreover, these manuals did not address the construction of a pool with the particular dimensions and shape of the one involved in the present case.

Here, as in *Cape Henry Towers*, the materials manufactured by Fort Wayne and incorporated into the finished swimming pool by Crystal Pools were clearly fungible components of that pool. Individually, these items served no function other than as generic materials to be included in the larger whole and are indistinguishable, in this context, from the wall panels we addressed in Cape Henry Towers. As such, these materials were ordinary building materials and not "equipment" within the meaning of Code §8.01-250. Consequently, because these materials were manufactured and installed in an improvement to real property more than five years before the plaintiff filed suit for Dennis Luebbers' death, these defendants are entitled to the protection of this statute. 6 For these reasons, we will affirm the order of the trial court granting summary judgment for Fort Wayne and Crystal Pools.

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5 For purposes of this appeal, the term "equipment" encompasses the phrase "equipment or machinery or other articles" contained in §8.01-250.

6 Because we conclude that the materials in question were ordinary building materials and not equipment within the meaning of Code §8.01-250, we need not address plaintiff's contention that the trial court further erred in finding that Crystal Pools was not a "supplier" of the materials. See Eagles Court Condominium v. Heatilator, Inc., 239 Va. 325, 329, 389 S.E.2d 304, 306 (1990)(holding that even the installer of machinery or equipment is entitled to the protection of the first sentence of Code §8.01-250).
YES, IT'S TRUE! I... I... BROUGHT HOME THE BACON!
HARRISON, J., delivered the opinion of the Court.

[Rapp bought a mobile concrete conveyor known as a placer, which broke down].

Rapp filed its action against the defendants, Whitlock [the retailer], the Mulkey Company [manufacturer of the placer], and the International Harvester Company [which built the rolling chassis on which the placer was mounted], more than three but less than four years after its cause of action for alleged breach of warranty accrued. It contends that the four-year statute of limitations set forth in Code § 8.2-725 (U.C.C. § 2-725) applies. The defendants argue that the three-year statute for a breach of contract not in writing, embodied in Code § [§ 8.01-246], controls. . .

Code § 8.2-725 (U.C.C. § 2-725) is the statute of limitations in contracts for sale. In pertinent part it provides [a four year period for commencement of an action respecting a sales transaction to which it applies].

The contract between Rapp and Whitlock was a routine contract for sale between a buyer and a seller of goods.

We express no opinion here on whether a breach of warranty occurred. If there has been a breach of warranty in this case, it occurred when the manufacturer made delivery of the placer to Rapp, a customer of Whitlock, on May 2, 1973. Code § 8.2-725 provides "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made . . . ." This Code section also provides that an action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. Plaintiff's action was commenced on April 22, 1977, within the four-year limitation period . . . .

We conclude that the contract of sale involved was one between a seller, Whitlock, and a buyer, Rapp, parties in privity, and was within the meaning of the Uniform Commercial Code. Code § 8.2-106(1). Mulkey-Symons was the manufacturer of the placer, the subject of the contract of sale. Rapp, Inc., was the "person" which Mulkey-Symons might reasonably have expected to use and consume or be affected by the equipment manufactured. Code § 8.2-318. We therefore hold that as to Whitlock and Mulkey-Symons the applicable statute of limitations to plaintiff's action is four years. Code § 8.2-725.

Whether Rapp, Inc., was a "person" which International Harvester "might reasonably be expected to use, consume, or be affected by" the chassis it sold Mulkey-Symons is a factual matter which is not before us. The sole issue as to International, as it is as to other defendants, is the applicable statute of limitations. It has heretofore been pointed out that the position of International Harvester is that of a supplier of a component part of an article or goods (placer) to be manufactured. The fact that the part supplied was the chassis of a vehicle rather than a smaller component of the placer
is immaterial. International Harvester remained the remote manufacturer of a component part of the unfinished product.

We think it clear that International Harvester was not a party to a contract of sale within the meaning or purview of the Uniform Commercial Code. "A sale consists in the passing of title from the seller to the buyer for a price." Code § 8.2-106(1). International Harvester was not privy to the contract of sale between Rapp and Whitlock, or the contract of sale between Whitlock and its supplier-manufacturer, Mulkey-Symons. Rapp concedes it did not rely on any representations by International Harvester in connection with its purchase of the placer. International Harvester was never in any commercial or contractual relationship with either Rapp or Whitlock. Mulkey-Symons was in such a relationship and hence its involvement in a Uniform Commercial Code transaction to which Code § 8.01-246 [applied] made the four-year limitation provide in Code § 8.2-725 applicable.

While Code § 8.2-318 abolishes lack of privity as a defense against manufacturers or sellers of goods, this statute does not change the three-year limitation period except "as to any action [founded upon contract] to which Code § 8.2-725 of the Uniform Commercial Code is applicable," i.e., as to any action for a breach of "contract of sale" between the "parties" described in the Uniform Commercial Code. (Code § 8.01-246) Because International Harvester is a remote manufacturer who is not a party to the contract of sale between the buyer and seller involved here, the three-year limitation applies to it. . . By its terms, UCC § 2-725 applies only to an "action for breach of any contract for sale," and was not meant to apply to actions between consumers and manufacturers who were never in any commercial relationship or setting. For example, the parties to the contract may agree under UCC § 2-725(1) to reduce the limitations period to not less than one year, but such an agreement could not bind one not privy to the parties' agreement and whose cause of action does not arise therefrom. . . For these reasons, we hold that application by the lower courts of UCC § 2-725 to bar plaintiff's action was error [as to the retailer and manufacturer of the placer itself].

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7 The final paragraph of § 8.01-246, which concerns the limitation period for personal actions based on contracts, provides the three-year limitation period for actions upon any unwritten contract, expressed or implied and reads as follows:

Provided that as to any action to which § 8.2-725 of the Uniform Commercial Code is applicable, that section shall be controlling except that in products liability actions for injury to person and for injury to property, other than the property subject to contract, the limitation prescribed in § 8.01-243 shall apply.

(It is not claimed that this case comes within the exception provided in that section.)
I. Suits on Loans and Notes – Some Real Surprises

GUTH v. HAMLET ASSOCIATES
230 Va. 64, 334 S.E.2d 558 (1985)

JUSTICE COMPTON delivered the opinion of the Court.

This is a controversy arising from a series of financial transactions between two individuals. Principally, we deal with questions involving the Uniform Commercial Code and the statute of limitations.

On July 17, 1980, appellants Herbert J. Guth (hereinafter, Guth) and Joanne Guth, his daughter, filed this suit against appellees Hamlet Associates, Inc., and Robert Greenberg for approximately $40,000.00. In a six-count amended motion for judgment, the plaintiffs sought recovery of the foregoing amount as compensatory damages and added a claim for $25,000.00 punitive damages, arising from dealings between Guth and Greenberg beginning in 1973.

Subsequently, defendants filed a pre-trial motion for summary judgment and the trial court sustained the motion in November 1981 pertaining to one count only of the complaint. In a March 1982 jury trial, the court sustained defendants' motion to strike the plaintiffs' evidence at the conclusion of the plaintiffs' case-in-chief. In the April 1982 order appealed from, the court entered judgment in favor of the defendants "as to all counts." At the trial, the only testimonial evidence came from Guth.

During the early 1970s, Guth, a resident of Maryland, and Greenberg, a resident of Northern Virginia, were acquainted and were employed full-time by the same federal agency. According to Guth, "Greenberg was known around the agencies as one involved in various financial matters. . ." Prior to the transactions in question Guth had been "involved" in a mortgage investment club of which Greenberg was the treasurer.

In 1970, Greenberg "formed" Hamlet Associates, Inc. The corporate business address was Greenberg's home address. Greenberg and his wife were the sole stockholders. He was president of Hamlet. She was vice-president and secretary of the corporation.

Hamlet was formed mainly for the purpose of using corporate assets to invest in other activities, such as the purchase of health club contracts. Greenberg, acting for the corporation, would buy at a discount installment contracts between health clubs and their patrons. The health club customers would then make payments directly to Hamlet. Hamlet's profit, if any, would be the difference between the price it paid for the contract and the amount paid by the health club patron. Initially, the corporation operated on funds loaned to it by Greenberg individually. Thereafter, Greenberg obtained corporate funds from other sources, including Guth.

On November 14, 1973, Guth "loaned" $5,000.00 to Hamlet. This was the first in the series of transactions giving rise to this controversy. In return, Greenberg executed and delivered to Guth the following typewritten document which Greenberg had prepared on corporate stationery:
CORPORATE NOTE

Hamlet Associates, Inc., a Virginia corporation located at 7506 Hamlet St., Springfield, Va., 22151, acknowledges receipt of five thousand dollars ($5000.00) as a loan from Joanne Guth. These funds will be used by the corporation to purchase discounted sales contracts and for other corporate business.

Hamlet Associates, Inc. agrees to pay interest on this loan at the rate of one percent (1%) per month on the unpaid balance. As interest is earned, it will be added to the unpaid balance and earn interest at the at the [sic] above rate. Hamlet Associates, Inc. will provide the lender with reports of the status of this account every six months.

Either the lender or the corporation may elect to have interest paid on a monthly basis in lieu of being added to the unpaid balance upon written notification to the other party.

The lender may request repayment of the unpaid balance by providing written notification requesting the borrower to arrange for payment after a ninety (90) day period. The borrower may at its option, either pay off the loan in full or repay the loan in twelve (12) monthly installments. The borrower may arrange for repayment of the loan by providing written notification with a ninety (90) day waiting period. Repayment may be either in full or on an installment basis.

This document supersedes the handwritten note of the same date.

HAMLET ASSOCIATES, INC

By /s/ Robert Greenberg

Robert Greenberg, President

Loan Repayment Guaranteed:

/S/Robert Greenberg

Robert Greenberg

Guth explained that the note was made payable to Joanne Guth, his daughter, because previously he had made other loans to Greenberg, which had been repaid, using names of family members for those "investments." Greenberg had no discussions with the daughter. Guth testified that the provisions in the fourth and fifth paragraphs regarding repayment were included because the loan proceeds were being used to purchase health club installment contracts and "it would be difficult for Mr. Greenberg to pay off this money immediately so there was a provision to pay it off over a period of time."

On January 9, 1974, Guth paid another $5,000.00 to Greenberg (the Second Transaction). Another document was prepared and executed by Greenberg, and delivered to Guth memorializing that transaction. This document was identical to the writing in the First Transaction, except it named Herbert Guth as the lender, it bore the
January 1974 date, and it did not contain the final sentence referring to a handwritten note. Again, Greenberg executed the instrument on behalf of the corporation and individually as guarantor.

On May 23, 1974, Guth "made another loan of $4,000.00" (the Third Transaction). Greenberg supplied Guth with a different writing in connection with this transaction. On a carbon copy of the note used in the Second Transaction, Greenberg placed the following handwritten statement under the foregoing date:

\[\text{Receipt of $4,000.00 acknowledged in accordance with above. This is a temporary receipt to be replaced by two notes.}\]

Robert Greenberg

Guth testified that the terms of the Third Transaction were "precisely the same" as the terms for the first two loans. Guth never received any notes to replace the handwritten receipt although he asked for them "repeatedly."

On March 13, 1975, Guth loaned the corporation $5,000.00 (the Fourth Transaction). Greenberg did not personally guarantee this obligation and no written document was prepared setting forth the terms of that transaction.

During the period 1974-80, Guth had sporadic, but continuing" conversations with Greenberg about "how matters were proceeding with the health clubs." During the early part of that period, Greenberg indicated that "it was going fine," and "they were doing well." Guth received written status reports from Greenberg as required by the notes. These reports were prepared on corporate stationery and were received through 1976. Generally, the reports showed monthly interest earned and the balance of principal and interest due the lender. Guth received no status reports after December 31, 1976.

In addition, Guth received copies of Internal Revenue Service forms 1099, "Statement for Recipients of Interest Income," for the years 1974, 1975, and 1976. These forms were prepared in the name of Hamlet for the accounts of both Guth and his daughter. Also, Guth testified that two payments were received "by check" in the amount of $500.00 each on the daughter's account in April and May, 1977.

During 1977, when Guth failed to receive a status report, he called Greenberg by telephone to inquire about "how the thing was going. . ." According to Guth, Greenberg said "things were going not too badly." Later in 1977, Guth "started asking more questions" of Greenberg and learned that one of the health clubs with which Greenberg was dealing had closed. However, Guth "got the impression" that the customers had been assigned to another exercise facility and would continue to pay on their contracts. Thus, he thought there was not "any great cause for {230 Va. at 70} [alarm]." But at one point in 1977 Greenberg advised Guth that he "had written off his own loans" to the corporation and he encouraged Guth to do likewise on his 1977 income tax returns. Guth testified he did not follow the advice in 1977 but that he did "write off" the loans later, probably on his 1980 tax return.

In August 1978, Guth "was requesting" Greenberg to repay the loans. Greenberg told Guth that "his lawyer [was] looking into the problem, . . ." and "that he would
discuss specifically on how he would repay the loan in a few months." In January of 1979, according to Guth, Greenberg told him that his lawyer was "pursuing recovery from the health spas." At that time, Guth said, he "was given to understand" that Greenberg "would make a settlement with me to pay off these loans."

In a letter addressed to Greenberg dated March 31, 1980, an attorney for Guth and his daughter demanded repayment of the outstanding balances of the four loans consisting of principal and accrued interest. After this suit was filed in July of 1980, counsel for the plaintiffs made another demand for repayment in a letter dated August 20, 1980 addressed jointly to Hamlet and Greenberg.

The plaintiffs' amended motion for judgment sought recovery on several theories against the defendants jointly and severally. The first three counts were based on the writings of the First, Second, and Third Transactions. The fourth count sought recovery of the amount allegedly due under the Fourth Transaction on the basis of a loan "which defendants promised to repay." The fifth count sought recovery of the amounts represented by all four transactions on the basis of an oral promise by both defendants to repay the loans. Finally, the sixth count sought recovery of the total amount of the loans on the theory of fraudulent inducement.

In finding against the plaintiffs, the trial court ruled that the statute of limitations had expired "with respect to all of the promissory notes and other obligations upon which suit was brought. . ." The court further decided that the defendants had not acknowledged the debts within the meaning of the applicable statute. Also, the court ruled there was insufficient evidence of fraud or other conduct of the defendants which would estop them from relying on the statute of limitations or that would toll the statute of limitations.

On appeal, as in the trial court, the parties agree that the five-year and three-year statutes of limitations set forth in Code § 8.01-246(2) and (4) are applicable to this controversy. See Code § 8.01-1. The foregoing subsections provide, in part, that actions founded upon a written contract shall be brought within five years "next after the cause of action shall have accrued," and that actions upon any unwritten contract shall be brought within three years after accrual of the cause of action. Initially, the crucial question is when did the applicable limitations begin to run or, more precisely, when did the causes of action accrue.

Preliminarily, we must decide whether Title 8.3 of the Uniform Commercial Code (UCC) applies to the written documents furnished by defendants to Guth in the first three transactions. Viewing the evidence in the light most favorable to plaintiffs, we will treat the memorandum in the Third Transaction as incorporating the terms of the first two notes, as Guth testified.

During oral argument on appeal, counsel for the plaintiffs stated he would "assume" that the three promissory notes were negotiable instruments. This position is contrary to the argument made in his opening appellate brief but consistent with the position taken on behalf of the plaintiffs in the trial court. In order to adjudicate the appeal within the context of the arguments made at the trial level, we will likewise assume the notes in the first three transactions were negotiable instruments and that the UCC applies.
According to the UCC, one of the characteristics of a negotiable instrument is that the writing must "be payable on demand or at a definite time." § 8.3-104(1)(c). "Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated." § 8.3-108. Because no time for payment was stated in the notes in issue, they are demand notes under the UCC, and not time instruments.

UCC § 8.3-122 is at the center of the legal dispute here. As pertinent to this controversy, the statute provides that: "(1) A cause of action against a maker . . . accrues . . . (b) in the case of a demand instrument upon its date or, if no date is stated, on the date of issue." The trial court ruled, and the defendants contend on appeal, that under the plain terms of § 8.3-122(1)(b), the causes of action against the corporate defendants on the notes in the first three transactions accrued on their dates, November 14, 1973, January 9, 1974, and May 23, 1974, respectively, and that the five-year statute of limitations had run on each claim when this suit was filed on July 17, 1980.

The plaintiffs argue, however, that the statute of limitations did not begin to run against the corporation until the 1980 formal demand. The plaintiffs recognize that ordinarily the cause of action against a maker on a demand note accrues on its date of issue. Nonetheless, they argue, "if the demand note and the parties thereto contemplated an actual demand, the cause of action accrues at the time of the demand, not on the date of the note." The plaintiffs contend that the evidence in this case, both the notes and Guth's testimony, show that it was the intention of the parties that the obligations would not become due immediately. They say that the provisions of the fourth and fifth paragraphs of the notes permitting installment payments, together with Guth's testimony about the purpose for such provisions, demonstrate such intention. We disagree with the plaintiffs' contentions.

The plaintiffs' argument blurs the distinction between "maturity" of an instrument and the "demand" for payment of the obligation, as those terms affect the accrual of the cause of action. A demand note matures and is payable at once, and interest and the statute of limitations commence to run on that date. *Bacon v. Bacon*, 94 Va. 686, 687, 27 S.E. 576, 577 (1897). Of course, every demand note contemplates that payment will be triggered by an actual demand in the form of a presentation or the equivalent. Nevertheless, the need for an actual demand does not affect the maturity of the obligation or the running of the period of limitations.

In the present case, there was no deferral of the maturity of the obligations beyond the dates of the instruments. There was merely a deferral of the payments on the fixed obligations with such payments to be made over a specified period of time after the "written notification" provided for in the fourth and fifth paragraphs of the instruments. This interpretation comports fully not only with the provisions of the notes but also with the evidence in the case. Guth testified the notes provided for deferred payments because Greenberg was buying contracts which themselves permitted installment payments. According to Guth, if either the lender or the borrower desired repayment, Greenberg would need time to accumulate the funds because of the nature of the commodity with which he was dealing. The effect of the plaintiffs' argument is to make the maturity of these demand notes conditional on a later event to occur on some unknown date in the future. Neither settled law nor § 8.3-122 provides for such an exception under these circumstances.
Thus, we hold that the trial court correctly decided that the period of limitations had expired as to the corporate maker on the notes given in the first three transactions. In addition, the court below properly held that the three-year statute of limitations had run on the oral agreement between the corporation and Guth in the Fourth Transaction.

The plaintiffs contend that, even if the trial court was correct in deciding the statute of limitations had run against the corporate maker of the instruments, the court erred in holding the action against Greenberg, the guarantor, was time-barred. The plaintiffs urge us to hold that Greenberg was both an indorser and a guarantor in the First, Second, and Third Transactions. They say that, even if the causes of actions against the maker accrued on the dates of the instruments under subsection (1)(b) of § 8.3-122, the statute of limitations did not begin to run against Greenberg until after there was a demand following dishonor by the maker, according to subsection (3) of the statute. It provides, in part: "A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument."

We reject this contention. The cause of action on Greenberg's guaranty accrued at the same time the statute of limitations began to run on the underlying obligation. Subsection (3) of § 8.3-122 does not apply to a "guarantor," only to an "indorser." The undertaking of a guarantor is different from an ordinary indorser and generates different liabilities. Code § 8.3-416 of the UCC describes the contract of a guarantor. In part, that statute provides:

"(1) 'Payment guaranteed' or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, without resort by the holder to any other party."

Here, by use of the language "loan repayment guaranteed," Greenberg agreed to pay the obligation when due without resort by Guth to the maker. In contrast, the liability of an ordinary indorser is expressly dependent upon dishonor, unless the endorsement otherwise specifies. Code § 8.3-414(1). Thus, Greenberg's higher obligation is virtually indistinguishable from the obligation of the corporate maker. Accordingly, this primary liability of one who guarantees payment makes the cause of action against the guarantor, like that of the maker, accrue on the date of the promissory demand note. *Ligran, Inc. v. Medlawtel, Inc.*, 86 N.J. 583, 432 A.2d 502 (1981); *Bank of New York v. Bersani*, 90 A.D.2d 302, 457 N.Y.S.2d 142 (1982). We conclude that the trial court did not err in deciding the action against Greenberg was time barred.

Alternatively, the plaintiffs argue that the suit is timely because the period of limitations was revived as the result of acknowledgments of the debts by the defendants, within the meaning of Code § 8.01-229(G). That statute provides, as pertinent here, that:

"1. If any person against whom a right of action has accrued on any contract, . . . promises, by writing signed by him or his agent, payment of money on such contract, the person to whom the right has accrued may maintain an action for the money so promised, within such number of years after such promise as it might be maintained if such promise were the original cause of action. An acknowledgment in writing, from which
a promise of payment may be implied, shall be deemed to be such promise within the meaning of this subsection."

The plaintiffs argue that rendition of the status reports through 1976, furnishing copies of the tax information forms through 1976, and the two partial payments made in April and May, 1977, on the First Transaction, operated to permit the periods of limitations to run from those dates, thus making the 1980 suit timely.

The items relied upon by the plaintiffs all were in writing, prepared in the name of the corporate defendant, but contained no express promise to pay. The defendants do not claim the corporate "signature" was insufficient under the statute. Rather, defendants contend that the status reports and tax forms were insufficient acknowledgments because they were "documents required to be prepared [by the terms of the notes and the tax laws], and not gratuitously prepared." They say the documents fail to demonstrate reaffirmation of intent to pay the debts because the documents had to be prepared under the contracts and the law. We reject this theory. Section 8.01-229(G) does not distinguish between "necessary" and "gratuitous" writings.

We hold that the plaintiffs presented evidence of acknowledgment sufficient to raise an issue for the jury. Even though the documentary and testimonial evidence is not conclusive, a review of both indicates to us that, prima facie, the status reports, but not the tax forms, constitute evidence of acknowledgment under the statute. We view the reports as evidence of direct and unqualified admissions of present, subsisting debts from which promises to pay would naturally and irresistibly be implied. Gold v. Crawford, 49 Va. (8 Gratt.) 110, 120 (1851).

With respect to the First Transaction, seven reports were received by Guth bearing dates from April 1, 1974 to December 31, 1976 inclusive. While there are handwritten notations made on some of the forms, which are not explained by the record, the figures appear to relate to the loan of $5,000 dated November 14, 1973 in the name of Joanne Guth, and constitute evidence from which a promise to pay the obligation may be implied and upon which to establish a new period of limitation. See Taylor Gilman Corp. v. Williams, 216 Va. 548, 221 S.E.2d 129 (1976).

With respect to the Second and Third Transactions, there are seven other reports dated January 1, 1974 to December 31, 1976 inclusive. Guth testified that these reports related to the 1974 loans. Again, there are unexplained handwritten notations on the typed reports. Nevertheless, the writings appear to be a specific acknowledgment of the debts. See Bickers v. Pinnell, 199 Va. 444, 100 S.E.2d 20 (1957). Cf. Magarity v. Shipman, 93 Va. 64, 24 S.E. 466 (1896) (statement of accounts showing balance due held insufficient acknowledgment of separate items of liability from which the balance results).

The tax forms have no probative value. They do not identify any particular debt. Moreover, the figures shown on the tax forms are mostly inconsistent with the amounts of interest shown on the status reports, rendering identification with any specific debt virtually impossible. For example, the interest reported on Joanne Guth's 1974 tax form
was $167.35. The status report for the First Transaction show Joanne Guth apparently earned $482.79 interest during that year on the $5,000.00 loan made in 1973.

The defendants contend, however, that even if there is sufficient acknowledgment to revive the period of limitations against the corporate defendant, such revival based on corporate writings cannot be attributed to Greenberg, the guarantor. We reject this contention. As we have previously stated, agreeing with defendants' contention on another issue in this appeal, the guarantor's liability is virtually indistinguishable from the maker's liability under these circumstances. Subsection (G)(2) of Code § 8.01-229 provides, in part: "The plaintiff may sue on the new promise described in paragraph 1 of this subsection or on the original cause of action. . ." The suit was based on the original causes of action and Greenberg's initial liability follows the acts of the corporation that revived the corporation's liability on the first, second, and third notes. These corporate acts were performed well before the dates that Greenberg contends the statute of limitations expired. Under the circumstances of this case, the maker has not been discharged from liability and the guarantor remains bound by his contract.

Next, we will address the issue of part payment by Greenberg. The case will be remanded and this issue may arise on a new trial if the plaintiffs do not ultimately prevail on the foregoing aspect of the acknowledgment question.

The evidence of part payment consists of Guth's testimony that, "Two payments were made," and that they were received in April and May, 1977, "By check, I believe." In addition, the status report for the First Transaction dated December 31, 1976 contains a handwritten notation, "check received" in the amount of $500.00 each on "4/13/77" and "5/10/77." While the record does not identify the author, presumably Guth made the notations.

We consistently have held that, standing alone, part payment of the principal or payment of interest does not toll or remove the bar of the statute of limitations. *Tyler Gilman Corp.*, 216 Va. at 550, 221 S.E.2d at 131. . . When payment by check is involved, the rule is based on the requirement that a writing, to be an acknowledgment under the statute, must be an unqualified admission of a subsisting debt which the party is liable for and willing to pay. See *Quackenbush*, 154 Va. at 413, 153 S.E. at 821. Here, while there is evidence of two checks, no evidence exists to show there was any explanatory writing upon either of them, except a mere order upon a bank signed by the maker to pay the payee the amount stated. See *Gwinn*, 159 Va. at 191, 165 S.E. at 650. The record fails to establish that any notation appeared on the checks to connect them with the obligation arising from the First Transaction so that a promise to pay the original debt can be implied. . .
J. Discovery Rule Not Recognized (Generally)

The General Rule

NUNNALLY v. ARTIS
254 Va. 247, 492 S.E.2d 126 (1997)

JUSTICE HASSELL delivered the opinion of the Court:

In this appeal, we consider whether to overrule our decision in *Scarpa v. Melzig*, 237 Va. 509, 379 S.E.2d 307 (1989), holding that in an action for wrongful conception, the statute of limitations begins to run when the health care provider negligently performs the ineffective sterilization procedure.

A.

On October 18, 1995, Valerie R. Nunnally filed her motion for judgment against Danville Memorial Hospital and Dr. Avis A. Artis, and alleged the following. Nunnally decided to have a sterilization because any subsequent pregnancies would have been detrimental to her health. Dr. Artis, the Hospital's purported agent, negligently performed a tubal ligation upon her on February 6, 1989. Nunnally became pregnant on November 1, 1993, and she gave birth to a healthy child. She "experienced a foreseeable traumatic delivery with consequent adhesions and other related medical problems."

The defendants filed special pleas in bar, asserting that Nunnally's action is barred by the applicable statute of limitations. The trial court entered a judgment sustaining the defendants' pleas, and we awarded Nunnally an appeal.

B.

Code § 8.01-243(A) 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." Code § 8.01-230 provides, in relevant part, that "in every action for which a limitation period is prescribed, the cause 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 . . . ."

Nunnally argues that the trial court erred in granting the defendants' special pleas of the statute of limitations. Nunnally contends that she pled a cause of action for wrongful conception, that her cause of action did not accrue until she was injured, that her injury occurred at conception and, hence, that the statute of limitations did not begin to run until November 1, 1993, the date she conceived her child. Thus, Nunnally urges us to overrule our decision in *Scarpa v. Melzig*, supra. The defendants respond that Nunnally's cause of action accrued on February 6, 1989, the date the sterilization procedure was performed and, thus, her action is barred by the two-year statute of limitations.

In *Scarpa v. Melzig*, we considered whether the trial court erred in ruling that a plaintiff's medical malpractice action was barred by the two-year statute of limitations.
JoAnn C. Scarpa filed an action against her physicians, Eric P. Melzig and Wanda L. Radford. In June 1975, Scarpa was hospitalized under the care of Melzig for treatment of a pelvic infection. Melzig removed certain tissue and body structures from Scarpa's body during an operation. Melzig erroneously recorded in a written operative report that he had removed Scarpa's left fallopian tube when, in fact, the left fallopian tube was not among the structures removed. Melzig signed a hospital discharge summary which also erroneously indicated that Scarpa's left fallopian tube had been removed.

In August 1980, Scarpa was hospitalized under the care of Dr. Radford because Scarpa desired a permanent sterilization. Radford performed the procedure and noted that Scarpa's left fallopian tube was not present when, in fact, the left fallopian tube was present. Thus, Dr. Radford did not ligate, cut upon, or alter Scarpa's left fallopian tube.

Scarpa conceived and became pregnant in March 1984, and a child was born. During an assessment of her reproductive system, the presence of her left fallopian tube was confirmed.

Scarpa filed a notice of medical malpractice on November 12, 1985 and filed her motion for judgment on July 11, 1986. In her motion for judgment, she alleged that Dr. Melzig negligently failed to describe accurately the surgical procedures he performed on her, thereby preventing subsequent health care providers from being fully apprised of the status of her reproductive system. Scarpa also alleged that Dr. Radford was negligent in either failing to visualize adequately Scarpa's left fallopian tube or in failing to ligate or attempt to ligate that tube. The trial court held that Scarpa's cause of action was barred because the statute of limitations began to run on August 5, 1980, the date that Radford negligently performed the sterilization procedure.

On appeal, Scarpa contended that her action was not barred by the statute of limitations because her "only hurt" occurred when she conceived through her left fallopian tube and became pregnant in March 1984. Rejecting Scarpa's contention, we pointed out that the applicable statute of limitations required that every action for personal injuries shall be brought within two years after the cause of action accrued, Code § 8.01-243(A), and that Scarpa's cause of action accrued from the date she sustained an injury to the person and not when the resulting damage was discovered, Code § 8.01-230. We held that Scarpa's cause of action began to run at the time that the negligent 1980 sterilization procedure was performed because, during that procedure she "endured trauma, pain, and inconvenience [and] due to defendants' alleged wrongful conduct, she was subjected to a wholly inadequate procedure and denied the adequate and complete sterilization which she requested." Scarpa, 237 Va. at 513, 379 S.E.2d at 310.

Justice Lacy, with whom Chief Justice Carrico joined, dissented. Justice Lacy was of opinion that although a legal wrong may have occurred in 1980 when Dr. Radford performed the negligent sterilization procedure upon Scarpa, no injury occurred because Mrs. Scarpa had suffered no "positive, physical or mental hurt" until she became pregnant. Id. at 515, 379 S.E.2d at 311.

C.

In Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986), we held "that an action for wrongful pregnancy or wrongful conception may be maintained in Virginia." Id. at 183, 343 S.E.2d at 305. Explaining our holding, we stated:

Under traditional tort principles, it is clear that a physician who performs . . . [a] sterilization procedure owes a legal duty to the patient. Where the patient can establish failure to perform the procedure with reasonable care and damages proximately resulting from breach of duty, she is entitled to recover as in any other medical malpractice action."

Id. at 182-83, 343 S.E.2d at 304.

Nunnally's motion for judgment alleges a cause of action for wrongful conception. The gist of an action for wrongful conception is that a health care provider negligently performed a sterilization procedure and, as a proximate result of that negligence, the patient conceives a child.

In Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900 (1981), we stated:

"We construe the statutory word [found in Code § 8.01-230] 'injury' 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. Thus, the running of the time 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."

221 Va. at 957-58, 275 S.E.2d at 904. Here, the injury of which Nunnally complains is not "trauma, pain, and inconvenience" that may have been associated with the negligent sterilization procedure. Rather, she complains of the consequences of the wrongful conception and the subsequent pregnancy which, for medical reasons, she sought to avoid. Indeed, we fail to understand how a plaintiff could have a cause of action for wrongful conception if there has been no conception.

Even though a legal wrong may have occurred in 1989 when the defendants performed the negligent sterilization procedure on Nunnally, we hold that no injury under the Locke accrual rule occurred at that time because Nunnally had suffered no "positive, physical or mental hurt" related to her alleged cause of action, wrongful conception. Thus, we are of opinion that Scarpa was wrongly decided and, therefore, it is expressly overruled.
D.

Our decision to overrule *Scarpa* is made with great reluctance. We recognize the importance of the doctrine of stare decisis in our jurisprudence. . . . Our strong adherence to the doctrine of stare decisis does not, however, compel us to perpetuate what we believe to be an incorrect application of the law; neither will we be compelled by the doctrine of stare decisis to ignore our duty to develop the orderly evolution of the common law of this Commonwealth. Indeed, this Court's obligation to reexamine critically its precedent will enhance confidence in the judiciary and strengthen the importance of stare decisis in our jurisprudence. Although we have only done so on rare occasions, we have not hesitated to reexamine our precedent in proper cases and overrule such precedent when warranted. . . .

E.

We find no merit in defendants' argument that our holding today constitutes a "discovery rule." We adhere to the holding, expressed in *Virginia Military Institute v. King*, 217 Va. 751, 760, 232 S.E.2d 895, 900 (1977), that adoption of a discovery rule, which causes the running of the statute of limitations only when an injury is discovered or should have been discovered in the exercise of reasonable diligence, must be accomplished by the General Assembly. As we observed in *Locke*, "in all of our prior decisions that reject the discovery rule, the injury or damage existed at the time of the wrongful act; it had merely not been discovered in a timely manner." 221 Va. at 959, 275 S.E.2d 906. Here, however, Nunnally's injury, the wrongful conception, did not exist at the time of the defendants' alleged wrongful act -- the negligent sterilization procedure. To hold otherwise would result in the inequity of barring a plaintiff's claim for wrongful conception before she conceived. Hence, we are of opinion that our decision today is entirely consistent with our holding in *Locke* and the cases discussed therein. . . .

JUSTICE COMPTON, with whom CHIEF JUSTICE CARRICO and JUSTICE STEPHENSON join, dissenting [opinion omitted].
Statutory Enclaves for the Discovery Rule.

The General Assembly has adopted the diligence and discovery rule for accrual of causes of action in malpractice in the narrow situation where foreign objects are unintentionally left in a person's body. See § 8.01-243, set forth early in this Chapter. Fraudulent or concealed injuries are similarly treated. See id. See also these two important Code sections addressing a number of situations, both those arising in general tort litigation and those in specific subject areas:

§ 8.01-249. When cause of action shall be deemed to accrue in certain personal actions.

The cause of action in the actions herein listed shall be deemed to accrue as follows:

1. In actions for fraud or mistake and in actions for rescission of contract for undue influence, when such fraud, mistake, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered;

2. In actions or other proceedings for money on deposit with a bank or any person or corporation doing a banking business, when a request in writing be made therefor by check, order, or otherwise;

3. In actions for malicious prosecution or abuse of process, when the relevant criminal or civil action is terminated;

4. In actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma, or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician. However, no such action may be brought more than two years after the death of such person;

5. In actions for contribution or for indemnification, when the contributee or the indemnitee has paid or discharged the obligation. A third-party claim permitted by subsection A of § 8.01-281 and the Rules of Court may be asserted before such cause of action is deemed to accrue hereunder;

6. In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incompetency of the person, upon removal of the disability of infancy or incompetency as provided in § 8.01-229 or, if the fact of the injury and its causal connection to the sexual abuse is not then known, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. As used in this subdivision, "sexual abuse" means sexual abuse as defined in subdivision 6 of §18.2-67.10 and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;

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7. In products liability actions against parties other than health care providers as defined in § 8.01-581.1 for injury to the person resulting from or arising as a result of the implantation of any prosthetic device for breast augmentation or reconstruction, when the fact of the injury and its causal connection to the implantation is first communicated to the person by a physician.

8. In actions on an open account, from the later of the last payment or last charge for goods or services rendered on the account.

§ 8.01-243. Personal action for injury to person or property generally; extension in actions for malpractice against health care provider.

... c. The two-year limitations period specified in subsection A shall be extended in actions for malpractice against a health care provider as follows:

1. In cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient's body, for a period of one year from the date the object is discovered or reasonably should have been discovered; and

2. In cases in which fraud, concealment or intentional misrepresentation prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exercise of due diligence, reasonably should have been discovered.

3. In a claim for the negligent failure to diagnose a malignant tumor or cancer, for a period of one year from the date the diagnosis of a malignant tumor or cancer is communicated to the patient by a health care provider, provided the health care provider's underlying act or omission was on or after July 1, 2008. Claims under this section for the negligent failure to diagnose a malignant tumor or cancer, where the health care provider's underlying act or omission occurred prior to July 1, 2008, shall be governed by the statute of limitations that existed prior to July 1, 2008.

However, the provisions of this subsection shall not apply to extend the limitations period beyond ten years from the date the cause of action accrues, except that the provisions of § 8.01-229 A 2 shall apply to toll the statute of limitations in actions brought by or on behalf of a person under a disability.
His exact words were "you act like a dog"?

Slander trial of the century
K. Accrual of Claims Inside the Human Body

**Focus on the Specific Injury Alleged in This Case**

**RENNER v. STAFFORD**  
245 Va. 351, 429 S.E.2d 218 (1993)

JUSTICE COMPTON delivered the opinion of the Court.

With increasing frequency, we are confronted with appeals of cases in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits. This is such a case.

On March 27, 1991, appellant Sandra L. Renner filed a motion for judgment against appellees James H. Stafford, Jr., M.D., John H. Lowder, M.D., and their professional corporation, Winchester Women's Specialists. The plaintiff alleged that she had been Stafford's patient for "obstetric care." She asserted that during the course of treatment, he prescribed "the drug Danocrine for endometriosis."

The plaintiff alleged that she "did not have endometriosis" and that the defendants "deviated from the accepted standard of medical care in making the diagnosis of endometriosis and instituting a protracted course of Danocrine therapy." She further alleged that in "January 1989," she "developed pseudotumor cerebri (benign) and intracranial hypertension secondary to the Danocrine."

Additionally, the plaintiff alleged that as a proximate result "of the deviation from the accepted standard of medical care," she "developed intracranial pressure, diplopia, papilledema and headaches as well as other numerous acute and chronic problems." She also asserted that she had incurred "unnecessary medical expenses, pain and suffering, both physical and mental," for which she sought recovery in damages against the defendants.

In an "answer and grounds of defense," the defendants denied the material allegations of the motion for judgment. Later, after the plaintiff had responded to 62 requests for admissions propounded by the defendants, the defendants filed a motion for summary judgment asserting the bar of the statute of limitations.

In that motion, the defendants noted that the plaintiff, on November 30, 1990, "appropriately" had filed a notice of claim pursuant to Code § 8.01-581.2, a provision of the Medical Malpractice Act. The defendants asserted, however, relying on the responses to requests for admissions, that the defendants undertook a continuous course of treatment of the plaintiff that ended at the latest "in the early part of November, 1988." Therefore, according to the summary judgment motion, the November 30, 1990 notice tolling the applicable two-year statute of limitations was untimely, and the action is barred.
According to the defendants, the "Plaintiff contends that her alleged injury from the Danocrine was not discovered until early January, 1989." Nonetheless, the defendants asserted, the statute of limitations began to run, at the latest, from a date in early November 1988, when plaintiff's Danocrine treatment ended.

Following a hearing at which the trial court considered the pleadings, the responses to requests for admissions, and the argument of counsel, the court granted the motion for summary judgment, finding "that the applicable Statute of Limitations has lapsed as to these Defendants." We awarded the plaintiff an appeal from an April 1992 order dismissing the action with prejudice.

A trial court may enter summary judgment only if no material fact is genuinely in dispute. The summary judgment rules and the discovery rules, while not intended to substitute a new method for trial when an issue of fact exists, were adopted to permit trial courts to end litigation at an early stage provided it clearly appears that one of the parties is entitled to a judgment in the case as made out by the pleadings and the parties' admissions. *Carson v. LeBlanc*, 245 Va. 135, 139-40, 427 S.E.2d 189 (1993). But a trial court, in considering a motion for summary judgment, must adopt those inferences from the facts that are most favorable to the nonmoving party, unless such inferences are strained, forced, or contrary to reason. Id. Conversely, the trial court is not permitted to adopt inferences from the facts that are most favorable to the moving party.

On appeal, the defendants maintain that the trial court correctly granted the motion for summary judgment. They note that every action for personal injuries must be brought "within two years after the cause of action accrues," Code § 8.01-243(A). They point to Code § 8.01-230, which provides that a "cause 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 . . . and not when the resulting damage is discovered."

The defendants then embark on a detailed analysis of the plaintiff's responses to the requests for admissions and put their own interpretation on the facts to posit a theory of recovery that is at odds with the plaintiff's theory set forth in the motion for judgment. A recital of the facts contained in the responses is unnecessary; it is sufficient to state that the defendants rely upon plaintiff's admissions that she continued to suffer menstrual cramping and heavy menstrual bleeding while under Stafford's care to conclude that plaintiff suffered an "injury" between October 1987 and early November 1988 when Stafford was prescribing the "Danocrine therapy." But that is not the basis of the plaintiff's claim, and neither the motion for judgment nor the plaintiff's responses to requests for admissions "clearly" establishes that to be the basis of the plaintiff's action.
According to the plaintiff, she is not alleging that defendants were negligent in failing to alleviate the problems for which Stafford initially undertook to treat her, namely, menstrual cramps and heavy menstrual bleeding. Rather, plaintiff argues, her allegations of fact furnish a basis for a finding, based upon medical evidence yet to be presented, (1) that Stafford negligently prescribed medication (Danocrine) inappropriate for the plaintiff's condition, (2) that the prolonged use of this medication caused plaintiff to develop conditions such as pseudotumor cerebri and intracranial hypertension, and (3) that such conditions did not occur until January 1989. This date, the plaintiff contends, was when she was "injured," when the cause of action accrued, and when the statute of limitations began to run. We agree with the plaintiff that her allegations properly may be so construed.

In determining when the plaintiff's "injury" was sustained, the crucial question in cases like this, when the date of the wrongful act possibly does not coincide with the date of the resulting harm to the plaintiff, is: When was the plaintiff hurt? The answer to this question must be found mainly in the medical evidence. Locke v. Johns-Manville Corp., 221 Va. 951, 958-59, 275 S.E.2d 900, 905 (1981). See Scarpa v. Melzig, 237 Va. 509, 379 S.E.2d 307 (1989).

Here, given the circumstance that the medical evidence supporting the plaintiff's theory has not been developed fully, the record is incomplete on that question, and the trial court prematurely ruled on the issue. Manifestly, there are material facts genuinely in dispute. The plaintiff is entitled to prove, if she can, that she sustained no "injury," no "positive, physical or mental hurt," in the language of Locke, 221 Va. at 957, 275 S.E.2d at 904, until January 1989.

Consequently, we hold that the trial court erred in entering summary judgment; it will be annulled and the case will be remanded for further proceedings, without prejudice to the defendants' right to reassert the bar of the statute of limitations after full development of the evidence.

Reversed and remanded.
The statute of limitations doctrines are in the nature of affirmative defenses, which must be raised -- normally by a special plea or plea in bar -- in order not to be waived. The Virginia Supreme Court has commented that the burden of proof in making out the limitation defense rests on the defendant who asserts the defense. This doctrine has particular significance in connection with personal injury claims, because if it is unclear when an injury was incurred, it will be held that the defendant has not carried the required burden of demonstrating when some injury, however slight, first afflicted the plaintiff, and the limitations defense will not be made out. *Brown v. Harms*, 251 Va. 301, 467 S.E.2d 805 (1996). See also *Lo v. Burke*, 249 Va. 311; 455 S.E.2d 9 (1995).
L. Fraud and Concealment; Estoppel.

Fraud is by definition conduct involving deceit. The general test under § 8.01-249 to measure the accrual date for fraud claims is when the wrongdoing was "discovered or by the exercise of due diligence reasonably should have been discovered." *STB Marketing v. Zolfaghari*, 240 Va. 140, 393 S.E.2d 394 (1990). Other circumstances may also suggest the appropriateness of a discovery test.

Under *Boykins Narrow Fabric v. Weldon Roofing*, 221 Va. 81, 266 S.E.2d 887 (1980), in rare circumstances fraud or concealment of a cause of action may defer the beginning of the running of the statutory period. Quoting prominent authority, the Court said:

Fraudulent concealment must consist of affirmative acts of misrepresentation, mere silence being insufficient. The fraud which will relieve the bar of the statute must be of that character which involves moral turpitude, and must have the effect of debarring or deterring the plaintiff from his action.

Applicable Virginia precedent clearly establishes that a party seeking to invoke the doctrine of estoppel must prove by clear, precise, and unequivocal evidence the following elements: (1) A material fact was falsely represented or concealed; (2) The representation or concealment was made with knowledge of the facts; (3) The party to whom the representation was made was ignorant of the truth of the matter; (4) The representation was made with the intention that the other party should act upon it; (5) The other party was induced to act upon it; and (6) The party claiming estoppel was misled to his injury. See *Coleman v. Nationwide Life Ins. Co.*, 211 Va. 579, 582-83, 179 S.E.2d 466, 469 (1971).

If the prospective plaintiff is "at no time ignorant of the true state of facts" the fraud or estoppel arguments will not work to put off the running of the statute of limitations.
JUSTICE WHITING delivered the opinion of the Court.

In this medical malpractice action against a surgeon, we decide when the applicable two-year statute of limitations began to run on a claim for an allegedly negligent operation, when that operation was followed by eight years of non-negligent treatment by the same surgeon.

For the purposes of ruling upon the defendant's plea of the statute of limitations, the parties stipulated the following facts. On January 11, 1977, Dr. Ralph A. Natvig, a general surgeon, negligently severed Harry L. Justice's common bile duct, rather than his cystic bile duct, in the surgical removal of Justice's gall bladder. On January 24, 1977, Dr. Natvig negligently inserted a U-tube in treating complications resulting from the severance of the common bile duct. Thereafter, until May 15, 1985, Dr. Natvig treated Justice non-negligently for complications arising out of his operations of January 1977. The trial court sustained Dr. Natvig's plea of the statute of limitations, and we granted this appeal.

On June 3, 1986, Justice filed this action against Dr. Natvig.

We have decided a number of cases involving the statute of limitations and a continuing professional relationship. Farley v. Goode, 219 Va. 969, 976, 252 S.E.2d 594, 599 (1979), was a dental malpractice case in which a dentist negligently failed to diagnose and treat a periodontal disease over a period of four years. In deciding when the statute of limitations began to run, we applied a "continuing treatment" rule in the following language:

We hold under these facts that when malpractice is claimed to have occurred during a continuous and substantially uninterrupted course of examination and treatment in which a particular illness or condition should have been diagnosed in the exercise of reasonable care, the date of injury occurs, the cause of action

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3 The cystic duct, leading to the gall bladder, was to be tied off, allowing bile to continue flowing from the liver through the common bile duct to the small intestine. Instead, the common bile duct was tied off, and thereafter severed, causing bile to back up in the liver.

4 When Dr. Natvig performed corrective surgery, he inserted a U-tube between the ribs, rather than through tissue in the abdomen. The U-tube was inserted to protect the surgical connection of the duct coming from the liver to the second period of the small intestine (jejunum) until the connection healed. The improper location of the U-tube caused osteochondritis, an infection of the bone cartilage, and other complications, necessitating Dr. Natvig's further treatment, which extended until May 15, 1985.
for that malpractice accrues, and the statute of limitations commences to run when the improper course of examination, and treatment if any, for the particular malady terminates.

We applied the continuing treatment rule in the medical malpractice case of *Fenton v. Danaceau*, 220 Va. 1, 4, 255 S.E.2d 349, 350 (1979). Then, in *Keller v. Denny*, 232 Va. 512, 519, 352 S.E.2d 327, 331 (1987), an attorney malpractice case, and *Boone v. C. Arthur Weaver Company*, 235 Va. 157, 163, 365 S.E.2d 764, 767 (1988), an accountant malpractice case, we applied a similar rule in the context of continuing professional services. Finally, in *Grubbs v. Rawls*, 235 Va. 607, 369 S.E.2d 683 (1988), a medical malpractice case, we applied the continuing treatment rule even though there was no negligence in the treatment following a negligently performed operation. Rejecting the doctor's argument that *Farley* applies only where the negligence has continued over the whole course of treatment, we held:

The rule of decision in [*Farley* and *Fenton*] was not that the negligence of the defendant physician extended until the physician-patient relationship ended. Instead, the rule of decision was that if there existed a physician-patient relationship where the patient was treated for the same or related ailments over a continuous and uninterrupted course, then the plaintiff could wait until the end of that treatment to complain of any negligence which occurred during that treatment. Thus, within the confines of *Farley*, *Fenton*, and this opinion, Virginia has a true continuing treatment rule.

*Grubbs*, 235 Va. at 613, 369 S.E.2d at 687.

Dr. Natvig maintains that the continuing treatment rule should not be applied in this case for several reasons. First, he says more than two years elapsed between some of his treatments, as well as between his final treatment and notice of the malpractice claim. But the record indicates otherwise. Dr. Natvig's office notes, attached to his discovery deposition and made a part of the record by agreement of counsel, indicate that during the period of treatment, he saw Justice in each of the years following the operations. Moreover, Dr. Natvig stipulated that his treatments related to the operations and extended until May 15, 1985. Thereafter, Justice gave the mandatory notice and filed this action within the required time periods.

Dr. Natvig's counsel noted at oral argument that he did not intend his stipulation to be as far-reaching as we have indicated. Our review of the record indicates otherwise. In statements to the trial court, Dr. Natvig's counsel said: "we will stipulate . . . that the care rendered by Dr. Natvig related to what the plaintiff will contend was sequela of the 1977 act of negligence." Additionally, counsel responded affirmatively to the following question of the trial court as to the scope of the stipulation, "[b]ut Dr. Natvig treated him up until 1985 and treated him for problems relating to that, to that negligence?"

Second, Dr. Natvig says that his treatment was not continuous because Justice saw other physicians during the eight-year period. Of the seven doctors mentioned by Dr. Natvig, only Dr. Owen Gwaltney, a thoracic surgeon, and Dr. William Robertson, another surgeon, treated Justice for complications secondary to Dr. Natvig's surgery. Justice was, however, referred to both surgeons by Dr. Natvig, who continued his treatment of Justice even after their operations. Under these circumstances, neither referral broke the continuity of Dr. Natvig's treatment.
Third, Dr. Natvig contends that his non-negligent treatment extended over eight years after the operations, and the longest treatment period to which we have applied the continuing treatment rule is four years, in Farley. We decline, however, to limit the application of the continuing treatment rule to a specific number of years.

Finally, we reject Dr. Natvig's argument that the rule should not apply in this case because Justice knew, or should have known, that Dr. Natvig had negligently cut the wrong duct and thereafter had negligently inserted the U-tube in the wrong place. In discovery depositions, Justice indicated that he understood he was jaundiced after the first operation because a duct was blocked or closed, but was never told that Dr. Natvig cut or closed it. He also testified that Dr. Gwaltney told him Dr. Natvig should not have placed the U-tube through his ribs, and that that was causing some of the complications. In neither instance, however, was Justice advised that either of these acts was negligent. In light of these facts, we hold that the continuing treatment rule does apply.

For the foregoing reasons, we will reverse the judgment of the trial court and remand the case.

Notes on Continuation and Termination of Services

Termination of Services. As suggested in the Justice case and MacLellan v. Throckmorton, claims against other professionals are increasingly viewed as maturing for statute of limitations purposes when the services of the professional terminate, either generally or as to the specific project out of which the claim later arises. See, e.g., Boone v. Weaver, 235 Va. 157, 365 S.E.2d 764 (1988) (accountants). See also Farley v. Goode, 219 Va. 969, 252 S.E.2d 599 (1979) (dental malpractice).

Continuing Breach of Duty. A breach of duty which remains uncured may not be the equivalent of a continuous wrong. See Westminster Investing v. Lamps Unlimited, 237 Va. 543, 379 S.E.2d 316 (1989) (cause of action for breach of a lease accrued when lease conditions were first clearly breached, and the fact that the breach continued over a period of years did not extend the running of the statute of limitations to later dates on which the breach continued to occur).
Divisible Contracts?

NELSON v. COMMONWEALTH OF VIRGINIA
235 Va. 228, 368 S.E.2d 239 (1988)

JUSTICE POFF delivered the opinion of the Court.

. . . . This action arose out of the design and construction of the 11-story, 550-bed teaching hospital (the hospital or the project) on the campus of the Medical College of Virginia, Virginia Commonwealth University (VCU). In 1971, VCU engaged the services of Ellerbe Architects and Engineers (Ellerbe or the architects) of St. Paul, Minnesota, for the early planning stages of the project. Ellerbe, in turn, engaged the services of Lee, King, Poole & White (LKP&W), a Richmond architectural firm, to assist Ellerbe as associate architects. In January 1976, VCU advised Ellerbe to proceed with the preparation of preliminary plans and specifications. The parties entered into a contract on April 30, 1976 for Ellerbe to design the working drawings and to administer the construction contract.

. . . The contract divided the architects' basic services into four phases: schematic design, preliminary design, working drawings, and construction. During the initial phase, the architects were required to assist VCU in planning the project and in developing additional detail, including schematic plans. Blue Book § 43.02.3. As a second phase, the architects agreed to supply preliminary drawings "to fix and describe the size and character of the entire Project". Id. § 43.03(A). In the working-drawings phase, Ellerbe was obligated to provide detailed drawings setting forth the nature and extent of the work to be performed, the materials, equipment, and supplies required, and the methods of installation and construction . . . .

Under the contract, Ellerbe's fee was based on a percentage of the cost of construction. VCU was required to pay Ellerbe periodically for services performed: 15 percent of the fee was due after completion of the schematic phase, 25 percent after Ellerbe finished the preliminary design, 75 percent after completion of the working drawings, 95 percent as construction progressed, and 100 percent after Ellerbe submitted "as-built" drawings for the project. Id. § 50.07. The employment contract also provided that VCU would pay the architects additional fees for services provided after final payment to the contractor and beyond the contractor's one-year guarantee period. Id. § 46.01(E); see also id. § 45.02. . . .

VCU entered into an agreement with the contractor on October 21, 1977 for the bid price of $42,374,000. The construction contract set November 29, 1980 as the project's scheduled date of completion.

Construction was plagued with delays, which each party claims were due, in part, to the fault of the other. As a result, VCU, Ellerbe, and the contractor agreed to a one-year extension of the contract to November 30, 1981. The project still was not complete in February 1982, and VCU began withholding payment of fees due Ellerbe. Construction of the hospital finally was substantially complete in June 1982.
II. PROCEEDINGS

The parties were unable to settle their dispute concerning the fees, and Ellerbe filed a motion for judgment against the Commonwealth, its Comptroller, and VCU (collectively, VCU). VCU denied that it owed any fees to Ellerbe and filed a counterclaim alleging that Ellerbe breached its contract with VCU by defectively designing certain portions of the project and by failing to perform its duties to administer the construction contract. In its grounds of defense to VCU's amended counterclaim, Ellerbe asserted that the claim for design defects was barred by the statute of limitations . . . .

The case was tried to a jury, and after VCU concluded its case on the counterclaim, Ellerbe moved to strike the evidence on the grounds that VCU's design claims were time-barred. . . The trial court held that the design-defect allegations were time-barred . .

B. Statute of Limitations

Obviously, in the course of marshalling its evidence for trial and during conduct of the trial on its counterclaim, VCU placed primary emphasis upon its design-defect claims. On appeal, VCU contends that the trial court erred in ruling that those claims were barred by the statute of limitations. Specifically, VCU argues that Ellerbe's "duties under the design and construction phase of the contract were not divisible" and that, because Ellerbe "retained rights to correct a design defect until the building [was] completed", its services were "ongoing" and the limitations period should not have run while the contract continued.

In VMI, we encountered a similar argument by the owner under prior provisions of the same form contract executed by Ellerbe and VCU. As in the case at bar, the employment contract in VMI divided the architects' performance of the contract into consecutive phases, with varying duties detailed for each phase, and with compensation to the architects reflecting an increasing proportion of the construction cost as each phase was completed. In VMI, we found that a cause of action for improper design accrued when the plans were approved by the owner because, "[a]t that time, the architects had a right to demand and received payment for their services for that phase of their undertaking. At that time, if defects had been discovered, [the owner] could have initiated legal proceedings against the architects." 217 Va. at 759, 232 S.E.2d at 900. While we made a merits adjudication of the issues relating to the owner's claims for the architects' failure to detect and recommend corrections of its own design defects, we refused to consider the owner's design-defect claims because we concluded that they were time-barred.

VCU urges us to apply our decision in County School Bd. v. Beiro, 223 Va. 161, 286 S.E.2d 232 (1982). In Beiro, the owner of a public school building brought an action against the contractor claiming damages due to a defective roof. Because the construction contract had reserved to the contractor until final payment had been approved the right to correct any defects in construction, we held that the contract was not divisible. Therefore, although the contractor had completed his work on the roof well before the architect issued the certificate of final payment, we held that no cause of action accrued until the date of the certificate. Id. at 163, 286 S.E.2d at 233.
Our decision in *Beiro* is inapposite to the facts in this case. The contract in issue here, like the contract we considered in *VMI*, is divisible. Once Ellerbe's plans were accepted by VCU in July 1977, Ellerbe had completed its duties under the working-drawings phase of the project and was entitled to demand full payment of its fees attributable to that phase. At that point, a new phase began, and the time in which VCU could assert an action based on the drawings submitted began to run on that date.

Nor is application of the rule of *VMI* affected by our decision in *Keller v. Denny*, 232 Va. 512, 352 S.E.2d 327 (1987), as counsel for VCU urged in oral argument. In *Keller*, a client sued his attorney for malpractice in the handling of a transaction involving the sale of shares of stock in a corporation. The client alleged that the attorney neglected instructions to include in the stock purchase agreement a provision permitting the client to repurchase the stock upon the happening of certain events. Although the attorney had completed and supervised execution of the necessary documents in 1975, his error was not detected until 1980 when he was reviewing the documents at the request of the client who wanted to reacquire the stock. The client terminated his relationship with the attorney in 1980 and filed suit against him in 1982. We stated that:

> [W]hen malpractice is claimed to have occurred during the representation of a client by an attorney with respect to a particular undertaking or transaction, the breach of contract or duty occurs and the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have terminated, notwithstanding the continuation of a general attorney-client relationship, and irrespective of the attorney's work on other undertakings or transactions for the same client.

Id. at 518, 352 S.E.2d at 330.

Applying these principles, we held that the attorney's undertaking was one of a continuing nature and was not completed upon the mere drafting and execution of the contract documents. Accordingly, the statute of limitations on the client's cause of action did not begin to run until the relationship between the parties ended with respect to the entire transaction. We noted, however, that the rule stated in that case "is applicable only when a continuous or recurring course of professional services relating to a particular undertaking is shown to have taken place over a period of time." Id., 352 S.E.2d at 331.

Here, as in *VMI*, the architects' undertaking in their contract with the owner involved several separate and distinct phases. Although Ellerbe was obligated to administer the construction phase of the project, its duties to design the project ended, as we have said, upon VCU's acceptance of the working drawings. It is true that a general architect-owner relationship continued to exist, but the design services offered by Ellerbe were severable and not "continuous or recurring", see id., and the statute of limitations began to run on VCU's design-defect claims when Ellerbe completed the design phase of the undertaking.

These claims arose out of a contract "in writing and signed by the party to be charged thereby," and the applicable period of limitations, therefore, was five years. See Code § 8.01-246(2); see also *VMI*, 217 Va. at 758-59, 232 S.E.2d at 899-900.
Because VCU filed its counterclaim on February 22, 1983, more than five years after its cause of action for design malpractice had accrued, the design-defect claims were time-barred.

In an alternative argument, VCU suggests that Ellerbe, by not asserting its statute of limitations plea in its initial response to VCU's counterclaim, waived the defense. The record shows that both parties were granted leave to file amended pleadings and that Ellerbe was permitted to include in its reply to VCU's amended counterclaim its plea of the statute of limitations. "Leave to amend shall be liberally granted in furtherance of the ends of justice," Rule 1:8, and absent a showing of prejudice, we will uphold a ruling of the trial court permitting amendments. See Herndon v. Wickham, 198 Va. 824, 826-27, 97 S.E.2d 5, 7 (1957) (affirming decision to allow delay in filing statute of limitations defense until eight days before trial).

VCU complains that it was prejudiced "in the preparation and presentation of its case" because the defense was asserted "only thirteen (13) days before the trial of this matter began." Yet, we note that, like the plaintiff in Herndon, VCU "did not request continuance of the case to a later date", id. at 827, 97 S.E.2d at 7, and we find no prejudice sufficient to support VCU's suggestion of waiver. . . .
Notes on Contracts Subject to the Continuous Undertaking Doctrine

Which Contract? In Suffolk City School Board v. Conrad Brothers, 255 Va. 171, 495 S.E.2d 470 (1998) the School Board sued a general contractor engaged to build two high schools, alleging defective roofs. The Supreme Court found it to be error for the trial court to identify the date of breach in the construction contract by using terms of the architects contract which the contractor did not sign.

Insurance and the Continuing Undertaking Doctrine. In Harris v. K&K Insurance Agency, 249 Va. 157; 453 S.E.2d 284 (1995), the Court accepted a certified question from the federal court asking whether the continuous undertaking doctrine of Virginia limitations law applied where an insurance agency allegedly failed to obtain proper coverage for a property owner. The Court found that – in contrast to the continuing nature of the services at issue in the cases noted above in these Readings -- the services performed by an insurance broker and an insurance agency on behalf of an insured ordinarily entail separate, independent acts involving an initial sale, a policy renewal, a policy change, or the processing of a claim. "As such, these actions are not analogous to the professional services at issue in our previous cases. Further, since these actions do not, by their nature, require continuing work by the broker or the insurance agency, they cannot be characterized as continuing services relating to a particular undertaking."
“I’m just sure that the answer to this Statute of Limitations question is right here in these cases, staring us in the face!”
N. Wrongful Death cases

The key statutes on the statutes of limitation in wrongful death cases are:

§ 8.01-50. Action for death by wrongful act; how and when to be brought.

A. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony.

B. Every such action under this section shall be brought by and in the name of the personal representative of such deceased person within the time limits specified in § 8.01-244.

§ 8.01-244. Actions for wrongful death; limitation.

A. Notwithstanding the provisions of § 8.01-229 B, if a person entitled to bring an action for personal injury dies as a result of such injury with no such action pending before the expiration of two years next after the cause of action shall have accrued, then an action under § 8.01-50 may be commenced within the time limits specified in subsection B of this section.

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

The diagram on the following page attempts to integrate the wrongful death period as provided in these statutes and the parts of Code §8.01-229 re appointment of a personal representative for a decedent (two year maximum):
**Unrelated Death of Victim & Tolling**

1. **Tort**
   - 2-year statute of limitations
   - **Claim Barred**
   - **Unrelated Death**

2. **Tort**
   - 2-year statute of limitations
   - **Longer of 2 years from the TORT or 1 year from appointment of Representative**

3. **Tort**
   - **No Rep.**
   - Max of 2 years from DEATH (Not tort) for appointment of Pers. Representative and 1 year thereafter for suit - max of 3 years from victim’s death (not tort)

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**Wrongful Death (related to the tort)**

4. **Tort**
   - 2-year LTD statute of limitations FOR PERSONAL INJURY
   - **Death from the Tort**
   - **Death from the Tort -- Occurrence**
   - **Death from the Tort -- Occurrence**

5. **Tort**
   - 2-year LTD statute of limitations runs from death
   - **Longer of 2 years from Death or 1 year from appointment**

6. **Tort**
   - **No Rep.**
   - Max of 2 years from DEATH (Not tort) is allowed for appointment of Pers. Representative and 1 year thereafter for suit = max of 3 years from death (not tort)
O. Tolling.

Code § 8.01-229(A) collects a variety of circumstances operating under Virginia law to toll (suspend) the running of the statutory period. This is an extremely important provision, regularly cited and applied. Several further specific situations are addressed by § 8.01-243 and § 8.01-243.1.

§ 8.01-229. Suspension or Tolling of Statute of Limitations; Effect of disabilities; death; injunction; prevention of service by defendant; dismissal, nonsuit or abatement; devise for payment of debts; new promises; debts proved in creditors' suits.

A. Disabilities which toll the statute of limitations. --Except as otherwise specifically provided in §§ 8.01-237, 8.01-241, 8.01-242, 8.01-243, 8.01-243.1 and other provisions of this Code,

1. If a person entitled to bring any action is at the time the cause of action accrues an infant, except if such infant has been emancipated pursuant to Article 15 (§ 16.1-331 et seq.) of Chapter 11 of Title 16.1, or of unsound mind, such person may bring it within the prescribed limitation period after such disability is removed; or

2. After a cause of action accrues,
   a. If an infant becomes entitled to bring such action, the time during which he is within the age of minority shall not be counted as any part of the period within which the action must be brought except as to any such period during which the infant has been judicially declared emancipated; or
   b. If a person entitled to bring such action becomes of unsound mind, the time during which he is of unsound mind shall not be computed as any part of the period within which the action must be brought, except where a guardian or committee is appointed for such person in which case an action may be commenced by such committee or guardian before the expiration of the applicable period of limitation or within one year after his qualification as such, whichever occurs later.

For the purposes of subdivisions 1 and 2 of this subsection, a person shall be deemed of unsound mind if he is adjudged insane by a court of competent jurisdiction to be mentally incapable of rationally conducting his own affairs, or if it shall otherwise appear to the court or jury determining the issue that such person is or was so mentally incapable of rationally conducting his own affairs within the prescribed limitation period.

3. If a convict is or becomes entitled to bring an action against his committee, the time during which he is incarcerated shall not be counted as any part of the period within which the action must be brought.

B. Effect of death of a party. --The death of a person entitled to bring an action or of a person against whom an action may be brought shall toll the statute of limitations as follows:

1. Death of person entitled to bring a personal action. -- If a person entitled to bring a personal action dies with no such action pending before the expiration of the limitation period for commencement thereof, then an action
may be commenced by the decedent's personal representative before the expiration of the limitation period including the limitation period as provided by subdivision E 3 or within one year after his qualification as personal representative, whichever occurs later.

2. Death of person against whom personal action may be brought. --
   a. If a person against whom a personal action may be brought dies before the commencement of such action and before the expiration of the limitation period for commencement thereof then a claim may be filed against the decedent's estate or an action may be commenced against the decedent's personal representative before the expiration of the applicable limitation period or within one year after the qualification of such personal representative, whichever occurs later.
   b. If a person against whom a personal action may be brought dies before suit papers naming such person as defendant have been filed with the court, then such suit papers may be amended to substitute the decedent's personal representative as party defendant before the expiration of the applicable limitation period or within one year after the date such suit papers were filed with the court, whichever occurs later, and such suit papers shall be taken as properly filed.

3. Effect of death on actions for recovery of realty, or a proceeding for enforcement of certain liens relating to realty. -- Upon the death of any person in whose favor or against whom an action for recovery of realty, or a proceeding for enforcement of certain liens relating to realty, may be brought, such right of action shall accrue to or against his successors in interest as provided in Article 2 (§ 8.01-236 et seq.) of this chapter.

4. Accrual of a personal cause of action against the estate of any person subsequent to such person's death. -- If a personal cause of action against a decedent accrues subsequent to his death, an action may be brought against the decedent's personal representative or a claim thereon may be filed against the estate of such decedent before the expiration of the applicable limitation period or within two years after the qualification of the decedent's personal representative, whichever occurs later.

5. Accrual of a personal cause of action in favor of decedent. -- If a person dies before a personal cause of action which survives would have accrued to him, if he had continued to live, then an action may be commenced by such decedent's personal representative before the expiration of the applicable limitation period or within one year after the qualification of such personal representative, whichever occurs later.

6. Delayed qualification of personal representative. -- If there is an interval of more than two years between the death of any person in whose favor or against whom a cause of action has accrued or shall subsequently accrue and the qualification of such person's personal representative, such personal representative shall, for the purposes of this chapter, be deemed to have qualified on the last day of such period of two years.

C. Suspension during injunctions. --When the commencement of any action is stayed by injunction, the time of the continuance of the injunction shall not be computed as any part of the period within which the action must be brought.
D. Obstruction of filing by defendant. --When the filing of an action is obstructed by a defendant's (i) filing a petition in bankruptcy or filing a petition for an extension or arrangement under the United States Bankruptcy Act or (ii) using any other direct or indirect means to obstruct the filing of an action, then the time that such obstruction has continued shall not be counted as any part of the period within which the action must be brought.

E. Dismissal, abatement, or nonsuit.

1. Except as provided in subdivision 3 of this subsection, if any action is commenced within the prescribed limitation period and for any cause abates or is dismissed without determining the merits, the time such action is pending shall not be computed as part of the period within which such action may be brought, and another action may be brought within the remaining period.

2. If a judgment or decree is rendered for the plaintiff in any action commenced within the prescribed limitation period and such judgment or decree is arrested or reversed upon a ground which does not preclude a new action for the same cause, or if there is occasion to bring a new action by reason of the loss or destruction of any of the papers or records in a former action which was commenced within the prescribed limitation period, then a new action may be brought within one year after such arrest or reversal or such loss or destruction, but not after.

3. If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1, whichever period is longer. This tolling provision shall apply irrespective of whether the action is originally filed in a federal or a state court and recommenced in any other court, and shall apply to all actions irrespective of whether they arise under common law or statute.

F. Effect of devise for payment of debts. --No provision in the will of any testator devising his real estate, or any part thereof, subject to the payment of his debts or charging the same therewith, or containing any other provision for the payment of debts, shall prevent this chapter from operating against such debts, unless it plainly appears to be the testator's intent that it shall not so operate.

G. Effect of new promise in writing.

1. If any person against whom a right of action has accrued on any contract, other than a judgment or recognizance, promises, by writing signed by him or his agent, payment of money on such contract, the person to whom the right has accrued may maintain an action for the money so promised, within such number of years after such promise as it might be maintained if such promise were the original cause of action. An acknowledgment in writing, from which a promise of payment may be implied, shall be deemed to be such promise within the meaning of this subsection.

2. The plaintiff may sue on the new promise described in subdivision 1 of this subsection or on the original cause of action, except that when the new promise is of such a nature as to merge the original cause of action then the action shall be only on the new promise.
H. Suspension of limitations in creditors' suits. --When an action is commenced as a general creditors' action, or as a general lien creditors' action, or as an action to enforce a mechanics' lien, the running of the statute of limitations shall be suspended as to debts provable in such action from the commencement of the action, provided they are brought in before the commissioner in chancery under the first reference for an account of debts; but as to claims not so brought in the statute shall continue to run, without interruption by reason either of the commencement of the action or of the order for an account, until a later order for an account, under which they do come in, or they are asserted by petition or independent action.

In actions not instituted originally either as general creditors' actions, or as general lien creditors' actions, but which become such by subsequent proceedings, the statute of limitations shall be suspended by an order of reference for an account of debts or of liens only as to those creditors who come in and prove their claims under the order. As to creditors who come in afterwards by petition or under an order of recommittal, or a later order of reference for an account, the statute shall continue to run without interruption by reason of previous orders until filing of the petition, or until the date of the reference under which they prove their claims, as the case may be.

I. When an action is commenced within a period of thirty days prior to the expiration of the limitation period for commencement thereof and the defending party or parties desire to institute an action as third-party plaintiff against one or more persons not party to the original action, the running of the period of limitation against such action shall be suspended as to such new party for a period of sixty days from the expiration of the applicable limitation period.

J. If any award of compensation by the Workers' Compensation Commission pursuant to Chapter 5 (§ 65.2-500 et seq.) of Title 65.2 is subsequently found void ab initio, other than an award voided for fraudulent procurement of the award by the claimant, the statute of limitations applicable to any civil action upon the same claim or cause of action in a court of this Commonwealth shall be tolled for that period of time during which compensation payments were made.

K. Suspension of limitations during criminal proceedings. In any personal action for damages, if a criminal prosecution arising out of the same facts is commenced, the time such prosecution is pending shall not be computed as part of the period within which such a civil action may be brought. For purposes of this subsection, the time during which a prosecution is pending shall be calculated from the date of the issuance of a warrant, summons or capias, the return or filing of an indictment or information, or the defendant's first appearance in any court as an accused in such a prosecution, whichever date occurs first, until the date of the final judgment or order in the trial court, the date of the final disposition of any direct appeal in state court, or the date on which the time for noting an appeal has expired, whichever date occurs last. Thereafter, the civil action may be brought within the remaining period of the statute or within one year, whichever is longer.

If a criminal prosecution is commenced and a grand jury indictment is returned or a grand jury indictment is waived after the period within which a
civil action arising out of the same set of facts may be brought, a civil action
may be brought within one year of the date of the final judgment or order in
the trial court, the date of the final disposition of any direct appeal in state
court, or the date on which the time for noting an appeal has expired,
whichever date occurs last, but no more than ten years after the date of the
crime or two years after the cause of action shall have accrued under § 8.01-
249, whichever date occurs last.

§ 8.01-243. Personal action for injury to person or property generally;
extension in actions for malpractice against health care provider.

A. 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.

B. Every action for injury to property, including actions by a parent or
guardian of an infant against a tort-feasor for expenses of curing or attempting
to cure such infant from the result of a personal injury or loss of services of
such infant, shall be brought within five years after the cause of action accrues.

C. The two-year limitations period specified in subsection A shall be
extended in actions for malpractice against a health care provider as follows:

1. In cases arising out of a foreign object having no therapeutic or
diagnostic effect being left in a patient's body, for a period of one year from
the date the object is discovered or reasonably should have been discovered; and

2. In cases in which fraud, concealment or intentional
misrepresentation prevented discovery of the injury within the two-year
period, for one year from the date the injury is discovered or, by the exercise of
due diligence, reasonably should have been discovered.

3. In a claim for the negligent failure to diagnose a malignant tumor or
cancer, for a period of one year from the date the diagnosis of a malignant
tumor or cancer is communicated to the patient by a health care provider,
provided the health care provider's underlying act or omission was on or after
July 1, 2008. Claims under this section for the negligent failure to diagnose a
malignant tumor or cancer, where the health care provider's underlying act or
omission occurred prior to July 1, 2008, shall be governed by the statute of
limitations that existed prior to July 1, 2008.

However, the provisions of this subsection shall not apply to extend
the limitations period beyond ten years from the date the cause of action
accrues, except that the provisions of § 8.01-229 A 2 shall apply to toll the
statute of limitations in actions brought by or on behalf of a person under a
disability.
§ 8.01-243.1. Actions for medical malpractice; minors.

Notwithstanding the provisions of § 8.01-229 A and except as provided in subsection C of § 8.01-243, any cause of action accruing on or after July 1, 1987, on behalf of a person who was a minor at the time the cause of action accrued for personal injury or death against a health care provider pursuant to Chapter 21.1 (§ 8.01-581.1 et seq.) shall be commenced within two years of the date of the last act or omission giving rise to the cause of action except that if the minor was less than eight years of age at the time of the occurrence of the malpractice, he shall have until his tenth birthday to commence an action. Any minor who is ten years of age or older on or before July 1, 1987, shall have no less than two years from that date within which to commence such an action.
NO, YOU CANNOT ALL GO HOME AND DELIBERATE IN A CHATROOM...
Multistate Filings and the Tolling Principle

In *Parker v. McClanahan*, 1995 U.S. Dist. LEXIS 12053 (W.D. Va. July 5, 1995) the federal trial court judge interpreted the tolling provisions of Code §8.01-229 – which stop the running of the limitations clock while an action is pending on a claim – to be applicable where the action is pending in another state, on the same claim as is eventually brought in Virginia.

Fraudulent Concealment of Claims for Tolling Purposes

The common law doctrine of fraudulent concealment or estoppel to plead the statute of limitations is noted earlier in this chapter. In addition, Code §8.01-229 contains a provision stopping ("tolling") the running of the period where the putative defendant uses "direct or indirect means [used] to obstruct the filing of [this] action."

**NEWMAN v. WALKER**

270 Va. 291, 618 S.E.2d 336 (2005)

JUSTICE KINSEY delivered the opinion of the Court:

Pursuant to Code § 8.01-229(D), a statute of limitations is tolled when a defendant uses any direct or indirect means to obstruct the filing of an action. In this case, we conclude that a defendant's affirmative misrepresentation about his identity at the scene of an automobile accident invokes this statute and tolls the running of the statute of limitations for the ensuing personal injury action if the defendant designed or intended his misrepresentation to obstruct the filing of the action. Thus, we will reverse the judgment of the circuit court sustaining a plea of the statute of limitations.

RELEVANT FACTS AND PROCEEDINGS

Sharon M. Newman allegedly sustained personal injuries on June 17, 2000 when a truck owned by Hastings Village, Inc. struck the motor vehicle she was operating. At the scene of the accident, the driver of the Hastings Village truck identified himself to a police officer as Kareem A. Brooks. Relying on that information, Newman filed a motion for judgment on June 11, 2002 against Brooks and Hastings Village. Both defendants filed grounds of defense, admitting that there was an incident involving the specified vehicles but denying that Brooks was the driver of the Hastings Village truck.

About a month after the accident, the liability insurance carrier for Hastings Village contacted Hastings Village about the accident and reported that Brooks was driving the company's vehicle. Hastings Village advised the insurance carrier that it did not employ anyone by the name of Kareem A. Brooks. Hastings Village then confronted one of its employees named William Walker, Jr., and Walker admitted that he had been driving the Hastings Village truck at the time of the accident.
In September 2003, soon after Newman had answered interrogatories and asked to depose Brooks, she learned for the first time that Brooks was not the driver of the Hastings Village truck. On October 1, 2003, the attorney for the defendants advised Newman's attorney that an investigator had found out that Walker had stolen Brooks' identification, had taken the Hastings Village truck without permission, and was driving it at the time of the accident.

With this new information, Newman moved to file an amended motion for judgment naming William Walker, Jr., as a defendant and as the driver of the Hastings Village truck. Brooks and Hastings Village admitted in their grounds of defense to the amended motion for judgment that Walker had identified himself as Brooks at the scene of the accident. After attempting unsuccessfully to serve process on Walker, Newman discovered that Walker's name was actually Leonard Walker, Jr. On February 26, 2004, the circuit court permitted Newman to change the name of the defendant-driver from William Walker, Jr., to Leonard Walker, Jr.

Nationwide Mutual Insurance Company, Newman's uninsured motorist carrier, then moved to dismiss the action pursuant to the applicable two-year statute of limitations. See Code § 8.01-243(A). Nationwide asserted that Walker was not named as a defendant in the action until January 12, 2004, more than two years after the date of the accident. Newman responded that, pursuant to the provisions of Code § 8.01-229(D), the statute of limitations was tolled during the period when Walker "falsely and fraudulently identified himself to both the plaintiff and the . . . police officer as Kareem Brooks." Walker's use of false identification in violation of Code § 18.2-204.1(B), according to Newman, obstructed her ability to file this action against the proper defendant.

Relying on Grimes v. Suzukawa, 262 Va. 330, 551 S.E.2d 644 (2001), the circuit court, in a letter opinion, concluded that Newman "failed [to] present any evidence to establish that Mr. Walker's conduct constituted a direct or indirect means to obstruct the filing of [Newman's] tort action[] within the meaning of Code § 8.01-229(D)." Thus, the circuit court granted Nationwide's motion to dismiss. Newman appealed to this Court.

ANALYSIS

The sole issue on appeal is whether Walker's misrepresentation by using stolen identification at the scene of the accident was a "direct or indirect means [used] to obstruct the filing of [this] action," thereby tolling the statute of limitations. Code § 8.01-229(D). The provisions of Code § 8.01-229(D) state that "when the filing of an action is obstructed by a defendant's . . . using any other direct or indirect means to obstruct the filing of an action, then the time that such obstruction has continued shall not be counted as any part of the period within which the action must be brought."

Newman argues that she should receive the benefit of the tolling provision in Code § 8.01-229(D) because she was the victim of Walker's fraudulent misrepresentations about his identity upon which she relied in filing this action. Citing Hawks v. Dehart, 206 Va. 810, 146 S.E.2d 187 (1966), Newman contends that Walker's concealment of relevant facts was the sort of fraud involving moral turpitude sufficient to toll the running of the statute of limitations. Finally, Newman distinguishes this Court's decision in Grimes by arguing, among other things, that Walker's giving false
information to the police officer at the scene of the accident, unlike the defendant's wearing a mask in Grimes, was an affirmative misrepresentation about his identity.

In response, Walker contends that our decision in Grimes is controlling. Citing Hawks and Culpeper National Bank v. Tidewater Improvement Co., Inc., 119 Va. 73, 89 S.E. 118 (1916), Walker argues that, under provisions of Code § 8.01-229(D), a statute of limitations is tolled when a defendant conceals the existence of a cause of action. According to Walker, Newman knew at the time of the accident that she had a cause of action just as the plaintiff in Grimes did when the defendant sexually assaulted her. Like the defendant in Grimes, Walker contends that, although he concealed his identity, he did not do so in order to obstruct Newman's filing of this action. Thus, in Walker's view, the statute of limitations was not tolled.

We do not agree with Walker's argument implying that a statute of limitations is tolled under Code § 8.01-229(D) only when a defendant acts to conceal the existence of a cause of action. See Baker v. Zirkle, 226 Va. 7, 12, 307 S.E.2d 234, 236 (1983) (suggesting that the provisions of Code § 8.01-229(D) apply when a defendant prevents service of process). In Culpeper National Bank, one of the cases cited by Walker, the plaintiff brought an action of assumpsit against a bank and its president to recover the proceeds of a note that had been delivered to the bank to be discounted by it. 119 Va. at 74, 89 S.E. at 118. The bank pled two statutes of limitations. Id. at 75, 89 S.E. at 119. The issue with regard to the plea was whether the bank, "by any indirect way or means, obstructed the prosecution of [the] suit" by participating in some fraudulent act "which kept the plaintiff in ignorance of its rights." 19 Id. at 82-83, 89 S.E. at 121. Quoting Foster v. Rison, 58 Va. (17 Gratt.) 321, 345 (1867), we stated that ignorance of the existence of a debt was not sufficient to toll a statute of limitations unless that ignorance came about from the fraud of the defendant. Culpeper Nat'l Bank, 119 Va. at 83, 89 S.E. at 121; accord Jones v. United States Fidelity & Guaranty Co., 165 Va. 349, 360-61, 182 S.E. 560, 564-65 (1935). In that context, we then explained the kind of concealment that would toll the statute of limitations:

"Mere silence by the person liable is not concealment, but there must be some affirmative act or representation designed to prevent, and which does prevent, the discovery of the cause of action. Concealment of a cause of action preventing the running of limitations must consist of some trick or artifice preventing inquiry, or calculated to hinder a discovery of the cause of action by the use of ordinary diligence, and mere silence is insufficient. There must be something actually said or done which is directly intended to prevent discovery. Mere silence or concealment by a debtor may not, without affirmative misrepresentation, toll the running of the statute. Where, however, a debtor by actual fraud keeps his creditor in ignorance of the cause of action, the statute does not begin to run until the creditor had knowledge, or was put upon inquiry with means of knowledge that such cause of action had accrued.

19 The relevant portion of the tolling provision in effect at that time, Code § 2933 (1904), which is a predecessor to Code § 8.01-229(D), stated that "where any such right . . . shall accrue against a person who . . . by any other indirect way or means shall obstruct the prosecution of such right the time that such obstruction may have continued shall not be computed as any part of the time in which the said right might or ought to have been prosecuted."
Fraudulent concealment must consist of affirmative acts of misrepresentation, mere silence being insufficient. The fraud which will relieve the bar of the statute must be of that character which involves moral turpitude, and must have the effect of debarring or deterring the plaintiff from his action."

*Culpeper Nat'l Bank,* 119 Va. at 83-84, 89 S.E. at 121 (quoting 2 H.G. Wood, Wood on Limitations 1422 (4th ed. 1916)).

Subsequent to *Culpeper National Bank,* we decided several more cases involving the question whether a statute of limitations had been tolled because a defendant had concealed a cause of action. For example, in *Hawks,* the other case cited by Walker, the plaintiff filed an action against a doctor for damages allegedly caused by the doctor's negligence in leaving a surgical needle in the plaintiff's neck during an operation. 206 Va. at 811, 146 S.E.2d at 187. The plaintiff alleged that the doctor had "knowingly, actively and negligently concealed from the plaintiff the fact of the presence of such needle in her neck." Id. at 814, 146 S.E.2d at 190. Again explaining the character of fraud necessary to toll the statute of limitations, we stated that it must involve moral turpitude and the "defendant must intend to conceal the discovery of the cause of action by trick or artifice." Id. (quoting *Richmond Redevelopment & Hous. Auth. v. Laburnum Constr. Corp.,* 195 Va. 827, 840, 80 S.E.2d 574, 582 (1954)). We concluded that the plaintiff had not established "such trick or artifice or purpose" by the doctor. Id.; accord *Horn v. Abernathy,* 231 Va. 228, 234, 343 S.E.2d 318, 321 (1986); *Morriss v. White,* 146 Va. 553, 570-71, 131 S.E. 835, 840 (1926); see also *Mid-Atlantic Bus. Communications, Inc. v. Virginia Dep't of Motor Vehicles,* 269 Va. 51, 58, 606 S.E.2d 835, 839 (2005) (defendant's continuing to consider plaintiff's claim and failing to respond to certain letters was not "an affirmative act . . . designed to thwart" the plaintiff's ability to file a lawsuit within the six-month limitations period).

In all these cases, the focus was whether the defendant had used any direct or indirect means to conceal the cause of action, thereby tolling the statute of limitations. We had no occasion to address Code § 8.01-229(D) or its ancestor statutes in regard to what other direct or indirect means would obstruct the filing of an action and thus toll a statute of limitations.

However, we did so in *Grimes.* There, the issue was not whether the defendant had concealed the cause of action but whether, by wearing a mask when he committed the crimes, he had obstructed the plaintiff's filing an action against him. 262 Va. at 332, 551 S.E.2d at 646. We concluded that the defendant had not done so because the "use of the mask was intended to conceal his identity and not to obstruct [the plaintiff's] filing of an action." Id. Thus, the applicable statute of limitations was not tolled under the provisions of Code § 8.01-229(D). Id. In reaching this decision, we stated that "][a] plaintiff who seeks to rely upon the tolling provision in Code § 8.01-229(D) must establish that the defendant undertook an affirmative act designed or intended, directly or indirectly, to obstruct the plaintiff's right to file her action." Id.

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20 When we decided Hawks, the relevant tolling provision was set forth in Code § 8-33 (1957), a predecessor to Code § 8.01-229(D). In pertinent part, that former section tolled a statute of limitations when a defendant used "any other indirect way or means [to] obstruct the prosecution" of an action.
While it is true that Walker's use of stolen identification at the scene of the accident concealed his identity as the wearing of a mask did in Grimes, there is nevertheless an important distinction between the two cases. When Walker gave the police officer stolen identification, he affirmatively misrepresented his identity. The defendant in Grimes never misrepresented anything about his identity; he merely concealed it with the mask. In other words, Walker "undertook an affirmative act." Id.

Although our earlier cases dealt with concealment of the existence of a cause of action, the principles enunciated there are applicable in this case. Fraudulent concealment, whether of a cause of action or of a defendant's true identity, "must consist of affirmative acts of misrepresentation. . . . The fraud which will relieve the bar of the statute must be of that character which involves moral turpitude, and must have the effect of debarring or deterring the plaintiff from his action." Culpeper Nat'l Bank, 119 Va. at 83, 89 S.E. at 121 (quoting Wood, supra, 101 U.S. 135).

Walker's actions at the scene of the accident involved this type of fraud. Thus, we conclude that the circuit court erred in holding that Walker's conduct did not constitute a direct or indirect means to obstruct Newman's filing of this action. However, before a final resolution can be made as to whether the applicable statute of limitations barred Newman's action against Walker, the circuit court must make two factual determinations that were not previously necessary to its judgment sustaining the plea of the statute of limitations: (1) whether Walker's use of stolen identification was "designed or intended, directly or indirectly, to obstruct" Newman's filing of this action, Grimes, 262 Va. at 332, 551 S.E.2d at 646; and (2) if so, the period of time such obstruction continued, see Code § 8.01-229(D).

CONCLUSION

For these reasons, we will reverse the judgment of the circuit court and remand this case for further proceedings.
Note: Tolling and the Commonwealth

See generally *Mid-Atlantic Business Communications, Inc. v. Virginia Department of Motor Vehicles*, 269 Va. 51, 606 S.E.2d 835 (2005) (While the trial court refused to apply the tolling provisions of Code § 8.01-229(D) because it concluded that tolling provisions could not run against the Commonwealth, the Supreme Court found that no existing case law evidences that a plaintiff was denied the ability to assert the tolling provisions of Code § 8.01-229 solely because the defendant involved was the Commonwealth or one of its agencies. However, to secure the tolling authorized by this statute, the plaintiff had to establish that the particular governmental department undertook an affirmative act designed or intended, directly or indirectly, to obstruct its right to file its action. Constructive fraud will not toll the running of the statute of limitations. A defendant must intend to conceal the discovery of the cause of action by trick or artifice and must have thus actually concealed it from the plaintiff in order for the exception to apply).
P. Equitable Claims and Aspects

The Doctrine of Laches

ROWE v. BIG SANDY COAL CORPORATION
197 Va. 136, 87 S.E.2d 763 (1955)

JUSTICE EGGLESTON delivered the opinion of the court.

In February, 1952, Ethel Rowe and others, hereinafter referred to as the appellants, filed a suit in equity in the court below against Big Sandy Coal Corporation and others, praying for the vacation and annulment of a decree entered in the same court on November 21, 1919, in the equity suit of Grundy Coal Corporation, et al. v. George W. Blair, et al., by which it was decreed that Grundy Coal Corporation, George Belcher, W. L. Dennis, Miles Charles and Green Charles were "seized of the true and perfect title to all the coal, oil and gas" rights on two tracts of land on Home Creek in Buchanan county, Virginia, the one containing 72 acres and the other 134.72 acres. After demurrers had been filed two amended and supplemental bills were filed. From a decree sustaining the demurrers to and dismissing the original and amended and supplemental bills the present appeal was allowed.

[In essence the complaint in the 1952 proceeding charged that the 1919 decree was erroneous, that errors were made collecting evidence, that there were other procedural errors, and that there was fraud upon the court at that time through false testimony about partition of the land in question.]

[W]e agree with the trial court that the appellants and those under whom they claim have been guilty of gross laches in delaying the assertion of their claims. The court had jurisdiction of the subject matter and the parties to the 1919 suit. Thirty-three years elapsed between the entry of the decree and the institution of the present suit attacking its validity. The bill shows on its face that Nancy Rowe, W. L. Dennis, George Belcher, J. H. Stinson, Green Charles, and others who would have known about the transactions both prior and subsequent to the institution of the 1919 suit, are dead. George W. McClanahan, who testified relative to the oral partition of the land of William McClanahan and as to other material facts in the case, stated that he was then fifty-nine years old. He is now presumably dead. Indeed, the brief of the appellees state that to be a fact and it is not challenged. Thus, much of the material evidence as to the surrounding facts and circumstances has been lost. In the meanwhile the record in the 1919 suit was on file in the clerk's office and open to inspection by appellants or their counsel. The bill in the present suit alleges no reason or excuse for the long delay of the appellants and those under whom they claim in asserting their rights.
It is elementary that unreasonable delay in the assertion of rights without excuse and coupled with the death of material witnesses and the loss of material evidence which works to the disadvantage of adverse parties will warrant the denial of equitable relief. 2 Pomeroy's Equity Jurisprudence, 5th Ed., § 419, etc., p. 171, etc; 7 Mich. Jur., Equity, § 26, etc., p. 47, etc; O'Neill v. Cole, supra, and authorities there collected.


For these reasons we are of opinion that the trial court committed no error in sustaining the demurrers to the amended and supplemental bill.

MURPHY v. HOLLAND

CHIEF JUSTICE CARRICO delivered the opinion of the Court.

In the court below, Raleigh Paris Holland, Jr. (Paris), filed a bill of complaint seeking to have himself declared "the legitimate and sole heir" of Raleigh Paris Holland (Holland), who died intestate owning a 77.25-acre tract of land in Henry County. Mae Holland Murphy (Murphy), Holland's sister, was named defendant, and she filed an answer in which she claimed ownership of the land. Murphy also filed a plea of laches.

After an ore tenus hearing, the trial court overruled Murphy's plea of laches and held that Paris was Holland's legitimate son, entitled to inherit his father's entire estate. We granted Murphy an appeal.

Then single and living with his parents, Holland purchased the 77.25-acre tract, consisting of unimproved farm land, in 1955. On August 29, 1961, Paris was born of a union between Holland and Geneva Craddock (Geneva). Holland signed Paris's birth certificate as "Father" and thereafter treated the child as his own. Another child, Kennon, was born of the union between Holland and Geneva.

Holland and Geneva never went through a marriage ceremony. They were living together as husband and wife, however, at the time of Paris's birth and continued to hold themselves out as a married couple until Holland's death on September 28, 1968, when Paris was seven years old. Geneva was known by and used her husband's surname, and the two were considered a married couple by family members and others.

Following Holland's death intestate, his mother, Effie Holland, qualified as his administratrix and listed herself and Holland's father as Holland's only heirs. Holland's parents claimed the land by intestate succession from Holland. After the father's death in 1969 and the mother's in 1977, Holland's sister, the appellant, claimed the property by descent from her parents.
Meanwhile, on January 16, 1969, when Paris was seven years five months old, Geneva, as mother and next friend, filed a bill in chancery on behalf of Paris and his younger brother, Kennon, against Effie Holland, individually and as administratrix of Holland's estate. Holland's father was also named a party defendant. The bill prayed that the two brothers be declared Holland's "legitimate heirs." The matter reached the point where demurrers had been overruled and an answer filed, but the suit was dismissed on December 20, 1972, because "no action [had] been taken . . . since April 14, 1969."

By deed dated May 10, 1983, Kennon Holland quitclaimed to Paris all his right, title, and interest in and to the 77.25-acre tract. Then, on August 29, 1983, Paris filed a memorandum of lis pendens, purportedly giving notice of a "pending" suit affecting Murphy's interest in the 77.25-acre tract. No suit was pending, however, at that time.

The present suit was filed December 21, 1984. Paris testified below he did not discover until mid-1983, when he was twenty-one years old, that his father had owned the 77.25-acre tract and that his mother and father had never been formally married.

We first consider whether the trial court erred in overruling Murphy's plea of laches. Concerning such a plea, we said in *Morris v. Mosby*, 227 Va. 517, 317 S.E.2d 493 (1984):

> When a trial court considers the defense of laches, it does not apply an absolute rule such as a statute of limitations, but instead, the court examines each case in light of the particular circumstances. Therefore, whether under the circumstances of a given case a claim is barred by laches is primarily a decision resting within the discretion of the trial court. Absent an abuse of discretion, its decision will not be disturbed on appeal.

Id. at 521, 317 S.E.2d at 496 (citations omitted). And in *Hamilton v. Newbold*, 154 Va. 345, 153 S.E. 681 (1930), we said:

> [L]aches or delay, in order to be effectual as a bar to the party [against whose claim the defense of laches is asserted], must be accompanied with circumstances and facts showing an intention on his part to abandon the [claim]. [The delay] must be unreasonable and injurious to the other party.

Id. at 351, 153 S.E. at 682.

It is difficult to discern from Murphy's brief what event she thinks started the time running on Paris's claim. At one point, Murphy seems to contend that the time began to run from the date in 1969 when Paris's mother filed suit on his behalf to have him legitimized. Murphy says that the fifteen years between 1969 and 1984, when the present suit was brought, is a "long . . . time to put off filing a claim."

At another point, Murphy appears to take the position that the time began to run when Paris reached his eighteenth birthday in 1979 and that he should have filed suit immediately thereafter. Murphy says that because Geneva, as Paris's next friend in the 1969 suit, knew of Murphy's claim to the 77.25-acre tract, Paris "certainly was responsible for obtaining this information by the time he became 18 years of age."
Under these circumstances, Murphy maintains, the five-and-one-half-year delay in filing suit after Paris became eighteen "is inexcusable."

At yet another point, Murphy argues that, at the latest, Paris became aware of his rights in May 1983, when he secured the quit-claim deed from Kennon. Even then, Murphy says, "laches would apply," for to withhold filing suit from May 1983 until December 1984, another year and eight months, "showed a lack of diligence" on Paris's part.

Murphy argues that these periods of delay, amounting to fifteen years, five and one-half years, and one year eight months, respectively, prejudiced her defense. By the time the present suit was filed, Murphy says, her parents had died, and they "knew more about the actions of their son, Raleigh Paris Holland, [Sr.,] than anyone else."

We reject as without merit Murphy's contention that laches began to run against Paris's claim from the time the suit was filed in 1969, when he was only seven years old. At the earliest, time began to run against the claim when Paris became eighteen and, even then, he had a reasonable time within which to bring the claim. What is reasonable depends upon the circumstances of each case, and one of the circumstances to be considered is the injury or prejudice the delay in bringing suit causes the opposing party. Hamilton, 154 Va. at 351, 153 S.E. at 682.

As noted previously, Murphy points to the death of her parents and the resulting loss of their testimony as the prejudice she suffered from Paris's delay in bringing suit. But Murphy's parents had already died, the father in 1969 and the mother in 1977, before Paris ever reached his eighteenth birthday or discovered his father's ownership of the 77.25-acre tract. Accordingly, Paris cannot be charged with this loss of testimony.

Furthermore, the trial court specifically found that "[n]o evidence was lost or subject to conjecture by the death of anyone, lapse of time or otherwise" and that "there was ample and clear testimony by witnesses who personally knew all the parties involved and the facts of this case." The trial judge concluded that since "the evidence available and . . . presented does in fact allow the Court to make a full and fair ascertainment of the facts," the "doctrine of laches does not apply." See Shirley v. Van Every, 159 Va. 762, 775, 167 S.E. 345, 349-50 (1933).

We find from this record no evidence that Paris intended "to abandon the [claim]" or that the delay involved was "unreasonable and injurious to the other party." Hamilton, 154 Va. at 351, 153 S.E. at 682. Accordingly, we hold that the trial court did not abuse its discretion in overruling Murphy's plea of laches. . . .
Claims with Legal Analogues.

Please consider whether the following decision has any role to play in the post-January 1, 2006 legal world in Virginia, where there is only one “side” of court. Could one file a contract case with no jury trial demand and make any argument for laches available?

BELCHER v. KIRKWOOD

JUSTICE WHITING delivered the opinion of the Court.

In this case, we decide whether the three-year statute of limitations for oral contracts bars certain claims for the recovery of monies on a theory of unjust enrichment.

In 1978, Irvin Wade Belcher, who was married to another, moved into Virginia L. Kirkwood's home and became her lover. At various times while they were living together, Kirkwood transferred money to Belcher. The sums involved in this appeal are in the amounts and were transferred on the dates which follow:

$ 1,000.00 - September 27, 1982;
$ 1,200.00 - October 19, 1982;
$ 7,000.00 December 2, 1982;
$ 2,497.34 - October 26, 1983; and
$ 1,646.97 - June 7, 1984.

On October 26, 1983, Belcher signed a demand note bearing that date evidencing his agreement to repay $14,429.14 for other transfers made by Kirkwood.

Belcher left Kirkwood's home in the fall of 1986. Thereafter, on November 26, 1986, Kirkwood filed an action at law against Belcher seeking to recover the monies she had transferred to him. Kirkwood's motion for judgment alleged that Belcher, "by playing on the emotions of the Plaintiff and making promises of marriage, urged, coerced and frauded [sic] the Plaintiff into making loans of substantial sums of money to him." Belcher filed a number of responsive pleadings, including a plea of the statute of limitations. Later, on Kirkwood's motion, without objection by Belcher, the court transferred the case from its law side to its equity side pursuant to Code § 8.01-270. None of the pleadings was amended after the transfer.

Following an ore tenus hearing on December 23, 1987, the circuit court found that:
(1) laches barred Kirkwood's recovery of other funds she transferred to Belcher in 1980 and 1981; (2) Kirkwood had not proved that Belcher obtained money from her by fraud; but (3) that Kirkwood should recover the amounts listed earlier because Belcher was unjustly enriched by his retention of those funds. We granted Belcher this appeal.

Kirkwood disavows any intent to recover based on Belcher's promises of marriage, and our review of the record indicates no evidence of coercion of Kirkwood by Belcher.

21
We find no merit in Belcher's first contention that public policy precluded enforcement of Kirkwood's claims because the monies were paid in return for his agreement to cohabit illicitly with Kirkwood. Neither party testified to such an agreement, and our review of the record discloses insufficient evidence to give rise to such an inference.

If his first contention has no merit, Belcher concedes that Kirkwood is entitled to recover the amounts due on the October 26, 1983 note of $14,429.14 and the loan of $1,646.97 made on June 7, 1984. Belcher contends, however, that the statute of limitations bars the enforcement of the balance of Kirkwood's claims.

On the other hand, Kirkwood asserts that her claims are not legal ones subject to the statute of limitations, but solely equitable claims based on the doctrine of unjust enrichment, subject instead to the defense of laches. She contends, moreover, that the trial court correctly held that laches did not apply to her 1982 and 1983 transfers, even though they were made more than three years before this action was commenced. For the reasons which follow, we find no merit in Kirkwood's argument.

Although this case is now a suit in equity, Kirkwood's claims are cognizable at law, even if based on the theory of unjust enrichment. In a case in which we permitted a recovery at law for money paid under a mistake of fact, we quoted Lord Mansfield's decision in the law action of Moses v. Macferlan, 2 Burrow 1005, 1012 (1760):

This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex aequo et bono, the defendant ought to refund. . . . [I]t lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied); or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.


"It is a well-established principle uniformly acted upon by courts of equity, that in respect to the statute of limitations equity follows the law; and if a legal demand be asserted in equity which at law is barred by statute, it is equally barred in equity." Sanford v. Sims, 192 Va. 644, 649, 66 S.E.2d 495, 498 (1951) (emphasis added); see also, Marriott v. Harris, 235 Va. 199, 212-13, 368 S.E.2d 225, 231 (1988). Therefore, the statute of limitations applicable to oral contracts bound the trial court in its ruling on the defense of laches.

Where there is no agreed repayment date of an alleged obligation to repay money, as in this case, it is deemed to be payable on demand. McComb v. McComb, 226 Va. 271, 282, 307 S.E.2d 877, 883 (1983). Thus, Kirkwood's claims for the repayment of any transfers made before November 26, 1983, are barred by the statute of limitations

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22 Robertson omitted the word "and equity" from the Moses quotation.
applicable to oral contracts, because those obligations were incurred more than three
years prior to the time Kirkwood filed this action. Code § 8.01-246(4); see Harbour

For the foregoing reasons, we will affirm the judgment insofar as it awarded a
recovery of $14,429.14 on the note, and $1,646.97 on the transfer of June 7, 1984,
with interest at the judgment rate from December 23, 1987, and costs incurred in the
lower court. We will reverse that part of the judgment allowing a recovery of the
balance of the claims, totaling $11,697.34, and enter final judgment here.

Notes on Equity and Estoppel

Other Relief in Equity. Where plaintiffs sought a form of rescission of a
transaction on the ground of substantial failure of consideration or damages for breach
of contract, this basis for relief was held to be a well recognized ground for rescission of
a contract, and hence the contract period (5 years for a written instrument) was applied to the equitable claim. *Marriott v. Harris*, 235 Va. 199, 368 S.E.2d 225 (1988).

**Estoppel to Sue?** The Supreme Court has applied a rigorous test to the argument, not unlike the defense of laches, that a party is barred by equitable estoppel from maintaining a suit. In *Princess Anne Hills Civic League v. Constant Real Estate Trust*, 243 Va. 53, 413 S.E.2d 599 (1992), the Court held that "The elements necessary to establish equitable estoppel are (1) a representation, (2) reliance, (3) change of position, and (4) detriment, and the party who relies upon estoppel must prove each element by clear, precise, and unequivocal evidence. *Dominick v. Vassar*, 235 Va. 295, 298, 367 S.E.2d 487, 489 (1988). Because the doctrine of estoppel prevents the showing of the truth, it is applied rarely and only from necessity. *Hyson v. Dodge*, 198 Va. 792, 795, 96 S.E.2d 792, 795 (1957); *Baker v. Preston*, 21 Va. (Gilmer) 235, 300 (1821)."
Q. Choice of Law on Limitations

Virginia generally adheres to choice of law notions best described as resembling the First Restatement of Conflict of Laws. For most issues, therefore, there are the specific rules which characterized the First Restatement approach, and the "modern" system of weighing the contacts to locate the state with the "most significant relationship" to the transaction is not followed. As respects the statutes of limitation, this means that the general approach in the Commonwealth is to follow practice used elsewhere early in this century, labeling limitations matters "procedural" rather than "substantive," and hence allowing the Virginia court to apply the forum's limitation period as a housekeeping matter even where the transaction or occurrence being litigated took place elsewhere and the law of another jurisdiction will supply the rules of decision on the merits. This leads to the anomalous possibility that an action may be timely in the sister forum but time-barred in Virginia, or vice-versa. This doctrine is constitutionally permissible. See Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953).

There are two exceptions to the general pattern of routinely applying the in-state limitation period for the cause of action involved. First, the "borrowing statute" quoted below requires (for contract actions only) that the shorter of the two statutes (Virginia's and the other jurisdiction's) be applied, such that if the matter would be barred in either state, it will be treated as time-barred in a litigation here. Second, Virginia recognizes that a statute of limitations may be enacted as an integral part of some newer forms of action (e.g., a securities cause of action unknown at common law, in which the statutory scheme creating the right of action also specifies a limitation provision peculiarly applicable to it). In those cases the Virginia court is expected to treat the limitation period as "special" and hence part of the substance of the cause of action. In those instances, therefore, the court will apply the limitation period of the state whose law governs the cause of action.

§ 8.01-247. When action on contract governed by the law of another state or country barred in Virginia

No action shall be maintained on any contract which is governed by the law of another state or country if the right of action thereon is barred either by the laws of such state or country or of this Commonwealth.
CHIEF JUSTICE CARRICO delivered the opinion of the Court.

This appeal involves a conflict of laws in the context of a wrongful death case. The conflict stems from the death in Florida of Ben A. Jones, Sr., a Virginia resident, who was killed when the plane he was piloting crashed on take-off from Pompano Beach.

The fatal crash occurred on October 12, 1987. On October 5, 1989, almost two years later, Charlotte Jones, administrator of Ben Jones' estate (the plaintiff), filed a motion for judgment in the Circuit Court of Lee County seeking damages for the decedent's death. Named as defendants were R. S. Jones and Associates, Inc. (Jones Inc.), the owner of the plane, and Piedmont Aviation, Inc. (Piedmont), a Roanoke firm that performed maintenance on the plane from time to time.

Jones Inc. objected to venue in Lee County. In addition, both Jones Inc. and Piedmont filed pleas of the statute of limitations.

The case was transferred to the Circuit Court of Washington County. That court held the plaintiff's cause of action was subject to the one-year period specified by Virginia's "catch all" limitations statute for bringing personal actions with respect to which no limitation is otherwise prescribed. Va. Code § 8.01-248. Because the plaintiff had not filed the cause of action within one year of the date of Ben Jones' death, the court sustained the pleas of the statute of limitations and dismissed the plaintiff's motion for judgment.

Jones Inc. and Piedmont (collectively, the defendants) contend that the trial court properly applied the one-year limitation prescribed by Va. Code § 8.01-248. On the other hand, the plaintiff contends that she is entitled to a two-year limitation, determined by applying either Va. Code § 8.01-244 or Fla. Stat. Ann. § 95.11(4)(d), both of which relate to actions for wrongful death.

In McMillan v. McMillan, 219 Va. 1127, 253 S.E.2d 662 (1979), we declined an invitation to adopt the so-called "most significant relationship" test, recommended by Restatement (Second) of Conflicts of Laws §§ 145, 146 (1971), for resolving conflicts of laws arising in multistate tort actions. 219 Va. at 1129, 253 S.E.2d at 663. We said that we would adhere to the lex loci delicti, or place of the wrong, standard that had been "the settled rule in Virginia." Id. at 1128, 253 S.E.2d at 663. According to the settled rule, "the lex loci will govern as to all matters going to the basis of the right of action itself, while the lex fori controls all that is connected merely with the remedy." Maryland v. Coard, 175 Va. 571, 580-81, 9 S.E.2d 454, 458 (1940) (quoting 5 R.C.L. 917 (1914)). In other words, in this case, we apply the substantive law of Florida, the place of the wrong, and the procedural law of Virginia.

The parties agree that this is the proper rule, but they disagree about what is substantive and what is procedural. Specifically, the disagreement is over Florida's statute of limitations concerning wrongful death cases, with the plaintiff contending the statute is substantive and, therefore, applicable to the present case, and the defendants saying it is procedural and, hence, inappropriate here.
Because no right of action for wrongful death existed at common law, statutes that created the right usually contained a "built in" limitation prescribing the time within which the action must be brought. Although the Florida statute that originally created the state's cause of action for wrongful death had a "built in" limitation, the statutory provisions relating to the cause of action and those relating to the limitation have been separated for many years.

Florida's present wrongful death act consists of Fla. Stat. Ann. §§ 768.16 through 768.27. The limitation is found in Fla. Stat. Ann. § 95.11, in this language:

Actions other than for recovery of real property shall be commenced as follows: . . .

(4) Within two years.--

. . . .

(d) An action for wrongful death.

So far as our research discloses, the Supreme Court of Florida has not addressed the precise question whether that state's wrongful death limitation is substantive or procedural. In Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972), the Court stated that "[s]tatutes of limitations traditionally have been considered procedural matters; as such, the limitation of action law of the forum is applicable." Id. at 20. However, this statement was made in the context of a personal injury suffered in a bus crash in Tennessee and a resulting action filed in Florida sounding both in tort and contract. The Florida wrongful death limitation, in issue here, was not implicated in any way. 23

Citing Davis v. Mills, 194 U.S. 451 (1904), Jones Inc. argues that, while it may not be essential that the limitation period is an actual "part of the section . . . which creates the liability," the limitation must refer "to [the liability] section in terms" which make it unmistakable that the limitation "is as much a part of [the section] as if it had been contained [therein]." Jones Inc. points out that the Florida limitation provision "in no way refers to the [wrongful death] section in terms." Jones Inc., joined by Piedmont, also points out that, by contrast, Virginia's wrongful death statute, Code § 8.01-50, specifically cross-references the two-year limitation contained in § 8.01-244 and that, in turn, § 8.01-244 cross-references § 8.01-50.

In a conflict-of-laws context, the United States Supreme Court stated the following in Davis v. Mills:

[T]he fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was

23 Interestingly, a United States district judge has ruled that Florida's wrongful death limitation is "'procedural,' rather than 'substantive.'" See Tennimon v. Bell Helicopter Textron, Inc., 823 F.2d 68, 71 (5th Cir. 1987). The correctness of this ruling was not reached on appeal. Id. at 71 n. 2. Another district judge has held that Florida's wrongful death limitation is substantive. See Tomlin v. Boeing Co., 650 F.2d 1065, 1067 (9th Cir. 1981). The Court of Appeals reversed on other grounds without resolving the substantive-procedural dichotomy, but did observe that "[o]ne could well conclude that the Florida statute is procedural." Id. at 1070.
directed to the newly created liability so specifically as to warrant saying that it qualified the right. 194 U.S. at 454 (emphasis added).

We think the limitation contained in Fla. Stat. Ann. § 95.11(4)(d) is directed so specifically to the right of action provided by the state's wrongful death act as to warrant saying that the limitation qualifies the right. Indeed, if the limitation is not so directed, one is constrained to ask, to what else could it possibly be pointed? The language, "[a]n action for wrongful death . . . shall be commenced . . . [w]ithin two years," is, to borrow from Davis v. Mills, "so specific that it hardly can mean anything else [than a qualification upon the newly created liability]." 194 U.S. at 455. Hence, we find the limitation substantive and applicable to provide the plaintiff a two-year period for the filing of her action.

The presence of such a specific limitation distinguishes the present case from Sherley v. Lotz, 200 Va. 173, 104 S.E.2d 795 (1958), which, the defendants say, is controlling, in their favor. In that case, a passenger, who was injured in an automobile accident in Tennessee on June 5, 1953, died from the injuries on November 15, 1953. A motion for judgment seeking damages for the death was based upon Tennessee statutes which "preserve[d] from abatement or extinguishment the right of action which a person dying from the wrongful act of another would have had against the wrongdoer had death not ensued." Id. at 175, 104 S.E.2d at 797. These statutes contained no specific period of limitation for bringing an action, but, as our opinion notes, "[t]he Tennessee court has consistently held that the general statute of limitations of one year from date of injury applies to all actions for personal injuries in that state." Id.

This Court said that these facts brought the limitation question within the rule recognized in Norman v. Baldwin, 152 Va. 800, 805, 148 S.E. 831, 833 (1929), where we quoted 7 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 4244 (1919), as follows:

"Where the statute imposing the liability and creating the remedy does not itself limit the time within which an action to enforce it must be brought, but leaves the matter to be governed by the general statute of limitations, the laws of the forum will govern in determining whether an action brought in [the forum state] is barred, since general statutes of limitation relate to the remedy and have no extra-territorial force."

(Emphasis added.) Sherley, 200 Va. at 175, 104 S.E.2d at 797. This Court then ruled that the one-year limitation from the date of the accident, contained in Virginia's "catch all" statute, now Code § 8.01-248, rather than the one-year limitation from the date of the death, contained in the wrongful death statute, now § 8.01-50, barred the plaintiff's claim. Id. at 177-78, 104 S.E.2d at 798-99.

While this Court in Sherley did not involve itself in the substantive-procedural dichotomy, or even mention it, there is no doubt the Tennessee limitation was considered procedural rather than substantive. This is made clear from the reference to the Tennessee court's application of its "general statute of limitations," id. at 175, 104 S.E.2d at 797, and from the reference to Norman v. Baldwin and its emphasis on "general statutes of limitation," id.

We think this Court in Sherley correctly considered the Tennessee limitation procedural rather than substantive. The limitation was contained in Tenn. Code Ann.
§ 8595, which provided that actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, and statutory penalties, [shall be brought] within one year after [the] cause of action accrue[s].

In our opinion, the Tennessee statute lacked the specificity that Davis v. Mills propounds as the test for "saying that [a limitation provision] qualified [a newly created] right." 194 U.S. at 454.

For the reasons assigned, we will reverse the judgment of the trial court, reinstate the plaintiff's motion for judgment, and remand the case for further proceedings.

Note: Choice of Law – Accrual of Claims for Limitations Purposes

Note that if the law of another jurisdiction governs the limitations period, the Supreme Court has held that the accrual principles of that law should be applied. See Hansen v. Stanley Martin Companies, 266 Va. 345, 585 S.E.2d 567 (2003) (applying the Maryland "discovery rule" to the accrual of a contract claim governed by the Maryland limitations statute).
R. Limitations -- A Waivable Affirmative Defense

§ 8.01-235 Bar of Expiration of Limitation Period Raised Only as Affirmative Defense in Responsive Pleading.

The objection that an action is not commenced within the limitation period prescribed by law can only be raised as an affirmative defense specifically set forth in a responsive pleading. No statutory limitation period shall have jurisdictional effects and the defense that the statutory period has expired cannot be set up by demurrer. This section shall apply to all limitation periods, without regard to whether or not the statute prescribing such limitation shall create a new right.

JONES v. JONES
457 S.E.2d 365 (1995)

JUSTICE KEENAN delivered the opinion of the Court:

In this appeal, we consider whether, in a suit for commutation of dower brought under former Code § 64.1-36, a decree confirming sale of lands owned by an infant heir is void as to the infant because the trial court did not make an affirmative finding that sale of the property would promote the interests of the infant. . . .

Lashi asserts that Jones's right of action arose on her husband's death, on August 7, 1973, and that Jones's bill to commute dower was time-barred since it was filed over 19 years after that date, on December 17, 1992.

We do not reach the merits of this argument, nor do we consider whether Code § 8.01-236 is relevant to the subject matter of Jones's suit, because Lashi failed to raise the statute of limitations as an affirmative defense in a responsive pleading, as required by Code § 8.01-235. Instead, she first raised this issue after the decree confirming sale was entered. Thus, as argued by both Jones and Bain, Lashi's failure to comply with Code § 8.01-235 precludes further consideration of her argument here.
S. Vested Rights in Expiration of the Period.

In General. The Supreme Court of Virginia has held that the legislature's attempt to resurrect a cause of action involving asbestos several years after it expired under existing law violated the Due Process Clause of the Commonwealth's Constitution. See School Board of the City of Norfolk v. United States Gypsum Co., 234 Va. 32, 360 S.E.2d 325 (1987)(invalidating § 8.01-250.1). A similar result, reached after an exhaustive analysis, was applied in Starnes v. Cayouette, 244 Va. 202, 419 S.E.2d 669 (1992), dealing with the General Assembly's efforts to allow a cause of action for adults who were victims of childhood sexual abuse. That issue has now been resolved by a non-retroactive statute, in light of the unconstitutionality – as Virginia interprets the issue – of laws that would bring back to life a cause of action that is time barred. In Virginia we say that a prospective defendant has a "vested right" with Due Process protections in his or her freedom from exposure to suit, which arises when the applicable statute of limitations expires.

Interplay of Statutes on Vested Rights and New Law: In Harris v. Dimattina, 250 Va. 306, 462 S.E.2d 338 (1995) the Court dealt again with the retroactive effect of changes in limitations provisions. In a complex medical malpractice context the Court noted that certain filing requirements prescribed only the procedural aspects of a remedy, and hence the code sections could be amended or repealed as long as reasonable opportunity and time were provided to preserve substantive or vested rights. Further, since the former statutes were procedural rather than substantive in nature, neither plaintiff acquired any vested right in these statutes at the time their causes of action accrued. Code §1-16 provides that when a claim arises before a new law takes effect, the proceedings thereafter shall conform, so far as practicable, to the law in force at the time of such proceedings. However, an exception set forth in Code § 8.01-1 provides that the applicable law in effect on the day before the effective date of the particular provisions shall apply if in the opinion of the court any particular provision (i) may materially change the substantive rights of a party (as distinguished from the procedural aspects of the remedy) or (ii) may cause the miscarriage of justice. In the case before it, the Court found that for one plaintiff, who had an option to file a pleading to pursue the case, there was no substantive curtailment of the right to pursue the cause of action. As to a second plaintiff, however, who had been required to follow one procedural path by the malpractice statutes applicable when the claim arose, and who did so, but was to be foreclosed by the amended statutes from proceeding in any fashion, a finding under the miscarriage of justice rationale was appropriate. Hence old law was applied to that plaintiff, allowing him to proceed as the former statutes would have permitted.
T. "Derivative" Claims.

T. "Derivative" Claims.

MAHONY v. BECKER
246 Va. 209, 435 S.E.2d 139 (1993)

JUSTICE COMPTON delivered the opinion of the Court.

In this action for damages brought by parents arising from the alleged sexual abuse of their daughter, we consider whether the trial court correctly decided that the action was time-barred.

On June 2, 1992, appellants Robert G. Mahony and Margaret L. Mahony sued appellee Paul G. Becker for compensatory and punitive damages allegedly resulting from certain conduct of the defendant involving the plaintiffs' daughter. Defendant filed a ground of defense denying the material allegations of the motion for judgment. He also filed requests for admission and a motion for summary judgment asserting, inter alia, that the "statutes of limitations regarding Plaintiffs' claims have expired."

After the plaintiffs responded to the requests for admission, the trial court held a hearing and considered the pleadings, the responses, and argument of counsel on the motion for summary judgment. Stating "that Defendant's motion should be granted insofar as the Plaintiffs' claims are barred by the statute of limitations," the court dismissed the action. We awarded plaintiffs an appeal . . .

The motion for judgment, as supplemented by the responses to requests for admission, sets forth the following allegations. The plaintiffs assert that during "the period beginning 1974 and continuing through 1978," defendant "committed multiple acts of assault and battery" upon their daughter, who was born in January 1969. The plaintiffs allege that defendant's conduct included acts of "fondling and physical touching" of the daughter "in a sexual manner."

Continuing, the plaintiffs assert that on May 20, 1991, the daughter "first disclosed to the Plaintiffs the conduct of the Defendant . . . and disclosed that the said conduct had caused her severe, physical, emotional and psychological distress and disorder." (The parties agree that the motion for judgment contains the erroneous date, 1992.)

Additionally, the plaintiffs allege that beginning on May 20, 1991, "and continuing up to the present time," they "have suffered great mental and emotional injury, anguish and distress, and have incurred, and will continue to incur medical and psychological expenses for the treatment of" their daughter, "all as a direct and proximate result of the acts of the Defendant described above." Also, plaintiffs assert that the "conduct of the Defendant . . . was intentional and outrageous, and subjected the Plaintiffs to severe and intentional emotional distress, as a result of which the Plaintiffs have suffered extreme physical and mental anguish, injury and distress."

Initially, we observe that the motion for judgment is vague and indefinite about the precise basis of the cause of action for emotional distress the plaintiffs are asserting; the plaintiffs' appellate briefs and argument are equally imprecise. In addition to a claim for reimbursement of medical expenses, the plaintiffs are alleging either that defendant's conduct was directed to the daughter, as the result of which they have suffered emotional damages, or that defendant's conduct targeted them directly, resulting in their
emotional damages. In either event, we express no opinion on the question whether the plaintiffs have any cause of action for intentional infliction of emotional distress under either theory, because those issues were not decided by the trial court and are not before us on appeal.

The more reasonable interpretation of the plaintiffs' allegations, however, is that they seek emotional damages because of defendant's conduct directed to the daughter. In their motion for judgment, the plaintiffs assert that, beginning on May 20, 1991, they suffered mental and emotional injury and distress "all as a direct and proximate result of the acts of the Defendant described above." And the acts "described above" are the alleged "multiple acts of assault and battery" upon the daughter. Accordingly, we will assume but not decide that a cause of action exists in Virginia for vicarious emotional injury suffered by parents as the result of sexual abuse of their minor child, and we will proceed to address only the statute of limitations issue.

On appeal, the plaintiffs argue that the statute of limitations for their cause of action for intentional infliction of emotional distress is two years, citing Code § 8.01-243(A) ("every action for personal injuries, whatever the theory of recovery, . . . shall be brought within two years after the cause of action accrues"). See Ludeke v. Amana Refrigeration, Inc., 239 Va. 203, 207, 387 S.E.2d 502, 504 (1990) (finding two-year statute of limitations applicable to claim for intentional infliction of emotional distress). The plaintiffs say, however, that the "real question in the case concerns the time when the two year statute of limitations began to run."

The plaintiffs maintain that their cause of action is separate and not derivative of their daughter's cause of action for assault and battery. Thus, they contend, their cause of action did not accrue at the same time as their daughter's but accrued on May 20, 1991, making their action filed in June 1992 timely and the trial court's ruling to the contrary erroneous. We do not agree.

The plaintiffs' allegations in their motion for judgment clearly demonstrate that any cause of action they may have is derivative of their daughter's claim. A derivative claim is one having no origin in itself, but one owing its existence to a preceding claim. Black's Law Dictionary 443 (6th ed. 1990). As the defendant argues, the plaintiffs have no viable theory of recovery but for their assertions that their daughter was the victim of an intentional tort committed by the defendant. As we have said, the motion for judgment describes the basis of their claim as the multiple acts of sexual battery upon the daughter between 1974 and 1978. This is the conduct that the plaintiffs contend caused them emotional injury and required them to expend approximately $10,000 in medical expenses. Manifestly, any injury or damages they have suffered are secondary to and arise from the tortious acts committed against their daughter. See Bulala v. Boyd, 239 Va. 218, 230, 389 S.E.2d 670, 676 (1990) (any claim father may have for emotional distress as the result of injury to child "wholly derivative" of the child's claim); Speet v. Bacaj, 237 Va. 290, 298, 377 S.E.2d 397, 401 (1989) (any claim of parents for emotional distress caused by injuries negligently inflicted on child during birth process "wholly derivative" of child's claim); Norfolk S. Ry. v. Fincham, 213 Va. 122, 128, 189 S.E.2d 380, 384 (1972) (parent's cause of action for medical and incidental expenses as the result of injury to child "a derivative action").

Because the parents' purported claim is derivative, it accrued at the same time as the daughter's claim, that is, during the period 1974-78; it did not accrue in May 1991.
when the parents first learned of the alleged tort against their child. Generally, a "cause 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 . . . and not when the resulting damage is discovered." Code § 8.01-230. Any cause of action for intentional infliction of emotional distress "accrues and the time limitation begins to run when the tort is committed." Luddeke, 239 Va. at 207, 387 S.E.2d at 504. Thus, the plaintiffs' purported claim, derivative of the daughter's claim, accrued at the latest in 1978 when the daughter allegedly was injured, some 14 years before this action was filed.

And, the plaintiffs may not take advantage of the tolling provisions of Code § 8.01-249(6) (cause of action for injury to the person resulting from sexual abuse occurring during infancy generally deemed to accrue when fact of the injury and its causal connection to the abuse first communicated). This provision deals with claims of only the victim of the abuse, not with derivative claims. See also Starnes v. Cayouette, 244 Va. 202, 419 S.E.2d 669 (1992) (retroactive application of § 8.01-249(6) violates a defendant's due process guarantees).

Finally, the plaintiffs' action is not saved by the disability tolling provisions of Code § 8.01-229(A)(2)(a) (when infant entitled to bring action, time during which infant is within age of minority generally not counted as any part of the period within which action must be brought). Even if the statute applies to claims of a child's parents, but see Perez v. Espinola, 749 F. Supp. 732 (E.D. Va. 1990), the accrual of the cause of action would have been the date of the daughter's 18th birthday, January 1987, and the 1992 action for emotional damages is still untimely. The same result ensues if the parents can take advantage of the five-year limitation of Code § 8.01-243(B) in their claim for reimbursement of medical expenses. The statute of limitations for these expenses would have expired in January 1992, five months before this action was filed.

Accordingly, we hold that the trial court correctly decided that this action was time-barred. The judgment below will be Affirmed.
U. Application of Limitations Periods to the Sovereign

The governing Code section, limiting the use of limitations periods against the Commonwealth's rights of action, is:

§ 8.01-231. Commonwealth not within statute of limitations.
No statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same.

COMMONWEALTH v. BOARD OF SUPERVISORS
225 Va. 492, 303 S.E.2d 887 (1985)

JUSTICE POFF delivered the opinion of the Court.

The Commonwealth of Virginia, ex rel. Vincent Pross, Comptroller (the Commonwealth), appeals from an order dismissing its motion for judgment against the Board of Supervisors of the County of Spotsylvania and the former County Administrator (collectively, the Board) as time-barred. The motion for judgment, dated November 30, 1979, demanded reimbursement of a portion of certain funds advanced to the Board by the Virginia Division of Justice and Crime Prevention, an agency of the Commonwealth. Invoking the provisions of Code § 15.1-552, the Board demurred on the ground the suit was filed more than six months after the Commonwealth's claim was disallowed. Over the Commonwealth's objection, the trial court admitted parol testimony which showed that, although the official minutes of the meetings of the Board did not so reflect, the Board had voted on July 25, 1978, to disallow the claim and had given the Commonwealth written notice to that effect. The trial court held that the Commonwealth was a "person" subject to the time limitation prescribed in the statute, ruled that the limitation was jurisdictional, sustained the demurrer, and dismissed the motion for judgment.

The record reveals several errors in the proceedings below. "[T]he defense that the statutory limitation period has expired cannot be set up by demurrer." Code § 8.01-235. "Upon demurrer, the test of the sufficiency of a motion for judgment is whether it states the essential elements of a cause of action, not whether evidence might be adduced to defeat it." Lyons v. Grether, 218 Va. 630, 633, 239 S.E.2d 103, 105 (1977). Thus, the demurrer was not cognizable and, even if it were, it raised a purely legal question, in the determination of which receipt of evidence was improper. But these errors were not assigned on appeal, and neither will be noticed in this opinion "as a ground for reversal of [the] decision below." Rule 5:21.

We will reverse the judgment, however, because the trial court erred in holding that the Commonwealth was a "person" subject to the statutory time limitation in issue. Insofar as relevant here, Code § 15.1-552 provides:

When a claim of any person against a county is disallowed... by the board of supervisors... such person... may appeal from the decision of the board to the circuit court... but in no case shall the appeal to taken after the lapse of six months from the date of the decision.
It is an ancient rule of statutory construction, one consistently applied by this Court for more than a century, that the sovereign is not bound by a statute of general application, no matter how comprehensive the language, unless named expressly or included by necessary implication.

It is old familiar law, and is applicable to the state as well as the crown, at common law, that where a statute is general, and any prerogative, right, title or interest is diverted or taken from the king, in such case, the king shall not be bound unless the statute is made by express words or necessary implication to extend to him.  

Whiteacre, sheriff v. Rector & wife, 70 Va. (29 Gratt.) 714, 716 (1878); see 3 Sutherland, Statutory Construction § 62.01 (4th ed. 1974).

In particular, this rule, most recently applied in Deal v. Commonwealth, 224 Va. 618, 299 S.E.2d 346 (1982) (Commonwealth not a "person" within the intendment of arbitration statute, Code § 8.01-577), has governed our construction of statutes of limitation.  "[N]o statute of limitations has been held to apply to suits by the crown, unless there has been an express provision including it." Leavaser v. Washburn, 52 Va. (11 Gratt.) 572, 576 (1854).  "Nullem tempus occurrit regi, applies in this state to the Commonwealth, as it does in England to the king." Taylor & als' Case, 70 Va. (29 Gratt.) 780, 794 (1878).  "[T]he statute of limitations does not run against the State unless expressly mentioned." Va. Hot Springs Co. v. Lowman, 126 Va. 424, 432, 101 S.E. 326, 329 (1919); see also Norfolk & W.R. Co. v. Supervisors, 110 Va. 95, 103, 65 S.E. 531, 534 (1909); Buntin v. Danville, 93 Va. 200, 208, 24 S.E. 830, 832 (1896). The Commonwealth is not named, expressly or by implication, in Code § 15.1-552.

The ruling sustaining the Board's demurrer imposes a time limitation upon the sovereign's power to collect money due the public purse. Code § 8.01-231 plainly provides that "[n]o statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same." That statute is absolute and unqualified.  It makes no distinction between so-called "pure" statutes of limitation (those which time-restrict the availability of a remedy) and "special" limitations (those prescribed by statute as an element of a newly-created right).  Hence, whether the time limitation prescribed in Code § 15.1-552 is "special" and "jurisdictional", as the Board contends, or merely procedural, it does not operate as "a bar to any proceeding by or on behalf of the [Commonwealth]."

We hold that the Commonwealth is not a "person" subject to the time limitation in issue and that the trial court erred in dismissing the Commonwealth's motion for judgment.  We will, therefore, reverse the judgment and remand the case for a trial on the merits.
Notes on Important Statute of Limitations Issues

Municipal Equitable Claims. In City of Manassas v. Board of Supervisors of Prince William County, 250 Va. 126 (1995) the Supreme Court held that laches and statute of limitations defenses were not available against a municipality in an equitable proceeding.

"Pure" and "Special" Limitations Periods. It is said that a traditional statute of limitations bars only a plaintiff's remedy; this formulation provides a plaintiff no comfort, since the effect is that the claim is dead. See § 8.01-228 et seq. In some situations, where a statute creates a new cause of action and provides for its limitation period, the expiration provision is sometimes called a "special" limitation. The effect of the running of the period is the same, but in such cases, a plaintiff may be required to plead affirmatively when bringing a claim that it has been timely advanced. Examples of such statutory causes of action with built-in limitation provisions are wrongful death, mechanics' lien enforcement proceedings, and suits under the Tort Claims Act (§ 8.01-195.7).

Periodic Future Obligations. Rights of action generally do not accrue under Virginia law for future periodic obligations (absent an acceleration clause) until they are due, even where there has been a default in performance of earlier similar obligations under the same instrument or arrangement. See Wiglesworth v. Taylor, 239 Va. 603, 391 S.E.2d 299 (1990).

Contribution and Indemnity. Section 8.01-249(5) provides that a cause of action for contribution or indemnification arises for limitations purposes when a party has paid or discharged the obligation. See Gemco-Ware, Inc. v. Rongene Mold & Plastics Corp., 234 Va. 54, 360 S.E. 342 (1987) set forth in Chapter 9, § A (clarifying law to this effect).

The Nonsuit Statute. Under §8.01-380 and §8.01-229(E)(3), a plaintiff who takes a nonsuit may recommence the action within the balance of the original statute of limitations (which was tolled during the first suit's pendency), or within 6 months from the date of the court order confirming the nonsuit, whichever is the later date. See Morrison v. Bestler, 239 Va. 166, 387 S.E.2d 753 (1989); Moore v. Gillis, 239 Va. 239, 389 S.E.2d 453 (1989); Sherman v. Hercules, Inc., 636 F.Supp. 305 (W.D. Va. 1986).

Agreed Periods. The parties are free under Virginia law to structure a transaction in which they provide for a limitation period they select (commonly, shorter than that prescribed by statute for such transactions generally). The agreement must be quite clear, however, in order to assure that it will later be interpreted as a contracted limitation provision. See Fairfax County v. Sentry Insurance, 239 Va. 622, 391 S.E.2d
(six month provision for suit on claims not a contractual limitation of action). For some subject areas, statutes provide that the parties may not agree to a limitation period shorter than a specified period, such as one year. The Court held in *Massie v. Blue Cross and Blue Shield of Virginia*, 256 Va. 161, 500 S.E.2d 509 (1998) that the extension period of six months provided by the nonsuit statute did *not* apply to extend a *contractually specified* limitation period.

**Counterclaims.** Under Code § 8.01-233 a counterclaim is deemed commenced when it is filed, unless it arises from the same transaction or occurrence that the plaintiff sues upon, in which case it is deemed to have been filed when plaintiff commenced the original action.

**Estoppel to Plead the Statute.** Under *Soble v. Herman*, 175 Va. 489, 9 S.E.2d 459 (1940) traditional fraud (involving express misrepresentation of present fact) can estop a debtor from pleading the statute against a creditor who forbears action in reliance. See generally § 8.01-232.

**Foreign Law.** The Supreme Court of the United States requires federal courts applying the law of a state to apply that state's limitation period as well, as an integral part of the substantive law of the jurisdiction whose law is deemed to control the controversy. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Virginia has traditionally enforced the *shorter* of the periods prescribed by the foreign state whose law is being applied to the transaction generally, or the Virginia period. The legislature may consider enacting the Uniform Conflict of Laws -- Limitations Act, which several states have passed. The uniform act requires that the limitation period of the jurisdiction whose law governs the merits of the transaction be applied.
Hypotheticals

1. S purchased a stomach medicine from the Ph pharmacy three years ago. It made him ill. He now files a lawsuit setting forth several theories of recovery, including negligence, breach of contract to provide products fit for their intended purposes, breach of express and implied warranty, and liability under the U.C.C. Counsel for Ph files a grounds of defense, asserting a special plea that the action is barred by "the applicable statute of limitations". How should the court rule?

2. C became a client of A, an attorney ten years ago when purchasing a house locally. The next year C asked A's advice on a complicated tax question involving inheritance of two kinds of property from his grandmother, some stocks and some real estate. Based on A's advice C filed a return eight years ago concerning the estate tax. The IRS rejected C's return because of its treatment of the real estate and conducted a lengthy audit and related proceedings, eventually charging him over $6,000 in penalties last year, when the matter was finally closed. A represented C in the efforts to dissuade the IRS from imposing penalties. C has now brought a malpractice action against A. During discovery conducted by his present counsel, C learns that A botched the original house purchase he performed for C a decade ago, and there is a cloud on the title to C's home as a result. Further, new counsel advises C that not only did A handle the estate tax issues incorrectly as to the real property inherited from the grandmother, but A failed to note significant deductions that should have been taken as to the stock which was inherited. C amends his claim, but A files pleas raising the statute of limitations as to
   a. the original claim, re the estate tax return.
   b. the amendment relating to other deductions.
   c. the amendment relating to C's home purchase 10 years ago.
   How should the court rule on these pleas.

3. P was a passenger injured in a car accident on July 22nd, two years ago. On July 20 of the present year his counsel filed a motion for judgment against D and E, the drivers involved in the accident, but could not arrange for service of process to reach the defendants until July 22nd and 23rd, respectively. Two weeks after being served, D files a grounds of defense to the motion for judgment. At the same time, however, he served a cross-claim against E to recover for his own personal injuries. E files a plea of the statute of limitations against the original motion for judgment and the cross-claim. How should the court rule?

4. K was killed in a traffic accident in Virginia on July 29, three years ago. His administrator, A, was qualified in Pennsylvania and instituted an action against O, the owner and driver of the other car, on May 1 last year, seeking $2.5 million in damages for the death of K. O's attorney moved to dismiss on the ground that foreign state administrators may not sue in Virginia courts. The motion was granted in August of last year, and in September V, a Virginian, qualified as K's ancillary administrator and immediately instituted an action against O seeking $2.5 million in damages for the death of K. O's counsel now moves for summary judgment on the ground that the suit
was not brought within the statutory period after the death of K. How should the court rule?

5. M, a minor, was negligently treated earlier this year by an orthopaedic surgeon when M broke his arm at a school soccer match.
   a. If M was 14 years old at the time, when does the statute of limitations run?
   b. If M was 9 years old at the time, when does the statute of limitations run?
   c. If M was 7 years old at the time, when does the statute of limitations run?

6. H, a housewife, had a gas oven installed several years ago by the manufacturer's representative. The unit and its installation were defective, but for many years the defect caused no difficulties. One afternoon, however, when she turned the oven on it exploded. Just under 2 years after the explosion, she sues for personal injuries to herself, damage to the apartment where she lives, and damage to the oven itself (or, in the alternative, recovery of the cost of the oven). Defendants file a special plea of the statute of limitations to all theories. What periods apply and what will be the result(s) here?

7. S had a swimming pool built, but it leaks, damaging the foundation of S's house. If S sues the pool company, what period of limitations will apply? Would it matter if S had the house and pool built with a contractor, and only the contractor had dealings with the pool company?

8. P, a patient, went to a D (a dentist). D treated her for almost a dozen years, but P's teeth and gums deteriorated greatly over the period. Finally, P went to a second dentist (S), who told P that she had an advanced case of a serious periodontal condition that had been worsening over at least a decade and that any dental student could have recognized it. S saved several of P's teeth, but others were lost and she suffered greatly. P sues D, charging dental malpractice. D defends on the grounds of the statute of limitation, contending that his alleged "continuing failure to diagnose" was applicable 10 years ago, 9 years ago, 8 years ago, etc., and that the time to sue had lapsed. What result?

9. O was negligently operated upon by H (a Hawk-eyed surgeon). H thereafter convinces O to be operated upon a second time, and the second surgery is successful in curing O's problem. O sues for the pain and suffering (and extra expense) caused by the first surgery. The suit is filed more than two years after the negligent surgery, but less than two years after the curative second surgery. Does a limitations defense lie?

10. Same facts as 9, except after the 1st operation H simply continued to monitor O's condition for a period of months. Eventually O sues for malpractice arising from the surgery. She sues more than two years after the surgery but less than two years from the termination of the post-operative care. What result?
Chapter 17
Discovery

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### A. Introduction to the Workings of Discovery in Virginia

The rules of court, in Part Four, provide a panoply of discovery devices for ascertaining (or confirming) information in preparation for trial. These rules apply to actions at law or in equity, in the circuit court.

**General District Court.** Discovery in the General District Court is limited to the subpoena duces tecum device, essentially a request for production of documents, but not limited to parties in the action: the subpoena may be directed to non-parties as well. § 16.1-89. A bill of particulars may serve some of the same purposes as formal discovery devices. Given the limited dollar ceiling for proceedings in this court, the cost and burdens of more full-blown discovery may not be justified. Also, in light of the possibility of a de novo trial at the Circuit Court level, the entire General District Court trial can be seen as a discovery event in some cases.

**Circuit Court.** Those who have learned the structure of the federal discovery provisions (Fed.R.Civ.P. 26 through 37) will find the Virginia rules very familiar in organization, terminology, and substance. This Part of the rules was revamped in 1977, and took cognizance of the format of the Federal Rules at that time.
The devices made available in Virginia under the rules are as follows:

- **Depositions (of parties and non-parties).** Depositions may be taken upon oral examination (Rule 4:5) or upon written questions (Rule 4:6). See section B of this Chapter.

- **Interrogatories** (Rule 4:8). Interrogatories are submitted in writing in separate numbered questions, to parties only.

- **Production of Documents and Things and Subpoenas Duces Tecum.** (Rule 4:9) The rule makes separate provision for the routine exchange of information between parties (Rule 4:9(a),(b) and (c-1)), and the obtaining of information from non-parties via a subpoena. Rule 4:9(c) and (c-1).

- **Entry on land.** Rule 4:9(a)(3) also permits a party to inspect another party's premises.

- **Physical and mental examinations.** (Rule 4:10) As in federal practice a physical examination may be ordered by the court, where the condition of a party (or one in the legal custody or control of a party) is in controversy in the lawsuit.

- **Requests for admissions.** (Rule 4:11) Requests for admission are also limited to parties, and may request concession of the genuineness of a document or the truth of any proposition of fact.

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B. "Scope" of Discoverable Information in Virginia.

**The Basics**

**Minimum Relevance Required.** Rule 4:1(b)) governs the scope of discoverable information. It authorizes exploration of any matter which is not privileged and which is relevant to the subject matter of the pending action. These are broad tests. Just as in federal practice, information may be discovered even if it will not be admissible under the law of evidence at trial, so long as its disclosure may lead to the discovery of other, admissible evidence. Rule 4:1(b)(1). Hence insurance coverage is discoverable under Rule 4:1(b)(2) even though it clearly will not be received in evidence at trial.

**Domestic relations, eminent domain and habeas corpus or related prisoner remedy cases.** In lawsuits sounding in these specific subject matters, discovery is permitted only if relevant to the issues. Rule 4:1(b)(5). This more narrow standard is intended to reduce abusive exploration of unnecessary matters in these cases. Moreover, leave of court is required to obtain discovery in such cases. The court is not obligated to allow this discovery.
Privilege. The Rules of Court do not define the law of privilege under Virginia law, which is largely codified. The attorney-client privilege is well-established in the common law of Virginia. Other privileges recognized in the Commonwealth include the physician-patient privilege (§ 8.01-399)(deemed waived where the patient's physical or psychiatric condition are placed in issue), the spousal privileges (see § 8.01-398)(not applicable in suits inter se), and that for a minister of religion (§ 8.01-400). Assertion of the Fifth Amendment right against self-incrimination may also bar discovery, but it is not self-executing. North Amber. Mortgage v. Pomponio, 219 Va. 914, 252 S.E.2d 345 (1979).

Work Product Doctrine. Under Rule 4:1(b)(3) the traditional American "work product doctrine" is set forth in Virginia. See Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385 (1947). Thus, materials prepared in anticipation of litigation or for trial will have a qualified immunity from disclosure. Although not covered by attorney/client privilege (e.g., because prepared entirely within the attorney's office), these notes and other materials are shielded to encourage prompt and thorough preparation by attorneys and to avoid unfairness. The rule applies to materials prepared by counsel, and by consultants, insurers, agents and other "representatives" for litigation purposes. The protections of the work product doctrine may be pierced if a requesting party can show substantial need for the withheld materials and the inability to obtain the substantial equivalent of those papers without undue hardship. In federal practice, where this same test applies, mere cost is not cognizable as undue hardship. See also Rakes v. Fulcher, 210 Va. 542, 172 S.E.2d 751 (1970) (old version of Rule 4:9). At all events, the court is directed by the rule to protect against disclosure of mental impressions, conclusions or opinions. Some federal courts extend this to protect against disclosure of legal theories or document compilations which would reveal strategy or theories. Note, however, that the interrogatory rule expressly permits discovery questions seeking legal contentions, in law or involving the application of law to fact in the case. See Rule 4:8(e).

Experts. Rule 4:1(b)(4) authorizes a party to obtain from an adversary the facts known and opinions held by the opponent's experts, in a detailed procedure calculated to provide minimal information in a routine fashion at no cost, and more extensive information only subject to cost recoupment provisions. The principal target of such discovery, of course is an adversary's expert who is expected to be called as a witness at trial. As to these individuals, the rule permits an interrogation which will elicit the identity of expected testifying experts, and for each a summary of the subject matter of the testimony, the substance of the expert's expected testimony (facts and opinions to be given) and a summary of the grounds for each opinion. The court may, upon motion of a party, order further discovery (usually, a deposition) subject to any scope, duration and expense provision the court deems just. As to experts who were consulted or retained but who are not expected to testify, discovery may only be had upon a showing of "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means", one of the stiffest tests in all of procedure, and rarely met. [Note, however, that physician's reports arising from medical examinations under the rules are governed by different standards under Rule 4:10(c)]. All expert discovery other than the first-wave interrogatory answer is subject to cost recoupment, some of it mandatory. See Rule 4:1(b)(4)(C). In Virginia eminent domain proceedings, a condemnor who initiates discovery bears the

**Role of the Court.** In most respects the design of the discovery rules minimizes the need for judicial permission or supervision of the process. Counsel may, in most instances, simply elect the discovery device to use and serve the appropriate notice directly upon the adverse party or witness. Expert discovery beyond the basic interrogatory, and physical examinations of persons are two significant instances where the court must give permission prior to the parties' engaging in a facet of discovery. Other examples are depositions accelerated ahead of the normal timetable of litigation (depositions before the period for filing a responsive pleading has expired require court permission unless the noticing counsel can represent that the prospective witness is about to leave the jurisdiction, or where the defendant has himself served a deposition notice. See Rule 4:5(a)). Production of documents and things by certain officials requires court approval (Rule 4:9(c-1)), as do aspects of discovery in actions involving incarcerated parties. See Rules 4:1(b)(5)(b), 4:6(a).

In 1990 the basic scope of discovery provision, Rule 4:1(b), was amended by the addition of a lengthy restrictive clause, which begins by making reference to the duty of counsel seeking information to use non-burdensome approaches to collection of information, and proceeds to state that the frequency or extent of discovery "shall" be limited if the requests are duplicative, there are less burdensome or expensive alternatives, or a party has waited too long to initiate an onerous course of discovery. The judge is empowered by this amendment to act *sua sponte* or in response to a protective order motion. These provisions, which adopt wholesale terms that have been in Federal Rule 26(b) for several years, are clearly intended to foster more discrimination among fact-gathering alternatives. It remains to be seen whether they work a change in Virginia practice.

**Numerical Limits on Discovery.** By express terms of the discovery rules, no more than thirty (30) interrogatories may be served by one party on another, unless the court makes a finding that there is good cause for greater discovery in a particular case. See Rule 4:8(g). In 2001 the General Assembly enacted § 8.01-420.6, which removed any general limit on the number of depositions, and Rule 4:6A was amended to conform with the notion that there is no limit to the number of depositions that may be taken by a party except by order of the court for good cause shown.

**Other Protective Provisions.** Rule 4:1(c) authorizes the trial judge to issue protective orders upon a motion by a party (or any person from whom information is sought). Normally such relief is sought in the court where the action is pending, though a motion respecting a deposition may be brought in the locale where the testimony is to be taken. Most protective relief applications are made upon receipt of a discovery request deemed unduly burdensome, or otherwise objectionable, but relief may be sought in the middle of a deposition, for example, if a problem arises. See Rule 4:5(d).

While the protective order rule also permits relief from "oppression", "embarrassment", and "annoyance", clearly the main grounds for relief in most cases would be "undue burden or expense". Rule 4:1(c). Protective relief may also be granted if the discovering party is using the discovery devices in an invalid fashion (shortening due dates, asking for a physical examination without prior order, etc.).
cross-reference in the rule to the sanction provisions of Rule 4:12(a)(4), it is provided that costs in connection with protective order motions may be transferred. There are no reported cases discussing the cost provision, but the general structure of the sanction motion provision would require the loser to pay reasonable costs the adversary incurred on the motion.

**Supplementation of Responses.** Rule 4:1(e) provides for supplementation of discovery responses in several situations. Of course, an incomplete response may be treated as a non-response, and hence be the basis for a Rule 4:12 order requiring further discovery. But even responses that were complete and accurate when given will require supplementation in some instances. Such updating or modification is *automatically required* regarding the identity and location of additional persons having knowledge of discoverable matter, as well as the identity of each expert expected to be called at trial, and the subject matter and substance of expected expert testimony. Supplementation is *also required* if a party learns the response made was incorrect when made or is no longer correct and failure to amend would amount to a knowing concealment (commonly, because you know that the adversary is relying on the response in structuring the case). A supplementation burden may also be imposed by court order, agreement of the parties, or the issuance of renewed requests for the same information (or specifically asking for supplementation). The wording of the Rule was completely recast in 2001. The Rule now states the duty to supplement in the affirmative. Once a party has served upon the opposing party appropriate discovery requests, the opposing party is under a duty to respond fully and accurately. If the opposing/responding party later determines that a response was incomplete or inaccurate when made, or was accurate when made but is no longer accurate, the duty should be upon the opposing/responding party to supplement and/or correct the response. That duty should not be an exception to a "no duty" rule, but rather should be a ongoing obligation.

Thus, a party is under a duty to supplement its disclosures promptly upon learning that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. Case law has yet to spell out the nuances of the notion that exposure of other parties to the corrective information obviates the supplementation burden.

The updating responsibility extends to the particular discovery tools used in the case. Thus, a party is under a duty to amend promptly a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

**Sharing Discovery Fruits.** The plaintiffs' bar was successful in obtaining passage of § 8.01-420.01, which provides that a protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter, with the permission of the court, after notice and an opportunity to be heard to any party or person protected by the protective order, and provided the attorney who
receives the material or information agrees, in writing, to be bound by the terms of the protective order.

**Use of Recorded Conversations.** Code § 8.01-420.2 states that no recording of a telephone conversation shall be admitted into evidence in any civil proceeding unless (i) all parties to the conversation were aware the conversation was being recorded or (ii) the portion of the recording to be admitted contains admissions that, if true, would constitute criminal conduct which is the basis for the civil action, and one of the parties was aware of the recording and the proceeding is not one for divorce, separate maintenance or annulment of a marriage. The parties' knowledge of the recording pursuant to clause (i) must be demonstrated by a declaration at the beginning of the recorded portion of the conversation to be admitted into evidence that the conversation is being recorded. This section *does not apply* to emergency reporting systems operated by police and fire departments and by rescue squads.
The Rules of Court, similar in many respects to the federal rules of discovery prior to the adoption of "mandatory disclosure" in that system, set forth the application and basic premises of the Virginia discovery system:

Rule 4:0 Application of Part Four.

(a) The Rules in this Part Four shall apply in civil cases in the circuit courts. They also shall apply to proceedings for separate maintenance, divorce or annulment of marriage, for the exercise of the right of eminent domain, and for writs of habeas corpus or in the nature of coram nobis as provided in Rule 4:1(b)(5). Whenever in this Part Four the word "action" appears it shall mean a civil case, whether the claims arise at law or in equity.

(b) No provision of any of the Rules in this Part Four shall affect the practice of taking evidence at trial in any action; but such practice, including that of generally taking evidence out of the actions upon claims arising at law and of generally taking evidence by deposition in equitable claims, shall continue unaffected hereby.

Rule 4:1 General Provisions Governing Discovery.

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these Rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Subject to the provisions of Rule 4:8 (g), the frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought;
or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice to counsel of record or pursuant to a motion under subdivision (c).

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person (which includes any individual, corporation, partnership or other association) carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts; Costs -- Special Provisions for Eminent Domain Proceedings. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) A party may depose any person who has been identified as an expert whose opinion may be presented at trial, subject to the provisions of subdivision (b)(4)(C) of this Rule concerning fees and expenses. (iii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this Rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent and expenses incurred in responding to discovery under subdivisions (b)(4)(A)(ii), (b)(4)(A)(iii), and (b)(4)(B) of this Rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(iii) of this Rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this Rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Notwithstanding the provisions of subdivision (b)(4)(C) of this Rule, the condemnor in eminent domain proceedings, when it initiates discovery, shall pay all costs thereof, including without limitation the cost and expense of those experts discoverable under subdivision (b) of this Rule. The condemnor shall be deemed to have initiated discovery if it uses, or gives notice of the use of, any discovery method before the condemnee does so, even though the condemnee subsequently engages in discovery.

(5) Limitations on Discovery in Certain Proceedings. In any proceeding (1) for separate maintenance, divorce, or annulment of marriage, (2) for the exercise of the right of eminent domain, or (3) for a writ of habeas corpus or in the nature of coram nobis; (a) the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged; and (b) no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of the court, which may deny or limit discovery in any such proceeding. In any proceeding for divorce or annulment of marriage, a notice to take depositions must be served in the Commonwealth by an officer authorized to serve the
same, except that, in cases where such suits have been commenced and an appearance has been made on behalf of the defendant by counsel, notices to take depositions may be served in accordance with Rule 1:12.

(6) Claims of Privilege or Protection of Trial Preparation Materials.

(i) When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(ii) If a party believes that a document or electronically stored information that has already been produced is privileged or its confidentiality is otherwise protected the producing party may notify any other party of such claim and the basis for the claimed privilege or protection. Upon receiving such notice, any party holding a copy of the designated material shall sequester or destroy its copies thereof, and shall not duplicate or disseminate such material pending disposition of the claim of privilege or protection by agreement, or upon motion by any party. If a receiving party has disclosed the information before being notified of the claim of privilege or other protection, that party must take reasonable steps to retrieve the designated material. The producing party must preserve the information until the claim of privilege or other protection is resolved.

(7) Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 4:1(b)(1). The court may specify conditions for the discovery, including allocation of the reasonable costs thereof.

(8) Pre-Motion Negotiation. A motion under this Rule 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.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, 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, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county or city where the deposition is to be taken, may make any order which justice requires to protect a party or person from
annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **Sequence and Timing of Discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of Responses.** A party who has responded to a request for discovery is under a duty to supplement or correct the response to include information thereafter acquired in the following circumstances.

(1) A party is under a duty promptly to amend and/or supplement all responses to discovery requests directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony, when additional or corrective information becomes available.

(2) A party is under a duty promptly to amend and/or supplement all other prior responses to interrogatories, requests for production, or requests for admission if the party learns that any such response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(3) A court may order, or the parties may agree to provide, supplementation in addition to that required in subsections (1) and (2) of this subpart (e).

(4) A party may supplement a prior discovery response by filing an updated response labelled "Supplemental" or "Amended", or by otherwise
notifying all other parties of the updated information in writing, signed by
counsel of record.

(f) Service Under This Part. Except for the service of the notice required
under Rule 4:2(a)(2), any notice or document required or permitted to be
served under this Part Four shall be served as provided in Rule 1:12 except that
any notice or document permitted to be served with the initial pleading shall be
served (or accepted) in the same manner as such pleading.

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

If a certification is made in violation of the rule, the court, upon motion or
upon its own initiative, shall impose upon the person who made the
certification, the party on whose behalf the request, response, or objection is
made, or both, an appropriate sanction, which may include an order to pay the
amount of the reasonable expenses incurred because of the violation, including
a reasonable attorney's fee.
YOUR HONOR, I OBJECT TO THIS CHARACTER WITNESS!
Notes on Discovery Limits and the "FOIA Alternative"

**Tax Returns.** Despite their obvious sensitivity, tax returns are often relevant to the issue of damages where lost wages or past business profits are legitimate issues. The Supreme Court has held that a corporation’s tax returns were discoverable for a seven year period in a case in which its former profits were relevant. *Lyle, Siegel v. Tidewater Capital Corp.*, 249 Va. 426, 439-39, 457 S.E.2d 28, 35-36 (1995).

"**FOIA**" Alternative. It has been held that the available of discovery options do not preclude use of the Freedom of Information Act to obtain information that would be in the scope of discoverable material. See generally *Cartwright v. Commonwealth Transportation Commissioner of Virginia*, 270 Va. 58, 613 S.E.2d 449 (2005) (In a Virginia Freedom of Information Act dispute, the circuit court erred in sustaining a state agency's demurrer and in denying plaintiff's petition for a writ of mandamus on the ground that plaintiff had an adequate remedy at law by means of discovery in a pending proceeding against the agency. Plaintiff was not required to prove absence of an adequate remedy at law, nor could the mandamus proceeding be barred on the ground that some other remedy at law was available, and the agency's eventual provision of the requested information did not render plaintiff's appeal moot).
The Adversary's Discovery Efforts

(Producing Party’s Perspective)
Confidentiality of Records and Public Access Issues

SHENANDOAH PUBLISHING HOUSE v. FANNING
235 Va. 253, 368 S.E.2d 253 (1988)

[This case is discussed extensively in the Wrongful Death portion of Part One of these Readings. It is a landmark affirmation that discovery fruits are not automatically open for inspection the way "Pleadings" may be.]

. . . . Here, the judicial records in issue were accumulated in a wrongful death action. In Virginia, settlements of wrongful death claims must be approved by the courts. Code § 8.01-55. The public has a societal interest in learning whether compromise settlements are equitable and whether the courts are administering properly the powers conferred upon them. Moreover, the people have a vital interest, one of personal and familial as well as community concern, in cases involving claims of medical malpractice on the part of licensed practitioners and other health care providers.

We hold, therefore, that the trial court erred in sealing that class of data we have denominated "judicial records". We now consider the several protective orders insofar as they denied the public access to the "pretrial documents".

III. THE PRETRIAL DOCUMENTS

In an opinion rejecting a First Amendment challenge to a state court's protective order prohibiting dissemination of data acquired in civil discovery proceedings, the Supreme Court explained that "pretrial depositions and interrogatories are not public components of a civil trial." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984). "Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private." Id. at 33 n.19.

The Court noted that Rule 26(b)(1) of the state court's discovery rules provided that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" and that discovery was not confined to information that is competent as evidence at trial so long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." Id. at 29-30.

Commenting upon these rules, the Court said:

Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as
relevant information in the hands of third parties may be subject to discovery.

The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders.

The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

Id. at 34-36 (footnotes omitted).

Although the issue in Seattle Times Co. was freedom of the press (i.e., the right to publish) rather than the public's right of access, the Court's opinion is relevant to the issue before us. Both cases are civil in nature. Both involve protective orders impressed on pretrial documents. And the discovery rules central to the Supreme Court's rationale and our Rules 4:1(b)(1) and (c) are essentially the same.

Shenandoah cites no authority, and we find none, respecting either a pre-judgment or a post-judgment right of public access to discovery data at common law, and in Virginia, trial courts are expressly authorized by our discovery rule "for good cause shown [to] . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense". Rule 4:1(c). We hold that the reasons assigned by the trial judge in his letter opinion constitute "good cause" to enter the pre-judgment protective orders sealing the pretrial documents.

IV. CONCLUSION

Upholding the rulings of the trial court in part, we will affirm the final judgment insofar as it approves the compromise settlement. We will reverse the final judgment in part, however, and because, in the proceedings below, the bench and bar did not have the benefit of the applicable standards and guidelines as we have defined them in this opinion, we will remand the case for a further hearing, if the parties be so advised, limited to the question whether the judicial records should remain sealed.

24 There is no question that the press and the public jointly possess a common-law right to inspect and copy judicial records and public documents. Nevertheless, this court has observed that private "documents collected during discovery are not "judicial records". Thus, while appellants may enjoy the right of access to "pleadings, docket entries, orders, affidavits or depositions duly filed," appellants' common-law right of access does not extend to information collected through discovery which is not a matter of public record.

In re Alexander Grant & Co. Litigation, 820 F.2d 352, 355 (11th Cir. 1987)(emphasis in original).
WHAT DO YOU THINK OF THE JUDGE’S RULING THAT YOU CAN’T TALK TO THE MEDIA?
Privileged Communications . . . And the Nightmare of Waiver

WALTON v. MIDATLANTIC SPINE SPECIALISTS, P.C.
280 Va. ___, ___S.E.2d ___ (2010)

[Plaintiff suffered a workplace injury to her wrist and was treated by an orthopedic surgeon and his practice group in the late 1990s. She commenced a workers' compensation proceeding. At one point early in plaintiff's treatment, the defendant doctor reviewed one of her x-rays and found nothing remarkable. However, almost three years later the doctor reviewed plaintiff's x-rays and wrote a letter to his attorney in which he admitted that he may not have been looking at the correct x-ray when he concluded that plaintiff's treatment was proceeding satisfactorily. According to the doctor, he kept his copy of the letter in a white binder, while medical records were contained in a manila folder. During discovery in the workers' compensation case, a subpoena duces tecum was issued to the doctor's practice group, which hired a document copying and production firm to gather the subpoenaed documents. That company obtained a copy of the letter and produced it to the attorney for plaintiff's employer in the workers' compensation case. In this later medical malpractice action, the letter was first produced to plaintiff's counsel in November 2004. Plaintiff notified the doctors that she was in possession of the letter in answers to interrogatories served in June 2006. However, the defendants assert they did not learn that plaintiff was in possession of the letter until they were notified in October 2007 that plaintiff had the letter and intended to use it at trial. Then in November of 2007 the doctors filed a motion for a protective order against use or distribution of the letter. The circuit court held several hearings on the motion, and ultimately granted the doctors' motion, ruling that the letter was privileged, had been involuntarily disclosed, and there had been no waiver. The court prohibited use of the letter and precluded plaintiff from asking any questions of the defendant doctor requiring his expert opinions including his retrospective interpretation of events that occurred during his treatment of the plaintiff in the late 1990s. A verdict was returned for the defense.]

As a general rule, confidential communications between an attorney and his or her client made in the course of that relationship and concerning the subject matter of the attorney’s representation are privileged from disclosure. Banks v. Mario Indus., 274 Va. 438, 453, 650 S.E.2d 687, 695 (2007); Commonwealth v. Edwards, 235 Va. 499, 508-09, 370 S.E.2d 296, 301 (1988). The objective of the attorney-client privilege is to encourage clients to communicate with attorneys freely, without fearing disclosure of those communications made in the course of representation, thereby enabling attorneys to provide informed and thorough legal advice. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). “Nevertheless, the privilege is an exception to the general duty to disclose, is an obstacle to investigation of the truth, and should be strictly construed.” Edwards, 235 Va. at 509, 370 S.E.2d at 301.

The attorney-client privilege may be expressly or impliedly waived by the client’s conduct. Banks, 274 Va. at 453-54, 650 S.E.2d at 695-96; Edwards, 235 Va. at 509, 370 S.E.2d at 301. Courts must consider the specific facts of each case in making a waiver determination, as there is no bright line rule for what constitutes waiver. Grant v. Harris, 116 Va. 642, 648, 82 S.E. 718, 719 (1914). The proponent of the privilege has the burden to establish that the attorney-client relationship existed, that the communication under consideration is privileged, and that the privilege was not waived. Edwards, 235 Va. at 509, 370 S.E.2d at 301; United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982).
In this case, the parties do not dispute the existence of an attorney-client relationship or that the letter was privileged at the time it was written. The issue presented is whether Dr. Moore waived the privilege attached to the letter. Whether inadvertent or involuntary disclosure of a privileged document constitutes a waiver of the attorney-client privilege is a mixed question of law and fact subject to de novo review. *In re Grand Jury Proceedings*, 33 F.3d 342, 353 (4th Cir. 1994).

### A. Walton’s Argument

Walton assigns error to the circuit court’s ruling that the privilege attached to the letter was not waived. Walton asserts the letter was produced to her during the ordinary course of discovery, the doctors did not produce any evidence that the letter was disclosed as the result of criminal acts or bad faith, and the letter contained an admission by Dr. Moore regarding the most crucial liability issue in the case. Walton contends that the disclosure was not involuntary, but inadvertent, and that the circuit court should have applied a multi-factor analysis using considerations often attributed to *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, (S.D.N.Y 1985), which is applied by many jurisdictions in cases of inadvertent disclosure of privileged documents during the ordinary course of discovery.

Walton argues that courts have only applied the involuntary disclosure test when there is evidence that the disclosure resulted from criminal activity or bad faith. Walton maintains that the doctors failed to produce any evidence of criminal activity, bad faith, or any other explanation for the disclosure of the letter besides a unilateral error of “carelessly placing a privileged document in a box of discovery documents and delivering them to the other side.” *Maldonado v. New Jersey*, 225 F.R.D. 120, 129 (D. N.J. 2004). Walton contends that the doctors’ position that there was no evidence that Dr. Moore himself was careless in placing the privileged document with the other materials to be produced is an insufficient reason to find the disclosure was involuntary. Walton asserts that Dr. Moore took no precautions to protect against the disclosure of the letter and did not take any steps to rectify disclosure until three years after he was first notified of the disclosure in November 2004. Walton argues that, under these facts, the doctors failed to carry their burden to show that the attorney-client privilege was not waived.

Additionally, Walton argues that the interests of justice require the letter to be admissible. Walton asserts that the December 1st x-ray and its interpretation were the most important pieces of evidence at trial, because Dr. Moore did not know if his notes were accurate regarding the most crucial x-ray. Walton argues that the circuit court erred by excluding the letter and allowing the jury to be misled.

### B. The Doctors’ Response

The doctors argue that the attorney-client privilege protecting the letter has not been waived, as the disclosure of the letter cannot be inadvertent if not made by a party to the privilege, in this case either Dr. Moore or his attorney. According to Dr. Moore,

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37 Walton does not contend that Dr. Moore’s attorney waived the attorney-client privilege.

38 We note that the recently promulgated Federal Rule of Evidence 502(b) adopts general standards concerning whether the party holding the privilege or protection took reasonable steps to prevent disclosure, and promptly took reasonable steps to rectify the error after inadvertent disclosure. The drafters state that they intend to make available for consideration the factors articulated in *Lois Sportswear and Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985). Advisory Committee Note of 2008 to Fed. R. Evid. 502.
Mid-Atlantic and/or Smart Copy disclosed the letter in the course of the separate, independent workers’ compensation case and, therefore, the disclosure can only be classified as involuntary.

The doctors, citing cases from other jurisdictions, contend that other courts have ruled that involuntary disclosure does not waive the attorney-client privilege when the party takes reasonable precautions to prevent the disclosure. The doctors maintain that, like the proponents of the privilege in those cases, they did not cause the disclosure through their own actions or inactions. The doctors assert that several individuals had access to the letter and all denied responsibility for its production. The circuit court could not determine who disclosed the letter and, therefore, the attorney-client privilege remained intact.

The doctors argue that Dr. Moore took reasonable precautions to prevent disclosure. In an affidavit by Dr. Moore, he stated that his litigation materials were kept in a white three-ring binder with no numbers on the side, in contrast to medical records, which were kept in a manila folder with numbers on the side. The doctors assert that Dr. Moore, by keeping the letter in a separate binder of a unique color, tried to ensure that his legal documents did not commingle with patient records, and that he cannot be held responsible for the unexplained production of the letter.

Moreover, the doctors contend that criminal activity or bad faith is not required for involuntary disclosure and, even if wrongdoing is required, the Mid-Atlantic employees and/or Smart Copy employees misappropriated Dr. Moore’s personal documents. According to the doctors, Dr. Moore met his burden of proof because the undisputed evidence was that he and his attorney did not disclose the letter, and that either Mid-Atlantic or Smart Copy disclosed the letter, or the disclosure was otherwise unexplained.

Lastly, the doctors argue that the exclusion of the letter was harmless error because Walton did not assign error to the circuit court’s grant of the doctors’ motion in limine. The doctors assert that the letter contained only expert opinion and retrospective critical analysis, but that Dr. Moore was not designated as an expert witness.

C. Analysis

As an initial matter, we hold that the disclosure of the letter was inadvertent, not involuntary, and that the circuit court erred as a matter of law in finding that the disclosure was involuntary instead of inadvertent. There was no evidence suggesting that the letter was knowingly produced by someone other than the holder of the privilege through criminal activity or bad faith, and the doctors do not argue that any criminal activity or bad faith was involved. All of the evidence indicates that the doctors mistakenly produced the letter, and therefore its disclosure was inadvertent, not involuntary.

The determination whether the disclosure was involuntary does not rest on the subjective intent of the doctors. The doctors’ intention to maintain the attorney-client privilege does not lead inevitably to the conclusion that the disclosure was involuntary instead of inadvertent. If subjective intention of the proponent of the privilege controlled, a disclosure would always be considered involuntary. However, in the waiver context, involuntary means that another person accomplished the disclosure through criminal activity or bad faith, without the consent of the proponent of the
privilege. See, e.g., In re Grand Jury Proceedings Involving Berkley and Co., Inc., 466 F.Supp. 863, 869 (D. Minn. 1979) (fired employee stole company’s documents and disclosed them to the government); Resolution Trust Corp. v. Clayton Dean, 813 F.Supp. 1426, 1430 (D. Ariz. 1993) (internal memorandum leaked to newspaper); Maldonado, 225 F.R.D. at 125-26 (letter from defendants to former attorney inexplicably found in plaintiff’s mailbox).

“The inadvertent production of a privileged document is a specter that haunts every document intensive case.” New Bank of New England v. Marine Midland Realty Corp., 138 F.R.D. 479, 479-80 (E.D. Va. 1991). Inadvertent disclosure of a privileged document includes a failure to exercise proper precautions to safeguard the privileged document, and does not require that the disclosure be a result of criminal activity or bad faith. For a disclosure to be considered inadvertent it is not required, as contended by the doctors at oral argument, that “an attorney or somebody on behalf of the client ma[de] a voluntary disclosure, in other words, they g[a]ve it up knowingly, but then they claim[ed] it was inadvertent, [claiming that] ‘I made a mistake when I gave it up.’” While knowingly, but mistakenly, producing a document may be an inadvertent disclosure, unknowingly providing access to a document by failing to implement sufficient precautions to maintain its confidentiality may also result in an inadvertent disclosure.

Once the trial court determines that a disclosure of one or more communications is inadvertent, it must then determine whether the attorney-client privilege has been waived for the items produced. In cases of inadvertent disclosure of a document protected by the attorney-client privilege, we adopt the multi-factor analysis set forth below, requiring the court to assess whether the holder of the privilege or protection took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error. This approach avoids the extremes, see New Bank of New England, 138 F.R.D. at 482, of an across-the-board rule of waiver when a communication has been produced, an approach often attributed to Dean Wigmore, 39 or a blanket “no waiver” rule which would hold that negligence by counsel or a producing party can never constitute waiver for lack of clear and intentional decision to waive protections. Id.

Under the standards we now adopt, waiver may occur if the disclosing party failed to take reasonable measures to ensure and maintain the document’s confidentiality, or to take prompt and reasonable steps to rectify the error. See id. at 482. This approach balances concerns of fairness and the fundamental importance of protection of the privilege long recognized in Virginia law “against the care or negligence with which the privilege is guarded.” Lois Sportswear, 104 F.R.D. at 105. Under this approach, the following factors are to be included in the court’s consideration: (1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper, or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances. See, e.g., Koch v. Cox, 489 F.3d 384

39 See, e.g., New Bank of New England, 138 F.R.D. at 481, noting that the Wigmore approach held that the privilege should be treated as destroyed by any disclosure under a narrow construction of the privilege that emphasizes that confidentiality is an exception to the general duty to disclose.
(D.C. Cir. 2007)(considering whether the party asserting privilege seeks to employ that privilege both as a sword and as a shield, and thereby to gain litigation advantage); United States v. Desir, 273 F.3d 39, 45 (1st Cir. 2001)(considering unfairness of allowing invocation of the privilege when a party testifies about portions of a communication or selectively asserts protections, because the “privilege cannot be used as both a shield and a sword”); United States v. Workman, 138 F.3d 1261, 1263-64 (8th Cir. 1998). Thus there may be “a determination that the privilege holder’s conduct makes it unfair to allow subsequent assertion of the privilege.” United States v. Yerardi, 192 F.3d 14 (1st Cir. 1999)(“Probably the most common example is a privilege holder’s effort to answer some questions in a subject area (usually those that serve the privilege holder’s interests) but not others (those that harm the privilege holder’s interest). Such a pick-and-choose approach may seem unfair in general or because it distorts the evidence that is presented to the factfinder”). See Developments in the Law – Privileged Communications, 98 Harv. L. Rev. 1450, 1629-31 (1985).

None of these factors is independently dispositive, and the court must also consider any other factors arising from the posture of the case at bar that have a material bearing on the reasonableness issues. Applying the relevant factors in this case to determine whether the disclosing party took reasonable measures to ensure and maintain the allegedly privileged document’s confidentiality, and took prompt and reasonable steps to rectify the error, we hold that the doctors waived the attorney-client privilege attached to the letter. Upon consideration of the record as a whole, we conclude that the doctors failed to take reasonable measures to ensure and maintain the confidentiality of the letter. We will analyze each of the five primary factors in turn. Our analysis takes into consideration Dr. Moore’s actions, as well as those of Mid-Atlantic, as the practice group to which Dr. Moore belonged and with which he rendered medical treatment to Walton. We also give deference to the circuit court’s findings of fact made during the second hearing on the doctors’ motion for a protective order against use of the letter. The Daily Press, Inc. v. City of Newport News, 265 Va. 304, 309, 576 S.E.2d 430, 432-33 (2003).

1. Reasonableness of Precautions

We first consider the reasonableness of Dr. Moore’s precautions to prevent an inadvertent disclosure of the letter. As the holder of the attorney-client privilege, Dr. Moore was charged with the responsibility to take reasonable precautions to safeguard the letter and to preserve its confidentiality.

Regarding the care exercised to ensure the letter was not disclosed, Dr. Moore “kept it in a separate notebook, and he kept it in his office.” The separate notebook was a white binder without numbers, whereas medical records were kept in a manila folder with numbers. However, Dr. Moore also kept medical records in his office. The notebook was not marked privileged or confidential, nor was the letter itself marked privileged or confidential. The number of documents to be reviewed before release was not extensive. There were no time constraints in responding to the discovery request that would have precluded a review of what was produced.

Neither the doctors nor their counsel conducted a privilege review of the documents gathered by Smart Copy. In fact, there was no evidence presented regarding any procedure for reviewing documents before they were copied by Smart Copy. Dr. Moore could have insisted upon additional review, such as after the documents were

When a party utilizes an independent copy service like Smart Copy for purposes of document production, it is especially important to clearly mark documents intended to remain confidential to avoid commingling such documents with documents that are properly subject to discovery. The doctors did not establish that they took sufficient efforts to supervise the Smart Copy employees or to prevent intermingling of the letter with unprivileged, non-confidential documents. We therefore conclude that the doctors failed to take reasonable precautions to prevent an inadvertent disclosure of the letter.

### 2. Time Taken to Rectify Error

There is some dispute as to when the doctors were notified that the letter had been produced. Walton contends that the doctors were informed that the letter had been produced during the workers’ compensation case in November 2004. Regardless, the doctors were again notified, in June 2006, that the letter had been produced to Walton’s attorney through Walton’s answer to Interrogatory 11. In her answer, she refers specifically to a letter dated October 30, 2001, authored by Dr. Moore, which was produced during the workers’ compensation case, and which she “consider[s] to be an admission or otherwise probative of liability.” Both parties agree that Walton’s attorney contacted the doctors’ attorney in October 2007 regarding the proposed use of the letter, but the doctors argue that they had not previously been notified that the letter had been disclosed. The doctors filed their motion for a protective order in November 2007.

Based on the information conveyed in Walton’s answer to Interrogatory 11, the doctors should have inquired into the whereabouts of the letter in question and attempted to rectify any potential error in its disclosure. A year and a half passed between service of the answers to interrogatories to the doctors and their filing of a protective order. Even in October 2007, the doctors did not take immediate measures to secure its return and to protect the privilege. Instead, the doctors allowed a month to lapse before seeking relief from the circuit court in the form of a protective order. The doctors should have taken immediate action to attempt to maintain the privilege attached to the letter.40

### 3. Scope of Discovery

The doctors do not contend that the discovery in this case was extensive or involved a massive exchange of documents. Also lacking was any evidence of time

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40 See, e.g., the recent amendment to the Part Four Rules of Court adding Rule 4:1(b)(6)(ii), setting up a notice procedure available when “a party believes that a document or electronically stored information that has already been produced is privileged or its confidentiality is otherwise protected,” halting use and dissemination of the document and providing an opportunity to obtain judicial determination.

We also note that the General Assembly has enacted a new Code § 8.01-420.7 in its 2010 session, which adopts, effective July 1, 2010, provisions that implement the standards articulated in this opinion to govern, inter alia, inadvertent waiver of the attorney-client privilege and work product doctrine confidentiality protections. See 2010 Acts ch. 350.
constraints or of any other factor impeding the doctors’ ability to monitor the documents
being produced. Because the discovery was not expedited or extensive, the doctors are given less leeway regarding their precautions to ensure the letter was not disclosed.

4. **Extent of Disclosure**

The disclosure of the letter was complete, because it was disclosed not only to Walton, but also in the workers’ compensation case to the attorney for Walton’s employer, and there is no indication that the document has not been copied, digested, and analyzed. The circuit court found that the privilege was permanently destroyed, so that disclosure cannot be cured simply by a return of the document.

5. **Interests of Justice**

Lastly, we consider whether, by asserting the claim of privilege as to the letter, the doctors used its unavailability for a misleading or otherwise improper purpose, making it unfair under the circumstances to allow the doctors to invoke confidentiality. Waiver of the attorney-client privilege should not be found in every instance in which upholding the protections of confidentiality or privilege may unfairly become an obstacle to the truth, because such an expansive view of waiver would defeat the salutary purpose of the attorney-client privilege. However, parties should not be permitted to use the privilege as both a shield, preventing the admission of evidence, and as a sword to mislead the finder of fact by allowing evidence that would be impeached by the privileged information if it had not been suppressed.

We hold that this factor also tips in favor of Walton. By ruling that the disclosure was involuntary and that the privilege attached to the letter had not been waived, the circuit court allowed the doctors’ counsel to engage in questioning that had significant potential to mislead the jury. Although framed as a question about what Dr. Moore wrote in his December 1st note, Dr. Moore’s answer led the jury to believe he had reviewed the December 1st x-ray when the suppressed letter may have impeached him by demonstrating that he may instead have mistakenly reviewed the November 24th x-ray. The issue of which x-ray Dr. Moore reviewed was a question of fact and a key to Walton’s claim of negligence, and did not require either an expert opinion or retrospective critical analysis.

Applying these five factors to the circumstances surrounding the inadvertent disclosure of the letter, we hold that the doctors did not fulfill their burden to prove that the attorney-client privilege was not waived with respect to the letter. While the attorney-client privilege serves a very important function in the administration of justice, it is subject to waiver, and the holder of the privilege is responsible for exercising reasonable caution to ensure that the privilege remains intact. For the proponent of the privilege to enjoy the benefits of the privilege, he or she must also bear the burden of taking sufficient measures to safeguard privileged documents. Such measures were lacking in this case. Therefore, the circuit court erred in ruling that the privilege was not waived.
C. Depositions

Overview of Deposition Practice

In all cases in Circuit Court, Virginia permits depositions upon oral examination (the usual mode) as well as depositions conducted on written questions. In the normal instance, notice is simply given of the convening of a deposition, setting forth the place of examination and the name and address of each person to be examined. The witness(es) may be subpoenaed to appear. When the written question device is used, questions are served and cross-questions may then be propounded within 21 days, redirect questions within 10 days and recross questions with another 10 days.

Depositions may be taken, pursuant to Code § 8.01-420.4, in the city or county where suit is pending, an adjacent city or county, or in any county where a non-party witness resides, has employment, or has a principal place of business. In addition, depositions may be taken at any agreed location or where the court may direct. Thus the parties may also agree to have the deposition conducted at any convenient location and, failing agreement, a party may move the court upon a showing of good cause for an order permitting the deposition to go forward in location the court may designate.

Leave of court is not required for depositions unless requested at the very outset of the lawsuit. Thus if a plaintiff seeks a deposition prior to the date upon which responsive pleadings are due (21 days unless extended) leave is required unless the defendant has already served notice of deposition or the witness is on the verge of departing from the Commonwealth and would be unavailable if the parties were to wait before seeking testimony from the witness.

In a normal pending case, notice is served by mail upon opposing counsel. Where deposition is to be taken before suit or pending appeal service of the notice must be made by an officer empowered to serve process generally unless the adverse party has already been served in that fashion. In divorce cases, notice of deposition must be formally served unless the party has appeared by counsel.

As noted in the outset of this Chapter, by statute and rules there is no limit on the number of depositions in any case as a matter of right. In actions where a party seeks a limitation, a motion must be made to the Court.

In most cases, depositions are conducted upon oral examination, in person. Virginia has subscribed to the Uniform Audio Visual Deposition Act, which permits depositions by videotape and other audio visual techniques for use as any deposition may be used. Code § 8.01-412.2.

Deposition transcripts are not filed with the court unless requested by a party or directed by the court. In divorce cases, however, it is required that the transcripts be lodged with the court. Rule 4:5(f).
The mime's depo was difficult...
particularly for the court reporter.
**Audio-Visual Depositions**

Depositions may be taken by a variety of audio-visual means in Virginia. In general, any depositions permitted under the Rules may be taken by audio-visual means, such as the use of videotape technology. It has been clarified that "audio-visual" includes video conferencing and teleconferencing procedures. Rule 4:7A contains elaborately detailed requirements for the conduct of such depositions. It provides that such a deposition must begin with an oral or written statement on camera which includes (i) each operator's name and business address or, if applicable, the identity of the video conferencing or teleconferencing proprietor and locations participating in the video conference or teleconference; (ii) the name and business address of the operator's employer; (iii) the date, time and place of the deposition; (iv) the caption of the case; (v) the name of the witness; (vi) the party on whose behalf the deposition is being taken; (vii) with respect to video conferencing or teleconferencing, the identities of persons present at the deposition and the location of each such person; and (viii) any stipulations by the parties.

In addition, the Rule requires that all counsel present on behalf of any party or witness identify themselves on camera. The oath for witnesses must be administered on camera. If the length of a deposition requires the use of more than one recording unit, the end of each unit and the beginning of each succeeding unit must be announced on camera. At the deposition site during an audio-visual deposition, all objections must be made as in the case of stenographic depositions.

At the conclusion of a deposition, a statement must be made on camera that the deposition is concluded. A statement may be made on camera setting forth any stipulations made by counsel concerning the custody of the audio-visual recording and exhibits or other pertinent matters.

The Rule makes it clear that any deposition may be recorded by audio-visual means without a stenographic record. The audio-visual recording is an official record of the deposition. However, a transcript prepared by a court reporter will also be deemed an official record of the deposition. And any party may make, at its own expense, a simultaneous stenographic or audio record of the deposition. Upon request and at his own expense, any party is entitled to an audio or audio-visual copy of the audio-visual recording. Submission of the tape to the witness is not required.

If an appeal is taken in the case, the appellant must cause a written transcript to be prepared and filed with the clerk covering the portion of an audio-visual deposition made a part of the record in the trial court that is germane to an issue on appeal. The appellee may designate additional portions to be so prepared by the appellant and filed.

To protect the integrity of the record, the Rule expressly provides that no audio-visual deposition shall be edited except pursuant to a stipulation of the parties or pursuant to order of the court and only as and to the extent directed in such stipulation and/or order. In any case where the parties stipulate or the court orders the audio-visual recording to be edited prior to its use, the original recording must not be altered; hence the editing is to be done on a copy or copies.

Unless otherwise stipulated by the parties or ordered by the court, the original audio-visual recording of a deposition, any copy edited pursuant to stipulation or an
order of the court, and exhibits must be filed only in accord with Rule 4:5(f)(1). An audio-visual deposition may be used for any purpose and under any circumstances in which a stenographic deposition may be used.

Video conferencing is a relatively recent form of communication which has become increasingly available at many locations across the country. Video conferencing allows persons at different locations the opportunity for "face to face" communications. The participants at one location can see and hear participants at another location. Some vendors refer to these services as teleconferencing. The General Assembly passed legislation in 2000 authorizing use of such procedures, and the Rule has been updated to implement this power.
Depositions Before an Action is Pending

While, by statute, the old common law procedure for taking a deposition to preserve testimony was expressly abolished, Virginia Rules include Rule 4:2, which allows for depositions before suit is filed, or even pending appeal.

DEPOSITION MECHANICS

The following rules spell out standard American procedures for the taking of depositions, which operate in Virginia very much as they do elsewhere:

Rule 4:3 Persons Before Whom Depositions May Be Taken.

(a) Within this Commonwealth. Within this Commonwealth depositions may be taken before any person authorized by law to administer oaths, and if certified by his hand may be received without proof of the signature to such certificate.

(b) Within the United States. In any other State of the United States or within any territory or insular possession subject to the dominion of the United States, depositions may be taken before any officer authorized to take depositions in the jurisdiction wherein the witness may be, or before any commissioner appointed by the Governor of this Commonwealth.

(c) No Commission Necessary. No commission by the Governor of this Commonwealth shall be necessary to take a deposition whether within or without this Commonwealth.

(d) In Foreign Countries. In a foreign state or country depositions shall be taken (1) before any American minister plenipotentiary, charge d'affaires, secretary of embassy or legation, consul general, consul, vice-consul, or commercial agent of the United States in a foreign country, or any other representative of the United States therein, including commissioned officers of the armed services of the United States, or (2) before the mayor, or other magistrate of any city, town or corporation in such country, or any notary therein.

(e) Certificate When Deposition Taken Outside Commonwealth. Any person before whom a deposition is taken outside this Commonwealth shall certify the same with his official seal annexed; and, if he have none, the genuineness of his signature shall be authenticated by some officer of the same state or country, under his official seal, except that no seal shall be required of a commissioned officer of the armed services of the United States, but his signature shall be authenticated by the commanding officer of the military installation or ship to which he is assigned.
Rule 4:5 Depositions Upon Oral Examination.

(a) When Depositions May Be Taken. — After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition before the expiration of the period within which a defendant may file a responsive pleading under Rule 3:8, except that leave is not required (1) if a defendant has served a notice of taking deposition, or (2) if special notice is given as provided in subdivision (b)(2) of this Rule. The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(a1) Taking of Depositions. (i) Party Depositions. A deposition of a party, or any witness designated under Rule 4:5(b)(6) to testify on behalf of a party, shall be taken in the county or city in which suit is pending, in an adjacent county or city, at a place upon which the parties agree, or at a place that the court in such suit may, for good cause, designate. Good cause may include the expense or inconvenience of a non-resident party defendant appearing in one of the locations specified in this subsection. The restrictions as to parties set forth in this subdivision (a1)(i) shall not apply where no responsive pleading has been filed or an appearance otherwise made.

(ii) Non-party Witness Depositions. Unless otherwise provided by the law of the jurisdiction where a non-party witness resides, a deposition of a non-party witness shall be taken in the county or city where the non-party witness resides, is employed, or has a principal place of business; at a place upon which the witness and the parties to the litigation agree; or at a place that the court may, for good cause, designate.

(iii) Taking Depositions Outside the State. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or, where applicable, the law of the United States, or (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued upon application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A commission or letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Witnesses may be compelled to appear and testify at depositions taken outside this state by process issued and served in accordance with the law of the jurisdiction where the deposition is taken or, where applicable, the law of the United States. Upon motion, the
courts of this State shall issue a commission or letter rogatory requesting the assistance of the courts or authorities of the foreign jurisdiction.

(iv) **Uniform Interstate Depositions and Discovery Act.** Depositions and related documentary production sought in Virginia pursuant to a subpoena issued under the authority of a foreign jurisdiction shall be subject to the provisions of the Uniform Interstate Depositions and Discovery Act, Virginia Code §§ 8.01-412.8 through 8.01-412.15.

(b) **Notice of Examination: General Requirements; Special Notice; Production of Documents and Things; Deposition of Organization.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the Commonwealth, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the period for filing a responsive pleading under Rule 3:8, and (B) sets forth facts to support the statement. The plaintiff’s attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) [Deleted.]

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 4:9 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 4:9 shall apply to the request.

(6) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he
will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these Rules.

(7) The parties may stipulate in writing or the court may on motion order that a deposition be taken by telephone. A deposition taken by telephone shall be taken before an appropriate officer in the locality where the deponent is present to answer questions propounded to him.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. If requested by one of the parties, the testimony shall be transcribed.

All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county or city where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 4:1(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to Witness; Changes; Signing. -- When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 21 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the
deposition may then be used as fully as though signed unless on a motion to suppress under Rule 4:7(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

* * * *
Rule 4:6 Depositions Upon Written Questions.

(a) Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take the deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 4:5(b)(6).

Within 21 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 4:5(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) Notice of Filing. When the deposition is filed, the party taking it shall promptly give notice thereof to all other parties.

Rule 4:7 Use of Depositions in Court Proceedings.

(a) Use of Depositions. — At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition taken in a civil action may be used for any purpose in supporting or opposing an equitable claim; provided, however, that such a deposition may be used on an issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E) or a hearing ore tenus only as provided by subdivision (a)(4) of this Rule.
(2) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(3) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 4:5(b)(6) or 4:6(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose in any action upon a claim arising at law, issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E), or hearing ore tenus upon an equitable claim if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a judge, or is a superintendent of a hospital for the insane more than 30 miles from the place of trial, or is a physician, surgeon, dentist, chiropractor, or registered nurse who, in the regular course of his profession, treated or examined any party to the proceeding, or is in any public office or service the duties of which prevent his attending court provided, however, that if the deponent is subject to the jurisdiction of the court, the court may, upon a showing of good cause or sua sponte, order him to attend and to testify ore tenus; or (F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(5) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(6) No deposition shall be read in any action against a person under a disability unless it be taken in the presence of the guardian ad litem appointed or attorney serving pursuant to§ 8.01-9, or upon questions agreed on by the guardian or attorney before the taking.

(7) In any action, the fact that a deposition has not been offered in evidence prior to an interlocutory decree or order shall not prevent its thereafter being so offered except as to matters ruled upon in such interlocutory decree or order; provided, however, that such deposition may be read as to matters ruled upon in such an interlocutory decree or order if the principles applicable to after-discovered evidence would permit its introduction.

Substitution of parties does not affect the right to use depositions previously taken; and when there are pending in the same court several actions
or suits between the same parties, depending upon the same facts, or involving the same matter of controversy, in whole or in part, a deposition taken in one of such actions or suits, upon notice to the same party or parties, may be read in all, so far as it is applicable and relevant to the issue; and, when an action in any court of the United States or of this or any other state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the one action may be used in the other as if originally taken therefor.

(b) Form of Presentation; Objections to Admissibility. - A party may offer deposition testimony pursuant to this Rule in stenographic or nonstenographic form. Except as otherwise directed by the court, if all or part of a deposition is offered in nonstenographic form, the offering party shall also provide the court with a transcript of the portions so offered. Except as provided in Rule 1:18 and subject to the provisions of subdivision (d)(3) of this Rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Taking or Using Depositions. - A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(3) of this Rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. - All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. - Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which
might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 4:6 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. - Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the officer under Rules 4:5 and 4:6 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(e) Limitation on Use of Depositions. - No motion for summary judgment in any action at law or to strike the evidence shall be sustained when based in whole or in part upon any depositions under Rule 4:5, unless such depositions are received in evidence under Rule 4:7(a)(4) or all parties to the suit or action shall agree that such deposition may be so used.

(f) Record. - Depositions shall become a part of the record only to the extent that they are offered in evidence.
Use of Deposition Transcripts as Admissions and Testimony

HORNE v. MILGRIM

JUSTICE RUSSELL delivered the opinion of the Court.

. . . . Raymond H. Horne, decedent's administrator, sued Cynthia Milgrim on the theory that she was the driver of decedent's car at the time of the accident and that her negligence was the proximate cause of his death. She insisted that decedent had been the driver and she, a passenger. The jury found for Milgrim. The administrator appeals.

Plaintiff's decedent, Stephen Horne, was the owner of a 1971 blue Corvette. On the evening of July 3, 1978, he met Cynthia Milgrim, then 18 years of age, whom he had dated a few times in the past. Cynthia testified that she had parked her car near the Piper's Gap Road in Carroll County and joined Horne for a ride in the Corvette. Three witnesses testified that they had seen the couple together in the Corvette that night, that Cynthia was driving, and that Horne was in the passenger seat. One witness testified that a month after the accident she overheard Cynthia admit that at the time of the accident she was driving and was "high."

About 10:00 p.m. that night, the Corvette, travelling north on the Blue Ridge Parkway, left the road on a curve three-tenths of a mile north of the Piper's Gap intersection and, after leaving over 220 feet of skid or "yaw" marks, struck trees well to the left of the paved road. Horne was killed instantly by an impact to the right side of his head. His left leg was pinned between the passenger seat and the dash; his upper body hung out of the window on the passenger side. The first witness to arrive at the scene found Cynthia standing behind the car, trying to flag traffic. She gave the keys of the Corvette to the witness and said, "[W]e've had an accident." Cynthia was taken to a hospital in Galax where she was interviewed by a park ranger who investigated the accident. She was rambling and incoherent in her speech, but told him she "thought Steve Horne had been driving." A few days later the ranger called her at home and asked further questions. When he again asked who had been driving, she said, "I think he was." . . .

The plaintiff took Cynthia's discovery deposition before trial. In it, she [gave one version of the events and admitted a lack of recollection].

At trial, the plaintiff moved to introduce in evidence the page of Cynthia's deposition containing the foregoing account, or, in the alternative, the entire deposition, pursuant to Rule 4:7(a)(3). The court held that the rule was "inapplicable to this case" and refused to permit the use of the deposition in evidence. The court, however, stated: "[I]f the Plaintiff decides to make the Defendant his witness, the Court would permit the introduction of the whole deposition."
Faced with this ruling, the plaintiff called Cynthia as an adverse witness. She testified [inconsistently with the deposition]. The plaintiff then confronted her with the prior inconsistent statement in her deposition, to which she responded, "I'm not sure." . . . After Cynthia testified as an adverse witness for the plaintiff, however, the court took the position that the plaintiff was bound by her testimony. . . [Other proof was such that the inability to offer the deposition version of "no recall" cleanly became a crucial inhibition on plaintiff's case. Ed.]

Rule 4:7(a)(3) provides in pertinent part: "The deposition of a party . . . may be used by an adverse party for any purpose." This language is identical to that of Fed. R. Civ. P. 32(a)(2). Although we have not previously construed this language, federal courts which have done so have concluded that it means exactly what it says. . . We agree with these views, and hold that a party may, subject to the rules of evidence, introduce an adverse party's discovery deposition as substantive evidence in his own case, whether the deponent is present or not.

The party offering such a deposition may tender only that part of it he considers relevant. If fairness requires the admission of additional parts, a remedy is provided by Rule 4:7(a)(5). The deposition is, of course, subject to objection on the grounds of authenticity, relevancy, non-compliance with the Rules of Court, or any failure to comport with the rules of evidence. See Rules 4:7(a), (b), and (d). The deposition of an adverse party that is received in evidence as substantive proof is oral testimony, not an exhibit. Unless the court for good cause otherwise directs, it should be read to the jury, not submitted in written form, so that it receives no more emphasis than other oral testimony.

The deposition of an adverse party, offered as substantive evidence, is distinguished from a deposition offered under Rule 4:7(a)(2) for the purpose of contradicting or impeaching the deponent. The former may adduce proof tending to establish or controvert any fact in issue; the latter serves merely to affect the deponent's credibility as a witness. The error of excluding the adverse party's deposition in this case was compounded by the requirement that the plaintiff either call the deponent as an adverse witness, or suffer the loss of her testimony entirely. Her testimony, thus, became binding upon him to the extent it was uncontradicted by his other evidence. See Cook v. Basnight, 207 Va. 491, 151 S.E.2d 408 (1966). Rule 4:7(c) provides that the use of an adverse party's deposition under Rule 4:7(a)(3) does not make the deponent the witness of the party offering the deposition. Accordingly, Horne was entitled to rely on Cynthia's deposition without incurring the dangers inherent in making her his witness. . . .
JUSTICE HARRISON delivered the opinion of the court.

[Plaintiff King failed to show up for trial of his personal injury case. His creative attorney attempted to offer his deposition into evidence.]

Plaintiff's attorney introduced several witnesses who were examined and cross-examined during the morning session of the court. Following a recess for lunch he advised the court that his client, the plaintiff, was a non-resident of Virginia living in Florida, and was not present. He asked leave to introduce in evidence the discovery deposition. He told the court that he had done everything he could to get the plaintiff back for trial and that he was supposed to be there; and further, that during the lunch recess he had determined over the phone that plaintiff was "logged to come in to work at 4 or 4:30 this afternoon". Plaintiff's attorney did not know why his client was not present.

The court sustained defendant's objection to the introduction of the deposition and held that the absence of the witness (the plaintiff) was voluntary and thereby procured by the plaintiff, the party offering the deposition, and was inadmissible under the Rules of this Court. Plaintiff objected and excepted to this ruling as well as to the action of the trial court in striking the plaintiff's evidence for failure of proof and entering final judgment for the defendants. We awarded plaintiff a writ of error to this final judgment.

. . . The only question for our determination is whether or not a party under such circumstances thereby procures his own absence within the meaning of [the predecessor of present Rule 4:7(a)(4)].

Plaintiff's construction of this rule is that if a party lives within Virginia and 100 miles or less from the place of trial and then leaves the state before trial, it may be said that his absence was procured by him. But, on the contrary, if the party at the time of trial lives more than 100 miles from the place of trial, or lives out of the State of Virginia, then he may elect to attend the trial, or, if having given his deposition, as had been done in the instant case, he may elect not to attend and to use the deposition . . .

The courts of Virginia have consistently attached great weight and importance to the verdicts of juries and to findings of fact by a trial judge. This is largely upon the premise that they are in the best position to evaluate the testimony of witnesses, having had the opportunity, denied an appellate court, to observe their demeanor, appearance, candor and behavior on the witness stand. As salutary as is [the rule] which permits the use in evidence of discovery depositions, under certain specified circumstances and conditions, such depositions were never intended to be substituted for the personal appearance of party litigants or witnesses.

We think the meaning of [this Rule] is clear as to when the deposition of a witness, whether or not a party, may be used. Obviously such a deposition may be used when a party is dead, when a party is unable to attend or testify because of age, sickness, infirmity or imprisonment and under other exceptional circumstances provided for in the rule. We think it equally clear that "the absence" of the witness as used in the second condition of the rule means absence from the trial and that a party who is out of
this state or is a greater distance than 100 miles from the place of trial, may not use his own deposition as evidence at the trial unless it appears that he could not be present and the court finds the existence of any one of the enumerated conditions.

When the absence of a witness is due merely to a preference to use his deposition rather than to testify orally at the trial, the rule does not permit of its use. Absence under such conditions is in effect "procured" by the party offering the deposition. . . .

When the plaintiff failed to appear at the trial of his case he thereby voluntarily caused or brought about his absence from the trial, and he thereby prevented his examination as a witness by his own counsel and by counsel for defendants. He deprived the jury and the trial judge of the benefit of such information as they would have obtained by his presence on the witness stand.

There is no intimation in the record that plaintiff's absence was caused by illness, age, infirmity or for any reason other than his own volition. His absence was the result of an act of "will" on his part. We construe a voluntary and unexplained absence as a "procured" absence. . .

Under these circumstances the trial court properly ruled that the plaintiff had procured his own absence from the trial and was not entitled to use the discovery deposition in evidence. Absent the testimony of the plaintiff the evidence of liability was insufficient to sustain a verdict in his behalf and the court properly struck the evidence and entered judgment for the defendants.

THE STEROID-ABUSE TRIAL TAKES A SUDDEN TURN
Location Options for the Deposition

In 2005 the General Assembly passed legislation drafted by the author of these Readings to clarify the place where depositions may be taken. For the first time, the governing Code section expressly distinguishes between party and non-party depositions, and the new language clarifies some confusing older statutory wording. No substantive change in practice was intended.

Under Code § 8.01-420.4 a deposition of a party, or any witness designated under Rule 4:5(b)(6) to testify on behalf of a party, may be taken in the county or city in which suit is pending, in an adjacent county or city, at a place upon which the parties agree, or at a place that the court may, for good cause, designate. The Code goes on to specify that good cause "may include the expense or inconvenience of a non-resident party defendant appearing in one of the locations specified in this subsection." Thus the burden remains on the out-of-state defendant witness objecting to being required to come to the Commonwealth to show that the contacts, or other circumstances, raise "good cause" for allowing the witness to be deposed only at home. See Code § 8.01-420.4(A).

The default provision heretofore in the Code has been continued: "The restrictions as to parties set forth in this subsection shall not apply where no responsive pleading has been filed or an appearance otherwise made."

For depositions of non-party witnesses, the Code now provides that unless otherwise provided by the law of the jurisdiction where a non-party witness resides, a deposition of a non-party witness must be taken in the county or city where the non-party witness resides, is employed, or has his principal place of business; at a place upon which the witness and the parties to the litigation agree; or at a place that the court may, for good cause, designate. See Code § 8.01-420.4(B).

The new Code section, which is implemented in Rule 4:5 set forth above, provides as follows:

§ 8.01-420.4. Taking of depositions

A. Party Depositions. --A deposition of a party, or any witness designated under Rule 4:5(b)(6) to testify on behalf of a party, shall be taken in the county or city in which suit is pending, in an adjacent county or city, at a place upon which the parties agree, or at a place that the court may, for good cause, designate. Good cause may include the expense or inconvenience of a non-resident party defendant appearing in one of the locations specified in this subsection. The restrictions as to parties set forth in this subsection shall not apply where no responsive pleading has been filed or an appearance otherwise made.

B. Non-party Witness Depositions. --Unless otherwise provided by the law of the jurisdiction where a non-party witness resides, a deposition of a non-party witness shall be taken in the county or city where the non-party witness resides, is employed, or has his principal place of business; at a place upon which the witness and the parties to the litigation agree; or at a place that the court may, for good cause, designate.
Notes

Treating Physicians' Testimony. Under Rule 4:7(a)(4)(E) an examining or treating physician's deposition may be used whether or not the deponent is unavailable or beyond the subpoena power of the court.

Depositions by Telephone. The Court has noted that absent agreement of counsel or a court order, the conduct of a deposition of an out-of-state witness via the telephone was improper under Rule 4:5(b)(7). Gillespie v. Davis, 242 Va. 300, 410 S.E.2d 613 (1991).
D. Interrogatories

**Brief Overview**

A party may serve up to 30 written interrogatories upon another party as a matter of right. Rule 4:8(g). By leave of court, a greater number may be served. Service is effected by delivering or mailing a copy to counsel for the party to whom the interrogatories are directed, or upon the individual if there is no counsel of record for the party.

Answers to interrogatories -- or objections to all or part of them -- are due within 21 days after service of the questions. If a plaintiff serves interrogatories immediately upon the filing of suit, the defendant is not required to respond earlier than 28 days after service of process against that defendant. Answers to interrogatories are not filed with the clerk unless a party requests that step or the court so directs. On the effect of interrogatory responses as admissions see *Seymour v. City of Alexandria*, 273 Va. 661, 643 S.E.2d 198 (2007).

Prior to 2001 the text of Rule 4:8 required that the party serving interrogatories "leave space" in the text of the discovery demand for the insertion of responses to each interrogatory. The Rules drafters concluded that today it is rare for an attorney's staff to manually type answers to photocopies of the interrogatories. Hence the Rule has been streamlined to provide simply that a party answering interrogatories must restate each question, by photocopying it or otherwise, then insert the word "Answer" and immediately thereafter state the response to that question. This formulation of the response mechanics allows the party answering the interrogatories to either scan the interrogatories into a computer or to photocopy the interrogatories and then respond to each item. As under prior practice, the answering party must attach the necessary oath and certificate of service to the answers.

As part of the "E-Discovery" amendments in 2009, the Interrogatory rule, Rule 4:8 was amended to expressly authorize a responding party to designate electronically stored records in lieu of answering an Interrogatory separately. Because of the recognized potential divergence in electronic storage formats, and the expense of "converting" information from one system or format to another, Rule 4:8 was given an additional sentence providing that specification of electronically stored information may be made in lieu of an Interrogatory answer under the Rule only if the information will be made available in "a reasonably usable form or forms." See subsection (f) of the Rule.

**Text of the Rule**

The governing rule on Interrogatories is straightforward and covers all of the important steps in the process, including the responder's option to produce business records instead of an interrogatory answer, quite clearly:
Rule 4:8 Interrogatories to Parties.

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the bill of complaint or motion for judgment upon that party.

(b) Form. - The party answering the interrogatories shall restate each question, by photocopying it or otherwise, then insert the word "Answer" and immediately thereafter state the response to that question. The answering party shall attach the necessary oath and certificate of service to the answers.

(c) Filing. The interrogatories and answers and objections thereto shall not be filed in the office of the clerk unless the court directs their filing on its own initiative or upon the request of any party prior to or during the trial. For the purpose of any consideration of the sufficiency of any answer or any other question concerning the interrogatories, answers or objections, copies of those documents shall be made available to the court by counsel.

(d) Answers. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 21 days after the service of the interrogatories, except that a defendant may serve answers or objections within 28 days after service of the bill of complaint or motion for judgment upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 4:12(a) with respect to any objection to or other failure to answer an interrogatory.

(e) Scope; Use. — Interrogatories may relate to any matters which can be inquired into under Rule 4:1(b), and the answers may be used to the extent permitted by the rules of evidence and for the purposes of Rule 3:20. Only such interrogatories and the answers thereto as are offered in evidence shall become a part of the record.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(f) Option to Produce Business Records. (f) Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract
or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer can be ascertained. A specification of electronically stored information may be made under this Rule if the information will be made available in a reasonably usable form or forms.

(g) **Limitation on Interrogatories.** No party shall serve upon any other party, at any one time or cumulatively, more than thirty written interrogatories, including all parts and sub-parts without leave of court for good cause shown.
E. Production and Inspection and the "E-Discovery" Developments

"E-Discovery" Rules Implemented. In 2009 the Supreme Court of Virginia made effective a series of amendments to the discovery rules designed to recognize the importance of the discovery of electronically stored information in modern litigation, and to make provisions for the presumed operation of the basic devices in that context. Mechanisms for objection and compulsion of discovery obligations are included in the new language added to the Rules of Court. At the outset, the revised provisions include "electronically stored information" as a discoverable category of information under Rule 4:1(a). In addition, Rule 4:4 was amended in 2009 to encourage stipulations between the parties concerning electronically stored information.

A key provision of the E-Discovery rules changes is the re-writing of Rule 4:1(b)(6), which addresses claims of privilege, and subsection 4:1(b)(7), which has been created to set forth the basic options for a responding or disclosing party faced with a request for production of electronically stored information. The new language is as follows:

(6) Claims of Privilege or Protection of Trial Preparation Materials.
(i) When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.
(ii) If a party believes that a document or electronically stored information that has already been produced is privileged or its confidentiality is otherwise protected the producing party may notify any other party of such claim and the basis for the claimed privilege or protection. Upon receiving such notice, any party holding a copy of the designated material shall sequester or destroy its copies thereof, and shall not duplicate or disseminate such material pending disposition of the claim of privilege or protection by agreement, or upon motion by any party. If a receiving party has disclosed the information before being notified of the claim of privilege or other protection, that party must take reasonable steps to retrieve the designated material. The producing party must preserve the information until the claim of privilege or other protection is resolved.
(7) Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 4:1(b)(1). The court may specify conditions for the discovery, including allocation of the reasonable costs thereof.
Under Rule 4:1(b)(7) (as in federal practice under a cognate rule provision) it is clear that a responding party can avoid the obligation to provide discovery of electronically stored information from "sources that the party identifies as not reasonably accessible because of undue burden or cost." This provision contemplates a subsequent motion to compel discovery or for a protective order. In either event, the Rule places the burden upon the party from whom discovery is sought to show that the information is not reasonably accessible because of undue burden or cost. Importantly, even if that showing is made, the Rule specifies the power of the court to nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 4:1(b)(1) on alternative or less-burdensome alternatives to generate the needed information. The Rule concludes with a provision expressly stating that the court may specify conditions for the discovery, including allocation of the reasonable costs thereof to either side or between the parties on an equitable basis.

The Interrogatory rule, Rule 4:8 was amended to expressly authorize a responding party to designate electronically stored records in lieu of answering an Interrogatory separately. Further, because of the potential divergence in electronic storage formats, Rule 4:8 was given an additional sentence providing that specification of electronically stored information may be made under the Rule only if the information will be made available in "a reasonably usable form or forms."

Other important E-Discovery changes in 2009 included the revision of the document production Rule, Rule 4:9 through the addition of references to production of electronically stored information, and express freedom of a requesting party to specify the "form or forms" in which such information is to be produced. Comparable provisions are added for the responding party to object to the requested formats for production, and to propose the format or formats in which responsive information will voluntarily be produced. Subdivisons 4:9(b)(iii) provides that if a request does not specify the form or forms for producing electronically stored information, or if a responding party objects to the requested form or forms of production, a responding party must produce the information as it is ordinarily maintained if it is reasonably usable in such form or forms, or must produce the information in another form or forms in which it is reasonably usable. This subdivision of the Rule also makes it clear that a party "need not produce the same electronically stored information in more than one form."

Production of discoverable information from non-parties was separated in 2009 from former Rule 4:9 and placed in new Rule 4:9A, which has parallel provisions, adapted to the non-party situation. With particular respect to the discovery of electronically stored information, Rule 4:9A contains detailed provisions:

(c) Responding to a Subpoena; Objections; Production of Documents and Electronically Stored Information.

(1) Production of Documents. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) Electronically Stored Information.

(A) A person responding to a subpoena need not provide discovery of electronically stored information from sources the responder identifies as not reasonably accessible because of undue burden or cost. On motion to compel
production or to quash a subpoena, the person from whom production is sought under the subpoena must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order production of responsive material from such sources if the subpoenaing party shows good cause, considering the limitations of Rule 4:1(b)(1). The court may specify conditions for the production of such information, including allocation of the reasonable costs thereof.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding thereto must produce the information as it is ordinarily maintained if it is reasonably usable in such form or forms, or must produce the information in another form or forms in which it is reasonably usable. A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(3) Objections and Procedures. The court, upon written motion promptly made by the person so required to produce, or by the party against whom such production is sought, may (1) quash or modify the subpoena, or the method or form for production of electronically stored information, if the subpoena would otherwise be unduly burdensome or expensive, (2) condition denial of the motion to quash or modify upon the advancement by the party in whose behalf the subpoena is issued of some or all of the reasonable cost of producing the documents, electronically stored information and tangible things so designated and described or (3) direct that the documents and tangible things subpoenaed, including electronically stored information (unless another location for production is agreed upon by the requesting and producing parties), be returned only to the office of the clerk of the court through which such documents and tangible things are subpoenaed in which event, upon request of any party in interest, or his attorney, the clerk of such court shall permit the withdrawal of such documents and tangible things by such party or his attorney for such reasonable period of time as will permit his inspection, photographing, or copying thereof.

(4) Pre-Motion Negotiation. A motion under this Rule 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.

Because of the serious expense issues attending discovery of electronically stored information, the 2009 revisions to the Part Four Rules of Court include the addition of language in Rule 4:13, which governs pretrial conferences and the formulation of issues, to encourage focus on means to achieve such discovery while minimizing costs and burdens.
Summary of the Process

Under Rule 4:9 a party may obtain the opportunity to inspect books, documents and tangible property. Both personal and real property may be inspected (e.g., physical objects; the premises). Items may be photographed or photocopied as appropriate.

Discovery from Parties. Parties are required by the rule to cooperate in making items available. The requesting party simply propounds a request for production or inspection, setting forth individual items or categories of materials and describing them with "reasonable particularity". Any relevant items may be inspected. Leave of court is not required for inspection requests.

Response to requests for production and inspection are due 21 days after the service thereof, though a defendant served at the outset of the case need not respond prior to 28 days after the basic service of process upon that defendant. The "Response" is a document which is required to state, by paragraph or category, that inspection will be permitted or is denied as to each item sought, giving grounds for any objections to all or part of the discovery requested. The requesting party may move for relief from the court with respect to items as to which there is a failure to respond or a refusal to produce. For obvious reasons of space, neither requests to produce nor the actual materials made available for inspection are filed with the court.

Rule 4:9 provides:

Production by Parties of Documents, Electronically Stored Information, and Things; Entry on Land for Inspection and Other Purposes; Production at Trial.

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect, copy, test, or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form), or to inspect, and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 4:1(b) and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to produce any such documents or electronically stored information to the court in which the proceeding is pending at the time of trial; or (3) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 4:1(b).

(b) Procedure.

(i) Initiation of the Request. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, period and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(ii) Response. The party upon whom the request is served shall serve a written
response within 21 days after the service of the request, except that a defendant may serve a response within 28 days after service of the complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and production shall be permitted as to the remaining parts. If objection is made to the requested form or forms for producing electronically stored information — or if no form was specified in the request — the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 4:12(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A motion under this Rule 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.

(iii) Organization, Reasonable Accessibility, and Forms of Production. Unless the parties otherwise agree, or the court otherwise orders:

(A) Production of Documents. A party who produces documents for inspection either shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(B) Electronically Stored Information.

(1) Responses to a request for production of electronically stored information shall be subject to the provisions of Rules 4:1(b)(7) and 4:1(b)(8).

(2) If a request does not specify the form or forms for producing electronically stored information, or if a responding party objects to the requested form or forms of production, a responding party must produce the information as it is ordinarily maintained if it is reasonably usable in such form or forms, or must produce the information in another form or forms in which it is reasonably usable. A party need not produce the same electronically stored information in more than one form.

(iv) Proceedings Under the Uniform Interstate Depositions and Discovery Act. Production of documents and electronic records sought in Virginia pursuant to a subpoena issued under the authority of a foreign jurisdiction shall be subject to the provisions of the Uniform Interstate Depositions and Discovery Act, Virginia Code §§ 8.01-412.8 through 8.01-412.15.

(c) Proceedings on Failure or Refusal to Comply. If a party fails or refuses to obey an order made under section (b) of this Rule, the court may proceed as provided by Rule 4:12(b)(2).

(d) Filing. Requests to a party pursuant to this Rule and responses or objections shall be filed as provided in Rule 4:8(c).
Production From Nonparties Under Rule 4:9A

In 2009, as part of the revisions of the discovery rules to accommodate discovery of electronically stored information (so-called "E-discovery") – and as a change intended to clarify the application of document production and inspection obligations of non-parties, the subpoena and enforcement provisions with respect to non-parties were eliminated from Rule 4:9, and reconstituted in a freestanding provision directed solely at such disclosures sought from non-parties, numbered Rule 4:9A.

New Rule 4:9A contains many of the mechanisms formerly found in the predecessor Rule, with express new provisions on the obligations of all parties where electronically stored information is involved in production and inspection requests. The context for these E-Discovery changes is discussed in § 12.1 of this Chapter. The full text of Rule 4:9A, effective in January of 2009, is:

Rule 4:9A. Production from Non-Parties of Documents, Electronically Stored Information, and Things and Entry on Land for Inspection and Other Purposes; Production at Trial.

(a) Issuance of a Subpoena Duces Tecum. Except as provided in paragraph (d) of this Rule, a subpoena duces tecum may be issued:

(1) By the clerk of court. Upon written request therefor filed with the clerk of the court in which the action or suit is pending by counsel of record for any party or by a party having no counsel in any pending case, with a certificate that a copy thereof has been served pursuant to Rule 1:12 upon counsel of record and to parties having no counsel, the clerk shall issue to a person not a party therein a subpoena duces tecum subject to this Rule.

(2) By an attorney. In a pending civil proceeding, a subpoena duces tecum may be issued by an attorney-at-law as an officer of the court if he or she is an active member of the Virginia State Bar at the time of issuance. An attorney may not issue a subpoena duces tecum in those civil proceedings excluded in Virginia Code § 8.01-407. An attorney-issued subpoena duces tecum must be signed as if a pleading and must contain the attorney's address, telephone number and Virginia State Bar identification number. A copy of any attorney-issued subpoena duces tecum must be mailed or delivered to the clerk's office of the court in which the case is pending on the day of issuance with a certificate that a copy thereof has been served pursuant to Rule 1:12 upon counsel of record and to parties having no counsel. If time for compliance with an attorney-issued subpoena duces tecum is less than fourteen (14) days after service of the subpoena, the person to whom the subpoena is directed may serve on the party issuing the subpoena a written objection setting forth any grounds upon which such production, inspection, copying, sampling or testing should not be had. If an objection is made, the party issuing the subpoena shall not be entitled to the requested production, inspection, copying, sampling or testing, except pursuant to an order of the court in which the civil proceeding is pending. If an objection is made, the party issuing the subpoena may, upon notice to the person to whom the subpoena is directed, move for an order to compel the production, inspection, copying, sampling or testing. Upon a timely motion, the court may quash, modify or sustain the subpoena as provided above in subsection (c) of this Rule.
(b) Content of Subpoena Duces Tecum; Objections. Subject to paragraph (d) of this Rule, a subpoena duces tecum shall command the person to whom it is directed, or someone acting on his behalf, to produce the documents, electronically stored information, or designated tangible things (including writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form) designated and described in said request, and to permit the party filing such request, or someone acting in his behalf, to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 4:1(b) which are in the possession, custody or control of such person to whom the subpoena is directed, at a time and place and for the period specified in the subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(c) Responding to a Subpoena; Objections; Production of Documents and Electronically Stored Information.

(1) Production of Documents. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) Electronically Stored Information.

(A) A person responding to a subpoena need not provide discovery of electronically stored information from sources the responder identifies as not reasonably accessible because of undue burden or cost. On motion to compel production or to quash a subpoena, the person from whom production is sought under the subpoena must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order production of responsive material from such sources if the subpoenaing party shows good cause, considering the limitations of Rule 4:1(b)(1). The court may specify conditions for the production of such information, including allocation of the reasonable costs thereof.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding thereto must produce the information as it is ordinarily maintained if it is reasonably usable in such form or forms, or must produce the information in another form or forms in which it is reasonably usable. A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(3) Objections and Procedures. The court, upon written motion promptly made by the person so required to produce, or by the party against whom such production is sought, may (1) quash or modify the subpoena, or the method or form for production of electronically stored information, if the subpoena would otherwise be unduly burdensome or expensive, (2) condition denial of the motion to quash or modify upon the advancement by the party in whose behalf the subpoena is issued of some or all of the reasonable cost of producing the documents, electronically stored information and tangible things so designated and described or (3) direct that the documents and tangible things subpoenaed, including electronically stored information (unless another location for production is agreed upon by the requesting and producing parties), be returned only to the office of the clerk of the court through which such documents and
tangible things are subpoenaed in which event, upon request of any party in
interest, or his attorney, the clerk of such court shall permit the withdrawal of
such documents and tangible things by such party or his attorney for such
reasonable period of time as will permit his inspection, photographing, or
copying thereof.
(4) Pre-Motion Negotiation. A motion under this Rule 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.
(d) Certain Officials. No request to produce made pursuant to paragraph (b)
above shall be served, and no subpoena provided for in paragraph (c) above
shall issue, until prior order of the court is obtained when the party upon whom
the request is to be served or the person to whom the subpoena is to be directed
is the Governor, Lieutenant Governor, or Attorney General of this
Commonwealth, or a judge of any court thereof; the President or Vice President
of the United States; any member of the President's Cabinet; any Ambassador or
Consul; or any Military Officer on active duty holding the rank of Admiral or
General.
(e) Certain Health Records. Patient health records protected by the privacy
provisions of Code Section 32.1-127.1:03 shall be disclosed only in accordance
with the provisions and procedures prescribed by that statute.
(f) Copies of Documents and Other Subpoenaed Information.
(1) Documents. When one party to a civil proceeding subpoenas documents, the
subpoenaing party, upon receipt of the subpoenaed documents, shall, if
requested, provide true and full copies of the same to any party or to the attorney
for any other party in accordance with Code § 8.01-417(B).
(2) Electronically stored information. When one party to a civil proceeding
subpoenas and obtains electronically stored information, the subpoenaing party
shall, if requested, provide true and full copies of the same to any party or that
party's attorney, in the form the subpoenaing party received the information,
upon reimbursement of the proportionate cost of obtaining such materials.
(g) Proceedings on Failure or Refusal to Comply. If a non-party, after being
served with a subpoena issued under the provisions of this Rule, fails or refuses
to comply therewith, he may be proceeded against as for contempt of court as
provided in § 18.2-456.

An important aspect of this Rule is found in subdivision (c)(2), which directly deals
with the response and objection mechanisms applicable to non-parties. Under that
provision as set forth above, a non-party responding to a subpoena is not required to
provide discovery of electronically stored information from sources the responder
identifies as not reasonably accessible because of undue burden or cost. On motion to
compel production or to quash a subpoena, the non-party from whom production is
sought under the subpoena has the burden to show that the information sought is not
reasonably accessible because of undue burden or cost. Even if that showing is made,
however, the Rule expressly empowers the court to nonetheless order production of
responsive material from such sources if the subpoenaing party shows good cause,
considering the limitations of Rule 4:1(b)(1). The court may specify conditions for the
production of such information, including allocation of the reasonable costs thereof. It is anticipated that with respect to non-parties, who have no stake in the pending litigation, the courts will look favorably on provisions that will place the financial burden for producing needed information upon the parties to the case, rather than the non-party who holds the information.

Another important aspect of the new provisions in Rule 4:9A is the way the Rule deals with a subpoena that does not specify the form or forms for producing electronically stored information. In that situation, a non-party responding to the discovery demand must produce the information as it is ordinarily maintained if it is reasonably usable in such form or forms, or must produce the information in another form or forms in which it is reasonably usable. The Rule also contains an express statement that a non-party responding to a subpoena need not produce the same electronically stored information in more than one form.
F. Physical and Mental Examinations

Introduction to the Examination and Report Process

Because of the intrusiveness and sensitivity of physical or mental examinations, a party must obtain leave of court in the form of an authorizing order prior to taking discovery in this fashion. A motion showing good cause for the discovery is required. The court order, if the discovery is approved, must specify the time, place, manner and scope of the examination(s) authorized, and should identify the physician(s) who will conduct the examination. The report of the examining health care professional is lodged with the court, but is not admissible as evidence unless offered by the party who was examined. Note also, if the party examined elects to take the deposition of the examining physician in preparation for expected trial testimony, the party examined is deemed to have waived any privilege that would otherwise obtain for communications between the examined party and his own physicians with respect to conditions that are in controversy in the suit. See Rule 4:10(c)(2) and Code § 8.01-399.

Text of the Physical Exam and Mental Exam Rule

Rule 4:10 Physical and Mental Examination of Persons.

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending, upon motion of an adverse party, may order the party to submit to a physical or mental examination by one or more health care providers, as defined in § 8.01-581.1, employed by the moving party or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties, shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and shall fix the time for filing the report and furnishing the copies.

(b) Out-of-State Examiners. Examiners named in such an order shall be licensed to practice in, and shall be residents of or have an office in, this Commonwealth. However, notwithstanding the reference to licensure by this Commonwealth in the definition of health care providers in § 8.01-581.1, the court may, in the exercise of its sound discretion and upon determining that the ends of justice will be served, order an examination by one who is not licensed to practice in, is not a resident of, and does not have an office in, this Commonwealth but who is duly licensed in his or her jurisdiction.

(c) Report of Examiner.

(1) A written report of the examination shall be made by the examiner to the court and filed with the clerk thereof before the trial and a copy furnished to each party. The report shall be detailed, setting out the findings of
the examiner, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition.

(2) The written report of the examination so filed with the clerk may be read into evidence if offered by the party who submitted to the examination. A party examined who takes the deposition of any examiner who shall have conducted an examination ordered pursuant to this Rule, waives any privilege that might have been asserted in that action or in any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examination made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of a health care examiner or the taking of a deposition of such examiner in accordance with the provisions of any other Rule.

Note

Effect of Examination, Report, Deposition of Physician. The physician who examines a party pursuant to the rule will file a report that is lodged with the court. The report has no role in the hearing unless the person examined decides to use it. If the person examined seeks further insight into the planned testimony of the examining physician, a deposition may be sought. The price of the deposition, however, is that the physician patient privilege applicable to communications about the same "condition" between the examinee and his or her own physicians will be deemed waived. Rule 4:10(c)(2).
WHAT'S REALLY GOING ON
BEHIND THE BENCH
Application of Code § 8.01-399

The physician-patient privilege, and several related notions, are embodied in this code section, which has been amended 8 times in the past 10 years. In 1997 the Supreme Court held that a prior version of the code section required court permission for disclosure of patient information, even when it was plausible that the patient had placed her medical condition in issue in a litigation by suing. *Fairfax Hospital v. Curtis*, 254 Va. 437, 492 S.E.2d 642 (1997). On the other hand, in the same year the Court held that the same code provision did not prevent disclosure of information by a physician in the protection of the physician’s legal rights. *Archambault v. Roller*, 254 Va. 210, 491 S.E.2d 729 (1997). This Code provision is often amended.

§ 8.01-399. Communications between physicians and patients

A. Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.

B. If the physical or mental condition of the patient is at issue in a civil action, the diagnosis or treatment plan of the practitioner, as documented in the patient's medical record, during the time of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial. ** **

D. Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient 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. However, the prohibition of this subsection shall not apply to:

1. Communication 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 practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions;

2. 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; or

3. Contact between a lawyer or his agent and a nonphysician 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 that 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 a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony. * * * *
G. Requests for Admissions

The Procedure

Virginia Rule 4:11 adopts Rule 36 of the Federal Rules of Civil Procedure almost verbatim, changing only the time schedule. Under the Virginia rule, a party may at any time propound requests for admissions in separate numbered paragraphs and the adversary must respond thereto in writing within 21 days (again, no sooner than 28 days from the initial service of process against a defendant).

Requests are sometimes viewed as not a pure "discovery" device since a party must know facts to place them in a request for admissions. However, this little-used tool can be most helpful in obtaining admissions of facts that would be cumbersome to prove at trial, thus obviating the need for exhibits or certain witnesses. The device also is frequently used by annexing copies of documents, as a means of obtaining a stipulation from adversaries that there is no issue as to the genuineness or foundation of planned exhibits, thus speeding and easing the presentation of those exhibits at the trial.

The proper response to a set of requests for admissions as a document responding paragraph by paragraph to the requests, admitting, denying or stating an inability to admit or deny. If the party served with requests fails to respond, the items in the request are taken as admitted.

For the effect of this and other discovery devices, see TransiLift Equipment v. Cunningham, below.

Governing Rule – Similar to Federal Rule 36

The Rule, which contains important provisions directly lifted from Federal Rule 36, reads as follows:

Rule 4:11 Requests for Admission.

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 4:1(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the bill of complaint or motion for judgment upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 21 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be
required to serve answers or objections before the expiration of 28 days after service of the bill of complaint or motion for judgment upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 4:12(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this Rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 4:13 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(c) Filing. Requests for admissions and answers or objections shall be served and filed as provided in Rule 4:8.

(d) Part of Record. Only such requests for admissions and the answers thereto as are offered in evidence shall become a part of the record.
JUSTICE CARRICO delivered the opinion of the Court.

Rule 4:12(c)\(^{25}\) provides that a trial court shall award attorney's fees and expenses to a party who is put to the necessity of proof by his opponent's failure to admit the truth of a matter when requested pursuant to Rule 4:11, unless the party failing to admit has reasonable ground to believe that he might prevail on the matter. In this case, the trial court awarded the appellee, Jerald Jones, attorney's fees of $250 and expenses of $1753.40 against the appellant, Erie Insurance Exchange, because of the latter's failure to make certain requested admissions.

Jones was injured in an automobile accident on October 20, 1983. He filed a motion for judgment against Margaret Mary Evans alleging that her negligence caused his injuries. Process was served on Evans, but she failed to respond. Process also was served on Nationwide Mutual Insurance Company and Erie Insurance Exchange, as uninsured motorist carriers, and each filed a response in its own name.\(^{26}\)

After the parties were at issue, Jones served requests for admission upon Erie. The latter admitted five requests relating to Evans' liability but denied thirty-five others concerning the nature and extent of Jones' injuries, the treatment he received, and the expenses he incurred.

On the eve of trial, Nationwide reached a settlement with Jones. The next day, the case went to trial before a jury, with Erie defending Evans. The trial court entered summary judgment in favor of Jones on the question of liability, and the jury awarded him $200,000 in damages.

Following return of the verdict, Jones filed a motion citing the thirty-five requests for admission which were denied by Erie and asking that he be allowed attorney's fees and expenses for making "his proofs concerning his injuries [and] his medical expenses." As indicated previously, the trial court granted the motion and made the allowances requested by Jones. On appeal, the sole question for decision is whether the trial court erred in making the allowances.

\(^{25}\) In pertinent part, Rule 4:12(c) provides:
If a party fails to admit . . . the truth of any matter as requested under Rule 4:11, and if the party requesting the admissions thereafter proves . . . the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that . . . (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter. . . .

\(^{26}\) At the time of the accident, Jones was operating a vehicle owned by his employer, upon which Nationwide provided uninsured motorist coverage. Erie provided similar coverage on Jones' personally owned vehicle.
The controversy centers on three of the requests for admission which were denied by Erie. In these three requests, Jones asked Erie to admit:

10. As a proximate result of Margaret Evans' negligence in causing the accident on 10/20/83, Jerald Jones sustained a herniated lumbar disc.

12. As a result of the herniated disc proximately caused by Margaret Evans' negligence, Jerald Jones was caused to undergo a decompression L4-S1 and arthrodesis L4-S2.

17. In an attempt to be cured of the injuries sustained as a proximate result of the collision, Mr. Jones was admitted to National Orthopaedic & Rehabilitation Hospital from 11/28/83 to 12/10/83 with a diagnosis of herniation nucleus pulposus L5-S1.

Essentially, what Jones asked Erie to admit in these three requests was that he had suffered a herniated disc in the accident and that, as a consequence, he had been forced to undergo surgery and submit to other treatment, for which he incurred medical expense. It was Erie's position throughout the litigation, however, that Jones had not suffered a herniated disc and, therefore, that the treatment he received was not necessitated by the accident. It was warranted in taking this position and denying requests Nos. 10, 12, and 17, Erie maintains, in light of the expert testimony submitted by Jones himself.

At trial, Jones offered the testimony of his initial treating physician, Gerard Engh. Doctor Engh conducted a series of tests, and he testified that "the tests were all quite positive and all in agreement that [Jones] did have a herniated disk." When Jones did not respond to "conservative treatment," however, Dr. Engh considered the necessity of surgery and referred Jones to Dr. H. Rolf Noer, an orthopedic surgeon.

Jones also offered Dr. Noer's testimony at trial. The doctor testified that he first "thought" Jones "probably had disk disease," and that he recommended surgery. Upon performing the surgery, however, Dr. Noer found he "was misled"; Jones did not have "a disk hernia," but, instead, suffered from "spinal stenosis," a condition described by the doctor as a narrowing of the "channel through which . . . [a]ll of the nerves pass." When asked on cross-examination whether the "lessening in size" of the channel was caused by Jones' accident, Dr. Noer responded that he did not know.
We think these statements of Dr. Noer show clearly that Erie had a reasonable basis for failing to admit Jones had a herniated disc. Indeed, when Dr. Noer's testimony is viewed alongside Dr. Engh's, a sharp conflict is revealed in the opinions of the two experts on the question whether Jones suffered a herniated disc, and Erie cannot be faulted for relying upon the opinion which most favors its position.

Jones argues, however, that even though Erie may have had a reasonable basis for denying he suffered a herniated disc in the accident, it should have admitted those portions of the requests for admission about which there could be no dispute. Consequently, Jones says, the trial court properly imposed sanctions upon Erie for failing to admit that he suffered serious injuries in the accident, that the treatment he received was necessitated by the accident, and that he incurred expenses in an attempt to be cured.\footnote{The question of Jones' medical expenses merits only passing reference. Erie admitted at trial the "genuineness and . . . reasonableness" of Jones' medical bills, and Jones knew well before trial that Erie intended to stipulate "to the authenticity of [his] medical bills and the reasonableness of the charges for the services rendered," although not to the "causation" for the charges.}

Under Rule 4:11(a), a party upon whom requests for admission are served has a "good faith" duty to "specify so much of [a request] as is true and qualify or deny the remainder." But we think there is a reciprocal duty upon the party requesting admissions to phrase his requests with clarity and fairness, so that the other party can safely "specify so much of [a request] as is true" without conceding away a disputed point.

Jones' requests for admission did not conform to the necessary standard of clarity and fairness. Jones did not ask Erie for the mere admission that he had sustained serious injuries in the accident. Rather, he asked Erie to concur in a specific medical diagnosis which he knew had been proven inaccurate. Furthermore, Jones tied his requests relating to medical treatment into the same inaccurate diagnosis, placing Erie at risk of conceding the accuracy of the diagnosis if it admitted the requests concerning treatment. Under the circumstances, we do not think Erie's failure to make a partial admission concerning Jones' injuries and treatment constituted a breach of good faith.

We agree with Jones that in deciding whether to impose the sanctions authorized by Rule 4:12(c), a trial court is vested with broad discretion. But where, as here, the party failing to admit the truth of a matter clearly has reasonable ground to believe that he might prevail on the matter, it is an abuse of discretion to impose the sanctions. Accordingly, the trial court's award to Jones of attorney's fees and expenses will be reversed, and final judgment with respect to that award will be entered here in Erie's favor.
Withdrawal or Amendment of Admissions – Who's Pulling the Rug Out?

SHAHEEN v. COUNTY OF MATHEWS

[In response to erection of barriers and "no trespassing" signs by the owners of riverfront land, a county filed a bill of complaint asking the circuit court to affirm its fee simple ownership of a landing and road for access to the water, or to affirm the existence of an easement for public use of the landing and road. During discovery the landowners served two sets of requests for admissions, which were not timely responded to. The county filed a fairly prompt motion requesting that its late answers be accepted, and the trial court eventually permitted the responses to be filed, to avoid having the county inadvertently admit away the merits of the case. The Supreme Court approved the permission granted to relieve the county of the admissions, stating as follows:

The Shaheens acknowledge that a trial court has discretion under Rule 4:11 with regard to whether a party should be allowed to amend or withdraw admissions. However, they assert that, in this case, the circuit court abused its discretion by allowing the County to file responses to two sets of requests for admissions when those responses were, according to the Shaheens' calculations, "71" and "24" days late, respectively, and the County did not offer any reason or excuse for its tardiness. Accordingly, the Shaheens request this Court to reverse the judgment of the circuit court and hold that the requests for admissions were deemed admitted. The issue before us is whether the circuit court abused its discretion in allowing the County to withdraw the admissions.

Several provisions of Rule 4:11 are relevant to this question. Pursuant to Rule 4:11(a), "each matter of which an admission is requested" is deemed admitted if "the party to whom the request is directed" does not serve "upon the party requesting the admission a written answer or objection addressed to the matter" within 21 days after service of the request. Any matter admitted under the provisions of Rule 4:11 is "conclusively established unless the court on motion permits withdrawal or amendment of the admission." Rule 4:11(b). A trial court's discretion to permit such withdrawal or amendment must be exercised within certain parameters: (1) "when the presentation of the merits of the action will be subserved thereby;" and (2) "the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." Rule 4:11(b); see American Automobile Ass'n v. AAA Legal Clinic of Jefferson Crooke, P.C., 930 F.2d 1117, 1119 (5th Cir. 1991); Farr Man & Co., Inc. v. M/V Rozita, 903 F.2d 871, 875-76 (1st Cir. 1990); Farm Credit Bank of Omaha v. McLaughlin, 474 N.W.2d 883, 887 (N.D. 1991). 28

Some courts have referred to these parameters as a "two-part test." E.g., Perez v. Miami-Dade County, 297 F.3d 1255, 1264 (11th Cir. 2002). . . This test, which we

adopt, "'emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.' " Perez, 297 F.3d at 1265 (quoting Smith v. First Nat'l Bank of Atlanta, 837 F.2d 1575, 1577-78 (11th Cir. 1988)).

Under the first prong of this two-part test, the moving party has the burden to demonstrate that withdrawal or amendment of an admission will "subserve" the presentation of the merits of the action. Gary Mun. Airport Auth. v. Peters, 550 N.E.2d 828, 831 (Ind. App. 1990); Farm Credit, 474 N.W.2d at 888. This aspect of the test is "satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case." Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995).

The record in this case demonstrates that the County satisfied the first prong of the two-part test. The circuit court found that the admissions, viewed as a whole, would result in the County's "admitting away the case," and we agree. For example, the Shaheens requested the County to admit that it had not recorded in the land records of Mathews County the final order in the Nelson suit and that there was no index reference in the land records of Mathews County reflecting the County's ownership interest in the road and landing site at Auburn. The County admitted by default matters that were at the core of its case. Thus, allowing the County to withdraw the admissions aided in the "'ascertainment of the truth and the development of the merits.' " Smith, 837 F.2d at 1577 (quoting with approval the district court's opinion in that case). The admissions in this case, if not withdrawn, would have "practically eliminated any presentation of the merits of the case." Hadley, 45 F.3d at 1348.

The second prong of the two-part test in Rule 4:11(b) requires the non-moving party to demonstrate that amendment or withdrawal of an admission will prejudice that party in maintaining the action or a defense. This prejudice has been described as not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.[Numerous citations omitted.]

In this case, the Shaheens did not establish this type of prejudice. Instead, the Shaheens focused on the lateness of the County's responses to the requests for admissions and the unfairness of allowing the County to withdraw the admissions less than 48 hours before commencement of the trial. They did not demonstrate that they would have difficulty in the presentation of their defense or that they were less able to obtain the evidence needed to prove the matters that had been admitted.

Furthermore, the court recessed for several months in order for the Shaheens to present additional evidence regarding the withdrawn admissions and required the County to bear certain costs to facilitate the Shaheens' presentation of that evidence. The court also noted that the County had responded to the requests for admissions "with great deliberation" and that the County, at one point, had opened its file to the Shaheens. Any inconvenience suffered by the Shaheens did not involve the type or level of prejudice that would have justified a denial of the County's motion to withdraw or amend the admissions.
Therefore, we hold that the circuit court did not abuse its discretion in allowing the County to withdraw and amend the admissions since those admissions effectively eliminated presentation of the case on its merits and the Shaheens did not show that they would be prejudiced in maintaining their defense on the merits. Our decision today does not diminish the seriousness of requests for admissions or the requirements for prompt responses. The purpose of Rule 4:11 is to expedite a trial by narrowing the contested facts and issues, but the rule should not be used as a weapon "with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements." Perez, 297 F.3d at 1268. Even though the consequences of failing to comply with the requirements of Rule 4:11 are harsh, a party who does so should not readily escape those consequences.
Note on Amendment of Admissions

In addition to the withdrawal of admissions, there is a possibility in Virginia law that responses to admissions can be amended. Rule 4:11(b) states that "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." The permissive word "may" makes the court's decision on the issue discretionary. A trial court's decision not to grant permission to amend a party's prior response to a request for admission is reviewed under an abuse of discretion standard.

The Virginia Supreme Court has held that Rule 4:11(b) creates a two-prong test within which the trial court must exercise its discretion regarding the amendment of a prior response to a request for admission. The first factor is whether the amendment will permit the parties to better address the merits of their claims or defenses. The second aspect is the requirement that the non-moving party to demonstrate that amendment or withdrawal of an admission will prejudice that party. The Court held that the requisite prejudice may occur because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions. Thus where plaintiffs argued to the trial court that the defendants' motion to amend came only three days before trial and that they had not prepared to prove particular matters of fact addressed in the requests for admissions, did not abuse its discretion in denying the motion as prejudicial to the plaintiffs. See *Perel v. Brannan*, 267 Va. 691, 594 S.E.2d 899 (2004).
FOOD LION, INC. v. MELTON

[Plaintiff sued a grocery chain alleging intentional infliction of emotional distress, defamation, insulting words, false imprisonment, and negligence, all relating to the fact that she was accused of stealing a package of meat, but none was found on her person. The defendant admitted, initially, that the "loss prevention representative" who accosted plaintiff was its agent, but was later granted leave to amend the responses so as to deny that he was their agent. At trial plaintiff sought to make use of the withdrawn admissions as "admissions" in whatever sense Virginia law allows.]

Melton . . . argues that the trial court erred in excluding evidence, as part of her case in chief, of Food Lion's original admissions that the man who accosted her was a Food Lion employee acting within the scope of his employment. Melton contends that, although the trial court later permitted Food Lion to amend these responses, the original responses nevertheless retained their character as admissions in the case.

In response, Food Lion asserts that, even if the trial court erred in refusing to allow Melton to introduce these admissions into evidence, any such error was harmless, because the jury learned the substance of these admissions during Melton's cross-examination of Derrick Slater. Further, since the trial court did not instruct the jury that this information could be considered only for impeachment purposes, Food Lion argues that Melton was not prejudiced by the trial court's ruling. We disagree with Food Lion.

We have not been called upon previously to address the issue whether admissions made by written answer to a request under Rule 4:11, which are thereafter amended under Rule 4:11(b), may be introduced as substantive evidence in the trial of the pending action. The effect of these admissions is governed by Rule 4:11(b), which provides in relevant part:

Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . . The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.
In this case, since Food Lion was permitted to amend its initial responses, the original admissions could not be used to establish conclusively that Melton was accosted by a Food Lion employee acting within the scope of his employment. Cf. State Farm Mut. Ins. Co. v. Haines, 250 Va. 458 S.E.2d 285 (1995)(decided this day). Thus, the matters addressed in those admissions were returned to the case as issues Melton was required to prove. However, we hold that Melton was entitled to introduce as substantive evidence Food Lion's original responses, since Rule 4:11 contains no provision prohibiting such a use of admissions that have been amended with leave of court. Therefore, we conclude that the trial court erred in barring Melton from introducing those admissions into evidence as part of her case in chief.

We reject Food Lion's contention that the exclusion of this evidence from Melton's case in chief was harmless error. Although these written admissions were not conclusive of the matters that were addressed, they were deliberately made and thus provided evidence of a persuasive nature that may have furnished the strongest and most convincing evidence of truth. See Tyree v. Lariew, 208 Va. 382, 385, 158 S.E.2d 140, 143 (1967); Watson v. Coles, 170 Va. 141, 150, 195 S.E. 506, 509 (1938). The weight to be given such admissions was an issue for the jury's determination. Tyree, 208 Va. at 385, 158 S.E.2d at 143. Therefore, we hold that Melton was prejudiced by the trial court's ruling. Further, since this error affected the presentation of evidence on the four counts that are the subject of this appeal, Melton is entitled to a new trial on all these counts.
H. Use of Discovered Matter at Trial

What's Conclusive (or not) and What Must Be Offered in Court – Waiver Problems Too

TRANSILIFT EQUIPMENT, LTD. v. CUNNINGHAM
234 Va. 84, 360 S.E.2d 183 (1987)

STEPHENSON, J., delivered the opinion of the Court.

This is an appeal from a judgment in a products liability case. A jury returned a verdict in favor of Warren Wayne Cunningham against TransiLift Equipment, Ltd. (TransiLift), for $255,000, and the trial court entered judgment on the verdict. In this appeal, TransiLift contends that the judgment should be reversed and final judgment entered in its favor because

Cunningham made pretrial discovery admissions that conclusively established facts inconsistent with his theory of defect and causation. . .

Cunningham sued Greater Lynchburg Transit Company (Transit Company), TransiLift, and Muncie Reclamation and Supply (Muncie). He alleged that he was injured when the wheelchair in which he was seated was thrown backwards off a lift for handicapped bus passengers. The lift was manufactured by TransiLift, sold by Muncie, and operated by Transit Company. Cunningham's action against TransiLift and Muncie sounded in warranty and negligence; his suit against Transit Company was for negligent operation of the lift. Cunningham took a nonsuit as to Muncie prior to trial and a nonsuit as to Transit Company after he rested his case.

An employee of TransiLift installed the lift on a bus owned by Transit Company. The lift is a device that forms from the steps on a bus. It is designed so that a bus driver can convert the steps into a platform that can be lowered and raised, thereby allowing wheelchair passengers to board the bus.

A bus driver can operate the lift by using a control that is mounted on the dashboard of the bus to the right of the steering wheel. When a wheelchair passenger desires to board the bus, the driver operates the lift as follows: After turning on the main power switch, the driver pulls the "steps-platform" switch outward and to the right, causing the steps to convert into a platform that forms at the floor level of the bus. He then lowers the platform to ground level by pushing downward on the "up-down" switch. When the platform reaches ground level, the wheelchair passenger rolls onto the platform. The driver then raises the platform back to floor level by pushing upward on the "up-down" switch. After the wheelchair passenger has rolled his wheelchair onto the bus, the driver reconverts the platform into steps by pulling the "steps-platform" switch outward and to the left. Finally, he turns off the power switch.

A person also may operate the lift by using electrical override controls located in the floor of the bus immediately behind the right front wheel well. These controls allow the operator to bypass a malfunction in the device.
After the lift had been installed, Transit Company decided to demonstrate its operation for the news media. Transit Company asked Cunningham, who was and still is a quadriplegic confined to a wheelchair, to participate in the demonstration, and he agreed to do so.

On April 28, 1980, the day of the accident, a Lynchburg television station film crew was present to film the demonstration. In addition to Cunningham, three Transit Company employees were present: Sam Smith, the General Manager, Rick Taylor, the Assistant General Manager, and Walter Apperson, a supervisor of bus operators.

When the demonstration began, Apperson operated the device from the driver's seat with the dash-mounted controls. He first caused the device to go through a complete cycle (from steps to platform and back to steps) without having anyone on the lift. The lift worked perfectly.

Apperson then converted the steps into a platform, lowered it to ground level, and Cunningham rolled his wheelchair onto the lift. Apperson raised the lift to the floor level of the bus, where it stopped. He then lowered Cunningham to the ground. The lift worked properly. As Apperson began to raise Cunningham a second time, the lift began to fold and went halfway into the "step mode," throwing Cunningham and his wheelchair backwards off the lift and onto the ground.

After Cunningham had been helped back into his wheelchair, Smith approached him and said "human error" had caused the accident. Smith asked Cunningham if he felt like continuing with the demonstration. Cunningham agreed to participate in a second demonstration.

Because Smith could not make the lift work from the driver's controls, he used the override controls in the floor of the bus. Using these controls, the lift raised and lowered Cunningham without incident.

After the accident, TransiLift's General Manager, Robert West, inspected the device. West observed that although the dash-mounted controls would make a platform and lower the lift, only the electrical override controls would raise the platform or allow it to be stored back into steps at floor level.
After removing the cover of a sealed electrical control box located inside the power module, West discovered that an electrical terminal connection had become disengaged. West explained that the "terminal fork, itself, had not become disengaged, but rather the insulated conductor had become separated from the mechanically crimped terminal fork."

After "[a] new terminal fork was reinstalled and reconnected to the respective terminal," the lift properly performed all of its design functions from the dash-mounted controls. West concluded that the disengaged wire had caused the device to malfunction when operated from the driver's seat using the dash-mounted controls.

Cunningham called Bernard Cooper, a consulting mechanical and electrical engineer, as an expert witness. Based upon West's findings and his own inspection, Cooper opined that the accident occurred when the wire became disengaged from its proper connector and made contact with another terminal in the electrical control box, causing the lift to drop suddenly and to begin forming steps. Cooper conceded, however, that after this occurred, the lift could not have been raised by using the dash-mounted controls.

TransiLift first contends in this appeal that Cunningham cannot be allowed to rely on portions of his trial testimony that tend to prove facts different from facts established by certain responses to requests for admissions he made pursuant to Rule 4:11. Thus, our task is to determine whether, under the circumstances of this case, Cunningham is bound by his pretrial responses as a matter of law.

The pertinent facts and circumstances germane to this inquiry are as follows: Cunningham gave certain answers in pretrial discovery, some by answers to interrogatories, Rule 4:8, and others by depositions, Rule 4:5. In those discovery procedures, Cunningham stated that Sam Smith operated the lift after the accident from the dash-mounted controls and the lift functioned normally.

He also stated that while he was on the lift and the platform had been raised to floor level, Smith was unable to lower the lift using the driver's controls and lowered him by using the override controls.

Subsequently, TransiLift filed requests for admissions and asked Cunningham to state whether his deposition statements and interrogatory answers were true and accurate. Because Cunningham either expressly admitted that these answers were correct or failed to respond within 21 days, the requests were deemed to have been admitted. See Rule 4:11(a).

At trial, however, while being cross-examined by TransiLift's counsel, Cunningham stated that he did not see Smith operate the lift from the driver's controls after the accident. Cunningham testified that following the accident, Smith operated the lift from the override controls in the floor of the bus.

Cunningham's expert had testified earlier in the trial that if his theory of the accident's cause was correct, Smith could not have operated the lift after the accident by using the driver's controls. Thus, TransiLift asserts, if Cunningham is held to his pretrial admissions, the facts that they established "render [Cunningham's] expert's theory of defect and causation impossible" and Cunningham's case fails as a matter of law.
TransiLift makes a three-pronged argument in support of its contention that Cunningham cannot be allowed to rely upon trial testimony that conflicts with his pretrial statements. First, it asserts that the matters admitted under Rule 4:11(b) are conclusively established. Second, TransiLift argues that Cunningham is estopped from testifying contrary to his pretrial admissions. Finally, it claims that Cunningham is bound by his pretrial statements under the rule of Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922).


The crucial question in the present case is whether the statements of fact contained in the admissions Cunningham made pursuant to Rule 4:11 were "conclusively established." TransiLift contends that the responses were conclusive and binding upon Cunningham when they were "filed with the clerk of the court." At that time, TransiLift asserts, they became "a part of the record," and there was no reason to introduce them into evidence. [Filing of responses has since been dropped from the procedure, and Rule 4:11 has been amended since the trial of this case to provide that "[o]nly such requests for admissions and the answers thereto as are offered in evidence shall become a part of the record." Rule 4:11(d).] TransiLift reasons that because the responses were binding upon Cunningham, they could not be waived at trial. Cunningham, on the other hand, contends that his responses were not binding upon him because TransiLift waived their conclusive effect in two ways: (1) by failing to introduce the statements as responses to requests for admissions into evidence at trial, and (2) by failing to object to Cunningham's trial testimony that was contrary to his responses. We have not previously addressed either of Cunningham's waiver contentions in the context of Rule 4:11.


A practical rationale exists for the rule that a party who wishes to rely on Rule 4:11 must introduce the admissions into evidence. If admissions are not offered for introduction into evidence, the trial judge would not know whether to disregard the admissions or to tell the jury to consider the admitted facts as conclusively established.

Courts in other jurisdictions have held that a party waives his right to rely on the conclusive effect of responses to requests for admissions when he permits the party who made the responses to testify at trial, without objection, contrary to his responses. See e.g., Foellmi v. Smith, 15 Wis.2d 274, 289-90, 112 N.W.2d 712, 719-20 (1962) (party waived right to rely on facts deemed admitted because party did not ground objection on claim that contrary testimony was precluded by a late response to a notice to admit).

This waiver principle is consistent with our contemporaneous objection rule. That rule provides that unless a party timely objects to the admission of evidence, he waives
the objection, and the fact finder may consider the evidence, although it may have been otherwise inadmissible.

In the present case, TransiLift did not introduce into evidence Cunningham's answers to the requests for admissions as Rule 4:11 admissions. Indeed, TransiLift did not even inform the trial court that it was relying upon Rule 4:11 admissions until after the jury had returned its verdict.

Additionally, TransiLift not only failed to object to Cunningham's testimony but also elicited such testimony from Cunningham for the first time during cross-examination. Thus, TransiLift itself placed into controversy and fully litigated facts that it earlier had removed from dispute. Rule 4:11 does not obviate the contemporaneous objection requirement. See Rule 4:0(b) ("No provision of any of the Rules in this Part Four shall affect the practice of taking evidence at trial in any action; . . .").

Consequently, we hold that in the circumstances of this case, TransiLift waived any binding and conclusive effect that Cunningham's deposition statements and interrogatory answers may have had pursuant to Rule 4:11(b) by failing to introduce the statements into evidence as responses to requests for admissions and by failing to object to the introduction of contrary testimony. Were we to hold otherwise, we would defeat the very purpose that Rule 4:11 was designed to achieve.

In its second argument, TransiLift contends that Cunningham is estopped from testifying contrary to his pretrial admissions. TransiLift relies on Winslow v. Scaife, 224 Va. 647, 299 S.E.2d 354 (1983), and other progeny of Burch v. Grace Street Bldg. Corp., 168 Va. 329, 191 S.E. 672 (1937), to argue that a litigant cannot assume inconsistent and mutually contradictory positions. We have no quarrel with the soundness of the estoppel principle; however, we do not agree that the principle applies here.

Although TransiLift waived the conclusive effect of Cunningham's responses to the requests for admissions, we still must consider the effect of the pretrial admissions he made in his discovery depositions and interrogatory answers. Unlike binding admissions made pursuant to Rule 4:11(b), discovery depositions and answers to interrogatories generally do not conclusively bind a party. Indeed, Rule 4:7(c) provides that "[a]t the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party."

While not conclusive, depositions and answers to interrogatories are admissible at trial for impeachment purposes and as substantive evidence. See Troyer v. Troyer, 231 Va. 90, 94-95 n.1, 341 S.E.2d 182, 185 n.1 (1986) (deposition admissible as party admission); Horne v. Milgrim, 226 Va. 133, 138, 306 S.E.2d 893, 895 (1983) (deposition admissible as substantive evidence); M'Farland v. Hunter, 35 Va. (8 Leigh) 489, 497 (1836) (answers to interrogatories not conclusive when introduced into evidence at trial).

Moreover, a litigant-witness has the right to explain or clarify his testimony, including previously entered deposition statements and interrogatory answers. See Ford Motor Co. v. Bartholomew, 224 Va. 421, 431, 297 S.E.2d 675, 680 (1982). Resolution of any inconsistencies and discrepancies is peculiarly within the province of the jury. VEPCO v. Mabin, 203 Va. 490, 493-94, 125 S.E.2d 145, 148 (1962).
In the present case, TransiLift's counsel vigorously cross-examined Cunningham on the discrepancy between his pretrial discovery statements and testimony at trial, and the jury had the right to resolve the conflict in Cunningham's favor. Because Cunningham's deposition statements and answers to interrogatories were not conclusive, we hold that he was not estopped from explaining and clarifying the contradiction.

In the third prong of its argument, TransiLift says that the rule in Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922), binds Cunningham to his unequivocal pretrial statement that Smith operated the lift from the driver's seat using the dash-mounted controls after the accident. Smith and Apperson, however, testified that the dash-mounted controls would not operate the lift after the accident. Cunningham's expert testified that if the lift was operable from the driver's seat after the accident, operator error, not mechanical defect, caused the lift to malfunction. TransiLift argues that Cunningham cannot rely on the testimony of his witnesses to contradict his unambiguous pretrial statements; therefore, Cunningham's claim that a mechanical defect caused the accident is precluded as a matter of law.

We assume without deciding that the rule in Massie v. Firmstone applies to a litigant's deposition statements and answers to interrogatories; nevertheless, we do not agree that the rule applies in this case.

The Massie doctrine is not to be read as a rule of thumb, categorical, absolute, and universally applicable. By definition, it applies only to "statements of fact" made by the litigant, to statements of facts "within his own knowledge", and to "the necessary inferences therefrom".

[T]he rule in Massie [does not] apply to an adverse statement standing in isolation from the litigant's testimony as a whole. Baines v. Parker and Gladding, 217 Va. 100, 104, 105, 225 S.E.2d 403, 406-07 (1976). Thus, "[a] damaging statement made in one part of [a litigant's] testimony must be considered in the light of an explanation of such statement made in a later part of his testimony . . . . And it is generally for the jury to determine whether it will accept such explanation or clarification." Mabin, 203 Va. at 494, 125 S.E.2d at 148. . . .

The accident occurred over four years prior to trial. Cunningham answered the first interrogatories almost two years after the accident occurred and gave his first deposition almost three years after the accident. When asked to explain the discrepancy between his pretrial statements and his in-court testimony, Cunningham said that after he reviewed a video tape of the accident that was shown during the trial, he realized he had been mistaken about the place from which Smith had operated the lift controls. He explained that he had reviewed the video tape on two separate occasions shortly after the accident.

The Massie rule "is intended to compel the exercise of good faith on the part of a litigant not to penalize him for honest mistakes or infirmities of memory." Burruss v. Suddith, 187 Va. 473, 482, 47 S.E.2d 546, 550 (1948). We cannot say as a matter of law that Cunningham's pretrial statements and in-court testimony, when considered as a whole, clearly and unequivocally establish that his claim is meritless. . . .
THAT'S RIGHT, THE WHOLE THING WAS A SCAM... I'D BLOW DOWN THEIR HOUSES AND WE'D SPLIT THE INSURANCE MONEY.
Note on *TransLift* and the Adverse Witness

In *Smith v. Smith*, 254 Va. 99, 487 S.E.2d 212 (1997) the Court applied the waiver of objection notion set forth in *TransLift* to a situation where the plaintiff called the defendant spouse as an adverse witness, at which point he testified in support of a jurisdictional defense not previously advanced, and indeed contrary to admissions previously filed in which he had conceded that certain investments were made subject to the Virginia Uniform Gifts to Minors Act. Based on the testimony, which demonstrated that the transaction did not take place in Virginia, the trial court sustained a jurisdictional defense proffered at the morning of trial. The Supreme Court affirmed, noting:

Plaintiff argues that the trial court abused its discretion "in permitting the defendant to recant on the morning of trial, [his] prior written admission that the custodial property was created under the Virginia Uniform Gifts to Minors Act." The plaintiff says that the defendant did not file a motion to withdraw or amend his responses to requests for admission and, therefore, plaintiff was prejudiced "by the court's allowance of the 'withdrawal.'"

The defendant, relying upon *TransLift Equipment*, argues that the plaintiff waived her right to rely upon any conclusive effect of his responses to her requests for admission. We agree with defendant.

Rule 4:11 permits a party to serve written requests for admission upon any other party. Rule 4:11(b) states, "any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

However, in *TransLift*, we held that a defendant, who failed to object to a plaintiff's testimony, which was contrary to the plaintiff's responses to requests for admission, waived any binding and conclusive effect of the responses to the requests for admission. Id., at 92, 360 S.E.2d at 188. Applying this rule, we hold that the plaintiff waived her right to rely upon any binding and conclusive effect of the defendant's admissions because she failed to object to his testimony which directly contradicted those admissions. As we mentioned in part II of this opinion, the defendant testified without objection that he did not give the bonds to plaintiff. Indeed, we observe the plaintiff elicited the contradictory testimony from the defendant during her direct examination of him. . . . Affirmed.
JUSTICE WHITING delivered the opinion of the Court.

In this appeal in a declaratory judgment action, we consider the effect of an admission obtained under Rule 4:11 upon the party making the admission and upon other parties to the action.

In August 1990, Mary Ellen Haines (Haines) bought a 1984 Subaru station wagon for the use of her daughter Jennifer. Haines took title to the Subaru and added it to her State Farm Mutual Automobile Insurance Company (State Farm) liability policy, with Haines shown as the named insured and Jennifer as the primary driver. Jennifer made the down payment on the vehicle and paid half of the deferred monthly payments, as well as that portion of Haines's insurance premiums attributable to the Subaru.

No restrictions were placed on Jennifer's use of the Subaru when it was purchased or two months later when she took it with her and moved into an apartment with Daniel Todd Walton (Walton), to whom she was married shortly thereafter. However, after seeing Walton driving the Subaru, Haines told Walton and Jennifer that Walton could not drive it because his driver's license had been suspended for one year. Haines told Walton and Jennifer that Walton had to be a licensed driver and have insurance "to drive the car."

On February 8, 1991, Walton was driving the Subaru when he ran off Interstate Highway 64 in Allegheny County, killing one passenger, Paul A. Thurston, Jr., and injuring two other passengers, Lorie A. Forbes and Karen R. Vance. State Farm was notified by representatives of the three passengers of their intent to assert claims against Walton arising from his allegedly negligent operation of the Subaru. As pertinent here, State Farm's liability insurance policy provided coverage to Walton if his operation of the Subaru was "with the permission of the named insured, provided his actual operation...is within the scope of such permission."

State Farm filed this declaratory judgment proceeding against Haines, Walton, Jennifer, Paul A. Thurston, Sr., administrator of the estate of Paul A. Thurston, Jr. (the administrator), Forbes, Vance, and other insurance companies whose liabilities might be affected by a ruling upon State Farm's liability under its policy. In paragraph 9 of its original and amended motion for declaratory judgment, State Farm alleged that:

At the time of the accident, Daniel T. Walton had no license to operate a motor vehicle and had been expressly forbidden by Mary Ellen Haines from operating the Haines automobile. This prohibition had been directly communicated to both Daniel T. Walton and Jennifer Haines Walton prior to the accident.

Haines admitted these allegations in her answer to the amended motion for declaratory judgment filed on October 2, 1991.
On May 4, 1992, Haines unequivocally admitted the following of State Farm's requests for admissions:

7. At the time of the accident, Daniel T. Walton had no license to operate a motor vehicle and had been expressly forbidden by Mary Ellen Haines from operating the 1984 Subaru automobile referred to above. This prohibition had been directly communicated to both Daniel T. Walton and Jennifer Haines Walton by Mary Ellen Haines prior to the accident.

RESPONSE: Admit

8. At the time of the accident, Daniel T. Walton did not have permission from Mary Ellen Haines to be operating the 1984 Subaru automobile.

RESPONSE: Admit

At a jury trial on December 2, 1993, the parties agreed that the defendants had the risk of nonpersuasion on their claim that Haines had given Walton permission to operate the Subaru. Haines was the defendants' only witness who testified on the issue whether she had given permission to Walton to operate the Subaru. Haines's testimony was introduced over the objection of State Farm, which asserted that she was bound by her responses to the above requests for admission and could not testify to the contrary either in her own behalf or on behalf of the other defendants.

Haines testified that the reason she prohibited Walton's operation of the Subaru was (1) that she thought his driver's license suspension would continue until he further contacted the court and recovered actual possession of his license, and (2) that she thought Walton would not be insured under her State Farm policy unless he was "placed on the policy that I had." Haines further testified that "if [Walton] is licensed and has insurance, yes, he may drive [the Subaru]." On its cross-examination of Haines, State Farm read into evidence numbers seven and eight of the requests for admission and Haines's responses thereto.

The defendants also introduced into evidence a record of the Juvenile and Domestic Relations District Court of Allegheny County showing that Walton's "privilege to operate a motor vehicle is suspended for 12 months [effective February 2, 1990]." The trial court ruled that he again became a licensed driver on February 2, 1991, six days before the accident.

Overruling State Farm's motions to strike the defendants' evidence at the conclusion of their case and again at the conclusion of State Farm's case, the court submitted the permission issue to a jury. The jury found that Walton had Haines's express or implied permission to operate the Subaru, and the court entered judgment on the verdict. State Farm appeals.

As pertinent, Rule 4:11(a) provides that "[a] party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 4:1(b)." As relevant here, Rule 4:1(b) provides that parties may obtain discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." Rule 4:11(b) provides in pertinent part that:
Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . . Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

The defendants never moved the court to permit Haines's admissions to be withdrawn or amended.

The defendants argue that Haines's admissions do not bind her or them. First they contend that State Farm's use of the requests for admission was one "inconsistent with the spirit of the rules as described by this Court," since the purpose of Rule 4:11 is to relieve a litigant of the burden of proving undisputed facts. And the defendants note that the question of permission is "the sole issue in dispute." The defendants cite TransiLift Equip., Ltd. v. Cunningham, 234 Va. 84, 90, 360 S.E.2d 183, 186-87 (1987), DeRyder v. Metropolitan Life Ins. Co., 206 Va. 602, 611, 145 S.E.2d 177, 183 (1965), and General Accident Fire and Life Assurance Corp. v. Cohen, 203 Va. 810, 813, 127 S.E.2d 399, 401 (1962), in support. We find no merit in this contention.

The flaw in this contention is that the issue of permission was not in dispute between State Farm and Haines when the requests for admission were made. This was not the situation in Cohen, in which a litigant failing to answer a request for admission had denied the facts contained in the request in a previously filed pleading. Here, Haines's answer to the motion for declaratory judgment indicated that the issue of permission was not in dispute, and when the requests for admission were filed later, she agreed that she had not given permission and had forbidden Walton's operation of the Subaru. Nor was an undue hardship being imposed upon Haines that would have justified her refusal to establish the opposing litigant's case, as in DeRyder, 206 Va. at 611-12, 145 S.E.2d at 183-84. Haines was simply requested to admit a fact within her own knowledge.

We did not decide whether a request for admission was proper in TransiLift. Instead, since the admissions were not introduced into evidence, we held that they were not binding upon the litigant who made the admissions. 234 Va. at 92, 360 S.E.2d at 188.

Next, the defendants claim that the requests for admission "did not conform to the required standards of clarity and fairness." According to the defendants, the request that Haines admit that "Walton had no license to operate a motor vehicle" was confusing because it could have meant that Walton "did not have a license with him, that he was not eligible for a license or that the DMV had never issued him a license." Additionally, the defendants contend that the request for admission asked Haines to admit something "which the evidence at trial showed to be untrue [since] the trial court found, as a matter of law, that Danny Walton had a valid driver's license."

We need not consider this argument since the balance of request number seven clearly asked for an admission that at the time of the accident, "Walton . . . had been expressly forbidden by Mary Ellen Haines from operating the [Haines automobile]." And request number eight was equally clear in asking that Haines admit that "at the time of the accident, Daniel T. Walton did not have permission from Mary Ellen Haines to be operating the 1984 Subaru automobile." These were requests for an admission of
matters within Haines's knowledge. And she admitted unequivocally that, at the time of the accident, not only had she not given permission for Walton's operation of the Subaru, but she had expressly forbidden him to do so.

Since State Farm's request for Haines's admission regarding permission was clear and fair, we find no merit in the defendants' first contention. Accordingly, we hold that Haines's responses "conclusively established" that she had not only not given Walton permission to operate the Subaru, but had forbidden him to do so. Rule 4:11(b). Because those responses were judicial admissions that bind Haines in this proceeding, the trial court erred in admitting her testimony to the contrary in support of the defendants' case.

Finally, the other defendants contend that even if Haines is bound by her admissions, they are not. We agree that Haines's admissions would not preclude the defendants from introducing evidence other than Haines's testimony to show that she had given permission to Walton. However, these defendants did not do so; instead, they relied solely upon Haines's testimony, which was inadmissible. Since there was no other evidence from which the jury could have found that Haines had given permission to Walton to operate the Subaru, the trial court erred in failing to sustain State Farm's motions to strike the defendants' evidence.

Accordingly, we will reverse the judgment of the trial court. We will also enter a final judgment for State Farm that it is not obligated under its insurance contract to provide a defense and coverage to Walton with respect to the claims of the administrator, Forbes, or Vance. We will remand the case for further proceedings upon Virginia Farm Bureau Mutual Insurance Company's cross-motion for declaratory judgment against Vance, which was stayed by the court pending this appeal. Reversed, final judgment in part, and remanded in part.
I. Discovery Sanctions

Layout of The Rule and Procedures

Rule 4:12 sets forth extensive provisions for sanctions to enforce discovery obligations, modeled largely on Fed.R.Civ. P. 37. It deals with "failure" to make discovery, a concept construed flexibly to get at the varieties of dilatory conduct which crop up in practice. It reaches evasive or incomplete answers as well as more objective failures to respond. See Rule 4:12(a)(2) and (3). The rule provides the trial court with broad discretion to determine what sanction, if any, will be imposed. Woodbury v. Courtney, 239 Va. 651, 391 S.E.2d 293 (1990).

A motion to compel discovery triggers the court's consideration of orders directing compliance, and for recoupment of the expense borne by the party required to enforce discovery obligations by motion. Each discovery device has both general and specific enforcement under Rule 4:12. In addition, requests for admissions are enforced in effect by the provision that a failure to respond admits the material sought, and a rule which permits a party who proves a fact denied by the adversary to recoup the costs of establishing the point at trial.

Once the court has ordered discovery, a party must comply or face a range of sanctions from monetary to case-dispositive orders striking part or all of a party's pleadings, claims or defenses.

Rule 4:12 is almost identical to Federal Rule 37, and divides coverage between failure to make discovery (a) and failure to abide by a court order (b). The dramatic sanctions of dismissal and foreclosure of proof are only applied under (b):

Rule 4:12 Failure to Make Discovery; Sanctions.

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the county or city where the deposition is to be taken. An application for an order to a deponent who is not a party shall be made to the court in the county or city where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 4:5 or 4:6, or a corporation or other entity fails to make a designation under rule 4:5(b)(6) or 4:6(a), or a party fails to answer an interrogatory submitted under Rule 4:8, or if a party, in response to a request for inspection submitted under Rule 4:9, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.
If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 4:1(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to Comply With Order.*

(1) Sanctions by Court in County or City Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county or city in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 4:5(b)(6) or 4:6(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this Rule or Rule 4:10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 4:10(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 4:11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 4:11(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 4:5(b) (6) or 4:6(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 4:8, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 4:9, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this Rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 4:1(c).
Survey of Key Discovery Sanctions Rulings

Trial Court Discretion on Compliance, Remedies and Sanctions. In First Charter Land v. Middle Atlantic Dredging, 218 Va. 304, 237 S.E.2d 145 (1977), the Supreme Court of Virginia adopted a general "abuse of discretion" standard in reviewing decisions of trial judge imposing (or refusing to impose) discovery sanctions.
Failure To Provide Timely Disclosure. In Woodbury v. Courtney, 239 Va. 651, 391 S.E.2d 293 (1990), several months after the case was filed later, the trial court ordered plaintiff to identify, by a particular date, all expert witnesses who would testify at trial on her behalf. The order prohibited her from using any expert witnesses at trial who had not been identified by the cut off date. Her counsel filed answers to interrogatories on shortly before that deadline which identified two physicians "who might testify" about the applicable standards of care and the defendant doctor's alleged deviations from those standards. During an evidentiary hearing, the trial court concluded that neither of the medical experts identified by plaintiff had actually agreed to or intended to testify at trial, and the court barred such expert testimony. Since plaintiff therefore lacked expert proof as required by Virginia malpractice law, the trial court then granted the motion for partial summary judgment. The Supreme Court held:

Woodbury next contends that the trial court erred when it granted summary judgment in favor of Dr. Courtney on her negligence claims because she failed to identify expert witnesses as required by the pre-trial order. The purpose of the order was to allow the litigants to discover the expert witnesses' opinions in preparation for trial. Rule 4:12 gives the trial court broad discretion in determining what sanctions, if any, will be imposed upon a litigant who fails to respond timely to discovery. Five months is more than sufficient time for a litigant to identify expert witnesses. The record does not indicate that the trial court abused its discretion in granting the motion for partial summary judgment. . . .

Deposition Scheduling. In Walsh v. Bennett, 260 Va. 171, 530 S.E.2d 904 (2000) the Supreme Court applied the abuse of discretion standard to a case where the trial court struck plaintiff’s designation of his expert witness for failure to comply with an order to provide discovery. Because the court took this action prior to a deadline that it had previously established for plaintiff to make his expert witness available for a deposition, the Court concluded that the trial judge had abused his discretion and will therefore reversed the judgment of the circuit court.
Non-Production of Documents Involving Expert Opinion. In Flora v. Shulmister, 262 Va. 215, 546 S.E.2d 427 (2001), the court considered whether a trial court abused its discretion by imposing monetary sanctions because a litigant's counsel failed to produce an autopsy report in response to a request for production of documents. Because the attorney, after reasonable inquiry, could have formed a reasonable belief, grounded in fact and warranted under existing law, that the report contained facts known and an opinion held by an expert and was, thus, discoverable only pursuant to Rule 4:1(b)(4), the award of sanctions was reversed.
Motions to Quash Subpoenas to Non-Parties – Who Moves and Why. In Tonti v. Akbari, 262 Va. 681, 553 S.E.2d 769 (2001) the Court considered whether the trial court erred in awarding attorney's fees against a party after denying the party's motions to quash subpoenas duces tecum issued to non-parties. The Court said:

We turn then to consider the interplay of the provisions of Rule 4:12 and those of Rule 4:9 under the circumstances of this case. In that context, Rule 4:12(a)(2) expressly limits its application with respect to discovery requests submitted under Rule 4:9 to instances in which "a party, in response to a request for inspection . . ., fails to respond that inspection will be permitted as requested or fails to permit inspection as requested." (Emphasis added). In such instances, the party requesting the inspection may seek an order compelling the inspection, and, if that order is granted, the trial court may award attorney's fees as a sanction under Rule 4:12(a)(4). Similarly, Rule 4:9(d) provides that "if a party fails or refuses to obey an order made under subsection (b) of this Rule, the court may proceed as provided by Rule 4:12(b)(2)." In contrast, Rule 4:9(d) also provides that "if a non-party . . . fails or refuses to comply" with a subpoena duces tecum issued under Rule 4:9(c), "he may be proceeded against as for contempt of court as provided in [Code] § 18.2-456." (Emphasis added).

The express distinction made between a party and a non-party under Rule 4:9(d) with regard to a discovery violation is significant and, indeed, dispositive of the issue in this appeal. Unlike a case involving a party, under this rule the failure or refusal of a non-party to comply with a properly issued and served subpoena duces tecum under Rule 4:9(c) is subject to a contempt sanction as provided in Code § 18.2-456. This express provision for the application of Code § 18.2-456 excludes the conduct of the non-party from the scope of Rule 4:12(a)(2) and, by necessary extension, from the sanctions provided under Rule 4:12(a)(4).

In the present case, Akbari sought to compel Bruno and USAA, non-parties, to comply with subpoenas duces tecum issued and served on them pursuant to Rule 4:9(c). Their failure or refusal to comply with these subpoenas would have subjected them to contempt sanctions under Code § 18.2-456 and not Rule 4:12(a)(4). It then necessarily follows that Rule 4:12(a)(4) does not provide authority for the imposition of attorney's fees as a sanction against Tonti for filing motions to quash subpoenas duces tecum issued to these non-parties. Accordingly, we hold that the trial court erred in relying upon Rule 4:12(a)(4) as its authority for awarding attorney's fees against Tonti. In the absence of such authority, the award of that sanction "as a routine matter" was clearly an abuse of discretion.
The Dismissal Sanction for Failure to Give Disclosure as Required (by Rule or After an Order)

In Brown v. Black, 260 Va. 305, 534 S.E.2d 727 (2000) the Supreme Court held, despite pretty clear language in the Rule making it a ground for dismissal if a party failed to appear for his own deposition, that dismissal in Virginia is reserved for those instances where a party has been expressly ordered to provide specific discovery, and then flouts that order.
JUSTICE STEPHENSON delivered the opinion of the Court.

The issue in this appeal is whether the trial court erred in dismissing this action for spoliation of evidence.

On May 17, 1991, Iris Gentry was rendered paraplegic when she lost control of her 1987 Toyota pickup truck and crashed into a ravine in Eden, North Carolina. Although Iris has amnesia as to the events surrounding the accident, an eyewitness testified that the truck's engine had been racing prior to the accident. The witness stated that, when Iris shifted gears, the engine "went wide open," and the truck "accelerated . . . started fishtailing" and went off the road.

Iris's attorney employed William Rosenbluth, a purported expert on the sudden acceleration of vehicles, to determine what could have caused the engine to race. Rosenbluth inspected the truck and concluded that a temperature control cable impinged on the accelerator pedal rod and caused the sudden acceleration. Rosenbluth then, without authorization or permission from anyone, removed the temperature control cable by using a hacksaw on the truck's instrument panel. He also removed the accelerator pedal rod.

Thereafter, the Gentrys sued Toyota Motor Corporation (Toyota Japan), Toyota Motor Sales, USA, Inc. (Toyota USA), and Danville Toyota, Inc. (Danville Toyota) (collectively, Toyota), seeking $10,000,000 in damages for bodily injuries sustained by Iris while operating an allegedly defective 1987 Toyota pickup truck. The Gentrys' action was based upon theories of negligence, breach of implied warranties, and strict liability. They alleged that Toyota Japan and/or Toyota USA were negligent in the design, manufacture, and testing of the truck and in failing to warn them of the truck's dangerous and defective condition. The Gentrys also alleged that Danville Toyota was negligent in selling the truck to them in a defective condition, in failing to inspect the truck, and in failing to warn them of the defect.

Based upon answers to interrogatories and Rosenbluth's deposition, Toyota moved to dismiss the action for spoliation of evidence (the Spoliation Motion). Toyota claimed that Rosenbluth had so damaged the truck during the course of his inspection that Toyota was deprived of its right to inspect and test the truck for any evidence of defect and that its ability to defend the action was severely prejudiced.
On April 22, 1993, the trial court conducted an ore tenus hearing on the Spoliation Motion. At the hearing, Toyota's expert, Lee Carr, who had inspected the truck in September 1992, testified he had been "faced with a dilemma" because he could reach "either one of two conclusions." He stated that either (1) the temperature control cable did not interfere with the throttle cable or (2) "there were other conditions present in [the] truck that [he could not] now evaluate [and] that [he could not] now duplicate that did, in fact, cause the [temperature control] cable to come into contact with the throttle pedal assembly." Carr further stated that "whatever those conditions were . . . [he could not] identify them and most importantly, if they existed, [he can't now know what caused them to be present]."

After the hearing ended, the Gentrys moved for a stay of consideration of the Spoliation Motion to allow testing of the truck by another expert. They also sought permission "to formulate and serve complete supplemental and amendatory responses to discovery and . . . to move the Court to reopen the hearing . . . on the [Spoliation Motion] and/or to move for leave to file an amended motion for judgment." By order entered October 12, 1993, the trial court granted the motion.

Thereafter, the Gentrys filed amended interrogatory answers setting forth the anticipated opinions of their new expert, Dr. Melvin K. Richardson. They also moved for leave to file an amended motion for judgment based upon their new expert's findings.

Richardson had inspected the truck in July and November 1993. He concluded that a defect had existed in the design or manufacture of the truck's carburetor. This defect had allowed varnish to accumulate in the "secondary butterfly" valve of the carburetor, causing the valve to stick in the open position and produce the sudden acceleration. Richardson stated that Rosenbluth's actions had not affected or impaired his ability to determine the nature of the defect. Richardson further stated that Rosenbluth's conclusions about the cause of the sudden acceleration were erroneous.

Carr, Toyota's expert, had examined the carburetor in September 1992 and again in March 1995 and found that the carburetor functioned properly. From the eyewitness' observations, Carr proposed yet a third theory regarding how the accident occurred. He theorized that, in response to some mechanical failure such as a "fuel problem" or an "ignition problem," Iris "pushed down on the gas." Then, after the mechanical failure resolved, "the engine . . . suddenly [had] power," causing the truck to "shoot ahead and . . . fishtail." Carr also stated that his inspection of and conclusion about the carburetor had not been affected by anything that Rosenbluth had done.

Toyota renewed its Spoliation Motion, and, on June 8, 1995, the trial court granted the motion and dismissed the action with prejudice. The trial judge stated his reason for granting the motion as follows:

I think that this case has to be dismissed because Mr. Rosenbluth . . . went in with a hack saw and then destroyed a vehicle . . . and now has proven to be absolutely wrong in his opinion[,] in the way in which he conducted his investigation, [and] in the way in which he destroyed the vehicle and prevented the defendant from properly being able to defend the case. I think he's responsible for the whole mess which inured to the detriment of the plaintiff.

We awarded the Gentrys this appeal.
A trial court's imposition of a sanction will not be reversed on appeal unless the court abused its discretion. See Oxenham v. Johnson, 241 Va. 281, 287, 402 S.E.2d 1, 4 (1991) (decided under Code § 8.01-271.1). This, therefore, is the standard we must apply in reviewing the trial court's ruling in the present case.

Courts often impose sanctions when a litigant or his attorney has acted in bad faith. The purpose of such a sanction is to punish the offending party and deter others from acting similarly.

In the present case, the record is clear that neither the Gentrys nor their attorney acted in bad faith, and the trial court so found. The wrongful act was committed by Rosenbluth who acted on his own with neither the consent nor the knowledge of the Gentrys or their attorney. Therefore, the dismissal of the Gentrys' action did not serve to punish Rosenbluth, the offender.

Additionally, Rosenbluth's wrongful act, as deplorable as it was, did not prejudice Toyota. The theory upon which the Gentrys now seek to recover is totally unrelated to the part of the vehicle that Rosenbluth destroyed. Indeed, Carr, Toyota's own expert, testified unequivocally that his inspection of and opinion concerning the carburetor were not affected by what Rosenbluth had done. Therefore, given the lack of prejudice, the dismissal of the Gentrys' action was too severe a sanction.

For these reasons, we conclude that the trial court abused its discretion in dismissing the Gentrys' action. Accordingly, we will reverse the trial court's judgment and remand the case for further proceedings.

JUSTICE COMPTON, with whom CHIEF JUSTICE CARRICO and JUSTICE LACY join, dissenting.

In my opinion, the trial court did not abuse its discretion in dismissing this action. Toyota was entitled to examine the allegedly defective vehicle in its post-accident condition to determine the cause of any malfunction that may have occurred. This examination was rendered impossible due to the intentional destruction by the plaintiffs' representative of an integral part of the truck.

The fact that the plaintiffs have now focused on an alleged defect not involving the portion of the vehicle removed with a hacksaw by the plaintiffs' representative is irrelevant on the issue of prejudice. The manufacturer should not be relegated to merely rebutting some recent theory advanced by the plaintiffs regarding the accident's cause. Toyota has the right to determine whether there is some cause of the accident related to the now nonexistent part removed by the plaintiffs. The majority has completely disregarded that right to the prejudice of the manufacturer.

I would affirm the judgment of the trial court.
Note on "Corporate Designees" and Sanctions

**Corporate Designees and Sanctions.** The person designated by a corporation to testify on its behalf must testify as to matters known or reasonably available to the organization. Thus, the designated person gives testimony about the knowledge and memory of the corporation, not his or her personal knowledge. One of the sanctions authorized under Rule 4:12(b)(2)(C) when a party fails to obey an order to provide discovery is judgment by default against the disobedient party. In one reported case, plaintiff sought through a Rule 4:5(b)(6) deposition to explore, among other things, the basis of a subcontractor's denials in its grounds of defense and its answers to interrogatories. Plaintiff was deprived of that opportunity. The Supreme Court held that it was not error to enter judgment by default against the subcontractor as a disobedient party. Given the circumstances of this case, it was doubtful that any lesser sanction would have remedied the problem posed by the failure to obey the circuit court's order compelling the appearance of its corporate designee at a deposition. In that case, a surety had notice of every step in the proceedings that led to the entry of the orders and judgment against its principal. In fact, counsel for plaintiff wrote the surety's counsel in order to obtain available dates before scheduling both the first and the second deposition of the subcontractor's corporate designee. The surety never attempted to designate a corporate representative to appear at a deposition on behalf of that entity. It was not until the hearing on plaintiff's motion for summary judgment that the surety even argued that it did not have the authority under the indemnity agreement to make that designation. The circuit court did not err in entering judgment in favor of a payment bond claimant and against a surety in an action for recovery on the bond, where the surety had notice of the underlying breach of contract claim against its principal and the right and opportunity to defend its principal against such claim, but permitted a judgment by default to be taken against its principal on the underlying claim. Under these circumstances, the judgment by default was binding upon and conclusive as to the surety. See generally, *American Safety Casualty Insurance Co. v. C.G. Mitchell Construction*, 268 Va. 340, 601 S.E.2d 633 (2004).
J. Interstate Discovery

The General Assembly of Virginia has abolished prior interstate deposition provisions, formerly contained in Virginia Code § 8.01-411 through § 8.01-412.1, and replaced them with a thorough and current version of the replacement "uniform act" on this topic, the Uniform Interstate Depositions and Discovery Act, codified at §§ 8.01-412.9 through 8.01-412.15.

Background. The Uniform Law Commission promulgated the Uniform Interstate Depositions and Discovery Act in 2007. The Act sets forth an efficient and inexpensive procedure for litigants to depose out of state individuals and for the production of discoverable materials that may be located out of state. Uniform procedures have become necessary as the amount of litigation involving individuals and documents located outside of the trial state has increased. In recognition of the fact that evidence or witnesses relevant to a party's case may be located outside the state where the litigation is instituted, the UIDDA, as well as its precursor uniform acts, provides for the cross-border cooperation that is essential for the successful conduct of complex litigation in a mobile society. The underlying purpose of all this statute and its predecessors promulgated by the Commissioners on Uniform State laws is to promote such cooperation as efficiently as possible, while simultaneously protecting the interests of both the party seeking interstate discovery and the party who will have to respond to the discovery request.

Under the Uniform Interstate Depositions and Discovery Act, litigants can present a clerk of the court located in the state where discoverable materials are sought with a subpoena issued by a court in the trial state. Once the clerk receives the foreign subpoena, the clerk will issue a subpoena for service upon the person or entity to which the original subpoena is directed. The terms of the issued subpoena must incorporate the same terms as the original subpoena and contain the contact information for all counsel of record and any party not represented by counsel.

The promoters of the statute have explained that the Act requires minimal judicial oversight and eliminates the need for obtaining a commission or local counsel in the discovery state, letters rogatory, or the filing of a miscellaneous action during the discovery phase of litigation. The scope of discovery authorized by the subpoena is to comply with the rules of state in which it occurs. Motions to quash, enforce, or modify a subpoena issued pursuant to the Act shall be brought in and governed by the rules the discovery state.

The Uniform Interstate Depositions and Discovery Act will help harmonize the existing process for obtaining interstate evidence, and is an appropriate act for enactment in all states. However, at the time the Act was adopted in Virginia, only a handful of other states had already passed the legislation. Nonetheless, all states already have in place some form of statutes or rules that permit parties to actions being litigated in other states to conduct discovery within their boundaries. The provisions of the UIDDA are designed to clarify and streamline the procedure involved with conducting interstate discovery by providing a uniform procedure to be employed by all jurisdictions when responding to interstate discovery requests. In addition to its procedural aspects, the UIDDA addresses the conflicts of law issues attendant with discovery when two or more jurisdictions are involved. One
of the hallmarks of the UIDDA is its deference to the law and procedure of the
discovery state (i.e., the state where discovery is sought) in resolving certain questions
concerning the service and enforcement subpoenas and the conduct of the discovery.

The operation of the new Uniform Act is controlled in large part by its
definitions of the key concepts, set forth in Virginia Code § 8.01-412.9:

§8.01-412.9. Definitions.
For purposes of this article, unless the context requires otherwise:
"Foreign jurisdiction" means a state other than the Commonwealth.
"Foreign subpoena" means a subpoena issued under authority of a court of
record of a foreign jurisdiction.
"Person" means an individual, corporation, business trust, estate, trust,
partnership, limited liability company, association, joint venture, public
corporation, government, or governmental subdivision, agency or
instrumentality, or any other legal or commercial entity.
"State" means a state of the United States, the District of Columbia, Puerto
Rico, the United States Virgin Islands, or any territory or insular possession
subject to the jurisdiction of the United States.
"Subpoena" means a document, however denominated, issued under the
authority of a court of record requiring a person to:
1. Attend and give testimony at a deposition;
2. Produce and permit inspection and copying of designated books,
documents, records, electronically stored information, or tangible things in
the possession, custody, or control of the person; or
3. Permit inspection of premises under the control of the person.

These terms use concepts familiar to Virginia lawyers and judges. 2 There are two
terms that are not already explicitly defined under Virginia law. The first new term is
"foreign jurisdiction." The second new term is "foreign subpoena." One of the key
provisions of the statute is that the definitions of both this term and the term "subpoena"
are limited to subpoenas "issued under authority of a court of record." According to the
comment to the model sections of this Act, the use of the term "court of record" was
designed "to exclude non-court of record proceedings from the ambit of the Act." The
Drafting Committee of the Commissioners on Uniform State Laws "concluded that
extending the Act to such proceedings as arbitrations would be a significant expansion
that might generate resistance to the Act." 3 Presumably, this language would also
preclude application of the UIDDA to administrative subpoenas, such as those issued by
a governmental agency. Application to arbitration remains to be seen. 4

Issuance of Subpoenas. Section 8.01-412.10 sets forth the procedure for
presenting a foreign subpoena to a court of the Commonwealth and the ensuing
obligations of that court. In order to enforce a foreign subpoena, a party must present it
to the clerk of the court in the relevant geographic area in which the discovery is sought
to be conducted. The clerk is then required to immediately issue a subpoena to that
party. The subpoena issued by the clerk must "incorporate the terms used in the foreign
subpoena." The Code section provides:

§ 8.01–412.10. Issuance of subpoena.
A. To request the issuance of a subpoena under this article, a party shall submit to the clerk of court in the circuit in which discovery is sought to be conducted in the Commonwealth (i) a foreign subpoena and (ii) a written statement that the law of the foreign jurisdiction grants reciprocal privileges to citizens of the Commonwealth for taking discovery in the jurisdiction that issued the foreign subpoena.

B. When a party submits a foreign subpoena to a clerk of court in the Commonwealth, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

C. A subpoena under subsection B shall:
   1. Incorporate the terms used in the foreign subpoena; and
   2. Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

D. A request for the issuance of a subpoena under this article does not constitute an appearance in the courts of the Commonwealth, and no civil action need be filed in the circuit court of the Commonwealth.

E. The provisions of this article shall be in addition to other procedures authorized in the Code of Virginia and the rules of court for obtaining discovery.

An important provision of this section requires that the subpoena issued by the court of the discovery state upon presentation of the original subpoena must incorporate the terms used in the foreign subpoena. Missing from this section is any language limiting any such incorporation to conform with law of the discovery state, such as the language found in certain other provisions of the Act. This provision may potentially require a court from the discovery state to issue a subpoena that exceeds the limits of the court's authority in domestic proceedings. As the drafters of the UIDDA note in its prefatory note, there may be some differences between the jurisdictions concerning what matter can be covered by a subpoena.

Any subpoena issued under the terms of the Virginia version of this Uniform Act must be served in compliance with the rules or statutes of the Commonwealth. Similarly, under Code § 8.01-412.12 as set forth above, Virginia law and procedures govern the obligations and procedures for compliance with the subpoenas, on such matters as attendance at a deposition, production of materials, and inspection of premises.

Finally, § 8.01-412.13 dealing with applications to a court invokes existing Virginia practice for applications to obtain a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under § 8.01-412.10. Such applications must comply with the statutes and rules of court of the Commonwealth and be submitted to the court in the circuit in which discovery is to be conducted. In an important clarification, the Virginia version of this Uniform Act contains this final sentence in § 8.01-412.13: "A separate civil action need not be filed."

It is not clear whether the Uniform Act as implemented in Virginia will achieve one of the National Commissioner's stated goals, the elimination of the need to obtain local counsel in the discovery state. Since the law of the Commonwealth is controlling with regard to the service of any subpoena, the conduct of the discovery, and any action
to enforce, quash or modify a subpoena, it is apparent that the correct interpretation and application of the discovery state's laws is necessary. Thus, a foreign attorney who seeks to take such actions in Virginia concerning a foreign subpoena without being a member of the Virginia bar or associating himself or herself with local counsel, may be considered to be engaging in the unauthorized practice of law.5. It may be that amendments by the Supreme Court to Va. S. Ct. R. 1A:4 that became effective on February 1, 2007 will obviate such problems, since the Virginia Supreme Court Rule now permits foreign attorneys to practice in Virginia without associating with local counsel or being admitted pro hac vice for limited purposes connected with foreign proceedings. The relevant provision of the amended rule, Va. S. Ct. R. 1A:4(10),6 reads as follows:

10. In-State Services Related to Out-of-State Proceedings. - Subject to the requirements and limitations of Rule 5.5 of the Virginia Rules of Professional Conduct, an out-of-state lawyer may provide the following services without the entry of a pro hac vice order:

(a) In connection with a proceeding pending outside of Virginia, an out-of-state lawyer admitted to appear in that proceeding may render legal services in Virginia pertaining to or in aid of such proceeding.

Uniformity and Reciprocity. The "uniformity and reciprocity provision of the new Act limits cooperation with out-of-state discovery to requests for discovery from jurisdictions which accord comparable rights to Virginia litigators seeking discovery in those locales:

§ 8.01-412.14. Uniformity of application and construction; reciprocal privileges.

In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. The privilege extended to persons in other states for discovery under this article shall only apply if the jurisdiction where the action is pending has extended a similar privilege to persons in the Commonwealth, by that jurisdiction's enactment of the Uniform Interstate Depositions and Discovery Act, a predecessor uniform act, or another comparable law or rule of court providing substantially similar mechanisms for use by out-of-state parties.

The use of the "substantially similar mechanisms" terminology is important, since it appears that prior uniform acts are more prevalent in the United States as Virginia implements the new statute, and the availability of at least some comparable mechanisms under the law of the place where the underlying action is pending will be sufficient under § 8.01-412.14 to satisfy the reciprocal treatment requirement.

OUTGOING DISCOVERY: COMMISSIONS OR LETTERS ROGATORY
In addition to whatever reciprocal provisions exist in a foreign state to facilitate
discovery by Virginia parties as contemplated under the Uniform Foreign Depositions
and Discovery Act – the provision added to the deposition Rules of Court in Virginia in
2008 in Rule 4:5(a1)(iii) is also intended to afford a simple mechanism for Virginia
parties to obtain either a "commission" or "letters rogatory" from the Virginia courts
and seek cooperation in the jurisdiction where the witness or evidence is located, as a
matter of comity. That Rule provides:

(iii) Taking Depositions Outside the State. Within another state, or within a
territory or insular possession subject to the dominion of the United States, or
in a foreign country, depositions may be taken (1) on notice before a person
authorized to administer oaths in the place in which the examination is held,
either by the law thereof or, where applicable, the law of the United States, or
(2) before a person appointed or commissioned by the court in which the
action is pending, and such a person shall have the power by virtue of such
appointment or commission to administer any necessary oath and take
testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory
shall be issued upon application and notice and on terms that are just and
appropriate. It is not requisite to the issuance of a commission or a letter
rogatory that the taking of the deposition in any other manner is impracticable
or inconvenient. A notice or commission may designate the person before
whom the deposition is to be taken either by name or descriptive title. A
commission or letter rogatory may be addressed "To the Appropriate Authority
in (here name the state, territory, or country)." Witnesses may be compelled to
appear and testify at depositions taken outside this state by process issued and
served in accordance with the law of the jurisdiction where the deposition is
taken or, where applicable, the law of the United States. Upon motion, the
courts of this State shall issue a commission or letter rogatory requesting the
assistance of the courts or authorities of the foreign jurisdiction.

Under this Rule, which is not the subject of any interpretive case law in Virginia as yet,
discovery in another state (or a territory or insular possession of the United States), or in
a foreign country, is simplified.

Rule 4:5(a1)(iii) allows a choice of officers before whom the discovery may be
taken. Depositions may be taken on notice before a person authorized to administer
oaths in the place in which the examination is held, either by the law thereof or, where
applicable, the law of the United States, or before a person appointed or commissioned
by the court in Virginia. The person appointed will have the power by virtue of such
appointment or commission to administer any necessary oath and take testimony. An
additional alternative is use of a letter rogatory.

The Rule provides that a commission or letter rogatory "shall be issued" upon
application and notice, although it is restricted by the express authorization for the
issuing court to impose "terms that are just and appropriate." However, the Rule makes
it express that no showing that the taking of the deposition in any other manner is
impracticable or inconvenient need be made in order to obtain use of the devices
authorized in the Rule.

There are simplified form provisions under this Rule as well. A notice or
commission may designate the person before whom the deposition is to be taken either
by name or by a descriptive title. The Rule provides that a commission or letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)."

Under Rule 4:5(a1)(iii) witnesses may be compelled to appear and testify at depositions taken outside this state by process issued and served in accordance with the law of the jurisdiction where the deposition is taken or, where applicable, the law of the United States. While it is not expected that such relief will often be necessary in order to achieve the discovery contemplated under this Rule, its terms include a provision recognizing that, upon motion, the courts of this State "shall issue a commission or letter rogatory" which requests the assistance of the courts or authorities of the foreign jurisdiction in effectuating the discovery.
Filing Discovery Materials. A few forms of discovery requests and the responses thereto are to be filed with the clerk of the court where the action is pending. This includes documents requested under Rule 4:9(a)(2) [wherein the request asks that the documents be produced to the court] and 4:9(c) [documents from non-parties] and transcript of those depositions taken before action or pending appeal (Rule 4:2(a)(5)) or taken on written questions (Rule 4:6(b)). Normal deposition transcripts are lodged with the attorney who initiated the deposition, and are only filed when the court directs that this be done.

Customized Procedures. Rule 4:4, entitled "Stipulations Regarding Discovery", authorizes the parties to agree to a variety of consensual modifications of the procedures available as of right:

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions and (2) modify the procedures provided by these rules for other methods of discovery. Such stipulations shall be filed with the deposition.

In 1991 the Legislature amended Code § 8.01-384.2 to provide that the parties may unanimously agree to waive discovery timetables provided in the rules, unless the court has previously entered a scheduling order setting up discovery or filing deadlines.

Limited Discovery on Motion. The Court has held it within the trial judge's discretion to limit discovery to certain issues while a summary judgment motion is being litigated. See Dick Kelly Enterprises v. City of Norfolk, 243 Va. 373, 416 S.E.2d 680 (1992).
Hypotheticals

1. P was injured in a car crash with another vehicle, driven by D. P sues, charging that D was driving while intoxicated and acted wantonly, maliciously and recklessly on the date in question, and seeking compensatory and punitive damages. During the discovery phase of the case P sent written interrogatories to D asking D to:

   a. state whether you had insurance on the date in question; if so, give the name of the company, policy number and coverage limits.

   b. state your net worth and earnings for the last five years.

   P also propounded a request for production of documents, seeking:

   c. all diagrams and drawings of the scene of the accident prepared by you or on your behalf.

   Not to be outdone, D sent interrogatories to P asking:

   d. state whether you have received any payments from others, including insurance companies, for injuries in connection with this crash.

   Finally, D sent a set of requests for admissions to the doctor who was P's principal treating physician, asking, inter alia

   e. please admit that P was 90% deaf at the time of the accident.

   If these discovery requests are contested, how should the court rule on their propriety?

2. After the prior disputes were resolved, P sends D a two paragraph set of requests for admissions, asking him to concede

   (i) that you had been drinking alcohol on the day of the accident, and

   (ii) that your driving was impaired by your consumption of alcohol on that day.

   D responded as follows:

   A(i) -- This is a jury question and I refuse to admit or deny it.

   A(ii) -- I deny this.

   P moves for an order compelling discovery or for sanctions in light of these responses; what result?

3. H was hurt in an explosion at the R restaurant. H sues for personal injuries. R doubts the severity of his injuries, and seeks a deposition of H to question him about his condition and his expected witnesses at trial. R also seeks to obtain from H a copy of "all medical reports you have received on your condition". H considers the reports private matters between physician and patient. Is the deposition proper? Will H be required to divulge the witnesses' names and addresses? The medical reports?
4. T is hoping to file an action based on theft of a trade secret, but needs a bit more time to collect information before commencing suit. T learns, however, that a key witness is about to leave for a two-year stint of military duty abroad. *How should T proceed? Would it make any difference if T did not learn this information until the week after the suit was actually been filed?*

5. In a grisly railroad crossing case in which it is alleged that safety warnings were inadequate, the surviving plaintiff sends the following interrogatory to the defendant railroad: "State whether any changes have been made by defendant in the signals at the crossing site since this accident." *Must the railroad respond? How might it do so?*
A. Introduction

While pretrial conferencing is not as frequent in Virginia practice as it is in federal courts, Rule 4:13 (set forth below) makes the conference procedure available upon the motion of any party or where the court, sua sponte, elects to hold such a conference. Traditionally, the pretrial conference was a singular event late in the preparations. Some courts are more recently adopting a calendaring practice that causes the case to be called for conference earlier in the proceedings, which makes a modicum of planning possible.

The purposes of a pretrial conference may include simplification of the issues through stipulations or amendment of pleadings, other amendments or the filing of new pleadings, plans for the completion of preparations or for the conduct of the trial itself, and any other matters that may aid in the ultimate disposition of the action. Where a conference is held under the rule the Court will enter an order embodying the directions given and stipulations made. That order is expected to govern future proceedings and may be changed only upon a finding that modification is needed to prevent manifest injustice.
Rule 4:13   Pretrial Procedure; Formulating Issues

The court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) A determination of the issues;
(2) A plan and schedule of discovery;
(3) Any limitations on the scope and methods of discovery;
(4) The necessity and desirability of amendments to the pleadings;
(5) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(6) The limitation of the number of expert witnesses;
(7) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(8) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered, and which limits the issues for those trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

A search of the local rules didn’t turn up anything that prohibited wearing mouse ears to mock opposing counsel’s case.
B. Local Rules.

Many circuits and districts in the Commonwealth have local rules of court, prescribing the means by which cases are scheduled for trial, and many other matters. Until 1999, this practice was broadly authorized by Code § 8.01-4, which provided generally that the trial courts may, from time to time, prescribe for their respective districts and circuits such rules as may be reasonably appropriate to promote proper order and decorum, and the convenient and efficient use of courthouses and clerks’ offices. The Code cautioned that no rule could be prescribed or enforced which was inconsistent with any statutory provision, or the Rules of the Supreme Court, or contrary to the decided cases, or which has the effect of abridging substantive rights of persons before such Court.

In 1999, the General Assembly passed a revision of Code § 8.01-4, which requires that local rules “shall be strictly limited to only those rules absolutely necessary to promote proper order and decorum and the efficient use of courthouse facilities and clerks’ offices.” The warning language now provided that: “No rule of any such court shall be prescribed or enforced which is inconsistent with this statute or any other statutory provision, or contrary to the decided cases, or which has the effect of abridging substantive rights of persons before such Court” and that “[a]ny rule of court which violates the provisions of this section shall be invalid.”

This anti-local rules provision hung over the General Assembly and the court system in Virginia for almost a year as various bar groups and the staff of the courts struggled to work out responses that would address the motivations for the threatened statute. The Courts of Justice Committees of the Senate and the House of Delegates, along with the Supreme Court, were directed to consider the issues relating to local rules and make recommendations to the General Assembly in an effort to differentiate the subjects addressed in local rules. It appeared that docket control aspects of court administration were not targeted by this impending statute, while other local rule topics were to be outlawed. The 1999 legislation expressly reflected the intent of the General Assembly “that there be no local rules and that any docket control procedures not affect the substantive rights of litigants.”

Statewide Pretrial Order Promulgated. In the year 2000, a number of steps were taken that resulted in modified legislation passing the General Assembly. After almost a year of work by bar groups and the staff of the Supreme Court, including efforts of several committees and a combined committee formed by the Office of the Executive Secretary of the Court to integrate suggestions of the various interested groups, the Supreme Court promulgated a final version of a "uniform" statewide scheduling order, and several related provisions. The resulting rule is highly flexible, and will be adapted in each circuit to the needs and practices that have worked best for the judges and litigators in that locality. It is hoped, however, that the standardization of the categories of provisions and ordering them in a prescribed fashion will permit counsel to learn and respond to local requirements much more easily.

The Court not only promulgated a final version of the pretrial order pro-visions that have been subject to considerable publicity, but also issued a model rule to implement the concept, along with rules providing guidelines for the con-duct of pretrial
conferences and for scheduling of cases for trial. A new rule for motions practice, issued in conjunction with the study of local rules, has also been set forth. These amendments become effective July 1, 2000.

The legislature in 2000 modified Code § 8.01-4 yet again, to soften the prohibition on local rules. That section now provides that district courts and circuit courts may, from time to time, prescribe rules for their respective districts and circuits, but that such rules shall be limited to those rules necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices. No rule may be prescribed or enforced which is inconsistent with the Code section, or any other statutory provision, or the Rules of Supreme Court or contrary to the decided cases, or which has the effect of abridging substantive rights of persons before such court. Indeed, per the statute, any rule of court which violates the provisions of this section shall be invalid.

Code § 8.01-4 now goes on to provide that the courts may prescribe docket control procedures which do not abridge the substantive rights of the parties nor deprive any party the opportunity to present its position as to the merits of a case solely due to the unfamiliarity of counsel of record with any such docket control procedures. The uniform order, pretrial order rule, and motion practice rules promulgated by the Court in 2000 are apparently valid authorizations under the revised statute.

Provisions of Uniform Order. Under Rule 1:18, in any civil case the parties, by counsel of record, may agree and submit for approval and entry by the court a pretrial scheduling order. If the court determines that the submitted order is not consistent with the efficient and orderly administration of justice, then the court shall notify counsel and provide an opportunity to be heard.

In any civil case where a pretrial scheduling order is not entered by agreement, the court may, upon request of counsel of record for any party, or in its own discretion, enter the pretrial scheduling order contained in Section 3 of the Appendix of Forms at the end of Part I of the Rules (Uniform Pretrial Scheduling Order). No court is permitted to enter the Uniform Pretrial Scheduling Order unless notice has been provided to all counsel of record at least 14 days prior to entry of the order. Upon motion by any party objecting to entry of the Uniform Pretrial Scheduling Order, the court must hold a hearing prior to entry of the order. With the exception of domestic relations cases, a court may not enter a scheduling order which deviates from the terms of the Uniform Pretrial Scheduling Order unless either (1) counsel of record for all parties agree to different provisions, or (2) the court, after providing an opportunity for counsel of record to be heard, makes a finding that the scheduling order contained in the Appendix is not consistent with the efficient and orderly administration of justice under the specific circumstances of that case.

To implement this Rule, the Supreme Court simultaneously promulgated a new example form, to be known as "Form 3" in the Appendix of Forms to Part One of the Rules. The text of Form 3 (also designated Form 18B), which sets forth the body of the scheduling order in fill-in-the-blank form (and with dates that may be modified by
judges implementing the order in a given circuit), includes provisions for specifying:

- Trial date and estimated trial length
- Discovery completion date (the standard would be 30 days before trial). The rule specifies that “Complete” means that all interrogatories, requests for production, requests for admissions and other discovery must be served sufficiently in advance of trial to allow a timely response at least 30 days before trial. Depositions may be taken after the specified time period by agreement of counsel of record or for good cause shown, provided however, that taking a deposition after the established deadline will not provide a basis for continuance of the trial date or the scheduling of motions inconsistent with the normal procedures of the court.
- Designation of Experts (standard schedule would be that plaintiff's, counter-claimant's, third party plaintiff's, and cross-claimant's experts will be identified on or before 90 days before trial).
- Dispositive Motions cut-off (encouraging prompt filing and bringing on for hearing all demurrers, special pleas, motions for summary judgment or other dispositive motions not more than 60 days after being filed).
- Exhibit and Witness List (counsel to exchange 15 days before trial a list specifically identifying each exhibit to be introduced at trial, copies of any exhibits not previously supplied in discovery, and a list of witnesses to be called).
- Pretrial Conferences (noting that when requested by any party or upon its own motion, the court may order a pretrial conference wherein motions in limine, settlement discussions or other pretrial motions which may aid in the disposition of this action can be heard).
- Motions in Limine (any motion in limine which requires argument exceeding five minutes shall be duly noticed and heard before the day of trial).
- Witness Subpoenas (early filing of a request for witness subpoenas is encouraged so that such subpoenas may be served at least 10 days before trial).
- Continuances (will only be granted by the court for good cause).
- Jury Instructions (to be exchanged, unless the court orders otherwise, two business days before a civil jury trial)
- Deposition Transcripts to be Used at Trial (the proponent of any deposition of any non-party witness who will not appear at trial must advise opposing counsel of the intent to use the transcript "at the earliest reasonable opportunity." It then becomes the obligation of the opponent of any such deposition to bring any objection or other unresolved issues to the court for hearing before the day of trial).
- Waiver or Modification of Terms of Order (leave of court for good cause shown may be obtained for the time limits and prohibitions contained in the standard order).
Based on my expert analysis, I'd say this is the handwriting of a five-year-old girl, a six-year-old boy, or my doctor...
C. Motions Practice Rule.

At the same time it announced sweeping pretrial order and scheduling options, the Court issued a new rule numbered 4:15, which – for the first time in statewide Virginia practice – attempts to organize and manage the submission and disposition of motions. Like the pretrial conference and order rules developed during the same process in 1999 and 2000, the motions practice rule is in effect a menu of considerations that will be implemented differently in different localities.

Rule 4:15 addresses a predictable range of mechanical issues for the scheduling and hearing of motions:

- Pre-motion Consultation – Counsel of record are required by the rule to make a reasonable effort to confer before giving notice of a motion to resolve the subject of the motion and to determine a mutually agreeable hearing date and time.

- Scheduling - A court may authorize counsel of record to schedule hearings on written or oral motions under a "motions day" procedure in which the court designates dates for motions hearings, or under a system in which counsel contact designated court personnel to obtain a specific date for hearing the motion.

- Notice - Reasonable notice of the presentation of a motion must be served on all counsel of record. Absent leave of court, notice must be served at least 7 days before the hearing.

- Filing and Service of Briefs – The parties may elect or the court may require the parties to file briefs in support of or in opposition to a motion. Any such briefs should be filed with the court and served on opposing counsel of record sufficiently before the hearing to allow consideration of the issues involved. Absent leave of court, if a brief in support of a motion is five or fewer pages in length, the required notice and the brief must be filed and served at least 14 days before the hearing and any brief in opposition to the motion shall be filed and served at least 7 days before the hearing. If a brief will be more than five pages in length, an alternative hearing date, notice requirement, and briefing schedule may be determined by the court or its designee.

- Definition of Served - For purposes of this Rule, a pleading is deemed "served" when it is actually received by, or in the office of, counsel of record through delivery, mailing, or facsimile transmission.

- Length – Absent leave of court, a motion brief shall not exceed twenty pages double spaced.

- Hearing – Generally, the court must hear oral argument on a motion (argument on a motion for reconsideration or any motion in cases where pro se incarcerated persons appear pro se are to be heard orally only at the request of the court). A court may place reasonable limits on the length of oral argument.
D. Electronic Filing.

For more than a decade Rule 1:17 has been part of the Part One rules of court, for the purpose of facilitating experiments with electronic filing of court papers. The rule—to date at least—is narrow: it applies only where the local court has adopted an electronic filing plan that has been approved by the Supreme Court, and then only if all parties and the clerk of court agree that the case will be handled under the electronic filing system. Within those limitations, any kind of litigation is apparently eligible for processing under the electronic filing system of the court involved.

Electronic documents permitted by the new rule include form of text or encoded submission, presumably so that tax and other financial information may be included in the definition.

The rule contemplates a system of coding such that there is a "high degree of certainty that the person identified as the sender is indeed the sender." As set forth in the rule, the identification may be by means of a user ID and password or by digitally encrypted electronic signatures or by any other means reasonably calculated to ensure identification to a high degree of certainty. Local practice would be expected to adopt one of these systems, and the filing parties would be required to adhere to it.

Format Issues. The range of possible formats for electronic filing is not circumscribed directly by the rule, which simply states the key goal that the process must be such that all documents filed electronically be capable of being received and stored without loss of content or material alteration of appearance. The rule indicates that the "format for electronically filed material shall be the Portable Document Format (PDF), or other approved format."

Recognizing that there may often be non-electronic format documents that need to be filed in any case, the rule provides that a clerk's office must accommodate the submission of such items. To minimize burdens and conflicting formats, the rule requires that in a case designated for electronic filing recourse to non-electronic documents should be restricted to those instances where, as a practical matter, the item cannot be "imaged" by the filer. Thus efforts must be made to facilitate creation of a single electronic case file to the extent reasonably possible.

Access. The new rule contemplates that the public, counsel and the parties will be permitted access to the electronic file a minimum of twelve hours per day, for five days per week, except for reasonable periods when the system may be unavailable due to maintenance downtime. In addition, the clerk shall provide a means for the parties, counsel and the public to review and copy electronic records from the electronic file during normal business hours.

Orders. When a judge enters an order in an electronically filed case, the electronic record will be updated to identify the judge entering the order and the date it was entered. Notification will be sent to counsel of record that the order has been entered.

Timing Issues. In general, under the new rule an electronic document will be considered filed when it is "written to disk" on the court's computer. However, if a document is received after the close of business, under the new rule the time of filing will be deemed to be the opening of business on the next business day of the court.
The rule contemplates that the filing system will transmit an acknowledgment to the sender of each electronic filing, indicating that the court has received the document. The acknowledgment must include the identity of the receiving court, date and time of the receipt and a court-assigned document reference number. If an electronic document is received but not accepted for filing, the electronic filing system or clerk shall notify the sender of the document's rejection and the grounds for rejection. This notification shall be sent not later than one business day after the filing has been received. A copy of this rejection will be retained in the permanent electronic case file maintained by the court.

In an electronically filed case, an e-mail address of the counsel of record shall also be included. See Rule 1:4(l).

**Computing due dates.** The new rule provides that when a party is required or permitted under these Rules to do an act within a prescribed time after service of a paper upon counsel of record, one (1) day shall be added when the paper is served electronically. Cf. Rule 1:7.

**Swearing.** The rule recognizes the problems of attestation and verification in an electronic world. In an electronically filed case, if a statute requires a pleading or affidavit to be sworn to, the original of the acknowledged pleading or affidavit must be physically filed in the clerk's office. The clerk shall accommodate the imaging of the document into electronic form and shall retain the original signed and acknowledged paper document. See Rule 1:10.

**Serving and Filing.** In an electronically filed case, all documents required to be served on counsel of record are to be served by electronic transmission on or before the date of filing. In a provision that has implications in other than electronic cases, the rule provides that "[i]n a non-electronically filed case, electronic service may be effected by consent of the parties and agreement of the clerk."

When papers are served electronically in an electronically filed case, they will be deemed served when transmission is completed, except when completion is after 5:00 p.m. they will be deemed served on the next day that is not a Saturday, Sunday, or legal holiday.

Finally, in an electronically filed case, all such drafts of orders, decrees and notices are to be served on each counsel of record. Such service may be by electronic transmission and may make provision for electronic endorsement by multiple parties where applicable. Rule 1:13.
E. Dormancy, "Striking" Cases from the Docket, & Reinstatement

Pursuant to subsection (A) of Code § 8.01-335, cases dormant two years may be discontinued by the court upon notice. If a party requests that the case be allowed to remain on the docket, it will not be discontinued. Under subsection (B) of this Code section, cases dormant three years or longer may also be discontinued by the court. Until 1997 this statute called for "dismissal" of the stale case, and older case law had held a "dismissal" to have a conclusive effect in that dismissed cases cannot be reinstated upon the docket without the consent of all parties. See Snead v. Atkinson, 121 Va. 182, 92 S.E. 835 (1917). However, without explanation the term was changed to "discontinued" in 1997, implying the possibility that the termination is not on the merits. It is also unclear whether the absence in subsection (B) of the notice and "party veto" a provisions found in (A) will mean that after three years the court can override a request to keep the case open.

§ 8.01-335. Certain cases struck from dockets after certain period; reinstatement.

A. Except as provided in subsection C, any court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. However, no case shall be discontinued if either party requests that it be continued. The court shall thereafter enter a pretrial order pursuant to Rule 4:13 controlling the subsequent course of the case to ensure a timely resolution of that case. If the court thereafter finds that the case has not been timely prosecuted pursuant to its pretrial order, it may strike the case from its docket. The clerk of the court shall notify the parties in interest if known, or their counsel of record at his last known address, at least fifteen days before the entry of such order of discontinuance so that all parties may have an opportunity to be heard on it. Any case discontinued under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after.

B. Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. Any case discontinued under the provisions of this subsection may be reinstated, on motion and for cause, after notice to the parties in interest, if known, or their counsel of record within one year of such order but not after.

C. If a civil action is pending in a circuit court on appeal from a general district court and (i) an appeal bond has been furnished by or on behalf of any party against whom judgment has been rendered for money or property and (ii) for more than one year there has been no order or proceeding, except to continue the matter, the action may, upon notice to the parties in accordance with subsection A, be dismissed and struck from the
docket of the court. Upon dismissal pursuant to this subsection, the judgment of
the general district court shall stand and the appeal bond shall be forfeited.

Obviously, "docket control procedures" come in for special scrutiny under the second paragraph of Code §8.01-4, quoted above. The evident legislative concern was for trial and motion scheduling procedures that could catch counsel from distant locales unaware, with prerequisites or limitations that do not generally apply in Virginia practice being enforced to prevent, truncate or peremptorily schedule pretrial or trial proceedings to the detriment of anyone not fully conversant with local practice.

The legislative gyrations of 1999 and 2000 threatened to outlaw or abolish all local rules, but ended up allowing such rules under a regime that stresses the importance of local procedures not affecting substantial rights (often thought to mean, among other things, dispositions affecting viability of claims, motions or defenses). Against that background the circuit court whose rule was under scrutiny in Collins v. Shepherd, 274 Va. 390, 649 S.E.2d 672 (2007), created a docket-control procedure to "enforce" the one-year service provisions of the Rules and Title 8.01 of the Code, and the appeal in that case presented the Court with the first full-blown opportunity since the reshaping of Code §8.01-4 to address the proper role of local rules of court and the relationship between such regulations and statewide law, in the Rules of Court and in statutes.

The Supreme Court deemed the issues respecting the validity of the local docket-weeding rule to be purely questions of law, which means that in Virginia the appellate court is free to engage in a ground-up or "de novo" consideration of the validity of the local procedure. The particular Local Rule 2(F)(3), a part of the "Civil Case Management Administrative Plan" had been originally adopted by the Circuit Court of the City of Norfolk in 1998. The plan itself had as its stated purpose, what the Supreme Court in Collins acknowledged as "the laudable goal" of concluding all civil cases, except by leave of court and in suits for divorce, within twelve months of filing. In an apparent effort to achieve that goal, the Norfolk Local Rules in Rule 2(F)(3) provided that:

If any civil action is not served within the time provided by Supreme Court Rule [3:5(e)], the Clerk shall prepare a notice of dismissal and send such notice to counsel for the plaintiff."

In Collins v. Shepherd, plaintiff sued for personal injuries allegedly resulting from the negligent operation of a motor vehicle by the defendant, but did not serve her with process. Within days after one year transpired from the date of filing, the circuit court, in accord with its local rule, mailed to plaintiff's attorney a "Notice of Dismissal" stating that the circuit court “on Friday, October 7, 2005 at 9:00 a.m. . . . pursuant to Supreme Court Rule [3:5(e)] and Nelson v. Vaughan, 210 Va. 1 [, 168 S.E.2d 126] (1969), will dismiss this case because [Shepherd] has not been served with process within one year after the filing of the . . . Motion for Judgment . . . unless the [c]ourt finds that [Collins] has exercised due diligence to have timely service on the defendant." Plaintiff did not appear on or before the date designated in the notice of dismissal, and the dismissal, nonsuit, and enforcement of dismissal described above then followed.

On appeal in Collins, plaintiff argued that the local rule was invalid because it abridges his "substantive right to take a nonsuit and refile his case." Further he
contended that the local rule conflicted with the procedures for discontinuance set forth in Code § 8.01-335, and that it permits dismissal of a case that was never served on the defendant in contravention of Rule 3:5(e).

Rule 3:5(e), the current Part Three embodiment of the long-standing one-year principle, provides that “[n]o order, judgment or decree shall be entered against a defendant who was served with process more than one year after the institution of the action against that defendant unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on that defendant.” However, unlike the local rule, Rule 3:5(e) does not expressly contemplate dismissal of cases not served within a year, although such cases are potentially subject to dismissal under Rule 3:5(e) upon motion by the defendant as the Supreme Court held over a decade ago in the landmark Gilbreath v. Brewster decision.

Despite the local rule’s reference to Rule 3:5(e), the Supreme Court found that the critical question was whether the circuit court had the authority to adopt a local rule that essentially translated Rule 3:5(e) into a mode of procedure for the court dismissing unserved cases sua sponte. The plaintiff asserted that the circuit court did not have such authority because the local rule violates the provisions of Code § 8.01-4. The Supreme Court remarked that while Code § 8.01-4 delegates to circuit courts the authority to establish rules regarding the management of their courts and the handling of cases, "[c]learly, however, Code § 8.01-4 denotes that such authority must be carefully exercised so that local rules do not encroach upon statutes, Rules of Court, or case law."

Based in part on the language in Code § 8.01-4 expressly stating that local rules must not “abridge the substantive rights of the parties” or deprive any party from having a case heard on the merits, the Supreme Court found that the General Assembly’s intention was that local rules govern the administration, but not become the determining factor in the ultimate outcome, of cases. It noted that – by operation of a procedure effectuated solely by its local rule – the circuit court dismissed the case under review case with prejudice without the case being heard on the merits. The Court observed that in the absence of this local rule, the plaintiff "would have retained the right to take a nonsuit and refile his civil action beyond the one-year limitation period established by the local rule," in accord with Code § 8.01-380 and case authority.

The Supreme Court therefore held that: "The dismissal under a local rule of a case that the plaintiff would otherwise be able to pursue under the Code, case law, and Rules of Court exceeds the authority delegated to circuit courts under Code § 8.01-4." An important part of the analysis of the validity of this local rule was the fact that it is in tension with another Title 8.01 provision – one which deals directly with the power of a court to dispose of cases where they are inactive on the docket for a period of time. This provision, Code §8.01-335, quoted above, governs circuit courts’ authority to discontinue inactive cases.

Under Code § 8.01-335(A), the earliest point at which the circuit court may discontinue a pending case is after two years of inactivity, and even then discontinuance may be ordered only if neither party requests a continuance or the parties fail to abide by a schedule set by the court following a continuance. A case must be inactive for three years before a circuit court may dismiss it sua sponte under Code § 8.01-335(B). Additionally, Code § 8.01-335 provides the parties to a discontinued case the opportunity to reinstate the case within one year of the discontinuance.
The Supreme Court of Virginia found that, in comparison to Code § 8.01-335, Local Rule 2(F)(3) reviewed in the Collins decision would "drastically expand the circuit court’s authority to dismiss an inactive case by permitting dismissal, sua sponte, after one year rather than after two or three years." It should also be noted that -- unlike Code § 8.01-335 -- the Norfolk local rule did not provide an opportunity for revival of a discontinued case, thus the Court found that it "totally ignore[d] the statutory distinction between a discontinuance and a dismissal with prejudice."

Given the strictures of Code § 8.01-4, which among many other limitations expressly states that “[n]o rule . . . shall be prescribed or enforced which is inconsistent with . . . any . . . statutory provision,” the court found the inconsistency between the Norfolk Local Rule and Code § 8.01-335 to be "palpable and beyond debate." Thus the circuit court did not have the authority under Code § 8.01-4 to adopt a local rule permitting the sua sponte dismissal with prejudice of cases not served within a year of the filing date, and the local rule to that effect was simply invalid. As a consequence, the dismissal ordered in the Collins case itself was in error.

**Reinstatement Problems.** The reinstatement provisions of Code § 8.01-335(B) have also generated perplexity. In one case, because an order reinstating a medical malpractice action to the circuit court's docket under Code § 8.01-335(B) that was entered without notice to the defendant was not void ab initio, and the action was thereafter nonsuited and refiled, the circuit court erred in dismissing the case on statute of limitation grounds. The judgment was reversed. *Hicks v. Mellis*, 275 Va. 213, 657 S.E.2d 142 (2008).

The language of Code § 8.01-335(B) is plain, and it provides that any court in which an action is pending for more than three years with no order or proceeding, except to continue it, may, in its discretion, order the case to be stricken from the docket and discontinued. The court may dismiss cases under this subsection without any prior notice to the parties. The section further provides that any case that is discontinued or dismissed under this provision may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record, within one year from the date of such order but not after.

The Supreme Court of Virginia held in *Hicks v. Mellis* that under this statutory language, a circuit court may enter an order reinstating a discontinued case only after notice is given to known parties in interest. In that case the parties did not dispute that the defendant doctor was a known party in interest to the discontinued action.

Code § 8.01-335(B) provides that a circuit court may reinstate a discontinued action after notice to the parties in interest, if known, or their counsel of record. Significantly, the statute does not direct that notice be given only to named defendants or their counsel of record, but leaves for the circuit court’s determination the issue whether there are known parties who have an interest in the litigation, a matter that will rest on the facts and circumstances of a particular case. The potentially broad scope of the inquiry may require that the circuit court decide both issues of fact and of law in reaching a conclusion. Such determinations are core functions of our courts in the exercise of their jurisdiction.
The fact that the defendant doctor easily could be identified as a person of interest in this case did not change the nature of the legal determination that the circuit court was required to make under the statute. Thus, the circuit court’s failure to apply the statute properly did not affect the court’s jurisdiction to enter the reinstatement order. Likewise, the circuit court’s reinstatement order was not void ab initio on the ground that the court employed an unlawful mode of procedure. Code § 8.01-335(B) required that the circuit court decide whether there were known interested parties entitled to notice before reinstating the case and, thus, the circuit court lawfully could have made this determination and still have reached the wrong result. Because the misapplication of the statute in the present case occurred in the circuit court’s lawful exercise of its jurisdiction, the reinstatement order was merely voidable, rather than void ab initio and, thus, was not subject to collateral attack in the present action. The Supreme Court concluded in *Hicks* that the fact that the defendant was not served in the nonsuited action, and had no other notice of those proceedings, and thus that he did not know that the May 25, 2004 order of nonsuit had been entered and could have been appealed, cannot be considered in this collateral action but may raise a question for the General Assembly’s consideration in future revisions to Code § 8.01-335(B).
THIS TRIAL IS AN OUTRAGE, YOUR HONOR! MY CLIENT IS ENTITLED TO A JURY OF PEARS!
F. Mass Claims Litigations

A fully articulated package of provisions dealing with coordination of "mass claim cases," exists in Title 8.01 of the Code, though it is rarely applied. It is found in Code §8.01-267.1 and following sections.

Consolidation and Other Combined Proceedings. Where separate civil actions are pending which were brought by six or more plaintiffs, a circuit court may enter an order providing for any or all of the following: coordinated or consolidated pre-trial proceedings; a joint hearing or trial by jury with respect to common questions at issue in the actions; and consolidations of the actions. The statute does not purport to create a class action device, but consolidated actions arising from a common transaction or occurrence bear some similarities to that form of procedure. The concept of the law bears some relation to the federal procedure for creating multi-district dockets in mass-claim situations. Advisory groups had opined that limiting the statute's effect to cases involving more than five plaintiffs would assure that it deals with the mass claim circumstances the drafters contemplated.

Motion Required. A party may make a motion to a circuit court to enter an order to join, coordinate, consolidate, or transfer actions. Bar groups had suggested that a motion be required, rather than permitting the court to order coordination or consolidation sua sponte. This procedure was viewed as not favoring either plaintiffs or defendants and was broadly supported by bar, so long as consolidation was not forced upon the parties by the court.

Numerical Threshold. The statute passed by the General Assembly is limited to instances where there are "separate civil actions brought by six or more plaintiffs." Given the limited opportunities for plaintiffs to join in a single action, it appears likely that this provision will mean that there must be six separate lawsuits pending to trigger availability of the consolidation and coordination procedures of this statute, but note the joinder discussion below.

Common Nucleus of Facts Requirement. The key focus of the statute is on the subject matter of the six or more claims. Under the act, multiple actions are amenable to consolidation and coordination if they "arise out of the same transaction, occurrence or series of transactions or occurrences." A similar "transaction or occurrence" test is found in other aspects of Virginia law.

Not only must there be a common event around which the multiple actions revolve, but the issues in the actions must be weighted toward those which are in common. The procedure is available where "the common questions of law or fact predominate and are significant to the actions."

Tort or Contract? The form of statute created in Virginia is sometimes referred to as a "mass tort statute" designed to deal with mass disasters such as plane crashes or toxic torts. The law as enacted in Virginia in these sections, however, is careful to avoid the term "mass tort," instead using the term "mass claim." This appears to leave flexibility for contract-based claims to be aggregated under the terms of the new law if the factors articulated in the Code are met in such a situation.
Findings Required; Factors. The statute requires that the trial court find that an order of consolidation or coordination will serve the ends of justice and efficiency, and will not impinge upon any party's Due Process rights.

A motion for such relief will be considered by the court in light of the following factors, among others: the nature of common questions of law or fact; convenience of the parties, witnesses, and counsel; relative stages of the actions; efficient usage of judicial facilities; calendar of the courts; the significance and probability of duplicative and inconsistent rulings, orders, or judgments; likelihood of settlement of the actions without the order; and likelihood of prejudice or confusion if there are joint trials by jury. These factors are merely an illustrative list of considerations which may bear on the decision whether to coordinate the proceedings in multiple cases.

Management Options. In order to further avoid unnecessary costs and promote fair and efficient resolution of the litigation, the court has a range of management options if the prerequisites for coordination are met and the court makes the findings noted above: ordering the parties to organize into groups with like interest; appointing counsel to have lead responsibility for specific matters; allocating costs to separate issues into common questions that require treatment on a consolidated basis and individual cases that do not; and to stay discovery on the issues that are not consolidated.

The statute does not make express provision for the appointment of special or temporary judges to handle multiple claims litigations. Advisory groups declined to recommend such provisions since the need for such appointments was not demonstrated, and funding issues were seen.

Joinder Options Expanded. In a significant change of prior law, the statute permits six or more plaintiffs to be joined initially as plaintiffs in a single action if their claims proceed from the common nucleus of facts defined in the statute. While this is a departure from prior Virginia law, the provision is drafted in a fashion to make this joinder possible only if the cases would be subject to consolidation under this statute if they had been filed separately.

Transfer. Where civil actions are brought by six or more plaintiffs anywhere in the Commonwealth involving a single transaction or occurrence and involving common issues of law or fact, a party may apply to a panel of circuit court judges for an order of transfer. The panel may order some or all of the actions transferred to a circuit court in which one or more of the actions are pending in order to coordinate or consolidate pre-trial proceedings. All parties must be given notice of the transfer application. After receiving notice of application for transfer, the circuit court shall not enter any further order until after the panel has entered an order granting or denying the application for transfer.

The transfer provisions of the act represent some of the most substantial changes in the entire statute. Any party is authorized to make the transfer application, which may be granted upon the panel of judges making the finding that the actions are subject to consolidation under the act.

Severance. On motion of a defendant, the joined actions will be severed unless the court determines that the claims of the plaintiffs were ones which, if filed separately, would have been consolidated under the § 8.01-267.3 provision of consolidation and
other combined proceedings. If the court orders severance, the claims may proceed separately in the separate circuit courts within sixty days of entry. The severance provision is largely repetitive of Code § 8.01-281, but it was felt that the creation of a separate consolidation statute would make reiteration of the power to direct severance appropriate.

**Separate Trials; Special Interrogatories.** On motion of any party, the court may order separate or bifurcated trials of any one or more claims, cross-claims, counterclaims, third-party claims, or separate issues, always preserving the right of trial by jury. The court may also submit special interrogatories to the jury to resolve specific issues of fact.

**Later-Filed Actions.** Later-filed actions may be joined with ongoing litigation, and parties in later-filed actions may be bound to prior proceedings to the extent that the court, in its discretion, finds that the interests of such parties were adequately and fairly represented. The court may also limit or prohibit discovery by parties in later-filed action if the court finds that the matters on which the discovery is sought have been covered adequately by prior discovery. There are considerable grounds for concern about the management of cases where later-filed actions are to be affected, and the advisory groups labeled such matters "vexing." Explicit findings are required of the trial court to the effect that added parties' interests were "adequately and fairly represented" in prior proceedings. Where appropriate findings are made, the court may limit the discovery by parties in later-filed actions in light of the consolidated proceedings taken previously.

**Interlocutory Appeal.** The Supreme Court or the Court of Appeals may permit an appeal to be taken from an otherwise nonfinal order of a circuit court directing a consolidated trial of claims joined or consolidated pursuant to this chapter. The Supreme Court or the Court of Appeals may allow an appeal from any other order of a circuit court, provided the written order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation. The advisory groups were of the view that if a large number of cases turn upon a crucial ruling, appellate review should be available. Application for appeal must be made within ten days after the entry of the order and will not stay proceedings in the circuit court unless so ordered.

**Effect on Other Law.** The procedures created by the mass claims act are not intended to displace other provisions of Virginia law. This clearly means that other consolidation powers, such as the traditional common law consolidation procedures recognized in such cases as *Clark v. Kimnach*, 198 Va. 737, 96 S.E.2d 780 (1957) and *Tazewell Oil Co. v. United Va. Bank*, 243 Va. 94, 413 S.E.2d 611 (1992) are not limited by the addition of these statutory provisions. Nor are the other procedures described earlier in this section of the Treatise displaced. In cases with fewer than six claimants, this common-law power remains the basis for consolidation orders, and it appears that common law consolidation of greater than six cases remains unaffected as well, given the language of this savings provision in the mass claims act (preserving procedures "otherwise available by statute, rule or common law"). In *Tazewell Oil*, for example, eight actions were consolidated under the traditional authority of a trial judge, well before the statute here discussed.
The General Assembly did provide that the new act will not apply to any action against a manufacturer or supplier of asbestos or products for industrial use that contain asbestos. This provision appears to proceed from an awareness that there is a separate coordination provision applicable to asbestos-related cases. That provision was originally enacted as a three-year experiment, but in 1995, the General Assembly deleted the original sunset provision, thus allowing the statute to remain on the books.
Chapter 19

Nonsuits and the 21-Day Rule

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A. Outline of the Rule

A plaintiff in Virginia has an extraordinary freedom to withdraw the case prior to its ultimate decision, or final submission of the matter for that decision. Under Code § 8.01-380 the plaintiff may "take a nonsuit" at any time prior to the case being fully submitted to the court or jury for decision. Plaintiff has one nonsuit as a matter of right, and may be allowed to nonsuit the action a second time if the court grants leave to do so. While nominally in the form of a motion for nonsuit, the statute assures plaintiff that the application will be granted.

A nonsuit is available in any civil case, and is attended by favorable statute of limitations provisions allowing the case to be refiled within six months whether the statute would otherwise have run by that time or not. All of the timetables of the rules start over again upon refiling, so that the plaintiff acquires another year to effect service under Code § 8.01-275.1.

The plaintiff may elect to nonsuit some claims while proceeding on others (e.g., nonsuiting counts for breach of contract but proceeding on a claim for tortious interference with existing business relationships arising from the same transaction), or may nonsuit the case as against some parties and not other defendants.

Most of the difficulties with nonsuits have come in determining when the action is "fully submitted", and hence not susceptible to plaintiff's unilateral right to nonsuit. In a jury case the right to nonsuit ends when the jury has been instructed on the law and retires to commence deliberations. In a case being tried to the judge alone, the time for taking a nonsuit ends when the case is fully submitted for decision. Cases in this Chapter note that this has been interpreted to mean that if briefing is still being completed, nonsuit is permitted. Where dispositive pleas or motions have been fully argued and the parties are awaiting decision, it is too late for plaintiff to take a nonsuit. Lorcom House Condominium Council v. Wells, 237 Va. 247 (1989).

A counter-claim may preclude the dismissal of an action by nonsuit, but a mere affirmative defense is not the equivalent of a counter-claim. City of Hopewell v. Cogar, 237 Va. 264 (1989).

Set forth on the following page is the full text of Code § 8.01-380 and the pertinent portions of the Reviser’s Note. In the right column are some editorial observations about the terms of the statute. Cases in this Chapter probe the limits of the application of this provision.
§ 8.01-380. Dismissal of action by nonsuit.

A. A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision. After a nonsuit no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause is shown for proceeding in another court, or when such new proceeding is instituted in a federal court. If after a nonsuit an improper venue is chosen, the court shall not dismiss the matter but shall transfer it to the proper venue upon motion of any party.

B. Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits upon reasonable notice to counsel of record for all defendants and upon a reasonable attempt to notify any party not represented by counsel, or counsel may stipulate to additional nonsuits. The court, in the event additional nonsuits are allowed, may assess costs and reasonable attorneys' fees against the nonsuiting party. When suffering a nonsuit, a party shall inform the court if the cause of action has been previously nonsuited. Any order effecting a subsequent nonsuit shall reflect all prior nonsuits and shall include language that reflects the date of any previous nonsuit together with the court in which any previous nonsuit was taken.

C. If notice to take a nonsuit of right is given to the opposing party within seven days of trial, the court in its discretion may assess against the nonsuiting party reasonable witness fees and travel costs of expert witnesses scheduled to appear at trial, which are actually incurred by the opposing party solely by reason of the failure to give notice at least seven days prior to trial. The court shall have the authority to determine the reasonableness of expert witness fees and travel costs.

D. A party shall not be allowed to nonsuit a cause of action, without the consent of the adverse party who has filed a counterclaim, cross claim or third-party claim which arises out of the same transaction or occurrence as the claim of the party desiring to nonsuit unless the counterclaim, cross claim or third-party claim can remain pending for independent adjudication by the court.

Don’t be fooled by the “suffer” language. This is a powerful option for plaintiff’s in Virginia, used when a witness performs poorly, a judge rules harshly, or the jury does not seem sympathetic.

This restriction is an effort to keep plaintiffs from shopping in different courts for a more favorable judge. But if venue was wrong, or if plaintiff can get the case into federal court, the nonsuit statute will apply to permit refiling and accord its limitations extension to such proceedings.

There are no reported cases involving stipulations to permit multiple nonsuits, though it may have happened in unreported instances.

Note the recitations now required re prior nonsuits.

The “seven days” provision was added in response to cases like Albright, below.

See the readings in this Chapter to develop a sense of this limitation. In Virginia, where the circuit courts are courts of general jurisdiction (not “limited” like the federal district courts), when is it that a counterclaim cannot remain standing for independent adjudication?
REVISERS' NOTE to §8.01-380

. . . . First, a party is restricted to one nonsuit as a matter of right. After taking the first nonsuit, a party can, with leave of court, or upon stipulation of the other party, be allowed additional nonsuits. The court, in permitting the additional nonsuit, may impose costs and reasonable attorney's fees upon the nonsuiting party. Similarly, a party agreeing to an additional nonsuit may stipulate upon what conditions he will permit the nonsuit.

B. Nature of the Nonsuit Right

ALBRIGHT v. BURKE & HERBERT BANK & TRUST CO.

JUSTICE WHITING delivered the opinion of the Court:

In this appeal, we consider whether a borrower has pled a cause of action against a bank that refused to perform an alleged contract to refinance the borrower's defaulted loans. We also consider whether the trial court can condition the borrower's amendment of his motion for judgment upon his payment of the attorney's fees incurred by the bank in defending the borrower's prior nonsuited action. . . .

On August 24, 1988, Penrose Lucas Albright was in default in the payment of three notes held by Burke & Herbert Bank & Trust Company (the bank). Two notes aggregating $45,000 were unsecured, and a third note of $144,150 was secured by a deed of trust upon real estate Albright owned in Alexandria. Albright discussed with the bank "a revised arrangement" to pay these three defaulted notes. . . .

Albright thereafter made . . . payments in accordance with [what he alleged was an orally modified] contract, and the unsecured notes were consolidated into a $42,000 90-day note. However, "sometime during or about October 1988," without notice to Albright, the bank directed the trustees named in the deed of trust to "foreclose on said property [securing the debt]." Accordingly, the trustees scheduled a foreclosure sale for December 29, 1988.

On November 17, 1988, Albright "asked that the remainder of the oral contract . . . be implemented" by converting the secured note into a monthly payment note as agreed. The bank refused to do so and thereby forced Albright to sell the property "under unfavorable conditions" to avoid foreclosure.

Contrary to its August 24 oral contract, the bank also advised Albright that his $42,000 unsecured 90-day note would not be renewed when it matured on November 25. Since Albright was unable to pay that note, the bank sued him in the Circuit Court of Arlington County. On October 27, 1989, the bank obtained a judgment against Albright for the amount of that note, plus interest, late charges, attorney's fees, and costs.

Albright had filed a counterclaim setting forth various claims arising from the breach of the oral contract. The issues on the counterclaim were set for trial in November 1989. However, on the morning of trial, Albright nonsuited his counterclaim. Later, he filed a motion for judgment in the Circuit Court of Arlington County against
the bank, again asserting claims arising from the bank's breach of the oral contract. After venue was transferred to the Circuit Court of the City of Alexandria, Albright again nonsuited his claim on the morning of trial.

Later, Albright filed a three-count motion for judgment in this action alleging (1) a breach of oral contract, (2) a breach of the bank's "obligation of good faith in contracting," and (3) "actual and/or constructive malice by [the bank]." The bank filed a motion to dismiss on the ground that Albright had twice nonsuited these causes of action on the days they were to be tried. The bank also filed a demurrer.

The court sustained the bank's demurrer, but denied the bank's motion to dismiss. However, the court conditioned Albright's right to amend his motion for judgment upon payment of the attorney's fees the bank had expended in defending the last action that Albright nonsuited. Albright appeals.

Challenging the ruling sustaining the demurrer, Albright contends that the consideration required to support the oral contract alleged in Count I is contained in (1) his agreement to pay, and subsequent payment of, the alleged sums to reduce his indebtednesses, (2) his reliance upon the bank's promise to refinance by making no effort to secure financing from any other source, and (3) the benefit to the bank of continued interest payments. We find no merit in any of these contentions. [Discussion omitted]

This brings us to a consideration of the court's requirement that Albright pay the bank's attorney's fees incurred in the defense of Albright's previously nonsuited counterclaim and his refiled action. The bank contends that Code § 8.01-380 gave the trial court the authority to assess these attorney's fees. We disagree.

Code § 8.01-380(B) provides:

Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits or counsel may stipulate to additional nonsuits. The court, in the event additional nonsuits are allowed, may assess costs and reasonable attorney's fees against the nonsuiting party.

In our opinion, this statute limits the assessment of attorney's fees to the cause of action being nonsuited. It does not authorize such an assessment in a subsequent action. Nor does Code § 8.01-380(B) give the court the right to condition the filing of an amended motion for judgment upon the payment of such fees, as the bank contends. Hence, the trial court erred in doing so.

For the foregoing reasons, we will affirm the court's judgment in sustaining the bank's demurrer, and we will reverse that part of the judgment conditioning the filing of an amended motion for judgment upon the payment of attorney's fees. We will remand the case for further proceedings consistent with this opinion.

Note on Imposition of Costs
In a personal injury case, the Supreme Court found that a trial judge erred by imposing $540 in jury costs upon a plaintiff who took a first nonsuit, as a matter of right, during the trial. Because the imposition of financial costs not authorized in Code § 8.01-380(C) places a limitation on the absolute right of a plaintiff to take a first nonsuit, the trial court could not assess jury costs upon a plaintiff taking such a nonsuit, and a local court rule could not serve as authority for imposing such costs, due to inconsistency with the state statutory provision. Martin v. Duncan, 277 Va. 204, 671 S.E.2d 15 (2009)(plaintiff’s motion to strike the defense evidence on liability issues was denied, and plaintiff elected to take a nonsuit. On defendant’s motion for imposition of costs, counsel asked the trial court to assess expenses incurred in securing the deposition of an expert witness and the defendant’s own travel costs. The trial court concluded that Code § 8.01-380(C) did not allow assessment of those costs, but assessed against the plaintiff the jury costs associated with the case, $540, finding that assessing jury costs was “‘pretty standard’” in that court. The Supreme Court reversed, holding that imposition of financial costs not authorized in Code § 8.01-380(C) places a limitation on the absolute right of a plaintiff to exercise that right, and that under Virginia Code § 8.01-4 a local rule or practice cannot be enforced if it is inconsistent with any statutory provision or has the effect of abridging substantive rights of persons before such court).
JUSTICE HASSELL delivered the opinion of the Court.

Code § 8.01-380(A) contains a limitation which provides that "after a nonsuit no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction." In this appeal, we consider whether Code § 8.01-380(A) permits a plaintiff to nonsuit an action in a general district court and to refile that action in a circuit court, claiming damages in excess of the jurisdiction of the general district court.

In 1994, Annie Conner filed an action against James M. Rose in the Richmond City General District Court. Conner alleged in her warrant in debt that she had purchased a home from Rose and that he breached certain warranties that he had made to her. Conner sought damages in the amount of $4,000.

On Rose's motion, the action was transferred to the Henrico County General District Court. Subsequently, Conner nonsuited her action in that court and refiled her action in the Circuit Court of Henrico County. Her motion for judgment included causes of action for breach of warranty and fraud in connection with the purchase of the house. She sought compensatory and punitive damages totaling $11,000.

Relying upon Code § 8.01-380(A), Rose requested that the circuit court transfer Conner's action to the general district court. Rose argued, and the trial court held, that Code § 8.01-380(A) requires that Conner refile her action in the general district court because her nonsuit was taken in that court. We awarded Conner an appeal.

Conner asserts that Code § 8.01-380(A) permits her to file her action in the circuit court because the ad damnum clause in her motion for judgment exceeds the jurisdictional limit of the general district court and, therefore, the general district court lacks jurisdiction over her action. We agree.

The applicable statutory language quoted in Code § 8.01-380(A) is clear and unambiguous and, therefore, we apply its plain meaning. Barr v. Town & Country Properties, Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990). This language permits Conner to refile her action in the circuit court because the ad damnum clause in her motion for judgment exceeds the general district court's jurisdictional limit of $10,000, see Code § 16.1-77. Therefore, the general district court is without jurisdiction to adjudicate her claims.

Accordingly, we will reverse the judgment of the trial court and remand this case for further proceedings.
Notes: The "Same Case" and More Nonsuits

The "Same Case" Principle. The limitation on nonsuits as a matter of right depends, of course, on the plaintiff commencing the later action being the same party for purposes of the nonsuit. In one illustrative case, a decedent's mother who maintained one action and a personal representative were not "substantially the same parties." Since the mother did not have standing to bring the wrongful death action, she was not suing in the same right as the personal representative in a second action. Accordingly, the mother's nonsuit of the first action did not impair the personal representative's absolute right to one nonsuit of the second action under the provisions of Code § 8.01-380(B). The nonsuit of the second action was a first nonsuit, and the circuit court therefore did not err in allowing the personal representative to suffer a nonsuit of that action. Brake v. Payne, 268 Va. 92, 597 S.E.2d 59 (2004).

More Nonsuits After Reversal and Remand. Reversal of a judgment and remand for a new trial is sufficient to re-awaken the plaintiff's right to take a nonsuit. Thus even though the case was "fully submitted" by the time of jury deliberations in the first trial, the reversal and remand of the action by an appellate court terminates the effect of the prior trial. Thus a plaintiff may assert a right to nonsuit after a remand. The Supreme Court has noted, however, that this principle does not apply to issues which under the "law of the case" doctrine are not subject to relitigation, or to parties and claims already dismissed with prejudice, or otherwise eliminated from a case, prior to a nonsuit. Ford Motor Co. v. Jones, 266 Va. 404, 587 S.E.2d 579 (2003).
C. Counterclaims and Third Party Claims

In *Bremer v. Doctor's Building Partnership*, 251 Va. 74, 465 S.E.2d 787 (1996), the Court held that the concept of “counterclaims” under Code § 8.01-380 does not include a matter pled against the plaintiff as a statutory plea for relief in the nature of “recoupment” under Code § 8.01-422.
D. Submission of the Case

KHANNA v. DOMINION BANK OF NORTHERN VIRGINIA

JUSTICE COMPTON delivered the opinion of the Court.

....In April 1985, following a hearing and argument of counsel on the motion for summary judgment, the trial judge stated he would grant judgment in favor of the plaintiff on the original claim, but that he would take under advisement the plaintiff's motion relating to the counterclaim. Plaintiff's counsel was granted leave to submit supplemental authorities responding to cases cited by defendants' counsel.

....In December 1985, counsel for the plaintiff filed a supplemental brief in support of its contention that defendants' counterclaim should be dismissed. Later in December 1985, the attorney for the defendants was granted leave to withdraw as counsel of record. In early January 1986, the attorney reentered the case. On January 20, 1986, the attorney mailed a praecipe to the clerk of the court below asking that his appearance be noted as counsel for defendants.

While You Were Out . . .

PHONE MESSAGE

Judge Solomon called, re the Khanna case:
He's decided to grant Summary Judgment.
Please prepare an order.

On the next day, the plaintiff's attorney received a telephone message from the trial judge's office indicating that the judge had decided to grant the plaintiff's motion for summary judgment on the counterclaim and asking counsel to prepare the appropriate order for submission to the defendants for review. Apparently, the judge was not aware that defendants' counsel had reentered the case. On the same day, plaintiff's counsel notified defendants' counsel of the substance of the telephone message and, on January 24, 1986, mailed for endorsement a draft order reflecting the court's ruling.

On February 6, 1986, before the draft order was endorsed, counsel for defendants filed a motion to nonsuit the counterclaim. Subsequently, the trial court ruled that at the time the defendants' motion for nonsuit was filed, "the plaintiff's Motion for Summary Judgment on the defendants' Counterclaim had been submitted to the Court for decision and was decided, the Court having received the arguments and memoranda of counsel in support thereof." The trial court, therefore, decided that the motion for nonsuit "comes too late," denied defendants' motion, and dismissed the counterclaim. We awarded defendants this appeal from the March 1986 judgment entered in accord with these rulings. . . .
Defendants rely on *Moore v. Moore*, 218 Va. 790, 240 S.E.2d 535 (1978). There, we held that a plaintiff in a divorce suit had an absolute right to a voluntary dismissal because the suit had not been "submitted" to the chancellor for decision, even though the defendant unilaterally had forwarded a sketch for a final decree to the court. Construing the nonsuit statute, we said that for a "submission" to have occurred under the procedural circumstances of that suit, "it was necessary for the parties, by counsel, to have both yielded the issues to the court for consideration and decision." Id. at 795, 240 S.E.2d at 538. We stated that this could have been accomplished "either as the result of oral or written argument, formal notice and motion, or by tendering a jointly endorsed sketch for a decree." Id. at 795-96, 240 S.E.2d at 538.

In the present case, defendants argue that nothing was done by them to "yield" the issues addressed to the court in plaintiff's supplemental argument. They say that plaintiff should have given formal notice of a motion to enter summary judgment to be based on the reasons advanced in argument, including the argument made in the supplemental brief. Defendants contend that because plaintiff had not taken that "appropriate step" before the nonsuit motion was filed, the trial court improperly denied them their right to nonsuit. We do not agree; *Moore* is inapposite.

The focus in this case should not be, as defendants urge, on whether the action set forth in the counterclaim had been "submitted" or "yielded" at or after the time plaintiff's supplemental brief was filed. Rather, the important circumstance in this case is that when defendants attempted to take a nonsuit, their action already had been decided and the court had announced its decision. It would be absurd to hold that a claimant could suffer a nonsuit as a matter of right after a court had decided the claim. Manifestly, an action has been "submitted to the court for decision" by the time the court decides the matter. See *City of Hopewell v. Cogar*, 237 Va. 264, 377 S.E.2d 385 (1989) (nonsuit erroneously denied when motion made within 15-day period allowed by court for parties to file memoranda of law); and *Wells v. Lorcom House Condominiums*, 237 Va. 247, 377 S.E.2d 381 (1989) (nonsuit improperly granted when case dispositive issues fully argued and no further action contemplated or necessary for court to decide issues), decided today.

Consequently, the trial court did not err in ruling that defendants' motion for nonsuit came too late.
Note on Submission and Decision of Dispositive Motions

In *Wells v. Lorcom House Condominiums’ Council*, 237 Va. 247, 377 S.E.2d 381 (1989), oral argument was heard in June by the trial court on the issues raised by various demurrers and motions. In November counsel for plaintiffs wrote the trial judge. Noting that the court had taken the various motions and demurrer "under advisement," counsel said: "Please be so kind as to inform me when your ruling may be expected." There was no response to that letter. In March of the next year, plaintiffs filed a notice and draft order for a voluntary nonsuit, according to the provisions of Code § 8.01-380. The trial court granted the nonsuit and, on appeal, the Supreme Court commented on both *appealability* of nonsuit rulings and the issue of submission of the case to the trial court as preclusive of a nonsuit:

The nonsuit statute, Code § 8.01-380, contains a number of limitations on a party's absolute right to take a voluntary nonsuit. For example, a party shall not be allowed to suffer a nonsuit "unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision." Code § 8.01-380(A). If a nonsuit has been allowed in violation of those, or other, provisions of the nonsuit statute, appellate review must be available to correct such an error.

Thus, where a dispute exists whether the trial court properly granted a motion for nonsuit, as in this case, we hold that the order of nonsuit is a final, appealable order within the meaning of Code § 8.01-670(A)(3) ("any person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved . . . [b]y a final judgment in any . . . civil case"). See *Iliff v. Richards*, 221 Va. 644, 649-50, 272 S.E.2d 645, 648 (1980) (order of nonsuit is final, appealable judgment when it improperly dismisses a defendant against whom a cross-claim has been asserted).

Neither *Mallory v. Taylor*, 90 Va. 348, 18 S.E. 438 (1893), nor *Gemmell v. Svea Fire and Life Ins. Co.*, 166 Va. 95, 184 S.E. 457 (1936), relied on by plaintiffs, requires a contrary holding. In *Mallory*, the Court merely held that an order of nonsuit ordinarily is not considered to be a final judgment for purposes of appeal. In *Gemmell*, the Court held that an order of nonsuit could not be the basis for a plea of res judicata, where the nonsuit was taken in a de novo circuit court hearing on appeal after a judgment in the case had been entered in the court not of record. In neither case, however, was there a dispute about the propriety of the trial court's action in granting the nonsuit. See generally *J.I. Case Co. v. United Virginia Bank*, 232 Va. 210, 349 S.E.2d 120 (1986) (money judgment in detinue action properly entered against plaintiffs in course of granting nonsuit).

Next, we address the correctness of the trial court's action in granting the nonsuit. The question is whether the action had been "submitted to the court
for decision," within the meaning of the nonsuit statute. We answer that question in the affirmative.

Among the matters upon which the parties had joined issue and which were argued to the trial court on June 20, 1985 were: defendants' demurrer attacking the legal sufficiency of the amended motion for judgment; defendants' plea in bar based on various statutes of limitations; and defendants' motion to dismiss. Any one of those pleadings were case dispositive if the court ruled in favor of the defendants. Moreover, the record is clear that no one, neither the trial judge nor the attorneys, contemplated that any further action, such as briefing, was necessary in order to enable the court to decide the issues. Indeed, counsel for the plaintiffs recognized this fact because he wrote the trial judge in November inquiring "when your ruling may be expected."

Consequently, we hold under these circumstances that the action had been "submitted to the court for decision," the request for nonsuit came too late, and the trial court erred in granting the request. See Khanna v. Dominion Bank, 237 Va. 242, 377 S.E.2d 378 (1989) (nonsuit motion properly denied when filed after court had announced decision); and City of Hopewell v. Cogar, 237 Va. 264, 377 S.E.2d 385 (1989) (nonsuit erroneously denied when motion made within 15-day period allowed by court for parties to file memoranda of law), decided today.
Nonsuits "In the Nick of Time"

NEWTON v. VENEY and RAINES

JUSTICE HARRISON delivered the opinion of the Court.

Jennie F. Newton alleged that she was injured in an accident between two automobiles, one operated by Odell Veney and the other by Gloria H. Raines. Plaintiff was a passenger in the Raines vehicle and claims that both drivers were negligent. On motion of the defendants, separately made, the court struck the evidence of the plaintiff as to each defendant. In this appeal plaintiff questions this action by the court and also its refusal to permit her to take a nonsuit as to Veney.

We . . . find that plaintiff's motion for a nonsuit as to Veney should have been granted. At the conclusion of plaintiff's evidence counsel for Raines made a motion to strike. The motion was argued, and the trial court said, "We grant that motion." Later in the proceedings counsel for Veney made a similar motion which was also argued. Following the argument this exchange occurred between the trial court and counsel:

THE COURT: I disagree, I'm sorry, but I disagree. I don't believe that the plaintiff has proven a case against either one of these defendants. And, I think that she is bound by any uncontradicted evidence that they have put on as adverse witnesses.

MR. BREIT: If Your Honor please, before the Court would rule on this point, because I think it is serious enough in view of the fact that the plaintiff is free of negligence as a matter of law. I would ask the Court, and I hereby, on behalf of the plaintiff, take a nonsuit in this case.

MS. KRAMER: Your Honor, I would just put on the record that you have ruled and the plaintiff is not permitted to take a nonsuit at this time.

THE COURT: I don't think it is proper to take a nonsuit after the plaintiff is rested and put on its evidence.

MR. BREIT: Before the jury retires, in fact, before the jury rules, it's a matter of statute, and absolute right of the plaintiff to take a nonsuit. I don't think the Court or any of the parties could prevent the nonsuit for the plaintiff in this stage of the proceeding.

THE COURT: Well, I'm ruling on a motion to strike.

MR. BREIT: Yes, sir, Court has taken --

THE COURT: (interjecting) And, I'm going to grant that motion.

Virginia Code § 8.01-380(A) is dispositive of the issue. It provides, in pertinent part, that: "A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained. . . ." A court decides a case by making a ruling. On a motion to strike the court "rules" or "decides" when it sustains or overrules the motion. It is this act that imparts finality to and disposition of the matter, and until it occurs a
party is allowed to suffer a nonsuit. This is not a case of a plaintiff taking advantage of "semantical niceties," as Veney argues, but of a plaintiff availing herself of an option under a clear and unambiguous statute. In the case under review, and in *Berryman v. Moody*, 205 Va. 516, 137 S.E.2d 900 (1964), the trial court clearly indicated its intention or inclination to sustain defendant's motion to strike. But in each case it is equally as clear that counsel for the plaintiff realized that his only chance of avoiding an adverse ruling was to take a voluntary nonsuit, and that he do so before the court ruled. The fact that counsel correctly divined the intention of the trial court does not estop him from suffering a nonsuit.

The construction we give the statute is necessary because of the varying practices followed by trial courts, and to avoid confusion and uncertainty. Some judges rule on a motion to strike without explanation or comment. Some rule and then explicate. And some analyze the motion, summarize and discuss the evidence, and then rule. When this last practice is followed a plaintiff is free to suffer a nonsuit at any time prior to a ruling by the court.

We hold that the plaintiff's motion for nonsuit was made in time under the provisions of Code § 8.01-380(A). The judgment below as to Veney is therefore reversed. The plaintiff's motion for a nonsuit as to this defendant is granted, and the case as to him is dismissed without prejudice. The judgment of the court below, striking plaintiff's evidence as to the defendant Raines, is reversed for the reasons stated, and the case is remanded for a new trial as to her.

Reversed and final judgment as to defendant Veney. Reversed and remanded for new trial as to defendant Raines.

**Note**

In *Hilb, Rogal and Hamilton Company v. Depew*, 247 Va. 240, 440 S.E.2d 918 (1994), the Court applied *Newton* in a case where the trial judge commented from the bench during the explanation of his thinking that plaintiff’s theory “seems to me to stretch the point quite a bit.” Just after the court made this statement, plaintiff moved to nonsuit remaining claim on the point the judge had been addressing. The Supreme Court found that plaintiff had “moved to nonsuit during the court's discussion of its proposed ruling, but before it had ruled. Hence, the motion was timely.”
Per Curiam:


Accordingly, the Court affirms the order of the circuit court granting the plaintiff a nonsuit. The appellant shall pay to the appellee thirty dollars damages.

**JUSTICE RUSSELL, with whom JUSTICE HASSELL joins, dissenting.**

In this negligence case tried to a jury, the plaintiff introduced her evidence and rested. The defendant made a motion to strike the plaintiff's evidence, which the court denied. The defendant then rested, without introducing any evidence, and renewed its motion to strike. After counsel argued the motion extensively, the court recessed the trial and retired to chambers to read certain cases cited by counsel.

The judge, having decided to grant the motion, then returned to the bench and began to explain his ruling, applying the applicable law to the facts in evidence. After this discussion had run to such length as to occupy three pages of the transcript, plaintiff's counsel interrupted the court in mid-sentence to say, "I'm going to take a nonsuit, Your Honor." The defendant objected on the ground that the nonsuit came too late, but the court granted the nonsuit and we awarded the defendant an appeal. This Court now, by order, affirms the trial court's ruling on the authority of *Berryman v. Moody*, 205 Va. 516, 137 S.E.2d 900 (1964) and *Newton v. Veney & Raines*, 220 Va. 947, 265 S.E.2d 707 (1980).

Code § 8.01-380(A) provides, in pertinent part:

A party shall not be allowed to suffer a nonsuit as to any cause of action . . . unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision.

In the present case, the jury had not "retired from the bar" because the case had not yet been submitted to the jury for decision. The final statutory provision applies only where the parties have submitted the case to the court, without the intervention of a jury, for final determination. *Moore v. Moore*, 218 Va. 790, 240 S.E.2d 535 (1978). It is inapplicable here because the jury had not been discharged at the time of the court's ruling, and if the motion to strike had been denied, the case would have gone to the jury for determination. Accordingly, we must focus only upon the first part of the statute, which prevents nonsuit after a motion to strike has been granted.

I must agree with the majority's conclusion that the rule in *Berryman*, which we followed in *Newton*, dictates an affirmance in this appeal. In *Berryman*, plaintiff's counsel interrupted the trial judge, who was announcing his ruling on a motion to strike, before the judge could utter such magic words as "the motion is granted." We held that
a nonsuit was timely because the court had not yet pronounced the magic words. *Berryman*, 205 Va. at 519, 137 S.E.2d at 902. I part company with the majority because I consider *Berryman* to be poorly reasoned, and I would overrule it.

It is very helpful to counsel, litigants, and appellate courts when trial judges give careful, patient, and reasoned explanations of their rulings. It is not conducive to a good public perception of the administration of justice when rulings are made peremptorily and without explanation. Even if such rulings have been carefully considered, they may appear to be arbitrary snap judgments to litigants and spectators.

*Berryman*, however, penalizes a judge who attempts a rational explanation before making a ruling. The judge who does so may be subjected to the indignity of interruption, followed by the necessity of trying the case a second time. To avoid those risks, the judge must either utter the magic words at once, preferably speaking so rapidly as to preclude the possibility of interruption, appending an explanation later, or rule in swift monosyllables, omitting any explanation whatever.

When, in 1954, the proviso concerning motions to strike was added to the nonsuit statute, Acts 1954, c. 333, it is highly unlikely that the General Assembly intended to put a premium on the discourtesy of counsel interrupting judges in the course of rulings from the bench. Yet *Berryman* rewards counsel who interrupt judges and penalizes those who patiently await an appropriate opportunity to be heard. The race is to the swift.

This unfortunate rule encourages counsel to leap to their feet with a cry of "nonsuit" during a patient and thoughtful explication of a judicial ruling. It contributes to the public perception of a judicial proceeding as a sporting event rather than a reasoned search for truth under the rule of law. It is altogether unnecessary. The rule is based solely on the unfortunate interpretation given to former Code § 8-220 by this Court in *Berryman*.

I would correct the rule by holding that the first proviso of Code § 8.01-380(A) becomes effective, precluding a nonsuit, whenever the trial judge begins the articulation of a ruling on a motion to strike the evidence. No magic words should be required, and the form of phraseology selected by the judge should be immaterial. Interjections and interruptions would not be rewarded because they would be ineffectual.

True, the statutory proviso employs the present perfect tense: it precludes a nonsuit unless it is sought "before a motion to strike the evidence has been sustained," (emphasis added). Read literally, that language might imply that the court's ruling must have finality before a nonsuit would be precluded, contrary to the interpretation just suggested. But if this interpretation is at odds with a literal reading of the statute, so is *Berryman*. A court of record speaks only through its written orders; only written orders are final. *Hill v. Hill*, 227 Va. 569, 578, 318 S.E.2d 292, 297 (1984). An oral pronouncement from the bench does not have the effect of a written order, id., it is merely a direction to counsel or the clerk to prepare an appropriate written order for later entry. *Berryman* requires no written order, but merely the oral pronouncement of some unspecified magic words. We have made it abundantly clear, in *Berryman*, and particularly in *Newton*, that the statute is not to be read literally, and that an oral pronouncement of magic words will bar the right to a nonsuit. I would make no change except to eliminate the magic.
One cannot escape admiration for this Court's faithful adherence to the principle of stare decisis, which lends so much stability and predictability to the law. But even this Court has not hesitated to overrule its prior decisions when time has shown them to be ill-adapted to present conditions, unworkable in practice, or ill-considered. . . .

There is no valid reason why an error, once committed, should be enshrined forever, to the detriment of future generations, like Sir Francis Bacon's proverbial fly in amber. Therefore, I would overrule Berryman and Newton and reverse the order of nonsuit.

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Summary of When Nonsuit is Barred Because Too Late

In a recent summary of these principles, a medical malpractice case in which, after briefing and oral argument of a motion for summary judgment by defendant concerning the absence of any expert witness supporting plaintiff's claims, the trial judge announced a ruling for the defendant and invited further comments of counsel. Plaintiff's attempt to take a nonsuit at that time came too late. The trial court's ruling allowing a nonsuit was reversed on appeal. Bio-Medical Applications of Virginia v. Coston, 272 Va. 489, 634 S.E.2d 349 (2006). The Supreme Court synthesized the Code and case law interpretations as follows:

The plain language of Code § 8.01-380(A) imposes a time bar for the plaintiff's ability to interpose a nonsuit in three conceptually distinct situations: The first contemplates a trial on the merits in which the plaintiff’s case has been fully presented to the trier of fact, the plaintiff has rested, the defendant has moved the court to strike the plaintiff’s evidence, and the court has sustained the motion; the second contemplates a jury trial in which all parties have rested, the court has instructed the jury, and the jury has retired to consider its verdict; the third contemplates a case in which the action is in the hands of the trial judge for final disposition, either on a dispositive motion or upon the merits.

The Court stated that it has been necessary to apply different rules for the application of the first and third branches of the nonsuit statute. As to the first branch, involving motions to strike the evidence, the rule is that the time bar fixed by that branch of the nonsuit statute does not become effective until the trial court actually sustains a motion to strike the evidence. Thus, a nonsuit is timely if taken while the trial judge is explaining his ruling, as long as he has not actually sustained the motion to strike. Although this rule has been criticized on the ground that it rewards interrupting the court, it has been applied in additional cases. This construction is necessary because of the varying practices followed by trial courts, and to avoid confusion and

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40 "Whence we see spiders, flies, or ants, entombed and preserved for ever in amber, a more than royal tomb, although they are tender substances and easily dissipated." F. Bacon, 1561-1626, "Historia Vitae et Mortis" 156 (J. Spedding trans. The Works of Francis Bacon vol. X 1872).
uncertainty. Some judges rule on a motion to strike without explanation or comment. Some rule and then explicate. Some analyze the motion, summarize and discuss the evidence, and then rule. When this last practice is followed a plaintiff is free to suffer a nonsuit at any time prior to a ruling by the court.

However, the Court has observed, the doctrine permitting the mid-ruling taking of nonsuits applies only to the first branch of the nonsuit statute, when a motion to strike the evidence is before the court. The more common situation – which the Court labeled as "the most productive of appeals" – is that in which the determinative question is whether the case had been “submitted to the court for decision” when the motion for a nonsuit was made. In a recent case before the Supreme Court, when the plaintiff moved for a nonsuit in the present case, the parties had completed their oral arguments on a motion for summary judgment that would, if granted, have been dispositive. The trial court had announced its ruling explicitly: “and that’s the ruling of the court.” The court’s subsequent invitation to counsel to make further comment, "while laudably courteous, gave them an opportunity to note their objections for the record but did nothing to rescind the court’s ruling." In sum, the Supreme Court has expressly stated that it would be "absurd" to hold that a claimant could suffer a nonsuit as a matter of right after a court had decided the claim. Manifestly, an action has been "submitted to the court for decision" by the time the court decides the matter.

Thus it is apparent that even where the court has not yet ruled, under the third branch of the nonsuit statute, the case has been submitted to the court for decision when both parties have yielded the issues to the court for consideration and decision. The time bar becomes effective then, and does not await the pronouncement of the court’s ruling. The Supreme Court has stated flatly that it is error to apply the mid-ruling nonsuit claim principle to a situation governed by the third branch of the nonsuit statute. When the motion for nonsuit is made after the court has heard all oral argument and is announcing its decision on a pretrial motion for summary judgment, the action had already been "submitted to the court for decision" and the motion for nonsuit at that time came too late.
Note on Motions to Dismiss for Defective Service of Process

In *Atkins v. Rice*, 266 Va. 328, 585 S.E.2d 550 (2003), the Court reviewed on appeal the availability of a nonsuit when a motion was argued in the trial court seeking outright dismissal of the case based on defects in the service of process. The Court said:

The motion before the trial court was not a motion to strike evidence; rather, it was a motion to dismiss based upon defects in service of process. These circumstances are governed by that portion of Code § 8.01-380(A) that prohibits a nonsuit unless a motion is made "before the action has been submitted to the court for decision."

When construing the nonsuit statute, for an action to be "submitted to the court," it is necessary for the parties to have yielded the issues to the court for consideration and decision. *Transcontinental Ins. Co. v. RBMW, Inc.*, 262 Va. 502, 514, 551 S.E.2d 313, 319 (2001). "However, when further submissions from the parties are contemplated, a matter has not been finally yielded for decision or finally determined." *Liddle v. Phipps*, 263 Va. 391, 394, 559 S.E.2d 690, 692 (2002).

In the case before us, the matter clearly had been submitted to the court for decision, and no further submissions were contemplated. Both parties had filed written memoranda in support of their positions concerning Atkins' motion to dismiss for failure of timely service of process. No further written submissions were contemplated, and neither party had sought leave to file any further papers. The parties had the opportunity to present oral argument and any evidence in support of their respective positions before the trial court on July 15, 2002. When asked by the trial court if he wanted to take a nonsuit, Rice's counsel expressly stated twice that he did not. After some final statements by Atkins' counsel, nothing further was expected from the parties, and the matter had been submitted for decision.

The trial court erred in granting Rice's nonsuit. Accordingly, we will reverse the judgment of the trial court and remand the case to the trial court for decision on Atkins' motion to dismiss.
E. Additional Nonsuits

As noted in the Albright decision at the outset of this chapter, while the Code provides only one nonsuit as a matter of "right", there is discretion for the trial court to allow additional nonsuits. As is evident from Albright the provision of Code § 8.01-380(B) permitting the imposition of cost and fee recoupment is worded such that a party must seek relief at the time of the second or subsequent nonsuit, not when the case is thereafter filed again. In connection with the timing of applications for a second or subsequent order of nonsuit, consider the following case.

**KELLY v. CARRICO**

JUSTICE HASSELL delivered the opinion of the Court:

As relevant to this appeal, Code §8.01-380(A) provides that a party shall not be allowed to take a voluntary nonsuit "unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision." In this case, we consider whether the trial court's order granting a motion for nonsuit on the basis that the action had not been submitted to the court for decision is erroneous.

Delores Carrico filed a motion for judgment against Roger Lee Kelly. Carrico, who had nonsuited a prior action against Kelly, alleged in her motion that she was injured as a result of Kelly's negligent operation of an automobile. Kelly filed a grounds of defense and asserted, among other things, that Carrico was guilty of contributory negligence. Pursuant to Rule 3:12, Kelly requested that Carrico reply to any "new matter" contained in his grounds of defense, including his allegations that Carrico was guilty of contributory negligence. Carrico failed to file a reply as requested.

On the morning of trial, after the jury had been impaneled, Kelly made a motion requesting that the trial court enter a judgment in his favor on the pleadings. Kelly asserted that he was entitled to judgment on the pleadings because he had pled "new matter" in his grounds of defense, which, if true, would show that Carrico was guilty of contributory negligence and, thus, she would be barred as a matter of law from any recovery against Kelly. Relying upon Rule 1:4(e), Kelly argued that he had pled allegations of fact to support his affirmative defense of contributory negligence, and that those allegations are deemed to have been admitted because Carrico had failed to deny them.

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41 Rule 3:12 states in relevant part: "If a plea, motion or affirmative defense sets up new matter and contains words expressly requesting a reply, the adverse party shall within twenty-one days file a reply admitting or denying such new matter."

42 This Court's Rules do not recognize "judgment on the pleadings." However, Carrico did not object to Kelly's use of this procedural device.

43 Rule 1:4(e) states in relevant part: "An allegation of fact in a pleading that is not denied by the adverse party's pleading, when the adverse party is required by these Rules to file such pleading, is deemed to be
The court and counsel discussed the merits of Kelly's "motion for judgment on the pleadings." During the discussion, the trial judge stated that he intended to read a certain case before deciding Kelly's motion. The following colloquy ensued:

"[CARRICO'S COUNSEL]: Your Honor, I mean, this is a horrible injustice for this young lady. I would ask the Court to give me a second nonsuit then. I mean, I do not see why --

"THE COURT: That is a different issue.

"THE COURT: We have not gotten to that point. My inclination is -- What is your position as far as a second nonsuit? I assume that is objected to.

"[KELLY'S COUNSEL]: Well, we would, of course, object. But I understand that this is coming up this morning --

"THE COURT: I will tell you that -- I will take a look at the case. I will give you a second nonsuit in the case -- and I will tell you that on the front end -- before I would throw this case out. I agree with you.

"But the rules are the rules. And, quite frankly, if we do not have any reply, the issues are not necessarily joined in the case.

"Let me take a look at the case. . . . If you would just give me one moment to read this case and just confirm what I believe to be the case."

The court then took a recess. At the conclusion of the recess, Carrico's counsel asked for permission to amend her pleadings. The trial court did not rule on Carrico's request to amend. The court did, however, sustain Carrico's motion for a second nonsuit. Kelly appeals.

Kelly, relying principally upon *Wells v. Lorcom House Condominiums' Council of Co-Owners*, 237 Va. 247, 377 S.E.2d 381 (1989), argues that the trial court erred by sustaining Carrico's motion for a nonsuit because the action had been submitted to the court for decision. We disagree with Kelly.

In *Wells*, the plaintiffs filed an amended motion for judgment against certain defendants, alleging that they were responsible for property damage to a building. The defendants denied the material allegations of the amended motion for judgment and also filed a plea in bar, demurrer, and "motion to dismiss." On June 20, 1985, the litigants appeared before the trial court and argued the motions raised by the various pleadings. On November 7, 1985, counsel for plaintiffs submitted a letter to the trial court, stating that the court had taken the various motions and demurrer "under advisement" and requesting that the court inform him when its "ruling may be expected." On March 19, 1986, plaintiffs filed a notice and draft order for a voluntary nonsuit, according to the provisions of Code §8.01-380. The trial court granted the nonsuit over the defendants' objection and dismissed the action without prejudice. Id. at 250, 377 S.E.2d at 382-83.

admitted. An allegation in a pleading that the party does not know whether a fact exists shall be treated as a denial that the fact exists."
We held that under the facts and circumstances in *Wells*, the plaintiffs' request for a nonsuit was not timely because the nonsuit motion was made after the action had been submitted to the court for a decision within the meaning of the nonsuit statute. . . .

The facts in this record are distinguishable from the facts of record in *Wells*. Carrico made her nonsuit motion before the trial court recessed to consider the merits of Kelly's dispositive motion. We have stated, when construing the nonsuit statute, that for a submission to occur, it is "necessary for the parties, by counsel, to have both yielded the issues to the court for consideration and decision." *Moore v. Moore*, 218 Va. 790, 795, 240 S.E.2d 535, 538 (1978). Here, there was no submission because the nonsuit motion was made before the court recessed to consider the merits of Kelly's motion and, thus, Carrico did not yield the dispositive issues to the court for consideration and decision. See *City of Hopewell v. Cogar*, 237 Va. 264, 268, 377 S.E.2d 385, 387-88 (1989) (nonsuit erroneously denied when motion was made within period allowed by court for litigants to file memoranda of law).

Even though the trial court's final order states that after the trial judge returned to the bench from his recess, he "indicated that he was ready to rule on the motion, and the plaintiff requested leave to suffer a second nonsuit of this cause of action, to which the defendant objected," the order also states that before the trial court recessed, "the court indicated its willingness to grant a second nonsuit, and counsel for [Carrico] stated that he would ask for a second nonsuit as stated." Our review of this order indicates that the trial court was correct in ruling that Carrico's request for a second nonsuit was made before the court recessed to consider the merits of Kelly's motion.

We do not consider Kelly's assignment of error that "the trial court erred in permitting Carrico to suffer a second nonsuit because the second nonsuit was prejudicial to Kelly's rights." As Carrico observes on brief, Kelly did not raise this objection in the trial court. Rule 5:25. Likewise, we do not consider Kelly's contention that Carrico's failure to file a pleading required by the Rules does not constitute good cause for granting a second nonsuit because this argument was not raised in the trial court. Rule 5:25.

Accordingly, the judgment of the trial court will be affirmed. Affirmed.
Note on Legislation for Notice of Second Nonsuit Applications

In order to assure that the adversary becomes aware of nonsuit applications – at least in certain circumstances, an amendment was adopted in 2007 to the nonsuit regarding notice to the adversary parties for subsequent nonsuits. The amendment to Code §8.-1-380(B) also provides that the trial court will be advised as to whether the pending action has been nonsuited previously. The new language requires that an order granting a second or subsequent nonsuit must set forth the existence and date of any previous nonsuit. As amended, the statute provides that the court may allow additional nonsuits "upon reasonable notice to counsel of record for all defendants and upon a reasonable attempt to notify any party not represented by counsel, or counsel may stipulate to additional nonsuits." It further provides that the court, in the event additional nonsuits are allowed, may assess costs and reasonable attorneys' fees against the nonsuiting party, that when seeking a nonsuit, a party shall inform the court if the cause of action has been previously nonsuited, and that any order effecting a subsequent nonsuit shall reflect all prior nonsuits and shall include language that reflects the date of any previous nonsuit together with the court in which any previous nonsuit was taken. Thus the trial court must be informed of the circumstances and must focus on the issues to render the order.
F. Nonsuits and Other Procedural Rules

21 Days, Again

THE BEREA N LAW GROUP, P.C. v. COX

[Plaintiff filed a legal malpractice case. The trial court sustained defense demurrers and
gave oral leave for filing an amended complaint by a specified date, and recited that if that
amended pleading was not file the case "shall STAND AS DISMISSED." [Caps by the trial
judge.] There was a telephone conference with the circuit court on the same day and plaintiff
claims that the court ruled during this telephone conversation that he was entitled to file an
amended complaint at a particular adjourned date. Defendants claimed that the court required
the amended pleading to be filed much earlier, and the circuit court had no recollection of the
extension date. Neither counsel for plaintiff nor defendants requested that the circuit court enter
an order suspending, modifying, or vacating the order which sustained the demurrers. Plaintiff
filed an amended complaint on the later date, and the defense moved to dismiss because more
than 21 days had elapsed following the entry of the order sustaining the demurrers. A couple
weeks later plaintiff filed a motion for a nonsuit, which the trial court granted. The defendants
appealed.]

The defendants argue that the circuit court could not consider the plaintiff's motion
for a nonsuit because the court lost control over the plaintiff's action 21 days after the
entry of the order that sustained the demurrers. Responding, the plaintiff argues that the
... order which granted him leave to file an amended motion was not a final order, or
was . . . modified, vacated, or suspended within the intendment of Rule 1:1 by [an order
the court entered dealing with production and inspection of documents.]

It is the well-established law of this Commonwealth that a circuit court speaks only
through its written orders. Austin v. Consolidation Coal Co., 256 Va. 78, 81, 501
S.E.2d 161, 162 (1998). . . . Additionally, an order of the circuit court becomes final 21
days after its entry unless modified, vacated, or suspended by the court during that time.
Rule 1:1.

We have stated that

"neither the filing of post-trial or post-judgment motions, nor the court's
taking such motions under consideration, nor the pendency of such
motions on the twenty-first day after final judgment, is sufficient to toll
or extend the running of the 21-day period prescribed by Rule 1:1 . . . .
The running of time under [Rule 1:1] may be interrupted only by the
entry, within the 21-day period after final judgment, of an order
suspending or vacating the final order."

an order that sustains a demurrer and dismisses the case if the plaintiff fails
to amend his motion for judgment within a specified time becomes a final order upon
the plaintiff's failure to file an amended motion within the specified time. Norris v.
The plaintiff, relying upon Norris, argues that the circuit court did not lose control over the September 24, 1998 final order and, thus, his nonsuit motion was timely. We disagree. In Norris, the circuit court held that a motion for judgment failed to state a cause of action, and the court sustained the defendants' demurrers and dismissed the action in a written order entered June 20, 1996. This order granted the plaintiffs leave to file an amended motion on or before July 8, 1996. Three days before the July 8 deadline, the plaintiffs filed a motion for a nonsuit which the court granted in a written order entered on July 15, 1996. The order granting the nonsuit was entered more than 21 days after the June 20 order, but less than 21 days after the July 8 deadline. Norris, 255 Va. at 238, 495 S.E.2d at 811. We held in Norris that the circuit court's written order that gave the plaintiffs leave to file an amended motion for judgment could not have become final until the July 8 deadline. Thus, the circuit court had 21 days after that time in which to modify, vacate, or suspend its order, and the circuit court did so by entering its order of nonsuit. Id. at 239, 495 S.E.2d at 811.

Unlike Norris, the plaintiff in this action filed his nonsuit motion after the circuit court lost control of the [demurrer] order pursuant to Rule 1:1. No written order was entered that modified, vacated, or suspended the circuit court's . . . order sustaining the demurrers. Additionally, the express language contained in that order states that the "plaintiff's action against [the defendants] shall STAND DISMISSED unless on or before [a specified date], the plaintiff shall file an Amended Motion for Judgment," which the plaintiff failed to do.

It is true, as the plaintiff asserts, that the circuit court agreed orally during a telephone conference with all counsel to permit the plaintiff to file an amended motion for judgment on a date later than the date specified in the . . . written order. However, the circuit court's oral ruling cannot nullify its written final order, and it was incumbent upon the plaintiff to submit timely a written order to the circuit court suspending, modifying, or vacating the . . . order sustaining the demurrers.

. . . We have reviewed both orders, and we conclude that the so-called "ORDER FOR PRODUCTION AND PROTECTIVE ORDER" did not vacate, modify, or suspend the circuit court's order fixing the time within which the plaintiff was required to file his amended motion for judgment. Furthermore, no ambiguity exists between the two orders.

Finding no merit in the plaintiff's remaining arguments, we hold that the circuit court did not have control of the final order when it entered the written order granting the plaintiff's motion for a nonsuit. Accordingly, we will reverse the order of nonsuit, and we will enter final judgment on behalf of the defendants.
SO, MR. BROWN... THE ONLY EXPLANATION YOU CAN GIVE FOR YOUR BEHAVIOR IS, "SHE PULLED THE BALL AWAY AGAIN"?
Notes on Discovery, Nonsuit and the 21-Day Rule

**Discovery Orders and 21 Days.** In *Liddle v. Phipps*, 263 Va. 391, 559 S.E.2d 690 (2002) the trial judge held a telephone hearing on August 23 in which he orally granted Liddle's motion to compel and ordered that Phipps completely and accurately respond to Liddle's discovery requests by October 2, 2000, or pay a sanction of $250. The trial court further ordered that if Phipps failed to completely and accurately respond to Liddle's discovery requests by November 2, 2000, Phipps' "action shall be dismissed with prejudice, which dismissal this Court finds to be an appropriate sanction in accordance with Rule 4:12 and other applicable Virginia law." The trial court entered an order on October 5, 2000 memorializing the August ruling. Phipps failed to respond to Liddle's discovery request by either the October or November deadlines established in the orders. Liddle prepared a proposed final order dismissing the case with prejudice and presented the order to Phipps for endorsement. On November 29, 2000, Phipps filed a motion for nonsuit. The trial court scheduled and held a hearing. The Supreme Court held that “The express language of the discovery order and the subsequent conduct of counsel and the trial court confirm that further consideration by the trial court was contemplated by the discovery order. On this record, it is clear that the issue of dismissal had not been decided by the discovery order.” Moreover, since discovery orders are not final and appealable orders in themselves, the 21-day limitation of Rule 1:1 did not prevent the trial court from revisiting the effects of failure to comply.

**21-Day Rule Does Apply to Nonsuit Orders.** In *James v. James*, 263 Va. 474, 562 S.E.2d 133 (2002), when the ex-wife failed to produce the couple’s children for a medical examination demanded by the ex-husband in their ongoing custody dispute, he filed for sanctions. A week before the scheduled hearing date on that motion, the wife took a nonsuit. She failed to appear at the sanctions argument. The trial judge and counsel for the husband discussed setting aside the nonsuit, but the only orders entered at the sanction hearing (1) required the wife to show cause why she should not be held in contempt, set for hearing several weeks later, (2) “continued” the hearing until a date six weeks later, and stated that (3) “This matter continues on the docket.” The Supreme Court held that jurisdiction to set aside or suspend an order of nonsuit ends 21 days after its entry. Order (3) apparently was not the equivalent of suspending the nonsuit, and thus several later proceedings over several months, and sanction orders later entered in this case were, therefore, void.
Nonsuits, Notice and the One Year Rule

McMANAMA v. PLUNK
250 Va. 27, 458 S.E.2d 759 (1995)

[In a personal injury suit arising from a traffic accident, the defendant never was served with process. The defendant was then killed while on active duty with the armed forces in the Persian Gulf War. Plaintiff took a nonsuit of the action. She filed a second complaint, naming the administratrix of the decedent as the defendant. Defendant objected to the filing of the second action on the ground that a refiling after a nonsuit must be "against the same party," Code § 8.01-380(A), and an individual decedent and the personal representative of his estate are not "the same party." Multiple versions of the lawsuit were filed, and several years passed in the process.]

In an April 1994 letter opinion, the trial court sustained the special pleas and granted the motions to dismiss. During its recitation of facts, the court noted that the August 29, 1991 nonsuit order was entered one year and two days after the first action was filed. The court stated that it "never acquired in personam jurisdiction over the defendant prior to his death; and no administrator, executor, or personal representative was ever substituted in his stead; and the order which dismissed the case on August 29, 1991, was ex parte and was without notice of hearing or opportunity to be heard by either the defendant or his estate." * * * *

[T]he August 1991 order granting the plaintiff's voluntary nonsuit was not a final, appealable order. Ordinarily, an order of nonsuit is not to be considered a final judgment for purposes of appeal. Mallory v. Taylor, 90 Va. 348, 349, 18 S.E. 438, 439 (1893). An order of nonsuit is a final, appealable order within the meaning of Code § 8.01-670(A)(3) ("any person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved . . . by a final judgment in any . . . civil case"), only when a dispute exists whether the trial court properly granted a motion for nonsuit. Wells v. Lorcom House Condominiums' Council, 237 Va. 247, 251, 377 S.E.2d 381, 383 (1989).

In the present case, there was no dispute at the time the nonsuit order was entered about the propriety of the trial court's action in granting the nonsuit. Code § 8.01-380, the nonsuit statute, while giving a party the absolute right to one voluntary nonsuit, contains a number of limitations on that right, none of which could have applied here. [T]he August 1991 order was fully and completely effective as a nonappealable voluntary nonsuit.

Second, the trial court erroneously placed limitations on the plaintiff's right to the voluntary nonsuit when it ruled that defendant "must first had to have been served with process, must have been before a court with jurisdiction over the defendant's person, and the defendant must have been given notice of hearing and an opportunity to be heard." None of these requirements is found in the applicable statutes, and a court should not add them by judicial fiat. The trial court had subject matter jurisdiction over the first action enabling it to properly enter an order granting plaintiff a voluntary nonsuit. See Morrison v. Bestler, 239 Va. 166, 173, 387 S.E.2d 753, 758 (1990). Therefore, the plaintiff's nonsuit of her first action was valid, the two-year statute of
limitations was tolled, and the plaintiff properly recommenced her action within six months from the date of the nonsuit order as authorized by Code § 8.01-229(E)(3).

Finally, the trial court's alternative, constitutional ruling is erroneous. Supporting the trial court's ruling, defendant contends that, while plaintiff had the right to sue Plunk within two years of the accident, Plunk had a "substantive right" not to be sued more than two years after the accident. Defendant says that Plunk had the following additional "substantive rights": to defend plaintiff's action; to challenge, if appropriate, plaintiff's termination of the litigation by nonsuit; to challenge where and when plaintiff recommenced an action terminated by a proper nonsuit; and to notice an appeal from "an improper nonsuit." . . .

We have already rejected a similar argument in Clark v. Butler Aviation-Washington Nat'l, Inc., 238 Va. 506, 512 n.5, 385 S.E.2d 847, 850 n.5 (1989). . . . We stated, however, that when the plaintiff suffered a voluntary nonsuit, he too had a "justifiable expectation," viz., that he would be entitled to the benefit of the six-month period allowed by § 8.01-229(E)(3) in which to recommence his action. Id. We said that if both postulates are accepted, a complete legal standoff would result. Accordingly, we accepted the plaintiff's premise, and rejected the defendant's, to avoid the standoff. Id.

Likewise, as the Clark defendant had no legitimate constitutional claim of entitlement or vested right in the statute of limitations or Rule 3:5(e) defenses, neither did the defendant in this case. Article I, § 11 of the Constitution of Virginia provides that "no person shall be deprived of his life, liberty, or property without due process of law." Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property. Commission of Fisheries v. Hampton Roads Oyster Packers and Planters Ass'n, 109 Va. 565, 585, 64 S.E. 1041, 1048 (1909). The procedural due process guarantee does not create constitutionally protected interests; rather, it provides procedural safeguards against government's arbitrary deprivation of certain interests. Etheridge v. Medical Center Hospitals, 237 Va. 87, 97, 376 S.E.2d 525, 530 (1989).

We need pursue only the [inquiry] whether entry of the ex parte order of voluntary nonsuit in the first action deprived Plunk of any protected property interest. We answer that query in the negative.

The grant of the nonsuit did not operate to deprive Plunk of any valid or vested defense of the statute of limitations, or of the time limits of Rule 3:5(e), as we pointed out in Clark. The fact that the Clark defendant may have had actual knowledge or notice of the nonsuit, while this defendant did not, does not affect the force of the Clark precedent. We determined in Clark that the defendant, like Plunk in the present case, simply had no property interest to protect. In other words, Plunk had no justifiable expectation of a Rule 3:5(e) or statute of limitations defense under Virginia law that was entitled to protection under the due process clause of the Constitution . . . .

In conclusion, we reject defendant's contention that neither the second action nor the third action was timely. Both were filed within the six-month extension granted by §8.01-229(E)(3). Contrary to defendant's contention, the filing of the third action, "against a known dead person," was not a nullity. Cf. Reynolds v. Williams, 147 Va. 196, 199, 136 S.E. 597, 598 (1927) (judgment against one dead when action brought a
nullity). And, the personal representative properly was substituted as a party defendant. Code § 8.01-229(B)(2)(b) ("If a person against whom a personal action may be brought dies before suit papers naming such person as defendant have been filed with the court, then such suit papers may be amended to substitute the decedent's personal representative as party defendant before the expiration of the applicable limitation period. . ."). Plunk died before the suit papers in the third action had been filed with the court. Thus, the foregoing statutory provision applied.

Therefore, the judgment appealed from will be reversed, and the case will be remanded for further proceedings.

JUSTICE WHITING, with whom JUSTICE KEENAN joins, dissenting.

In my opinion, the majority has misconstrued Code § 8.01-380 as a grant of a statutory right when it is actually a restriction upon a common-law right. [Wonderful, scholarly dissent, going back to Blackstone – the stuff of Law Review articles – is, alas, omitted here.]
WE, THE JURY, RULE IN FAVOR OF PAPA BEAR AND ORDER MAMA BEAR TO PAY THE SUM OF FIFTEEN MILLION DOLLARS...

THE INFAMOUS "PORRIDGE-TOO-HOT" TRIAL
Scope of Issues Nonsuited – And, What is Appealable

WILBY v. GOSTEL

[Following the consumption of alcohol and a late-night argument at their apartment, decedent followed her boyfriend as he left the building and got behind the wheel of his employer's van parked outside. Decedent climbed to a standing position on the front bumper of the van, which moved forward with some speed, then rapidly stopped, causing her to sustain fatal injuries when she was thrown to the ground. Decedent's personal representative sued the individual defendant for negligent as well as willful and wanton operation of the van, and sued his employer for negligent entrustment of the vehicle. Based on admissions that the decedent had used intoxicants and voluntarily stood on the bumper of the van while the individual defendant was operating it, the trial court issued a letter opinion and entered an order granting partial summary judgment on the grounds that the decedent was contributorily negligent as a matter of law. This ruling left other issues for later disposition, including the willfulness and wantonness of the conduct involved, which bore on the issue whether the defense could rely on decedent's contributory negligence as a defense. The plaintiff thereafter filed motions to nonsuit the action as to all claims against both defendants. The defendants requested that the nonsuit order expressly preserve the prior contributory negligence ruling, but the trial court concluded that the partial summary judgment ruling had not dismissed any claims with prejudice, and therefore entered an order granting an unconditional nonsuit of all claims. These appeals followed.]

. . . .We also awarded an appeal to Gostel to consider whether the trial court erred in finding that Newton was contributorily negligent as a matter of law. However, any consideration of the issue raised by Gostel in her appeal necessarily is contingent upon our first finding that the trial court erred in not limiting the nonsuit order. This is so because an appeal from a nonsuit order is limited to resolving disputes regarding the propriety of granting the nonsuit. Otherwise, a nonsuit order is not an appealable order. McManama v. Plunk, 250 Va. 27, 32, 458 S.E.2d 759, 761 (1995). Thus, only if we conclude that the trial court erred in not preserving within the nonsuit order the ruling that Newton was contributorily negligent will we be able to reach the issue of whether that ruling was proper. See Dalloul, 255 Va. at 514-15, 499 S.E.2d at 281-82. For this reason, we will consider the issue raised in the Wilby and Middleton appeals first . . . .

In Dalloul, we held that "the action' subject to a plaintiff's nonsuit request is comprised of the claims and parties remaining in the case after any other claims and parties have been dismissed with prejudice or otherwise eliminated from the case." 255 Va. at 514, 499 S.E.2d at 281. In that case, the trial court entered an order dismissing with prejudice four of six counts of a motion for judgment. n3 Subsequently, the trial court entered a voluntary nonsuit order as to the entire case, overruling the defendants' request to limit the nonsuit order to the two remaining counts. Reversing that judgment, we concluded that "when the trial court dismissed with prejudice Counts III through VI, the respective defendants obtained a final disposition of those counts that was adverse to Agbey and was res judicata as to those claims . . . . Thus, when Agbey requested the nonsuit, Counts I and II were the only claims remaining in the action." Id. at 514-15, 499 S.E.2d at 281-82.
Wilby's motion for summary judgment was premised upon Newton's contributory negligence being an absolute bar to recovery by the administrator of her estate for any liability arising from his actions. However, as the trial court noted, if the evidence were to show that Wilby's conduct rose to the level of willful and wanton negligence, he could not rely upon Newton's contributory negligence as a defense unless Newton's conduct also rose to that level of negligence. Wolfe v. Baube, 241 Va. 462, 465, 403 S.E.2d 338, 339 (1991). "Willful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." Griffin v. Shively, 227 Va. 317, 321, 315 S.E.2d 210, 213 (1984).

Nonetheless, Wilby and Middleton assert that the trial court erred in ruling that Dalloul did not require a limitation on the nonsuit order in this case. This is so, they contend, because the claims of negligence and willful and wanton conduct contained in both count 1 and count 2 of the motion for judgment qualify as separate "claims." Thus, they contend that when the trial court found as a matter of law that Newton was contributorily negligent, Gostel's "claim" for liability premised on Wilby's simple negligence was resolved adverse to her and was barred by the doctrine of res judicata, just as the claims in Dalloul had been resolved adverse to the plaintiff in that case. We disagree.

In Dalloul, each count of the motion for judgment contained a separate claim based upon a distinct theory of liability. 255 Va. at 512, 499 S.E.2d at 280. The trial court's dismissal of those counts eliminated entirely from the case those theories of liability and the evidence that would have been adduced thereon. Here, by contrast, the trial court's ruling did not eliminate either count 1 or count 2 or otherwise limit the evidence that would be relevant to the resolution of the claims made in those counts.

The claims made in count 1 and count 2 of the motion for judgment relate to Wilby's liability for his conduct. Gostel alleged that this conduct was "negligent" and also that it was "willful and wanton." However, these two allegations do not represent separate claims or theories of liability. Rather, in this context, negligent conduct and willful and wanton conduct merely refer to different degrees of proof that can be applied to the same theory of liability.

Accordingly, the trial court correctly determined that its ruling on Wilby's motion for summary judgment did not render final judgment on the claims asserted in count 1 and count 2 of Gostel's motion for judgment. Rather, the ruling had the effect of an in limine determination that in the posture of this case Gostel's burden of proof would be to establish willful and wanton negligence. While it was undoubtedly adverse to Gostel, this ruling did not dismiss any count or claim in the motion for judgment, as in Dalloul, and it did not dismiss with prejudice either Wilby or Middleton as parties to the suit. Thus, we hold that Gostel was entitled under Code § 8.01-380 to take a voluntary nonsuit as to her entire cause of action and as to all the defendants.

Having determined that the trial court did not err in entering the nonsuit order without limitation, we hold that the nonsuit order was not a final appealable order with respect to the issue of contributory negligence decided in the motion for summary judgment. . . Accordingly, we will dismiss Gostel's appeal.
Kiss me, and I turn into a judge.

Federal or state?
[Plaintiff commenced a medical malpractice action against various health care providers. The following year, the trial court granted plaintiff's motion for a nonsuit pursuant to Code § 8.01-380. Approximately nine months after entry of the nonsuit order, plaintiff re-filed her motion for judgment against the same defendants. The defendants filed pleas in bar, asserting that the cause of action was barred by the applicable statute of limitations. The circuit court concluded that the two-year statute of limitations was not tolled while the first action was pending. Since the second action was filed outside the original two-year limitations period and not within six months of entry of the nonsuit order as provided in Code § 8.01-229(E)(3), the court sustained the pleas in bar and dismissed the renewed action with prejudice. Plaintiff appealed.]

. . . . Initially, it is important to point out that this case does not implicate the tolling provision set forth in Code § 8.01-229(E)(1). Under that subsection, a statute of limitations is tolled when an action, commenced within the prescribed limitation period, is later dismissed or abates without determining the merits. The time during which the action was pending is not included as part of the period within which the action could have been brought, and the action may be re-filed "within the remaining period." Code § 8.01-229(E)(1). However, the initial clause of subsection (E)(1) specifically precludes the applicability of that tolling provision to an action that is nonsuited. In the event of a nonsuit, the provisions of subsection (E)(3) govern the determination of the time period during which a nonsuited action may be recommenced.

Subsection (E)(3) provides that, when a plaintiff suffers a nonsuit, that plaintiff, unlike a plaintiff coming within the scope of subsection (E)(1), has three possible time periods in which to renew the nonsuited action: (1) within six months of the date of the nonsuit order; (2) within the "original period of limitation;" or (3) within the period provided in subsection (B)(1). n2 Code § 8.01-229(E)(3). A plaintiff may utilize whichever of these periods is longest. Id. The question we must answer is whether an "original period of limitation" is tolled upon commencement of a nonsuited action. We conclude that it is not.

In Code § 8.01-229(E)(3), the General Assembly provided that an applicable statute of limitations shall be tolled upon commencement of a nonsuited action. But, the General Assembly did not include the language used in subsection (E)(1), stating that "the time such action is pending shall not be computed as part of the period within which such action may be brought." Code § 8.01-229(E)(1). That particular language delineates the period of time during which a statute of limitations is tolled under subsection (E)(1), i.e., while an action is pending.

Since subsection (E)(3) does not contain comparable language, Simon contends that we should refer to the provisions in subsection (E)(1) to determine the amount of time remaining on the two-year "original period of limitation" after entry of the nonsuit order. However, we find nothing in subsection (E)(3) indicating that reference to subsection (E)(1) is permissible when an action is nonsuited. To the contrary, the opening clause of subsection (E)(1) expressly excludes the applicability of the tolling provision contained therein to an action that is nonsuited. But if we adopted Simon's
position that the "original period of limitation" was tolled upon commencement of the nonsuited action even though she did not renew that action within six months of the date of the nonsuit order, we would necessarily have to refer to subsection (E)(1) in order to ascertain the duration of the tolling. Otherwise, the "original period of limitation" would be tolled for an indefinite period of time under subsection (E)(3).

Obviously, the General Assembly did not intend for that scenario to arise. Consequently, we conclude that the subsection (E)(3) tolling provision must be read in conjunction only with the option to renew the nonsuited action within six months of the date of the nonsuit order. By constructing subsection (E)(3) in this manner, the General Assembly has provided a window of six months during which a nonsuited action can be recommenced even if it was originally filed on the last day of the applicable statute of limitations. However, when a plaintiff, such as Simon, suffers a nonsuit and does not renew the action within the allotted six months, the "original period of limitation" is not tolled.

Our conclusion is consistent with the General Assembly's use of different terms in Code §§ 8.01-229(E)(1) and -229(E)(3). In subsection (E)(1), the General Assembly utilized the term "remaining period" to describe the period of time during which a plaintiff may recommence an action that is dismissed or abates without determining the merits. The use of that term is consistent with the fact that a statute of limitations is tolled under subsection (E)(1) while an action is pending. However, in subsection (E)(3), which specifically applies to an action that has been nonsuited, the General Assembly used the term "original period of limitation" to describe one of the possible periods during which a plaintiff may renew a nonsuited action. We construe the term "original period of limitation" to mean the original statute of limitations without any tolling of that statute while a nonsuited action is pending. To interpret this term as Simon suggests would require us either to give that term and the term "remaining period" the same meaning or to re-write subsection (E)(3) to say "original period of limitation" as computed under subsection (E)(1).

CONCLUSION

For these reasons, we conclude that, when Simon suffered a nonsuit of her first motion for judgment and did not recommence the action within six months of the date of the nonsuit order, the two-year statute of limitations was not tolled during the pendency of the nonsuited action. Consequently, the "original period of limitation" expired in September 2000. Since Simon did not re-file the nonsuited action until April 2001, the circuit court correctly sustained the defendants' pleas in bar. We will affirm the judgment of the circuit court.
Notes on Nonsuits

**Right to Nonsuit.** It is said in a number of decisions construing this section that a plaintiff has an “absolute right” to one nonsuit. The election is plaintiffs, and if this party insists upon taking the nonsuit within the limitations imposed by this section, neither the trial court nor opposing counsel can prevent plaintiff from doing so. *Nash v. Jewell*, 227 Va. 230, 315 S.E.2d 825 (1984).

**Consent of Defendant -- Unnecessary.** Defendant's consent is not required under the statute.

**Partial Nonsuits.** A plaintiff has the option to nonsuit specific counts or claims of an action, and allow others to remain pending (again assuming that no counterclaims are adversely affected by the nonsuiting of some claims).

**Nonsuit after General District Court Proceedings.** It appears that because of the premise that Circuit Court proceedings are "de novo", a plaintiff may take a nonsuit at the Circuit Court even if the matter was fully litigated, opposed by defendant, and decided by a General District Court judge. Under older cases, the general district judgment is of “no effect” once the appeal is taken.

**“Independent” Counterclaims.** The Court has held that where a defendant *could* have brought an independent claim in court, but failed to do so, and instead asserted its right of action only as a response to the plaintiff's litigation, it may be found that the defendant's counterclaim is not capable of “independent” determination should the plaintiff be allowed to take a nonsuit; hence the pendency of the counterclaim can bar the plaintiff’s effort to take a nonsuit. See *Lee Gardens Arlington Ltd. Partnership v. Arlington County Board*, 250 Va. 534 (1995).

**Effect of a Nonsuit.** When plaintiff takes a nonsuit the claim (or litigation) as to which plaintiff enters the nonsuit is terminated, without prejudice to either party. This disposition does not operate as a bar to any subsequent suit between the same parties on the same cause of action. See, e.g., *Alderman v. Chrysler Corp.*, 480 F. Supp. 600 (E.D. Va. 1979).

**Undoing the Nonsuit.** Since a court order is required to effectuate the termination of litigation which the nonsuit contemplates, it is possible for a plaintiff to change elections, if the change takes place before the court enters the order implementing the nonsuit. In such a situation, plaintiff must move for leave of court to reinstate the action, a matter within the court's discretion. *Nash v. Jewell*, 227 Va. 230, 315 S.E.2d 825 (1984).
Contractual Periods for Bringing Claims. In *Massie v. Blue Cross and Blue Shield of Virginia*, 256 Va. 161, 500 S.E.2d 509 (1998), the Court held that the tolling provision in Code §8.01-229(E)(3), which allows a plaintiff to recommence a cause of action within six months of the date of an order of nonsuit or within the original period of limitation, whichever is longer, does not apply to a limitation period fixed by contract rather than by statute. The plaintiffs had a claim under an insurance contract which required all actions to be brought within 12 months from the date the claim accrued. The Court held that the shortening of the normal statutory period for claims upon a written contract was valid and enforceable. However, since Code §8.01-229(E)(3) has the operative language, "the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action," the Court held that it does not apply to limitations periods established by private contract. Hence taking a nonsuit did NOT extend a party’s time to bring a claim under the parties’ contract by the statutory six months.

Nonsuit after Remand. In *Ford Motor Co. v. Jones*, 266 Va. 404, 587 S.E.2d 579 (2003) the Supreme Court held that where a case is reversed and remanded, all claims that were previously in the action are available for nonsuit if the plaintiff takes that step.

Nonsuit and “Prevailing Parties.” In *Sheets v. Castle*, 263 Va. 407, 559 S.E.2d 616 (2002), the Court held that a defendant is not a “prevailing party” when the plaintiff takes a nonsuit, and if there is a contractual right to recover fees that requires “prevailing” the defendant cannot recover. Other contract terms *not* imposing that requirement could lead to recovery of fees, however.

Motions to Dismiss and Motions to Strike Distinguished. The Supreme Court has drawn an important distinction between motions to strike and motions to dismiss. In a key decision the Court held that a trial judge erred in granting a nonsuit after a defendant's motion to dismiss had been filed, memoranda of law in support and in opposition were submitted, arguments had been made before the trial court by both parties, no further evidence was to be presented or arguments to be made, and the case had been submitted to the court for decision. In a personal injury case arising from an automobile accident, the defendant made a special appearance and filed a motion to dismiss for failure of the plaintiff to serve process within one year after commencement of the action, which was briefed. Oral argument was heard from both sides, and rebuttal argument was received. In response to a question from the judge, plaintiff's counsel stated that a nonsuit was not requested. The trial court began to rule orally from the bench on the motion to dismiss. Plaintiff's counsel then interrupted, stating: "Judge, we take a nonsuit." After consideration, the trial judge granted the motion for nonsuit, concluding that Code § 8.01-380(A) permits a plaintiff to take a nonsuit during the course of the court's explanation of its proposed ruling. However, the Supreme Court construed Code § 8.01-380(A) which provides in part that a party will not be permitted to take a nonsuit unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted.
to the court for decision. The Court held that the first circumstance anticipated by Code § 8.01-380(A) deals with a motion to strike the evidence and focuses upon the actual rendering of a decision. A party may nonsuit even during the trial court's comments in anticipation of its ruling on a motion to strike so long as the ruling has not yet been made. However, when the motion before the trial court is not a motion to strike the evidence but, rather, is a motion to dismiss based upon defects in service of process, the circumstances are governed by the portion of Code § 8.01-380(A) prohibiting a nonsuit unless a motion is made "before the action has been submitted to the court for decision." Atkins v. Rice, 266 Va. 328, 585 S.E.2d 550 (2003).

The Supreme Court noted that for an action to be "submitted to the court," it is necessary for the parties to have yielded the issues to the court for consideration and decision. When further submissions from the parties are contemplated, a matter has not been finally yielded for decision or finally determined. The Court reviewed a case where the matter "clearly had been submitted to the court for decision, and no further submissions were contemplated." It noted that both parties had filed written memoranda setting forth their positions on the motion to dismiss for failure of timely service of process. No further written submissions were contemplated, and neither party had sought leave to file any further papers. The parties had the opportunity to present oral argument and any evidence in support of their respective positions at the hearing. When asked by the trial court if he wanted to take a nonsuit, plaintiff's counsel expressly stated twice that he did not. After some final statements by defense counsel, nothing further was expected from the parties, and the matter had been submitted for decision. In that posture, the trial court erred in granting plaintiff's nonsuit. See Atkins v. Rice, 266 Va. 328, 585 S.E.2d 550 (2003).
G. 21-Day Rule – Supreme Court’s Synthesis

Rule 1:1 provides that a final judgment may be modified, vacated, or suspended for a period of 21 days after the date of entry and no longer. The provisions of Rule 1:1 are mandatory in order to assure the certainty and stability that the finality of judgment brings. There are, however, legislative exceptions to this rule of finality. Code § 8.01-428(B) provides in relevant part that clerical mistakes in all judgments or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order.

The Supreme Court has repeatedly held that the power to correct the record under Code § 8.01-428 is limited to those situations when the record clearly supports such corrections. the statutory authority of Code § 8.01-428 should be narrowly construed and applied.

Scrivener's or similar errors in the record, which are demonstrably contradicted by all other documents, are clerical mistakes. Such errors cause the court's record to fail to speak the truth. Examples of clerical errors include a typographical error made by a court reporter while transcribing a court proceeding or an unintended error in the drafting of a divorce decree.

In one case the trial court recited that the "clerical error . . . arising from oversight or an inadvertent omission," was the entry of the order. However, characterizing the signing of the order by the trial judge, and by counsel for both parties, as an "oversight" or an "inadvertent error" is inconsistent with the affirmative acts of the trial court and counsel. Not only were all signatories aware that they were signing an order disposing of the merits of the case consistent with the trial court's previous opinion letter, all signatories are charged with the knowledge that an order is entered when signed by the trial judge under Rule 1:1.

Where the record shows that no motion to set aside, vacate, or suspend an order was made and granted, an oral ruling granting the motion to reconsider did not modify, vacate or suspend the written final order. Therefore, a trial court's nunc pro tunc order vacating the a prior written order did not conform the record to reflect what actually took place in the trial court. See Morgan v. Russrand Triangle Associates, L.L.C., 270 Va. 21, 613 S.E.2d 589 (2005) (The trial court erred in entering an order nunc pro tunc more than 21 days after entry of a prior order, where entry of the prior order was not a clerical error subject to correction under Code § 8.01-428, the prior order was not suspended, modified or vacated within 21 days of its entry, and the nunc pro tunc order did not correct the record to reflect the actual chain of events. Under these circumstances the trial court lacked jurisdiction to enter the nunc pro tunc order, which was of no force or effect).
JUSTICE KOONTZ delivered the opinion of the Court:

This appeal involves our consideration of the requirements of Rule 1:1 to extend the time within which a final judgment remains under the control of the trial court. In addressing those requirements, we take the opportunity to resolve any difference in interpretation that may exist among the trial bench and bar regarding what is required under this rule to forestall the finality of a judgment entered by a trial court.

Because we are concerned with the procedural posture of this case as a result of the application of Rule 1:1 and Rule 5:9, a detailed recitation of the facts related to the merits of the action brought in the trial court is not necessary. Accordingly, the following summary will suffice.

On July 14, 1998, Racquel Ruffin filed a motion for judgment in the trial court against Super Fresh Food Markets of Virginia, Inc. and two of its employees (collectively, Super Fresh). Ruffin alleged that while she was a customer in a Super Fresh store in Harrisonburg she was falsely accused of having shoplifted merchandise and was subjected to a pat-down search without probable cause. Contending that Super Fresh had acted without justification, Ruffin sought $150,000 in compensatory damages and $350,000 in punitive damages.

Super Fresh filed its grounds of defense to Ruffin's motion for judgment on September 11, 1998. Super Fresh asserted that it was immune from civil liability under Code § 18.2-105, which provides that a merchant who has probable cause to believe that a person has shoplifted or committed willful concealment of goods or merchandise may detain and search the person. Following the resolution of various motions, a jury trial was held in the trial court on April 21, 2000.

The jury returned its verdict for Ruffin, awarding her $10,000 in compensatory damages and $60,000 in punitive damages. Super Fresh made an oral motion to set aside the jury's verdict as contrary to the law and the evidence. Thereafter, as permitted by the trial court, Super Fresh filed a memorandum in support of its motion and therein requested the trial court to order remittitur or a new trial if its motion to set aside the verdict was denied. In a responding memorandum, Ruffin requested that the trial court "enter judgment based on the verdict rendered by the jury."

On August 23, 2000, the trial court entered an "Opinion and Order" in which it declined to order remittitur as requested by Super Fresh and "entered judgment consistent with that returned by the jury." On August 31, 2000, Super Fresh filed a motion seeking reconsideration of the August 23, 2000 order, contending that the trial court had failed to address Super Fresh's assertion that Code § 18.2-105 provided it with immunity. Super Fresh further contended that oral argument on the motion had been scheduled for October 11, 2000 and requested that the court enter an order "retaining jurisdiction of this action" until the motion for reconsideration was ruled upon. Ruffin opposed the motion for reconsideration, contending that the August 23, 2000 order
"entering judgment in this case . . . should be allowed to stand." On September 12, 2000, the trial court entered an order stating that "this court shall retain jurisdiction over this action until such time as this court may consider and rule on" Super Fresh's motion for reconsideration.

On October 20, 2000, without receiving additional oral argument, the trial court advised counsel by letter that it would deny Super Fresh's motion for reconsideration and directed Ruffin's counsel to prepare an order to that effect.49 On March 26, 2001, the trial court entered an order, styled as a "Final Order," overruling Super Fresh's motion for reconsideration and entering judgment for Ruffin. On April 21, 2001, Super Fresh filed a notice of appeal "from the final judgment entered by [the trial court] on March 26, 2001."

On May 31, 2001, Super Fresh filed a petition for appeal in this Court. On June 21, 2001, Ruffin filed a brief in opposition to Super Fresh's petition for appeal. In addition, Ruffin filed a motion to dismiss asserting that this Court lacked jurisdiction to consider Super Fresh's appeal because Super Fresh had not filed a timely notice of appeal in accord with Rule 5:9. Ruffin contended that the August 23, 2000 order was a final judgment order and that the September 12, 2000 order had not modified, vacated, or suspended the prior order in accord with Rule 1:1.

Super Fresh filed a brief responding to Ruffin's motion to dismiss on July 2, 2001. Distinguishing Lyle v. Ekleberry, 209 Va. 349, 350-51, 164 S.E.2d 586, 587 (1968), Super Fresh contended that the September 12, 2000 order suspended the judgment entered August 23, 2000 because the order expressly stated that the trial court was retaining jurisdiction. We awarded Super Fresh an appeal and directed the parties to address the issue raised in Ruffin's motion to dismiss on brief and in oral argument.

DISCUSSION

As previously noted, the premise of Ruffin's motion to dismiss is that Super Fresh failed to file a timely notice of appeal pursuant to the provisions of Rule 5:9. In pertinent part, Rule 5:9 provides that "no appeal shall be allowed unless, within 30 days after the entry of final judgment . . . counsel for the appellant files with the clerk of the trial court a notice of appeal." To determine the timeliness of a notice of appeal from a final judgment, obviously it is first necessary to determine the date of the action of the trial court that constitutes the final judgment.

In general terms, a final judgment is one which disposes of the entire action and leaves nothing to be done except the ministerial superintendence of execution of the judgment. Daniels v. Truck & Equipment Corp., 205 Va. 579, 585, 139 S.E.2d 31, 35 (1964). However, under Rule 1:1, "final judgments . . . remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer."

The running of the twenty-one day time period prescribed by Rule 1:1 may be interrupted only by the entry, within the twenty-one day time period, of an order

49 On November 16, 2000, Super Fresh filed a notice of appeal "from the final judgment entered by [the trial court] in this action." The clerk of the trial court forwarded the trial record to this Court in accord with the requirements of Rule 5:13(a). On March 13, 2001, the Clerk of this Court returned the record to the trial court "because no petition for appeal has been filed and the time allowed by law within which to do so has expired."
modifying, vacating, or suspending the final judgment order. Berean Law Group, P.C. v. Cox, 259 Va. 622, 626, 528 S.E.2d 108, 111 (2000); accord Wagner v. Shird, 257 Va. 584, 587, 514 S.E.2d 613, 614-15 (1999). Neither the filing of post-trial or post-judgment motions, nor the trial court's taking such motions under consideration, nor the pendency of such motions on the twenty-first day after final judgment, is sufficient to toll or extend the running of the twenty-one day time period of Rule 1:1. In re Commonwealth, Department of Corrections, 222 Va. 454, 464, 281 S.E.2d 857, 863 (1981) (holding that a trial court taking a motion to set aside under advisement "did not 'modify, vacate, or suspend' the judgment[.]").

Rule 1:1 facially contemplates the existence of a final judgment that a court subsequently seeks to modify, vacate, or suspend. The rule is not applicable prior to the entry of a final judgment, and the twenty-one day time period contained in the rule does not delay the finality of a judgment. Thus, when a trial court enters an order, or decree, in which a judgment is rendered for a party, unless that order expressly provides that the court retains jurisdiction to reconsider the judgment or to address other matters still pending in the action before it, the order renders a final judgment and the twenty-one day time period prescribed by Rule 1:1 begins to run.

The distinction to be drawn between an order that renders judgment and retains jurisdiction and an order that renders judgment but does not retain jurisdiction for purposes of when the twenty-one day time period under Rule 1:1 commences to run is demonstrated in Concerned Taxpayers v. County of Brunswick, 249 Va. 320, 455 S.E.2d 712 (1995). In that case, the trial court entered an order on January 3, 1994 dismissing a bill of complaint. However, that order expressly stated that the trial court "would reconsider the Concerned Taxpayer's request to file an amended bill of complaint" and also "granted [certain respondents] leave to file 'additional submissions and a Notice of Hearing upon their Motion for Sanctions within twenty-one (21) days after entry of this Order.' " Id. at 331-32, 455 S.E.2d at 718.

On February 10, 1994, the trial court entered an order denying the motion for leave to file an amended bill of complaint. That order further stated that the trial court "would retain jurisdiction' over the . . . request for sanctions." Id. at 332, 455 S.E.2d at 718. On March 31, 1994, "the trial court entered its last order in the case, in which it granted . . . the motion for sanctions and entered judgment against Concerned Taxpayers . . . for legal expenses incurred in defending the claim." Id., 455 S.E.2d at 718-19.

On appeal, Concerned Taxpayers challenged the award of sanctions on the ground that the respondents had failed to give notice of a hearing on their motion for sanctions within twenty-one days of the January 3, 1994 order. Citing Bibber v. McCreary, 194 Va. 394, 397, 73 S.E.2d 382, 384 (1952), Concerned Taxpayers contended that when the respondents failed to fully comply with the January 3, 1994 order, that order became a final order, and the trial court's jurisdiction expired on January 24, 1994. Concerned Taxpayers, 249 Va. at 332, 455 S.E.2d at 719.

Rejecting this argument, we explained that "the trial court expressly reserved jurisdiction . . . in the two orders that preceded the final order entered March 31, 1994." Id. at 332-33, 455 S.E.2d at 719. In other words, the orders entered January 3, 1994 and February 10, 1994 were not final orders and, thus, were not subject to the twenty-one day time period of Rule 1:1. By using the term "retain jurisdiction" in the February 10, 1994 order, the trial court was not attempting to interrupt the twenty-one day time
period of Rule 1:1. Rather, it was expressly indicating that the order was not rendering a final judgment. The "final judgment" in Concerned Taxpayers was rendered by the March 31, 1994 order, and the twenty-one day time period of Rule 1:1, and concurrently the thirty day time period of Rule 5:9, commenced only upon the entry of that order.

In the present case, by contrast, the August 23, 2000 order clearly rendered a final judgment at the time of its entry, and the record establishes that the trial court and the parties treated it as doing so. Accordingly, upon entry of that order, the trial court's jurisdiction over the case extended only to September 13, 2000, the twenty-first day after the entry of the order, unless a subsequent order modified, vacated, or suspended the judgment on or before that date.

In Lyle v. Ekleberry, the case cited by Super Fresh in the present appeal, we held that a letter from counsel requesting that the trial court vacate a final judgment was insufficient to toll the running of the twenty-one day time period of Rule 1:1 because "an order of the court was necessary" to achieve that end. 209 Va. at 350-51, 164 S.E.2d at 587. Super Fresh contends that because the September 12, 2000 order was entered in response to its motion for reconsideration, "the trial court here took the necessary step of entering an Order memorializing its . . . intent to retain jurisdiction over the cause."

Super Fresh misconstrues Lyle. To interrupt the running of the twenty-one day time period of Rule 1:1, it is not sufficient that the trial court enter an order acknowledging the filing of a post-trial or post-judgment motion within twenty-one days following the entry of a final judgment. Rather, the rule requires that the trial court enter an order that expressly modifies, vacates, or suspends the judgment. In the absence of such an express order, the twenty-one day time period is not interrupted, and the case will no longer be under the control of the trial court when the original twenty-one day time period has run. See Godfrey v. Williams, 217 Va. 845, 845-46, 234 S.E.2d 301, 301-02 (1977).

The September 12, 2000 order in the present case stated that the trial court would "retain jurisdiction over this action . . . [to] consider and rule on" Super Fresh's motion for reconsideration. Unlike the context in which the phrase "retain jurisdiction" was used by the trial court in Concerned Taxpayers, it is evident that the trial court here was not forestalling the commencement of the twenty-one day time period of Rule 1:1 but, rather, it was attempting to interrupt the twenty-one day time period of Rule 1:1 that had begun on August 23, 2000 when final judgment had been entered. In doing so, that order clearly did not vacate, modify, or suspend that judgment. The sole purpose of the September 12, 2000 order was to permit the trial court to take under advisement the motion for reconsideration filed after the entry of the final judgment. Such an action by the trial court does not toll or extend the running of the twenty-one day time period of Rule 1:1. See In re Commonwealth, Department of Corrections, supra.

Accordingly, we hold that the language of the September 12, 2000 order purporting to extend the period of the trial court's jurisdiction beyond the post-judgment twenty-one day time period of Rule 1:1 was ineffective because that order did not modify, vacate, or suspend the final judgment rendered by the August 23, 2000 order. The trial court's subsequent actions were void for want of jurisdiction, and the time for filing a notice of appeal was thirty days from the date of the entry of the August 23, 2000 order.

Having resolved this particular appeal, we take this opportunity to emphasize that the provisions of Rule 1:1 are mandatory in order to assure the certainty and stability that the finality of judgments brings. Once a final judgment has been entered and the twenty-one day time period of Rule 1:1 has expired, the trial court is thereafter without jurisdiction in the case. Thus, only an order within the twenty-one day time period that clearly and expressly modifies, vacates, or suspends the final judgment will interrupt or extend the running of that time period so as to permit the trial court to retain jurisdiction in the case. See *Davis v. Mullins*, 251 Va. 141, 150, 466 S.E.2d 90, 94 (1996). Finally, we also stress that a judgment which has been properly vacated or suspended under Rule 1:1 does not become a final judgment thereafter without a subsequent order confirming it as originally entered or as modified.

**CONCLUSION**

For these reasons, we hold that the order awarding an appeal to Super Fresh was improvidently granted and, accordingly, that order will be vacated and the appeal dismissed.

*It was clear that a challenge to the expert witness' qualifications would occur when he put on those mail-order, X-ray glasses to read the film.*
Note: Applying SuperFresh to Real World Orders & Circumstances

Focus on Final Form – "Reserving Jurisdiction" and "Suspending an Order or Judgment." While directly applicable to construction of the finality of nonsuit orders, another recent decision further explores the depths of the final order problem in Virginia under Rule 1:1 involving orders "reserving jurisdiction" and "suspending orders" issued in connection with disposition of a case, and the problem of ancillary issues that arise in connection with a "final judgment." In a case involving multiple nonsuits, the circuit court judge stated that he was "going to enter the nonsuit order [and] going to retain the case on the docket to [consider] the issue of fees and costs and whether this is a first voluntary nonsuit of right or whether it is the second nonsuit" under Code § 8.01-380(B). On that same day the trial court granted the motion for a nonsuit without prejudice in an order that stated: 'his suit shall remain on the docket for the court to determine issues concerning attorney fees, costs and expenses incurred by [the heirs]. ’ The parties thereafter filed briefs and argued their positions before the circuit court, which much later entered a "Final Order" in favor of the individual defendants, finding that the pending case is a second or additional nonsuit of the prior action, awarding attorney fees and costs, and rejecting the claim that pursuant to Rule 1:1 it lacked jurisdiction to decide the matters raised in the request for attorney’s fees. The Supreme Court of Virginia reversed. In Lummis Gin Co. the Court found that an order of nonsuit is "sufficiently imbued with the attributes of finality" to be subject to the provisions of Rule 1:1, a Rule with "mandatory" provisions that control the subject matter jurisdiction of the circuit court to take further steps in a case. See City of Suffolk v.Lummis Gin Co., 278 Va. 270, 683 S.E.2d 549 (2009).

Most troubling for Virginia practitioners today is the further conclusion the Supreme Court reached in Lummis Gin Co. that – notwithstanding the circuit court’s attempt to preserve the nonsuit issues by including the statement: ‘his suit shall remain on the docket for the court to determine issues concerning attorney fees, costs and expenses incurred by [the heirs]’ in its initial order -- the trial court still only had 21-one days to resolve the issue before it lost jurisdiction. The Supreme Court found that order language insufficient to suspend the judgment, and thus the trial court lost jurisdiction to decide any issue in the action 21-one days after entry of the nonsuit order. Its later order awarding attorneys’ fees and costs to the heirs was a nullity.

Prior to Lummis Gin Co., many observers had assumed that SuperFresh meant that in order prevent the 21-day window from expiring on an what would otherwise be a final order, the judge needed only to make it clear in the order that the court was retaining control for some purpose, and thus there was "more to be done" in the action, with no specific language being required to reserve jurisdiction beyond 21 days. Lummis Gin Co. indicates, however, that SuperFresh is viewed as a case where the Final Order was so labeled, and had no qualifications whatsoever, holding that in that context only entry of a specific order suspending, modifying or vacating the prior order avoids the 21 bar.

Earlier, in the Concerned Taxpayers decision discussed above, it appeared that recitations by the trial court that issues were being held over for further rulings was sufficient. There the trial court dismissed a complaint in an order expressly stating that the trial court "would reconsider the . . . request to file an amended bill of complaint" and also granted "leave to file additional submissions and a Notice of Hearing upon their Motion for Sanctions within twenty-one (21) days after entry of this Order." A
month later, the trial court in Concerned Taxpayers entered a second order, this time denying the motion for leave to file an amended and expressly stating that it "would retain jurisdiction' over the . . . request for sanctions." Then the following month, the trial court entered its last order in the case, in which it granted the motion for sanctions and entered judgment or legal expenses incurred in defending the claim. See Concerned Taxpayers v. County of Brunswick, 249 Va. 320, 455 S.E.2d 712 (1995).

As noted, in SuperFresh the Supreme Court construed Concerned Taxpayers to represent the situation where "the trial court expressly reserved jurisdiction . . . in the two orders that preceded the final order." By using the term "retain jurisdiction," the trial court was therefore not attempting to interrupt the 21-day time period of Rule 1:1. Rather, it was expressly indicating that the order was not rendering a final judgment. However, In the recent Lummis Gin Co. decision the bench and bar are told that "[a]t the conclusion of the hearing, the circuit court articulated that it was "going to enter the nonsuit order [and] going to retain the case on the docket to [consider] the issue of fees and costs and whether this is a first voluntary nonsuit of right or whether it is the second nonsuit contemplated by [Code § 8.01-380(B)]." On that same day the court entered an order granting the City's motion for a nonsuit without prejudice. The order further provided that "[t]his suit shall remain on the docket for the Court to determine issues concerning attorney fees, costs and expenses incurred by [the Baker heirs]." Thus, like some of the orders in Concerned Taxpayers – and unlike the order in SuperFresh which called itself the "Final Order" in the case – the nonsuit order did not have the appearance of complete disposition of all issues in the case in order to qualify as a final order in the first place. The trial court's statement in Lummis Gin Co. that "[t]his suit shall remain on the docket for the Court to determine issues concerning attorney fees, costs and expenses incurred" appears to be the exact equivalent of language found sufficient in Concerned Taxpayers, but in the more recent case it was not enough to defer running of the 21-day period under Rule 1:1. Thus the standards have significantly tightened. In the wake of Lummis Gin Co. law reform advocates have expressly questioned whether – in light of this strict interpretation – Rule 1:1 needs to be amended to add language assuring that an order expressly "reserving jurisdiction" to decide a then-pending motion acts as a suspension of the order. In the meantime, the only safe course is for the trial court order to state that it is "reserving jurisdiction and expressly suspends the entry of judgment."

A True "Suspending Order." A further piece of the puzzle has fallen into place in the Court's decision of an appeal in a medical malpractice action, involving an order denying a motion to set aside the verdict that was held not to be a "final judgment" for purposes of the deadline for filing a notice of appeal, because the trial judge had rendered final judgment in a separate, previously entered order, which is not vacated, suspended, or modified by the later order ruling upon the motion to set aside the verdict. Because the notice of appeal filed in the case was therefore untimely, the appeal was dismissed. See Hutchins v. Talbert, 278 Va. 650, 685 S.E.2d 658 (2009).

In that case, on April 25 the circuit court entered an order entitled "Final Order" that rendered judgment in favor of the plaintiff for that amount, and it concluded: "AND THIS CAUSE IS ENDED." On that same date, the circuit court also entered a separate "‘Suspending Order’ providing that the final order was suspended for 14 days. The suspending order stated:

It is ORDERED that the final Order be suspended for fourteen (14) days from this date. This tolls the running of the twenty-one (21) day provision in Rule 1:1,
thus allowing a total of thirty-five (35) days for entry of an Amended Final Order.

The defendants filed a motion to set aside the verdict, but on May 28 the circuit court entered an order denying that motion that did not refer to the April 25 final order in any manner. The circuit court entered no other orders in the case thereafter. Defendants filed a notice of appeal on June 19th. That filing was timely only if the May 28th decision was the appealable "final order" but, unfortunately for plaintiff, the decision back in April was held to be the final decision and time to appeal had expired by the time the June notice of appeal was filed.

**Definition of Time to Appeal.** Rule 5:9(a) states that no appeal shall be allowed unless, within 30 days after the entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel. The effect of trial court orders in conjunction with final disposition is also controlled by Part Five of the Rules rather than the Part Three trial court rules for civil cases. Rule 5:5(a) declares the time prescribed for filing a notice of appeal to be "mandatory," and the Rule then prescribes:

The time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the trial court pursuant to Rule 1:1 . . . . In any such case the time for filing shall be computed from the date of final judgment entered following such modification, vacation, or suspension . . .

In *Hutchins* the circuit court entered final judgment for plaintiff on April 25, and that day entered an order "suspending" the final judgment order for 14 days. In Virginia, the date of entry of any final judgment, order, or decree is the date the judgment, order, or decree is signed by the judge. However, in this case, as allowed by Rule 1:1 the circuit court suspended the entry of the final order for 14 days.

**Self-Executing – Self-Terminating – Suspension Orders.** The Supreme Court describes the 14-day time period set forth in a suspending order of the form used in *Hutchins* as "self-executing," and in that case the suspension expired by the terms of the order on May 9. When the suspension expired, two critical time periods started to run simultaneously against the losing party: the 21-day time period under Rule 1:1 during which the trial court could modify, vacate, or suspend the final judgment, and the 30-day time period under Rule 5:9 for filing a notice of appeal. While the defendants in *Hutchins* filed a motion to set aside the verdict, and the circuit court entered an order on May 28 denying that motion, the Supreme Court holds in *Hutchins* that Rule 5:5(a) is clear in providing that the time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the circuit court pursuant to Rule 1:1. Thus, the motion to set aside the verdict did not extend the period for filing the notice of appeal, or the time for filing a notice of appeal.
Chapter 20

Jury Trial Rights and Procedures

A. Introduction

This chapter addresses the right to trial by jury in civil cases, as guaranteed under the Constitution of Virginia and various statutes, and implemented in Rule 3:21. Various types of actions, proceedings and issues as to which the parties may demand a jury trial are discussed, along with those in which no jury trial right exists. Rule 3:21 includes procedures relating to the demand for jury trial and also contemplates the possibility of waiver of the right to jury trial. Rule 3:22 deals with the issues pertaining to the mode of trial, by the court or by a jury, including the effect of demand for jury trial under Rule 3:21, applications for jury trial when no demand was made, and jury trial by consent of the parties.
No Enlargement or Restriction of the Right to Jury Trial. The Rules that became applicable in 2006 were not intended to change in any material way the right to jury trial. It was a premise of the development of the single-form-of-action procedures that those cases that historically were tried by a jury would continue to be heard by a jury, and that proceedings traditionally heard by the court alone, such as domestic relations matters, would remain bench-trials. The procedures are more elaborate than in the prior era, in part because the adoption of a single "form" for civil cases means that something beyond the lodging of plaintiffs pleading is needed in order to call upon the plaintiff to stake out a claim to the right to have the proceeding heard before a jury.

*Sometimes there aren’t enough strikes at jury selection.*
Previously, one of the few advantages of the separate "sides" of court was that cases filed under the "bill of complaint" rubric as equity proceedings were fairly certainly not going to be tried before a jury, unless one of the provisions of Code § 8.01-336 made a jury available. Conversely, on the "law side" of court prior to 2006, there was ambiguity, since there was generally a right to a jury in most law actions, but a plaintiff was not required to request one. A plaintiff might elect to "put himself upon the country" (making a jury demand) or might not.

Under a unified system as adopted effective in 2006 it is necessary for there to be a clear event in which the assertion can be made that a jury is appropriate, along with mechanisms to assure that other parties' rights are preserved, and the court has the opportunity to rule on those instances where there is disagreement between the parties over which mode of fact-finding is appropriate given the substance of the case and its procedural posture. Rules 3:21 and 3:22 are designed to accomplish these goals.

Rule 3:21 preserves the right of jury trial in those cases in which the right is protected by the Constitution of Virginia, the Code of Virginia, or "other authority," apparently invoking case doctrines enunciated by the Supreme Court of Virginia about the proper modes of disposition for various categories of claims. The Rule contains no affirmative grant of new jury trial rights, and neither enlarges nor restricts the right to jury trial that existed before the 2006 Rules of Court were adopted. Thus, issues formerly triable by the court, where a right of trial by jury did not exist under the Constitution or statutes, are still triable by the court.

What is the Function of Rule 3:21? If Rule 3:21 does not alter a right that is already guaranteed by the Constitution or by statute, what is its function? The need to expressly set forth in Rule 3:21 that the jury trial right is preserved must be seen in the context of the harmonization of law and equity procedure under the 2006 Rules. Rule 1 creates one form of action, to be known as "civil action," which takes the place of separate suits at law and in equity under the former practice. Under the new Rules, it became possible to present all claims and defenses, both legal and equitable in the same action. Essentially, Rule 3:21 is an express assurance to counsel and parties that the unification of law and equity procedure is not intended to alter the fundamental right to jury trial. Although under the new Rules of procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial.

Entitlement to Jury Trial, Demand and Waiver Provisions Are Contained in Rule 3:21. Rule 3:21(b) provides that any party may demand a jury trial of any issue triable of right by a jury. The demand must be in writing, and must be served on the other parties within 10 days after service of the last pleading addressing that issue, and it must be filed with the clerk of the court of court.

The demand may be indorsed on a pleading, or it may be a separate paper. The issues in the action as to which the demand is made may be specified; otherwise the demand is deemed to apply to all issues triable by a jury. If a demand is made as to less than all issues triable by a jury, any other party has 10 days to serve and file a separate demand on that other party's behalf for jury trial as to any or all other issues.

Failure to serve and file the demand as provided constitutes a waiver by the party of the right to trial by jury.
While Rule 3:21 is silent on this topic, it appears that a demand, once made, may not be withdrawn without consent of the parties or an order by the trial court permitting withdrawal. This doctrine is necessary to protect a defendant or any other party who may be relying on a demand initially served in order to assure that a jury trial is requested for all issues properly triable by a jury.

The Mode of Trial, Based on Entitlement, Demand and Waiver, Is Governed by Rule 3:22. Rule 3:21 deals with the right to jury trial (including the method of demanding it, and waiver of the right), and these matters provide the basis for the court's actions in directing the mode of trial under Rule 3:22. When a timely demand for a jury trial has been made, all issues within the demand will be tried to a jury, unless the parties stipulate otherwise, or unless the court, on motion or sua sponte, finds that there is no jury trial right as to some or all of the issues within the demand. It is a general principle under Rule 3:22 that if there is no objection--by a party, or by the court on its own initiative--the jury trial will proceed. Rule 3:22(b) provides that issues not demanded for trial by jury shall be tried by the court.

Some jurisdictions feature a rule allowing the court in its discretion, on motion, to order a jury trial if the party would have been entitled to demand a jury as of right, but failed to do so. Whether that power will be found to exist for Circuit Court judges in Virginia is unclear. Rule 3:22 does not contain any express provision allowing that practice. However, Rule 3:21 does contain a provision in subdivision (b) which allows the court to "set a final date for service of jury demands," and it may be that this freedom would allow a court to grant leave for a "late" jury demand (after the 10-day window from the close of pleadings on an issue otherwise provided by the Rules) where there is no prejudice to other parties from allowing late assertion of jury trial rights.

Under Rule 3:22, a jury trial may be ordered on consent of all the parties, even though it is not available as of right. As an alternative, on motion, or on its own initiative, the court may try any issue with an advisory jury where the statutory standards of Code § 8.01-336 are met.
Distinctions Between Law and Equity Claims Continue in Determining Jury Trial Right as to Issues. An important element in the former distinction between law and equity was the right to jury trial, generally available in suits at law but not in equity. Despite the merger of procedures for all civil actions after January 1, 2006, a distinction between jury trial and non-jury trial continues. As emphasized by the structure of Rules 3:21 and 3:22, the right attaches to issues rather than to actions. Thus, legal issues, formerly triable of right by a jury, retain that status; similarly, equitable issues which were formerly triable by the court will generally continue to be non-jury issues. Rules 3:21 and 3:22, in effect, permit the merger of procedure under Rule 3:1 to be accomplished within Constitutional constraints, in that they preserve the jury trial right, despite the merger of pleading and procedural provisions, and provide mechanisms for continued implementation of the right in the context of a unified system.

The 2006 Rules of Court rules for demanding a jury trial (Rule 3:21) and implementing that procedure (Rule 3:22) read as follows today:


(a) Jury Trial Situations Unchanged. — The right of trial by jury as declared by the Constitution of Virginia, or as given by an applicable statute or other authority, is unchanged by these rules, and shall be implemented as established law provides. Established practice for the trial and decision of equitable claims by the judge alone shall be continued.

(b) Demand. — Any party may demand a trial by jury of any issue triable of right by a jury in the complaint or by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to the issue, and (2) filing the demand with the trial court. Such demand may be endorsed upon a pleading of the party. The court may set a final date for service of jury demands.

(c) Specification of Issues. — In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. — Absent leave of court for good cause shown, the failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury.
Rule 3:22. Trial by Jury or by the Court.

(a) By Jury. — When trial by jury has been demanded as provided in Rule 3:21, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury; or (2) the court upon motion or of its own initiative finds that a right of trial by jury on some or all of those issues does not exist under applicable law.

(b) By the Court. — Except as otherwise provided in this Rule, issues not demanded for trial by jury as provided in Rule 3:21, and issues as to which a right of trial by jury does not exist, shall be tried by the court.

(c) Statutory Jury Rights in Certain Equitable Claims. —

(1) In an equitable claim where no right to a jury trial otherwise exists, where impaneling of an advisory jury pursuant to Code § 8.01-336(E) to hear an issue will be helpful to the court concerning disputed fact issues, such a jury may be seated. Decision on such claims and issues shall be made by the judge.

(2) Where a jury trial on a defendant's plea in an equitable claim is authorized under Code § 8.01-336(D), trial of the issues presented by the plea shall be by a jury whose verdict on those issues has the same effect as if trial by jury had been a matter of right.

(d) Party Consent to Jury. — As to any claim not triable of right by a jury, the court, with the consent of the parties, may (i) order trial of any claim or issue with an advisory jury or, (ii) a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Judge Powell pioneers judicial bench wind farms powered by long-winded arguments.
B. Constitutional and Statutory Rights to a Jury in Virginia

The right to jury trial in "controversies respecting property, and in suits between man and man" has been guaranteed by the Virginia Bill of Rights since 1776. As professor A. E. Dick Howard, executive director of the Virginia Commission on Constitutional Revision for the current Constitution of Virginia, writes in his commentaries to the present Constitution, "[a]lthough the provision has changed somewhat over the years, the fundamental principle remains unchanged—a preference for jury determination of disputed issues of fact in civil suits." COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, vol. 1, 1974 at p. 244.

In Virginia practice, the right to trial by jury in civil cases is interpreted to be the same right that existed at the time the Constitution was passed. Article I, section 11, was finalized in 1776. As a result, if no jury trial right existed at that time, section 11 does not assure that a jury will hear the issue. A statute may confer more rights than existed in 1776, but the Constitution provides a floor. The Constitution does not provide a constitutional right to a jury in equity cases, which in 1776 were not tried to juries. Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E. 141 (1920); Pillow v. Southwest Imp. Co., 92 Va. 144, 23 S.E. 32 (1895).

As summarized by professor Howard, the right is commonly interpreted to consist of a trial in which the jury, under the direction and supervision of a judge, passes on disputed issues of fact. If no disputed issues of fact exist, the trial judge can pass on the law without consulting a jury. The Virginia courts have upheld various methods of judicial procedure, such as demurrers, the setting aside of verdicts, and the use of special verdicts against attacks alleging that they violated the guarantee of a jury trial. See, e.g., New York Life Ins. Co. v. Davis, 94 Va. 427, 26 S.E. 941 (1897).

Waiver. Thus it is accurate to conclude that Article I, section 11 guarantees the opportunity to have a jury determine the facts in a civil trial. The section does not require that a jury must pass on disputed issues of fact. Consequently, the Legislature can pass and has passed legislation providing that the failure of the parties to demand a trial by jury constitutes a waiver of that right. Such statutes are not interpreted as an abrogation of the right. See Jayne v. Kane, 140 Va. 27, 124 S.E. 247 (1924).

Generally, the Virginia courts have liberally applied the waiver provisions whenever necessary to protect a judgment. A statute providing that certain issues "shall" be tried by a jury has been found not to eliminate the possibility of waiver of that right, the word "shall" being interpreted as "may" for this purpose. Meade v. Meade, 111 Va. 451, 69 S.E. 330 (1910). The Virginia Supreme Court has even allowed a retroactive waiver of the right to protect an otherwise valid judgment when the party whose demand for a jury was improperly denied at trial acquiesced to this denial on appeal. Dickenson County v. West Dante Supply Co., 145 Va. 513, 134 S.E. 552 (1926).

Since the constitutional guarantee of jury trial in civil cases attaches only to common law actions as they existed in 1776, statutes creating a new cause of action need not provide for trial by jury.
No Federal Constitutional Right. While many provisions of the Bill of Rights in the United States Constitution have been applied to the statues through the Fourteenth Amendment, this incorporation is "selective" and it has never been held that the Seventh Amendment of the United States Constitution applies to the States. In several cases the United States Supreme Court held that the Seventh Amendment does not apply to state civil trials,\(^\text{41}\) and there is no apparent prospect that the Supreme Court of the United States would be inclined to "incorporate" the protections of the Seventh Amendment against the states in the future.

Actions at Law

However difficult it may have been in prior jurisprudence to define with precision the line between actions at law, dealing with legal rights, and suits in equity, dealing with equitable matters, some proceedings were unmistakably actions at law, triable to a jury. Such actions are jury actions under the new Rules, if timely demand is made. These include:

- breach of contract
- personal injury
- wrongful death
- injury to property
- assault and battery\(^{42}\)
- premises liability
- nuisance\(^{43}\)
- trespass\(^{44}\)
- bailments
- municipal liability
- products liability
- breach of warranty


\(^{42}\) At common law, assault and battery came under the heading of trespass to the person and fell squarely in the hands of law courts. The entitlement to a jury trial of such actions is beyond question.

\(^{43}\) Actions seeking monetary damages under a common law theory of nuisance are actions at law and provide a jury trial right. However, actions seeking an injunction to abate a nuisance are equitable in nature, and when no damages are sought, no jury trial right arises. Even a claim for recovery of costs incurred in abatement of the nuisance has been deemed in the nature of equitable restitution, not giving rise to the right to jury trial.

\(^{44}\) Trespass is the invasion of a party's interest in the exclusive possession of his or her property. Trespass is perhaps the most fundamental of traditional legal actions, dating back to the thirteenth century. Actions for ejectment or damages for trespass are clearly legal and require a jury trial on demand.
Fraud. In the abstract, fraud is neither a legal nor an equitable issue. For the purpose of determining whether an issue of fraud should be tried to the court or to a jury, the relief sought by the party raising the issue, and the context in which the claim arises, are controlling.

When monetary damages are sought, there is a right to jury trial. This is true even when an accounting is requested, unless there is such a complication of accounts that it

45 Like assault and battery, false imprisonment came under the common-law heading of trespass to the person, and was squarely in the hands of law courts. As in the case of other torts derived from the old action of trespass, false imprisonment establishes a cause of action for compensatory damages, and in an appropriate case for punitive damages as well.

46 Historically, malicious prosecution came under the heading of trespass on the case, a well recognized form of action at common law. The parties to such an action are entitled to a jury trial under the Rules.

47 See Code §8.01-120.

48 See Code §8.01-149. Under the common law, actions to recover possession of real property were actions at law. Parties are entitled to a jury trial of the issue of title to the property in such actions.

49 Actions for conversion are based upon the common law action of trover and conversion, in which damages were recoverable for the wrongful interference with or detention of the goods of another. Conversion claims are well recognized legal forms of action and are triable by a jury.

50 Code §8.01-167.

51 See Code §8.01-188 (jury available where fact issues are involved, and special interrogatories are permitted).

52 Code §8.01-194.
is difficult for the machinery of the law courts to cope with them. Indeed, even when there is some measure of complexity, a jury trial will be required if a legal remedy is sought. And, in most jurisdictions, when claims include legal as well as equitable elements, and monetary damages as well as equitable remedies are sought, a jury trial may be demanded.

If the relief required to make the claimant whole is available only in equity, there is no right to a jury trial in most jurisdictions. Thus, when plaintiff alleged that defendant had fraudulently obtained a release of its claims arising out of an alleged trademark infringement, and when the court had dismissed damage claims for the infringement and only an injunction claim survived, the fraud issue was treated as a claim for rescission, and a jury trial was not required.

In a fraud action in which the claims asserted and remedies sought are wholly equitable, the fact that injunctive relief is denied and damages appear to the court to be a more appropriate remedy does not convert the action into a legal one in which a jury trial may be demanded. Damages may be awarded by the court without ordering a new trial before a jury.

### Illustrative Equitable Actions

- bill of peace
- rescission and cancellation
- reformation
- specific performance
- to declare or enforce a trust
- to set aside a fraudulent transfer
- interpleader
- accounting
- injunctive actions

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53 An action for rescission or cancellation of a contract or other instrument is traditionally equitable, and is triable by the court without a jury. The ultimate disposition of action involving a distribution of assets to the parties does not convert an action into a legal action for damages.

54 Contractual reformation is an equitable remedy granted by the court, and there is no right to a jury trial on the issue, even when the facts are in dispute.

55 An action for specific performance is equitable, and if it is uncomplicated by other requests for relief or by counterclaims, there is no right to a jury trial.

56 Suits for accounting originated in the common law courts, but they were narrow in scope in that they only applied against persons having a legal duty to account to plaintiff, such as guardians and receivers. Furthermore, the procedures were cumbersome, and the accounting action was soon replaced in large part at common law by the action of general assumpsit for money had and received, in which all issues were triable to the jury. In equity, there developed both a concurrent and exclusive jurisdiction over matters of account. Concurrent jurisdiction could be invoked when the claims involved were legal, but the complicated nature of the account rendered the legal remedy inadequate. When the claims involved were equitable, jurisdiction in equity over the accounting were exclusive.
constructive trust applications

Additional Statutes Providing for a Jury

Several statutes authorize trial by jury in specific categories of cases. These include:

§ 8.01-188 -- Declaratory judgment actions at law

§ 8.01-336(D) -- Pleas in equity

§ 8.01-195.4 -- Tort claims against the Commonwealth

§ 37.1-67.6 -- Appeals of involuntary commitments

§ 37.1-134.13 -- Appointment of guardian or conservator

§ 53.1-40.4 -- Appeals of involuntary mental health commitments of prisoners.

§ 55-177 -- Escheat proceedings

§§ 64.1-83, 64.1-88 -- Will contests
Absence of Jury Trial Right

Except for the provisions of Code §8.01-336 there are generally no jury trial rights in equity. Several other topics on which there are express exclusions of a right to a jury trial include:

- Grievances pursued by government employees (§ 2.2-3004(E))
- Appeals under the Administrative Process Act (§ 2.2-4026; Rule 2A:1 et. seq.)
- Cases in which damages sought are less than $100 (§ 8.01-336(B))
- Petitions for writs of Habeas Corpus (§ 8.01-654(B)(5))
- General district court appeals where the appellant seeks $50 or less (§ 16.1-113)
- Some contempt proceedings (§ 18.2-456; § 18.2-457)
- Actions involving allegedly erroneous tax assessments (§ 58.1-3984; § 58.1-1825)

Virginia's Liberal Joinder Doctrine for Claims on Related Facts

In Virginia a plaintiff may plead as many matters as are deemed necessary and may join a claim in tort with one in contract. Code § 8.01-272 provides in this regard: "In any civil action, a party may plead as many matters, whether of law or fact, as he shall think necessary. A party may join a claim in tort with one in contract provided that all claims so joined arise out of the same transaction or occurrence." And, under the landmark decision in Fox v. Deese, 234 Va. 412, 423, 362 S.E.2d 699, 705 (1987) it is error for a trial court to dismiss a defendant on the ground of misjoinder merely because the motion for judgment states multiple distinct separate causes of action. Further, under Code § 8.01-281 a plaintiff may plead alternative theories of recovery against alternative defendants: "A party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may plead alternative facts and theories of recovery against alternative parties, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence." However, all of these freedoms are limited by the general requirement that all claims arise out of the same
transaction or occurrence. Thus in any multiple-claim action the "crucial issue is whether the claims set forth in the . . . counts of the [complaint] arise out of the same transaction or occurrence, within the meaning of the applicable statutes." *Powers v. Cherin*, 249 Va. 33, 37, 452 S.E.2d 666, 668 (1995).

**Joinder Does Not Affect Jury Trial Right.** Joinder of claims does not affect a party's Constitutional right to jury trial. In *Dairy Queen v. Wood*, 369 U.S. 469, 473 (1962), the United States Supreme Court held that in an action seeking injunctive relief and damages, the defendant could not be deprived of its right to a jury trial on the damages issue. A similar result should obtain under the Virginia Constitutional provision preserving jury rights as they existed in 1776, Article I section 11.

Thus no waiver of jury trial results from the joinder of legal and equitable claims or issues,57 whether the issues pertain to what may be said to be one cause of action, or to two or more separate and distinct causes of action.

**Legal and Equitable Claims With Common Factual Issues.** In order to preserve the right to jury trial in cases in which there is overlap in the factual questions underlying legal and equitable claims, the jury must not only decide the legal claims, but must also decide all questions common to both claims, and the court, in later ruling on the equitable claims, will be bound by the findings of fact of the jury with regard to those common issues.

**Sequence of Trial.** Most jurisdictions in the United States hold that when legal and equitable claims share common issues, the legal claims must be tried first. In *Beacon Theatres v. Westover*, 359 U.S. 500, 501 (1959), the Court held that if legal and equitable claims containing common issues are bifurcated for trial, absent extraordinary circumstances, the legal claims must be tried first, in order to avoid depriving the parties of their jury trial right as to the common questions. In *Dairy Queen*, the Court held that this rule applies regardless of whether the legal issues are characterized as "incidental" to the equitable issues.

Rule 3:22(e) was added to the jury rules in Part Three of the Rules of Court recently to clarify the sequence issues when there are mixed claims, and adopts the general American approach of assuring that any issue properly tried to the jury is heard by the jury:

(e) *Trial by Mixed Jury and Non-Jury Claims.* In any case when there are both jury and non-jury issues to be tried, the court shall adopt trial procedures and a sequence of proceedings to assure that all issues properly heard by the jury are decided by it, and applicable factual determinations by the jury shall be used by the judge in resolving the non-jury issues in the case.

57 In federal practice the leading cases on this point are: *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-53 (1990), quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (when legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact"); *Tull v. United States*, 481 U.S. 412, 418 (1987).
C. Method of "Demanding a Jury" & Procedural Issues Under Rule 3:21(b)

**Jury Trial May Be Obtained Only on Demand.** The right to jury trial is not self enforcing. To be obtained, a jury trial must be demanded pursuant to the provisions of Rule 3:21. Inaction results in waiver of the right.

Any party may demand a jury trial of any issue triable by a jury. The party must serve a written demand on the other parties at any time after commencement of the action, but not later than 10 days after service of the last pleading directed to the issue. The demanding party must also file the demand. The wording of Rule 3:21 is not clear on the question whether the demand must be filed in 10 days: it provides that a party must make service within the 10-day period, and then prescribes that the demand must also be filed. The demand may be indorsed on a pleading of the party, or set forth in a separate paper.

The demand may be made by any party to the action. This includes third-party defendants, intervening parties, and parties to interpleader actions.

**Avoiding Basic Problems in the Demand Process**

Rule 3:21(a) safeguards the right to jury trial. However, in order to exercise the right, an affirmative demand must properly be made, under the provisions of subdivision (b) and (c). Absent such demand, there is a waiver, under subdivision (c). Thus, the problem of whether to grant a jury trial will only arise in certain circumstances.

(1) When a demand is duly made, pursuant to Rule 3:21, and a motion is made to strike the demand, and hence the action (or certain issues), from the jury list or calendar.

(2) When demand is duly made and the court, on its own initiative, determines that there is no right to a jury trial.

In either of the above circumstances, the issue is whether the party making the demand is entitled to a jury trial of right under the Constitution of Virginia or a statute. If so, a jury trial must be granted. If not, a jury trial can only be granted upon consent of the parties.

(3) When, absent a demand duly served and filed, a party moves for a jury trial of the action, or certain issues, on grounds that the action or issues are such that if a demand had been timely made, a jury trial would have been granted as of right.

In these circumstances, if the movant would not have been entitled as of right to make a demand for a jury trial, then clearly the motion will be denied. If, on the other hand, the movant would have been so entitled, the court is still not obliged to grant the motion. The issue now is whether the movant should be relieved of its waiver, and this decision is in the sound discretion of the court.
The question of whether a party is entitled to a jury trial will not arise:

✔ When a demand is made and there is no objection by a party or by the court. In this situation, the issues claimed for jury trial are properly so tried, even if there was no statutory or constitutional right to a jury trial.

✔ When no demand for a jury trial has been made, and no motion to be relieved of the waiver has been made by any party. In this situation, the issues will be tried by the court, even if there may have been a constitutional or statutory right to a jury trial of some or all issues.

✔ When the court, with the consent of all parties, orders a jury trial.
Multiple Party Situations: an Introduction

In general, under rules in the form of Virginia Rules 3:21 and 3:22, all parties may rely on a jury demand made by any other party. Rule 3:22(a) contains mandatory language to the effect that if a timely demand for a jury trial has been made, all issues within the demand must be tried by a jury. As noted above, the Rule contemplates that there may be a court trial after a timely jury demand has been made only when the parties stipulate to trial of the action, or specified issues, by the court, or when the court determines that the parties have no right to a jury trial.

Rule 3:22(a) provides:

When trial by jury has been demanded as provided in Rule 3:21, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury; or (2) the court upon motion or of its own initiative finds that a right of trial by jury on some or all of those issues does not exist under applicable law.

If neither of these situations arises, the action is triable to a jury. The requirement of a stipulation implies that no one party, not even the party who initially made the demand for a jury trial, may unilaterally withdraw that demand.

The Rule is specific in precluding unilateral action by one party, or inaction by the parties or the court, from eliminating the jury in a case. Thus Rule 3:22(a) requires trial unless the parties (plural), or their attorneys of record, file a written stipulation with the court, or enter an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. Similarly, the circuit court must act affirmatively to derail a jury claimed in a proper demand under Rule 3:21: it must act upon motion or of its own initiative to make an express finding finds that a right of trial by jury on some or all of those issues does not exist under applicable law.

Timing of the Demand, in General

Under Rule 3:21, the demand for jury trial may be made immediately upon the commencement of the action. For example, the plaintiff may indorse the demand upon the original complaint. The jury demand must be made not later than 10 days after service of the last pleading directed to the issue as to which jury trial is demanded. The 10-day period begins to run with service of the last pleading directed to the issue. Until the pleading is served, the 10 days does not begin to run. The 10-day provision enables counsel to reflect on the various factors which should be considered in deciding whether to demand a jury.

For purposes of Rule 3:21(b), it is expected that a pleading will not be deemed directed to an "issue" triable by jury if only equitable relief is sought. Rather, a pleading is directed to an issue triable by jury only when a party actually makes a claim for legal relief.
Under the "last pleading" approach of Rule 3:21, although an answer may be served months after service of a complaint, there is no waiver of the jury trial right if the demand is made within ten days of service of the answer. Indeed, in federal practice under a very similar provision in the Federal Rules of Civil Procedure, it is generally held that the "last pleading" within the meaning of the rules generally will be an answer or reply, and is determined on a case-by-case basis. If there are multiple defendants, the fact that one defendant has served its answer does not begin the running of the ten-day period as against the plaintiff with regard to any issues that are also alleged against a second defendant, if the second defendant has not yet served its answer. A jury demand is timely if served within ten days after the last defendant has served its answer.

**If Service Is by Mail, Three Days Are Added.** If service is by mail, Rule 1:7 provides that "three (3) days shall be added to the prescribed time" in calculating when "a party is required or permitted under these Rules, or by direction of the court, to do an act within a prescribed time after service of a paper upon counsel of record." The additional three days runs in favor of the party being served by mail, not the party serving. Since the time for filing a demand is based on service of the last pleading directed to an issue (Rule 3:21 speaks of "not later than 10 days after the service of the last pleading directed to the issue"), it would appear that the three-day grace period of Rule 1:7 will apply to the demand for jury under Rule 3:21.
D. Form and Sufficiency of the Jury Demand

**Demand Must Be in Writing.** Rule 3:21(b) requires that the demand for jury trial be in writing. An oral demand will therefore be ineffective. Federal case law has noted that it is better practice to request a jury on the face of the pleading rather than buried in the body of the pleading. Nevertheless, the courts "indulge every reasonable presumption against waiver" of jury trial rights.58

**Endorsement on Pleading.** Rule 3:21(b) provides that the jury trial demand may be endorsed on a pleading. The simple notation "Jury Demanded" placed beneath the docket number on a complaint will therefore be deemed sufficient to place the opposing party on notice that a jury trial has been requested. In other jurisdictions, failure to serve the other parties with a jury trial demand waives the right to jury trial, and given the wording of Rule 3:21 it is expected to have that result in Virginia as well.

**Specification of Issues for Jury Trial in the Demand**

**Effect of Specification Under Rule 3:21(c).** In the demand, a party may specify those issues it wishes to have tried by a jury--a desirable practice to follow in cases where there are both legal and equitable issues. Absent specification, the party will be deemed to have demanded jury trial on all issues triable by a jury. If a party specifies only some issues in the demand, any other party may demand trial by jury of any other or all jury-triable issues in the action. This is done by serving a demand within 10 days after service of the original demand upon it, or within such lesser time as the court may order.

Although the party making the demand may specify issues to be tried to a jury, a general demand to try all of the issues so triable is advised. The sorting out of the issues can occur later pursuant to Rule 3:22 if it is claimed by adversaries that some issues do not carry a jury trial right.

**Scope of Specified Issues.** If issues are specified in a demand, other parties may rely upon the demand as to those specified issues, and need not make their own demands for jury trial of those issues, but a party desiring jury trial of an issue not specified in the initial demand for a jury must make its own demand with regard to those additional issues.

Rule 3:21(c) provides:

If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

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58 See, e.g., Lutz v. Glendale Union High Sch., 403 F.3d 1061, 1065 (9th Cir. 2005).
Ten-Day Limit on Subsequent Demand by Other Parties

Rule 3:22(c) provides that within 10 days after service of the demand for jury trial, or such lesser time as the court may order, other parties may serve a demand as to any issues not covered in the original demand.

This provision should not be read literally in all situations. Assume, for example, that the plaintiff endorses on its complaint a demand for jury on one issue. Taken literally, the Rule would require that defendant serve a demand for jury trial of any other issues within ten days after service of the complaint, or be held to have waived jury trial of any issues not embraced by plaintiff’s demand. This result could not have been contemplated, since under Rule 3:8 defendant has 21 days to answer or otherwise present objections. Rather, Rule 3:22(c) was designed to cover the situation where a demand as to fewer than all issues is made after or simultaneously with the closing of the pleadings, so as to provide other parties with a reasonable period in which to add additional issues to the jury trial demand. Thus, for example, if plaintiff were to demand a jury trial as to only some issues on the tenth day after an answer was served, defendant would have time to make its demand. In order to avoid delay of trial, the court may reduce that period to less than ten days. This construction is fair to all sides, and yet requires the demand to be made at an early date so that the clerk can prepare the trial calendars.

Failure to Specify is a Demand as to All Issues Triable by Jury

Under Rule 3:22(c), when a general demand for jury trial is made without specifying particular issues, the demand is deemed to be a demand for jury trial of all issues in the case that are triable by a jury. A jury demand that does not specify particular issues covers all issues raised in subsequent pleadings affecting the party making the demand.
*Patricia, who flew in for the hearing, sensed she was getting “hometowned.”*
Amended Pleadings Raising New Issues

In federal practice, under a rule almost identical to Rule 3:21, when an amended pleading raises new issues, by asserting new facts, a jury trial may be demanded with regard to those new issues, even if the right had been waived with regard to issues raised in the original pleading. Virginia law on this point remains to be developed.

Effect of Amendments. It has been held that a rule in the form of Rule 3:21 envisions an amendment that raises new facts, perhaps culled during discovery, as a prerequisite to reactivation of the 10-day period during which a party has a right to make a jury demand. The question is whether the amended pleading is significantly different from the original pleading. The mere addition of extra details or new legal arguments will not suffice. Furthermore, when the parties are the same before and after an amendment, "it is difficult to show that a new issue has been raised." Every amended pleading contains some new material. However an amended pleading does not always introduce new issues. The term "issue" means something more than the evidence offered and the legal theories pursued. Generally, an amended complaint does not revive a plaintiff's right to request a jury trial if the issue in the original complaint and the amended complaint turn on the same matrix of facts.59

Amendments Adding or Changing Parties. In practice elsewhere in the United States, amendment of a pleading by the addition of new parties may or may not revive the right to jury trial, depending on the circumstances. When the addition of parties alters the claims or nature of relief sought, the right to demand a jury trial should revive.60 On the other hand, when the addition does not alter the claims or add new issues to the case, the right should not be revived.61

Amended Pleading Merely Asserting New Theories. In the practice of other jurisdictions which have developed a mature jurisprudence on jury demands, an amended complaint which merely asserts new theories of recovery, but is based on the same facts as the original complaint, does not reestablish the defendant's right to demand a jury trial when the right had been waived as to the original complaint.62 Only

60 LaMarca v. Turner, 995 F.2d 1526, 1545-1546 (11th Cir. 1993).
61 State Mut. Life Assurance Co. v. Arthur Andersen & Co., 581 F.2d 1045, 1049 (2d Cir. 1978) (amendment revives right to demand jury trial only if amendment changes issues; court is doubtful that mere addition of codefendants one year after expiration of time to demand jury trial revived previously waived right). See also Gamboa v. Medical College of Hampton Rds., 160 F.R.D. 540, 543 (E.D. Va. 1995) (change of name of defendant employer and increase in damages sought; no other change in complaint); Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1063-64 (5th Cir. 1990) (addition of party to counterclaim did not create new issues of fact).
62 Sunenblick v. Harrell, 145 F.R.D. 314, 317 (S.D. N.Y. 1993) (presentation of "new issue" means more than new legal theory; allegations of reverse confusion involved same general area of dispute as original trademark infringement complaint); Walton v. Eaton Corp., 563 F.2d 66, 73 (3d Cir. 1977) (pleading additional facts, but the general area of dispute was unchanged); Lawrence v. Hanson, 197 F. Supp. 2d 533, 536 (W.D. Va. 2002) (proposed amendment to complaint stating that defendant was being sued in his individual and official capacities did not introduce new "issue" so as to revive plaintiff's right to request jury trial).
new issues asserted in the amended pleading will generate a new right to make the demand. The term "issue" means something more than the evidence offered and the legal theories pursued. One must ask whether the ultimate issue for decision is different. New facts that merely clarify the same general issues raised in the original complaint should not create new issues of fact on which to assert a jury demand, and the mere submission of more detailed statements of previously submitted claims does not in other jurisdictions which have considered the matter confer anew the right to jury trial. Amendments to pleadings thus may contain new facts which do not create new issues triable by a jury.

**Amendment Merely Demanding Different Relief.** A pleading which does not raise new issues or change the character of the original pleading, but merely seeks additional relief is generally felt to be insufficient to revive the right to demand a jury trial.

**New Issues Raised in Counterclaims**

If a jury trial has already been demanded with respect to issues raised in the complaint, most jurisdictions hold that this demand will be effective as to those claims raised as counterclaims that are directed at the same issues. Thus, if a defendant demands a jury trial on counterclaims that turn on the same matrix of facts as the claims in the complaint, in federal practice, under a rule almost identical to Rule 3:21, the plaintiff may rely on the defendant's jury demand and is not required to make its own jury demand on the issues raised in the complaint.

As to issues raised for the first time in a counterclaim, a new demand may need to be made. It has been held in some jurisdictions that the failure to demand a jury trial on new issues raised in the counterclaim waives the right as to those issues, even if a general demand was made with regard to the issues in the complaint. Elsewhere, it has been held that a general demand made with respect to the issues in the complaint will cover all issues raised in the counterclaim, even if they are unrelated.

**Jury Demand Within Ten Days of Reply Effective as to Issues Raised in Counterclaim Only.** In some jurisdictions, if a counterclaim raises the same issues as


64 Rosen v. Dick, 639 F.2d 82, 94 (2d Cir. 1980) (noting fear of "insubstantial alterations" in papers to court).


those raised in the answer, a jury demand within ten days of the reply to the counterclaim will be effective for all issues raised by the answer and counterclaim; however, if the issues raised in the counterclaim are new issues, not those raised in the answer, demand within ten days of the reply will only be effective as to those new issues, and not as to issues addressed in the complaint and the answer.

\[
\text{Therefore, it is hereby ordered that all claims be dismissed.}
\]

*Whenever Judge Cardenas had the clerk sing his ruling, the lawyers knew their case was sooo over.*
E. Trial by Jury Pursuant to Demand

All Issues Within Timely Demand Will Be Tried to Jury. When a timely demand for a jury trial has been made, all issues triable by a jury that are within the demand must be tried to a jury under the clear text of Rule 3:22. A jury may be avoided only if all of the parties stipulate to a court trial or if the court, on motion or sua sponte, finds that there is no jury trial right as to some or all of the issues within the demand.

However, the fact that there is no constitutional or statutory right to a jury trial on a particular issue, such as an equitable issue, does not automatically or absolutely prevent that issue from being properly tried to a jury. There are several ways in which a jury may hear issues that would ordinarily be tried to the court:

☑ Consent. The parties may expressly consent to a trial by jury and the court may order a jury trial based on this consent, under Rule 3:22(d). In fact, in most jurisdictions if an issue not triable by jury is inadvertently submitted to a jury without objection, the failure to object has been deemed to operate as a consent to the trial by jury even without reliance on such a provision of the Rules.

☑ Advisory jury. Even if there is no right to a jury trial on a particular issue, the court still has the discretion to impanel and submit the issue to an advisory jury where Code § 8.01-336 permits, under cross-reference provisions in Rule 3:22.

Jury Rights Attach to Specific Issues, Not the Case as a Whole

The right to jury trial attaches to specific issues, rather than to an entire action. Rule 3:22(a) refers to docketing the entire action as a "court action" or a "jury action," but the balance of the Rule speaks of the trial of specific "issues" either by a jury or by the court. Rule 3:21 provides for jury demands only for "any issue triable of right by jury," and provides for parties to expressly limit jury demands to specific issues, leaving others triable by the court. See Rule 3:21(a) and (c).

Operating under substantially the same rules, the federal courts have long rejected the idea of characterizing the action as a whole as a "legal" action or an "equitable" action and determining jury rights for the entire action on that basis. Indeed, in an appropriate case, some issues may be tried to the court while others are tried to the jury. In these mixed-issues actions, there are rules governing which issues should be tried first so as not to impair the right to jury trial on the issues triable by jury.
F. Motions to Strike a Jury Demand

Consent of All Parties to Nonjury Trial Is Permitted by Rule. Even if a jury demand is made with respect to an issue, that issue may be tried to the court rather than a jury if all parties or their attorneys of record so consent by filing a written stipulation or by making an oral stipulation that is entered in the record, according to Rule 3:22(a). Whenever the record adequately reflects the consent of the parties, even if not in the form of a stipulation, the courts will permit nonjury trials of issues that are otherwise subject to valid jury demands.

Inferring Consent to a Non-Jury Trial. After a timely jury demand has been made with respect to an issue for which there is a right to a jury trial, the language of Rule 3:22 permits a nonjury trial only if all parties so stipulate on the record. Despite such provisions, some jurisdictions find that the right to a jury trial may be waived, despite a timely filed demand and the absence of any express stipulation on the record, if the conduct of the parties makes it clear that they do not intend to maintain their claim to a jury trial. There is no invitation for this result in Virginia's Rules of Court, and since waiver is rarely inferred in Virginia, it seems unlikely that this result will follow in the Commonwealth, given the limited grounds for overcoming the demand for a jury, as spelled out in Rule 3:22(a).

Participation in Bench Trial, Without Objection, Shows Consent. The most common form of conduct that will demonstrate consent to a nonjury trial is participation in a bench trial without objection. Almost every court that has considered the question has concluded that the right to object to a bench trial after a timely jury demand has been made is waived by failure to raise the objection at the commencement of a bench trial and by subsequent participation in that bench trial.

Determination That No Right to Jury Trial Exists Makes Jury Demand Irrelevant. Despite a timely demand for jury trial, the action, or particular issues in the action, will be tried by the court if the court determines under Rule 3:22(a)(2) that there is no right to jury trial for the action or for particular issues covered by the jury demand. Permitting a court to ignore a timely-filed jury demand when it rules that there is no right to a jury is proper because Rules 3:21 and 3:22 merely preserve the right to a jury trial – these Rules do not create jury rights where none existed before.

Party May Move to Strike Demand or Court May Strike Sua Sponte. Any party may move to strike the demand for a jury trial, or move to strike the action or specified issues in the action from the jury trial list or jury calendar. Rule 3:22(a) also permits the court to strike an action from the jury trial list on its own initiative.

No Time Limit on Motion to Strike. Parties have a great deal of latitude on the timing of motions to strike a jury demand. Because a court has the power to act sua sponte at any time under Rule 3:22(a)(2), it follows that a court has the discretion to permit a motion to strike a jury demand at any time, even on the eve of trial.

Motion to Strike Directed to Specific Issues, Not Case as Whole. In making its determination as to the right to jury trial, the court must consider the nature of the particular issues in the action, rather than the character of the overall action. Rule
3:22(a) characterizes the question as whether "trial by jury on some or all of those issues does not exist under applicable law."

Thus, if a jury demand includes issues as to which a party is not entitled to a jury trial, and others as to which a jury demand is proper, the court will not strike the demand altogether, but will limit the demand to the issues that properly may be tried to a jury.

The right to a jury is determined by the actual issues in the case. Determination of the motion to strike is not, therefore, limited to a consideration of the issues apparent on the face of the pleadings. Conversely, even if there are issues in a case that would normally be triable by a jury, most courts in other jurisdictions operating under rules comparable to Rule 3:22 hold a jury demand may be stricken if there are no factual disputes on those issues for the jury to resolve. Even if there is a right to a jury trial, the jury resolves only disputed questions of fact. The court retains the power to determine the law and apply it to the undisputed facts, so there is no right to a jury when there are no factual disputes in a case.

 Judge Time doesn’t grant continuances.

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67 See Monroe Auto Equip. Co. v. Heckethorn Mfg. & Sup. Co., 332 F.2d 406, 412 (6th Cir. 1964) (evidence "so clear and overwhelming" there were no factual issues to be resolved).
G. Trial of "Non-Jury" Issues by a Jury – On Consent

Court Has Discretion to Act on Consent of Parties. If all of the parties to the action consent, the court may order a jury trial of issues not triable of right by a jury, under a new Virginia Rule found in Rule 3:22(d) However, the court does not have to order a jury trial merely because the parties consent to one, since this provision states that the trial judge "may" order a jury trial of any issue when the parties consent. This appears to be a matter committed to the unfettered discretion of the circuit court judge, since no standard is prescribed (not even the lowly "good cause" test).

Consent to a jury trial under Rule 3:22(d) is described very differently from the consent under subpart (a) of the same rule. In order to waive a jury that was properly demanded, a "written stipulation filed with the court or by an oral stipulation made in open court and entered in the record" under Rule 3:22(a). However, when it comes to consenting to try a case with a jury (in effect to have greater jury trial rights) the Rule is differently stated, and requires only "the consent of the parties." Thus the Rule for according a party a jury by agreement requires no special formality for the consent, no writing, and no statement on the record. In other jurisdictions operating under a Rule worded like this, the failure to object to the submission of issues to a jury operates as a consent to the trial by jury of those issues.68 The fact that there is no constitutional or statutory right to a jury trial of a particular issue, such as an equitable issue, will not prevent that issue from being properly tried to a jury if there is no objection.69

Effect of Consent. In cases tried to a jury as a result of the parties' consent under Rule 3:22(d), the jury's verdict can have two very different degrees of weight, depending on the agreement of the parties. The Rule provides:

(d) Party Consent to Jury. — As to any claim not triable of right by a jury, the court, with the consent of the parties, may (i) order trial of any claim or issue with an advisory jury or, (ii) a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Under this provision, the parties may consent to have any claim or issue heard by an advisory jury. The impact of this provision of the rule is to obviate the requirement in some Virginia case law seeming to require a party to show, beforehand, that there will be hotly contested facts and, in effect, a swearing contest at which credibility determinations will be crucial. See generally Nelms v. Nelms,70 the leading case.

The other alternative under Rule 3:22(d) is for the parties to consent that there will be a jury whose verdict is treated as a nonadvisory jury verdict, with the same effect as if trial by jury had been a matter of right.

68 Bereda v. Pickering Creek Indus. Park, Inc., 865 F.2d 49, 52 (3d Cir. 1989) (both parties requested a jury trial although it was not available as of right); Whiting v. Jackson State Univ., 616 F.2d 116, 123 (5th Cir. 1980).
69 U.S. Phillips Corp. v. Ferro Corp., 522 F.2d 1100, 1102 (6th Cir. 1975) (no timely objection to a jury trial).
H. Waiver of Jury Trial Results in a Nonjury Trial

Issues Not Demanded for Jury Trial Are Tried by Court. Issues not demanded for trial by jury under Rule 3:21 will be tried by the court, according to Rule 3:22(b). This accords with the premise of Rule 3:21(d) that a failure to make a timely demand results in the waiver of the right to a jury trial.

There is no constitutional right to a non-jury trial. As stated by the United States Supreme Court in *Beacon Theatres v. Westover*, "[T]he right to jury trial is a constitutional one, ...while no similar requirement protects trials by the court. . . ."71 In *Fitzgerald v. United States Lines*, involving a subject where there was traditionally no jury trial right (there, admiralty) the trial court may order a jury trial simply as an option of convenience. Obviously, the Court saw no right of any party to a nonjury trial.72

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71 *Beacon Theatres v. Westover*, 359 U.S. 500, 510 (1959) (although trial court has discretion over whether to try legal or equitable issues first, its discretion must not impair a party's constitutional right to a jury trial of legal issues).

Relief From Waiver of Jury: Motion for Trial by Jury. In federal practice, a court has the discretion, on the motion of a party, to order a jury trial of any or all issues in any action in which a demand for trial by jury could have been made of right, notwithstanding the failure of a party to make a timely jury demand. This is based on specific language found in the federal rule comparable to Rules 3:21 and 3:22 which expressly embraces that possibility.

Recently 3:21(d) was amended to allow relief, because it now provides that there is a waiver, "Except upon leave of court for good cause shown,"

Thus it may be possible that where good cause exists to allow a party who through inadvertence has omitted a jury demand the court could rely on this provision as the basis for an application later in the proceedings to resurrect a jury demand that is stated by the express terms of Rule 3:21(d) to be otherwise waived.

The second possible basis for a ruling that a jury trial demand will be permitted to be promulgated – more than 10 days after the last pleading on an issue – would be Rule 1:9, which provides in relevant part:

The time allowed for filing pleadings may be extended by the court in its discretion and such extension may be granted although the time fixed has expired; but the time fixed for the filing of a motion challenging the venue shall in no case be extended except to the extent permitted by § 8.01-264.

This Rule obviously takes a broad view of "pleadings" (since it is necessary to exempt a venue motion from its operation), and that concept could be capacious enough to include a jury demand – which would normally be upon a pleading, or may be in a separate paper accompanying the pleadings. If Rule 1:9 does apply, it permits relief after a deadline has passed.

Double Bind: Julia grew increasingly annoyed with cross-examining the witness through his sock puppet, but didn’t want the jury to think she couldn’t do it.
I. Statutory Jury Rights in Certain Equitable Claims.

Even though procedures for legal and equitable claims have been unified into a single form of civil procedure, the Code of Virginia in § 8.01-336 continues to recognize two specific forms of jury proceedings that are applicable only in the hearing of equitable claims. That is, in cases where the historic treatment of a kind of claim in 1776 was equitable, and it was tried by a jury alone, there would not normally be a jury trial right available to a party. However, by this statute the General Assembly has distilled two specific situations in which a jury will be available as a matter of statutory right.

These provisions of Code § 8.01-336 are as follows:

**D. Trial by jury of plea in equity.** --In any action in which a plea has been filed to an equitable claim, and the allegations of such plea are denied by the plaintiff, either party may have the issue tried by jury.

**E. Suit on equitable claim.** --In any suit on an equitable claim, 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 before an advisory jury.

To implement the continued application of these two statutory provisions the drafters of new Part Three of the Rules of Court have built into Rule 3:22 an express recognition of those two options. A portion of Rule 3:22 provides:

(c) *Statutory Jury Rights in Certain Equitable Claims.* —

(1) In an equitable claim where no right to a jury trial otherwise exists, where impaneling of an advisory jury pursuant to Code § 8.01-336(E) to hear an issue will be helpful to the court concerning disputed fact issues, such a jury may be seated. Decision on such claims and issues shall be made by the judge.

(2) Where a jury trial on a defendant's plea in an equitable claim is authorized under Code § 8.01-336(D), trial of the issues presented by the plea shall be by a jury whose verdict on those issues has the same effect as if trial by jury had been a matter of right.
**Issues for an Advisory Jury**

**Issues out of Chancery Have Become Advisory Jury Proceedings.** Under the version of Code § 8.01-336 crafted by the General Assembly in 2005, excerpted above, where an "equitable claim" is being tried, the trial court may – on its own motion or upon motion of any party supported by an affidavit that "the case will be rendered doubtful by conflicting evidence," direct an issue to be tried before an advisory jury.

In the classic case, *Nelms v. Nelms*, 236 Va. 281, 374 S.E.2d 4 (1988), the "issue" was a party's capacity to make a certain deed of gift. Among the factors that seem to control whether the advisory jury procedure – formerly known as hearing an "issue out of chancery" – is whether the demand therefor is express (in the sense that it unequivocally calls for a non-binding advisory hearing) and whether the evidence appears likely to be hotly contested. This places upon the party moving for empanelment of such a jury the delicate task of preserving the appearance of having a strong case, while at the same time averring that it will be a close call for the trial judge to make in the bench hearing, and hence having the jury perform its vaunted credibility-assessment function would be of benefit.

Under Rule 3:22(c), also excerpted above, the new Part Three expressly implements that provision of Code § 8.01-336 by noting that even if no right to a jury trial otherwise exists for an equitable claim, where impaneling of an advisory jury pursuant to Code § 8.01-336(E) to hear an issue will be helpful to the court concerning disputed fact issues, such a jury may be seated. The Rule goes on to make the cardinal distinction that "[d]ecision on such claims and issues shall be made by the judge." This latter statement is crucial, since it is reversible error for the trial judge to treat the verdict of an advisory jury as binding or to follow it as a matter of rote unless it is unsupported by the evidence. Instead, in words and substance the trial judge is required to make it clear that he or she is making the decision, having been "informed" by the view of the advisory jury on the issues presented to them.

**"Pleas to Equitable Claims"**

Under Code § 8.01-33(D) set forth above, where the case involves an equitable claim in which a "plea" has been filed, the allegations of such plea are denied by the plaintiff, either party may have the issue tried by jury. Several important concepts are packed into that short subsection of the statute.

A "plea" is either a freestanding pleading, or it may be a section of the defendant's answer. If it is the latter, case law prior to the present version of the rules counsels that it should be conspicuously designated as a "Plea to an Equitable Claim," perhaps even citing the statute, "Pursuant to Code § 8.01-336(D)." This is because labeling sometimes makes a considerable difference in how the jury claim will be treated.

A plea is classically treated as a single, dispositive state of facts, which if resolved in the defendant's favor will end the claim of the plaintiff. A list of typical pleas, as endorsed by the Supreme Court of Virginia in *Nelms*, is:
Familiar illustrations of the use of a plea would be: The statute of limitations; absence of proper parties (where this does not appear from the bill itself); res judicata; usury; a release; an award; infancy; bankruptcy; denial of partnership; bona fide purchaser; denial of an essential jurisdictional fact alleged in the bill, etc.

Pleas tend to be specific, supervening affirmative defenses unrelated to the merits of the claim, which provide a bar-doctrine to the defendant, if the plea is proven. Hence a jury trial on that single dispositive factual situation is permitted by the Code section.

The drafters of revised Part Three of the Rules of Court include in Rule 3:22 express provision implementing this subsection of Code § 8.01-336 as well. In Rule 3:22(c)(2) the Rules provide:

(2) Where a jury trial on a defendant's plea in an equitable claim is authorized under Code § 8.01-336(D), trial of the issues presented by the plea shall be by a jury whose verdict on those issues has the same effect as if trial by jury had been a matter of right.

The signal feature of this Rule of Court, continuing the gloss from case law that would not be apparent to the reader of the face of the statutory section itself, is that the binding effect of the jury under this provision is the same as a regular verdict, such as one obtained at law in a jury trial of right. That is, the jury verdict on a plea in equity is binding, and may only be set aside or otherwise interdicted in accord with the traditional Virginia standards for disregard of jury verdicts in civil cases at law, which are highly limited.


In the case of an issue on a plea in equity, not only does either party have the right to a jury trial, but the jury may not be discharged before verdict and its verdict, when returned, is as binding and conclusive upon the factual issue submitted to it as is a jury verdict in an action at law."
Note: Designation of Case on Docket as Jury Action

Clerk Has Duty to Designate Case on Jury Docket. When a jury trial is demanded under Rule 3:21, the action must be designated on the court's "docket" as a jury action. By statute in Virginia, the clerk of the court must keep a "civil docket book" for the docketing of all civil actions before the court. See Code §8.01-331. The clerk will also establish calendars of all actions ready for trial based on the particular circuit's pretrial management and preaceipe processes. As a result of these developments, these calendars must distinguish between actions triable by jury or triable by the court. Thus the requirement that the clerk "docket" a matter as a jury trial when a proper and timely jury demand has been made has the practical effect of scheduling that case for a jury trial.

A clerk's error in docketing a jury case as a nonjury case, or docketing a nonjury case as a jury case, does not control the right to a jury trial. There is no right to a jury trial when no timely demand is made, despite an indication on the docket setting the matter for jury trial. Similarly, an entitlement to a jury will not be lost simply because the clerk fails to properly mark the docket book despite a timely demand.
"I don't mean to rush you, Doctor, but you are due in Circuit Court in about 20 minutes."
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