# Chapter 1 GENERAL PRINCIPLES

#### § 1.06 Contribution

2010—*City of Alexandria v. J-W Enterprises, Inc.*, 279 Va. 711, 691 S.E.2d 769.

Police officer, while working for a restaurant, follows patrons out of restaurant when they did not pay. Patrons then enter car and drive car towards officer who believes that they have then committed a misdemeanor and fires at the vehicle. City, in attempting to seek contribution from restaurant for actions of police officer acting as a restaurant employee is barred from contribution because the officer in shooting was performing a police function and therefore doing so on behalf of the city.

#### § 1.08 Duty—In General

2017—*MCR Federal, LLC v. JB&A, Inc.*, 294 Va. 446, 808 S.E.2d 186.

Because fraud claim arose from contractual relationship it is barred in this circumstance under Source of Duty Rule.

2014—*RGR, LLC v. Settle*, 288 Va. 260, 764 S.E.2d 8.

Wrongful death action where lumber company had piled lumber near a railroad crossing blocking the truck driver’s view as he approached the crossing. Lumberyard should have foreseen the risk. Court imposed a duty owed to mankind in general.

2012—*Cline v. Dunlora South, LLC*, 284 Va. 102, 726 S.E.2d 14.

Motorist injured when tree located on private land fell on public roadway striking vehicle. No duty exists in this case. The complaint did not allege any affirmative act of the landowner, making the property different from its natural state or from its condition when the road was built. Demurrer properly sustained.

2011—*Kaltman v. All American Pest Control*, 281 Va. 483, 706 S.E.2d 864.

Husband and wife filed complaint against pest control company after employee treated couple’s home with pesticide that was not approved for residential use. Trial court improperly granted demurrers as to negligence and negligence per se counts as these claims did not necessarily arise out of the agreement between the home owners and the pest company but the duties instead arose out of the statute.

2009—*Kellermann v. McDonough*, 278 Va. 478, 684 S.E.2d 786.

Plaintiff allowed daughter to stay at home of a friend and daughter was subsequently killed while riding in a vehicle driven by another minor against the father’s expressed instructions. Father properly alleged common-law claim based upon duty in tort of failing to supervise and care for the daughter when the parents relinquished supervision and care to the defendants and the defendants agreed to supervise and care for the child. Parents also pled a cause of action on the basis that defendant assumed duty to the plaintiff’s child. These defendants, however, did not have a special relationship with the decedent child that created a duty to protect her from the criminal acts of third parties such as the driver of the vehicle in question.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 1.10**

#### § 1.10 Duty to Warn

2015—Brown v. Jacobs, 289 Va. 209, 768 S.E.2d 421.

Wrongful death action where process server is killed by husband who is being served with suit papers in divorce action. The attorney who hired the process server did not warn the process server that the husband was armed. Trial court properly granted Demurrer due to absence of duty to warn in this context.

#### § 1.11 Economic Loss Rule

2010—Abi-Najm v. Concord Condominium, LLC, 280 Va. 350, 699 S.E.2d 483.

Trial court improperly granted demurrer based upon Economic Loss Rule where plaintiffs had pled duties that gave rise to economic damages that were independent of the agreement between the parties. In this case, the economic losses flowed from a breach of the Virginia Consumer Protection Act and also from fraud in the inducement.

#### § 1.15 Gross Negligence

2016—Elliott v. Carter, 292 Va. 618, 791 S.E.2d 730.

In this wrongful death drowning case against a Boy Scout leader the fact that the leader exercised some degree of care in supervising the decedent means that there was no gross negligence.

2011—Volpe v. City of Lexington, 281 Va. 630, 708 S.E.2d 824.

Child drowned in river that was designated as a city park designed for swimming. Trial court incorrectly held that dangerous current was open and obvious condition. Although the potential dangerousness of the water itself may have been open and obvious, what was not open and obvious was the dangerous current which created a hydraulic beneath the water surface. Jury issue likewise created as to whether or not this condition constituted a form of recklessness or total disregard of precautions amounting to gross negligence on the part of the City. As a matter of law, however, this conduct on the part of the City did not rise to the level of willful and wanton negligence.

#### § 1.24 Limitation of Actions

* + 1. **Accrual of Cause of Action**

2016—Haynes v. Haggerty, 291 Va. 301, 784 S.E.2d 293.

Plaintiff alleged sexual abuse as a minor from 1971 to 1975. Plaintiff reached age of majority in March of 1975. She was informed of this abuse by her therapist on May 14, 2012. Code § 8.01-249(6) does not apply and claim is time barred.

2013—*Kiser v. A.W. Chesterton Company*, 285 Va. 12, 736 S.E.2d 910.

Cause of action for personal injury based on exposure to asbestos accrues upon first communication by a physician of a diagnosis of any of the specified diseases or some other disabling asbestos-related injury or disease.

2012—*Bing v. Haywood*, 283 Va. 381, 722 S.E.2d 244.

Plaintiff filed assault and battery as well as intentional infliction of emotion distress claim alleging illegal body cavity search. Court applied one-year statute of limitations under Section 8.01-243.2 for commencement of claims related to conditions of confinement. Claim time barred.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 1.24**

#### Personal Injury

2014—*Lucas v. Woody*, 287 Va. 354, 756 S.E.2d 447.

Suit for personal injuries while in confinement in the city jail. One-year limitation under Section 8.01-243.2 controls regardless of whether the plaintiff is still incarcerated when the action is filed.

2011—*Chalifoux v. Radiology Associates*, 281 Va. 690, 708 S.E.2d 834.

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 when the improper course of examination and treatment for the particular malady terminates. In this case, the plaintiff was referred to a radiological group who on six occasions during a three-year period conducted radiology studies. Each study related to the same or similar symptoms. All of the radiology studies were kept in one file under the plaintiff’s name. The Trial court in this case improperly granted the plea of the statute of limitations.

#### Property Damage

2017—*Forest Lakes v. United Land Corp.*, 293 Va. 113, 795 S.E.2d 875.

Property owner alleged ongoing incursion of sediment into lake owned by plaintiff. The fact that the incursion was continuing did not prolong the statute of limitations and claim is time barred.

#### Tolling of Statute

2016—*Richmond v. Volk*, 291 Va. 60, 781 S.E.2d 191.

Plaintiff incorrectly used car owner’s last name in naming the defendant. Suit papers were delivered to the car owner’s address and posted at that address. Car owner’s insurer discussed the case with the actual defendant. Plaintiff nonsuited and then refiled within six months, this time correctly naming the defendant. The original filing was a misnomer which tolled the statute of limitations and as such the six month provision applies.

2012—*Casey v. Merck & Company, Inc.*, 283 Va. 411, 722 S.E.2d 842.

Virginia Law does not permit equitable tolling of state statute of limitations due to pendency of a putative class action in another jurisdiction.

2010—*Conger v. Barrett*, 280 Va. 627, 702 S.E.2d 117.

Wrongful death action was dismissed due to inactivity but reinstated within one year. Such action is not time barred as it does not constitute another action but is simply the reopening of an existing action.

2010—*Aguilera v. Christian*, 280 Va. 486, 699 S.E.2d 517.

Pro se plaintiff may not authorize other party to sign Complaint. Such a signature is invalid and the Complaint is a nullity and does not toll the statute of limitations.

2010—*Shipe v. Hunter*, 280 Va. 480, 699 S.E.2d 519.

Complaint signed by non-Virginia lawyer at direction of Virginia lawyer is inadequate as a matter of law since it does not bear the signature of a Virginia lawyer. The filing of such an action does not toll the statute of limitations.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 1.24**

#### Miscellaneous

2011—*Kocher v. Campbell*, 282 Va. 113, 712 S.E.2d 477.

In this personal injury case, the plaintiff filed bankruptcy before filing civil action. Personal injury claim was not listed as an asset in the bankruptcy case. As a matter of law, the personal injury claim became an asset of the bankruptcy estate. The complaint filed was a nullity because the plaintiff had no standing to bring the complaint. Since the statute of limitations had run, the claim is time barred.

2010—*Idoux v. Helou*, 279 Va. 548, 691 S.E.2d 773.

Plaintiff filed suit in General District Court against defendant after the defendant had died from causes unrelated to the alleged acts of negligence. The General District Court dismissed because of the improper identity of the defendant. A year later plaintiff files in the Circuit Court and identifies the defendant as being the estate of the decedent. This suit was filed within two years of the date of accident. The personal representative was served after the statute of limitations had expired. Trial court properly did not allow amend- ment under § 8.01-6.2 on the grounds that the suit against the estate was a nullity and did not toll the statute of limitations.

#### Statute of Repose

2011—*Royal Indemnity Company v. Tyco Fire Products*, 281 Va. 157, 704 S.E.2d 91.

Exterior sidewalk sprinkler heads are equipment under the statue of repose and are not ordinary building material and as such the statute of repose does not bar the claim.

2010—*Jamerson v. Coleman-Adams Construction*, 280 Va. 490, 699 S.E.2d 197.

Claim is barred by statute of repose because it was filed more than five years after the date of construction. The defective material in question was a steel platform and pole which collapsed causing injury. These items were not equipment, machinery or other arti-cles but were ordinary building materials and therefore governed by the statute of repose.

#### § 1.25 Minors

**[3] Duty Toward**

2014—*Lasley v. Hylton*, 288 Va. 419, 764 S.E.2d 88.

Minor child injured while driving ATV at home of host. Father is present and consents to the child operating the ATV. When parent is actively supervising child then parent’s duty supersedes that of host.

**[4] Parent/Child**

See Virginia Code § 8.01-36 as to joinder of infant.

#### § 1.26 Negligence Per Se

2011—*Kaltman v. All American Pest Control*, 281 Va. 483, 706 S.E.2d 864.

In a negligence per se case the plaintiff must show that the defendant violated a statute enacted for public safety, that the plaintiff belongs to the class of persons for whose benefits the statute was enacted and that the harm that occurred was of the type against which the statute was designed to protect and finally that the violation was a proximate cause of the plaintiff’s injury. In this case, the plaintiff alleged spraying of an unauthorized pesticide within the plaintiff’s home. Plaintiff properly pled negligence per se claim.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 1.31**

#### § 1.31 Proximate Cause

1. **Damages**

2018—*Dixon v. Sublett*, 295 Va. 60, 809 S.E.2d 617.

In this medical malpractice action plaintiff failed to present sufficient evidence to prove causation of injury resulting from two (2) day delay in treatment of perforated bowel during the performance of a hysterectomy.

2013—*Ford Motor Company v. Boomer*, 285 Va. 141, 736 S.E.2d 724.

In this asbestos case, court dealt with issue of proper instruction on proximate cause. Use of the multiple sufficient causes approach is proper whether the concurring causes are all tortious in nature or some are innocent. Trial court erred in failing to sustain objections to “substantial contributing factor” jury instructions. Court should have granted instructions dealing with “sufficient to have caused” standard.

2009—*Smith v. Kim*, 277 Va. 486, 675 S.E.2d 193.

In this medical malpractice/wrongful death action, plaintiff offered jury instruction stating that defendant is legally responsible for any additional injuries a tort victim suffers during treatment for the original injuries caused by that defendant. This instruction was not a correct statement of the law and therefore was properly rejected.

2009—*Howell v. Sobhan*, 278 Va. 278, 682 S.E.2d 938.

In this medical malpractice action, plaintiff presented evidence that defendant removed too much of colon essentially precluding plaintiff from ever returning to normal bowel function. Trial court improperly struck plaintiff’s case on issue of causation.

#### Intervening Cause

2016—*Dorman v. State Industries, Inc.*, 292 Va. 111, 787 S.E.2d 132.

Plaintiff raised issue of propriety of instruction on superseding cause. Instruction failed to state who had burden of proof. Plaintiff failed to present argument on that before the trial court and failed to proffer alternative jury instruction. In any event in this case the instruction was a proper statement of the law. There was more than a scintilla of evidence to support it.

2009—*Williams v. Joynes*, 278 Va. 57, 677 S.E.2d 261.

In this legal malpractice action, defendant attorney contended that plaintiff’s failure to file suit in other jurisdiction where statute of limitations had not expired was superseding event that severed the link of proximate causation. Trial court improperly granted sum- mary judgment on that issue. That issue should have been submitted to the jury for determination.

#### Miscellaneous

2014—*Harman v. Honeywell International, Inc.*, 288 Va. 84, 758 S.E.2d 515.

In airport crash litigation, plaintiff proposed as part of jury instruction language stating, “there may be more than one proximate cause.” Proximate cause need not be established with such certainty so as to exclude every other possible conclusion. Such additional language should not have been included.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 1.32**

#### § 1.32 Rescue Doctrine

2010—*Kimble v. Carey*, 279 Va. 652, 691 S.E.2d 790.

Plaintiff attempted to rescue driver slumped over wheel in automobile accident. Whether that driver’s conduct that put plaintiff in peril was willful and wanton was irrelevant to the rescue doctrine. In this case, however, it was error for the Court to rule as a matter of law that the plaintiff was contributorily negligent since under the rescue doctrine the issue should have been submitted to the jury.

#### § 1.39 Willful and Wanton Misconduct

2011—*Volpe v. City of Lexington*, 281 Va. 630, 708 S.E.2d 824.

Child drowned in river that was designated as a city park designed for swimming. Trial court incorrectly held that dangerous current was open and obvious condition. Although the potential dangerousness of the water itself may have been open and obvious, what was not open and obvious was the dangerous current which created a hydraulic beneath the water surface. Jury issue likewise created as to whether or not this condition constituted a form of recklessness or total disregard of precautions amounting to gross negligence on the part of the City. As a matter of law, however, this conduct on the part of the City did not rise to the level of willful and wanton negligence.

2011—*Kaltman v. All American Pest Control*, 281 Va. 483, 706 S.E.2d 864.

Plaintiff alleged that pest control employee failed to thoroughly clean equipment before applying the pesticide to the home in question. These facts do not justify a claim of willful and wanton misconduct.

**Chapter 2**

**DEFENSES**

#### § 2.06 Immunity

**[1] Charitable**

2014—*Byrd Theatre Foundation v. Barnett*, 287 Va. 291, 754 S.E.2d 299.

A member of this foundation was injured while attempting to repair pipe organ. Plea of charitable immunity was properly denied since Barnett was not a beneficiary of the foundation’s mission at the time he was injured.

#### [5] Sovereign

* 1. **Commonwealth**

2016—*Phelan v. Commonwealth*, 291 Va. 192, 781 S.E.2d 567.

Notice of claim by prisoner against Department of Corrections must explicitly include the agency alleged to be liable. Even though such information may be inferred from the notice, that is not sufficient.

* 1. **Counties**

2012—*Seabolt v. County of Albemarle*, 283 Va. 717, 724 S.E.2d 715.

County is absolutely immune in tort. City or town may be liable for gross negligence and sued for damages arising out of operation or maintenance of public park, recreational facility, or playground.

#### Employees

2016—*Pike v. Hagaman*, 292 Va. 209, 787 S.E.2d 89.

Medical malpractice action against nurse employed by VCU. Court applied four factors and found that nurse was entitled to immunity.

2014—*McBride v. Bennett*, 288 Va. 450, 764 S.E.2d 44.

Officer responding to non-emergency call without emergency equipment strikes and kills bicyclist. Supreme Court concludes officer was exercising discretion therefore immune.

2012—*Burns v. Gagnon*, 283 Va. 657, 727 S.E.2d 634.

Assistant Principal was alerted to impending fight in school and took no action. Fight occurred and student was severely injured. Assistant Principal is immune as to negligence, but gross negligence should have been submitted to jury.

2010—*Hawthorne v. VanMarter*, 279 Va. 566, 692 S.E.2d 226.

Circuit Court on Plea in Bar decided issue on sovereign immunity in favor of the defendant and with consent of parties resolved all factual and legal issues as to immunity. If either party had requested a jury trial as to the factual issues, such would have been granted.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 2.06**

#### Hybrids

2014—*Robertson v. Western Virginia Water Authority*, 287 Va. 158, 752 S.E.2d 875.

Sewer line burst causing collapse of 10-foot retaining wall. Operation of the sewer system is not a governmental function but is proprietary and therefore no immunity.

#### § 2.07 Last Clear Chance

1. **Opportunity to Avoid Injury**

2017—*Coutlakis v. CSX Transportation, Inc.*, 293 Va. 212, 796 S.E.2d 556.

Decedent walking adjacent to railroad tracks. Decedent apparently was unconscious of his peril. Defendant is liable only if he saw plaintiff and realized or ought to have realized his peril in time to avoid the collision using reasonable care. In this instance the Amended Complaint was sufficient to state facts for application of last clear chance and therefore Demurrer was improperly granted.

#### § 2.08 Release

2012—*Askew v. Collins*, 283 Va. 482, 722 S.E.2d 249.

Defendant sought application of Code Section 8.01-35.1 on grounds that injury suffered by plaintiff from defamatory statement made by defendant was the same injury suffered by plaintiff from subsequent publication of newspaper article. In fact, there were separate injuries and therefore this Code Section does not apply.

#### § 2.09 Sudden Emergency

2009—*Hancock-Underwood v. Knight*, 277 Va. 127, 670 S.E.2d 720.

Driver of van had complaint of a severe headache immediately before he slumped over the wheel leading to the accident. Neurological expert confirmed that he had a brain bleed. This set of facts did not support sudden emergency instruction.

#### § 2.10 Unavoidable Accident

2009—*Hancock-Underwood v. Knight*, 277 Va. 127, 670 S.E.2d 720.

Supreme Court declares that it is error to grant an unavoidable accident instruction.

#### § 2.11 Waiver

2010—*Heinrich Schepers GMBH & Co. v. Whitaker*, 280 Va. 507, 702 S.E.2d 573.

Waiver is voluntary and intentional abandonment of a known legal right, advantage or privilege. In this instance, the plaintiff’s waiver of a jury trial was limited to the first trial and did not apply to the retrial.

**Chapter 3**

**VEHICLES**

#### § 3.07 Bicycle

2010—*Rascher v. Friend*, 279 Va. 370, 689 S.E.2d 661.

Plaintiff was riding a bicycle on a residential two-lane road. As plaintiff approached intersection, oncoming vehicle made left turn in front of him. After collision, defendant admitted fault and prepaid statutory fine for failing to yield right of way. Trial court improperly struck plaintiff’s evidence on the grounds of contributory negligence. The jury reasonably could have concluded that the plaintiff was not negligent or, in the alternative, that any such negligence was not a proximate cause of the collision.

#### § 3.71 Seatbelts

2010—*Evans v. Evans*, 280 Va. 76, 695 S.E.2d 173.

Personal injury action by minor child against parent for negligence in failing to secure in a proper child restraint device. Although statute precludes claims of negligence per se in failure to comply with child seat restraint laws, this does not abrogate a common law action for negligence and as such the case should not have been dismissed on demurrer.

#### § 3.89 Turns

* + 1. **Left**

2010—*Rascher v. Friend*, 279 Va. 370, 689 S.E.2d 661.

Plaintiff was riding a bicycle on a residential two-lane road. As plaintiff approached intersection, oncoming vehicle made left turn in front of him. After collision, defendant admitted fault and prepaid statutory fine for failing to yield right of way. Trial court improperly struck plaintiff’s evidence on the grounds of contributory negligence. The jury reasonably could have concluded that the plaintiff was not negligent or, in the alternative, that any such negligence was not a proximate cause of the collision.

# Chapter 7 PREMISES LIABILITY

#### PART I. FALLS

#### § 7.07 Floors

2009—*Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 677 S.E.2d 272.

Trial court improperly granted summary judgment based upon contributory negligence of plaintiff where issue presented was whether or not metal bar attached to the floor in this grocery store was open and obvious and, if so, was it reasonable on the part of the plaintiff to not see it. Even assuming that the condition was open and obvious, the second issue was one for the jury.

#### § 7.12 Open and Obvious Condition

2011—*Volpe v. City of Lexington*, 281 Va. 630, 708 S.E.2d 824.

Child drowned in river that was designated as a city park designed for swimming. Trial court incorrectly held that dangerous current was open and obvious condition. Although the potential dangerousness of the water itself may have been open and obvious, what was not open and obvious was the dangerous current which created a hydraulic beneath the water surface. Jury issue likewise created as to whether or not this condition constituted a form of recklessness or total disregard of precautions amounting to gross negligence on the part of the City. As a matter of law, however, this conduct on the part of the City did not rise to the level of willful and wanton negligence.

2009—*Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 677 S.E.2d 272.

Trial court improperly granted summary judgment based upon contributory negligence of plaintiff where issue presented was whether or not metal bar attached to the floor in this grocery store was open and obvious and, if so, was it reasonable on the part of the plaintiff to not see it. Even assuming that the condition was open and obvious, the second issue was one for the jury.

#### PART II. INTERVENING CRIMINAL ACTS

#### § 7.21 Criminal Acts

2013—*Commonwealth v. Peterson*, 286 Va. 349, 749 S.E.2d 307.

This case arises out of the 2007 Virginia Tech shootings. Four million dollar jury verdict is reduced by trial judge to $100,000.00 and then totally vacated by Supreme Court. The relationship of the parties is that of business owner and invitee and in that circumstance owner owes a duty to warn only if he knows of an imminent probability of harm. Although the trial court applied a lesser standard, even that standard could not be met in this case. Secondly from the administrator’s point of view, they believed the shooting was a domestic incident and that the shooter had fled the scene and no longer posed a danger. Under these circumstances there was no duty to warn.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 7.24**

#### PART III. LANDLORD/TENANT

#### § 7.24 General Obligations

*See* Va. Code § 8.01-226.12 as to mold cases.

2012—*Steward, v. Holland Family Properties*, 284 Va. 282, 726 S.E.2d 251.

It is alleged that infant was exposed to lead paint in rental houses resulting in permanent injury. The complaint alleges that the landlords of both premises are liable for these injuries based on negligence per se, common law negligence, Residential Landlord and Tenant Act, and building code provisions. Trial court properly held that tort duty with regard to tenants of leased properties is not imposed upon the landlord.

#### § 7.27 Promises to Repair

2010—*Sales v. Kecoughtan Hous. Co.*, 279 Va. 475, 690 S.E.2d 91.

Tenant filed suit against apartment owner and management company for personal injury and property damage resulting from mold in the apartment. Plaintiff complained about the presence of mold. Defendants represented that the mold had been remedied. The mold in fact began growing again causing personal injury and property damage to the plaintiff. Plaintiff properly set forth claims of negligent repair and fraud. Trial court improperly granted demurrer to the amended complaint and dismissed the complaint with prejudice. That was error.

# Chapter 8

# PRODUCTS LIABILITY

#### § 8.04 Defects

**[5] Specific**

2018—*Evans v. Nacco*, 295 Va. 235, 810 S.E.2d 462.

In this product liability action plaintiff failed to present sufficient evidence for jury issue as to whether proposed redesign was in fact safer overall thereby constituting specific defect i.e., unreasonable danger.

#### § 8.17 Warranties

**[3] Express Warranty**

2011—*Royal Indemnity Company v. Tyco Fire Products*, 281 Va. 157, 704 S.E.2d 91.

Manufacturer’s description of how sprinkler head functions does not constitute express warranty of future performance.

# Chapter 9

# MEDICAL MALPRACTICE

#### § 9.11 Consent

2017—*Allison v. Brown*, 293 Va. 617, 801 S.E.2d 761.

In regards to informed consent claim plaintiff presented no evidence that lack of disclosures prevented plaintiff from making an informed decision or that she would not have elected to have the surgery if the proper disclosure had been made. Without evidence to establish proximate cause the claim fails as a matter of law.

2014—*Fiorucci v. Chinn*, 288 Va. 444, 764 S.E.2d 85.

Dental malpractice case where trial court properly excluded information given to patient in advance about the risk of the extraction.

#### § 9.15 Expert Testimony Required

2017—*Summers v. Syptak*, 293 Va. 606, 801 S.E.2d 422.

Plaintiff alleged certain inappropriate statements made by a family practice doctor. At summary judgment stage plaintiff was required to present expert opinion establishing that statements were a proximate cause of injury. Failure to do so justified entry of summary judgment.

2012—*Bowman v. Concepcion*, 283 Va. 552, 722 S.E.2d 260.

Statutes and rule requiring service of process within one year cannot be overridden by trial court without finding that Plaintiff has exercised due diligence as to service. In this medical malpractice case, Claimant did not serve defendant within one year of filing because plaintiff did not have required expert witness statement. Plaintiff could have non-suited prior to dismissal. In this case, dismissal with prejudice was proper.

#### § 9.27 Physician and Patient Relationship

2014—*Simpson v. Roberts*, 287 Va. 34, 752 S.E.2d 801.

Doctor performs amniocentesis and severely injures the fetus. Jury verdict of $7 million is reduced to the cap. Physician-patient relationship held to exist between doctor and fetus.

# Chapter 10 NONMEDICAL MALPRACTICE

#### § 10.01 Architects

2016—*William H. Gordon Assoc., Inc., v. Heritage Fellowship*, 291 Va. 122, 784 S.E.2d 265.

Suit against engineers and others was governed by a five-year statute of limitations. Trial court properly concluded that there was a breach of the standard of care by the engineer for failure to comply with certain state administrative regulations and other standards.

#### § 10.02 Attorneys

1. **Creation of Attorney-Client Relationship**

2016—*Thorsen v. Richmond SPCA*, 292 Va. 257, 786 S.E.2d 453.

Due to drafting error in the will property did not properly pass to the plaintiff. Plaintiff sufficiently alleged that testator sought to confer a benefit to the plaintiff and therefore plaintiff was intended beneficiary and could pursue professional negligence/breach of contract claim.

1. **Limitations**

2017—*Moonlight Enterprises, LLC v.Mroz*, 293 Va. 224, 797 S.E.2d 536.

Continuous representation rule means the statute of limitations does not begin to run until the attorney’s services rendered in that particular undertaking have terminated even though the general attorney-client relationship may otherwise continue as to other matters.

2010—*Van Dam v. Gay*, 280 Va. 457, 699 S.E.2d 480.

Wife sued former attorney for legal malpractice in terms of drafting of property settlement agreement. Legal injury occurred when the Court entered the final decree of divorce and at that time the legal representation terminated. Right of action accrued on that date of divorce and not when it was subsequently determined that the wife had been injured as a result of the PSA and, as such, claim is time barred.

#### Negligent Conduct

2015—*Desetti v. Chester*, 290 Va. 50, 772 S.E.2d 907.

In this legal malpractice action against criminal defense lawyer, plaintiff must allege and prove that attorney’s malpractice resulted in a more severe conviction or longer sentence than necessary.

2015—*Shevlin Smith v. McLaughlin*, 289 Va. 241, 769 S.E.2d 7.

Legal malpractice action where lawyer who is being sued is acting in area of the law that was unsettled. In this instance there was no breach of duty. Court further ruled that defense of collectability imposes the burden on the defendant to prove such. Since legal malpractice claims are contract claims, there is no recovery for non-pecuniary damages such as pain and suffering. In addition, the Plaintiff’s damages based upon his escaping from jail when he had been wrongfully convicted was not a proper element of damage in this context. At trial, the Plaintiff sued for $6,000,000.00 but asked a jury to award $10,000,000.00. That should not have been allowed.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 10.02**

2010—*Wintergreen Partners v. McGuire Woods*, 280 Va. 374, 698 S.E.2d 913.

Law firm was accused of failing to timely file transcript of trial proceedings for purposes of appeal. Legal malpractice action against law firm fails because legal malpractice could not be proven as a matter of law since during the course of the trial the trial firm failed to properly preserve objections and, as such, filing of transcript in effect became irrelevant.

2010—*Johnson v. Hart*, 279 Va. 617, 692 S.E.2d 239.

A sole testamentary beneficiary in their individual capacity could not maintain a legal malpractice action against the attorney for the estate based upon the attorney’s alleged negligent services.

2009—*Williams v. Joynes*, 278 Va. 57, 677 S.E.2d 261.

In this legal malpractice action, defendant attorney contended that plaintiff’s failure to file suit in other jurisdiction where statute of limitations had not expired was superseding event that severed the link of proximate causation. Trial court improperly granted sum- mary judgment on that issue. That issue should have been submitted to the jury for determination.

# Chapter 11

# WORKERS’ COMPENSATION

#### § 11.02 Exclusiveness of Remedy

2014—*Kohn v. Marquis*, 288 Va. 142, 762 S.E.2d 755.

Recruit police officer killed during training process. There was an identifiable event that was thought to be the cause of his death. Subsequent suit against police department is barred under exclusive remedy rule.

2012—*Napper v. ABM Janitorial Services*, 284 Va. 55, 726 S.E. 2d 313.

Trial court improperly held that plaintiff’s personal injury suit arising from fall in public lobby of building where she worked was barred by workers’ compensation immunity. Mere fact that cleaning company that cleaned the public area also cleaned the plaintiff’s office area did not mean that plaintiff’s employer and the janitorial company were engaged in the same trade business or occupation.

2012—*Giordano v. McBar Industries, Inc.*, 284 Va. 259, 729 S.E.2d 130.

In this wrongful death action, decedent had been hired by general contractor on construction project. Administrator of estate sought to file wrongful death action against general contractor and subs and also building supply company. Action against general and subcontractors is barred. Supplier of product that was used on the job was not engaged in trade business or occupation of the decedent’s employer was subject to suit.

2012—*Gibbs v. Newport News Shipbuilding*, 284 Va. 677, 733 S.E.2d 648.

Navy seaman assigned to perform testing and inspection duties on nuclear submarines under construction at shipyard brought claim for asbestos exposure. US Navy could not be held liable to pay compensation under Virginia Workers’ Compensation Act and likewise could not be statutory employer of the shipyard and as such there is no workers’ compensation bar as to claim against the shipyard.

2012—*Redifer v. Chester*, 283 Va. 121, 720 S.E.2d 66.

Employee injured on the job was awarded workers’ compensation benefits and received some benefits, and was assured of receiving the balance of the benefits either from the employer or from the Uninsured Employer’s Fund. This barred any civil action against the employer. An employee may pursue alternative relief at the same time and if the employee fails to collect under one remedy, then he may pursue the other but may not have a double recovery.

2012—*Moore v. Virginia Int’l. Terminals*, 283 Va. 232, 720 S.E.2d 117.

Decedent in this wrongful death action was an employee of a private stevedore company assisting in the loading and unloading of a vessel. The Virginia Port Authority created a non-profit, non-stock terminal corporation to perform certain functions. An employee of this latter corporation was responsible for the death of the decedent. The trial court incorrectly determined that the parties were statutory employees of the Virginia Port Authority. In this case, there was no contract between the plaintiff’s employer and the Port Authority. Under the terms of Virginia Code § 65.2-302, the work must be part of the owner’s trade business or occupation and the owner must have contracted with another to perform the work. In this case, there was no such contract.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 11.02**

2011—*David White Crane Service v. Howell*, 282 Va. 323, 714 S.E.2d 572.

Employee of general contractor on construction site sued uninsured subcontractor for negligence. Uninsured subcontractor is statutory employer even though uninsured. Claim barred.

# Chapter 12

# WRONGFUL DEATH

#### § 12.02 Distribution

2015—*In re Woodley*, 290 Va. 482, 777 S.E.2d 560.

In this wrongful death action trial court erred in ordering that the awards to minors be held by the clerk of the court until they reach the age of majority and thereby rejecting payment to irrevocable trust proposed by the parents to be professionally managed.

#### § 12.03 Limitations

2010—*Conger v. Barrett*, 280 Va. 627, 702 S.E.2d 117.

Wrongful death action was dismissed due to inactivity but reinstated within one year. Such action is not time barred as it does not constitute another action but is simply the reopening of an existing action.

#### § 12.04 Miscellaneous

See Va. Code § 8.01-50B allowing recovery for fetal death.

#### § 12.05 Personal Representative

2011—*Addison v. Jurgelsky*, 281 Va. 205, 704 S.E.2d 402.

In this wrongful death action against physicians the fact that it was commenced by only one of two co-administrators does not justify dismissal as being time barred when the second co-administrator was joined after the statute of limitations had run. Virginia Code Section 8.01-5(A) permits such.

2010—*Hawthorne v. VanMarter*, 279 Va. 566, 692 S.E.2d 226.

Administrator of decedent’s estate has no right to file appeal in pro se capacity.

2010—*Antisdel v. Ashby*, 279 Va. 42, 688 S.E.2d 163.

Personal representative who was appointed by the court for purposes of bringing a wrongful death action lacks standing to bring a survival claim.

2009—*Johnston Mem. Hosp. v. Bazemore*, 277 Va. 308, 672 S.E.2d 858.

Plaintiff filed complaint alleging wrongful death prior to her qualifying as personal representative. Plaintiff thereafter qualified as administrator and then non-suited. Circuit court granted motion to non-suit and denied defendant’s motion to abate the action. The action was a nullity from the beginning since there was no administrator appointed and therefore there was no right to non-suit.

#### § 12.06 Survival of Actions

2009—*Centra Health, Inc. v. Mullins*, 277 Va. 59, 670 S.E.2d 708.

In this medical malpractice action, trial court properly refused to require administrators of estate to elect between wrongful death and survival claim. Election between these remedies is required only at a time when the record is sufficiently established that the personal injuries and the death arose from the same cause. In this case, both claims were submitted to the jury. Where there is any doubt as to when compelling an election would be proper, bifurcation is the most practical means to assure that each party receives a fair opportunity to present their case to the jury without prejudice to the other.

# Chapter 13

**OTHER MISCELLANEOUS CASES**

#### § 13.02 Admiralty

2012—*John Crane, Inc. v. Hardick*, 284 Va. 329, 732 S.E.2d 1.

The jury’s $2,000,000.00 award of damages for decedent’s pre-death pain and suffering is reinstated.

2012—*John Crane, Inc. v. Hardick*, 283 Va. 358, 722 S.E.2d 610.

Uniform rule exists for cases involving wrongful death of a seaman in that non pecuniary damages are not available.

#### § 13.27 Drowning

2011—*Volpe v. City of Lexington*, 281 Va. 630, 708 S.E.2d 824.

Child drowned in river that was designated as a city park designed for swimming. Trial court incorrectly held that dangerous current was open and obvious condition. Although the potential dangerousness of the water itself may have been open and obvious, what was not open and obvious was the dangerous current which created a hydraulic beneath the water surface. Jury issue likewise created as to whether or not this condition constituted a form of recklessness or total disregard of precautions amounting to gross negligence on the part of the City. As a matter of law, however, this conduct on the part of the City did not rise to the level of willful and wanton negligence.

#### § 13.32 Federal Employers Liability Act (FELA)

2017—*Cole v. Norfolk Southern Railway Company*, 294 Va. 92, 803 S.E.2d 346.

Court determined that a prior release of liability was effective under FELA as to pending claim.

#### § 13.48 Jones Act

2012—*Omega Protein, Inc. v. Forrest*, 284 Va. 432, 732 S.E.2d 708.

In seaman’s action for personal injury, plaintiff failed to present adequate evidence that injury was caused by the employer’s alleged negligence. The fact that employer rehired plaintiff without having him undergo an MRI does not mean that employer caused him to suffer injury where no evidence was presented that MRI would have indicated he was unfit for the job.

#### § 13.69 Skating Rink

*See* Va. Code § 8.01-227.11 as to Winter Sports Safety Act.

#### § 13.70 Skiing

*See* the Winter Sports Safety Act at Virginia Code § 8.01-227.11.

#### § 13.77 Trees

*See* Va. Code § 10-1-1111 as to cutting trees on state forest reservations.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 13.77**

2012—*Cline v. Dunlora South, LLC*, 284 Va. 102, 726 S.E.2d 14.

Motorist injured when tree located on private land fell on public roadway striking vehicle. No duty exists in this case. The complaint did not allege any affirmative act of the landowner, making the property different from its natural state or from its condition when the road was built. Demurrer properly sustained.

#### § 13.80 Water

2015—*Collett v. Cordovana,* 290 Va. 139, 772 S.E.2d 584.

Plaintiff landowner alleged that defendant neighbor was committing trespass, nuisance, negligence per se, and ordinary negligence for directing large quantities of water onto plaintiff’s property. Surface water is treated as a common enemy. Plaintiff failed to set forth proper claim under any of those causes of action.

2012—*Kurpiel v. Hicks*, 284 Va. 347, 731 S.E.2d 921.

Trial court erred in sustaining demurrer for common law trespass alleging that defendants did not develop their land in a reasonable manner and, as a result, storm water was directed onto the plaintiff’s property amounting to a trespass. Complaint alleged sufficient facts to state the claim based upon a violation of the modified common law rule applicable to surface water.

# Chapter 14

# VICARIOUS LIABILITY

#### § 14.07 Public Employee

2010—*City of Alexandria v. J-W Enterprises, Inc.*, 279 Va. 711, 691 S.E.2d 769.

Police officer, while working for a restaurant, follows patrons out of restaurant when they did not pay. Patrons then enter car and drive car towards officer who believes that they have then committed a misdemeanor and fires at the vehicle. City, in attempting to seek contribution from restaurant for actions of police officer acting as a restaurant employee is barred from contribution because the officer in shooting was performing a police function and therefore doing so on behalf of the city.

#### § 14.09 Scope of Employment

2010—*City of Alexandria v. J-W Enterprises, Inc.*, 279 Va. 711, 691 S.E.2d 769.

Police officer, while working for a restaurant, follows patrons out of restaurant when they did not pay. Patrons then enter car and drive car towards officer who believes that they have then committed a misdemeanor and fires at the vehicle. City, in attempting to seek contribution from restaurant for actions of police officer acting as a restaurant employee is barred from contribution because the officer in shooting was performing a police function and therefore doing so on behalf of the city.

# Chapter 15

# INTENTIONAL TORTS

#### § 15.02 Assault

1. **Medical Personnel**

2017—*Mayr v. Osborne*, 293 Va. 74, 795 S.E.2d 731.

Surgeon is alleged to have mistakenly fused wrong level of spine. At best this is only negligence and not assault or battery.

#### § 15.03 Business Torts

1. **Conspiracy**

2012—*Van Buren v. Grubb*, 284 Va. 584, 733 S.E.2d 919.

On certified question from federal court, it was held that Virginia Law recognizes wrongful discharge in violation of established public policy against an individual who is not the plaintiff’s actual employer but who was the actor in violation of public policy and who participated in the wrongful firing of the plaintiff.

2010—*Syed v. ZH Technologies*, 280 Va. 58, 694 S.E.2d 625.

Code Section 18.2-500 requires a finding of some compensatory damages as an element of the claim. If there is no finding of compensatory damages, then there is no liability under the statute.

#### Interference with Contracts

2011—*Lewis-Gale Medical Center, LLC v. Alldredge*, 282 Va. 141, 710 S.E.2d 716.

Hospital employee described an emergency room physician as an “organizational terrorist.” Physician emergency room practice group subsequently terminated her. These types of comments by hospital employee did not rise to the level of “improper methods” and therefore no jury issue presented.

2011—*Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 708 S.E.2d 867.

When a contract is terminable at will, the plaintiff must not only prove tortious interference but must allege and prove an intentional interference that caused the termination of the contract and also that the defendant employed improper methods. The interference is improper if it is illegal, independently tortious, or violates established standard of trade or profession. Conduct that is merely motivated by spite or ill will or malice does not suffice.

2009—*DurretteBradshaw, P.C. v. MRC Consulting, L.C.*, 277 Va. 140, 670 S.E.2d 704.

Plaintiff sued law firm alleging tortious interference with contractual relationship where the alleged contract that was directly interfered with was one that the plaintiff was not a party to but that interference then allegedly caused damage to the plaintiff under a separate contract. The complaint did not allege that defendant intended to affect the plaintiff’s contract or that it acted for the purpose interfering with that contract. As such, the claim was demurrable and the demurrer should have been sustained. Judgment in favor of the plaintiff was reversed.

#### [4] Wrongful Termination

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 15.03**

2014—*Anthony v. Verizon Virginia, Inc.*, 288 Va. 20, 758 S.E.2d 527.

Issue was whether or not claims of fraud and negligent infliction of emotional distress were preempted under the Federal Labor Statute. Supreme Court answered the question in the negative.

#### § 15.04 Conversion

2011—*Condominium Services, Inc. v. First Owners’ Ass’n.*, 281 Va. 561, 709 S.E.2d 163.

The allegation here is that, after a management contract had ended, the management firm opened a bank account by falsely representing authorization from the other party to do so and then directed the unit owners of this condominium to send money owed to the Owners’ Association to the condominium service company. Because the management agreement had ended, the alleged act referenced above did constitute an independent willful tort of conversion.

#### § 15.05 Defamation

1. **Defenses**

**[b] Privilege**

2013—*Cashion v. Smith*, 286 Va. 327, 749 S.E.2d 526.

Malice may defeat a qualified privilege. Malice can be found in knowledge of the fact that the statements were false, acting with reckless disregard for the truth, communicating statements to a third party who has no duty or interest in the matter, personal ill will, strong or violent language disproportionate to the occasion or the fact that the statements were not made in good faith.

2011—*Isle of Wight County v. Nogiec*, 281 Va. 140, 704 S.E.2d 83.

In this defamation action the statements alleged were not absolutely privileged because they were not made during a legislative proceeding. The qualified privilege for reports to a legislative body was applicable making them actionable only if the plaintiff was able to prove they were made with malice.

#### Elements

2015—*Pendleton v. Newsome*, 290 Va. 162, 772 S.E.2d 759.

Trial court erred in sustaining demurrer where reasonable inference could be made from statements that defendant was alleging plaintiff bore responsibility for the death of her child. Case is remanded.

2015—*Schaecher v. Bouffault*, 290 Va. 83, 772 S.E.2d 589.

Statement in email charging that individual plaintiff is “lying” and manipulating facts with the basis for that statement being fully disclosed is not defamatory but rather is opinion.

2013—*Cashion v. Smith*, 286 Va. 327, 749 S.E.2d 526.

A statement made by a surgeon to an anesthesiologist that the patient could have made it if the anesthesiologist had exercised better resuscitation and further that the anesthesiolo-gist determined from the beginning that the patient was not going to make it and purposely did not resuscitate him are not statements of opinion but rather are statements that are capable of being proven true or false. Rhetorical hyperbole is not defamatory. Such statements are those from which no reasonable inference could be drawn if the indi-

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vidual identified in the statements, as a matter of fact, engaged in the conduct described. Whether a statement is rhetorical hyperbole is a question of law for the court.

2013—*Tharpe v. Saunders*, 285 Va. 476, 737 S.E.2d 890, (2013).

Saunders is alleged to have made a statement to a county official that Tharpe told Saunders that Tharpe was going to screw this governmental agency just like he did Fort Picket. The insinuation in the statement is that Tharpe had somehow defrauded governmental authority. The elements of defamation are publication of an actionable statement with the requisite intent. The statement must be both false and defamatory. If it is a pure statement of opinion then it is constitutionally protected. In this instance the trial court improperly concluded at the demurrer stage that this was simply an opinion. Regardless of the truth or falsity of the matters asserted in the statement attributed to Tharpe, Saunders’ statement is an actionable statement of fact.

2012—*Askew v. Collins*, 283 Va. 482, 722 S.E.2d 249.

Private individual may recover compensatory damages for defamation upon proof that publication was false and that defendant either knew it was false or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based. In this case, there was no challenge to the fact that the statement was defamatory per se. Damage award upheld.

2009—*Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 670 S.E.2d 746.

Trial court improperly granted summary judgment in this defamation case. Trial court should not have looked at portion of statement in isolation but looked at the statement as a whole in terms of determining truth or falsity. It is up to the court to determine whether or not the statement is provably false. If it is, then it may be subject to a defamation claim that then will be decided by the jury as to the truth or falsity of the statement. If the trial court determines that the statement is not provably false, then it in effect becomes a statement of opinion and therefore not subject to a defamation claim. Under common law, the plaintiff must show that the defendant published a false factual statement that concerns and harms the plaintiff or the plaintiffs’ reputation. The plaintiff must show that the defendant knew the statement was false, or believing the statement was true, lacked a reasonable basis for such belief, or acted negligently in failing to determine the facts.

#### [8] Legal Proceedings

2012—*Mansfield v. Bernabei*, 284 Va. 116, 727 S.E.2d 69.

Distribution to interested persons of draft complaint shortly before it was filed is subject to absolute privilege. Demurrer properly sustained.

#### [10] Media

2014—*Webb v. Virginian-Pilot Media*, 287 Va. 84, 752 S.E.2d 808.

School administrator sues newspaper alleging that newspaper story indicated that he improperly exerted pull to get cushy treatment for his son. The trial court properly ruled that the story cannot be fairly read as a report that the father pulled strings to get his son preferential treatment.

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#### [14] Slander Per Se

2011—*Lewis v. Kei*, 281 Va. 715, 708 S.E.2d 884.

Police officer obtained a warrant for arrest of plaintiff for attempted abduction of a 10-year-old child based upon citizen’s complaint which ultimately proved to be unfounded. Based on those facts, the officer had probable cause to seek the arrest warrant and therefore demurrer to malicious prosecution claim was properly granted. Likewise, the finding of probable cause defeats the claim for false imprisonment. The police officer, however, did make several false statements about the plaintiff relating to the facts of the matter thereby accusing him of the commission of a criminal offense constituting defamation per se.

#### § 15.07 False Imprisonment

**[3] Definition**

2011—*Lewis v. Kei*, 281 Va. 715, 708 S.E.2d 884.

Police officer obtained a warrant for arrest of plaintiff for attempted abduction of a 10-year-old child based upon citizen’s complaint which ultimately proved to be unfounded. Based on those facts, the officer had probable cause to seek the arrest warrant and therefore demurrer to malicious prosecution claim was properly granted. Likewise, the finding of probable cause defeats the claim for false imprisonment. The police officer, however, did make several false statements about the plaintiff relating to the facts of the matter thereby accusing him of the commission of a criminal offense constituting defamation per se.

#### § 15.08 Fraud and Misrepresentation

**[1] Actual**

2017—*LaBella Dona Skin Care, Inc. v. Belle Femme Enterprises, LLC*, 294 Va. 243, 805 S.E.2d 399.

Trial court erred when it held that fraudulent conveyance under Code § 55-80 cannot serve as the predicate unlawful act to support a claim for statutory or common law conspiracy. In this case even though the recipient of a purported fraudulent conveyance was a third party creditor with a higher security interest, that did not mean as a matter of law that could not be a fraudulent conveyance. In addition in successor liability claims the standard of proof is greater weight of the evidence and not clear and convincing evidence when the successor liability is alleged pursuant to the mere continuation exception. If the claim is that the transaction is fraudulent in fact then the standard of proof is clear and convincing evidence.

2012—*Orthopedic & Sports Physical Therapy Associates, Inc. v. Summit Group Properties, LLC*, 283 Va. 777, 724 S.E.2d 718.

Trial court erred in giving instruction that jury could only find liability of the LLC for fraudulent activity if the conduct was approved by the members of the LLC. If the fraud was committed in the ordinary course of the LLC’s business, then fraudulent acts by one member of the LLC would bind it.

2012—*Murayama 1997 Trust v. NISC Holdings*, 284 Va. 234, 727 S.E.2d 80.

Court properly sustained demurrer to complaint filed by trust seeking damages relating to a prior settlement agreement entered into relating to previous litigation between parties. Based upon the allegations of the settlement agreement and the nature of the adversarial

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relationship between the parties, as a matter of law, the trust did not reasonably rely upon any alleged fraudulent omissions or misrepresentations by the defendant.

2010—*Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 699 S.E.2d 483.

Trial court improperly granted demurrer based upon Economic Loss Rule where plaintiffs had pled duties that gave rise to economic damages that were independent of the agreement between the parties. In this case, the economic losses flowed from a breach of the Virginia Consumer Protection Act and also from fraud in the inducement.

2010—*Sales v. Kecoughtan Hous. Co.*, 279 Va. 475, 690 S.E.2d 91.

Tenant filed suit against apartment owner and management company for personal injury and property damage resulting from mold in the apartment. Plaintiff complained about the presence of mold. Defendants represented that the mold had been remedied. The mold in fact began growing again causing personal injury and property damage to the plaintiff. Plaintiff properly set forth claims of negligent repair and fraud. Trial court improperly granted demurrer to the amended complaint and dismissed the complaint with prejudice. That was error.

2009—*Dunn Constr. Co. v. Cloney*, 278 Va. 260, 682 S.E.2d 943.

In this action for breach of contract between building contractor and property owner, supreme court determined there was insufficient evidence to permit the jury to find that the builder had committed an act of fraud independent of the contractual relationship such that the property owner could maintain an action both for breach of contract and fraud. Any misrepresentations arose out of the contract and not tort.

1. **Constructive Fraud**

2017—*MCR Federal, LLC v. JB&A, Inc.*, 294 Va. 446, 808 S.E.2d 186.

Because fraud claim arose from contractual relationship it is barred in this circumstance under Source of Duty Rule.

#### § 15.09 Infliction of Emotional Distress

2012—*Wyatt v. McDermott*, 283 Va. 685, 725 S.E.2d 555.

On question certified by Federal Court, Supreme Court stated that Virginia does recognize tortious interference with parental rights as a cause of action and set forth the elements of such a claim.

#### § 15.10 Malicious Prosecution

1. **Defenses**
   1. **Advice of Counsel**

2010—*O’Connor v. Tice*, 281 Va. 1, 704 S.E.2d 572.

In this malicious prosecution action primary issue is whether or not probable cause existed for the criminal prosecution. Jury returned a verdict adverse to the defendant. Defendant seems to raise advice of counsel defense. That defense is not applicable in this instance. If the defense were applicable, then the defendant would have to show that there had been a full disclosure of all material facts to the attorney.

#### [c] Probable Cause

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2010—*O’Connor v. Tice*, 281 Va. 1, 704 S.E.2d 572.

In this malicious prosecution action primary issue is whether or not probable cause existed for the criminal prosecution. Jury returned a verdict adverse to the Defendant. Defendant seems to raise advice of counsel defense. That defense is not applicable in this instance. If the defense were applicable, then the Defendant would have to show that there had been a full disclosure of all material facts to the attorney.

#### [7] Instituting Criminal Proceedings

2011—*Lewis v. Kei*, 281 Va. 715, 708 S.E.2d 884.

Police officer obtained a warrant for arrest of plaintiff for attempted abduction of a 10-year-old child based upon citizen’s complaint which ultimately proved to be unfounded. Based on those facts, the officer had probable cause to seek the arrest warrant and therefore demurrer to malicious prosecution claim was properly granted. Likewise, the finding of probable cause defeats the claim for false imprisonment. The police officer, however, did make several false statements about the plaintiff relating to the facts of the matter thereby accusing him of the commission of a criminal offense constituting defamation per se.

**Chapter 17**

**EVIDENCE**

#### § 17.01 Accidents

**[1] Absence of Accidents**

2016—*Dorman v. State Industries, Inc.*, 292 Va. 111, 787 S.E.2d 132.

Witness testified to the number of atmospheric heaters that had been sold and were operating in the United States. There was no timely objection by plaintiff’s counsel. Evidence was relevant to the question of whether or not the heaters breached an implied warranty of merchantability and whether or not they were unreasonably dangerous.

**[2] Prior Accidents**

2012—*Funkhouser v. Ford Motor Company*, 285 Va. 272, 736 S.E.2d 309.

In this products liability action on re-hearing plaintiff’s expert was properly precluded from relying upon seven (7) other fires in other vehicles since they were not substantially similar to the present case. Although expert may rely on inadmissible material in forming an opinion, the expert cannot offer opinion testimony based on evidence that fails that substantial similarity test.

2012—*Funkhouser v. Ford Motor Company*, 284 Va. 214, S.E.2d, 726 S.E.2d 302.

In this product liability action alleging failure to warn of dangers of dashboard electrical fires, the issue of the admissibility of other van fires is governed by whether or not they occurred under substantially the same circumstances and were caused by the same or similar defects and dangers as those alleged in the present fire.

#### § 17.03 After-Discovered Evidence

2010—*Hawthorne v. VanMarter*, 279 Va. 566, 692 S.E.2d 226.

The after discovered evidence requirements have not been satisfied where witnesses that held the evidence had been identified prior to the hearing in question and it was only after the hearing that their depositions were taken and information was discovered. That is not after discovered evidence.

#### § 17.23 Dead Man’s Act

2010—*Jones v. Williams*, 280 Va. 635, 701 S.E.2d 405.

In this medical malpractice action against deceased doctor, testimony of nurse on behalf of plaintiff did not require corroboration under the Dead Man’s Act since corroboration only applies as to an interested party. The nurse was not an interested party.

#### § 17.29 Expert Testimony

1. **Adequate Basis for Admissibility**

See *Virginia Code*§ 8.01-20.1 and 50.1 as to certification of expert witness at time of service.

2016—Toraish *v. Lee*, 293 Va. 262, 797 S.E.2d 760.

Defense expert witness stated that he had eliminated all possible causes of death until only one remained but it became apparent that some of the possible causes of death he could not have eliminated because they related to matters that fell outside the scope of his

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expertise and testified that he relied upon the expertise of people who are qualified to exclude

them. That was not a sufficient basis for the opinion and therefore should not have been allowed. Defendant himself however is entitled to render factual testimony regarding circumstances that impacted or would have impacted his decision to perform surgery.

2016—*Holiday Motor Corp. v. Walters*, 292 Va. 461, 790 S.E.2d 447.

Expert testimony should not have been admitted that manufacturer had duty to design or supply a soft top on a convertible that provided occupant protection in a rollover. In addition the plaintiff’s expert had lack of foundation as to whether or not soft top latching system was defectively designed. He testified at trial that he did not apply any safety standards other than what he called “the Right Hand Rule” of connection, he did not do any testing, did not rely upon authoritative literature and did not know how much weight the latching would support when the latches were connected.

2015—*Hyundai Motor Company v. Duncan*, 289 Va. 147, 766 S.E.2d 893.

Fourteen-million-dollar judgment is reversed based upon inadequacy of expert testimony. Plaintiff’s airbag expert stated that the sensor was placed in the wrong location. The expert had not conducted any independent testing; he relied on manufacturer’s own sensor-location study back when the car was designed. He did perform a crash-severity analysis and compared the severity of this crash with the manufacturer’s unquestioned desire for bag deployment at a lower impact speed. The court concluded this evidence was inadmissible because neither the expert nor the manufacturer had tested the precise location that the expert had indicated would be best. Court stated that this testimony failed to establish that another sensor location would have produced deployment of the bag and prevented the injury.

2012—*Arnold v. Wallace*, 283 Va. 709, 725 S.E.2d 539.

Trial court did not err in refusing to disqualify defense expert witness because she was a member of the same medical group as the expert plaintiff had initially retained in the case. There was no showing any confidential or privileged information was conveyed by the plaintiff to the first expert or by that expert to the defense witness.

2011—*CNH America v. Smith*, 281 Va. 60, 704 S.E.2d 372.

Trial court erred in admitting testimony of plaintiff’s two expert witnesses. One expert testified that because a hose in this case failed that it was a manufacturer’s defect. That is insufficient basis for such conclusion. Second expert admitted that he was not an expert in hydraulic systems of mowers and had no experience in the design or manufacture of such or other agriculture equipment and therefore had inadequate qualifications.

1. **Adequate Identification of Expert**

2017—*Emerald Point, LLC v. Lindsey Hawkins*, 294 Va. 544, 808 S.E.2d 384.

Plaintiff’s expert should not have been allowed to testify as to statements and opinions not adequately disclosed in Answers to Interrogatories.

2016—*Mikhaylov v. Sales*, 291 Va. 349, 784 S.E.2d 286.

Plaintiff failed to properly identify proposed expert testimony of treating doctor as to future care and therefore that should have been excluded.

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2011—*Landrum v. Chippenham & Johnston-Willis Hosp.*, 282 Va. 346, 717 S.E.2d 134.

In this medical malpractice action, the plaintiff failed to comply with pretrial orders concerning identification of expert witnesses and timely disclosure of their testimony and therefore witnesses were barred. A supplemental expert designation filed by local counsel, who is not admitted in Virginia, was deemed to be an invalid instrument and therefore of no effect.

2011—*Condominium Services, Inc. v. First Owners’ Ass’n.*, 281 Va. 561, 709 S.E.2d 163.

In this case, FOA did not itemize the specific amounts of penalties and interest to be testified to. The interrogatory answer did disclose that the witnesses’ opinion was that CSI’s failures resulted in underpayment of taxes and FOA incurring interest and penalties. The Supreme Court in deference to the trial court held that this answer was adequate.

2009—*Graham v. Cook*, 278 Va. 233, 682 S.E.2d 535.

Trial court properly limited cross-examination of radiologist called by the defense on the grounds that the cross-examination was simply an attempt by the plaintiff to seek an expert opinion from a witness who had not been designated as such by the plaintiff.

#### Authoritative Text or Journal

2014—*Harman v. Honeywell International, Inc.*, 288 Va. 84, 758 S.E.2d 515.

Accident investigation report was improperly admitted into evidence as learned treatise under Va. Code § 8.01-401.1. It should not have been designated as such and was therefore not admissible.

#### Miscellaneous

2009—*Kitt v. Crosby*, 277 Va. 396, 672 S.E.2d 851.

When one party seeks to disqualify the expert of an opposing party because the expert had been previously retained by the first party, the analysis is whether it was objectively reasonable for the party who claims to have first retained the expert to conclude that a confidential relationship existed between that party and the expert and did that party disclose any confidential or privileged information to the expert. The party seeking disqualification has the burden on these issues.

#### Qualification of Expert

2018—*Holt v. Chalmeta*, 295 Va. 22, 809 S.E.2d 636.

Trial Court erred in not allowing expert to testify in this medical malpractice case where there was evidence that she satisfied both the knowledge and active clinical practice requirements of Virginia Code §8.01-581.20.

2010—*Hollingsworth v. Norfolk S. Ry.*, 279 Va. 360, 689 S.E.2d 651.

In this FELA case, the circuit court properly refused to admit testimony of podiatrists because they were not medical doctors and therefore not qualified to render expert opinions on causation.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 17.29**

2009—*Jackson v. Qureshi*, 277 Va. 114, 671 S.E.2d 163.

In this medical malpractice action, trial court improperly struck expert witness. Issue that expert was to testify on was whether infant should have been admitted to inpatient hospital care when he presented at the emergency room showing signs of respiratory distress and/or pertussis. The record is clear that the witness directly treated patients who presented with this condition within one year of the date of the alleged omission in this case. Thus, he met the requirement of an active clinical practice requirement and was properly qualified.

#### § 17.33 Hearsay

#### [3] Miscellaneous

2011—*Ruhlin v. Samaan*, 282 Va. 371, 718 S.E.2d 447.

Prior consistent statements made by plaintiff to his wife were not admissible since they are hearsay.

#### § 17.48 Opinions—Lay

2018—*Martin v. Lahti*, 295 Va. 77, 809 S.E.2d 644.

In this medical malpractice action Circuit court did not abuse discretion in excluding lay opinions by deceased patient’s sister and daughter that patient would not have agreed to procedure if she had been properly advised of the risks and the alternatives.

2014—*Harman v. Honeywell International, Inc.*, 288 Va. 84, 758 S.E.2d 515.

Admissibility of lay opinion testimony is governed by Rule 2:701, which says it is admissible if based upon personal experience or observations and will aid the trier of fact in understanding the witness’ perceptions. In this case, witness expressed opinion as to whether or not decedent exercised good judgment in flying his plane. That was not admissible. Another witness expressed opinion relating to personal experiences on flying two (2) different planes. The witness compared them. This testimony was properly admissible.

#### § 17.53 Privilege

See Virginia Code § 8.01-420.7 for limitation on waiver as to attorney/client privilege and Work Product Doctrine.

2010—*Walton v. Mid-Atlantic Spine Specialists*, 280 Va. 113, 694 S.E.2d 545.

Inadvertent production of letter written by defendant doctor to attorney waived privilege where inadequate measures had been taken to insure and maintain confidentiality of the letter.

#### § 17.56 Records

**[2] Medical Records**

2012—*Arnold v. Wallace*, 283 Va. 709, 725 S.E.2d 539.

In this personal injury action, a sufficient foundation was laid for admission of patient medical chart through testimony of doctor in that practice group that treated her explaining the regular preparation of the record and reliance upon it in treating the plaintiff. Objecting party should have noted objection to presence of opinions in the records.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 17.56**

#### [4] Miscellaneous

*See* Va. Code § 8.01-390.1 as to school records.

#### § 17.57 Relevancy

2017—*Gilliam v. Immel,* 293 Va. 18, 795 S.E.2d 458.

Defendant reportedly called plaintiff a black bitch after the collision. Plaintiff sought to admit evidence based upon it having caused mental anguish. In this negligence action there was no allegation that the comment caused any damages flowing from the defendant’s negligence and as such it was irrelevant.

2015—*Cain v. Lee,* 290 Va. 129, 772 S.E.2d 894.

In this auto accident case defendant admitted liability. Defendant’s post-accident behavior was therefore irrelevant.

#### § 17.61 Spoliation of Evidence

2017—*Emerald Point, LLC v. Lindsey Hawkins,* 294 Va. 544, 808 S.E.2d 384.

Adverse inference instruction for spoliation of evidence is proper only where parties acted in bad faith or with intentional conduct calculated to suppress the truth. That was not shown in this case.

#### § 17.63 Witnesses

**[6] Statements**

2011—*Ruhlin v. Samaan*, 282 Va. 371, 718 S.E.2d 447.

In this personal injury action, defense counsel was properly allowed to use the transcript of a recorded telephone conversation of the plaintiff taken by the insurance adjuster for the sole purpose of refreshing the plaintiff’s recollection at trial. The statement was not identified as to the source of the document nor was it admitted into evidence.

# Chapter 18

# PROCEDURE

#### § 18.01 Ad Damnum

2015—*Shevlin Smith v. McLaughlin*, 289 Va. 241, 769 S.E.2d 7.

In this legal malpractice action Plaintiff sued for $6,000,000.00 and at trial counsel asked for $10,000,000.00. That was impermissible.

#### § 18.02 Affidavits

#### See § 8.01-4.3 that declarations need not be sworn to.

#### § 18.03 Appeal and Error

1. **Contemporaneous Objection**

2010—*Johnson v. Hart*, 279 Va. 617, 692 S.E.2d 239.

An attorney who wins on summary judgment and signs the Order as seen and consented to does not thereby waive objections to previously rulings made by the trial court to which appropriate objection had been made.

#### Final Order

2009—*Hutchins v. Talbert*, 278 Va. 650, 685 S.E.2d 658.

In medical malpractice action, an order denying motion to set aside verdict was not a final order for purposes of appeal wherein trial judge has already entered final order which was not vacated, suspended, or modified. As such, the notice of appeal was untimely since it was filed more than 30 days after the entry of the final order.

#### Miscellaneous

2012—*John Crane, Inc. v. Hardick*, 283 Va. 358, 722 S.E.2d 610.

Rule 5:27 requires that brief contained statement of standard of review, argument, and authorities. In this case, party failed to include argument or authorities relating to the trial court’s action in allowing plaintiff to introduce evidence of asbestos exposure from gasket removal and therefore this argument is waived.

#### Proffer

2012—*Galumbeck v. Lopez*, 283 Va. 500, 722 S.E.2d 551.

Only a unilateral avowal of counsel, if unchallenged or a mutual stipulation of the testimony expected constitutes a proper proffer.

#### Record on Appeal

2010—*Shapiro v. Younkin*, 279 Va. 256, 688 S.E.2d 157.

Trial court improperly dismissed case because plaintiff did not have court reporter present in contravention of local rule. In addition, trial court must make an affirmative attempt to create a record for appellate review that contains a fair statement of the facts by making reasonable additions, deletions, or changes to the proffered statement of facts.

#### [9] Standard of Review

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 18.03**

2011—*Dunn, McCormack & MacPherson v. Connolly,* 281 Va. 553, 708 S.E.2d 867.

The standard of review for a demurrer is de novo.

2010—*Hawthorne v. VanMarter*, 279 Va. 566, 692 S.E.2d 226.

Whether jury instruction accurately states the relevant law is a question of law and is reviewed de novo.

#### § 18.05 Assignments

2017—*Erie Insurance Company v. McKinley Chiropractic Center, P.C.*, 294 Va. 138, 803 S.E.2d 741.

Plaintiff assigned personal injury claim to chiropractor but then failed to pay chiropractor out of settlement proceeds. Chiropractor then sued insurance carrier. Plaintiff had no right to sue Erie and likewise chiropractor had no right to sue Erie.

#### § 18.06 Attorneys

2017—*West Lake Legal Group v. Flynn*, 293 Va. 344, 798 S.E.2d 187.

Sanctions properly awarded against attorney for attempting to collect fees and costs from the client based upon a judgment that the attorney should have known was void.

2016—*Ragland v. Soggin*, 291 Va. 282, 784 S.E.2d 698.

Trial court awarded sanctions in regards to submission of jury instructions. There is nothing in Code § 8.01-271.1 that allows for award of sanctions based upon inadvertent mistake of counsel.

2016—*Environment Specialists, Inc. v. Wells Fargo Bank Northeast, N.A.*, 291 Va. 111, 782 S.E.2d 147.

Court can award sanctions against counsel under 8.01-271.1 or court’s inherent power. The court in this instance did not utilize either one and as such the award is reversed.

#### § 18.07 Closing and Opening Statements

**[2] Formula for Damages**

2012—*Wakole v. Barber*, 283 Va. 488, 722 S.E.2d 238.

Proper for plaintiff to ascribe fixed numerical value to each item of damage for which there is proof in this personal injury action.

#### [5] Objections

2014—*Harman v. Honeywell International, Inc.*, 288 Va. 84, 94, 758 S.E.2d 515.

Pretrial Order precluded argument or evidence as to history of Honeywell Autopilots. Defense counsel during closing made mention of such. It was a reversible error for the Court to allow such.

#### § 18.11 Consolidation

2009—*Centra Health, Inc. v. Mullins*, 277 Va. 59, 670 S.E.2d 708.

In this medical malpractice action, trial court properly refused to require administrators of estate to elect between wrongful death and survival claim. Election between these reme-dies is required only at a time when the record sufficiently established that the personal injuries and the death arose from the same cause. In this case, both claims were submitted

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to the jury. Where there is any doubt as to when compelling an election would be proper, bifurcation is the most practical means to assure that each party receives a fair opportunity to present their case to the jury without prejudice to the other.

#### § 18.15 Courts

See § 8.01-4 of the Virginia Code as to local rules.

#### § 18.18 Default Judgment

2015—*Sauder v. Ferguson*, 289 Va. 449, 771 S.E.2d 664.

Plaintiff’s Motion to Vacate Default Judgment in this auto accident case was properly denied.

#### § 18.19 Demurrer

2009—*DurretteBradshaw, P.C. v. MRC Consulting, L.C.*, 277 Va. 140, 670 S.E.2d 704.

Plaintiff sued law firm alleging tortious interference with contractual relationship where the alleged contract that was directly interfered with was one that the plaintiff was not a party to but that interference then allegedly caused damage to the plaintiff under a separate contract. The complaint did not allege that defendant intended to affect the plaintiff’s contract or that it acted for the purpose interfering with that contract. As such, the claim was demurrable and the demurrer should have been sustained. Judgment in favor of the plaintiff was reversed.

#### § 18.22 Dismissal

2011—*Rutter v. Oakwood Living Centers*, 282 Va. 4, 710 S.E.2d 460.

In this wrongful death action, trial court incorrectly entered self-executing, prospective order of dismissal. Since that order was improperly entered, the subsequent order of dismissal was not a final order and therefore appeal is dismissed.

#### § 18.24 Estoppel

2016—*Mikhaylov v. Sales*, 291 Va. 349, 784 S.E.2d 286.

Judicial estoppel is not applicable in an instance like this where the plaintiff in a civil assault and battery action is attempting to use a prior plea to the criminal charge since there is not an identity of parties.

#### § 18.27 Instructions

**[5] Miscellaneous**

2010—*Hawthorne v. VanMarter*, 279 Va. 566, 692 S.E.2d 226.

Whether jury instruction accurately states the relevant law is a question of law and is reviewed de novo.

#### § 18.32 Jury

1. **Misconduct**

2012—*Galumbeck v. Lopez*, 283 Va. 500, 722 S.E.2d 551.

Interaction between juror and persons who are not on the jury was alleged by defendant, but after inquiry by the Court, the Court was satisfied that the juror explained the actions and mistrial was properly refused.

#### Right to

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 18.32**

2010—*Heinrich Schepers GMBH & Co. v. Whitaker*, 280 Va. 507, 702 S.E.2d 573.

Waiver is voluntary and intentional abandonment of a known legal right, advantage or privilege. In this instance, the plaintiff’s waiver of a jury trial was limited to the first trial and did not apply to the retrial.

#### Strikes

2010—*Roberts v. CSX Transp., Inc.*, 279 Va. 111, 688 S.E.2d 178.

In this FELA claim, trial court improperly refused to strike a potential juror who was a long time stockholder of the defendant railroad thereby forcing the plaintiff to use a peremptory challenge. Judgment is reversed and case remanded for new trial.

2009—*Robert M. Seh Co. v. O’Donnell*, 277 Va. 599, 675 S.E.2d 202.

Trial court erred in allowing juror to remain on panel where juror had expressed concern about his ability to remain impartial and that statement by the juror that he was partial had never been overcome.

#### [8] Voir Dire

2010—*Hawthorne v. VanMarter*, 279 Va. 566, 692 S.E.2d 226.

The extent and method of voir dire is within the sound discretion of the Court.

#### § 18.33 Jurisdiction

See *Virginia Code* § 8.01-277.1 as to what does and does not constitute a waiver as to personal jurisdiction and service issues.

2011—*Davis v. County of Fairfax*, 282 Va. 23, 710 S.E.2d 466.

Case from General District Court appealed to Circuit Court and then non-suited. Plaintiff then re-filed in General District Court. General District Court dismissed due to lack of jurisdiction. The plaintiff then appealed to the Circuit Court and thereafter to the Court of Appeals. The Circuit Court, in the second action, lacked jurisdiction since what plaintiff should have done, after the non-suit, was simply re-file in the Circuit Court.

#### § 18.40 Non-Suits

1. **Allowable**

2012—*INOVA Health Care Servs. v. Kebaish*, 284 Va. 336, 732 S.E.2d 703.

Prior dismissal in federal court pursuant to Rule 41 is not a non-suit as defined in the Virginia statute.

2009—*Martin v. Duncan*, 277 Va. 204, 671 S.E.2d 151.

Assessment of jury costs for taking of non-suit during trial where that was the first non-suit is reversible error.

2009—*Johnston Mem. Hosp. v. Bazemore*, 277 Va. 308, 672 S.E.2d 858.

Plaintiff filed complaint alleging wrongful death prior to her qualifying as personal representative. Plaintiff thereafter qualified as administrator and then non-suited. Circuit Court granted motion to non-suit and denied defendant’s motion to abate the action. The action was a nullity from the beginning since there was no administrator appointed and therefore there was no right to non-suit.

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#### Effect

2016—*Richmond v. Volk*, 291 Va. 60, 781 S.E.2d 191.

In original Complaint correct defendant involved in auto collision was identified but incorrect last name was used. This was a misnomer. Misnomer was not corrected in the original filing. Case was nonsuited and then refiled within six (6) months. Within the refiled action the defendant was correctly identified. The statute of limitations was tolled.

2015—*Allstate v. Ploutis*, 290 Va. 227, 776 S.E.2d 793.

Two (2) year limitation period within insurance policy is not tolled by nonsuit.

2014—*Temple v. Mary Washington Hospital*, 288 Va. 134, 762 S.E.2d 751.

Where nonsuit is taken and in re-filed action, prior discovery is incorporated, that only applies to the discovery and not motions, objections, or rulings made in the prior action.

2012—*Laws v. McIlroy*, 283 Va. 594, 724 S.E.2d 699.

Plaintiff requested non-suit. Before non-suit order entered, plaintiff re-filed identical action. The re-filed action deemed by the Supreme Court to be timely within the language of Section 8.01-229.

2012—*McKinney v. Virginia Surgical Associates*, 284 Va. 455, 732 S.E.2d 27.

In this medical malpractice action, plaintiff initially brought claim for personal injuries during his lifetime. Personal injury action converted into an action for wrongful death. Plaintiff thereafter non-suited the wrongful death action and two months later filed action for personal injuries suffered by the decedent arising out of the same alleged negligence as a survival action pursuant to Section 8.01-25. There was a single cause of action of which the survival claim is a part and therefore plaintiff allowed to re-file within six (6) months of date of non-suit.

#### § 18.42 Orders

2013—*Cashion v. Smith*, 286 Va. 327, 749 S.E. 2d 526.

Signing an Order as “WE ASK FOR THIS” where objection has otherwise properly been preserved on the record does not constitute waiver of the objection.

2010—*Johnson v. Hart*, 279 Va. 617, 692 S.E.2d 239.

An attorney who wins on summary judgment and signs the Order as seen and consented to does not thereby waive objections to previously rulings made by the trial court to which appropriate objection had been made.

#### § 18.43 Parties

See *Virginia Code* § 8.01-15.1 as to keeping the plaintiff anonymous in certain circumstances.

2016—*Lopez-Rosario v. Habib*, 291 Va. 293, 785 S.E.2d 214.

Plaintiff filed suit in her own name even though she had a guardian who had been appointed by the court. Action properly dismissed.

2016—*Richmond v. Volk*, 291 Va. 60, 781 S.E.2d 191.

In original Complaint correct defendant involved in auto collision was identified but incorrect last name was used. This was a misnomer. Misnomer was not corrected in the original filing. Case was nonsuited and then refiled within six (6) months. Within the refiled action the defendant was correctly identified. The statute of limitations was tolled.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 18.43**

2009—*Estate of James v. Peyton*, 277 Va. 443, 674 S.E.2d 864.

Plaintiff filed suit after defendant had passed away. Plaintiff’s counsel was unaware of that and subsequently amended so as to substitute “The Estate of Robert Judson James, Administrator, Edward F. Gentry, Esquire.” The estate was not the proper defendant and as such this constitutes a misjoinder, not a misnomer, and therefore the action should be dismissed.

#### § 18.44 Pleadings

**[4] Amendment**

See *Virginia Code* § 8.01-6, 6.1, 6.2 and 6.3 as to amendment of pleadings.

2017—*Emerald Point, LLC v. Lindsey Hawkins*, 294 Va. 544, 808 S.E.2d 384.

It was error for Trial Court to allow amendment of amount sued for after completion of all evidence in this case. Since case is being remanded then such amendment may be appropriate on remand.

2016—*Richmond v. Volk*, 291 Va. 60, 781 S.E.2d 191.

Plaintiff incorrectly used car owner’s last name in naming the defendant. Suit papers were delivered to the car owner’s address and posted at that address. Car owner’s insurer discussed the case with the actual defendant. Plaintiff nonsuited and then refiled within six months, this time correctly naming the defendant. The original filing was a misnomer which tolled the statute of limitations and as such the six month provision applies.

**[6] Miscellaneous**

2010—*Aguilera v. Christian*, 280 Va. 486, 699 S.E.2d 517.

Pro se plaintiff may not authorize other party to sign Complaint. Such a signature is invalid and the Complaint is a nullity and does not toll the statute of limitations.

2010—*Shipe v. Hunter*, 280 Va. 480, 699 S.E.2d 519.

Complaint signed by non-Virginia lawyer at direction of Virginia lawyer is inadequate as a matter of law since it does not bear the signature of a Virginia lawyer. The filing of such an action does not toll the statute of limitations.

#### [8] Variance

2010—*Syed v. ZH Technologies*, 280 Va. 58, 694 S.E.2d 625.

Plaintiff pled breach of fiduciary duty by defendant as employee. Defendant denied he was an employee. To allow plaintiff to proceed on breach of fiduciary duty against defendant as a partner was fundamentally unfair and is reversed.

#### § 18.45 Process

See *Virginia Code* § 8.01-15.2 as to service on service members and taking of default.

2012—*Bowman v. Concepcion*, 283 Va. 552, 722 S.E.2d 260.

Statutes and rule requiring service of process within one year cannot be overridden by trial court without finding that plaintiff has exercised due diligence as to service. In this medical malpractice case, Claimant did not serve defendant within one year of filing because plaintiff did not have required expert witness statement. Plaintiff could have non-suited prior to dismissal. In this case, dismissal with prejudice was proper.

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#### § 18.47 Remittitur

2013—*Allied Concrete Company v. Lester*, 285 Va. 295, 736 S.E.2d 699.

Trial court improperly based decision to grant remittitur on improper comparison of awards and failed to consider proper factors in evidence. In addition, trial court failed to provide any way of ascertaining whether the reduced award bears a reasonable relation to damages suffered by the plaintiff.

2011—*Condominium Services, Inc. v. First Owners’ Ass’n.*, 281 Va. 561, 709 S.E.2d 163.

Punitive award in this conversion case was upheld. Total award was $275,000, which was two and a half times the compensatory award. Although defendant may have been experiencing financial difficulties, that evidence was not presented at trial and therefore cannot be considered now as to excessiveness of punitive award.

#### § 18.49 Res Judicata and Collateral Estoppel

**[2] Res Judicata**

2015—*Lee v. Spoden*, 290 Va. 235, 776 S.E.2d 798.

Contempt proceeding between former spouses has res judicata effect. Issue preclusion bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment even if the issue recurs in the context of a different claim.

2013—*Caperton v. A.T. Massey Coal Co.*, 285 Va. 537, 740 S.E.2d 1.

In this case involving res judicata, the Court applied the law prior to the adoption of Rule 1:6. The elements of res judicata are an identity of the remedy sought, identity of the cause of action, identity of the parties and identity of the quality of the persons for or against whom the claim is made. In this particular case, the evidence needed in the second action was different from the proof necessary to support the claims in the prior action, there were differing causes of action asserted and therefore the defense of res judicata should have been denied.

#### § 18.51 Settlement

2012—*Murayama 1997 Trust v. NISC Holdings*, 284 Va. 234, 727 S.E.2d 80.

Court properly sustained demurrer to complaint filed by trust seeking damages relating to a prior settlement agreement entered into relating to previous litigation between parties. Based upon the allegations of the settlement agreement and the nature of the adversarial relationship between the parties, as a matter of law, the trust did not reasonably rely upon any alleged fraudulent omissions or misrepresentations by the defendant.

#### § 18.54 Standing

2017—*Eilber v. Floor Care Specialists. Inc.*, 294 Va. 438, 807 S.E.2d 219.

Defamation clam arose after confirmation of plaintiff’s Chapter 13 Bankruptcy Plan but prior to discharge. Plaintiff did not disclose until after discharge. Plaintiff is judicially estopped from asserting claim. Judicial estoppel is not an affirmative defense that can be waived and therefore case is dismissed.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 18.54**

2017—*Erie Insurance Co. v. McKinley Chiropractic Center, P.C.*, 294 Va. 138, 803 S.E.2d 741.

Plaintiff assigned personal injury claim to chiropractor but then failed to pay chiropractor out of settlement proceeds. Chiropractor then sued insurance carrier. Plaintiff had no right to sue Erie and likewise chiropractor had no right to sue Erie.

2017—*Ricketts v. Strange*, 293 Va. 101, 796 S.E.2d 182.

Plaintiff had filed bankruptcy prior to this negligence action being filed and did not list the personal injury claim as an asset. The claim belonged to the trustee and therefore the plaintiff lacked standing.

#### § 18.56 Statutes

**[5] Standard of Care**

2011—*Vuich v. Great Eastern Resort Corp.*, 281 Va. 240, 704 S.E.2d 377.

In this interlocutory appeal that was agreed to by the parties the trial court determination was reversed by the Supreme Court as to the issue of whether or not the Virginia Amusement Device Regulations applied to a snow tube ride.

#### § 18.58 Summary Judgment

2017—*Summers v. Syptak*, 293 Va. 606, 801 S.E.2d 422.

In this medical malpractice action plaintiff alleged certain inappropriate statements made by a family practice doctor. At summary judgment stage plaintiff was required to present expert opinion establishing that statements were a proximate cause of injury. Failure to do so justified entry of summary judgment.

2009—*Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 670 S.E.2d 746.

Trial court improperly granted summary judgment in this defamation case. Trial court should not have looked at portion of statement in isolation but looked at the statement as a whole in terms of determining truth or falsity. It is up to the court to determine whether or not the statement is provably false. If it is, then it may be subject to a defamation claim that then will be decided by the jury as to the truth or falsity of the statement. If the trial court determines that the statement is not provably false, then it in effect becomes a statement of opinion and therefore not subject to a defamation claim. Under the common law, the plaintiff must show that the defendant published a false factual statement that concerns and harms the plaintiff or the plaintiffs’ reputation. The plaintiff must show that the defendant knew the statement was false, or believing the statement was true, lacked a reasonable basis for such belief, or acted negligently in failing to determine the facts.

**Chapter 19**

**DAMAGES**

#### § 19.13 Excess Verdict

2013—*Allied Concrete Company v. Lester*, 285 Va. 295, 736 S.E.2d 699.

Trial court improperly based decision to grant remittitur on improper comparison of awards and failed to consider proper factors in evidence. In addition, trial court failed to provide any way of ascertaining whether the reduced award bears a reasonable relation to damages suffered by the plaintiff.

#### § 19.17 Inadequate Verdict

2017—Gilliam v. Immel, 293 Va. 18, 795 S.E.2d 458.

Jury returned verdict in favor of plaintiff but with zero damages in case where damages were clearly questionable. Verdict upheld.

2015—*Cosby v. Clem*, 290 Va. 1, 773 S.E.2d 159.

Jury awarded verdict of $9,000.00 with evidence of medical bills of over $180,000.00. Trial court improperly granted Motion for Additur and added medical bills to the verdict. Jury determination of verdict of $9,000.00 was properly within their province.

#### § 19.20 Loss of Earnings

2015—*Egan v. Butler*, 290 Va. 62, 772 S.E.2d 765.

In this suit by former employee against employer on claims of malicious prosecution and defamation trial court improperly excluded history of the plaintiff’s prior work. This evidence was properly admissible as bearing on future lost income claim and the failure to admit it is reversible error.

#### § 19.23 Medical Bills

2012—*Galumbeck v. Lopez*, 283 Va. 500, 722 S.E.2d 551.

Medical bills were properly admitted into evidence in this medical malpractice case as they were not being offered for the purposes of seeking damages or demonstrating how much money the doctor received, but were offered to contrast the level of emphasis he placed on the financial aspect of the treatment versus the quality of care delivered.

#### § 19.31 Punitive Damages

See Virginia Code § 8.01-44.5 as to punitive damages against intoxicated drivers.

**[1] Basis for an Award**

2015—*Cain v. Lee,* 290 Va. 129, 772 S.E.2d 894.

Trial court erred in giving an instruction about the disfavored status of punitive damage claims based upon published Virginia case law.

2010—*Syed v. ZH Technologies*, 280 Va. 58, 694 S.E.2d 625.

An award of compensatory damages is a necessary predicate for punitive damages except in actions for defamation.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 19.31**

#### Measure of Damage

2014—*Coalson v. Canchola*, 287 Va. 242, 754 S.E.2d 525.

Compensatory award of $5,600.00 and punitive award of $100,000.00 is not excessive.

2011—*Condominium Services, Inc. v. First Owners’ Ass’n.*, 281 Va. 561, 709 S.E.2d 163.

Punitive award in this conversion case was upheld. Total award was $275,000, which was two and a half times the compensatory award. Although defendant may have been experiencing financial difficulties, that evidence was not presented at trial and therefore cannot be considered now as to excessiveness of punitive award.

#### Responsibility of Employer for

2015—*Egan v. Butler*, 290 Va. 62, 772 S.E.2d 765.

To subject corporate employer to punitive damage liability the employee who committed the wrongful acts must be in a sufficiently high position in the corporate structure. The question of how high is dependent upon the power, role, and independence of the employee relative to the nature and structure of the employer.

# Chapter 20 INSURANCE LAW

#### § 20.01 Accidental Injury

2012—*AES Corporation v. Steadfast Insurance Company*, 283 Va. 609, 725 S.E.2d 532.

Intentional release of large amount of greenhouse gasses in the course of energy production and distribution business did not allege an occurrence to invoke coverage as to this general liability policy.

2011—*AES Corp. v. Steadfast Ins. Co.*, 282 Va. 252, 715 S.E.2d 28.

In this declaratory judgment action, insured alleged it was covered under liability policy for claim asserting damages to an Alaskan village caused by global warming attributable to the insured’s intentional release of large amounts of greenhouse gases. This did not constitute an occurrence.

#### § 20.06 Coverage

**[2] Auto**

2015—*Bratton v. Selective Insurance Co.,* 290 Va. 314, 776 S.E.2d 775.

Employee of a paving company who was driving a dump truck to a highway site at night got out of his truck and moved nine (9) feet to the rear of the truck and was then struck and killed by two (2) drunk drivers crashing into a highway work site. The employee was deemed to be occupying both the dump truck and also the nearby company pickup truck as a safety vehicle and therefore was entitled to coverage under both.

2015—*Bartolomucci v. Federal Insurance Co.,* 289 Va. 361, 770 S.E.2d 451.

Lawyer on way to work driving his own personal vehicle is not covered by the law firm’s policy because he was not engaged in any income-producing activity nor was he engaged in any non-income producing activity that benefited the business. He was simply going to work.

2011—*Farmers Ins. Exchange v. Enterprise Leasing Co.*, 281 Va. 612, 708 S.E.2d 852.

Self-insured rental car company may seek indemnity from renter. Renter’s insurer is required in this case to reimburse the rental car company for damages.

**[6] Health Insurance**

See *Virginia Code* § 8.01-27.5 as to duty of in-network providers to submit claims.

#### [7] Homeowners’ Policy

2012—*TravCo Insurance Company v. Ward*, 284 Va. 547, 736 S.E.2d 321.

All risk homeowners’ policy did not cover damage resulting from defective drywall manufactured in China which emitted various compounds and caused health issues. This claim is excluded from coverage because the damage is a loss caused by latent defect, faulty, inadequate or defective materials, rust or other corrosion, or pollutants as defined in the policy.

2018 VIRGINIA TORT CASE FINDERCUMULATIVE SUPPLEMENT **§ 20.06**

#### [9] Professional Liability

2013—*The Doctors’ Co. v. Women’s Healthcare Assoc.*, 285 Va. 566, 740 S.E.2d 523.

Trial court correctly found that professional liability coverage applied to a breach of contract claim brought by family alleging that healthcare provider misrepresented its participation in the Virginia Birth-Related Neurological Injury Compensation Act.

#### § 20.09 False Representation

2009—*Portillo v. Nationwide Mut. Fire Ins. Co.*, 277 Va. 193, 671 S.E.2d 153.

Insured committed material misrepresentation in not disclosing the number of persons of driving age living in the household, and this was a basis for voiding the policy.

#### § 20.11 Garage Policy

2009—*Seals v. Erie Ins. Exch.*, 277 Va. 558, 674 S.E.2d 860.

Plaintiff injured while test driving a motor vehicle is entitled to uninsured motorist coverage under the Dealership’s Garage Keepers Insurance Policy.

#### § 20.13 Medical Payment

2013—*Christy v. Mercury Casualty Company*, 283 Va. 542, 722 S.E.2d 256.

Medical payments coverage was properly denied where benefits in whole or in part are payable under any workers’ compensation law.

#### § 20.14 Notice of Claim

2011—*Dabney v. Augusta Mut. Ins. Co.*, 282 Va. 78, 710 S.E.2d 726.

Under this homeowner’s policy, jury issue presented as to whether notice of accident was given “as soon as is practical.”

#### § 20.15 Permissive Use

2011—*GEICO v. USAA*, 281 Va. 647, 708 S.E.2d 877.

In this permissive use case, the Court held that the first permittee with general use has the authority to permit either general use or to impose such limits on use by a second permittee as the first permittee finds prudent. In this case, the second permittee was using the vehicle in a reckless fashion. There was no evidence that he was using the vehicle within the scope of permission that he might reasonably have believed he had from the first permittee and therefore there is no coverage.

#### § 20.16 Policy Limits

See *Virginia Code* § 8.01-417.01 as to disclosure of policy limits for homeowners and personal injury claims in certain circumstances.

#### § 20.19 Uninsured Motorist

1. **Coverage**

2009—*Va. Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, 677 S.E.2d 299.

Supreme Court held that exclusion in policy that prohibited stacking was not applicable and that coverage for all three vehicles covered under the policy for which separate premiums were paid resulted in the uninsured motorist (UM) coverage being stacked for a total of $850,000.

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#### Defense of Case

2017—*Manu v. GEICO*, 293 Va. 371, 798 S.E.2d 598.

Demurrer properly sustained where plaintiff alleges violation of good faith obligation to pay uninsured limits prior to the insured obtaining a judgment against the uninsured tortfeasor.

2012—*Transportation Insurance Company v. Womack*, 284 Va. 563, 733 S.E.2d 656.

Trial court entry of summary judgment against defendant is reversed. Case is remanded in order to allow uninsured motorist carrier to present defense as permitted by Code.

#### § 20.20 Use of Vehicle

2010—*Simpson v. Virginia Municipal Liability Poll*, 279 Va. 694, 692 S.E.2d 244.

Deputy Sheriff who, in the attempting to take suspect into custody, left his vehicle and was tackled to the ground 10 feet away did not suffer injuries that arose out of the use or occupancy of the vehicle.