COMMONWEALTH OF VIRGINIA COMPENDIUM OF LAW

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Pre-Suit and Initial Considerations

Pre-Suit Notice Requirements/Prerequisites to Suit

A) **Against Commonwealth.** VA. CODE ANN. § 8.01-195.6 (2008) establishes notice requirements for "every claim cognizable against the Commonwealth or a transportation district." Prior to the suit and within one year after the cause of action accrued, the claimant or the claimant's representative must file "a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable." If the claimant was under a disability at the time the cause of action accrued, however, the tolling provisions of VA. CODE ANN. § 8.01-229 (2008) shall apply.

1) **Filing statement.** "If the claim is against the Commonwealth, the statement shall be filed with the Director of the Division of Risk Management or the Attorney General. If the claim is against a transportation district the statement shall be filed with the chairman of the commission of the transportation district." VA. CODE ANN. § 8.01-195.6 (2008).

2) **Delivery.** "The notice is deemed filed when it is received in the office of the official to whom the notice is directed. The notice may be delivered by hand, by any form of United States mail service (including regular, certified, registered or overnight mail), or by commercial delivery service." *Id.*

3) **Contesting filing.** VA. CODE ANN. § 8.01-195.6 (2008) states:

> In any action contesting the filing of the notice of claim, the burden of proof shall be on the claimant to establish receipt of the notice in conformity with this section. A signed United States mail return receipt indicating the date of delivery, or any other form of signed and dated acknowledgment of delivery given by authorized personnel in the office of the official with whom the statement is filed, shall be prima facie evidence of filing of the notice under this section.

Relationship to the Federal Rules of Civil Procedure

Virginia has its own Code of Civil Procedure. VA. CODE ANN. §§ 8.01-1 – 8.01-697 (2008).

Description of the Organization of the State Court System

This portion is largely copied from the *Virginia Civil Procedure* treatise on Lexis:

A) **Establishment.** The Constitution of the Commonwealth provides only for the Supreme Court. Other courts are established and governed by statutes enacted by the General Assembly, which may also supplement the original and appellate jurisdiction of the Supreme Court. Courts established by the General Assembly consist of the Court of Appeals, circuit courts, and district courts. Judges of the latter are classified as general district court judges and juvenile and domestic relations district court judges, so that

there are, in effect, two separate courts with separate functions at the district court level.

B) **Supreme Court.** At present, the Supreme Court of Virginia consists of seven justices elected for twelve year terms by a majority vote of both houses of the General Assembly.

1) **Chief justice.** The position of Chief Justice has previously been filled by the justice with the longest service upon the Court. Currently, however, Chief Justices are selected by a majority vote of the members of the Court, and the Chief Justice serves for a term of four years in that capacity (unless he or she resigns the Chief Justice position earlier to return to duties as a member of the Court).

2) **Original jurisdiction.** The Supreme Court has original jurisdiction in four basic types of proceedings: habeas corpus, mandamus, prohibition, and matters of censure, retirement, and removal of justices and judges. All other jurisdiction is appellate; and, except for appeals from the State Corporation Commission, is discretionary.

3) **Rules of practice.** The court is empowered to prescribe Rules of practice and procedure for all courts of the Commonwealth. Pursuant to this authority, and with the aid of advisory committees, Rules have been promulgated governing procedures in the Supreme Court, the Court of Appeals, the circuit courts (whether the matter be at law or in equity), the general district courts, and the juvenile and domestic relations district courts.

C) **Court of appeals.** The 1984 General Assembly created the Court of Appeals of Virginia, another court of record, which consists of eleven judges. The Court of Appeals is headquartered in Richmond, but sits in panels in such places as will provide convenient access to the various geographical areas of the Commonwealth. One of the judges is to be elected by the others as Chief Judge for a four-year term; he presides over the court and the panel on which he sits; arranges to provide physical facilities for and assigns judges to panels, designating which judge will preside; makes arrangements for the convening of panels and schedules sessions of the court as required to discharge expeditiously the business of the court. The court has its own clerk with offices in Richmond.

1) **Original jurisdiction.** The Court of Appeals has original jurisdiction in contempt cases, as well as in mandamus and prohibition proceedings and in certain habeas corpus proceedings. The court also has original jurisdiction to exercise initially (by a single judge) the injunctive authority vested in a Supreme Court justice by the Code.

2) **Appellate jurisdiction.** The court has appellate jurisdiction pursuant to two Code sections. The Code provides for appeals of right from final decisions of the Workers' Compensation Commission, from final decisions of the circuit courts regarding cases appealed from administrative agencies, or from grievance hearing

decisions issued pursuant to VA. CODE ANN. § 2.1-116.07 (2008), from circuit court decisions in domestic relations cases (affirmation of marriage, divorce, custody, spousal or child support, or other juvenile or domestic relations cases under Title 16.1 or 20, and adoption), and from interlocutory decrees or orders in chancery causes in one of the above categories granting, dissolving, or denying an injunction or adjudicating the principles of a cause in one of the categories of cases within the court's jurisdiction. The Code also provides for appeals by petition from convictions of traffic infractions and of any crime not involving a sentence of death. Appeals are also permitted from a decision of a circuit court on application for a concealed weapons permit pursuant to VA. CODE ANN. § 18.2-308(D), in petitions for appeal by the Commonwealth in revenue and felony cases and by any county, city, or town from a judgment declaring an ordinance to be invalid (except where the violation of the ordinance is made a misdemeanor by statute), all pursuant to VA. CODE ANN. § 19.2-317 (2008).

D) **Circuit courts.** The circuit courts are the plenary jurisdiction trial courts of the Commonwealth. They replace a variety of earlier courts. The Commonwealth now has thirty-one circuit courts, each having an assigned territorial jurisdiction, each having two or more judges, and each possessing the same subject matter jurisdiction as the others.

1) **Jurisdiction.** While circuit courts are trial courts of general subject matter jurisdiction, they do not have initial jurisdiction of cases at law to recover personal property or money of the value of $100.00 or less; nor do they have subject matter jurisdiction over proceedings assigned to other tribunals, such as workers' compensation, certain juvenile and domestic matters, certain proceedings assigned exclusively to general district courts, proceedings over which the United States has preempted exclusive jurisdiction, and certain rate matters committed to the jurisdiction of state agencies.

Circuit court jurisdiction includes such special proceedings as quo warranto, mandamus, prohibition, and writs of certiorari to lower courts. Circuit courts also have appellate jurisdiction to review matters heard in the district courts, certain juvenile and domestic relations court judgments, and appealable orders of the clerks of court. Additionally, they are the courts to which proceedings may be removed from general district courts.

E) **General District Court.** The General District Court is a court of limited jurisdiction and is confined to the authority expressly conferred upon it by the legislature. General district courts are given jurisdiction over civil claims (involving up to $15,000.00 exclusive of interest, costs, and attorneys' fees provided for in the instrument) to recover: specific personal property; any fine, debt, or other money; damages for breach of contract or injury to property, real or personal; and damages for injuries to the person (including slander, libel, and insulting words). Their jurisdiction over such claims not exceeding $4,500.00 is exclusive. Since 1998 the General Assembly has required that all districts create small claims divisions. Small claims proceedings are commenced by filing a small claims civil warrant, and all claims and counterclaims in such proceeding are limited to a

maximum of $2,000.00. General district courts also have jurisdiction over: actions of unlawful entry and detainer; actions to adjudicate and commit incapacitated persons, drug addicts, and inebriates; attachments (within a $15,000.00 monetary limit); and partition of tangible personal property of a value from $20.00 to $15,000.00. The General District court has concurrent jurisdiction with the circuit courts in the territory to adjudicate cases involving habitual offenders pursuant to the provisions of Article 9 § 46.2-355.1 *et seq.* of Chapter 3 of Title 46.2.

Service of Process

A) **Persons.** VA. CODE ANN. § 8.01-296 (2008) governs service of process upon natural persons. Service on a person includes: (1) personal service; (2) substituted service, which is providing a copy of the process and giving information of its purpose to a family member or a person residing there who is 16 years of age or older, or posting a copy of such process at the front door or at such other door as appears to be the main entrance to the residence and mailing a copy of process to the party served and filing a certificate of the mailing with the clerk of the court no less than 10 days before a judgment by default may be entered.

B) Waiver. VA. CODE ANN. § 8.01-286.1 (2008) governs waiver of service. Notably, if a defendant fails to comply with a request for waiver made by a plaintiff, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure is shown. The defendant's waiver of service does not waive personal jurisdiction or venue issues. Furthermore,

> A. In an action pending in circuit court, the plaintiff may notify a defendant of the commencement of the action and request that the defendant waive service of process as provided in subsection B. Any person subject to service as set forth in § 8.01-296Shepardize, 8.01-299Shepardize, §§ 8.01-301Shepardize through 8.01-306Shepardize or § 8.01-320Shepardize, with the exception of the Secretary of the Commonwealth and the Clerk of the State Corporation Commission, who receives actual notice of an action in the manner provided in this section, has a duty to avoid any unnecessary costs of serving process.
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> B. The notice and request shall incorporate the request for waiver and shall:
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> 1. Be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer, director or registered agent authorized by appointment or law to receive service of process of a defendant subject to service under § 8.01-299Shepardize, §§ 8.01-301Shepardize through 8.01-306Shepardize or § 8.01-320Shepardize;
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> 2. Be dispatched through first-class mail or other reliable means;
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> 3. Be accompanied by a copy of the motion for judgment, bill of complaint or other such initial pleading and identify the court in which it has been filed;
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> 4. Inform the defendant, by means of a form provided by Executive Secretary of the Supreme Court, of the consequences of compliance and failure to comply with the request;

> 5. Set forth the date on which the request is sent;
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> 6. Allow the defendant a reasonable time to return the waiver, which shall be no more than 30 days from the date on which the request is sent, or 60 days from that date if the defendant's address is outside the Commonwealth; and
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> 7. Provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

Id.

C) **Domestic corporation.** VA. CODE ANN. § 8.01-299 (2008) governs service of process on a domestic corporation. Process may be served by (1) "personal service on any officer, director, or registered agent of the corporation," or (2) "by substituted service on stock corporations in accordance with VA. CODE ANN. § 13.1-637 (2008) and on non-stock corporations in accordance with VA. CODE ANN. § 13.1-836."

1) **Stock corporation.** Under VA. CODE ANN § 13.1-637, a stock corporation's registered agent is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation. The registered agent may designate a natural person in the agent's office to receive process. The agent or his surrogate may receive process by facsimile, provided acknowledgement of receipt of service is returned by facsimile to the sheriff. When a corporation fails to appoint or maintain a registered agent in the Commonwealth or the agent cannot be served, the Clerk of the State Corporation Commission becomes the agent. This section does not prescribe the only means, or necessarily the required means, of serving a corporation.

2) **Non-stock corporation.** VA. CODE ANN. § 13.1-836 (2008) contains the identical procedures set forth in VA. CODE ANN § 13.1-637 for serving process on a non-stock corporation.

D) **Foreign corporations.** VA. CODE ANN. § 8.01-301 (2008) outlines the methods for service of process on foreign corporations. Service on a foreign corporation may be achieved (1) by personal service on any officer, director, or registered agent of a corporation authorized to do business in the Commonwealth, and (2) by personal service on any agent of a foreign corporation "transacting business in the Commonwealth without such authorization," wherever any such officer, director, or agents be found within the Commonwealth. The statute permits (3) substituted service on a foreign corporation in accordance with VA. CODE ANN. §§ 13.1-766 (2008) and 13.1-928 (2008), if such corporation is authorized to transact business or affairs within the Commonwealth. VA. CODE ANN. § 8.01-301 (2008) also permits substituted service on a foreign corporation in accordance with VA. CODE ANN. § 8.01-329 (2008) where jurisdiction is authorized under VA. CODE ANN. § 8.01-328.1, regardless of whether such foreign corporation is authorized to transact business within the Commonwealth. Lastly, the statute permits order of publication in accordance with VA. CODE ANN. §§ 8.01-316 (2008) and 8.01-317 (2008) where jurisdiction "in rem or quasi in rem is authorized,

regardless of whether the foreign corporation so served is authorized to transact business within the Commonwealth."

E) **Other government entities.** VA. CODE ANN. § 8.01-300 (2008) governs service of process on municipal and county governments and on quasi-governmental entities. Service under this section may be made by leaving a copy with the person in charge of the office of any officer designated in the subsections below.

> 1. If the case be against a city or a town, on its city or town attorney in those cities or towns which have created such a position, otherwise on its mayor, manager or trustee of such town or city; and
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> 2. If the case be against a county, on its county attorney in those counties which have created such a position, otherwise on its attorney for the Commonwealth; and
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> 3. If the case be against any political subdivision, or any other public governmental entity created by the laws of the Commonwealth and subject to suit as an entity separate from the Commonwealth, then on the director, commissioner, chief administrative officer, attorney, or any member of the governing body of such entity; and
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> 4. If the case be against a supervisor, county officer, employee or agent of the county board, arising out of official actions of such supervisor, officer, employee or agent, then, in addition to the person named defendant in the case, on each supervisor and the county attorney, if the county has a county attorney, and if there be no county attorney, on the clerk of the county board.

Id.

F) **Publication.** VA. CODE ANN. § 8.01-316 (2008) allows for service by publication, which may only be used after the party seeking service files an affidavit stating the party to be served is a (i) foreign corporation, (ii) a foreign unincorporated association, or (iii) a nonresident individual, or when unknown parties do or may exist, and (a) the number of defendants upon whom process has been served exceeds 10, and (b) it appears by a pleading, or exhibit filed, that such defendants represent like interests with the parties not served with process.

G) **Long arm statute.** VA. CODE ANN. § 8.01-328.1 (2008) ("the long-arm statute") provides that a court may exercise in personam jurisdiction over a person who acts directly or by an agent "as to a cause of action arising from the person's":

> 1. Transacting any business in this Commonwealth;
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> 2. Contracting to supply services or things in this Commonwealth;
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> 3. Causing tortious injury by an act or omission in this Commonwealth;
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> 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth;

5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when he might reasonably have expected such person to use, consume, or be affected by the goods in this Commonwealth, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth;

6. Having an interest in, using, or possessing real property in this Commonwealth;

7. Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting;

8. Having (i) executed an agreement in this Commonwealth which obligates the person to pay spousal support or child support to a domiciliary of this Commonwealth, or to a person who has satisfied the residency requirements in suits for annulments or divorce for members of the armed forces pursuant to § 20-97 provided proof of service of process on a nonresident party is made by a law-enforcement officer or other person authorized to serve process in the jurisdiction where the nonresident party is located, (ii) been ordered to pay spousal support or child support pursuant to an order entered by any court of competent jurisdiction in this Commonwealth having in personam jurisdiction over such person, or (iii) shown by personal conduct in this Commonwealth, as alleged by affidavit, that the person conceived or fathered a child in this Commonwealth;

9. Having maintained within this Commonwealth a matrimonial domicile at the time of separation of the parties upon which grounds for divorce or separate maintenance is based, or at the time a cause of action arose for divorce or separate maintenance or at the time of commencement of such suit, if the other party to the matrimonial relationship resides herein; or

10. Having incurred a liability for taxes, fines, penalties, interest, or other charges to any political subdivision of the Commonwealth.

Statutes of Limitations

A) **Affirmative defense.** The statute of limitations defense is an affirmative defense, which must be raised normally by a special plea or plea in bar. If the statute of limitations is not raised as an affirmative defense in the Answer or by special plea as an initial responsive pleading, it may be deemed waived. The burden of proof in establishing the limitation defense rests on the defendant who asserts the defense.

B) **Key statute of limitations periods.**

1) **Contracts.** There is a three-year statute of limitations period if the contract is oral and a five-year period if it is written. VA. CODE ANN. § 8.01-246 (2008). If the agreement is a sales contract involving goods covered by the UCC, a four-year period will apply, unless the parties have provided for a shorter period in their agreement (down to a one-year minimum). VA. CODE ANN. §§ 8.01-246, 8.2-725 (2008).

2) **Torts.** The basic statute of limitations period for personal injury actions, however the claim is pled, is two years. VA. CODE ANN. § 8.01-243(A) (2008). Property

damage claims are governed by a surprisingly long five-year period. VA. CODE ANN. § 8.01-243(B) (2008).

3) **Fraud.** Claims asserting fraud must be brought within two years, VA. CODE ANN. § 8.01-243, though there is a special tolling section which extends the accrual date for such claims until a point when the cause of action could reasonably have been known by the plaintiff. The fraud period applies to actions sounding in fraud, and not to suits on other theories arising from facts which arguably involved fraud. VA. CODE ANN. § 8.01-249 (2008).

4) **Other personal actions.** Other personal action claims for which no specific period is set forth in the Code of Virginia are governed by a catch-all two-year statute of limitations period. VA. CODE ANN. § 8.01-248 (2008).

5) **Wrongful death.** Wrongful death claims may be brought within two years from the victim's death (if death was within two years of the accrual of the underlying cause of action), VA. CODE ANN. § 8.01-244 (2008), though the complications with appointment of a personal representative must be considered. *See Horn v. Abernathy*, 231 Va. 228, 343 S.E.2d 318 (1986). The Legislature has specified that the tolling and refilling provisions of the nonsuit statute, VA. CODE ANN. § 8.01-380 (2008), apply in proceedings brought under the Wrongful Death Act. *See* VA. CODE ANN. §§ 8.01-380 and 8.01-244. In addition, the Supreme Court has held that the tolling provisions of the Medical Malpractice Act also apply in wrongful death cases to the benefit of plaintiffs. *Wertz v. Grubbs*, 245 Va. 67, 73, 425 S.E.2d 500, 503 (1993).

6) **Enforcement of judgments.** Judgments rendered by Virginia Circuit Courts must be enforced within 20 years, though there is a procedure to extend the life of the judgment. VA. CODE ANN. § 8.01-251(A) (2008). General District Court judgments may be enforced for 10 years, unless they are extended or docketed with the Circuit Court. VA. CODE ANN. § 16.1-94.1 (2008).

7) **Contribution and indemnity.** Although there was earlier some confusion about the matter, the Supreme Court has now clearly stated that actions for contribution or indemnification will be governed by the three-year limitation period for implied contracts. *Gemco-Ware, Inc. v. Rongene Mold & Plastics Corp*., 234 Va. 54, 360 S.E.2d 342 (1987); *Nationwide Mut. Ins. Co. v. Jewel Tea Co.*, 202 Va. 527, 118 S.E.2d 646 (1961). *Cf. McKay v. Citizens Rapid Transit Co.*, 190 Va. 851, 59 S.E.2d 121 (1950).

8) **Attorney malpractice**. An action for the negligence of an attorney in the performance of professional services, while sounding in tort, has been held to be an action for breach of a contract. *Oleyar v. Kerr*, 217 Va. 88, 225 S.E.2d 398 (1976). *But see Goodstein v. Weinberg*, 219 Va. 105, 245 S.E.2d 140 (1978) (analyzing the effect of the plaintiff's election to proceed solely on tort liability). The three-year limitation provision for oral contracts has been held to apply in an

action to recover the reasonable value for services rendered pursuant to a contract unenforceable under the statute of frauds. *Ricks v. Sumler*, 179 Va. 571, 19 S.E.2d 889 (1942). Similarly, and of considerable practical importance, as noted in the preceding paragraph, the same limitation applies in actions for contribution between joint tortfeasors. *See, e.g., Nationwide Mut. Ins. Co. v. Jewel Tea Co.*, 202 Va. 527, 118 S.E.2d 646 (1961). Also where a grantee of a deed assumes payment of bonds given by his grantor for deferred purchase money but does not sign the deed, the three-year period is applicable, *W.L. Becker & Co. v. Norfolk & W. Ry.*, 125 Va. 558, 100 S.E. 478 (1919), as it is to an action to recover money paid under a mistake of fact. *Hughes v. Foley*, 203 Va. 904, 128 S.E.2d 261 (1962). For special accrual rules, *see* Va. Code § 8.01-249(1) (2008).

9) **Defamation.** VA. CODE ANN. § 8.01-247.1 (2008) provides that actions for libel, slander, insulting words, or other defamation are governed by a one-year statute of limitations.

Statutes of Repose

A) **Construction**. VA. CODE ANN. § 8.01-250 (2008) provides a statute of repose for personal actions arising out of defective or unsafe condition of improvements to real property. The statute provides:

> No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance or furnishing of such services and construction.
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> The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, nor to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought; rather each such action shall be brought within the time next after such injury occurs as provided in VA. CODE ANN. §§ 8.01-243 and 8.01-246.

B) **Motor Vehicle Warranty Enforcement Act.** This statute, which provides that any consumer who suffers loss by reason of a violation of its provisions may bring a civil action, is subject to a flat 18-month period following the original delivery of the motor vehicle in which to bring the "lemon law" proceeding. There is also a 12-month limitation period after certain manufacturer-initiated dispute resolution procedures, and the consumer has the longer of the 12 or 18-month periods in which to commence an action**.** VA. CODE ANN. § 59.1-207.16 (2008).

Venue Rules

A) VA. CODE ANN. § 8.01-261 (2008) sets forth preferred venues for different actions. While VA. CODE ANN.§ 8.01-261 grants priority to actions classified as "preferred," a mistaken commencement of the lawsuit in another venue will not present a jurisdictional defect. Indeed, dismissal is not available as a remedy for improper venue for any action encompassed by the modern Virginia venue statutes. Instead, if an action falling into one of the categories of the preferred venue section is filed in a district other than one provided for in the section, it will be transferred to a preferred district if a defendant makes timely objection. *See id.* Even if the locale where the action is commenced is a permissible venue under another category of analysis, it will be transferred to the preferred venue upon timely application by a defendant if the matter falls within one of the preferred venue categories. *See id.* Not only is an outright dismissal of a pending proceeding unavailable as a remedy for venue defects, but it is clear that a judgment rendered cannot be voided or collaterally attacked on such ground. *See* VA. CODE ANN. §§ 8.01-258, 8.01-264 (2008). Instead, under VA. CODE ANN. § 8.01-264, when an appropriate objection is sustained, any of the actions listed in VA. CODE ANN. § 8.01-261 will be transferred to a "preferred" forum set forth in that section. If an objection is not timely made, the venue defect is waived. VA. CODE ANN. § 8.01-264.

B) **Preferred venues by action.** According to VA. CODE ANN. § 8.01-261, the following are preferred venues for various actions.

1) **Administrative matters**. Subsection 1 applies to actions for review of, appeal from, or enforcement of state administrative regulations, decisions, or other orders, and requires that litigation be conducted in a forum proximate to the affected citizen. VA. CODE ANN. § 8.01-261(1).

2) **Actions against commonwealth's officers**. Subsection 2 provides that, except for cases controlled by subsection 1, where an action is brought against one or more Commonwealth officers in an official capacity, the appropriate forum is the place where this person has his official office. VA. CODE ANN. § 8.01-261(2)

3) **Land**. Subsection 3 follows the customary rule that when the suit involves real estate, the principal forum is the place where any part of the land is located. VA. CODE ANN. § 8.01-261(3). Thus this subsection is applicable to such suits as suits for unlawful entry or detainer, *see* VA. CODE ANN. §§ 8.01-124—8.01-130; *see also* VA. CODE ANN. § 55-225 (2008), partition of real property, *see* VA. CODE ANN. §§ 8.01-81—8.01-93 (2008) and sale or lease of lands of persons under a disability. *See* VA. CODE ANN. §§ 8.01-67—8.01-80

4) **Extraordinary writs**. Subsection 5 provides that in actions for writs of mandamus, prohibition, or certiorari, except such as may be issued by the Supreme Court, the appropriate forum is the place where the record or proceeding is lodged to which the writ relates. VA. CODE ANN. § 8.01-261(5).

5) **Public contracts**. Subsection 6 states that in actions on bonds required for a public contract, the place where any part of the public project is located is the appropriate forum. VA. CODE ANN. § 8.01-261(6).

6) **Wills**. Subsection 7 provides that, in suits to impeach or establish a will, the appropriate forum is where the will has been probated or may be properly offered for probate. VA. CODE ANN. § 8.01-261(7).

7) **Transportation districts**. Subsection 10 provides that in actions on any contract between a transportation district and a component of government, the place where any part of such transportation district is located is a proper venue for the action. VA. CODE ANN. § 8.01-261(10).

8) **Attachment**. Subsection 11 provides that in actions for attachment, venue is appropriate wherever it would be proper in an action against the principal defendant or in a place where the principal defendant has estate or debts owing to him. The test is with respect to the principal defendant—not the co-defendants who may be liable with or to him. VA. CODE ANN. § 8.01-261(11).

9) **Taxes**. Subsection 13 provides that in any action for the collection of state, county, or municipal taxes, any one of the following places shall be deemed appropriate.

   a) Where the taxpayer resides.

   b) Where the taxpayer owns real or personal property.

   c) Where the taxpayer has a registered office, or regularly or systematically conducts business; or

   d) In the case of withdrawal from the Commonwealth by a delinquent taxpayer, "wherein venue was proper at the time the taxes in question were assessed or at the time of such withdrawal." In any action for the correction of an erroneous assessment of state taxes and tax refunds, any of the places noted in (1) to (3) above are appropriate forums.

   VA. CODE ANN. § 8.01-261(13).

10) **Quo warranto**. Subsection 14 provides that, in proceedings by writ of quo warranto, the city or county wherein any of the defendants reside is an appropriate forum. If the defendant is a corporation, the proper venue would be the city or county where its registered office is, or where its mayor, rector, president, or other chief officer resides. If there is no officer or none of the defendants reside in Virginia, the proper forum is the City of Richmond. VA. CODE ANN. § 8.01-261(14).

11) **Injunction applications**. Subsection 15 applies in proceedings to award an injunction and tracks the provisions of prior law. The preferred places for instituting injunction proceedings are as follows:

> a) As to any judgment or judicial proceeding of a circuit court, the court in the county or city in which the judgment was rendered or such proceeding is pending.
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> b) As to any judgment or judicial proceeding of a district court, the circuit court of the county or city in which the judgment was rendered or where such proceeding is pending.
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> c) As to any other act or proceeding, the circuit court of the county or city in which the act is to be done, or being done, or is apprehended to be done or where the proceeding is pending.

VA. CODE ANN. § 8.01-261(15).

12) **Virginia Tort Claims Act**. Subsection 18 provides for the proper forum in actions under the Virginia Tort Claims Act. The plaintiff may institute and maintain a suit against the Commonwealth at any of the following locations: (1) "the county or city wherein he resides;" or (2) "the county or city where the act or omission complained of occurred;" or (3) "if the claimant resides outside the Commonwealth and the act or omission complained of occurred outside the Commonwealth, the City of Richmond." VA. CODE ANN. § 8.01-261(18).

13) **Divorce and annulment**. In suits for annulment, affirmance, or divorce, (1) "the county or city in which the parties last cohabited," or (2) "at the option of the plaintiff, in the county or city in which the defendant resides, if a resident of this Commonwealth, and in cases in which an order of publication may be issued against the defendant under VA. CODE ANN. § 8.01-316," (3) "venue may also be in the county or city in which the plaintiff resides." VA. CODE ANN. § 8.01-261(19).

C) **Permissible venue.**

1) **No preferred forum.** VA. CODE ANN. § 8.01-262 (2008) applies to most actions where no preferred forum is provided by VA. CODE ANN. § 8.01-261, and when the case is not one of the exceptional actions excluded from the operation of this chapter by VA. CODE ANN. § 8.01-259 (2008).

2) **Choice of forum.** VA. CODE ANN. § 8.01-262 provides that "one or more" of the forums listed in subsections 1 through 9 will be permissible forums, so the plaintiff may frequently have the choice of more than one locale in which the action may be brought. Subsection 10 is a last resort provision, giving the plaintiff a forum when no forum is otherwise available.

3) **Permissible forums.** According to VA. CODE ANN. § 8.01-262, the following are permissible forums:

a) **Residence or employment of the defendant**. Subsection 1 provides for venue where the defendant resides or has his principal place of employment. If the defendant is a corporation, venue is also proper "wherein its mayor, rector, president or other chief officer resides." VA. CODE ANN. § 8.01-262(1).

b) **Agents**. Subsection 2 provides that forum is appropriate where the defendant has a "registered office, has appointed an agent to receive process, or such agent has been appointed by operation of law." In case of withdrawal from this Commonwealth by a defendant, proper venue exists where venue was proper at the time of withdrawal. VA. CODE ANN. § 8.01-262(2).

c) **Conduct of business**. Subsection 3 provides for a permissible venue where "the defendant regularly conducts substantial business activity, or in the case of withdrawal from this Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal." VA. CODE ANN. § 8.01-262(3).

d) **Where the cause of action arose**. Subsection 4 provides for a permissible venue where "the cause of action, or any part thereof, arose." VA. CODE ANN. § 8.01-262(4).

e) **Property cases**. In actions to recover or partition personal property, whether tangible or intangible, the county or city: (1) in which the property is physically located, or (2) where the evidence of the property is located. If the first two locations do not apply, then (3) the county or city where the plaintiff resides. VA. CODE ANN. § 8.01-262(5).

f) **Actions against a fiduciary**. For actions against a fiduciary (as defined by VA. CODE ANN. § 8.01-2) who is appointed under court authority, the county or city wherein such fiduciary qualified is a permissible venue. VA. CODE ANN. § 8.01-262(6).

g) **Message transmission**. Proper venue for actions for improper message transmission or misdelivery is the place where the message was transmitted or delivered or where it was accepted for delivery or misdelivered. VA. CODE ANN. § 8.01-262(7).

h) **Delivery of goods**. The place were the goods were received is an appropriate venue for an action arising out of the delivery of goods. VA. CODE ANN. § 8.01-262(8).

i) **Catchall number one**. "If there is no other forum available in subsections 1 through 8, then the county or city where the defendant has property or debts owing to him subject to seizure by any civil process" is an appropriate venue. VA. CODE ANN. § 8.01-262(9).

j) **Catchall number two**. Subsection 10 provides a plaintiff with appropriate venue where he resides if "(i) all of the defendants are unknown or are nonresidents of the Commonwealth or if (ii) there is no other forum available under any other provisions of VA. CODE ANN. § 8.01-261 or this section." VA. CODE ANN. § 8.01-262(10).

D) **Altering forum.**

1) ***Forum non conveniens.*** VA. CODE ANN. § 8.01-265 (2008) permits a court to,

> upon motion by any party and for good cause shown, (1) dismiss an action brought by a person who is not a resident of the Commonwealth without prejudice under such conditions as the court deems appropriate if the cause of action arose outside of the Commonwealth and if the court determines that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth or (2) transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth. Such conditions as the court deems appropriate shall include, but not be limited to, a requirement that the defendant agree not to assert the statute of limitations as a defense if the action is brought in a more convenient forum within a time specified by the court. The court, on motion of any party and for good cause shown, may retain the action for trial. Except by agreement of all parties, no action enumerated in Category A, VA. CODE ANN. § 8.01-261, shall be transferred to or retained by a forum not enumerated in such category. Good cause shall be deemed to include, but not to be limited to, the agreement of the parties or the avoidance of substantial inconvenience to the parties or the witnesses, or complying with the law of any other state or the United States.

2) **Transfer within Virginia**. In *Norfolk & Western Railway v. Williams*, the Virginia Supreme Court addressed Virginia courts' forum non conveniens power to transfer an action within the Commonwealth. 239 Va. 390 (1990). The plaintiff originally brought suit in the Circuit Court of the City of Portsmouth. N& W Railway moved to transfer the case to the Circuit Court of the City of Roanoke. The trial court denied the motion, refusing to transfer the case. On appeal, the court affirmed the trial court and adopted the factors for assessing a transfer request employed by the U.S. Supreme Court in *Gulf Oil Corp. v. Gilbert*, including:

> relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Williams, 239 Va. at 393 (quoting *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947)).

While the court afforded weight to the plaintiff's original forum selection, the court concluded that Portsmouth "had no practical nexus whatsoever with the instant action." *Id.* at 396. Conversely, the action "had a strong nexus with Roanoke." *Id.* In ruling that the trial court abused its discretion when it refused the transfer, the court cited a number of facts in support of its decision.

The injury arose in Roanoke. N & W's registered agent and principal headquarters were located in Roanoke. All of the known potential witnesses, with the exception of one, were residents of Roanoke. The plaintiff was employed by N & W at an office in Roanoke. The trial court was presented with sufficient information to show good cause to transfer, including substantial inconvenience to the parties and witnesses as well indications of a forum originally selected for "not simply justice, but perhaps justice blended with some harassment." *Id.* at 396 (quoting *Gulf*, 330 U.S. at 507).

3) **Dismissal in favor of a foreign forum**. VA. CODE ANN. § 8.01-265 (2008) includes several express restrictions:

a) The court may not dismiss an action unless the plaintiff is not a resident of Virginia.

b) The cause of action must have arisen outside of the Commonwealth.

c) The party requesting dismissal must make a good cause showing of greater convenience; the standard for the showing is the same showing discussed for transfer within the Commonwealth.

d) There exists a more convenient forum which has jurisdiction over all parties in a jurisdiction other than the Commonwealth.

NEGLIGENCE

Comparative Fault / Contributory Negligence

A) Virginia is one of the last states in the country to recognize the doctrine of contributory negligence. A plaintiff's contributory negligence generally will bar recovery on part of the plaintiff. However, if the plaintiff's action only contributes slightly or trivially to the injury, the contributory negligence will not act as a complete bar. *Simpson v. Lambert Bros. Division-Vulcan Materials Co.*, 362 F.2d 731, 734 (4th Cir. 1966).

B) **Affirmative defense.** "Contributory negligence is an affirmative defense that is based on the objective standard whether a plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances." *Sawyer v. Comerci*, 563 S.E.2d

748, 752 (2002). Generally the initial pleadings must state enough to show, that if true, the defendants are liable, but a general allegation of negligence generally suffices to survive the pleading stage. *Moore v. Virginia Transit Co.*, 50 S.E.2d 268, 271 (1948).

1) **Willful and wanton disregard.** "[W]hile contributory negligence, in the sense of failing to exercise ordinary care for one's safety, is not a defense to a defendant's willful and wanton negligence, a plaintiff's wanton and reckless disregard for his own safety bars recovery even against a defendant whose conduct also amounts to willful and wanton negligence." *Griffin v. Shively*, 315 S.E.2d 210, 213 (1984).

2) **Last clear chance.** The last clear chance doctrine applies in two situations:

> [1]Where the injured person has negligently placed himself in a situation of peril from which he is physically unable to remove himself, the defendant is liable if he saw, or should have seen, him in time to avert the accident by using reasonable care. [2] Where the plaintiff has negligently placed himself in a situation of peril from which he is physically able to remove himself, but is unconscious of his peril, the defendant is liable only if he saw the plaintiff and realized, or ought to have realized, his peril in time to avert the accident by using reasonable care.

Eisenhower v. Jeter, 135 S.E.2d 786, 788 (1964).

C) **Comparative negligence.** Comparative negligence is not recognized in Virginia courts, and any negligence on the part of the plaintiff bars his recovery. *Waynick v. Walnord*, 154 S.E. 522, 525 (1930).

D) **Definition.** Negligence is the failure to exercise the degree of care which an ordinary prudent person would exercise under the same or similar circumstances. *Gossett v. Jackson*, 457 S.E.2d 97, 100 (1995).

Exclusive Remedy – Workers' Compensation Protections

A) In Virginia, worker's compensation claims are governed by VA. CODE ANN. § 65.2- 100 *et. seq*. (2008). "The purpose of the Workers' Compensation Act is to provide compensation to an employee for the loss of his opportunity to engage in work, when his disability is occasioned by an injury suffered from an accident arising out of and in the course of his employment." *Barnett v. D.L. Bromwell, Inc*, 366 S.E.2d 271, 273 (Ct. App. Va. 1988).

1) **Arising out of and in the course of.** An injury arises out of the employment, when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury occurs in the "course of employment" when it takes place within the period of employment, at a place where the employee may be reasonably expected to be, and while he is fulfilling the duties of his employment or is doing something which is reasonably incidental

thereto. *Bd. Of Supervisors v. Martin*, 348 S.E.2d 540, 541 (Va. Ct. App. 1986).

2) **Actual risk test.** "In Virginia we have adopted the 'actual risk test,' which requires only that the employment expose the workman to the particular danger from which he was injured, notwithstanding the exposure of the public generally to like risks." *Lucas v. Lucas*, 186 S.E.2d 63, 64 (1972). "[A]n injury is compensable if it appears 'to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." Martin, 348 S.E.2d at 541.

B) **Exclusivity.** The Virginia's Worker's Compensation provides the full and exclusive remedy "[w]hen an employee in Virginia is injured in the performance of her duties for her employer. . ." *McCotter v. Smithfield Packing Co., Inc.*, 849 F. Supp 443, 446 (E.D. Va. 1994).

1) **Voluntary payments.** VA. CODE ANN. § 65.2-307 (2008):

> Notwithstanding this exclusion, nothing in the Act shall bar an employer from voluntarily agreeing to pay an employee compensation above and beyond those benefits provided for in the Act. Nothing herein, however, shall be deemed to affect or alter any existing right or remedy of the employer or employee under the Act.

2) **Illegally employed minors.** Illegally employed minors are covered under the Virginia Worker's Compensation Act. *Humphrees v. Boxley Bros. Co.*, 135 S.E. 890, 895 (1926).

3) **Subrogation and indemnity.** Virginia "Code §§ 65.1-41, 65.1-42, and 65.1-112 subrogate employers and insurers to the rights of injured employees to whom they pay compensation and provide rights of indemnity against third parties who may be liable to those employees for their injuries." *Ball v. C.D.W. Enters., Inc*, 413 S.E.2d 66, 68 (Va. Ct. App. 1992).

C) **Burden.** *Pro-Football, Inc. v. Uhlenhake*, 558 S.E.2d 571, 577 (Va. Ct. App. 2002) (with internal quotations omitted):

> The employee bears the burden of proving by a preponderance of the evidence that an injury by accident occurred. To meet that burden the evidence must prove (1) an identifiable incident; (2) that occurs at some reasonably definite time; (3) an obvious sudden mechanical or structural change in the body; and (4) a causal connection between the incident and the bodily change.

D) **Intentional torts.** Virginia courts hold that an intentional tort is within the accidental occurrence provision of the code. *Middlekauff v. Allstate Ins. Co.*, 439 S.E.2d 394 (1994).

E) **Sexual assault.** Any employee who is sexually assaulted in the course of employment, where the nature of such employment substantially increases the risk of such assault,

shall have a valid claim for workers' compensation benefits. VA. CODE ANN. § 65.2-301 (2008).

1) An employee who is sexually assaulted and can identify the attacker may elect to pursue an action-at-law against the attacker, even if the attacker is the assaulted employee's employer or co-employee. *Id.*

F) **Co-worker conduct.** Virginia courts compensate claims "when an employee is an innocent nonparticipating victim of a co-worker's playful or joking actions." *Dublin Garment Co. v. Jones*, 342 S.E.2d 638, 639 (Va. Ct. App. 1986).

G) **Assault.** "If the assault is personal to the employee and not directed against him as an employee or because of his employment, the [resulting] injury does not arise out of the employment." *Richmond Newspapers v. Hazelwood,* 457 S.E.2d 56, 58 (1995).

Indemnification

A) The VA. CODE ANN. states: "Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude." VA. CODE ANN. § 8.01-34 (2008).

B) **Concurrent negligence.** Concurrent negligence creates joint liability – thus, where two parties create a single injury and each is responsible under proximate cause analysis, they are both liable. *Von Roy v. Whitescarver*, 89 S.E.2d 346, 352 (1955).

C) **Indemnification from duty.** *Wallenius Bremen G.M.B.H. v. U.S.*, 409 F.2d 994, 998 (4th Cir. 1969) states

> Contract aside, indemnity for tortious conduct may be allowed only if the person from whom indemnity is sought . . . owed a *duty* of his own to the injured person. The duty owed by the one sought to be made indemnitor must be must be . . . more grievous than the breach of duty of the indemnitee.

D) **When right to recover arises.** The right to *recover* contribution arises "only after payment of an unequally large share of the common obligation." Stated differently, the right to recover contribution "arises only when one tort-feasor has paid or settled a claim for which other wrongdoers are also liable," while the cause of action for contribution arises at the time of the jointly negligent acts. *Shiflet v. Eller*, 319 S.E.2d 750, 754 (1984).

E) **Indivisible injury.** Tortfeasors may not be sued jointly in a single action unless their acts produce a single, indivisible injury. *Fox v. Deese*, 362 S.E.2d 699, 705 (1987).

1) **Effect of nonjoinder or disjoinder.** VA. CODE ANN. § 8.01-5 (2008) states

> No action or suit shall abate or be defeated by the nonjoinder or misjoinder of parties, plaintiff or defendant, but whenever such nonjoinder or misjoinder shall be made to appear by affidavit or otherwise, new parties may be added and

> parties misjoined may be dropped by order of the court at any time as the ends of justice may require.

2) **Joint wrong.** *Bowles v. City of Richmond,* 129 S.E. 489 (1926) states:

> At common law, in case of joint wrongs, the plaintiff may at his election sue all or any one, or any intermediate number of the wrongdoers, but in order to sue all there must be a joint wrong. In an action against several doers for a joint wrong, there can be only one final judgment upon the merits.

F) Indemnity can be express or implied, but when a contract expressly provides the right to indemnification, indemnity is determined by contractual principles and will not be implied. *Dacotah Mktg & Research, L.L.C. v. Versatility, Inc.*, 21 F.Supp. 2d 570 (E.D. Va. 1998).

1) **Express Indemnity.** In Virginia, "a contractual provision whereby a party indemnifies itself against losses incurred as the result of personal injury caused by its own future negligence is enforceable and does not violate the public policy of the Commonwealth." *W.R. Hall, Inc. v. Hampton Rds. Sanitation Dist.,* 641 S.E.2d 472, 475 (2007).

2) **Implied Indemnity.** "Although an implied right to indemnity may be read into some contracts, only unique factors or a special relationship between the parties give rise to such a right." *Transdulles Center, Inc. v. USX Corp*., 976 F.2d 219, 228 (4th Cir. 1992).

Joint and Several Liability

A) *Sullivan v. Robertson Drug Co., Inc.*, 639 S.E.2d 250, 255 (2007) (citations omitted) states,

> If separate and independent acts of negligence of two parties directly cause a single indivisible injury to a third person, either or both wrongdoers are responsible for the whole injury. Thus, in determining the liability of a person whose concurrent negligence results in such an injury, comparative degrees of negligence shall not be considered and both wrongdoers are equally liable irrespective whether one may have contributed in a greater degree to the injury. Accordingly, each such wrongdoer is responsible for an equal share of the amount paid in the damages for a single injury. Only when there are multiple, divisible injuries covered by a compromise settlement is the finder of fact required to attempt an allocation of the amount in contribution a wrongdoer must pay for his negligent act or acts causing one or more of those divisible injuries.

B) **Applicability.** VA. CODE ANN. § 8.01-34 (2008) governs joint and several liability in Virginia. Liability to both defendants will be found even in the absence of a common design, plan, or scheme. *Baise v. Warren*, 158 Va. 505 (1932). Thus, when a single injury results from the negligence of two defendants, each is responsible for the entire result, even though his act or neglect alone might not have caused it. *Dickenson v. Tabb*, 165 S.E.2d 795 (1967). Either or both of the wrongdoers may be responsible. *Murray v. Smithson*, 48 S.E.2d 239 (1948). Those engaged in a common scheme are liable,

however, as joint tortfeasors despite their tortious acts not being simultaneous. *Seaboard Air Line Ry. Co v. Bowden & Co.*, 131 S.E. 245 (1926).

C) **Concurrent negligence.** Concurrent negligence applies and may create joint and several liability, as long as the concurrent harms create a single, indivisible injury. *Von Roy v. Whitscarver*, 89 S.E.2d 346 (1955). Thus, the defendant can collect from either, or all, as the liability for torts is joint and several. *Luck v. Rice*, 29 S.E.2d 238 (1944).

D) **Several liability.** Virginia will not apportion comparative degrees of blame, as each tortfeasor is liable for the whole injury, even though the other defendant was equally culpable, or more culpable. *Lavenstein v. Maile*, 132 S.E. 844 (1926). Where the acts are plainly separable, each will be liable independently for the harms they caused. *Id*.

E) **Jurisdiction.** Jurisdiction over one joint tortfeasor, confers jurisdiction over all the tortfeasors creating the single/indivisible injury. *See Seaboard Air Line R. Co. v. Bowden & Co.*, 131 S.E. 245 (1926).

F) **Separate actions.** The injured party may elect to go after all liable defendants individually in separate actions until the judgment is satisfied. *Powell v. Troland*, 183 S.E.2d 184 (1971). A judgment against one or several of the joint tortfeasors, will not bar action against any or all of the others – the injured party may bring separate actions against each until completely satisfied. *Hogan v. Miller*, 157 S.E. 540 (1931). A judgment against one tortfeasor is not necessarily an acquittal as to the others. *Hudgins v. Jones*, 138 S.E.2d 16 (1964).

G) **Several defendants.** In an action against several defendants for a single wrong, liability is joint, as the jury may not depart from their duty to find the defendants equally liable or innocent. *Freeman v. Sproles*, 131 S.E.2d 410 (1963).

Strict Liability

A) **Abnormally dangerous activities.** Strict liability is reserved for selected uncommon and extraordinarily dangerous activities for which negligence is an inadequate deterrent or remedy. *Arlington Forest Assocs. v. Exxon Corp.*, 774 F. Supp. 387 (E.D. Va. 1991).

1) **Standard.** An activity is abnormally dangerous if it is dangerous in its normal or nondefective state. *Arlington Forest Assocs. V. Exxon Corp.*, 774 F. Supp. 387 (E.D. Va. 1991). The Virginia Supreme Court has been reluctant to expand strict liability outside of the blasting context. *Stockbridge Community Assc. V. Star Enterprise*, 27 Va. Cir. 82, 84 (1992). Six factors are to be weighed in determining whether an activity is abnormally dangerous:

> [T]he existence of a high degree of risk of some harm to the person, land or chattels of others; a likelihood that the harm that results from it will be great; an inability to eliminate the risk by the exercise of reasonable care; the extent to which the activity is not a matter of common usage; the inappropriateness of the

> activity to the place where it is carried on; and the extent to which its value to the community is outweighed by its dangerous attributes.

Id. "[T]he Virginia Supreme Court as a threshold determination . . . [asks] whether the risk can be eliminated by the exercise of reasonable care. If it can be, then the other factors will not be considered. *Id.*

C) **Products.** The manufacturer of a product that is potentially dangerous if used in a manner within the reasonable contemplation of the parties has a duty to use ordinary care to avoid such danger. *McClanahan v. California Spray-Chemical Corp.*, 75 S.E.2d 712 (1953).

1) **Standard.** The appropriate standard in Virginia is whether the producer of the chattel has a reason to know, not whether the producer "should know." *Owens-Corning Fiberglass Corp. v. Watson*, 413 S.E.2d 630 (1992). The chattel producer will be liable if

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

Id.

2) **Course of intended use.** A manufacturer is liable only for injuries that the product causes in the course of its intended use and whether the accident was reasonably foreseeable. The environment should also be accounted for in the foreseeability analysis. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962).

Willful and Wanton Conduct

A) **Gross negligence.** Gross negligence is the showing of such indifference to others that it constitutes an utter disregard of caution and amounts to a complete neglect of the safety of another person or another person's property. While not as extreme as 'willful recklessness,' gross negligence shocks fair-minded people. Virginia Model Jury Instruction 4.030. *See also* Newell v. Riggins, 90 S.E.2d 150 (1955).

1) **Criminal gross negligence.** Acts of gross negligence may be criminal if accompanied by willful or wanton conduct which the offender knew or should have known that the injury to the plaintiff would have resulted. *Bell v. Comm.*, 195 S.E. 675 (1938).

B) **Willful or wanton conduct.** Willful or wanton conduct imports knowledge or consciousness that the defendant's actions would likely result in injury, and involve a reckless disregard of the rights of another. *Infant C. v. Boy Scouts of Am., Inc.*, 391 S.E.2d 322 (1990). Prior knowledge or notice is significant in deciding whether one's

actions amounts to willful and wanton negligence. *Alfonso v. Robinson*, 514 S.E.2d 615 (1999).

1) **Egregiousness.** Willful and wanton conduct negligence generally involves some form of egregious conduct. This conduct would shock fair-minded people. *Harris v. Harman*, 486 S.E.2d 99 (1997).

DISCOVERY

General Purposes of Discovery

The rules of pre-trial discovery in Virginia are set out in Part Four of the Rules of the Supreme Court of Virginia, and are the Federal Rules of Civil Procedure 26 through 37, so far as is consistent with Virginia practice.

A) The general purposes of the modern discovery devices are to prepare the parties for trial and to encourage out of court settlements of cases in which there is no substantial or irreconcilable dispute between the parties.

B) Discovery should lead to a better understanding of the other party's evidence and legal positions, which should result in a focusing of the issues, the elimination from the trial of issues and facts not in dispute, and possibly an out of court settlement.

C) Modern discovery rules are interpreted broadly, eliminating the old method of trying a case by surprising the adverse party in court with unexpected issues and legal theories. The theory of modern rules of discovery is to avoid this by making all the issues and evidence known to all the parties before trial.

1) It is the public policy of Virginia to "encourage pretrial discovery of facts in order that a just and fair trial may be had." *Watkins v. Republic Lumber etc. Corp*., 2 Va. Cir. 463, 467 (Va. Cir. Ct. 1978).

Non-Party Discovery

A) **Subpoenas.** Subpoenas and subpoenas duces tecum are governed by VA. SUP. CT. R. 3A:12 (2008). Subpoenas are issued by the clerk of the court upon request. The issuance of a subpoena commands the nonparty to appear and, if ordered, to produce documents or other tangible items within the scope of the matter at a specified time and place. A deponent, or witness, who is subpoenaed is ordered by law to obey it.

B) **Depositions.** VA. SUP. CT. R. 4:5(a)(1)(ii) (2008):

> A deposition of a non-party witness must be taken in the county or city where the non-party witness resides, is employed, or has a principal place of business; at a place upon which the witness and the parties to the litigation agree; or at a place that the court may, in its own discretion, designate.

1) After commencement of an action, any party may take the testimony of any person, including a non-party, by deposition upon written questions (interrogatory). The attendance of witnesses may be compelled by the use of subpoena. VA. SUP. CT. R. 4:6(a) (2008).

Privileges

Any claim of privilege from discovery or protection of trial preparation materials must be made with specificity so as to enable the other parties to assess its applicability. VA. SUP. CT. R. 4:1(b)(6) (2008); *see also Edgar v. Edgar*, 44 Va. Cir. 191 (Va. Cir. Ct. 1997).

A) **Self-incrimination.** The privilege against self-incrimination applies in both criminal prosecutions and civil proceedings.

1) **Documents.** A witness or party to a civil proceeding cannot be compelled to give information to produce documents which will incriminate him in a separate, independent criminal trial. Furthermore, information is privileged even if it might only tend to incriminate or if it might provide *any* link in the chain of proof in a criminal prosecution. *Edgar v. Edgar*, 44 Va. Cir. 191 (Va. Cir. Ct. 1997).

2) **Asserting.** In Virginia, the privilege against self-incrimination can be asserted in any court. "[N]o man should anywhere, before any tribunal, in any proceeding, be compelled to give evidence tending to criminate himself, either in that or any other proceeding." *Cullen v. Commonwealth*, 65 Va. 624, 628 (1873).

3) **Actual danger of prosecution.** The privilege against self-incrimination cannot be invoked unless there is actual danger of prosecution or forfeiture. For example, it cannot be invoked where the statute of limitations has expired, where immunity has been granted, or where the offense has been pardoned. *Hale v. Henkel*, 201 U.S. 43, 69-70 (1905).

4) **Personal to witness.** The privilege is "personal to the witness," so that one *can* be compelled to testify against or incriminate one's friends and/or employers. *Id*.

B) **Attorney work product.** The result of an attorney's labor and efforts made in preparation for litigation and which is performed or is done at his direction on behalf of a client is referred to as his "work product."

1) The work product doctrine, conceived in *Hickman v. Taylor*, 329 U.S. 495 (1974), and codified in subsequent federal and state laws, bars discovery of materials prepared by opposing counsel in anticipation of litigation.

2) **Anticipation of litigation.** The privilege extends to material prepared or collected in anticipation of litigation as well as that gathered after the suit has been initiated. This privilege can be waived; however, an inadvertent disclosure does not waive the attorney work product privilege. *Id.*

3) **Not absolute.** The protection of an attorney's work product is not an absolute privilege. In rare cases where a party "has substantial need of the materials in the preparation of his case and . . . is unable without undue hardship to obtain the substantial equivalent of the materials by other means," a judge can order discovery of the documents. Va. Sup. Ct. R. 4:1(b)(3).

4) **Opinion work product.** Opinion work product (mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation) is *always* privileged from discovery in Virginia. *Grove v. Thomasson*, 45 Va. Cir. 425 (Va. Cir. Ct. 1998).

5) **FOIA.** The Freedom of Information Act cannot be used to discover an attorney's work product. VA. CODE ANN. § 2.2-3705(A)(7), (8) (2008).

C) **Attorney-client privilege.** The private communications between a client and her attorney are privileged from discovery requests. This privilege exists for the benefit of the client in order to promote and protect the privacy of the professional relationship.

1) **Extent.** The attorney-client privilege extends to all information that the client confides to his lawyer while acting in his capacity as a client. The attorney-client privilege *may* be waived by the client. *Grant v. Harris*, 116 Va. 642 (Va. 1914).

D) **Other privileges.** In addition to recognizing the privilege against self-incrimination, the work product doctrine, and the attorney-client privilege, Virginia courts recognize other privileges.

1) **Mediation.** There is a statutory privilege of confidentiality that includes memoranda, documents, and communications relating to mediation. This privilege extends to all mediation materials and to all communications made to the mediator, any party, or any other person who is present at a mediation session. VA. CODE ANN. § 8.01-581.22 (2008).

2) **Physician-patient privilege.** In Virginia, there is a statute which protects communication between a person and her physician from disclosure. The statute provides, however, that no privilege exists if a medical condition is at issue in that lawsuit or if the judge deems the disclosure "necessary to the proper administration of justice." VA. CODE ANN. § 8.01-399 (2008).

a) **Waiver.** If a party who has been examined pursuant to VA. SUP. CT. R. 4:10 takes the deposition of the examining physician, he waives any physician-patient privilege. VA. SUP. CT. R. 4:10(c)(2) (2008).

E) **Priest-penitent.** The professional and confidential communications between a clergyman or religious advisor and a person being counseled are protected from disclosure in civil cases. VA. CODE ANN. § 8.01-400 (2008).

1) The priest-penitent privilege is a part of the common law of the Commonwealth with respect to criminal cases. *Commonwealth v. Cronin*, 2 Va. Cir. 488 (Va. Cir. Ct. 1855).

2) The priest-penitent privilege can only be invoked by the *priest*, not by the layman. *Seidman v. Fishburne-Hudgins*, 724 F.2d 413, 415-16 (4th Cir. 1984).

F) **Spousal privilege.** Communications between husbands and wives are privileged unless both spouses consent to the disclosure. This rule does not apply, however, where one spouse sues the other. VA. CODE ANN. § 8.01-398 (2008).

1) Private communications, which include "conduct, acts, signs and spoken or written words," are specifically prohibited from being divulged. *Menefee v. Commonwealth*, 189 Va. 900 (1949).

2) The confidentiality of the communication between spouses can be waived.

3) **Child abuse.** The privilege is abolished for cases involving child abuse. VA. CODE ANN. § 63.2-1519 (2008).

G) **News reporters.** Members of the press enjoy a qualified privilege against disclosure of confidential sources in public figure defamation cases where the reporter is a defendant. This privilege extends to documentary and electronically compiled evidence that is the product of the news gathering activities.

1) In balancing the interests of this qualified privilege, courts consider whether the information is relevant, whether it can be obtained by other means, and whether there is a compelling interest in the information. *Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1 (Vir. Cir. Ct 1994).

Requests for Admission

A) Requests for admission in Virginia are governed by VA. SUP. CT. R. 4:11 (2008).

B) **Purpose.** A request for admission is a suggested answer to an unasked interrogatory question that is to be confirmed by another party. Unlike an interrogatory, a request for admission is designed to identify material facts over which there is no dispute. *See id.*

C) **Factual.** Under Rule 4:11, a party may serve another party a written request for an admission to a specified fact related to the request. The rule allows a party to serve on another party a written request for an admission of the genuineness of a document described in, or attached to, the request. *See id.*

D) **Deemed admitted.** The party responding to a request has 21 days to respond or the information contained in the response is deemed admitted. If the matter requested to be

admitted is disputed, it must be expressly denied or objected to so that it will be clear from the beginning what must be proved at trial. *Id.*

E) **Effect of admission.** An admission under Rule 4:11 is similar to an admission in a pleading and a stipulation, so far as it is conclusively binding. An admission under Rule 4:11 may, upon motion, and leave of court, be withdrawn or amended. *Shaheen v. Matthews County*, 265 Va. 462, 472-75 (2003).

Scope of Discovery

A) Under Virginia practice, "any matter, not privileged, which is relevant to the subject matter involved in the pending action" is discoverable, if the information sought" appears reasonably calculated to lead to the discovery of admissible evidence." VA. SUP. CT. R. 4:1(b); *Turner v. Manning*, 216 Va. 245, 253 (1975).

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

Accident reconstruction is performed by expert witnesses who testify to the details of the incident. While occasionally admitted, Virginia courts are related to admit extensive accident reconstruction testimony. As noted by the Supreme Court of Virginia, such testimony is "rarely admissible in Virginia because it invades the province of the jury." *Brown v. Corbin*, 244 Va. 528, 531, 423 S.E.2d 176, 179 (1992).

A) The test to determine whether reconstruction evidence is proper is whether the testimony of the expert witness would "aid the trier of fact in understanding the evidence." *Keesee v. Donigan,* 259 Va. 157, 161, 524 S.E.2d 645, 647 (2000). The court will consider four areas to qualify the witness as an expert:

   1) the witness's qualifications;

   2) the sufficiency of the knowledge, skill, or experience upon which the expert bases his opinion considered in light of the evidence and physical facts of the case;

   3) the helpfulness of the testimony to the trier of fact; and

   4) the reliability of the factual foundation upon which the expert bases his opinion.

   Id.

B) An accident reconstruction expert, in either a civil or criminal case, may describe tire marks, skid marks, or cuts which he has observed on the pavement at or near the place of an automobile accident, as well as damage to the vehicles, but the inference to be drawn from such testimony is solely within the province of the jury. *Venable v. Stockner*, 200

Va. 900, 905, 108 S.E.2d 380, 383-84 (1959) (citing *Richardson v. Lovvorn*, 199 Va. 688, 693, 101 S.E.2d 511, 514 (1958)).

Biomechanical Engineering

Before testimony from a biomechanical engineer may be admitted at trial, it must meet certain fundamental requirements:

A) It must meet the standard requirements of all expert testimony. *Tarmac Mid-Atlantic, Inc. v. Smiley Block Co.*, 250 Va. 161, 166, 458 S.E.2d 462, 465-66 (1995).

B) Such testimony must consider all variables that bear upon the inferences to be deduced from the facts observed. *Id.*

C) Where tests are involved, there must be proof that the conditions existing at the time of the tests and at the time relevant to the facts at issue are substantially similar. *Id.*

D) *Spencer v. Commonwealth*, 240 Va. 78, 97, 393 S.E.2d 609, 621 (1990):

> When scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis; or unless it is so unreliable that the considerations requiring its exclusion have ripened into rules of law.

1) ***Frye* test**. Virginia has refused to adopt the "Frye test," enunciated in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Ct. App. 1923), making evidence of scientific tests admissible only when the technique involved is generally accepted by the scientific community in the particular field in which the test belongs. *O'Dell v. Commonwealth*, 234 Va. 672, 695, 364 S.E.2d 491, 504 (1988).

Collateral Source Rule

A) The collateral source rule prohibits the admission of evidence that an injured party's damages will be compensated by a source other than the person or entity which caused the injury. *See* RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979). Such collateral benefits do not reduce the defendant's tort liability, even though they reduce the plaintiff's loss.

B) **No damages reduction.** Under Virginia law, it is well-established that damages recovered by the plaintiff from the defendant are not decreased by the amount the plaintiff received from a collateral source. If "the plaintiff was himself responsible for the benefit, as by making insurance arrangements or as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself" and does not allow it to be applied as a credit against the debt owed to him by the defendant. *Acordia of Va. Ins. Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377, 387, 560 S.E.2d 246, 251 (2002).

C) **Loss of income.** The collateral source rule, when applied to an action seeking damages for loss of income due to personal injury or death, has been codified in VA. CODE ANN. § 8.01-35 (2008).

Convictions

Evidence of prior convictions is only admissible to impeach the credibility of a witness. The party who opposes the admission of the evidence bears the burden of proving it is more prejudicial than probative.

A) **Criminal.** Evidence of prior felony convictions and misdemeanors which involve moral turpitude, or the character of a witness for veracity, are admissible. *See Bell v. Commonwealth*, 167 Va. 526, 538, 189 S.E. 441, 446 (1937); *Burford v. Commonwealth*, 179 Va. 752, 765, 20 S.E.2d 509, 514 (1942). Misdemeanor crimes of moral turpitude include those crimes involving lying, cheating and stealing, making a false statement, and petit larceny.

B) **Traffic.** A traffic conviction is a misdemeanor. Evidence of prior misdemeanor convictions, not involving moral turpitude, are inadmissible in civil cases.

Day in the Life Videos

A) Admissibility of videotapes is governed by the same rules that are applicable to photographs. These videotapes are admissible even if the photographs of the same scene also have been admitted. *Payne v. Commonwealth*, 257 Va. 216, 509 S.E.2d 293 (1990).

B) **Accuracy.** It must be shown that the tape is an accurate representation of what it purports to depict. This may be established by the tape itself. *Brooks v. Commonwealth*, 15 Va. App. 407, 410-411, 424 S.E.2d 566, 569 (1992) (stating the an on-screen display of the passage of time in seconds, as well as the removal of tabs which allow alteration of the tape, helped ensure the tape was authentic).

C) A videotape may be employed for the taking of depositions and the preparation of "day in the life" presentations. 18 U. RICH L. REV. 751 (1984).

The Dead Man's Statute

A) The Dead Man's Statute protects both the deceased and the estates of persons laboring under disability or who are incapable of testifying. It prevents a surviving party from prevailing in suit through reliance on that party's own unsupported credibility. The statute states, in part, that in any action by or against a person who is incapable of testifying, "no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony." VA. CODE ANN. § 8.01-397 (2008).

B) The Dead Man's statute is inapplicable in instances where a plaintiff offers an adverse party's testimony in his case, and the testimony is not contradicted or inherently impossible. *Brown v. Metz*, 240 Va. 127, 128 (Va. 1990).

Expert Testimony

In 1993 the Virginia General Assembly enacted VA. CODE ANN. § 8.01-401.3 (2008). This section incorporates into Virginia law FED. R. EVID. 702, which addresses the admissibility of expert testimony, the qualifications of expert witnesses, and the manner in which expert testimony may be used.

B) **Test.** Generally, the test as to whether expert testimony is admissible is whether it will "assist the fact finder in understanding the evidence." *John v. Im*, 263 Va. 315, 559 S.E.2d 184 (1990). Such testimony, however, must meet certain fundamental requirements:

A) Such testimony cannot be "speculative or founded upon assumptions that have an insufficient factual basis." *Id.*

B) Such testimony is inadmissible if the expert has failed to consider all the variables that bear upon the inferences to be deduced from the facts observed. *Tittsworth v. Robinson*, 252 Va. 151, 475 S.E.2d 261 (1996).

C) **Qualifications.** An expert witness is "a witness qualified as an expert by knowledge, skill, experience, training, or education." VA. CODE ANN. § 8.01-401.3 (2008).

A) It is not necessary for the expert to be a practitioner in any part of a science, art, learned profession or highly technical operation. *See id.*

B) The law requisitions the expert in every field of human knowledge. It has been consistently held that all that is necessary is that the witness have sufficient expertise in the field, however that expertise was obtained. *Neblett v. Hunter*, 207 Va. 335, 150 S.E.2d 115 (1966).

D) An exception to the admissibility rule is that experts may not testify "on any subject on which the ordinary lay person of average intelligence is equally capable of reaching his or her own conclusion." *Brown v. Corbin*, 244 Va. 528, 530 (Va. 1992).

A) **Technical areas.** Even when the matter was a highly technical or complex one, if the precise point at issue was obvious even to those without special expertise, expert testimony was neither required nor permitted. *Nelson v. Commonwealth*, 235 Va. 228, 368 S.E.2d 239 (1988).

Medical Bills

A) A plaintiff's medical bills are generally admissible as damages evidence, regardless of whether or not they had been paid. Evidence of the existence of a collateral source or the receipt of benefits is inadmissible under the collateral source rule. Proof of medical expenses by the introduction of bills through the sole testimony of the plaintiff requires consideration of four major elements:

1) Authenticity of the medical statements;

2) Reasonableness in amount, considering the prevailing cost of such services;

3) Medical necessity in the opinion of experts qualified in the appropriate field to cure the plaintiff, ameliorate his injuries, or relieve his suffering; and

4) Whether the treatment was rendered necessary solely by a medical condition proximately resulting from the defendant's negligence, not by an unrelated or preexisting condition except to the extent such a condition was aggravated by the defendant's negligence.

McMunn v. Tatum, 237 Va. 558, 568, 379 S.E.2d 908, 913 (1989).

Offers of Proof

When an objection is sustained, counsel proffering the rejected evidence must take care that the record shows what the evidence would have been had it not been excluded. Unless the record reveals what the evidence would have been if it had been admitted, the appellate court has no means for determining if the evidence was material, or otherwise admissible and will not consider the issue on appeal.

A) **Requirements.** The offer of proof may consist of (1) a unilateral statement by counsel, if unchallenged, as to what the excluded testimony would have been; (2) a mutual stipulation by the parties as to what the testimony would have been; or (3) the witness may testify for the record in the absence of the jury. *See Bloom v. Commonwealth*, 238 Va. 295, 384 S.E.2d 785 (1989).

B) **Timing.** The proffer may be made either during the trial or after the verdict, since the purpose of the proffer is only to provide a record for consideration on appeal, and not to assist the trial judge in making evidentiary rulings during the trial. *Lowery v. Commonwealth*, 9 Va. App. 304, 387 S.E.2d 508 (1990).

C) **Substance.** Attorneys and the trial court must ensure that the proffers "contain all of the information necessary to resolve the issue at trial and to provide a sufficient record for appellate review." *Albert v. Albert*, 38 Va. App. 284, 563 S.E. 389 (2002).

Prior Accidents

A) Evidence of prior accidents generally is inadmissible unless the plaintiff shows the prior accidents occurred under substantially the same circumstances by the same or similar dangers or defects so as to impute notice to defendant. *Roll 'R' Way Rinks, Inc. v. Smith*, 218 Va. 321, 325, 237 S.E.2d 157, 160 (1977). As the Court held in *Roll 'R' Way Rinks, Inc.*:

> Evidence of other similar accidents or occurrences, when relevant, is admissible to show that the defendant had notice and actual knowledge of a defective condition; but it is well settled that evidence of prior accidents or occurrences is not admissible and can have no effect in establishing the defendant's knowledge of a danger unless the plaintiff shows

that those prior accidents or occurrences happened at substantially the same place and under substantially the same circumstances, and had been caused by the same or similar defects and dangers as those in issue, or by the acts of the same person.

Spoliation

Spoliation is the withholding, hiding, or destruction of evidence relevant to a legal proceeding.

A) **No duty to preserve.** In Virginia, the general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, or another special circumstance. When the duty to preserve evidence is breached, then the plaintiff has a cause of action in tort for destruction of evidence. *See Austin v. Consolidation Coal Co.*, 256 Va. 78, 82, 501 S.E.2d 161, 163 (1998).

B) The elements for a cause of action based on tortuous conduct are (1) "a legal obligation of a defendant to the plaintiff [to preserve evidence]"; (2) "a violation or breach of that duty or right;" and (3) "harm or damage to the plaintiff as a proximate consequence of the violation or breach." *Id.*

Subsequent Remedial Measures

Subsequent remedial measures usually refer to a change, repair or precaution taken after an event or injury has occurred. Issues involving such evidence are not admissible to prove prior negligence. *See Whitten* v. *McClelland,* 137 Va. 726, 120 S.E. 146 (1923).

A) **Condition.** If a defendant offers evidence that the thing claimed to cause the injury is in good condition, the plaintiff may rebut the assertion with evidence showing subsequent repairs were made. *Wheel Co. v. Chalkley*, 98 Va. 62, 34 S.E. 976 (1900).

Use of Photographs

A) **Admissibility.** Under Virginia law, photographs are admissible for two purposes:

1) To illustrate the testimony of a witness; and

2) As an "independent silent witness" of matters revealed by photograph. *Bailey v. Commonwealth*, 259 Va. 723, 529 S.E.2d 570 (2000).

B) **Foundation.** "The party offering the photographs must demonstrate their relevance and lay a foundation for their introduction into evidence." *Lucas v. HCMF Corp.*, 238 Va. 446, 384 S.E.2d 92 (1989). These photographs, even when found relevant, may be excluded if they are excessively prejudicial. *Id.*

1) Where the photograph has independent evidentiary value, rather than merely being an adjunct to testimonial evidence, the photograph may be admitted even where no witness is in a position to testify that the photograph accurately depicts a scene personally observed by the witness. In such cases, if it can be shown by evidence of extrinsic circumstances that the photograph is authentic, it is

admissible. *Brooks v. Commonwealth*, 15 Va. App. 407, 410, 424 S.E.2d 566, 569 (1992).

DAMAGES

Caps on Damages

In medical malpractice actions, damages are capped at $2,025,000.00. *See* VA. CODE ANN. § 8.01-581.15 (2008).

Calculation of Damages

Under Virginia law, a plaintiff may recover for: (1) any bodily injuries which he sustained and their effect on his health according to their degree and probable duration; (2) any physical pain and mental anguish he suffered in the past and any that he may be reasonably expected to suffer in the future; (3) any disfigurement or deformity and any associated humiliation or embarrassment; (4) any inconvenience caused in the past and any that may be reasonably expected to occur in the future; (5) any medical expenses incurred in the past and any that may be reasonably expected to occur in the future; (6) any earnings he lost because he was unable to work at his calling; (7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future; and (8) property damage. *Webster v. Heckler & Koch, Inc.*, 50 Va. Cir. 103 (Va. Cir. Ct. 1999). Virginia case law and statutes addressing these various elements of damages are set forth below.

A) **Loss of profits.** Damages for loss of profits is permitted but must be established with reasonable certainty. This does not require the plaintiff to prove an exact amount, but the plaintiff must present sufficient evidence to permit a jury to make a reasonable estimate of damages. *See Goldstein v. Kaestner*, 243 Va. 169, 173, 413 S.E.2d 347, 349 (1992).

B) **Loss of earnings.** With respect to lost earnings damages, a wage claim shall not be diminished because of reimbursement, nor shall reimbursement be admitted into evidence. *See* Va. Code § 8.01-35 (2008). A copy of wage or salary records or papers of employment may be admitted into evidence. *See id.* at § 8.01-413.1.

C) **Pain and suffering.** "The compensation one is entitled to receive for pain and suffering in a personal injury case cannot be measured with precision and ordinarily is a question of fact to be determined by [a jury]". *See Wangstrom v. Pope*, 207 Va. 761, 152 S.E.2d 21 (1967).

D) **Emotional distress.** Damages for emotional distress are permitted in Virginia. *See e.g., Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974) (stating that a cause of action will lie for emotional distress). In absence of physical harm or wanton and willful conduct, emotional distress damages are not recoverable. *See Cartensen v. Chrisland Corp.*, 247 Va. 433, 446 442 S.E.2d 660, 668 (1994). Thus, damages are not available for emotional distress unless there is physical injury or unless the emotional

distress flows from an intentional tort (*i.e.*, the intentional infliction of emotional distress).

E) **Disfigurement.** Damages for disfigurement is permitted in Virginia. *See Armstead v. James*, 220 Va. 171, 174, 257 S.E.2d 767, 769 (1979) (providing that "with evidence of a deformity a jury could have properly concluded, without being presented with direct evidence on the subject, that plaintiff's injuries were a source of humiliation and embarrassment to him . . . the trial court properly included such an element in the damage instruction").

F) **Future damages—pain and suffering.** A jury can be instructed that plaintiff's future pain and suffering could be taken into account as an element of damages where there is sufficient evidence to support it. *See Hailes v. Gonzales*, 207 Va. 612, 151 S.E.2d 388.

G) **Future Damages—lost income.** Damages for future lost wages are permitted in Virginia, but a reasonable degree of certainty is required. For example, evidence of past earnings may be required. *See Bulala v. Boyd*, 239 Va. 218, 234, 389 S.E.2d 670, 677 (1990) (economist's testimony of future lost income of infant plaintiff with no work history was too speculative, therefore stricken); *see also Asphalt Service Co. v. Thomas*, 198 Va. 490, 95 S.E.2d 141 (showing prior earnings history of plaintiff were properly admitted). Hypothetical questions about prospective loss wages of wages is improper. *See Exxon Corp. v. Fulgham*, 224 Va. 235, 294 S.E.2d 894 (1982); *see also* Va. Code § 8.01-37 (indicating an emancipated infant is entitled to recover lost wages).

H) **Loss of services.** In *Pugh v. Yearout*, deceased wife cooked, cleaned and took care of family home. There was testimony as to the value of these services, and this evidence was properly admitted to establish pecuniary loss by the dependents arising from of decedent's death. 212 Va. 591, 186 S.E.2d 58 (1972). However, no recovery was allowed by the husband for loss of consortium of his deceased wife. *See Floyd v. Miller*, 190 Va. 303, 57 S.E.2d 114 (1949).

Lost Opportunity

Plaintiffs may recover for lost opportunities provided they make a showing of reasonable certainty. *Murray v. Hadid*, 238 Va. 722, 734 (Va. 1989).

Mitigation

A plaintiff's available damages may be limited if it is shown that the plaintiff should have mitigated the damages. The defendant has the burden of proof as to mitigation of damages. *See generally, Lee v. Bell*, 237 Va. 626, 379 S.E.2d 464 (1989).

If a special benefit is conferred on the plaintiff by defendant's tortious act, then this evidence may be considered by a jury in mitigation of damages. *See id.; but see Swersky v. Higgins*, 194 Va. 983, S.E.2d 200 (1953) (showing that because the alleged corrective measure would have only had a temporary effect, the defendant was not entitled to an instruction based on plaintiff's failure to mitigate).

Punitive Damages

A) **Standard.** Punitive damages are damages not awarded in order to compensate the plaintiff, but in order to reform or deter the defendant and similar persons from pursuing the course of action that ultimately caused injury to the plaintiff. The amount of punitive damages awarded should bear some reasonable relationship to the actual damages sustained and to the measure of punishment required. *Little v. Cooke*, 274 Va. 697, 719 (2007).

1) **Other terms.** Other terms are used to describe types of damages. For example, damages are often spoken of as being "direct" or "consequential." These terms are more germane to the law of contracts than to the law of torts, which deals with damages in terms of proximate cause.

2) **Willful and wanton conduct.** Va. Code § 8.01-44.5 provides that punitive damages may be awarded if defendant's conduct is found to be so willful and wanton as to evidence a conscious disregard for rights of others. Expounding upon this provision, the Virginia Supreme Court has said that a plaintiff does not have to prove actual malice but rather must prove legal malice that is proof that the defendant acted intentionally, purposely, and without lawful justification. *See Advanced Marine Enters. v. PRC, Inc.*, 256 Va. 106, 118, 501 S.E.2d 148, 154 (1998). Punitive damages should only be awarded in the most egregious cases. *See Bowers v. Westvaco Corp.*, 244 Va. 139, 419 S.E.2d 661 (1992). Gross negligence alone is not enough. *See Wright v. Everett*, 197 Va. 608, 90 S.E.2d 855 (1956). Where no compensatory or nominal damages have been awarded, a court cannot award punitive damages. *See Valley Acceptance Corp. v. Glasby*, 230 Va. 422, 337 S.E.2d 291 (1985).

B) **Punitive Damage Cap.** Virginia limits punitive damages to $350,000.00. Va. Code § 8.01-38.1 (2008).

Recovery of Pre-and Post-Judgment Interest

A) **Prejudgment interest.** "Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered." *Upper Occoquan Sewage Auth. v. Blake Constr. Co.,* 275 Va. 41 (Va. 2008). The trier of fact has discretion to award prejudgment interest in an amount it sees fit. *Id.*

B) **Post-judgment interest.** Post-judgment interest is available for all tort actions. VA. CODE ANN. § 8.01-382 (2008). If the judge or contract does not impose an interest rate, VA. CODE ANN. § 6.1-330.54 dictates the interest rate.

Recovery of Attorneys' Fees

"It is well settled that as a general rule, in the absence of any contractual or statutory liability therefore, attorneys' fees and expenses incurred by the plaintiff in the litigation of his claim against the defendant, aside from the usual taxed court costs, are not recoverable as an item of damages." *See Hiss v. Friedberg*, 201 Va. 572, 577, 112 S.E.2d 871, 875 (1960). Ordinarily, expert testimony is necessary to assist the fact finder in awarding fees. *See generally, Tazewell Oil Co. v. United Virginia Bank*, 243 Va. 94, 413 S.E.2d 611 (1992).

Taxation of Costs

Generally, each party is responsible for paying its own costs. *Little v. Cooke*, 274 Va. 697, 721 (Va. 2007). Courts honor contractual provisions shifting responsibility for costs to the losing party. *West Square, L.L.C. v. Commun. Techs.*, 274 Va. 425 (Va. 2007).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.