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VIRGINIA
Tort Profile

The Virginia Tort Law Profile is not intended to provide specific legal advice or opinions, but rather to provide general information. If you need additional information regarding Virginia law, or in relation to a specific claim, please do not hesitate to call upon us. (February 2019)

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VIRGINIA TORT LAW PROFILE

I. OVERVIEW OF THE VIRGINIA COURTS SYSTEM

Information about the Virginia Judicial System may be found at the official web site which can be accessed at **www.courts.state.va.us.** There are various links there that will lead to information about each of the courts in Virginia, as well as general information about the judicial system as a whole.

A. Trial Courts

Throughout Virginia, each County and City has its own courts, with a few exceptions. Each jurisdiction has several layers of courts, as established by the Virginia Code. While there are central Rules of Procedure for all state courts, each local jurisdiction has its own "local rules of procedure" which can dramatically vary practice in that Court. Accordingly, familiarity with the local rules in a given jurisdiction can be as important as familiarity with the central Rules of Procedure. The local rules are usually available through the court clerk's office or the judges' chambers.

1. General District Court

The General District Court has exclusive jurisdiction over amounts in controversy of $4,499 or less. For amounts between $4,500 and $25,000, the General District Court has concurrent jurisdiction with the Circuit Court. These courts are often mistakenly called small claims court (see below). In the General District Court, jury trials are not available, there is no formal discovery, and the parties to a case have the right to appeal the judge's ruling for a trial *de novo* in the Circuit Court. The maximum possible verdict in General District Court is $25,000.

a. Small Claims Court

Small Claims Court has concurrent jurisdiction with the General District Court for claims not exceeding $5,000. Each small claims court has its own local rules of procedure which govern practice in that court. Generally speaking, parties may not be represented by counsel in small claims courts in Virginia.

2. Circuit Court

The Circuit Court is Virginia's initial "court of record." The Circuit Court has concurrent jurisdiction with the General District Court to hear matters involving claims between $4,500 and $25,000. For cases with claims in excess of $25,000 the Circuit Court has exclusive jurisdiction. For cases in which the Circuit Court has concurrent jurisdiction with the General District

Court, if tried to a jury, the jury shall consist of five (5) jurors. For cases in which the Circuit Court has exclusive jurisdiction, if tried to a jury, the jury shall consist of seven (7) jurors. Many Circuit Courts have their own sets of local rules governing practice and procedure in that Court.

Full discovery is allowed in Circuit Court, including thirty (30) interrogatories and unlimited requests for production of documents and thirty (30), excluding genuineness of documents, requests for admissions. The depositions of both parties and non-parties is allowed, in addition, the Courts allow the use of expert witnesses and independent medical examinations.

3. Reputation of Jurisdictions in Virginia

In general, Virginia juries and judges have a reputation for rather conservative verdicts and damage awards. There are some exceptions, including the Circuit Courts for the City of Richmond, the City of Portsmouth, City of Newport News, Roanoke, Petersburg, and Norfolk where relatively pro-plaintiff juries can be expected. The generally conservative bent of jury pools, coupled with that of the judges and the framework of the legal system in the Commonwealth, leads to a generally favorable prospect for a fair and reasonable result from most jury trials.

4. Arbitration / Mediation

Traditionally, Virginia courts have not required any formal alternative dispute resolution ("ADR"). Of course, the courts have always encouraged settlement of any and all disputes and issues before them. In all jurisdictions, the parties are free to engage in informal or private ADR where they desire to do so.

B. Appellate Courts

1. The Virginia Court of Appeals

The Virginia Court of Appeals was created by statute in 1985 to alleviate the crowded docket of the Supreme Court of Virginia. The Court of Appeals has, by statute, limited jurisdiction and can only hear appeals in the following types of cases: domestic relations, criminal (non-capital), cases from the Workers' Compensation Commission, certain other administrative agency decisions, and cases involving injunctions or findings of contempt.

2. The Supreme Court of Virginia.

The Supreme Court of Virginia is the highest court in the Commonwealth, and is the final stop for state court actions. Appeals to the Supreme Court

of Virginia can come directly from the Circuit Courts in some instances, and from the Court of Appeals in other instances, depending on the subject matter of a particular action.

There is no appeal of right in Virginia. A party must petition the Court to hear its appeal. The party files a petition for writ, (generally followed by a one-sided ten minute oral argument) and only if the Court accepts the writ, does an appeal go forward.

II. COMMENCEMENT OF ACTION

A. Venue

A civil action shall be brought in a county or independent city where the defendant resides or has his principal place of employment; wherever a corporate defendant maintains a resident agent; wherever the defendant regularly conducts business activity; or where the cause of action arose. If there is more than one defendant, and there is no single venue applicable to all defendants, all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose.

Venue is not jurisdictional and a venue defect may be cured upon a Motion to Transfer Venue to a more appropriate forum. By statute, if a matter is improperly brought in the wrong venue, the proper remedy is to transfer the matter to the appropriate court. *See* Va. Code § 8.01-264.

B. Complaints and Time for Filing an Answer

1. General District Court

Actions are begun in General District Court with the filing of a **Warrant in Debt**. This is a one page form which contains only a brief description of the cause of action (usually one sentence or less) and the amount sought. No Answer is initially required on behalf of the Defendant(s). A date for the "First Return Hearing" will appear on the Warrant in Debt. Usually, counsel will appear on the First Return date and set a date for trial. In some jurisdictions, the parties must be prepared to go forward to trial on the return date. If no trial is to be held on the return date, the defendant may ask the plaintiff to submit a **Bill of Particulars**, which is a supplemental pleading containing a concise statement of facts and information sufficient to inform the defendant of the nature of the claim. The plaintiff may ask the defendant to file an **Answer and Grounds of Defense**. That is the extent of pleading in the General District Court. While no formal discovery is permitted, the parties can issue subpoenas for documents and witnesses returnable on the date of trial.

Generally, proceedings in General District Court are less formal than those in Circuit Court. The same rules of evidence are applicable, however, with minor exceptions. Opening and closing statements are permitted. Medical records may be submitted, and are admissible without live testimony of the physician if the records are provided to the opposing party at least 10 days in advance of trial. Likewise, estimates for damage to automobiles may be introduced if accompanied by a sworn statement of the estimator regarding the authenticity of the estimate. Appeals to Circuit Court may be noted in writing, within 10 days of the adverse decision below, and perfected by posting a bond within 30 days.

2. Circuit Court

Civil actions are commenced by filing a **Complaint.** An **Answer** or other responsive pleading must be filed within 21 days. The initial pleading must specifically inform defendant when punitive damages are being sought. Absent this allegation, punitive damages may not be awarded.

A Demurrer is a type of pleading filed by the defendant alleging that the Complaint fails to state a claim upon which relief can be granted; i.e. that even if the facts are true as alleged, the Complaint does not set out a legal claim recognized under Virginia law. A Plea In Bar may also be filed prior to the Answer. Pleas usually refer to a specific issue which may make or break plaintiff's case, such as the statute of limitations, res judicata, collateral estoppel, accord and satisfaction, and the workers' compensation bar. Affirmative defenses such as the statute of limitations, contributory negligence and assumption of the risk must be raised specifically in the responsive pleading.

C. Service of Process

Particularly noteworthy for our interstate trucking companies, service of process can be perfected against a driver defendant through the Department of Motor Vehicles. The mere operation of a motor vehicle in the Commonwealth by a non-resident is consent that service of process may be made on the Commissioner of Department of Motor Vehicles. *See* Va. Code § 8.01-308.

III. COMMON CAUSES OF ACTION

A. Negligence

Negligence is defined as a failure to use ordinary care. Ordinary care is that which a "reasonable person" would use under the given circumstances. If this breach of ordinary care is found to be the proximate cause of damage to the plaintiff, the plaintiff may recover. In order to establish a case, a plaintiff must first show what the appropriate standard of care is; i.e., what the reasonable person should have done under the circumstances. In some complicated actions, such as medical

malpractice cases, this showing requires testimony from expert witnesses to explain to the jury and the court the appropriate standard of care required under the circumstances. Plaintiff must then show that the conduct of the defendant failed, without excuse, to meet the applicable standard.

The theory of Negligence *per se* suggests that the conduct of the defendant is negligent as a matter of course without the need for further inquiry. Plaintiffs often argue Negligence *per se* in conjunction with a statutory provision that allows persons injured by another's violation of any statute to recover for the same. *See* Va. Code § 8.01-221. Thus, plaintiffs argue that if the defendant's conduct violated any statutory obligation, that the defendant is guilty of Negligence *per se* and plaintiff should automatically recover. While the defendant may be found to be Negligent *per se*, the court will still require plaintiff to prove that such negligence is the proximate cause of plaintiff's injury.

Virginia recognizes the rule of contributory negligence. If a plaintiff is found to have contributed in any way to the plaintiff's injuries, the plaintiff may not recover. In theory, if the defendant's negligence is 99.99% of the total negligence comprising the incident, and the plaintiff's negligence is .01%, the plaintiff is not entitled to recovery. Defendants can also argue that a plaintiff's contributory negligence is Negligence *per se*, subject to the same requirements of showing proximate causation.

B. Imputed Liability

1. Employer

An employer may be held responsible for the torts of his/her employee under three distinct theories: respondeat superior; negligent hiring and retention; and negligent entrustment.

a. Respondeat Superior

Under this doctrine, an employer may be held vicariously liable for tortious acts proximately caused by an employee, as long as those acts are within the scope of employment. In order to prevail under this theory of recovery, a plaintiff must prove (1) a master and servant relationship between employer and employee; (2) that the employee was in the course of his employer's business at the time of the tort; and (3) that the employee was in the scope of his employment at the time of the tort. The scope of the employment is defined as "incidental" to an employer's business and done "in furtherance of" the employer's business. An employee who deviates far from his duties has taken himself out of the scope of the employment. However, an employee's willful or malicious act may still be within the scope of employment.

b. Negligent Hiring and Retention

In order to establish a claim for negligent hiring or retention, a plaintiff must prove that the employer of the individual who committed the allegedly tortious act negligently placed an unfit person in an employment situation involving unreasonable risks of harm to others. Virginia has also recognized negligent retention of an independent contractor.

c. Negligent Entrustment

An employer is subject to liability if it allows an employee to use a vehicle or other property when the employer knows or has reason to know that because of the employee's youth, inexperience, physical or mental disability, or otherwise, the employee may use the vehicle or property in a manner involving unreasonable risk of physical harm to himself and others.

d. Subcontractors

Employers, generally, are not liable for the acts of independent contractor. However, there are limits on this immunity. For instance, where one engages an independent contractor to do work that is inherently dangerous, work which is likely to cause injury to person or property, the employer may be subject to liability if the contractor fails to use due care. *See Ritter Corp. v. Rose,* 200 Va. 736, 107 S.E.2d 479 (1959). Likewise, if the work to be performed constitutes a nuisance, the employer cannot avoid liability simply because it engaged an independent contractor to perform the work. *See Finley, Inc. v. Waddell,* 207 Va. 602, 151 S.E.2d 347 (1966); *Norfolk & W. Ry. v. Johnson,* 207 Va. 980, 154 S.E.2d 134(1967).

2. Passengers

There is no unauthorized passenger defense in Virginia. The negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver. A guest has a right to maintain an action for damages against an owner or operator of an automobile in which he is riding. *See* Va. Code § 8.01-63.

3. Parental Liability for Torts of Children

Generally, a parent is not liable for the malicious, intentional acts of his/her minor, unemancipated child based upon their own independent negligence in failing to control the child. *See Bell v. Hudgins,* 232 Va. 491, 352 S.E.2d

332 (1987). There is a statutory exception to this, providing parental liability for damage to public or private property caused by a minor child for damages up to a limit of $2,500.00. *See* Va. Code § 8.01-43; 44.

Another key exception to this general rule is if a person gives or furnishes a motor vehicle to a minor who is too young to obtain a driver's license, such person shall be jointly and severally liable with the minor for any damages that may be caused by the minor's operation of that motor vehicle. *See* Va. Code § 8.01-64.

4. Family Purpose Doctrine

The family purpose doctrine is not applied in Virginia. The head of a family who maintains a car for general family use is not liable for the negligence of family members using the car. *See Hackley v. Robey*, 170 Va. 55, 195 S.E. 689 (1938).

5. Dram Shop

A vendor of alcoholic beverages is not liable for injuries sustained by a third party that result from the intoxication of the vendor's patron. *See Williamson v Old Brogue, Inc.*, 232 Va. 350, 350 S.E.2d 621 (1986). The basis of the rule is that individuals, drunk or sober, are responsible for their own torts and that, apart from statute, drinking the intoxicant, not furnishing it, is the proximate cause of the injury. The Alcoholic Beverage Control Act makes it a misdemeanor to sell alcoholic beverages to an intoxicated person but this does not mean that the statute creates a cause of action in favor of the plaintiff imposing civil liability on a seller of intoxicants licensed under the Act.

C. Infliction of Emotional Distress Claims

1. Negligent Infliction of Emotional Distress

Virginia does not recognize the tort of negligent infliction of emotional distress. The courts have held that where conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone. A plaintiff can recover for "mental anguish" as an element of their damages if they can assert an action for some other tort recognized by Virginia courts. *See Sanford v. Ware,* 191 Va. 43 60 S.E.2d 10 (1950).

2. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress applies under only most compelling circumstances, requiring a plaintiff to prove by clear and

convincing evidence that: (1) the wrongdoer's conduct is intentional or reckless; (2) the conduct is outrageous and intolerable; (3) the wrongful conduct and the emotional distress are causally connected; and (4) the resulting distress is severe. *See Russo v. White,* 241 Va. 23, 400 S.E.2d 160 (1990).

D. Wrongful Death

A wrongful death action is brought by certain relatives or beneficiaries of a decedent and seeks recovery for their loss as a result of the death of the decedent. The focus on this type of action is not on the damages incurred by the decedent, but on the loss incurred by the plaintiff or plaintiffs.

1. Plaintiffs and Beneficiaries

The Wrongful Death Statute specifies that any action brought under it should be brought by and in the name of the personal representative of the decedent. *See* Va. Code § 8.01-50. The Act also sets forth four distinct classes of beneficiaries who may be entitled to recover damages for a wrongful death, and addresses the distribution of the recovery among the beneficiaries. The jury may apportion the damages to the beneficiaries, and if it does not, then the Court must do so when it enters Judgment on the verdict. *See* Va. Code § 8.01-54.

The first class of plaintiffs include the surviving spouse, children of the deceased (minor or adult) or the children of the decedent's deceased children. If there are no beneficiaries who fit in the first class, then the second class includes parents, brother and sisters of the decedent and any other relative primarily dependent on the decedent for support or services and is a member of the same household. If the decedent leaves behind a surviving spouse and parents, but no children or grandchildren, then the third class of beneficiaries includes both the surviving spouse and the parent(s). If there are no survivors under the foregoing classes, then the fourth class includes certain other relatives of the decedent. *See* Va. Code § 8.01-53.

2. Defenses

Any defense which would have barred suit or recovery by the deceased also bars recovery by a wrongful death plaintiff, e.g., assumption of the risk or contributory negligence by the decedent.

3. Statute of Limitations Error! Bookmark not defined.

A wrongful death action must be filed within two years from the date of death. *See* Va. Code § 8.01-244.

4. Damages

Damages may include both pecuniary damages which are designed to compensate for the loss of economic benefits and non-economic (solatium damages). The Virginia's Wrongful Death Act specifically outlines five categories/descriptions of allowable damages. *See* Va. Code § 8.01-52. The categories are as follows:

a. Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;

b. Compensation for reasonably expected loss of income of the decedent and services, protection, care and assistance provided by the decedent;

c. Expenses for the care, treatment, hospitalization of the decedent incident to the injury resulting in death;

d. Reasonable funeral expenses; and

e. Punitive damages for willful or wanton conduct or such recklessness as evinces a conscious disregard for the safety of others.

5. Compromise

a. Prior to the Commencement of the Wrongful Death Action

No wrongful death action may be maintained where the decedent, after injury, entered into a compromise of claims and accepted satisfaction. *See* Va. Code § 8.01-51.

b. Compromises of Wrongful Death Action Must Be Court Approved

Any settlement of a wrongful death claim must be approved by a Circuit Court in Virginia. If the claim is settled without pending litigation, any interested party (the personal representative of the decedent, any potential defendant, or any interested insurance company) may petition the Court for approval of the settlement. *See* Va. Code § 8.01-55.

E. Survival Actions

Any claim recognized by Virginia law can survive the death of either the person entitled to assert such claim, or the person against whom such claim would be

asserted. In the event that a person asserts a personal injury claim and then dies as a result of the injury and while such claim is pending, the claim should be amended to be a wrongful death claim. *See* Va. Code § 8.01-25. In a survival action, damages are measured in terms of the harm to the victim; in a wrongful death action, damages are measured in terms of the harm to others from the loss of the victim. Damages recovered become assets of the estate. Any defense which would have barred suit or recovery by the deceased also bars recovery by survival action. In the event the party liable for the injury dies, punitive damages shall not be awarded.

F. Loss of Consortium

Loss of consortium means loss of society, affection, assistance, conjugal fellowship and loss or impairment of sexual relations. Virginia does not recognize claims for loss of consortium, and plaintiffs may not seek recovery for the same.

G. Premises Liability

Premises liability actions are a version of negligence involving the liability of the owner or occupant (herein collectively "owner") of real property for damage sustained by another person on the premises.

1. Duty Owed by Owner to Other Persons

The duty owed to injured individuals, by the owner, differs depending on which of the following four (4) categories is applicable.

a. Trespasser

A trespasser is a person who intentionally and without consent or privilege enters another's property. Generally, a property owner owes no duty to protect or safeguard an unknown trespasser from injury upon the premises. To a trespasser, an owner owes no duty to maintain his property in a safe condition. Likewise, there is no general duty on the part of an owner to prevent a trespass. *See Norfolk & P.R.R. v. Barker,* 221 Va. 924, 275 S.E.2d 613 (1981).

However, once the owner is aware of the trespasser's presence, some degree of duty arises on the part of the owner. Essentially, an owner must exercise ordinary care not to injure a known trespasser. *See Franconia Assocs. v. Clark,* 250 Va. 444, 463 S.E.2d 670 (1995).

Some of the legal standards are different when the trespasser is a child, but generally Virginia does not adhere to the "attractive nuisance" doctrine. That doctrine provides that children are unable

to control their impulses, and when a piece of property has some feature that children find interesting (pond, tower, etc.), that owner should anticipate that children may be drawn to that feature, and should take appropriate measures to protect such child trespassers. However, there are some cases in Virginia which carve out an exception to this general rule in cases where an owner maintains on his property an instrumentality of hidden or latent danger which is easily accessible to children and in a location where children are known to frequently gather. *See Washabaugh v. Northern Va. Constr. Co.*, 187 Va. 767, 48 S.E.2d 276 (1948).

b. Licensees

A licensee is described as a person who enters the land of another, with permission, and for his or her own purposes and benefits. Licensees include the following classes of persons: social guests, hunters, persons who are invited into one portion of the premises and proceed to enter other portions, trespassers whose presence is known and acquiesced-to by the owner.

Generally an owner has no duty to keep premises safe and suitable for the use of a licensee and is only liable for willful and wanton injury that may be done to a licensee. There are two exceptions to that general rule. The first is that an owner may be liable if a licensee is injured by the owner's "affirmative negligence" (i.e., activities, as opposed to a condition of the premises). The test in that case is one of reasonable care under the circumstances. The second exception essentially imposes on an owner a duty to exercise reasonable care in making safe or warning of a condition that poses an unreasonable risk and which a licensee would not know or have reason to know about.

c. Invitee

An invitee is described as a person who enters the land of another, with permission, pursuant to the invitation. Unlike trespassers and licensees, a property owner owes a duty to invitees to maintain the premises in a reasonably safe condition for the invitees visit. The duty does not extend beyond the invitation and those places to which the invitee is not reasonably expected to go. *See Tate v. Rice*, 227 Va. 341 315 S.E.2d 385 (1984). The owner owes an invitee the duty to exercise ordinary care to discover dangerous conditions and to prevent foreseeable injury to the invitee. *See Roll `R' Way Rinks v. Smith*, 218 Va. 321, 237 S.E.2d 157 (1977). Further, the owner can be held liable if he has actual or constructive knowledge of the defect. *See Culpepper v. Neff*, 204 Va. 800 134 S.E.2d 315 (1964).

> In the event that an invitee sustains injury, there can be no recovery from the owner unless the invitee can show that the owner was negligent, that such negligence proximately caused a foreseeable injury to the invitee, and that the defect was not open and obvious. It has been held that the failure of an invitee to observe and avoid a danger that was open and obvious constitutes contributory negligence on his or her part, thereby precluding any recovery from the owner. *See Snyder v. Ginn,* 202 Va. 8, 116 S.E.2d 31 (1960). This often causes plaintiffs difficulty in making out their case, as they have to show that the defect was easily-enough discoverable by the owner to show that the owner was negligent for not fixing it or warning the plaintiff, but the defect was not so easily identifiable by the plaintiff so as to constitute an open and obvious hazard.

2. Snow and Ice

An owner or occupant of property must remove snow and ice from his or her property within a reasonable time after the end of a storm. *See Mary Washington Hosp. v. Gibson,* 228 Va. 95, 319 S.E.2d 741 (1984).

3. Intervening Criminal Acts

Generally, an owner or landlord has no duty to prevent the criminal acts of third persons. *See Yuzefousky v. St. John's Woods Apartments, et al,* 261 Va. 97, 105, 540 S.E.2d 134 (2001) (landlord has no duty to tenant) and *Dudas v. Glenwood Golf Club, Inc.,* 261 Va. 133, 540, S.E.2d 129 (2001) (business invitor has no duty to business invitee), decided by the Virginia Supreme Court on the same day. These cases hold that a landlord does not owe a tenant a duty to warn or a duty to protect against the criminal acts of third parties. The Dudas court, citing *Wright v. Webb*, 234 Va. 527, 533, 362 S.E.2d 919, 922 (1987), held that ordinarily, the owner or possessor of land is under no duty to protect invitees from the criminal acts of third parties, unless a special relationship exists between the invitor and invitee. "Where the invitor and invitee are both innocent victims of criminals, it is unfair to place that burden on the invitor.

Moreover, *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 157, 207 S.E.2d 841 (1974) holds that while a landlord may owe duty to his tenants to exercise ordinary care and diligence to maintain in a reasonably safe condition areas over which he has control, a landlord is not an insurer of this tenant's safety, nor does he have a duty to police the area. *Id*. at 158 (adopting the Restatement of Torts, 2d. § 315). A special relationship must exist between the defendant and the plaintiff in order for some sort of duty to arise. Examples of special relationships recognized by this Supreme Court included employer-employee, common carrier-passenger, and innkeeper-

guest. *But see Thompson v. Skate America, Inc.* 261 Va. 121, 540 S.E.2d 123 (2001) (imposing liability because the skating rink had specific knowledge of the criminal actor and his intent).

H. Products Liability

Products liability actions are of two basic types: defective products and inherently dangerous products. Inherently dangerous products are those which were manufactured without defect, and yet pose a danger to person or property due to the design of the product. Products liability claims essentially argue that the defendant was negligent or breached applicable warranties.

A manufacturer must exercise ordinary care to produce products which are reasonably safe for their intended use. *See Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217 S.E.2d 863 (1975). If there is a an available alternative design which would make the product safer with minimal increase in the cost of design or production, then the manufacturer may be held liable for failing to implement such design. *See Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974). As with other causes of action, the plaintiff must also show that his or her damages were proximately caused by the conduct of the defendant. *See Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979).

Where a plaintiff is alleging that a product was unreasonably dangerous, he or she must show that the product was unreasonably dangerous for its intended use or other reasonably foreseeable uses, and that unreasonably dangerous condition existed when the goods left the defendant's hands (in order to rule out subsequent modification or damage as the cause of injury). *See Logan v. Montgomery Ward*, 216 Va. 425 219 S.E.2d 685 (1975). Similarly, liability on a claim for failure to warn is established when a manufacturer: knows or has reason to know that the product is or is likely to be dangerous for the use for which it is supplied; has no reason to believe that those for whose use the product is supplied will realize is dangerous condition; and fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous. *See Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979). Lack of privity is not a defense if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to be affected by the goods. *See* Va. Code § 8.2 -318.

I. Strict Liability

Strict liability is not generally recognized in Virginia, except for "intrinsically dangerous and ultra hazardous activities" (such as blasting). *See Harris v. T.I., Inc.*, 243 Va. 63, 413 S.E.2d 605 (1992)*; M.W. Worley Construction Co. v. Hungerford, Inc.*, 211 Va. 377, 210 S.E.2d 161 (1971).

J. Medical Malpractice

Actions for medical negligence are governed by statute in Virginia. Any party may petition the Supreme Court of Virginia to convene a medical review panel to extensively review the facts involved in the case. Once a panel is requested, the court case is stayed until the panel concludes its efforts, which must be completed within six months. *See* Va. Code § 8.01-581.4. The medical review panel shall consist of two attorneys and two medical professionals. *See* Va. Code § 8.01-581.3.

Medical Malpractice recoveries are subject to a cap which varies depending upon the date of the occurrence. For actions where the occurrence took place between August 1, 1999 and July 1, 2031, the maximum recovery for any given occurrence is as follows:

August 1, 1999, through June 30, 2000	$1.50 million
July 1, 2000, through June 30, 2001	$1.55 million
July 1, 2001, through June 30, 2002	$1.60 million
July 1, 2002, through June 30, 2003	$1.65 million
July 1, 2003, through June 30, 2004	$1.70 million
July 1, 2004, through June 30, 2005	$1.75 million
July 1, 2005, through June 30, 2006	$1.80 million
July 1, 2006, through June 30, 2007	$1.85 million
July 1, 2007, through June 30, 2008	$1.925 million
July 1, 2008, through June 30, 2012	$2.00 million
July 1, 2012, through June 30, 2013	$2.05 million
July 1, 2013, through June 30, 2014	$2.10 million
July 1, 2014, through June 30, 2015	$2.15 million
July 1, 2015, through June 30, 2016	$2.20 million
July 1, 2016, through June 30, 2017	$2.25 million
July 1, 2017, through June 30, 2018	$2.30 million
July 1, 2018, through June 30, 2019	$2.35 million
July 1, 2019, through June 30, 2020	$2.40 million
July 1, 2020, through June 30, 2021	$2.45 million
July 1, 2021, through June 30, 2022	$2.50 million
July 1, 2022, through June 30, 2023	$2.55 million
July 1, 2023, through June 30, 2024	$2.60 million
July 1, 2024, through June 30, 2025	$2.65 million
July 1, 2025, through June 30, 2026	$2.70 million

July 1, 2026, through June 30, 2027	$2.75 million
July 1, 2027, through June 30, 2028	$2.80 million
July 1, 2028, through June 30, 2029	$2.85 million
July 1, 2029, through June 30, 2030	$2.90 million
July 1, 2030, through June 30, 2031	$2.95 million

In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after July 1, 2031, which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed $3 million. *See* Va. Code § 8.01-581.15.

IV. DEFENSES TO CLAIMS

A. Limitations

1. Generally

For causes of action alleging personal injury, the statute of limitations is 2 years. *See* Va. Code § 8.01-243 (A). On property damage claims, the statute is 5 years. *See* Va. Code § 8.01-243 (B). On oral or unwritten contracts the statute is 3 years. *See* Va. Code § 8.01-246 (4), and on written contracts, the statute is 5 years. *See* Va. Code § 8.01-246 (2). As the statute of limitations is an "affirmative defense," it must be raised in the first responsive pleading or it is considered waived.

2. Medical Malpractice

The statute of limitations for filing actions for medical malpractice is 2 years from the date the cause of action accrues. However, so as not to interfere with the patient-physician relationship, a cause of action accrues on the date of the last treatment. If a medical malpractice claim arises from a foreign object left in the body of the plaintiff, the statute extends to one year from the date the object is discovered or reasonably should have been discovered. See Va. Code § 8.01-243 (C)(1). The statute provides one year from the date of discovery in cases of fraud, concealment, or intentional misrepresentation.

In 2016, Va. Code Sec. 8.01-243 which governs the statute of limitations for injury to persons or property, and extension of actions for malpractice against health care providers was amended to specifically address certain types of cancer. Section 8.01-243 (C)(3) was amended to state that, in cases involving a negligent failure to diagnose a malignant tumor, cancer, or an

intracranial, intraspinal, or spinal schwannoma, the statute of limitations was extended for a period of one year from the date the diagnosis of the malignant tumor, cancer, or an intracranial, intraspinal, or spinal schwannoma is communicated to the patient by a health care provider. The caveat being that the health care provider's underlying act or omission was on or after July 1, 2008, in the case of a malignant tumor or cancer, or on or after July 1, 2016, in the case of an intracranial, intraspinal, or spinal schwannoma. Should the claim under § 8.01-243 (C)(3) for the negligent failure to diagnose a malignant tumor or cancer, arise from the health care provider's underlying act or omission which occurred prior to July 1, 2008, that claim shall be governed by the statute of limitations that existed prior to July 1, 2008. Should the claim under § 8.01-243(C)(3) for the negligent failure to diagnose an intracranial, intraspinal, or spinal schwannoma, arise from the health care provider's underlying act or omission which occurred prior to July 1, 2016, that claim shall be governed by the statute of limitations that existed prior to July 1, 2016. It should be noted that the amendment to section 8.01-243(C)(3) does not operate to extend the statute of limitations period beyond 10 years from the date the cause of action accrues, unless the person was under a disability, as provided for under Va. Code Section 8.01-229.

3. Wrongful Death

The statute of limitations for a wrongful death action is 2 years from the date of death. See Va. Code § 8.01-244 (B). If the wrongful death occurred in another state, that state's wrongful death act governs. If a specific statute of limitations is included in the foreign state's act, that limitation period will apply in the Virginia proceeding.

4. Fraud

The limitations period for an action for fraud in Virginia is 2 years from the date of the fraud or misrepresentation. See Va. Code § 8.01-243 (A). A cause of action for fraud accrues when such fraud is discovered or should have been discovered by the exercise of due diligence. § 8.01-249 (l).

5. Limitations on Enforcing Judgments

Any efforts to enforce or execute a civil judgment rendered in Virginia must be initiated within twenty years from the date the judgment was entered. However, this period of time may be renewed for an additional twenty year period by motion to the Circuit Court. See Va. Code § 8.01-251. Actions to enforce foreign judgments must be authenticated in accordance with the act of Congress or the statutes of the Commonwealth may be filed in the office of the clerk of any circuit court of any city or county of the Commonwealth upon payment of the fee. The clerk is required to treat the

foreign judgment in the same manner as a judgment of the circuit court of any city or county of the Commonwealth. See Va. Code § 8.01-465.2

6. Claims Against the Government

Virginia has a statutory scheme that controls tort actions brought against the State or a local government in the state. The Virginia Tort Claims Act, Va. Code §§ 8.01-1951 et seq. Generally speaking, the limitations periods for bringing an action against the government require a claimant to give detailed notice to certain governmental officials before any legal action may be commenced. The time period for giving such notice is one year for tort claims *(See* Va. Code § 8.01-195.7) and five years for certain contact claims *(*See Va. Code § 8.01-255*).*

7. Tolling the Statute of Limitations

The running of the limitations period for any given action may be tolled, or suspended, in certain special circumstances. These include claims where: the claimant is a minor; the claimant is incapacitated during the limitations period; the claimant is incarcerated; or the death of either the claimant or the defendant. See Va. Code § 8.01-229.

B. Contributory Negligence

Virginia is a "contributory negligence" jurisdiction. Therefore, a lack of reasonable care on the part of the plaintiff, however slight, even one percent, is a complete bar to recovery if such negligence contributes to the plaintiff's injury. In other words, a negligent plaintiff may recover only if his negligence was a remote rather than a proximate cause of the accident. See *Williams v. Harrison*, 255 Va. 272, 497 S.E.2d 467 (1998). The evidence must show that the plaintiff's conduct did not conform to the standard of what a reasonable person of like age, intelligence, and experience would do under the circumstances for his own safety and protection. The burden is on the defendant to prove plaintiff's contributory negligence by a preponderance of evidence standard. However, in reality, a jury will not likely find a contributory negligence bar unless the plaintiff's negligence is substantial. A child under the age of 7 is conclusively presumed to be incapable of contributory negligence. The presumption may be rebutted for children between the ages of 7 and 14 (burden falls to defendant), and children over the age of 14 are rebuttably presumed to be capable of contributory negligence (burden falls to plaintiff).

If the plaintiff has plead reckless or willful and wanton conduct, that is a defense to contributory negligence. This can arise, for example, if a defendant was contemplating admitting liability but raising contributory negligence. The plaintiff could still get all "bad facts" before the jury on the issue of willful and wanton conduct. Contributory negligence is also not a defense to an intentional tort.

C. Assumption of the Risk

A plaintiff is completely barred from recovery if he or she assumes the risk of injury when, with full knowledge and understanding of an obvious danger, he or she voluntarily exposes himself or herself to that risk of injury. The doctrine of assumption of risk requires showing: (1) that the nature and extent of the risk are fully appreciated; and (2) that the risk is voluntarily incurred. There are certain risks which anyone of adult age must be able to appreciate, including the danger of slipping on ice, falling through unguarded openings, and lifting heavy objects.

Assumption of the risk is a corollary doctrine to the contributory negligence defense, and the distinctions between the two generally depend upon the conduct and intent of the plaintiff. If the plaintiff acts with an understanding of the risks he or she faces and the likelihood of injury, and takes care in the execution of his or her plan of action, they are more likely to have assumed the risk. Alternatively, if they act without careful contemplation of their proposed actions and the consequences of the same, or without care in the execution of their plan, then he or she is likely to be contributorily negligent.

D. Immunity

1. Interspousal Immunity

The common-law defense of interspousal immunity in tort was abolished for any cause of action arising on or after July 1, 1981. See Va. Code § 8.01-220.1.

2. Parent-Child Immunity

The rule of parent-child immunity is not applicable in automobile accident litigation, nor does it apply to intentional, willful, or malicious torts.

3. Shopkeeper Immunity

By statute, a merchant or its employees may detain a suspected shoplifter, provided the merchant or its agents (1) have probable cause to believe that the suspect has committed the crime of shoplifting or concealing merchandise with the intent to shoplift the same; and (2) the detention of the suspect does not last longer than one hour. See Va. Code § 18.2-105.1. Case law also requires that the conduct of the merchant and its agents be reasonable in general, and not excessive under the circumstances.

4. Charitable Immunity / Good Samaritan Doctrine

Virginia statute affords immunity from civil liability to individuals and entities in certain specified situations. For example, an individual who, in good faith, renders emergency care or assistance without compensation to any ill or injured person at the scene of an accident shall not be liable for civil damages resulting from such care. See Va. Code § 8.01-225. A teacher is not liable for acts or omissions which take place in the course of their employment and in good faith, unless they commit gross negligence or intentional wrongdoing. See Va. Code § 8.01-220.1:2. A church cannot be held liable for torts that occur during the course of its charitable works and a member of a religious congregation shall not be liable for the actions of another member, leader, or officer of the church merely because of one's status as a member of the congregation. See Va. Code § 8.01-220.1:3.

5. Indemnification and Hold Harmless Clauses

In 2007, the Virginia Supreme Court in *W.R. Hall vs. Hampton Roads Sanitation District*, 273 Va. 350, 641 S.E.2d 472 and *Estes Express Lines, Inc. et. al vs. Chopper Express, Inc.*, 273 Va. 358, 641 S.E.2d 476, both decided on the same day, held that indemnification clauses which applied to personal injuries for which a party was not at fault and losses for personal injuries for which a party's own negligence caused the injury were valid.

E. Last Clear Chance

The last clear chance doctrine is effectively a plaintiff's defense to a defendant's claim of contributory negligence; but, the doctrine does not supersede contributory negligence. If the opportunity to avoid the accident is as available to a plaintiff as to a defendant, then the plaintiff's negligence is a proximate cause rather than a remote cause, and bars recovery. See *Williams v. Harrison*, 255 Va. 272, 497 S.E.2d 467 (1998). The doctrine only applies to two types of plaintiffs, the "helpless plaintiff" (physically unable to avoid peril) and the "inattentive plaintiff" (physically able but unaware of peril). Contributory negligence does not bar the "helpless" plaintiff's claim if the defendant saw or should have seen the helpless plaintiff. Contributory negligence does not bar the "inattentive" plaintiff's claim if the defendant actually saw the inattentive plaintiff. In either case, liability is further predicated upon a showing that the defendant realized or ought to have realized the peril of the helpless or inattentive plaintiff in time to avert the accident by use of reasonable care. See *Williams v. Harrison*, 255 Va. 272, 497 S.E.2d 467 (1998).

F. Misuse of Product

There cannot be a recovery against a manufacturer in a product liability case for breach of an implied warranty when there has been an unforeseen misuse of the

article. See *Layne-Atlantic Co. v Koppers Co.*, 214 Va. 467, 201 S.E.2d 609 *(1974).* While a manufacturer may not be held liable for every misuse of its product, it may be held liable for a **foreseeable** misuse of an unreasonably dangerous product.

G. Exclusivity of Workers' Compensation Claim

Workers' compensation is the sole remedy for an injured worker as against his or her employer or co-employee for injuries sustained in the workplace. See Va. Code § 65.2-307. The workers' compensation bar is a special plea which must be raised either before the Answer is filed or concurrently with the Answer.

H. Non-permissive Use

An owner of a motor vehicle is not liable for damages caused by another person using such vehicle, provided that the owner did not give permission for such use. See Va. Code § 8.01-65.

I. Plaintiff's Failure to Mitigate His or Her Damages

If a plaintiff brings an action for damages, some of which could have been avoided if the plaintiff had taken reasonable measures to avoid the same, then the plaintiff shall not recover for such damages. See *Haywood v. Massie,* 188 Va. 176, 49 S.E.2d 281 (1948).

J. The Economic Loss Rule

The law of torts offers redress for losses suffered by a breach of duty imposed by law to protect the broad interests of social policy, but it is not designed to compensate for losses resulting from a breach of duties assumed only by agreement. See *Sensenbrenner v. Rust, Orling & Neale*, 236 Va. 419, 375 S.E.2d 55 (1988). Accordingly, the rule applies when a plaintiff's losses are really nothing more than disappointed economic expectations. This doctrine most typically arises when a party alleges negligence in a case that is truly a breach of contract case in order to try to avoid certain procedural problems and damages limitations inherent in contract law.

V. DISCOVERY

A. In the General District Court

Discovery in the General District Court is very limited, in keeping with the general idea that General District Courts allow parties to resolve disputes as quickly and inexpensively as possible. Specifically, the Rules of Court allow for the subpoena of witnesses and certain documents, (See Rule 7A:12 of the Rules of the Supreme Court of Virginia), such as the production of a written agreement when the lawsuit

is based upon such agreement, (See Rule 7B:5 of the Rules of the Supreme Court of Virginia).

B. In the Circuit Court

1. Scope of Discovery

The Rules allow much more discovery in Circuit Court actions but they are not modeled on the Federal Rules as are many other states. In general, parties may obtain discovery of any matter relevant to the subject matter of any party's claim or defense in the action, regardless of whether or not the discovery sought will be admissible as evidence at the trial of the matter. The benchmark is "reasonably calculated to lead to the discovery of admissible evidence." See Rule 4:1 (b) of the Rules of the Supreme Court of Virginia.

a. Insurance Agreements

A party may obtain discovery of the existence and contents of any insurance agreement. See Rule 4:1 (b)(2) of the Rules of the Supreme Court of Virginia. An application for insurance, however, is expressly not considered part of an insurance agreement. The Rule also specifies that discoverability of insurance agreements does not mean that any such material will be admissible in evidence at trial.

b. Trial Preparation Materials

A party may obtain discovery of any statements that party has made relevant to the litigation, i.e. any recorded or written statements. Therefore, a plaintiff's recorded statement, taken by an insurance company or a third party adjuster, is always discoverable and must be produced if requested. See Rule 4:1 (b)(3) of the Rules of the Supreme Court of Virginia. Interestingly, a person not a party to the action may also obtain discovery of any such statements they have made.

A party may, in certain circumstances, obtain discovery of certain materials prepared by an adverse party in anticipation of trial. In order to obtain such discovery, the party seeking such discovery must show the Court that they would be unable to obtain such material through any other means, and that without such material, they would not be able to adequately prepare their case. See Rule 4:1 (b)(3) of the Rules of the Supreme Court of Virginia. A party may not obtain discovery of the mental impressions, conclusions, opinions, or legal theories of an attorney or representative of the party from whom discovery is so ordered.

c. Expert Witness Discovery

Discovery of information pertaining to a party's expert witness(es) is limited to certain items expressly allowed by Rule, unless a party seeking additional discovery can show good cause for additional discovery. See Rule 4:1 (b)(4) of the Rules of the Supreme Court of Virginia. Items generally discoverable include the identity of the witness, the subject matter upon which the witness is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for such opinions. However, if the category is not set forth in the Rule, and the party seeking its discovery cannot show a strong good cause, the discovery request will be denied. Additionally, a party can depose another party's testifying expert witness(es).

d. Asserting Privilege to Avoid Disclosure

Whenever a party asserts any privilege or other protection from disclosing material or information, they must expressly state their basis for doing so, and describe the material or information withheld in such a manner as to enable the requesting party, and the court if necessary, to assess whether the privilege or other protection was properly applicable to the material or information withheld. See Rule 4:1 (b)(6) of the Rules of the Supreme Court of Virginia. This explanation is often referred to as a "Privilege Log".

e. Protective Orders

A party may move the Court for a Protective Order when the discovery sought imposes an annoyance, embarrassment, oppression, or undue burden or expense. See Rule 4:1 (c) of the Rules of the Supreme Court of Virginia. The Court may, at its discretion, afford the following types of relief: that the discovery not be had; that the discovery only be had on certain terms or conditions; that the discovery only be had using a different discovery tool than that originally sought (i.e., Interrogatories instead of a deposition); that the scope of discovery be limited so as to not allow inquiry into certain matters; that the discovery only be allowed with certain specified persons present; that discovery be sealed, and thereafter only opened by the Court; that certain trade secret information not be disclosed, or only disclosed in a certain manner; or that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened only as directed by the Court.

2. Specific Discovery Methods

Practice may vary somewhat in a particular jurisdiction in accordance with local rules, but the Rules of the Supreme Court of Virginia provide for the following types of discovery in civil actions:

a. Depositions

A party may take the deposition of any person. *See* Rule 4:5 of the Rules of the Supreme Court of Virginia. Such deposition shall take place within the jurisdiction where the action is pending, except in the case of non-party witnesses who may be deposed in any adjacent jurisdiction where such witness lives or works. By agreement of the parties, however, a deposition may be taken anywhere else. Leave of Court must be obtained if a plaintiff wishes to take any depositions before the deadline for the Defendant(s) to file their Answer(s). The Notice of Deposition shall afford reasonable notice of the time and place of the deposition. A party may also notice the deposition of a corporate party, partnership, association, or governmental entity**.** See Rule 4:5 (b)(6) of the Rules of the Supreme Court of Virginia.

There is no limit on the number of witness depositions that may be taken in a matter, although the Court has discretion to do so if the need arises. See Rule 4:6A of the Rules of the Supreme Court of Virginia. Deposition testimony may not be relied upon to support a Motion for Summary Judgment unless all parties agree. See Va. Code §8.01-420. If a party can show that it was not afforded reasonable time to obtain counsel to represent him or her at such deposition, the deposition may not be used against that party. See Rule 4:5 (b)(2) of the Rules of the Supreme Court of Virginia.

b. Interrogatories

Any party may serve Interrogatories on any other party. See Rule 4:8 of the Rules of the Supreme Court of Virginia. Interrogatories must be answered under oath within 21 days of the date they were served. If objections are not served timely, they are forever waived. However, if the Interrogatories were served by facsimile, then the responding party may add 1 day to that time period. Likewise, if they were served by mail, the responding party may add 3 days to that time period. See Rule 1:7 of the Rules of the Supreme Court of Virginia. Where the answer to an Interrogatory is contained in the business records of the responding party, that party may choose to make such records available in lieu of formally answering such

Interrogatory. No more than thirty Interrogatories, including sub-parts, may be served without leave of Court.

c. Requests for Production and Things and Entry on Land for Inspection

Any party may serve Requests for Production or for Entry Upon Land for Inspection on any other party without leave of Court. They must be answered within 21 days. See Rule 4:9 of the Rules of the Supreme Court of Virginia. The requesting party is allowed to make copies of any documents properly requested. Requests for Production must be answered in writing within 21 days of service. As with Interrogatories, the responding party may add 1 day if service was affected by facsimile, and 3 days if service was by mail. The party producing documents has the option of producing them as they are kept in the normal course of business or organizing them to correspond to the requests for production.

With respect to non-party witnesses, a party may issue a *Subpoena Duces Tecum* seeking the production of certain specified documents. If they were served by mail, the responding party may add 3 days to that time period. See Rule 4:9 (c) of the Rules of the Supreme Court of Virginia. Licensed attorneys in Virginia may now issue *Subpoena Duces Tecum* pursuant to Rule 4:9 (c) of the Rules of the Supreme Court of Virginia.

d. Independent Medical Examinations

When the mental or physical condition of a party is at issue in a case, the Court may Order that party to submit to an examination arranged by, and at the expense of, the party requesting such examination. See Rule 4:10 of the Rules of the Supreme Court of Virginia. While generally it is preferred that such medical examiners be licensed in Virginia, the Court has discretion, for good cause, to compel an examination by a medical professional licensed elsewhere. The examining physician **shall** issue a detailed written report that **shall** be given to the party and filed with the Court, and which shall set forth the findings of the examiner, the results of all tests made, and all diagnoses and conclusions.

e. Requests for Admissions

A party may serve on any other party up to thirty (30) written requests for the admission of certain facts or the application of law to fact, including the genuineness of documents described in the request. However, the requests pertaining to genuineness of

documents shall not count against the total thirty (30) request for admissions allowed under the rules. See Rule 4:11 of the Rules of the Supreme Court of Virginia. Such admissions are limited to the pending case only, and may not be used in other actions. Each request shall be separately set forth, and shall be deemed admitted unless denied within 21 days. The responding party cannot object or refuse to answer a request for admission solely because the requested admission presents a genuine issue for trial. If a party does not have sufficient information to respond, they must affirm in their response that they have made a reasonable inquiry and the information known or readily obtainable is insufficient to enable that person to admit or deny, and are unable to answer the request.

If a party fails to admit certain facts, or the genuineness of certain documents, and does not make an objection which is sustained by the Court, they face certain sanctions if the requesting party is later otherwise able to establish the truth of the facts or the genuineness of the documents involved. In this circumstance, the Court shall award the requesting party the reasonable expenses it incurred in making that proof, including reasonable attorneys' fees, unless the Court finds that the refusal to admit was based on a good faith belief that the non-admitting party would prevail, that the admission sought was of no substantial importance, or the existence of other circumstances that would make an award of expenses unjust. See Rule 4:12 of the Rules of the Supreme Court of Virginia.

Since, by rule, deposition testimony may not form the basis for a Motion for Summary Judgment (See Rule 3:18 of the Rules of the Supreme Court of Virginia), Requests for Admissions are often used after a deposition to establish certain facts identified during a deposition sufficient to form a basis for a Motion for Summary Judgment.

IV. Motions Practice

A. Generally

The procedures which govern the filing and arguing of motions vary depending on local rules. The procedures vary from very informal jurisdictions, which schedule motions for hearing through a phone call to the judge's secretary, to very formal jurisdictions, which have local rules which establish colored-paper cover sheets, briefing deadlines and page limits, as well as filing deadlines and argument procedures.

B. Motions Hearings

Essentially, all jurisdictions in Virginia fall into one of two categories with respect to their procedures for scheduling argument on motions. Some jurisdictions require counsel for the parties to contact the judges' chambers and specifically schedule each hearing on motions filed in a case. Other jurisdictions regularly conduct "motions day" dockets (i.e. every Friday morning) at which all motions that can be heard within a particular time limitation (usually 30 minutes) shall be argued. Motions which will require longer than that period of time have to be scheduled through the judges' chambers. When counsel files a motion, they must assess the jurisdiction's method of scheduling argument, as well as any notice requirements that the jurisdiction imposes (i.e., some jurisdictions require that the adverse party must receive notice of the hearing at least 7 days prior to the hearing date).

C. Motion to Dismiss

Traditionally, Virginia Courts did not recognize Motions to Dismiss. See *Aetna Cas. & Sur. Co. v. Fireguard Corp.,* 249 Va. 209 455 S.E.2d 229 (1995)("This Court's rules governing actions at law do not provide for a 'Motion to Dismiss'"). This was changed in 1997 when the General Assembly amended Rule 3:18 of the Supreme Court of Virginia, governing pleadings. The new Rule, as amended, specifically states that Motions to Dismiss are to be considered pleadings. While it was originally intended that Motions to Dismiss would cover arguments such as those set forth in Rule 12(b) of the Fed. R. of Civil Procedure (lack of jurisdiction, improper venue, improper service of process, failure to state a claim, failure to join a proper party), practice has seen Motions to Dismiss filed in a growing set of circumstances (sovereign immunity, statute of frauds, accord and satisfaction, release, and collateral estoppel.)

D. Summary Judgment

Depositions may <u>not</u> be used to support motions for summary judgment, unless it is agreed upon by both sides. *See* Va. Code §8.01-420. This makes Summary Judgment harder to obtain, as it must be based on either extrinsic evidence or a party's answers to written discovery. Since answers to written discovery are prepared by counsel, it is unusual for them to provide solid support for Summary Judgment by an opposing party. Often, when information comes to light during a deposition that would be useful to a Motion for Summary Judgment, the moving party will follow the deposition with written discovery (Interrogatories, Requests for Admissions, etc.) in an effort to construct a proper foundation for a Motion for Summary Judgment.

VII. VIRGINIA'S NON-SUIT STATUTE

Virginia has a unique statue, called the non-suit statute, Defense counsel sometimes call this the "mulligan" or "do-over" statute. A plaintiff has an automatic, one-time, right to voluntarily dismiss his action and automatically re-file it within six months or within the remainder of the statutory period, whichever is longer. This means that any time, up until

a verdict is returned, or a judge renders his decision, a plaintiff may elect to non-suit his case, and he has an automatic right to re-file it. This allows plaintiff's to cure what could be a fatal defect. See Va. Code § 8.01-380.

VIII. DAMAGES

A. Legal Measure of Damages

1. Compensatory Damages

a. Generally

Compensatory damages are allowed for injuries actually received. Damages must be established with reasonable certainty. Damages in a personal injury action can include:

1. any bodily injuries 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 probably will be caused 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;

8. any property damage he sustained.

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b. Future Losses

Damages for future losses may be recovered, but those losses must be proven by the plaintiff with particularity. These can include future lost wages or income, lost business opportunities, future medical treatment, and future pain and suffering. If such losses, or the amount of damage to be suffered therefrom, require any speculation, no recovery will be allowed. Future economic damages are well-suited for expert testimony, as they must be determined with certainty and then discounted to present-day value for purposes of calculating the award to be fixed. It is the defendant's burden to present evidence on reduction to present value.

c. Property Damage

Generally, the measure of recovery for damage to property is the fair market value of the property. Where that property was damaged, but not destroyed, the proper measure of damages is the difference in fair market value of the property immediately before and immediately after the incident. This is known as the diminution of value, and is often awarded in addition to the cost of repairing the damage.

By statute, in the event of a motor vehicle accident, a plaintiff is also entitled to recover reasonable costs actually incurred for the hiring of a comparable substitute vehicle for a reasonable amount of time. Further, any carrier which refuses to provide a rental vehicle without a good faith basis for doing so is subject to a penalty of $500 or double the actual rental costs, whichever amount is greater. See Va. Code § 8.01-66.

d. Mitigation of Damages

A plaintiff has a duty to mitigate their damages.

2. Consequential Damages

Consequential damages are most commonly involved in contract actions, where the claimant alleges some damages which are not directly caused by the actions complained of, but result from some of the consequences or results of such actions. Such damages are only recoverable where they were within the contemplation of the parties at the time the contract was entered into. See *Richmond Med. Supply Co., Inc. v. Clifton*, 235 Va. 584 369 S.E.2d 407(1988).

3. Punitive Damages

Punitive damages must be specifically requested by a Plaintiff and they are capped at $350,000. See *Va Code* § 8.01-38.1. That is, the total punitive award against all defendants shall not exceed $350,000. An award of treble damages is not subject to the same limitation.

Punitive damages, also known as exemplary damages, are available for willful, wanton and malicious conduct or conduct so reckless as to evince a conscious disregard for others' rights. See *Bowers v. Westvaco Corp.*, 244 Va. 139, 419 S.E.2d 66` (1992). The purpose of punitive damages is to punish the wrongdoer and warn others. Accordingly, punitive damages may not be awarded against a defendant who is merely vicariously liable for the acts of another, unless they authorized or ratified the conduct of the wrongdoer. See *Freeman v. Sproles,* 204 Va. 353, 131 S.E.2d 410 (1963).

Evidence of a party's net worth is admissible because it is material to this purpose and is relevant to a determination of the size of the award and whether it is so large as to be destructive.

The Virginia Code specifies that it is not against public policy to obtain insurance coverage for punitive damages that may be awarded for injury or death caused by negligence, including willful and wanton conduct. See Va. Code § 38.2-227. This excludes, however, coverage for punitive damages awarded as a result of intentional acts.

For cases involving a drunk driver, the driver's conduct will be deemed sufficiently willful or wanton as to show a conscious disregard for the rights of others when the evidence proves that: (i) when the incident causing the injury or death occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume or 0.15 grams or more per 210 liters of breath, or the defendant unreasonably refused to submit to a blood alcohol test; (ii) at the time the defendant began, or during the time he was, drinking alcohol, he knew that he was going to operate a motor vehicle, engine or train; and (iii) the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff. See Va. Code § 8.01-44.5.

B. Attorney's Fees

1. Generally

Generally, attorney's fees are not recoverable against another party unless they are permitted by contract or statute and must be specifically included in the pleadings for a party to be allowed to recover attorney fees. In tort litigation, each party is required to pay their own attorney's fees regardless of the result of the litigation. Caution should be taken however with certain

actions maintained under federal and state laws pertaining to discrimination as those particular statutes may have provisions which permit plaintiffs to seek attorney's fees.

2. Actions Against Insurers

When the insured must resort to litigation to enforce a liability carrier's contractual duty to provide coverage for his/her potential liability to third persons, the insured is entitled to recovery of attorney's fees and expenses incurred in that litigation provided that the court finds that the insurer did not act in good faith in its denial or coverage or refusal to make payment. See Va. Code § 38.2-209.

3. Various Statutory Provisions for Attorney's Fees.

Certain causes of action provided for by statute also specifically allow for the recovery of attorney's fees by the prevailing party. The most common of these is the Virginia Consumer Protection Act. See Va. Code § 59.1-204. Other causes of action include antitrust suits, antimonopoly suits, the Home Solicitation Sales Act, and certain actions involving misrepresentations in sales.

4. Procedural Issues

Rule 4:12 of the Rules of the Supreme Court of Virginia provides that in matters of discovery disputes, if a Motion to Compel discovery is granted, the Court **shall** award the prevailing party its costs, including reasonable attorney's fees, unless the court finds that the losing party was substantially justified in refusing to provide the discovery at issue.

C. Interest

The Virginia Code provides that a verdict or judgment may, but does not necessarily have to, provide for pre-judgment interest from such time that the verdict or judgment shall determine. If the verdict or judgment is silent on the issue of interest, then by function of the statute interest will come due beginning on the date the judgment is entered at the prevailing legal interest rate, currently 6 % per annum. See Va. Code §§ 8.01-382 and 6.1-330.54

D. Costs

While the court has some discretion with regard to the award of costs, it is generally observed that the prevailing party shall recover its costs from the non-prevailing party. See Va. Code § 17.1-601. However, these are limited to filing fees, subpoena costs, copies and the like, and specifically do not include expert witness fees.

E. Limitation on Damages

Virginia does not have a general cap on damages like some other states, including Maryland. The only caps on damages in Virginia are the cap on Medical Malpractice judgments and the cap on punitive damages discussed elsewhere herein.

IX. INSURANCE COVERAGE IN VIRGINIA

A. Automobile Liability Limits

Liability insurance is "required" in Virginia. Proof of insurance coverage is required before one can register a motor vehicle. Alternatively, a person can certify to the D.M.V. that they do not have liability insurance, and will be required to pay to the D.M.V. a fee of $500. This fee does not create or purchase any insurance coverage for the individual or their motor vehicles, but merely allows the registration of the motor vehicle without insurance coverage. Operating an uninsured motor vehicle without payment of this $500 fee is a class 3 misdemeanor. See Va. Code 46.2-707.

By statute, any insurance policy, issued to a resident of Virginia or issued in Virginia, providing insurance coverage for liability arising from the use of an automobile shall provide coverage for at least $25,000 to any single plaintiff for personal injury, $50,000 total coverage for any single incident, and coverage for property damage in the amount of $20,000. See Va. Code 46.2-472.

B. No Personal Injury Protection Coverage in Virginia

In Virginia, there is no PIP (personal injury protection) coverage as there is in other jurisdictions. However, Virginia has a similar type of coverage for the payment of medical expenses incurred by the occupants of a vehicle, commonly referred to as MEDPAY. This is elective coverage that pays regardless of fault. It is not uncommon for an injured party to have his or her health insurance pay the medical bills when they are incurred, and then obtain payment from both their own Medical Payments policy and the liability policy of the tortfeasor, effectively netting a triple-recovery. Generally, none of these policies are entitled to recover from the other or from the injured person for the multiple payments.

C. Uninsured / Underinsured Motorist Coverage

Any policy for automobile coverage must include coverage for damages caused to the insured by uninsured motorists in at least statutory minimum liability limits (25K/50K/20K). See Va. Code § 38.2-2206. A vehicle is underinsured if its liability coverage is less than the insurance coverage maintained by any person injured as a result of the operation of the vehicle. In some circumstances, the

underinsured motorist coverage of several policies can be stacked together to afford greater relief to qualified injured persons.

Any action filed by an injured plaintiff who intends to seek recovery of any Uninsured or Underinsured motorist coverage he or she may have must serve the lawsuit on his or her insurance carrier in addition to any other defendants. See Va. Code 38.2-2206 (F).

Virginia made changes to its underinsured motorist law which took effect on July 1, 2015. The major impact of the changes to the underinsured motorist law, is that the burden of defending a suit is shifted to the underinsured insurance carrier, once the liability carrier pays its policy limits to the injured party and end most subrogation rights formerly enjoyed by a UIM carrier against the tortfeasor.

The changes to Va. Code § 38.2-2206 include amendments to Sections K and L, and the addition of Sections M and N. The new provisions only apply to policies written after January 1, 2016. The changes and additions are as follows:

Section K: A liability carrier that has settled with an underinsured plaintiff/claimant for policy limits must obtain a release from the plaintiff/claimant. After obtaining this release and paying its limits, the liability carrier has no further duties to its insured, including the duty to defend the insured in any action.

Section L: The settlement must be in writing, include a specific written notice to the underinsured motorist, and be signed not only by the plaintiff/claimant but also by the underinsured motorist. The requirement for the signature of the underinsured motorist is waived if the liability carrier sends a copy of the required notice to the underinsured motorist by certified mail, return receipt requested.

Section M: Lawsuits brought by a plaintiff/claimant after the liability carrier has paid its limits shall name the liability carrier's released insured as the defendant, and any action already pending against such a defendant shall continue. If the lawsuit results in a verdict against the defendant, judgment shall be entered in the name of "Released Defendant," and shall be enforceable against the UIM carrier, up to the amount of its limits in excess of the liability coverage.

Section N: Payments made to the personal representative of a person under a disability or of an estate in a wrongful death action are not required to be court approved. Unapproved settlement payments must be made to the attorney for the personal representative to be held in trust, or paid into court.

D. Bad Faith

Virginia Code § 38.2-209 allows an insured to recover costs and reasonable attorneys' fees in a declaratory judgment action brought by the insured against the

insurer, if the trial court determines that the insurer was not acting in good faith when it denied coverage or refused payment under the policy. There can also be a bad faith claim when the carrier unjustifiably refuses to settle a claim within policy limits.

E. Reservation of Rights

The Virginia Code requires a liability insurer to provide notice to the claimant or claimant's counsel when a breach of the terms or conditions of the policy may give rise to a contractual defense on the part of the insurer. Such notice shall be given within 45 days of the discovery of the breach or the claim, whichever is later. See Va. Code 38.2-2226. Whenever, on account of such a breach, an insurer enters into a non-waiver agreement with its insured, or sends a reservation of rights letter, the claimant or claimant's attorney must be notified of such action, again within 45 days of the action or the claim, whichever comes later. Failure to provide notice to claimant or claimant's counsel will result in waiver of the insurer's defense based on such breach by the insured.

Notwithstanding the 45 day period discussed above, notice of any reservations of rights shall be delivered to claimant or claimant's counsel no less than 30 days prior to trial. Failure to do so will result in waiver of the insurer's defense based on such breach by the insured. For good cause, the court can shorten this 30 day period upon motion by the insurer.

F. Punitive Damages

The Virginia Code specifies that it is not against public policy to obtain insurance coverage for punitive damages that may be awarded for injury or death caused by negligence, including willful and wanton conduct. See Va. Code § 38.2-227. This excludes, however, coverage for punitive damages awarded as a result of intentional acts.

G. Cancellation or Refusal to Renew Insurance

The Virginia Code provides several strictly-enforced guidelines for the cancellation or the refusal to renew (hereafter collectively "cancellation") a policy of insurance that has been properly issued and which has become effective. Failure to adhere to these guidelines may result in a judicial determination that coverage is required, even though the would-be insured has failed to pay the required premiums due to the purported cancellation. While an exhaustive treatment of the requirements and procedure for cancellation of insurance is beyond the scope of this document, below are some common pitfalls to be avoided in order to effectively mount the defense of cancellation of insurance.

1. Warning Concerning Cancellation

Any application for insurance must include, on or attached to the front page, the following warning, in bold-faced type: "**READ YOUR POLICY. THE POLICY OF INSURANCE FOR WHICH THIS APPLICATION IS BEING MADE, IF ISSUED, MAY BE CANCELLED WITHOUT CAUSE AT THE OPTION OF THE INSURER AT ANY TIME IN THE FIRST 60 DAYS DURING WHICH IT IS IN EFFECT AND AT ANY TIME THEREAFTER FOR REASONS STATED IN THE POLICY.**" See Va. Code § 38.2-2210. Further, any application that requires an applicant to disclose prior cancellations shall also permit the insured to offer a full explanation of the same.

2. Grounds for Cancellation

No insurer may cancel a policy except for one or more of the following reasons:

a. the named insured (or any other operator who resides in the household or operates a motor vehicle under the policy) has had his drivers' license suspended or revoked during the policy period (or in the case of a renewal, the policy period or the 90 days immediately preceding the last effective date);

b. failure to pay the premium;

c. the insured changes his address to outside the state of Virginia, and the vehicle will be principally garaged in the new state of residence.

See Va. Code § 38.2-2212 (D).

3. Notices of Cancellation

In order to be valid, a notice of cancellation must be in writing, delivered or mailed to the named insured at the address shown in the policy. See Va. Code § 38.2-2212 (E). Furthermore, the notice of cancellation must be sent by registered or certified mail. This includes notice to any lienholders, if the policy requires such notice, unless the insurer and the lienholder agree to some form of electronic notice. The insurer must retain a copy of the notice and the registered/certified mail receipts for at least one year from the date of cancellation. See Va. Code § 38.2-2208.

The notice of cancellation must include the following information:

a. the effective date of the cancellation, which must be at least 45 days after mailing or delivering the notice of cancellation, unless the

cancellation is for non-payment of the premium, in which case the cancellation must be at least 15 days from the mailing or delivery of the notice;

b. the specific reason for the cancellation;

c. The notices regarding recorded personal information contained in an insurer's files pertaining to the insured (*See* Va. Code § 38.2-608), the insured's right to correct certain information maintained by the insurer (See Va. Code § 38.2-609), and the basis for adverse underwriting decisions (See Va. Code § 38.2-610). None of these notifications are required, however, if the cancellation is for non-payment of premiums;

d. the following notice regarding the insured's right to seek review by the insurance commissioner: "IMPORTANT NOTICE. Within fifteen days of receiving this notice, you or your attorney may request in writing that the Commissioner of Insurance review this action to determine whether the insurer has complied with Virginia laws in canceling or non-renewing your policy. If this insurer has failed to comply with the cancellation or nonrenewal laws, the Commissioner may require that your policy be reinstated. However, the Commissioner is prohibited from making underwriting judgments. If this insurer has complied with the cancellation or nonrenewal laws, the Commissioner does not have the authority to overturn this action"; and

e. the availability of alternative insurance through other carriers or the Virginia Automobile Insurance Plan; See Va. Code § 38.2-2212 (E).

H. Subrogation

Generally, an insurer is subrogated to claims of its insured against another once the insurer has indemnified the loss of the insured. An insurer paying MEDPAY has no right of subrogation and no claim against any other person or insurer to recover any benefits pay by reason of the alleged fault of such other person in causing or contributing to the accident.

The insurer had the right to file suit for its subrogated interest in its own name or in the name of its insured.

Effective January 1, 2016, Va. Code Ann. Section 8.01-66.1.1 went into effect and governs uninsured/underinsured motorist claims. Under the statue, any insurer paying underinsured benefits to an insured, by way of settlement or judgement, will not have a right of subrogation against any individual or entity who settled with the underinsured motorist benefits insurer's insured pursuant to subsection K of § 38.2-2206 (see Uninsured/Underinsured Motorist Coverage above), unless the underinsured motorist failed to reasonably cooperate in the

defense of any lawsuit brought against him. The underinsured motorist will be presumed to have failed to reasonably cooperate if he fails or refuses:

1. to attend his deposition or trial if subpoenaed to appear at least 21 days in advance of either event;

2. to assist in responding to written discovery;
3. to meet with defense counsel for a reasonable period of time after reasonable notice, by phone or in person, within 21 days of being served with any lawsuit and again prior to his deposition and trial; or

4. to notify counsel for the underinsured motorist benefits insurer of any change in address.

However, the underinsured motorist may rebut the presumption that he failed to reasonably cooperate. If the court finds that the underinsured motorist's failure to cooperate was not unreasonable or that the underinsured motorist otherwise acted in good faith in attempting to comply with his duty to reasonably cooperate with the UIM insurer, the UIM insurer will not regain its right of subrogation. It should be noted that the statute also provides that if the court determines that the underinsured motorist satisfied his duty to cooperate, or that his failure to do so was not unreasonable, then the court may award him his costs in defending such subrogation action, including reasonable attorney fees.

Under the statute, the underinsured motorist benefits insurer who is seeking the cooperation of the underinsured motorist will be responsible for paying the reasonable costs and expenses related to obtaining such cooperation, including any travel costs if the underinsured motorist resides more than 100 miles from the location of his deposition or trial. The Court may consider travel costs when determining whether the underinsured motorist's failure to cooperate was unreasonable or not.

X. MISCELLANEOUS ISSUES

A. Collateral Source Rule

In a tort action, there is no set-off for monies obtained through collateral sources such as health insurance, medical payment coverage, workers' compensation payments or co-defendant settlements. See Va. Code § 8.01-35; § 38.2-2211 (dealing with automobile medical payment insurance policies). Further, the fact that any such payments were received by the plaintiff may not be admitted into evidence.

Payments received from the defendant, or the defendant's agents, are generally not considered to be collateral, and therefore may be applied to reduce the liability of a defendant to a claimant.

B. Joint and Several Liability

In Virginia, joint and several liability is imposed on joint tortfeasors. All defendants are jointly and severally responsible for the entire judgment. See *Freeman v. Sproles,* 204 Va. 353, 131 S.E.2d 410 (1963); See also Va. Code §8.01-443.

C. Workers' Compensation Lien

The workers' compensation carrier has a statutory lien against any recovery made by the injured worker against a third party. If the worker settles a third party claim without notification or approval of the employer and/or workers' compensation insurer, the injured worker forfeits his right to additional workers' compensation benefits.

D. Offer of Judgment

Offers of Judgment are not recognized in Virginia.

E. *Res Judicata* and Collateral Estoppel

The doctrine of *res judicata* provides that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action or legal issue, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit. Collateral estoppel involves preclusion of a claim when the material issue has been litigated and decided in a prior suit, though that prior suit may have involved a completely different cause of action.

F. Seat Belt Statute

The Virginia Code provides that failure to use seat belts does <u>not</u> establish negligence *per se*, and that evidence of non-use of seatbelts shall not be considered in mitigation of damages nor is that fact admissible. See Va. Code § 46.2-1094. This is despite the fact that front seat passengers over the age of 16 are required by law to wear seatbelts, and that violation of a statute is ordinarily considered negligence per se in Virginia.

G. Releases

Unless the document specifically provides for release of all tortfeasors, a release discharges the obligations of only the party to the release. However, any claim against joint tortfeasors is reduced by the amount of the release. The released party shall not owe, and may not seek, contribution to or from any other tortfeasor or

defendant whose liability is not extinguished in the release. See Va. Code § 8.01-35.1.

H. Absent Practitioner Doctrine

It is well settled in Virginia, that a medical expert cannot testify that another medical care expert (expert or treating physician) either agrees with him or disagrees with him; unless that expert is available for cross-examination. An expert may say he reviewed the report for Dr. A; but he cannot testify that Dr. A agrees with him. This doctrine arose out of a dental malpractice where one expert tried to testify that another doctor agreed the plaintiff was a malingerer. See *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989).

I. Internet Resources

In addition to the web-site for the Virginia Judicial System, provided on page 1 of this profile, there are several other web pages that provide useful information.

1. The Virginia Code

The Code of Virginia can be found on-line at http://leg1.state.va.us/000/src.htm. This website offers searches for particular text, as well as a linked table of contents.

2. The Virginia Administrative Code

A companion to the Code of Virginia, the Administrative Code contains all of the agency regulations promulgated by state agencies, including the Insurance regulations (Chapter 14). The site is very similar to the Code of Virginia site described above. http://leg1.state.va.us/000/srr.htm.

3. The Virginia Bureau of Insurance

The homepage for the Bureau of Insurance can be accessed at http://www.state.va.us/scc/division/boi/webpages/homepageb.htm.

4. The Virginia Workers' Compensation Commission

The web-site for the Workers' Compensation Commission can be accessed at http://www.vwc.state.va.us/.

5. Virginia Circuit Court Clerks

A useful collection of information about contact information, hours, judges, and general information about procedures in the various circuit courts in

Virginia, with links to each jurisdiction's own website (where applicable). **www.courts.state.va.us.**

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