

**REVIEW OF CIVIL CASES  
DECIDED BY THE  
VIRGINIA SUPREME COURT**

June 2009 to April 2010

Wilford Taylor, Jr.  
Judge, 8<sup>th</sup> Judicial Circuit

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## **Administrative Law**

### ***Environmental Law***

Frederick County Bus. Park v. Virginia D.E.Q.  
278 Va. 207 (2009)

The Court of Appeals correctly held that the decision by the Department of Environmental Quality to classify a site as a materials recovery facility was neither arbitrary nor capricious.

A company planned to collect construction waste in containers and take them to a proposed facility where marketable materials would be extracted and processed for recycling or reuse. The Department of Environmental Quality (DEQ) advised the company that it would be treated as a materials recovery facility and therefore subject to permitting and other requirements of the Virginia Solid Waste Management Regulations. The company asserted that it was an “exempt” recycling center and appealed the ruling to the circuit court. The circuit court held that deference was owed to the DEQ’s determination, the DEQ’s record provided sufficient support, and the DEQ’s determination was not arbitrary or capricious. The Court of Appeals affirmed.

The Supreme Court affirmed. The Court noted that the determinations of regulatory agencies are granted substantial deference. The Court also held that there was a legitimate basis to conclude that the facility was a materials recovery facility and not a recycling center.

### ***Health Care Regulation***

Virginia Dept. of Health v. NRV Real Estate  
278 Va. 181 (2009)

The Court of Appeals erred in its reversal of the circuit court judgment below as it was not arbitrary and capricious for the Virginia Department of Health to cease to follow its prior, incorrect statutory interpretations in favor of the correct application of law.

A hospital which operated 21 nursing facility beds certified for Medicaid reimbursement gave notice to the Virginia Department of Health that it intended to cease operations as an intermediate-care nursing home. Four days before the effective date of the hospital’s cessation of operations, it entered an agreement to relocate the 21 nursing home beds to another facility owned by NRV Real Estate, LLC (NRV). Eleven months later, NRV filed an application with the Department for a Certificate of Public Need (COPN) to approve the relocation. The Department declined the application on the ground that such relocation would constitute an unauthorized addition to the supply of nursing home beds in the planning district, citing Code § 32.1-102.3:2(A). NRV appealed the decision to the circuit court, which granted a motion by the Department to dismiss. The Court of Appeals reversed the judgment of the circuit court because it deemed the Department’s denial arbitrary and capricious.

The Supreme Court reversed the decision of the Court of Appeals and entered final judgment. The Court held that the Department of Health was correct in its interpretation of Code § 32.1-102.3:2 and any prior erroneous agency interpretation that would have favored NRV was immaterial.

## **Anti-Discrimination Laws**

### ***Americans with Disabilities Act***

#### **Winborne v. Virginia State Lottery**

278 Va. 142 (2009)

The circuit court erred in entering judgment in favor of the respondents because the Virginia Lottery offers a program, service, or activity within the meaning of the VDA and the ADA, but the circuit court did not err in denying the petitioners' motion for partial summary judgment.

Petitioners, individuals who used wheelchairs, filed suit against the Virginia Lottery and its director, seeking a declaratory judgment and injunctive relief for alleged violations of the Americans with Disabilities Act (ADA) and the Virginians with Disabilities Act (VDA) because certain lottery retailers were inaccessible to disabled persons. The circuit court granted the respondents' motion for partial summary judgment, finding that the Virginia Lottery did not offer a program, service, or activity within the meaning of the ADA or VDA and, moreover, could not be responsible for the violations of individual retail sites. The circuit court also denied the petitioners' motion for partial summary judgment.

The Supreme Court reversed in part, affirmed in part, and remanded. The Court held that the Virginia Lottery's activities fell within the scope of the ADA and the VDA. The Court concluded that the ADA and the VDA impose obligations of accessibility on the Virginia Lottery separate from, and in addition to, the individual retailers. In affirming the circuit court's denial of the petitioners' motion for partial summary judgment, the Court held that there was no legal requirement dictating how the Virginia Lottery should fulfill such obligations.

## **Appellate Practice**

### ***Practice and Procedure***

#### **Shapiro v. Younkin**

279 Va. 256 (2010)

The trial judge erred in dismissing the plaintiff's appeal with prejudice based on the plaintiff's failure to obtain the services of a court reporter as required under local rules and procedures.

In a landlord-tenant dispute, plaintiff, appearing pro se, appealed to the circuit court from the dismissal of his case in general district court. The circuit judge dismissed the appeal with prejudice based on failure to comply with a requirement in that judicial circuit that a court reporter be present at the trial of all civil cases, and that a party appealing from the general district court arrange to have a court reporter present. The trial judge denied the request of a waiver of this requirement. On the day of trial, after his case was dismissed, plaintiff submitted a proposed written statement of facts in lieu of a transcript for purposes of appeal to the Supreme Court. The circuit court refused to certify his facts because of inaccuracies.

The Supreme Court reversed and remanded. The Court held that, although circuit courts are allowed to prescribe their own rules, those rules cannot abridge the substantive rights of litigants. The Court further found that the trial judge improperly refused to sign the written statement of facts submitted by the plaintiff. If the trial judge believed there to be inaccuracies in the proposed statement, the judge

was required to correct it or certify the manner in which it was incorrect or, if unable to so formulate, order a new trial.

## **Attorneys and Judges**

### ***Canons of Judicial Conduct***

#### **Judicial Inquiry & Review Comm'n v. Taylor**

278 Va. 699 (2009)

In a complaint filed by the Judicial Inquiry and Review Commission against a juvenile and domestic relations district court judge, the judge's actions in thwarting an appeal of the denial of bond violated the law and public confidence in the integrity and impartiality of the judiciary was diminished.

The Judicial Inquiry and Review Commission issued a notice establishing formal charges against a juvenile and domestic relations district court judge, alleging misconduct or conduct prejudicial to the proper administration of justice. In the underlying case, the judge found that a juvenile represented a risk of harm to the community, and the judge remanded him to custody, denying his request for immediate sentencing so that an appeal could be noted. The judge then denied the juvenile's written motion for bond and release pending the sentencing hearing by an order that stated it was "an interlocutory, non-appealable order." The juvenile sought reconsideration of the denial of bond and the judge, in turn, denied reconsideration. When the juvenile attempted to appeal the case, the clerk of the court refused to process the appeal, based on information from the judge. After mandamus proceedings in circuit court led to the release of the juvenile, the proceeding before the Commission was commenced. The Commission determined that the judge violated Canons 1, 2A, and 3B(2), and that the charges were well-founded and of sufficient gravity to censure the judge based on a finding by clear and convincing evidence that the judge had acted intentionally to thwart the juvenile's attempt to appeal from the order that denied bail.

The Supreme Court censured the judge, finding that the judge's actions "rose to a level beyond a mistake of law when she affirmatively blocked [the juvenile's] attempted appeal to the circuit court," and holding that she engaged in "conduct prejudicial to the proper administration of justice."

### ***Discipline Procedures***

#### **Green v. Virginia State Bar**

278 Va. 162 (2009)

The Court affirmed an attorney suspension order of the Virginia State Bar Disciplinary Board because, *inter alia*, the attorney could not demonstrate that he was prejudiced by delay in the receipt of his notice of certification and the Bar did not err in finding violations of the Rules by clear and convincing evidence.

A subcommittee of a District Committee of the Virginia State Bar considered disciplinary charges against a Virginia attorney for two matters. In the first matter, the client paid \$7,500 in advance for the attorney to defend against charges of driving while intoxicated, money which the attorney processed as earnings although no work had been performed. In the second matter, the attorney was paid \$2,500 to represent the co-owners of a motor vehicle in connection with a claim under the insurance policy covering the vehicle. Although the attorney initiated litigation on his clients' behalf, he did not notify the clients of

the litigation or the deadlines and court dates in the case, which was eventually dismissed without prejudice for failure of the plaintiffs to appear. The attorney attempted to settle the matter with the insurance company although he neither informed his client of the settlement proposal nor obtained his client's authorization. The clients demanded a refund of their money, but the attorney did not return their payment. The attorney was notified by letter that the Subcommittee had certified charges of misconduct against him and that he would receive the Subcommittee Determination (Certification). The Certification was provided to him in another letter, one year and two weeks later. The attorney's motion to strike the allegations for lack of jurisdiction due to the delay between the Subcommittee determination of misconduct and the Certification was overruled by the Board. The Virginia State Bar Disciplinary Board ultimately concluded that the attorney's conduct in the two matters violated several Rules of Professional Conduct. The Board suspended his license to practice law for eighteen months.

The Supreme Court affirmed. The Court held that the attorney failed to show prejudice due to the delay and the Board did not err in finding clear and convincing evidence of Rule violations.

### *Legal Malpractice*

#### Johnson v. Hart

279 Va. \_\_ (2010); 2010 Va. LEXIS 55 (April 15, 2010)

In affirming the circuit court's decision, the Supreme Court observed that the strict privity doctrine dictates who may bring a legal malpractice action and that the prevailing party's endorsement of the circuit court's order as "[s]een and consented to" did not serve as an express waiver of all objections raised before the court but simply as consent to the trial court's order.

The plaintiff filed a complaint in her individual capacity against the defendant, asserting that his negligent counsel regarding the probate of her mother's estate amounted to legal malpractice which resulted in her removal from her position as executor of the estate and pecuniary loss. The defendant objected to the plaintiff's standing to maintain a legal malpractice claim because any attorney-client relationship existed between the defendant and the estate, not between the defendant and the plaintiff. The plaintiff argued that, by Code § 8.01-13, she was allowed as a beneficiary of the estate to bring the legal malpractice in her own name. The circuit court determined that the plaintiff seemed to have standing under § 8.01-13 but was not convinced in light of strong public policy against the assignment of legal malpractice claims. The circuit court granted the defendant's motion for summary judgment and the defendant endorsed the order as "[s]een and consented to."

The Supreme Court affirmed, holding that beneficial ownership of a cause of action for legal malpractice may not be permitted under the strict privity doctrine in the absence of clear legislative intent to abrogate the common law rule. Moreover, the defendant's endorsement of the circuit court's order as "[s]een and consented to" did not serve as an express waiver of the defendant's arguments in circuit court but as consent to the court's order.

## ***Professional Regulation and Discipline***

### **Weatherbee v. Virginia State Bar**

279 Va. 303 (2010)

The three-judge panel did not err when it concluded that a lawsuit filed by an attorney was frivolous within the meaning of Rule 3.1 of the Virginia Rules of Professional Conduct.

The Virginia State Bar filed disciplinary charges against an attorney under the Virginia Rules of Professional Conduct arising out of his erroneous naming of a particular physician as a malpractice defendant in a civil action. The charges asserted a violation of the competence requirement of Rule 1.1, and violation of Rule 3.1 relating to the filing of meritorious claims. At the conclusion of an *ore tenus* hearing, the court found that he violated Rule 3.1 but it dismissed the charges relating to Rule 1.1. The court entered a judgment that imposed a public reprimand.

The Supreme Court affirmed. The Court held that the record did not show that the circuit court's conclusions were not justified by the evidence or were contrary to law.

## **Commercial Law**

### ***Distribution of Automobiles to Dealerships***

#### **Volkswagen v. Smith**

279 Va. 327 (2010)

In the absence of fair notice from the language of the statute or guidance from enforcement officials of how the statute would be applied, the appellant car company was denied its right to due process because the statute was unconstitutionally vague as applied.

When appellant car company introduced new 1998 car models, the demand exceeded supply, so the appellant distributed the models to hundreds of dealers based on factors such as inventory and sales rate. Appellee franchise dealer asked the appellant to ship a few new models; however, he received no shipments for several months. The appellee challenged the appellant's allocation of the high-demand models and, over time, the disagreement resulted in a determination by the Commissioner of the Department of Motor Vehicles that the appellant had violated Code § 46.2-1569(7). Ultimately, the Supreme Court reversed the decision and remanded the matter back to DMV. The Commissioner again found violation of Code § 46.2-1569(7), and the circuit court and Court of Appeals affirmed the decision.

In an appeal limited to due process and commerce clause issues, the Supreme Court held that the statutory language in question was unconstitutionally vague for lack of notice and administrative guidance "as applied." Having resolved the matter, the Supreme Court did not address the facial validity of the statute or any violation of the commerce clause.

## Cities, Counties, and Towns

### *Zoning*

Board of Sup. Of Stafford County v. Crucible, Inc.  
278 Va. 152 (2009)

The circuit court did not err in allowing a landowner to seek a vested rights determination without first presenting the issue to a zoning administrator, but did err in holding that a “zoning verification letter” was a significant governmental act sufficient to vest a right in the landowner.

A landowner, seeking to acquire nearby property to expand its existing training facilities as a “school” under local zoning ordinance provisions, met with the county’s zoning administrator and its planning staff. In a document titled “Zoning Verification” the zoning administrator stated that the proposed facility would be classified as a “school” and that the verification was “valid” as of its date of issuance but “subject to change.” Under the existing zoning ordinance, a “school” could be constructed “by right” without additional discretionary approval by the county. After the landowner purchased the property for over two million dollars, the county’s Board of Supervisors adopted a new zoning ordinance requiring that the landowner obtain a conditional use permit prior to erecting a school on the property. Without requesting a vested rights determination from the zoning administrator, the landowner filed a declaratory judgment proceeding in circuit court requesting a determination of whether it had a vested right to develop a school on a “by right” basis. The circuit court overruled the Board’s demurrer, which alleged that the circuit court lacked jurisdiction because the landowner failed to exhaust administrative remedies. The circuit court ruled that the landowner had a vested right in the use of its property on a “by right” basis.

The Supreme Court affirmed in part, reversed in part, and entered final judgment for the Board. The Court held that the statute authorizing the zoning administrator to make a vested rights determination did not divest the pre-existing authority of the court to do the same. The Court also held that a simple verification letter from the zoning administrator is not a “significant affirmative government act,” giving rise to vested rights to “by right” development.

McLane v. Vereen  
278 Va. 65 (2009)

The circuit court erred in fixing fines in an amount less than the rate specified in a consent decree containing the terms of the parties’ agreement and entered by the court.

County zoning enforcement officials filed a complaint against residents for maintaining a “junk yard” on their property in violation of a zoning ordinance. The parties ended the litigation by filing a consent decree, which required the removal of the offending material by a specified date and fixed a fine of \$100 per day for every day after the deadline that the landowners failed to remedy the violation. The decree stated that the terms could not be modified without written consent of the parties and approval of the court. The landowners ignored the deadline and failed to remedy the violation for another 206 days. The circuit court imposed lower fines equaling \$3,500, and concluded that, since compliance had finally been obtained, the fines imposed by the consent decree were unreasonable and constituted a penalty.

The Supreme Court reversed and entered final judgment in favor of the county in the amount of \$20,600. The Court held that the consent decree agreed to by the parties and endorsed by the circuit court was final in nature and the circuit court did not have authority to modify its terms.

Schefer v. City Council of the City of Falls Church

279 Va. \_\_ (2010); 2010 Va. LEXIS 47 (April 15, 2010)

The circuit court correctly granted defendant's motion for summary judgment where the local ordinance in question did not violate the uniformity requirement and the plaintiff did not present sufficient evidence to support his equal protection challenge.

The plaintiff owned 12 substandard lots in the City of Falls Church, *i.e.*, residential lots with an area of less than 7,500 feet. In 2006, the City adopted a zoning ordinance which restricted the maximum allowable height for a one-family dwelling on a substandard lot based on the lot size. The formula adopted by the City effectively lowered the permissible height of one-family dwellings on the plaintiff's lots from two stories to one story. The ordinance applicable to standard lots, residential lots with areas of 7,500 feet or more, continued to allow two-story, one-family dwellings. The plaintiff filed a declaratory judgment action against the City, claiming the ordinance violated the uniformity requirement and deprived him of equal protection under the law. The circuit court granted the defendant's motion for summary judgment.

The Supreme Court affirmed. The one-family dwelling height restriction was uniformly applied to all substandard lots and the defendant failed to meet his burden of proving that the ordinance in question was unreasonable.

## **Contracts**

### ***Construction Contracts***

Dunn Construction Co. v. Cloney

278 Va. 260 (2009)

The circuit court erred by entering judgment for punitive damages because the source of the duty between the parties arose only out of the contract.

A property owner entered into a contract with a builder for the partial construction of a new home. The contract stated that all work was to be completed in a workmanlike manner according to standard practices. The builder failed to construct the front foundation wall in accordance with building codes. Only after the builder represented to the owner that he had made all repairs needed to bring the wall in compliance and provided the owner with a written guarantee of the wall's stability did the owner give the builder his final payment. It was later determined through independent inspection that the wall had not been brought into compliance and that the defect in the wall could cause the house to collapse. The owner sued the builder alleging breach of contract, negligence, and fraud. A jury trial was held resulting in a verdict for the owner, awarding him compensatory damages and punitive damages. Prior to the entry of the final order, the builder filed a motion for reconsideration in which he contended that the award of punitive damages was improper because the duties breached arose solely out of contract. The circuit court nevertheless entered final judgment in favor of the owner on the jury's verdict.

The Supreme Court reversed the award of punitive damages. The Court held that the award of punitive damages was improper because the builder's noncompliance and misrepresentations breached contractual duties, not separate and independent duties. To hold otherwise would turn "every breach of contract into an actionable claim for fraud."

### ***Construction and Interpretation***

VEPCO v. Norfolk Southern Ry. Co.  
278 Va. 444 (2009)

The circuit court correctly determined that a railway coal-hauling contract was unambiguous in specifying the applicable coal-hauling rate, did not err in striking certain affirmative defenses raised by the utilities, and did not err in denying the utilities' motion to file an amended complaint. The circuit court did err in determining the basis for calculating the underlying damages to which the railroad was entitled.

After fourteen years of service under a railway coal-hauling agreement with two utility companies, coal-hauling railroad company announced its intention to apply a to calculate amounts the utilities owed under the contract. The utilities filed suit for a declaratory judgment claiming that the contract required the use of a lower rate. The railroad filed a demurer, an answer, and a cross-bill seeking a declaratory judgment in its favor, along with specific performance of the contract using the higher rate . Following a hearing, the circuit court concluded that the contract unambiguously specified use of the higher rate. The utilities were denied leave to amend their complaint to include allegations of contract modification, novation, equitable estoppel or fraud, but they were permitted to file an amended answer to the railroad's cross bill, in which they contended that the railroad was estopped from asserting the application of the higher rate because it had made representations to the utilities that the agreement specified the lower rate. The railroad moved to strike various of the utilities' allegations and defenses as contrary to the circuit court's determination, arguing that they were barred by judicial estoppel. The circuit court entered a decree sustaining the railroad's motions to strike the utilities' affirmative defenses. The circuit court then entered final judgment for the railroad.

The Supreme Court affirmed in part, reversed in part, and remanded. The Court held that the circuit court correctly ruled that the contract was unambiguous. The Court also held that, if the circuit court relied upon the previous factual assertions of a party in its ruling, then that party is judicially estopped from making contrary assertions of fact, even if the ruling was not in that party's favor. The Court further held that the trial court, in assessing damages, incorrectly determined the date to start applying the higher coal-hauling rate.

### ***Implied Contracts***

Mongold v. Woods  
278 Va. 196 (2009)

The circuit court did not err in finding for the plaintiff based on his quantum meruit claim, but erred by calculating damages starting in 1996 because the evidence showing an employment relationship dated back to 1985.

A landowner and his wife hired the plaintiff as a farm laborer at a salary of \$7,850 in 1985. His duties were supposed to occupy 35-40 hours per week. About six months later it became apparent that the plaintiff's duties would occupy far more than 40 hours per week. When his duties nearly doubled and the couple could not afford to increase his salary the husband told the plaintiff that if he "stayed and stuck with them," they would take care of him. The husband also told the plaintiff that when the couple died, they would leave the property to him. The landowner predeceased his wife and she inherited the farm. After the wife's death, her last will was admitted to probate. It divided her estate among her brothers and sisters and the plaintiff was not mentioned in the will. Plaintiff brought an action against the executors and beneficiaries, seeking a constructive trust upon the estate based on a theory of unjust enrichment and a second claim based on a theory of quantum meruit. The circuit court held that there was not enough evidence to create a constructive trust on the property, but found that plaintiff had established a valid claim for quantum meruit damages beginning in 1996.

The Supreme Court affirmed in part, reversed in part, and remanded. The Court held that, although the circuit court's quantum meruit determination was correct, the evidence warranted a recalculation of damages.

## **Education Law**

### *Administrative Law*

#### School Board v. Commonwealth

279 Va. 460 (2010)

The trial court erred in failing to find coverage for the expenses in defending a claim made pursuant to the Individuals with Disabilities Education Act under the Virginia Local Government Risk Management Plan because such a claim is not excluded as an administrative action.

In prior administrative and federal court proceedings against a school board, parents of an autistic child were awarded a substantial recovery for expenses related to their claim under the Individuals with Disabilities Education Act (IDEA). The present petition was brought by the school board, which paid premiums to the state insurance plan known as the Virginia Local Government Risk Management Plan. The board alleged that the Commonwealth breached contractual obligations to defend and indemnify the board on the IDEA lawsuit pursuant to the Plan. The Plan provided compensation for "any demand, suit, or legal action" seeking monetary damages brought against covered parties but excluded "administrative hearings or procedures...regardless of whether or not monetary relief is sought." The trial court denied the petition to find coverage under the Plan, holding that the request related to an administrative action.

The Supreme Court reversed and remanded. Adopting the Fourth Circuit's analysis in Kirkpatrick v. Lenoir County Board of Education, 216 F.3d 380 (4<sup>th</sup> Cir. 2000), the Court held that a claim under the Individuals with Disabilities Education Act is not an administrative action. Therefore, since the IDEA claimants sought, and were awarded, monetary damages, there was a duty on the part of the Commonwealth to defend against the claim.

## **Employment Law**

### ***Government Offices***

#### **Ligon v. County of Goochland**

279 Va. 312 (2010)

The circuit court did not err in granting a motion to dismiss a claim against a county based on sovereign immunity because the statute in question did not explicitly waive immunity for counties.

Plaintiff filed a complaint in circuit court against his former employer, a county, asserting that he was unlawfully terminated from employment in retaliation for his reporting of allegedly fraudulent action by his former supervisor, and he was entitled to relief under the “whistleblower protection” provision in Code § 8.01-216.8 of the Virginia Fraud Against Taxpayers Act. The county demurred to the action on several grounds, including a bar of the retaliatory discharge claim by the doctrine of sovereign immunity. The circuit court sustained the demurrer.

The Supreme Court affirmed. The Court held that the Virginia Fraud Against Taxpayers Act did not contain a waiver of immunity that would allow an action against a county because no explicit waiver appeared in the statute.

## **Evidence**

### ***Contemporaneous Objections***

#### **Graham v. Cook**

278 Va. 233 (2009)

The trial court did not err in (1) admitting challenged medical testimony of treating physicians where the statements were not medical diagnoses, but merely impressions formed during the plaintiff’s treatment and (2) limiting counsel’s closing argument where counsel attempted to ask the jury to compare x-rays when no evidence addressing such comparison had been submitted.

The plaintiff injured his hip falling from the second story of his home and the defendant orthopedic surgeon repaired the damage by surgically installing a reconstruction plate secured by several screws. The plaintiff continued to experience significant left hip pain and the defendant diagnosed avascular necrosis, or “bone death,” unrelated to reconstruction surgery. The plaintiff consulted other specialists and one concluded a screw protruded into the left hip joint space had eroded the thigh bone. That doctor performed surgery to remove the screw and another physician performed surgery to repair the damage. Plaintiff filed a medical malpractice action against the doctor who performed the reconstruction surgery alleging negligence. At trial, the defendant presented evidence that the damage to the thigh bone was caused by bone death. Over objection, the defendant was allowed to offer deposition testimony from the plaintiff’s treating physicians concerning the condition of plaintiff’s thigh bone, which the trial court ruled permissible under Code § 8.01-399(B). A report and trial testimony were received into evidence from a radiologist who spoke of bone death being “suspected” or “suggested” after voir dire elicited testimony that his impressions were held to a reasonable degree of medical probability. Part of the radiologist’s testimony concerned his “habit” of routinely checking for hardware like screws intruding into the joint space. Plaintiff’s attempt to cross-examine the radiologist was precluded by the court upon defendant’s argument that plaintiff was seeking a contemporaneous expert opinion from the witness, who

had not been designated as such. During closing, the court sustained the defense's objection when plaintiff's counsel sought to invite the jury to compare x-rays to measure the growth of the defect in the thigh bone in the absence of evidence addressing the comparison of x-rays. The jury returned a verdict in favor of the defense.

The Supreme Court affirmed the decision. The Court held that most of the medical testimony submitted by the defense constituted factual impressions formed during treatment, so the defendant was permitted to offer the testimony into evidence. The Court also found that the plaintiff's counsel had waived his objection to the radiologist's habit testimony by affirmatively abandoning his objection. The Court also held that the decision to sustain the defendant's objection to the plaintiff's closing argument was correct because there had been no foundation offered into evidence and such comparisons of x-ray evidence are not within the common knowledge and experience of the jury.

## **Highways, Vehicles, and Traffic**

### *Automobile*

Rascher v. Friend  
279 Va. 370(2010)

The circuit court erred in striking plaintiff's evidence based on contributory negligence because the jury could have determined that plaintiff's conduct was reasonable and also could have found that the alleged negligence by plaintiff was not a proximate cause of the accident.

Plaintiff was riding a bicycle on a residential road when he approached an intersection. Defendant had stopped her vehicle in the opposite lane approximately fifty feet away, apparently waiting to make a left into a driveway. Plaintiff looked down at his speedometer and when he looked up he saw that defendant had turned left and that her vehicle was only three to five feet in front of him in his lane of travel. He struck the rear passenger side of defendant's vehicle and sustained injuries. Defendant told plaintiff that she had not seen him and accepted responsibility for the collision. At trial, the court struck plaintiff's evidence at the conclusion of the case, finding that the plaintiff was contributorily negligent as a matter of law because the evidence conclusively showed that the plaintiff could have avoided the accident. The judge entered a final order for the defendant.

The Supreme Court reversed and remanded. The Court held that the trial court should not have struck the plaintiff's evidence because reasonable minds could differ on the issue of the plaintiff's negligence and proximate causation.

# Insurance Law

## *Contracts*

### Copp v. Nationwide Mutual Insurance Co.

279 Va. \_\_ (2010); 2010 Va. LEXIS 43 (April 15, 2010)

The circuit court erred in finding that an insurance company had no duty to defend an insured individual who, as the defendant in an assault and battery lawsuit, sought to raise a self-defense justification; the insurance policy in question provided an exception to the intentional acts exclusion for damages caused when the insured tries “to protect [his] person or property.”

In the events leading to the present case, the appellant injured Gregory Jacobsen when he struck Jacobsen while wrangling from an altercation with several other men. Jacobsen was knocked unconscious by the blow and the injuries required multiple surgeries. Jacobsen sued the appellant for assault and battery alleging that the appellant intentionally caused his injury. Pointing to the intentional acts exclusion, the insurer/appellee requested a declaratory judgment ruling that it did not owe a duty to defend the appellant under an umbrella policy which provided for coverage of bodily injury caused by the appellant. The circuit court agreed with the insurer, but the circuit court did not address the part of the insurance policy which provided a coverage exception to the intentional acts exclusion for bodily injury caused by an insured in the course of protecting his person or property.

The Supreme Court reversed and held that, while the duty to defend generally will be determined solely by the allegations in the complaint, where an insurance policy provides coverage for intentional actions taken in self-defense of person or property, the duty to defend may be determined by the allegations in the answer.

### Simpson v. Virginia Municipal Liability Pool

279 Va. \_\_ (2010); 2010 Va. LEXIS 44 (April 15, 2010)

The circuit court correctly held that the “use” of a motor vehicle played no role in the plaintiff’s injuries which were sustained while arresting a suspect after a car chase and that the plaintiff had no right to insurance coverage by vehicle insurers.

The plaintiff, a Nottoway County deputy sheriff, responded to a call for assistance from a state trooper in pursuit of a motorist evading arrest. The car chase ended after the offending motorist lost control of his vehicle and came to a stop. The plaintiff and the state trooper exited their vehicles and, while arresting the offender, the plaintiff injured his left shoulder. In a petition for declaratory judgment, three insurers - the plaintiff’s personal vehicle insurer, the insurer of plaintiff’s cruiser, and the offender’s vehicle insurer – sought rulings that relieved them of the duty to provide coverage to the plaintiff. The circuit court ruled that the “use” of vehicles played no role in the plaintiff’s injury and, therefore, none of three insurers had a duty to defend the offender or afford coverage to the plaintiff.

The Supreme Court affirmed the circuit court’s declaratory judgment. The circuit court correctly held that the plaintiff’s injury did not arise out of the use or occupancy of motor vehicles.

Virginia Farm Bureau Mutual Ins. v. Williams  
278 Va. 75 (2009)

The circuit court correctly held that the insured was afforded coverage under the policy, but erred by not construing an ambiguity in the policy against the insurer and thus erred in failing to declare that the insured was entitled to higher coverage.

A minor was injured in a collision while riding in an automobile. Both of the vehicles were underinsured. The minor qualified as an insured of the first class under her father's insurance policy, which provided coverage for three separate vehicles, none of which was involved in the accident. The minor, by her father, filed a complaint seeking a declaration of her rights and asserting that she was entitled to UM/UIM coverage under the policy in the total amount of \$850,000, representing the combined UM/UIM bodily injury coverage for each person per vehicle. The insurance company asserted that the terms of the policy prevented "intrapolicy stacking." The circuit court entered an order granting each of the summary judgments in part and determined that the total coverage was \$550,000.

The Supreme Court affirmed in part, reversed in part, and entered final judgment. The Court held that, although anti-stacking language appeared in the policy, another section referenced by the anti-stacking provision rendered the language ambiguous. The Court reversed the decision as to the amount of coverage, finding that the higher amount should have been allowed.

## **Local Government Law**

### *Zoning*

Marble Technologies v. City of Hampton  
279 Va. 409 (2010)

The circuit court erred in granting summary judgment for the city because it exceeded its granted authority and therefore violated Dillon's Rule.

The Chesapeake Bay Preservation Act requires localities in Tidewater Virginia to incorporate general water quality protection measures into their comprehensive plans, zoning and subdivision ordinances. To further the Act's implementation, the General Assembly established the Chesapeake Bay Local Assistance Board, which promulgates criteria for use in designating land to be part of preservation areas. Plaintiff landowners brought suit for declaratory and injunctive relief against enforcement of a 2008 city zoning ordinance amendment which changed the definition of protected buffer areas to include lands designated as part of the federal Coastal Barrier Resources System. Plaintiffs alleged that the amended ordinance exceeded the city's authority in violation of Virginia law and Dillon's Rule because it incorporated federal criteria despite the General Assembly's express mandate that localities use the criteria developed by the Chesapeake Bay Local Assistance Board to determine the extent of any preservation area within their jurisdiction. The circuit court held that the city had the statutory authority needed to pass the amendment and entered summary judgment for the city.

The Supreme Court reversed and entered final judgment. The Court held that several provisions in the Chesapeake Bay Preservation Act mentioned the authority given to localities, but, in every case, referred to guidelines developed by the Board. The city did not have the express or implied grant of authority from the General Assembly to incorporate federal criteria. The Court also held that the plaintiff

did not need to assert that the city's action were arbitrary or capricious because localities may not act at all without authority.

## **Negligence**

### ***Wrongful Death***

#### **Kellermann v. McDonough**

278 Va. 478 (2009)

The trial court erred in sustaining a demurrer as to the validity of a negligence claim because an adult who agrees to supervise and care for a child has a common law duty to exercise reasonable care in such supervision and one who assumes to so act may become subject to a duty of care; however, the trial court did not err in sustaining the demurrer on the theory of a duty to protect from the acts of third parties because agreeing to care for a minor does not itself give rise to a special relationship.

The decedent's parents agreed that she could spend one night with her friend, the defendants' daughter. In discussing the planned activities, decedent's father told the defendant mother that decedent was "not to be driven by any inexperienced drivers." The defendant mother promised to "take good care of" the decedent. The defendant mother later dropped decedent and her daughter at a shopping mall. Later that day, the defendant mother permitted the girls to be driven home from the mall by a young minor male. He drove recklessly, causing an accident by which the decedent was killed. In a wrongful death action, plaintiffs alleged that (1) the defendants had common law duty to supervise and care for the decedent, (2) they had assumed a duty of reasonable care, and (3) they had a special relationship with the decedent which gave rise to a duty to protect the decedent from the negligence of third parties. Upon sustaining defendants subsequent demurrer, the circuit court dismissed the complaint with prejudice.

The Supreme Court affirmed in part, reversed in part, and remanded. In its reissuance of the decision, the Court reaffirmed its July ruling that both defendants defend claims of breach of the common law duty of supervision and care and the defendant mother answer to the claim of assumption of duty. The Court also clarified that the duties at issue are "a general duty of ordinary care and an assumed duty" not the duty to protect from the conduct of third parties which requires proof of foreseeability. The defendants could not argue that, as a matter of law, the boy's reckless driving was the sole proximate cause of death; a jury could find otherwise.

## **Practice and Procedure**

### ***Alternative Dispute Resolution***

#### **Cotton Creek Circles v. San Luis Valley Water Co.**

279 Va. 320 (2010)

The circuit court did not err in confirming an arbitration award because, even if the arbitration panel misinterpreted the contract in question, that mistake did not provide a basis for vacating the award under section 10(a)(4) of the Federal Arbitration Act.

In a dispute among entities engaged in the business of developing and selling water rights to certain Colorado municipalities, the company's operating agreement provided that "any dispute with

respect to” the agreement should be settled by arbitration. After a dispute arose concerning the non-compete clause in the operating agreement, a panel of arbitrators interpreted that the non-compete clause permitted a member of the company to purchase title in related land so long as the member gave the company a water rights easement. The plaintiff members filed a motion in circuit court to vacate the arbitration award, arguing the panel exceeded their authority under section 10(a)(4) of the Federal Arbitration Act. Applying the Federal Arbitration Act, the circuit court denied the motion to vacate and affirmed the arbitration award.

The Supreme Court affirmed. Since the arbitration panel clearly had the authority to settle the dispute under the broad language set forth in the operating agreement, the panel did not exceed their powers within the meaning of section 10(a)(4) of the Act. Misinterpretation of the agreement could not provide a basis for vacating the panel’s decision under section 10(a)(4); the panel was empowered to provide any interpretation it deemed proper.

### *Appeals*

#### Hutchins v. Talbert 278 Va. 650 (2009)

An order denying a motion to set aside the verdict was not a final judgment for purposes of extending the deadline for filing an appeal where there has been a final judgment rendered in a separate, previously entered order, which is not vacated, suspended, or modified by the denial.

In a medical malpractice trial the jury awarded the plaintiff a judgment for \$4 million, which was reduced by the circuit court to \$885,000. On April 25, 2008, the circuit court entered an order entitled “Final Order” that rendered judgment in favor of the plaintiff for that amount, and the order concluded: “AND THIS CAUSE IS ENDED.” On the same date, the circuit court also entered a separate “Suspending Order” providing that the final order was suspended for 14 days thereby allowing the court to have more time to consider possible amendment to the final order. One of the defendants filed a motion to set aside the verdict and on May 28, 2008, the circuit court denied the motion. The defendant filed a notice of appeal on June 19, 2008, and the plaintiffs filed a motion to dismiss the appeal as not timely filed.

The Supreme Court granted the defendant’s motion to dismiss the appeal as not timely filed. The court’s denial of the motion to set aside the verdict did not extend the period during which the defendant could file a timely appeal. The suspension order postponed the date of entry of the final judgment to May 9, 2008. Thus, the defendant had 30 days from May 9 to file a notice of appeal, *i.e.*, on or before June 9, 2008.

### *Appellate Practice*

#### United Leasing Corp. v. Lehner Family Bus. Trust 279 Va. 510 (2010)

In making a renewed motion to strike at the conclusion of the trial, the defendant failed to preserve an objection previously raised in the defendant’s motion to strike at the conclusion of the plaintiff’s evidence by neglecting to restate the objection.

The plaintiff obtained an assignment of claims from one of the principals of a trash removal business after a secured equipment leasing company foreclosed upon the business's assets. In subsequent litigation, the plaintiff sued the equipment leasing company, alleging that the lessor failed to pay \$1 million in surplus proceeds to the trash removal business. The defendant lessor moved at the close of plaintiff's case-in-chief to strike the evidence on two grounds: (1) failure to prove an assignment from the trash collection company and (2) a failure to prove a breach of contract. The motion was denied. After the jury retired after the close of all the evidence, counsel for the defendant stated, "Renew my motion to strike. For the record, I wanted to renew my motion to strike." The defendant made no argument in support of its renewed motion, nor did the trial judge rule on the motion at that time. Following closing arguments and after the jury deliberations began, the trial judge addressed counsel for the defendant with the following question, "you want to renew your motion to strike?" Counsel responded: "I wanted to renew my motion to strike at the end as we had stated, stating that the plaintiff did not prove that there was a deficiency in this situation." In support of the motion, the defendant's counsel argued only the issue of whether the plaintiff proved damages and not the validity of the assignment. The circuit court overruled the renewed motion. The jury returned a verdict for the plaintiff and the circuit court entered judgment.

The Supreme Court affirmed. The Court held that the defense waived the right to argue sufficiency of the evidence related to the assignment issue on appeal when it failed to make known to the circuit court that the validity of the assignment was grounds for its renewed motion to strike based upon all the evidence presented at trial.

### *Jury Selection*

Roberts v. CSX Transportation, Inc.  
279 Va. 111 (2010)

The circuit court erred in failing to strike a potential juror who was a long-time stockholder of the defendant corporation and thereby forcing the use of a peremptory strike.

In an action brought under the Federal Employee's Liability Act (FELA), plaintiff alleged that he suffered personal injury while working for the defendant. During the circuit court's voir dire of the venire, a potential juror stated that he was a shareholder of the defendant railroad company, but he stated that this would not have any impact on his ability to be fair and impartial. Plaintiff moved to strike the prospective juror for cause and the circuit court overruled the motion. Plaintiff later used one of his peremptory strikes to remove this individual from the jury. A jury found that although the plaintiff had suffered \$280,000 in damages that he had been 95% percent at fault. In accordance with the verdict, the circuit court entered judgment in the amount of \$14,000. The trial court denied a motion for a new trial based on the failure to excuse the stockholder from the jury.

The Supreme Court reversed and remanded. The Supreme Court held that the circuit court erred by not striking the prospective juror because, similar to the criminal trial setting, one who owns stock in a party to the case is per se disqualified from sitting as a juror. Additionally, while under federal law the use of a peremptory challenge to remove a juror who should have been excluded for cause does not result in automatic reversal, Virginia law governs because FELA actions are subject to state procedural rules. Under Virginia law, in civil cases, the trial court's refusal to strike an ineligible juror and forcing the use of a peremptory challenge to remove the prospective juror amounts to an abuse of discretion.

## *Motions to Strike*

### Howell v. Sobhan

278 Va. 278 (2009)

The trial court erred by striking the plaintiff's evidence and entering summary judgment for the defendants where there was sufficient evidence of proximate causation to take a medical malpractice case to a jury.

Plaintiff was referred to the defendant doctor to remove polyps in her colon. During surgery the doctor removed most of her colon. After the surgery, complications ensued, including a fistula or intestinal leak that required surgical repair. Plaintiff filed a medical malpractice action, alleging breach of the standard of care by removing too much of her colon and by using inappropriate techniques. Plaintiff introduced two experts who testified on cross examination that fistulas are known complications of colon surgery and could form in the absence of surgery. The defendant renewed a motion to strike the evidence at the close of all the evidence for plaintiff's failure to prove proximate causation. The circuit court sustained the motion, entered summary judgment for the defendants, and dismissed the case with prejudice.

The Supreme Court reversed and remanded. The Court held that, upon viewing the evidence in the light most favorable to the plaintiff, the plaintiff presented sufficient evidence to create a question of fact for the jury to decide.

## *Nonsuits*

### City of Suffolk v. Lummis Gin Company

278 Va. 270 (2009)

The circuit court erred by granting costs and fees to defendants for a second nonsuit because the causes of action at issue were not the same and, therefore, the nonsuit granted by the circuit court was a first nonsuit as a matter of right.

In 1995 Suffolk filed a complaint against two businesses and other property owners, seeking a sale of various parcels of real estate to satisfy delinquent taxes on those parcels. The city subsequently filed a motion for a nonsuit so that the action could be dismissed against one of the defendants, Lummis Gin Co., and the circuit court granted the nonsuit. Eleven years later, in 2006, the city again filed a complaint seeking to satisfy delinquent real estate taxes against the same parcel of land, naming several additional defendants as well as Lummis Gin Co. The city again submitted a proposed order for a nonsuit. The defendants contended that since the previous case against the Lummis Gin Co. had resulted in a nonsuit, the city's motion for a nonsuit represented a request for a second nonsuit, and they sought an award of attorney fees and costs. The court entered a February 2008 order granting the nonsuit without prejudice. The order also provided that the suit would remain on the docket for the court to determine the issue of costs and fees. The parties then filed briefs and argued their positions before the circuit court in August 2008, which entered a final order in favor of the individual defendants, granting them attorney fees and costs.

The Supreme Court reversed and entered final judgment. The Court held that there could be no second nonsuit because the 2006 action commenced by the city was wholly distinct from the 1995 action.

The Court also observed in dictum that the nonsuit order was final and the circuit court lost jurisdiction 21 days after entry of the February 2008 order, rendering the August 2008 order null.

### ***Wrongful Death Actions***

#### **Antisdel v. Ashby**

279 Va. 42 (2010)

The circuit court did not err in granting the defendants' pleas in bar because the plaintiff, the administrator of an estate appointed expressly for the purpose of bringing a wrongful death action, lacked standing to assert personal injury survival claims on behalf of the estate.

After her son committed suicide, plaintiff sought appointment as administrator of his estate. The plaintiff nonsuited two actions, the second of which pled both survival and wrongful death claims. The plaintiff filed a third complaint, asserting only survival claims. The defendants filed pleas in bar asserting that the plaintiff lacked standing to bring the survival claims, because the order appointing her as administrator expressly limited her appointment to the initiation of a wrongful death action. After a hearing, the circuit court granted the pleas in bar, holding that the clerk's appointment order expressly limited the scope of the plaintiff's appointment to the pursuit of a wrongful death action. The circuit court also declined to enter an order nunc pro tunc to expand retroactively the plaintiff's administrative authority.

The Supreme Court affirmed. The Court held that one may qualify to pursue a wrongful death claim, a survival claim, or both; however, the plaintiff only requested and received the qualification authority to pursue a wrongful death action. The Court rejected the plaintiff's argument that the defendants effectively waived the right to challenge her standing because the objection was not raised during the second nonsuited action; the action in question stood independent of any prior nonsuited action. The Court further held that nunc pro tunc orders are permitted to correct the record, but they cannot be used to create a fiction.

## **Real Property**

### ***Cities, Counties and Towns***

#### **County of Chesterfield v. Tetra Assocs., LLC**

279 Va. 500 (2010)

The circuit court erred by declaring county ordinances void in their entirety where the principle of severability was applicable; however, an applicable subdivision ordinance which required rezoning inconsistent with a permitted use of property was void and the circuit court correctly ordered the approval of plaintiff's subdivision application.

A county's code contained subdivision ordinance provisions generally defining residential parcels and lots, allowing subdivision of parcels into lots less than five acres for residential purposes. Another provision, however, barred recordation of subdivision plats except for land included in residential or townhouse zoning districts or approved residential areas of commercial zoning districts. This provision contradicted other provisions which permitted residential uses in agricultural districts. Plaintiff's application for subdivision for residential use of a seven-acre parcel in a district zoned "agricultural" was

rejected because the land was not in a residential district. Plaintiff sued for declaratory judgment and was granted summary judgment. The circuit court found that county ordinances prohibiting lot subdivision in an agricultural district and restricting lot size were void. The circuit court held that the county was required to approve plaintiff's subdivision application.

The Supreme Court affirmed in part, reversed in part, and remanded. The Court held that a subdivision ordinance cannot be used to effectively require the rezoning of land. The Court further held that the subdivision ordinances in question could not be void in their entirety. The single offending ultra vires ordinance could be "severed" and deemed void without affecting the remaining ordinances.

### ***Contracts***

#### **C. Porter Vaughan, Inc. v. DiLorenzo** 279 Va. 449 (2010)

The trial court erred in sustaining defendant's demurrer on the grounds that the claim for a breach of an oral contract was barred by the statute of frauds because there was a written memorandum sufficient to overcome the plea.

A real estate broker brought suit against the seller for commission due on the sale of several properties. The defendant's demurrer asserted a failure to satisfy the requirements of Code § 11-2(7), statute of frauds, by alleging an unenforceable oral agreement. The plaintiff provided as evidence of the oral agreement several writings including an unconsummated, written purchase agreement between the seller and a potential buyer which identified the plaintiff as the defendant's real estate agent. Defendant's renewed demurrer was sustained by the trial court.

The Supreme Court reversed and remanded. The Court held that the unconsummated sales contract, by itself, was enough to overcome the statute of frauds.

### ***Creation of Lots***

#### **W&W Partnership v. Prince William County BZA** 279 Va. 483 (2010)

The circuit court's affirmation of a zoning administrator's ruling that a voluntary conveyance of land to the Commonwealth did not legally subdivide the owners' parcel was correct.

In 1940, owners of a tract of land conveyed 1.44 acres to the Commonwealth for extension of a public road, leaving the owners approximately 40 acres south of the road and 5.17 acres to the north. Ownership of the 5.17 acres north of the road ultimately transferred to the plaintiff, who sought a separate address and Grid Parcel Identification Number (GPIN) from the county zoning administrator for the land, claiming that the property was a separate, legally nonconforming lot created by the 1940 conveyance. The zoning administrator determined that the land was not legally subdivided by the 1940 conveyance and, instead, continued as one parcel with two noncontiguous portions. The requests for a separate address and GPIN were denied because 5.17-acre lot designated by the plaintiff could not meet the county's existing A-1 zoning district requirement that all lots be at least 10 acres. The board of zoning appeals upheld the decision and the circuit court affirmed.

The Supreme Court affirmed. The Court held that because the original landowners never recorded a change in the legal description of the property, either by metes and bounds or by plat, after the 1940 conveyance. The 5.17-acres of land was subject to existing, and not former, zoning ordinances and, therefore, not entitled to its own GPIN and address as a separate lot.

### *Deeds and other Instruments of Conveyance*

#### Bailey v. Town of Saltville

279 Va. \_\_\_ (2010); 2010 Va. LEXIS 53 (April 15, 2010)

The circuit court did not err in finding that a fee simple interest was granted to the complainant by way of quitclaim deed based on the natural and ordinary meaning of language found in the preceding deed.

In 1909, the owners of a farm granted a “right-of-way” to a railroad company for a railroad track through the farm. The owners recorded an agreement describing the “right-of-way” and the consideration for the conveyance separate from the deed “conveying” to the railroad company the “strip or parcel of land” underlying the then-existing railroad line. The defendant acquired title to relevant portions of the farm; the plaintiff received title to the railroad corridor by gift. When the plaintiff attempted to make improvements to the railroad corridor, the defendant denied the plaintiff access. In an action to quiet title, the circuit court held that the defendant had a fee simple interest in the railroad corridor and granted the defendant’s motion for summary judgment.

The Supreme Court affirmed. Giving the words used in the preceding deed their natural and ordinary meaning, the Court concluded that the farm owners transferred complete ownership of the railroad corridor to the railroad company.

#### Burdette v. Brush Mountains Estates

278 Va. 286 (2009)

While correctly concluding that an easement is not an ownership interest in land subject to Code § 55-2, the trial court erred in concluding that language appearing on a plat was sufficient to convey an easement benefitting a third party because a plat cannot serve as an instrument of conveyance.

The plaintiff was the successor in title to a certain land adjoining a parcel owned by the defendant. The deeds evidencing the conveyance of plaintiff’s property contained a description of the property that incorporated by reference a recorded boundary line adjustment plat, and stated that the conveyance was made subject to all easements, reservations, restrictions, and conditions on record. The plat, in a footnote, referred to a 50 foot easement that traversed the southern portion of the plaintiff’s property. The defendant submitted a request to rezone its adjoining property, indicating its intent to develop and access it via the easement shown and described on the plat, and the plaintiff subsequently filed a motion for declaratory judgment contesting the validity of the easement. The circuit court granted judgment in defendant’s favor, concluding that the notes on the plat were sufficient to create an easement.

The Supreme Court reversed and remanded. The Court held that the statute of conveyances does not require the creation of an easement by a deed or will because an easement is not an estate in land. However, the Court also held that the plat notation was not sufficient to convey the easement. Some instrument of conveyance is required, not necessarily a deed.

## *Easements*

### Anderson v. Delore

278 Va. 251 (2009)

The circuit court correctly held that the plaintiffs failed to carry their burden of showing that the defendants had encroached upon their easement.

A subdivision developer subdivided 140 acres of land adjacent to a lake. However, it retained ownership of land below an 800-foot elevation contour fronting the lake, and granted a flowage easement over this land to a power company. The plaintiffs and defendants owned adjacent lots lying immediately above the contour. The defendants' lot was improved with a pre-existing dock structure, rip rap, and a beach area along the shoreline of the lake. The parties' respective chains of title indicated that each possessed an easement across the strip of land below the contour for purposes of accessing the lake. The plaintiffs filed a complaint seeking an injunction requiring that the defendants remove the dock, rip rap, and beach area from their property, alleging that these improvements encroached upon the "extended lot lines" of the plaintiff's lot. The circuit court held that the defendants did not interfere with the plaintiffs' reasonable use and enjoyment of their easement to access the lake.

The Supreme Court affirmed. The Court held that the plaintiffs did not meet their burden of proof to show an encroachment because the language in the deeds submitted as evidence did not define the precise boundaries of the easement.

### Hafner v. Hansen

279 Va. \_\_ (2010); 2010 Va. LEXIS 52 (April 15, 2010)

The Supreme Court reversed the circuit court's holding that a litigant established a prescriptive easement where there was no evidence of an adverse use which would give rise to a prescriptive easement.

During a remodeling project, the plaintiff's contractor damaged a sewage line that lay hidden underground on her property. The sewage line provided service to a neighboring apartment building owned by the defendant. The plaintiff filed a trespass action against the defendant seeking removal of the sewer line and the defendant countered that he had acquired a prescriptive easement. The circuit court agreed with the defendant and denied the plaintiff's request for injunctive relief.

The Supreme Court reversed and remanded, finding no proof that the plaintiff or any prior owner had any actual knowledge of the underground sewage line or reasonably should have discovered it for the requisite 20-year prescriptive period.

### Snead v. C&S Properties Holding Company, Ltd.

279 Va. \_\_ (2010); 2010 Va. LEXIS 42 (April 15, 2010)

Where there was uncontroverted evidence that the plaintiff's express easement appurtenant was significantly obstructed by the servient estate owners' fence, the circuit court erred in declining to grant plaintiff's request for permanent injunctive relief.

The plaintiffs had the benefit of a 60-foot-wide, express easement over the defendant's property. The northern portion of the easement contained a 12- to 15-foot wide gravel road. The defendants, servient owners, constructed a fence which prevented access to a 40-foot portion of the easement south of the fence. The plaintiffs sought permanent injunctive relief against the defendants' obstruction of the easement. The circuit court denied injunctive relief, finding the use of the gravel road unimpaired by the defendants' man-made improvements.

The Supreme Court reversed as the plaintiffs were entitled to the reasonable use and enjoyment of the entire 60-foot-wide easement area that was expressly reserved by deed. Whether or not the defendants interfered with the plaintiffs' use of, or access to, the easement was immaterial.

### ***Joint Tenants***

de Benveniste v. Aaron Christensen Family, LP  
278 Va. 317 (2009)

The circuit court correctly held that the defendant was liable for her share of expenses relating to the subdivision of jointly held property because, though intangible, the subdivision increased the property's value and, therefore, became a permanent improvement of the property.

A father established a family-owned, limited partnership to hold his portion of a large farm and named his four children as limited partners. By the time of the father's death, all of his ownership shares in the partnership were held by the children and members of their families. The mother's ownership interest passed to her children in equal shares. The defendant, a daughter, held 25% of the ownership interest in the parcel. The other siblings decided to begin the process of subdividing the property into as many lots as possible to avoid the negative impact of potential "downzoning." The defendant sent letters to the other siblings informing them that she was not interested in subdividing the property. The siblings, acting through the partnership, continued to go through with the project. The siblings filed suit against the defendant seeking allotment of the property, a sale in lieu of partition, or a partition of the property. The trial court accepted evidence that the plan to divide the property greatly enhanced the value of the property. The trial court held that the defendant was obligated to pay a share of the expenses relating to obtaining the preliminary subdivision plan.

The Supreme Court affirmed. The Court held that the subdivision plan approval increased the property's value, so it qualified as a permanent improvement to the property triggering the defendant's obligation to pay her portion of the expenses. The Court also held that the unclean hands assertion by the defendant was correctly dismissed by the trial court because the defendant had expressed "mixed signals" about the subdivision.

### ***Leased Premises***

Sales v. Kecoughtan Housing Company  
279 Va. 475 (2010)

The circuit court erred in sustaining the defendants' demurrers to allegations of negligent repair, actual fraud, and constructive fraud where the plaintiff properly pled the causes of action.

Plaintiff rented an apartment owned by one of the defendants and managed by the other. After several months of living in the apartment, the plaintiff informed the property manager that there was mold growing on the property and requested repair. The property manager entered the property to repair the moldy areas, but simply painted over the mold. Thereafter, the property manager repeatedly told the plaintiff that the mold problem had been remedied. A few months later, mold began growing in plaintiff's eye, causing serious and permanent injury. The mold also infested and destroyed his personal property in the apartment. The plaintiff filed a complaint against the landlord and his property management company for defective repair, actual fraud, and constructive fraud. Defendants' demurrers to the plaintiff's complaints were sustained.

The Supreme Court reversed and remanded. The Court held that the circuit court should not have sustained the defendants' demurrers because the plaintiff properly pled that the landlord and his agent undertook mold remediation of his apartment and that negligence performance of such remediation caused personal injury and property damage. Moreover, defendants' false representation to the plaintiff that the repairs were complete could serve as the foundation for actual or constructive fraud actions because the statements were factual.

### ***Wills and Trusts***

#### **Virginia Home for Boys & Girls v. Phillips** 279 Va. 279 (2010)

The circuit court erred in granting specific performance of the plaintiff's alleged parol agreement because the record contains no corroborative evidence of the agreement independent of the plaintiff's own testimony as required by the Dead Man's Statute.

Plaintiff brought suit against the named defendant nonprofit entity as the devisee of certain real and personal property under his aunt's will, claiming that, pursuant to an unrecorded oral agreement he had entered into in 1977, he was entitled to receive such property. At trial, plaintiff proffered that, during a meeting with his aunt and uncle, he agreed to help them by working on their farm in exchange for the receipt of all of their assets upon their deaths. The plaintiff also presented evidence that he faithfully performed his obligations under the agreement. The defendant argued that the plaintiff's testimony as to the alleged agreement was not corroborated as required under Virginia's Dead Man's Statute, and that, as a result, the alleged oral agreement was unenforceable under the statute of frauds. The circuit court ruled in plaintiff's favor, finding that the statute of frauds did not bar the plaintiff's claim on the basis of part performance of the alleged parol agreement.

The Supreme Court reversed and entered final judgment. The Court held that, under the Dead Man's statute, "evidence, to be corroborative, must be independent of the surviving witness." In the absence of evidence supporting the existence of the parol agreement other than the plaintiff's own testimony, the plaintiff's claim failed to satisfy statute of frauds

# Torts

## *Legal Malpractice*

Williams v. Joynes  
278 Va. 57 (2009)

In a legal malpractice case, the circuit court erred in granting summary judgment to the defendant attorneys since the plaintiff's failure to pursue his personal injury claim in a foreign jurisdiction was not a superseding cause of the plaintiff's injury as a matter of law.

Five months after sustaining severe injuries from an automobile accident in Fairfax County, the plaintiff hired the defendants to handle his personal injury case. The lawsuit was not filed until 25 months after the accident, and two months later, the defendants notified the plaintiff that the action had not been timely filed within the two-year statute of limitations. The defendants advised the plaintiff that his personal injury claim might be viable in Maryland, because one of the drivers involved in the accident and his employer were domiciliaries of Maryland and the Maryland statute of limitations was three years. The plaintiff was unable to find an attorney to take his case in Maryland and he subsequently filed a malpractice action against the defendants. The defendants moved for summary judgment contending that plaintiff's decision not to file an action in Maryland severed any causal link between defendants' negligence and the plaintiff's loss. The trial court granted defendant's motion.

The Supreme Court reversed and remanded. The Court held that the plaintiff's difficulties hiring an attorney in Maryland and his decision not to file an action in Maryland were set in motion by the defendants' negligence, so the plaintiff's failure could not be a superseding cause of plaintiff's loss of his personal injury action. The Court also noted that the plaintiff forever lost the right to pursue one of the primary tortfeasors who was not subject to suit in Maryland.

## *Personal Injury*

City of Alexandria v. J-W Enterprises, Inc.  
279 Va. \_\_ (2010); 2010 Va. LEXIS 50 (April 15, 2010)

The circuit court correctly held that, when an off-duty officer hired by the defendant for private security shot and killed a patron, he was acting as a police officer and not as the defendant's employee.

An Alexandria Police Department officer worked off-duty for the defendant at the defendant's IHOP restaurant. In the pursuit of patrons who were "walking out" on a bill (a class one misdemeanor), the off-duty officer shot at a fleeing vehicle, killing a passenger. The City of Alexandria settled with the decedent's estate and agreed to pursue a claim of contribution against the defendant. At trial, the City asserted that the off-duty officer was the defendant's employee and acting within the scope of employment when he caused the decedent's fatal injury. Citing a number of alternative grounds, the circuit court concluded that the City was not entitled to contribution from the defendant and dismissed the City's complaint.

The Supreme Court reiterated that an employer's liability is determined by the capacity in which the officer was acting at the time he committed the allegedly tortious acts. As there was ample evidence supporting the circuit court's determination that the off-duty officer was acting in his public capacity as a police officer, the Court affirmed the circuit court's decision.

Hawthorne v. VanMarter

279 Va. \_\_ (2010); 2010 Va. LEXIS 54 (April 15, 2010)

The Supreme Court dismissed the appeal filed by the administrators of an estate because the administrators were not true parties in interest and, therefore, could not file an appeal in a pro se capacity.

The driver of a vehicle was killed and her passenger injured when an officer struck the vehicle while attempting to “overtake” a speeding motorist. The officer struck the driver’s vehicle when he looked down to turn on his lights and siren. The driver’s estate and the passenger filed motions for judgment alleging negligence and the cases were consolidated for trial. The defendant officer filed a plea in bar asserting that he was entitled to sovereign immunity and immune from liability for ordinary negligence. In the hearing conducted on the defendant’s plea in bar, the plaintiffs did not present testimony and the circuit court held in favor of the defendant, concluding that the plaintiffs’ claims of ordinary negligence were barred by sovereign immunity. The plaintiffs proceeded to trial solely on the gross negligence claim, the jury returned a verdict in favor of the defendant, and the circuit court entered final judgment. On appeal, the administrators of the estate proceeded pro se.

The Supreme Court dismissed the appeal filed by the administrators of an estate because the administrators were not true parties in interest and, therefore, could not file an appeal in a pro se capacity. The Supreme Court held that the circuit court did not abuse its discretion by declining to reopen the record and reconsider its ruling on the plea in bar or by granting the defendant’s motion to change venue. Moreover, the Court held that the circuit court did not commit manifest error in refusing to grant plaintiff’s motion to strike five jurors for cause - jurors who demonstrated that they were able to serve impartially - and the circuit court did not err in overruling the defendant’s objections to jury instructions.

Hollingsworth v. Norfolk Southern Ry. Co.

279 Va. 360 (2010)

The circuit court did not err in granting the defendant’s motions in limine to exclude the testimony of two podiatrists because they were not medical doctors and not qualified to render expert opinions as to causation of physical injuries.

Plaintiff brought a negligence action under the Federal Employers’ Liability Act against his former employer, alleging that the company required him to walk on large ballast and debris scattered throughout the railroad yards causing injury to his ankles and feet. He designated two licensed podiatrists as expert witnesses to testify about their treatment and to give the opinion that his injuries were caused by repeated walking on irregular surfaces. The defendant moved in limine, arguing that the podiatrists could not testify as to causation of injuries because they were not medical doctors. The circuit court granted the motions and, in light of the absence of medical causation testimony, granted summary judgment for the defendant.

The Supreme Court affirmed. The Court held that the podiatrists were not medical doctors and, therefore, were not qualified to render an expert opinion regarding the cause of human physical injury.

Idoux v. Helou

279 Va. \_\_ (2010); 2010 Va. LEXIS 56 (April 15, 2010)

The circuit court correctly held that the statute of limitations barred the plaintiff's claim where the plaintiff mistakenly filed a negligence action which named an estate as the defendant (and not the estate's personal representative), a mistake that persisted until after the relevant statute of limitations expired.

Before the plaintiff filed a negligence claim in general district court, the defendant died. The decedent's wife qualified as the personal representative of the decedent's estate. The general district court dismissed the plaintiff's warrant in debt for improperly identifying a deceased defendant. The plaintiff subsequently filed a negligence claim in circuit court, naming the decedent's estate as the defendant. The personal representative was not named in the complaint and was served with the complaint after the statute of limitations expired. The estate then filed a plea in bar asserting that the estate could not be a proper party to the action and that the proper party, the personal representative of the estate, could not be sued because the statute of limitations barred the claim. The circuit court sustained the plea in bar.

The Supreme Court affirmed, reiterating that Virginia statutes do not authorize an action against an estate. "A [complaint] against an 'estate' is a nullity and cannot toll the statute of limitations." Code §.01-6.2(B) is inapplicable where the personal representative of an estate could have received service if the proper name was used.

*Legislative Update:* House Bill 1193 (Chapter 437, 2010 Acts of Assembly) allows such improper pleading to be amended without penalty on the motion of any party or by the court on its own motion.

Kimble v. Carey

279 Va. \_\_ (2010); 2010 Va. LEXIS 57 (April 15, 2010)

The issue of whether a rescuer acted in rash or reckless disregard to her own safety in attempting a rescue was a question for a jury.

While attempting to assist the defendant who was trapped in a burning vehicle, the plaintiff was struck by an oncoming vehicle. The plaintiff filed a complaint against the defendant alleging that his negligence created the peril from which he needed to be rescued and that his negligence proximately caused her injuries. Upon learning that the defendant's blood alcohol level at the time of the accident was above the legal limit, the plaintiff sought to submit evidence that the defendant was intoxicated and amend her complaint to include a count alleging willful or wanton conduct. The circuit court denied the plaintiff's motion to amend and excluded evidence of defendant's intoxication as immaterial and irrelevant. The circuit court granted the defendant's motion to strike the evidence, holding that the plaintiff was contributorily negligent as a matter of law.

The Supreme Court held that the circuit court did not abuse its discretion by rejecting compounding evidence of the defendant's negligence. However, since reasonable minds could differ on the issue of whether or not the plaintiff acted rashly or recklessly, the Court held that the circuit court erred in not submitting the question to the jury.

## ***Premise Liability***

### **Fultz v. Delhaize America**

278 Va. 84 (2009)

The circuit court erred by granting a motion for summary judgment for the defendants when the issue of whether or not the plaintiff was contributorily negligent should have been decided by a jury.

The plaintiff walked to an ATM located in the front vestibule of a grocery store. The ATM was flanked by two bars, each approximately twice the length of the machine and five inches off the floor. The placement of the bars forced the user to stand between them while using the ATM. The plaintiff's young grandson suddenly moved away as she used the ATM. As the plaintiff turned and moved towards her grandson, she tripped over one of the metal bars, fracturing bones in her right elbow. She filed a complaint alleging that defendants, the grocery store and the ATM installer, were negligent. The circuit court granted the defense's motion for summary judgment, holding that the ATM bars represented an open and obvious hazard and that the plaintiff was contributorily negligent as a matter of law.

The Supreme Court reversed and remanded the case. The Court held that whether or not the plaintiff was contributorily negligent was a matter on which reasonable people could disagree and, therefore, should have been submitted to a jury.

## **Utilities**

### ***Power Companies***

### **Piedmont Environmental Council v. VEPCO**

278 Va. 553 (2009)

The State Corporation Commission conducted its review of power line applications within the statutory requirements, and its decision to grant the application was supported by the evidence.

Following a determination by the Federal Energy Regulatory Commission that a new electric transmission line was needed to avoid projected violations of electric power transmission grid reliability standards, two Virginia utilities filed applications with the State Corporation Commission. The utilities sought the approval for the construction and operation of two Virginia segments of the proposed interstate transmission line. The Commission appointed a hearing examiner to conduct proceedings on the utilities' applications and also retained a consulting firm to conduct independent verification of the utilities' data. The consulting firm ultimately concluded that the utilities' data was based on reasonable assumptions and made recommendations to the Commission that were favorable to the applications. The consulting firm also recommended that the Commission use the utilities' data to determine the need for a new transmission line. The named appellant, along with three local governmental entities and a public interest group, opposed the applications, and filed appeals of right from the Commission's order.

The Court affirmed the order of the State Corporation Commission. The Court held that the Commission properly found that the construction of the lines was necessary, and it afforded appropriate weight to data received from the utility in support of the applications. The Court noted the deference that is given to decisions by fact-finding agencies.

## Wills, Trusts, and Estates

### *Cemeteries*

#### Shilling v. Baker

279 Va. \_\_ (2010); 2010 Va. LEXIS 49 (April 15, 2010)

The circuit court correctly held that a plot of land used for the scattering of ashes and placement of memorials was not a lawful cemetery under the local zoning ordinance.

The plaintiff's grandfather owned a tract of land with a scenic hilltop in Rockingham County and, when the plaintiff's grandfather died in 1949, his ashes were scattered on the hilltop. Additional family members' ashes were scattered there in the 1980s and 1990s and memorials were erected. The defendant acquired the land by deed of gift in 1991 and allowed the plaintiff to bury her mother's ashes near the hilltop site. When defendant contracted to sell the land in 2007, the plaintiff filed a complaint in circuit court requesting, in part, that the hilltop site be declared a legal cemetery. The circuit court, contrary to the county board of zoning appeals, held in defendant's favor stating that a "cemetery cannot be established without the burial of a dead body."

The Supreme Court agreed with the circuit court and affirmed, finding no legal support for the plaintiff's argument that the scattering of remains creates a cemetery.

### *"Pour Over" Wills*

#### Keener v. Keener

278 Va. 435 (2009)

The circuit court erred by holding that a daughter's commencement of intestate administration of her father's estate amounted to a challenge of his testamentary trust because a no-contest provision, while appearing in the trust, did not appear in the underlying "pour over" will.

A father created a "pour over" will leaving all his property to a revocable living trust which was created on the same day as his will. One of his sons was designated as the successor trustee under the will. The trust provided that if all of his children were to survive him, the trust would terminate at his death and that all of its assets were to be distributed to them in equal shares. The father executed an addendum to the trust providing that at his death, any person objecting to or contesting any provision of the trust, would forfeit any distribution otherwise payable from the trust or estate. The will did not contain a forfeiture or no-contest provision. After one of his daughters learned that a will had not been offered for probate, she applied to the clerk of the court for administration of her father's estate. The clerk entered an order appointing her administratrix and authorizing issuance of letters of administration to her. After learning of these acts, the successor trustee stopped payment on a trust distribution check sent to her, asserting that she had forfeited her interest by violating the no-contest provision. He filed a petition in circuit court against the daughter exhibiting the original will and asking for its admission to probate as well as for the removal of the daughter as administratrix. He also alleged that the acts amounted to a contest of the provisions of the trust. The circuit court ruled that the daughter's actions were a contest of the trust, and that she had forfeited her interest.

The Supreme Court reversed and remanded. The Court held that a forfeiture clause in a testamentary trust, as with one appearing in a will, should be strictly construed. The daughter's actions, while undermining the will that funded the trust, did not amount to a contest of the trust itself.

### ***Residual Clauses***

#### **Lane v. Starke**

279 Va. \_\_ (2010); 2010 Va. LEXIS 41 (April 15, 2010)

Reversing the circuit court judgment, the Supreme Court used the canons of construction to interpret the terms of a confusing will, holding that the will created remainder interests which vested upon the death of testator subject only to a charge on the property at the death of a life tenant.

A testator was survived by his wife and his will provided a life estate to her in real property he devised to three of his children. The children's remainder interests were subject to payment into the estate of one-half of the assessed values of the real property. After the death of the testator's wife, one of the children filed suit in circuit court for direction as to the appropriate date to determine the assessed valuations of the real property. The trial court ruled that the will created contingent remainders for the three children and not vested remainders, and the payments of one-half of the assessed values of real property were conditions precedent which had to have been met before the death of the testator's wife. Since the children had not met the conditions precedent, the trial court concluded that the properties reverted to the testator's estate.

The Supreme Court reversed and remanded. The Court observed that the will did not explicitly provide a time for the assessment of value and that, since the terms used in the will were ambiguous, the canons of construction guided interpretation. Applying the "early vesting" rule, the Court concluded that, upon the testator's death, the children held vested remainder interests subject only to a charge on the property at the death of the life tenant as assessed on that date.

### ***Trustees and Executors***

#### **Bell v. Saunders**

278 Va. 49 (2009)

While the circuit court correctly sustained a demurrer against a co-plaintiff that did not demonstrate any legal matter of contention, the circuit court erred in sustaining a demurrer against the remaining plaintiff who pled a justiciable controversy ripe for adjudication.

A daughter-in-law and her son brought a declaratory action against the attorney serving as the executor and trustee of her father-in-law's estate alleging that, although she was entitled to annual income from one-half of a trust estate, the executor refused to make disbursements until after the daughter-in-law died. Moreover, her son alleged that the attorney drafted a will for his decedent father but, to his detriment, refused to take on executorship responsibilities. The trial court sustained demurrers upon a finding that the complaint failed to state facts upon which relief can be granted.

The Supreme Court affirmed in part, reversed in part, and remanded. The Court held that the daughter-in-law's claim against the executor was suitable for a declaratory proceeding because it involved the assertion of a right and the denial of that right by the executor. The Court also held that the son's

action was not suitable for declaratory judgment because he admitted in the complaint that the attorney was not the executor of his father's will.

### *Trust Instruments*

Harbour v. SunTrust Bank  
278 Va. 514 (2009)

Where the plain language of a trust agreement indicates that the surviving beneficiaries' remainder interests vest upon the death of the grantor, the court may not examine what the grantor intended to say.

A wife executed an inter vivos trust agreement directing that the income and the corpus of the trust be used for her benefit during her lifetime. She also directed that, if her husband survived her, the assets were to be used for his benefit during his lifetime. The agreement set forth further provisions distributing any remainder at the death of her husband into four equal shares, to three siblings and a church. The agreement specifically provided that, if any sibling predeceased the grantor, their remainder share would lapse and would be given to the church. The grantor died, survived by her husband and two of the three siblings. These two siblings predeceased the husband, and each was survived by one child. A bank, as trustee, filed a complaint seeking guidance in the interpretation of the trust. The circuit court entered final judgment holding that the shares of all three deceased siblings had lapsed since they predeceased the grantor's husband and the shares should be given to the church.

The Supreme Court reversed and remanded. The Court held that the plain text of the trust required that the shares of the two siblings who survived the grantor be given to their children. The trust only required that the siblings survive the grantor for their remainder interests to vest; it did not require that they survive the grantor's husband.