RECENT DEVELOPMENTS IN VIRGINIA CIVIL LITIGATION

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TABLE OF CONTENTS

I. INTRODUCTION. 1
II. MOST IMPORTANT DEVELOPMENTS COVERED BY THIS OUTLINE. 1
A. Admissibility of business records. 1
B. Appellate jurisdiction—after voluntary dismissal of remaining claims. 1
C. Defamation. 2
D. Default judgment. 2
E. Discovery violations—sanctions. 2
F. Federal jurisdiction—abstention. 2
G. Federal jurisdiction—removal; consent. 3
H. Hearsay—exceptions when declarant is unavailable. 3
I. Insurance—preemption of Virginia law. 3
J. Personal jurisdiction—conspiracy theory of jurisdiction. 3
K. Standing—personal interest. 4
L. Taxation of discovery costs. 4
M. Title VII—hostile environment. 4
N. Tolls as valid user fees. 4
O. Tortious interference. 5
P. Wrongful termination. 5
III. JURISDICTION, VENUE AND SERVICE OF PROCESS. 6
A. Cases. 6
1. Federal jurisdiction—abstention. 6
2. Federal jurisdiction—Alien Tort Statute. 6
3. Federal jurisdiction—diversity of citizenship. 6
4. Federal jurisdiction—removal; consent. 6
5. Federal jurisdiction—removal; defective pleading. 7
6. Federal jurisdiction—removal; lack of substantial federal question. 7

7. Federal Jurisdiction—State officials under *Ex Parte Young*. 8
8. Federal jurisdiction—waiver. 8
9. Forum-selection clause—motion to transfer. 8
10. Forum non conveniens. 8
11. Mootness. 9
12. Personal jurisdiction—conspiracy theory of jurisdiction. 9
13. Standing—First Amendment; injury-in-fact. 9
14. Standing—personal interest. 10
15. Standing—statutory standing. 10

IV. CAUSES OF ACTION AND DAMAGES 10

A. Contract Cases. 10
1. First material breach. 10
2. Implied covenant of good faith and fair dealing. 11
3. Undue influence. 11

B. Insurance cases 11
1. Preemption of Virginia law. 11
2. Uninsured motorist carrier—stacking. 11

C. Tort cases. 12
1. Defamation. 12
2. Intentional infliction of emotional distress. 12
3. Punitive damages—remittitur. 12
4. Tortious interference. 12

D. Other. 13
1. Lanham Act—claims based on social media. 13
2. Property—easements. 13
3. Property—interests. 13
4. Property—Takings Clause. 14
5. Sarbanes-Oxley Act—whistleblower protection. 14
6. The Patent Act—fee shifting. 14
7. The Patent Act—patent eligible. 14
8. The Voting Rights Act of 1965 14
9. Title VII—*prima facie* case of discrimination. 15
10. Title VII—retaliation. 15
11. Title VII—workplace harassment; “supervisor”. 15

12. Title VII—hostile environment....15
13. Tolls as valid user fees....16
14. Virginia Consumer Protection Act....16
15. Virginia Freedom of Information Act....16
16. Wrongful termination....16
17. Zoning....17

V. PLEADING, PRACTICE AND PROCEDURE....17

A. Statutes....17
1. Foreign judgments....17
2. Injunctions—objection to petition for review....18
3. Judgment on an affidavit in action upon contracts or notes—grounds for dismissal....18

B. Rules....18
1. Federal procedure—subpoenas....18
2. Foreign attorneys—admitted to practice in Virginia without examination.18
3. Foreign attorneys—revocation of Certificates....19
4. Pretrial Scheduling Orders....19
5. Summary judgment....19
6. Use of depositions in court proceedings....19

C. Cases....19
1. Amendments to pleadings....19
2. Attorney's fees—Rule 3:25....20
3. Attorney's fees—Court's inherent power....20
4. Choice of law....20
5. Class Action Fairness Act of 2005....21
6. Class actions—commonality requirement....21
7. Declaratory judgments....21
8. Default judgment....21
9. Derivative lawsuits— Fed. R. Civ. P. 23.1....22
10. Indispensable parties....22
11. Motion to amend complaint....22
12. Motions to dismiss—patent cases....23
13. Motion to extend expert disclosure deadline....23
14. Privilege—work product doctrine....23
15. Right to a jury trial....23

16. Sanctions. 24
17. Scope of review on remand. 24
18. Summary judgment. 24
VI. AFFIRMATIVE DEFENSES. 24
A. Statutes. 24
1. Statute of limitations. 24
B. Cases. 24
1. Failure to plead. 24
2. *Noerr-Pennington* immunity. 25
3. Preemption. 25
4. Qualified immunity. 25
5. Res judicata. 25
6. Statute of limitation—equitable estoppel. 26
7. Statute of limitations—retroactivity. 26
8. Statutory employer. 26
VII. TRIAL PROCEEDINGS AND EVIDENCE. 26
A. Statutes. 26
1. Admissibility of business records. 26
2. Expert witness testimony. 27
B. Rules. 27
1. Experts—literature designations. 27
2. Hearsay—exceptions when declarant is unavailable 27
C. Cases. 27
1. Courtroom coverage. 27
2. Discovery violations—sanctions. 28
3. Judgment as a matter of law—specificity requirement. 28
4. Jury verdicts. 28
5. Motion to set aside the judgment—fraud on the court doctrine. 28
6. *Pro se* representation. 29
7. Remittitur. 29
8. Taxation of discovery costs. 29
9. Waiving objections. 30
VIII. APPELLATE PRACTICE. 30
A. Rules. 30

1. Appeals to the Supreme Court of Virginia—petition for rehearing. 30
2. Appeals to the Supreme Court of Virginia—from the Virginia State Bar Disciplinary Board or a three-Judge Circuit Court Determination. 30

B. Cases. 30
1. Appellate jurisdiction—after voluntary dismissal of remaining claims. ...30
2. Federal court—preservation of issues for appeal......................................31
3. Finality—time for filing notice of appeal. 31

VIRGINIA CIVIL LITIGATION
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I. INTRODUCTION.

This outline focuses on civil litigation developments from May 1, 2013, to April 30, 2014, of interest to Virginia practitioners. It discusses developments affecting civil practice and procedure and describes the 2014 amendments to the Virginia Code. Unless otherwise noted, changes to the Virginia Code take effect July 1, 2014. The outline identifies changes to the Rules of the Supreme Court of Virginia and the Federal Rules of Civil Procedure. The outline also addresses statutes and published cases dealing with contracts, employment law, insurance, and torts.

II. MOST IMPORTANT DEVELOPMENTS COVERED BY THIS OUTLINE.[2]

A. Admissibility of business records.

2014 Va. Acts 398 (H. 301) (approved Mar. 31, 2014) (amending Code § 8.01-391 and enacting § 8.01-390.3 to provide that the authentication and foundation necessary for the admission of a business record under the business records exception to the rule against hearsay may be laid by (1) witness testimony, (2) a certificate of authenticity of, and foundation for, the record made by the record's custodian or another qualified witness, or (3) a combination of testimony and a certification; providing that if the proponent of the record intends to rely upon certification, he must give written notice and a copy of the certification to all other parties no later than 15 days in advance of the trial or hearing, and if any party objects to the use of the certification, the authentication and foundation necessary for the admission of the record must be made by witness testimony).

B. Appellate jurisdiction—after voluntary dismissal of remaining claims.

Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27, 728 F.3d 354 (4th Cir. 2013) (Diaz, J.) (holding that, when the district court enters an order dismissing some, but not all, of the pending claims, and the parties stipulate to a voluntary dismissal of the remaining claims, but not entirely with prejudice, this constitutes a type of "split judgment" that is not sufficiently final to trigger appellate jurisdiction under 28 U.S.C. § 1291; rejecting some circuits' approach of dismissing the appeal for lack of jurisdiction; adopting the Eighth Circuit's pragmatic approach of treating the remaining claims as dismissed "with prejudice," and considering the appeal).

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[1] We are grateful to our colleagues John E. Beerbower, Joshua P. Hanbury, Haley Costello Essig and Jill M. deGraffenreid who helped digest many of the cases in the outline and provided helpful insights and editorial assistance with this effort.

[2] These summaries are repeated in the main outline but collected here for easy reference.

C. Defamation.

Cashion v. Smith, 286 Va. 327, 749 S.E.2d 526 (2013) (Mims, J.) (overruling language in *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 334 S.E.2d 846 (1985), and holding that it is "unwarranted" to consider good faith when determining whether a qualified privilege exists; explaining that whether a statement was made in good faith is a question of fact for the jury to resolve when deciding whether a qualified privilege has been lost or abused, and it is not a question of law for the court to answer in deciding whether a privilege exists; explaining that, once a qualified privilege has attached to a communication, the plaintiff must prove by clear and convincing evidence that the privilege was lost or abused; holding that "a showing of pre-existing personal spite or ill will is only one of several ways in which a privilege can be lost").

D. Default judgment.

Evans v. Larchmont Baptist Church Infant Care Ctr., Inc., 956 F. Supp. 2d 695 (E.D. Va. 2013) (Leonard, J.) (entering default judgment even though defendant answered plaintiff's amended complaint because, as a result of the termination of the defendant's corporate existence while the case was pending, it was unable to retain counsel and "otherwise defend" as required by Fed. R. Civ. P. 55(a)).

E. Discovery violations—sanctions.

Projects Mgmt. Co. v. Dyncorp Int'l LLC, 734 F.3d 366 (4th Cir. 2013) (Agee, J.) (affirming the district court's invocation of its inherent authority to sanction a party for abusing the judicial process and the dismissal of plaintiffs' claims as a sanction for a series of discovery abuses; holding that, although the dismissal of claims is a sanction that should be levied "with the greatest caution," each of the six factors outlined in *United States v. Shaffer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993), had been satisfied, the most significant of which was that the client, not its counsel, was responsible for thwarting discovery and that the client had been given multiple chances to cure its deficiencies).

F. Federal jurisdiction—abstention.

Town of Nags Head v. Toloczko, 728 F.3d 391, 393, 396 (4th Cir. 2013) (Diaz, J.) (holding that a federal district court has an "unflagging obligation to exercise its jurisdiction," thus, "abnegation of federal jurisdiction is a serious measure to be taken only under 'extraordinary and narrow' circumstances;" concluding that abstention was inappropriate because the state law question at issue was not a close one; reversing the district court's decision to abstain from adjudicating constitutional claims regarding the enforcement of the Town of Nags Head's land-use ordinances, despite the fact that the Court conceded that land-use issues provide the "paradigm of *Burford* abstention") (citations omitted).

G. Federal jurisdiction—removal; consent.

Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co., 736 F.3d 255, 259-60 (4th Cir. 2013) (Wilkinson, J.) (holding, as a matter of first impression, that "nominal" party defendants need not consent to removal in order to satisfy the unanimity requirement, but declining to adopt any of the tests applied by other circuits to determine whether a defendant is "nominal;" holding instead that "[n]ominal means simply a party having no immediately apparent stake in the litigation either prior or subsequent to the act of removal" and that "the key inquiry is whether the suit can be resolved without affecting the non-consenting nominal defendant in any reasonably foreseeable way").

Mayo v. Bd. of Educ. of Prince George's Cnty., 713 F.3d 735, 742 (4th Cir. 2013) (Niemeyer, J.) (holding, as a matter of first impression, that a "notice of removal signed and filed by an attorney for one defendant representing unambiguously that the other defendants consent to the removal satisfies the requirement of unanimous consent for purposes of removal," and thereby adopting the approach followed by the Sixth and Ninth Circuits, and rejecting the more restrictive rules of the Seventh, Fifth, and Eighth Circuits).

H. Hearsay—exceptions when declarant is unavailable.

Va. Sup. Ct. R. 2:804(b)(5) amended, effective July 1, 2013, to provide: "For the purposes of this section, and in addition to corroboration by any other competent evidence, an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party. If authentication of the business record is not admitted in a request for admission, such business record shall be authenticated by a person other than the author of the entry who is not an adverse or interested party whose conduct is at issue in the allegations of the complaint."

I. Insurance—preemption of Virginia law.

Hillman v. Maretta, 133 S. Ct. 1943 (2013) (Sotomayor, J.) (holding that the Federal Employees' Group Life Insurance Act ("FEGLIA"), which provides that an employee may designate a beneficiary of his or her life insurance proceeds and that the designation takes precedence over other potential recipients, preempts Va. Code Ann. § 20-111.1(D), which allows the current spouse of an employee to sue the employee's former spouse to recover benefits paid to him or her under a pre-existing designation of benefits; concluding that Section 20-111.1(D) conflicts, and directly interferes, with Congress's purpose in enacting FEGLIA).

J. Personal jurisdiction—conspiracy theory of jurisdiction.

Unspam Techs., Inc. v. Chernuk, 716 F.3d 322, 329 (4th Cir. 2013) (Niemeyer, J.) (affirming the dismissal of claims against defendant banks for lack of personal jurisdiction where the plaintiff made no more than conclusory allegations that the banks were amenable to jurisdiction because they were part of a conspiracy whose members had direct contacts with the forum; holding that, under this "conspiracy theory of

jurisdiction," a plaintiff must show, with more than bare allegations, "(1) that a conspiracy existed; (2) that the [defendants] participated in the conspiracy; and (3) that a coconspirator's activities in furtherance of the conspiracy had sufficient contacts with [the forum] to subject that conspirator to jurisdiction in [the forum]").

K. Standing—personal interest.

Friends of the Rappahannock v. Caroline Cnty. Bd. of Supervisors, 286 Va. 38, 47-48, 743 S.E.2d 132, 136-37 (2013) (Millette, Jr., J.) (holding, in a declaratory judgment action challenging the county's grant of a special exception permit, that the appropriate standard to apply in determining if a plaintiff has standing to challenge "a land use decision by a board of zoning appeals" or similar "local governing bodies" is the "aggrieved person" standard; noting that "any distinction between an 'aggrieved party' and 'justiciable interest' is a distinction without a difference in declaratory judgment actions challenging land use decisions").

L. Taxation of discovery costs.

Country Vintner of N.C., LLC v. E. & .J Gallo Winery, Inc., 718 F.3d 249 (4th Cir. 2013) (Davis, J.) (holding, as a matter of first impression, that large categories of ESI-processing costs—specifically, the cost of flattening/indexing ESI, searching and reviewing and extracting metadata, bates-numbering and quality-control—are not taxable under 28 U.S.C. § 1920(4) as "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case . . ."; holding that the only costs that are fairly taxable under the statute are the cost of converting native files to .TIFF or .pdf images, but allowing, in a footnote, for the possibility that costs for extraction of metadata might be recoverable where that metadata is essential to the particular case).

M. Title VII—hostile environment.

Freeman v. Dal-Tile Corp., No. 13–1481, 2014 WL 1678422 (4th Cir. Apr. 29, 2014) (Shedd, J.) (holding that employer can be held liable for sex- or race-based harassment by a third party when the employer knows or reasonably should have known about the harassment and fails to take prompt, remedial action reasonably calculated to end the harassment).

N. Tolls as valid user fees.

Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 749 S.E.2d 176, 179 (2013) (Millette, J.) (holding that "the General Assembly did not unconstitutionally delegate its legislative power of taxation by authorizing the Virginia Department of Transportation ('VDOT') and Elizabeth River Crossings OpCo, LLC ('ERC') to charge tolls to motorists using existing river tunnels to help finance construction of various improvements to the transportation network, including an additional river tunnel crossing in another location; explaining that the tolls are valid user fees, and not unconstitutionally delegated taxes, because they provide "a particularized benefit not shared by the general public," they are not required of all drivers because drivers may avoid the road, and the

funds collected from the tolls are not used to "raise general revenues" that are unrelated to the overall transportation project objectives).

O. Tortious interference.

Dunlap v. Cottman Transmission Sys., LLC, 287 Va. 207, 754 S.E.2d 313 (2014) (Kinser, J.), *answering certified questions of law from* No. 11-2327 (4th Cir. Aug. 21, 2013) (determining that tortious interference with contract or tortious interference with business expectancy may serve as the necessary unlawful act for a claim of business conspiracy under Va. Code §§ 8.2-499 and 18.2-500, because both are grounded on an independent common law duty not arising solely out of the underlying contract; distinguishing *Station #2, LLC v. Lynch*, 280 Va. 166, 695 S.E.2d 537 (2010) (holding that conspiracy merely to breach a contract does not involve an independent duty arising outside the contract and, thus, cannot serve as the underlying "unlawful act" under § 18.2-500); concluding that the five-year statute of limitations in Va. Code § 8.01-243(B) applies to tortious interference with contract and tortious interference with business expectancy claims, because both involve property rights injuries).

P. Wrongful termination.

Lewis v. City of Alexandria, 756 S.E.2d 465 (Va. 2014) (McClanahan, J.) (determining as a matter of first impression that, because front pay and compensation for lost pension are not expressly mentioned in Virginia's wrongful Virginia Fraud Against Taxpayers Act, Va. Code § 8.01-216.8, which entitles a wrongfully terminated employee to relief that will make him or her "whole," they fall within the statute's provision for "special damages sustained as a result of the discrimination"; holding that such damages under the Act constitute equitable relief, which is a matter of the court's discretion and may properly be denied where other relief makes the plaintiff "whole").

III. JURISDICTION, VENUE AND SERVICE OF PROCESS.

A. Cases.

1. Federal jurisdiction—abstention.

Town of Nags Head v. Toloczko, 728 F.3d 391, 393, 396 (4th Cir. 2013) (Diaz, J.) (holding that a federal district court has an "unflagging obligation to exercise its jurisdiction," thus, "abnegation of federal jurisdiction is a serious measure to be taken only under 'extraordinary and narrow' circumstances"; concluding that abstention was inappropriate because the state law question at issue was not a close one; reversing the district court's decision to abstain from adjudicating constitutional claims regarding the enforcement of the Town of Nags Head's land-use ordinances, despite the fact that the Court conceded that land-use issues provide the "paradigm of *Burford* abstention") (citations omitted).

VRCompliance LLC v. Homeaway, Inc., 715 F.3d 570 (4th Cir. 2013) (Wilkinson, J.) (affirming the district court's decision to stay the lawsuit pending the resolution of a parallel state lawsuit between the same parties involving the same subject matter, where the federal court plaintiffs argued that the narrower *Colorado River* abstention doctrine applied, while the federal defendants claimed that the broader *Brillhart/Wilton* doctrine in declaratory judgment actions should govern; declining to decide the standard that governs, because the federal plaintiff had ample opportunity to avail itself of a federal forum through removal, and its failure to do so suggested the type of forum shopping and "procedural fencing" that justifies abstention generally).

2. Federal jurisdiction—Alien Tort Statute.

Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857 (E.D. Va. 2013) (Lee, J.) (holding that, in light of the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the district court lacked jurisdiction under the Alien Tort Statute where the acts giving rise to the plaintiff's claim for relief occurred exclusively in Iraq).

3. Federal jurisdiction—diversity of citizenship.

Hoschar v. Appalachian Power Co., 739 F.3d 163 (4th Cir. 2014) (Thacker, J.) (holding that the "nerve center" test from the Supreme Court's decision in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), is the proper test in assessing the "principal place of business" of a corporation).

4. Federal jurisdiction—removal; consent.

Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co., 736 F.3d 255, 259-60 (4th Cir. 2013) (Wilkinson, J.) (holding, as a matter of first impression, that "nominal" party defendants need not consent to removal in order to satisfy the unanimity requirement, but declining to adopt any of the tests applied by other circuits to

determine whether a defendant is "nominal;" holding instead that "[n]ominal means simply a party having no immediately apparent stake in the litigation either prior or subsequent to the act of removal" and that "the key inquiry is whether the suit can be resolved without affecting the non-consenting nominal defendant in any reasonably foreseeable way").

Mayo v. Bd. of Educ. of Prince George's Cnty., 713 F.3d 735, 742 (4th Cir. 2013) (Niemeyer, J.) (holding, as a matter of first impression, that a "notice of removal signed and filed by an attorney for one defendant representing unambiguously that the other defendants consent to the removal satisfies the requirement of unanimous consent for purposes of removal," and thereby adopting the approach followed by the Sixth and Ninth Circuits, and rejecting the more restrictive rules of the Seventh, Fifth, and Eighth Circuits).

5. Federal jurisdiction—removal; defective pleading.

DBS, Inc. v. Selective Way Ins. Co., Civ. No. 2:13 cv 312, 2013 U.S. Dist. LEXIS 97112, at *4-5, *10 (E.D. Va. Jul. 10, 2013) (Morgan, Jr., S.J.) (holding that defendant's notice of removal was defective in alleging diversity of citizenship when it stated: "[a]t the time this action began, the defendant . . . was, and still remains incorporated in the State of New Jersey and has its principal place of business in New Jersey"; stating that "[g]rammar matters," and the sentence left doubt as to the defendant's principal place of business at the time the action was commenced; granting defendant leave to amend to correct the defect, even though it was longer than 30 days following removal: "The insufficiency of these allegations is best seen as an 'imperfect statement' of presently undisputed jurisdictional facts rather than an omission.").

6. Federal jurisdiction—removal; lack of substantial federal question.

Fastmetrix, Inc. v. ITT Corp., 924 F. Supp. 2d 668, 673-74 (E.D. Va. 2013) (Ellis, J.) (rejecting defendant's argument that removal was warranted and timely because the plaintiff's Third Amended Complaint had raised two questions of federal law for the first time; "a federal court has jurisdiction to hear only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law"; holding that none of the asserted bases for federal-question removal were elements of the plaintiff's state law claims, and plaintiff's right to relief did not depend on the resolution of either federal question allegedly raised by the new allegations, which were "no more than unnecessary surplusage") (internal quotation marks and citation omitted).

Fed. Nat'l Mortg. Ass'n v. Davis, 963 F. Supp. 2d 532, 537, 543 (E.D. Va. 2013) (Payne, J.) (holding that plaintiff's congressional charter "authoriz[ing] [it] to 'sue and be sued, and to complain and defend, in any court of competent jurisdiction, State or Federal'" does not automatically confer federal question jurisdiction

because the "words 'of competent jurisdiction,' . . . require an independent basis of subject matter jurisdiction") (citation omitted).

7. Federal Jurisdiction—State officials under *Ex Parte Young*.

   Harris v. McDonnell, Civ. A. No. 5:13cv077, 2013 WL 6835145 (W.D. Va. Dec. 23, 2013) (Urbanski, J.) (holding that the Governor was not a proper party in a suit brought by same-sex couples challenging the marriage laws of Virginia because he had no "special relation" with the challenged law, other than the general supervisory authority to enforce state laws).

8. Federal jurisdiction—waiver.

   Doe v. Brennan, No. 1:13–cv–00639 –GBL–JFA, 2013 WL 5883870, at *6 (E.D. Va. Nov. 4, 2013) (Lee, J.) ("Where a plaintiff does not affirmatively raise the issue that he lacked notice and should be entitled to an extension during the administrative process, he has waived that notice argument in an appeal in federal court.").

9. Forum-selection clause—motion to transfer.

   Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex., 134 S. Ct. 568 (2013) (Alito, J.) (holding that a motion to transfer under 28 U.S.C. § 1404(a) is the proper avenue for enforcing a forum-selection clause when the transfer is within the federal court system, and a court should grant the motion "unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor" it; stating that when the parties' contract includes a valid forum-selection clause, no weight should be afforded to the plaintiff's choice of forum; holding that it is the plaintiff's burden to show that the transfer is unwarranted, the private interests of the parties should be disregarded, the public interests at stake may be considered, and the choice-of-law rules from the plaintiff's chosen forum will not transfer; noting that if the transfer is between a federal court and state court or foreign forum, then the doctrine of *forum non conveniens* is appropriate).

10. Forum non conveniens.

    DiFederico v. Marriott Int'l Inc., 714 F.3d 796 (4th Cir. 2013) (Gregory, J.) (reversing dismissal on *forum non conveniens* grounds a wrongful death claim brought by the survivors of a contractor who was killed in Pakistan because, had the claim been filed in Pakistan, it would have been dismissed on statute of limitations grounds, a factor that ordinarily makes a foreign venue "unavailable" under the *forum non conveniens* doctrine; concluding that the district court's determination that the rule of unavailable foreign venues did not apply because the plaintiffs may have deliberately and tactically elected to let the statute of limitations run was unsupported by the evidence; holding that where the plaintiff chooses her home forum, that choice is entitled to heightened deference, and the district court failed to accord such deference).

ElcomSoft, Ltd. v. Passcovery Co., 958 F. Supp. 2d 616 (E.D. Va. 2013) (Wright Allen, J.) (granting dismissal on *forum non conveniens* grounds because all parties were citizens of Russia, Russian law provided adequate remedies for the alleged patent infringement and breach of contract claims, and the convenience factors—particularly the likely application of Russian law to the case and a number of witnesses being located in Russia where there is no compulsory attendance—favored dismissal).

11. Mootness.

Wall v. Wade, 741 F.3d 492, 497 (4th Cir. 2014) (Gregory, J.) (reversing dismissal of prisoner's lawsuit challenging a prison policy that allegedly violated his First Amendment right to free expression, where the district court concluded that the prison's discontinuance of the policy mooted the case; noting that "'voluntary cessation of a challenged practice' moots an action only if 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'"; concluding that this test was not satisfied, because the prison retained the authority and capacity to reinstate the challenged policy) (citation omitted).

12. Personal jurisdiction—conspiracy theory of jurisdiction.

Unspam Techs., Inc. v. Chernuk, 716 F.3d 322, 329 (4th Cir. 2013) (Niemeyer, J.) (affirming the dismissal of claims against banks for lack of personal jurisdiction where the plaintiff made no more than conclusory allegations that the defendant banks were amenable to jurisdiction because they were part of a conspiracy whose members had direct contacts with the forum; holding that, under this "conspiracy theory of jurisdiction," a plaintiff must show, with more than bare allegations, "(1) that a conspiracy existed; (2) that the [defendants] participated in the conspiracy; and (3) that a coconspirator's activities in furtherance of the conspiracy had sufficient contacts with [the forum] to subject that conspirator to jurisdiction in [the forum]").

13. Standing—First Amendment; injury-in-fact.

Cooksey v. Futrell, 721 F.3d 226 (4th Cir. 2013) (Thacker, J.) (holding that court must presume the legal validity of the claim underlying a First Amendment challenge at the standing stage; determining that, where plaintiff brought a First Amendment claim alleging that the North Carolina Board of Dietetics/Nutrition caused him to self-censor certain speech on his website, more lenient standing rules apply, and under those standards, the plaintiff had clearly suffered an injury-in-fact; rejecting the Board's argument that First Amendment principles should not apply because the Board's empowering legislation was a professional regulation that does not abridge First Amendment rights under the "professional speech doctrine").

14. Standing—personal interest.

Hollingsworth v. Perry, 133 S. Ct. 2652, 2656 (2013) (Roberts, C.J.) (holding that proponents of a law passed by referendum but struck down by a federal district court (here California's Proposition 8, which defined marriage as between one man and one woman only) whose "only interest [is] to vindicate the constitutional validity of a generally applicable . . . law" do not have standing to pursue an appeal in federal court because such an interest is no different "from the general interest of every . . . citizen").

Friends of the Rappahannock v. Caroline Cnty. Bd. of Supervisors, 286 Va. 38, 47-48, 743 S.E.2d 132, 136-37 (2013) (Millette, Jr., J.) (holding, in a declaratory judgment action challenging the county's grant of a special exception permit, that the appropriate standard to apply in determining if a plaintiff has standing to challenge "a land use decision by a board of zoning appeals" or similar "local governing bodies" is the "aggrieved person" standard; noting that "any distinction between an 'aggrieved party' and 'justiciable interest' is a distinction without a difference in declaratory judgment actions challenging land use decisions").

15. Standing—statutory standing.

Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1395 (2014) (Scalia, J.) (holding that, to establish standing to bring Lanham Act false advertising claims, "a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's mis-representations"; leaving uncertain whether there is now standing for claims other than those relating to commercial interest injuries, such as infringement of unregistered trademarks; foreclosing the possibility of class action suits under this Section).

Small v. Fed. Nat'l Mortg. Ass'n, 286 Va. 119, 747 S.E.2d 817 (2013) (Kinser, J.), *answering certified question of law from* No. 3:12CV487 (E.D. Va. Feb. 20, 2013) (holding that a clerk of court in Virginia, in his or her official capacity, does not have statutory standing to file a lawsuit to collect unpaid real estate transfer taxes under Va. Code §§ 58.1-801 and 58.1-802, because the clerk's duties are ministerial, the enforcement of the statutes is discretionary, and enforcement authority is delegated to the Department of Taxation).

IV. CAUSES OF ACTION AND DAMAGES.

A. Contract Cases.

1. First material breach.

Norfolk S. Ry. v. E.A. Breeden, Inc., 756 S.E.2d 420 (Va. 2014) (Russell, S.J.) (holding that the doctrine of "first material breach" of a vested property right under a real covenant is "ill suited" for terminating an interest in real property held by another landowner under the terms of the instrument allegedly breached).

2. Implied covenant of good faith and fair dealing.

Stoney Glen, LLC v. S. Bank & Trust Co., 944 F. Supp. 2d 460 (E.D. Va. 2013) (Morgan, Jr., J.) (holding that when a debt settlement agreement gave the bank the right to terminate the agreement if it determined a material misrepresentation was made regarding the plaintiff's finances, the plaintiff sufficiently stated a claim for a breach of the agreement based on the implied covenant of good faith and fair dealing by alleging that the bank failed to use usual and prudent banking practices to assess whether there had been a misrepresentation in terminating the agreement).

3. Undue influence.

Ayers v. Shaffer, 286 Va. 212, 748 S.E.2d 83 (2013) (Koontz, Jr., J.) (declaring that Virginia's combined precedent requires that a claim for undue influence must allege *either* that the defendant leveraged the other party's "great weakness of mind" for the benefit of the bargain with "grossly inadequate consideration" (or other suspicious circumstances), *or* that the parties had a confidential relationship at the time of the transaction (even without other suspicious circumstances); holding that these two options may be pleaded in the alternative or independently, such that the absence of an allegation of one does not defeat the sufficiency of the complaint as a whole; advising that a trial court is required to assess the sufficiency of each allegation independently of the other when considering a demurrer).

B. Insurance cases.

1. Preemption of Virginia law.

Hillman v. Maretta, 133 S. Ct. 1943 (2013) (Sotomayor, J.) (holding that the Federal Employees' Group Life Insurance Act ("FEGLIA"), which provides that an employee may designate a beneficiary of his or her life insurance proceeds and that the designation takes precedence over other potential recipients, preempts Va. Code Ann. § 20-111.1(D), which allows the current spouse of an employee to sue the employee's former spouse to recover benefits paid to him or her under a pre-existing designation of benefits; concluding that Section 20-111.1(D) conflicts, and directly interferes, with Congress's purpose in enacting FEGLIA).

2. Uninsured motorist carrier—stacking.

Dooley v. Hartford Accident & Indem. Co., 716 F.3d 131, 134 (4th Cir. 2013) (Keenan, J.) (affirming summary judgment in favor of insurer where the plaintiff filed an action in state court seeking a declaration that he could "stack" uninsured motorist/underinsured motorist ("UM/UIM") coverage for each of three vehicles for which he had coverage with the defendant insurer; the policy in question contained an anti-stacking provision that stated that, regardless of the number of vehicles insured, "[t]he limit of [ ] Liability *shown in the Declarations* for each person for [UM/UIM] Coverage is [insurer]'s maximum limit of liability for all

damages . . . arising out of bodily injury sustained by any one person in any one accident"; holding that the policy was unambiguous because it specifically referenced Va. Code Ann. § 38.2-2206, which requires that automobile policies issued in the Commonwealth provide UM/UIM coverage at a level that "shall equal" the "limits of the liability insurance provided by the policy"; distinguishing the Supreme Court of Virginia's decision in *Virginia Farm Bureau Mutual Insurance Co. v. Williams*, 278 Va. 75, 677 S.E.2d 299 (2009)).

C. Tort cases.

1. Defamation.

Cashion v. Smith, 286 Va. 327, 749 S.E.2d 526 (2013) (Mims, J.) (overruling language in *Great Coastal Express, Inc. v.* Ellington, 230 Va. 142, 334 S.E.2d 846 (1985), and holding that it is "unwarranted" to consider good faith when determining whether a qualified privilege exists; explaining that whether a statement was made in good faith is a question of fact for the jury to resolve when deciding whether a qualified privilege has been lost or abused, and it is not a question of law for the court to answer in deciding whether a privilege exists; explaining that, once a qualified privilege has attached to a communication, the plaintiff must prove by clear and convincing evidence that the privilege was lost or abused; holding that "a showing of pre-existing personal spite or ill will is only one of several ways in which a privilege can be lost").

2. Intentional infliction of emotional distress.

Williams v. The Agency, Inc., Civ. A. No. 3:13–CV–549, 2014 WL 496656 (E.D. Va. Feb. 6, 2014) (Spencer, J.) (holding that plaintiffs stated a claim of intentional infliction of emotional distress sufficient to defeat a motion to dismiss by alleging that private investigation agency surreptitiously videotaped plaintiffs engaging in sexual activity and shared that tape with the spouse of one of the plaintiffs).

3. Punitive damages—remittitur.

Coalson v. Canchola, 287 Va. 242, 754 S.E.2d 525 (2014) (Goodwin, J.) (holding that it is improper for a trial court to compare punitive damage awards or consider "relative ratios of compensatory damages to punitive damages" in determining whether to grant remittitur; drawing from the similar rationale of *Allied Concrete Co. v. Lester*, 285 Va. 295, 736 S.E.2d 699 (2013) (holding it improper for a trial court to compare verdicts in assessing whether compensatory damages are excessive), and *John Crane, Inc. v. Jones*, 274 Va. 581, 650 S.E.2d 851 (2007) (same), to declare that whether an award is excessive depends only upon the facts and circumstances of the case at hand).

4. Tortious interference.

Dunlap v. Cottman Transmission Sys., LLC, 287 Va. 207, 754 S.E.2d 313 (2014) (Kinser, J.), *answering certified questions of law from* No. 11-2327 (4th Cir. Aug.

21, 2013) (determining that tortious interference with contract or tortious interference with business expectancy may serve as the necessary unlawful act for a claim of business conspiracy under Va. Code §§ 8.2-499 and 18.2-500, because both are grounded on an independent common law duty not arising solely from the underlying contract; distinguishing *Station #2, LLC v. Lynch*, 280 Va. 166, 695 S.E.2d 537 (2010) (holding that conspiracy merely to breach a contract does not involve an independent duty arising outside the contract and, thus, cannot serve as the underlying "unlawful act" under § 18.2-500); concluding that the five-year statute of limitations in Va. Code § 8.01-243(B) applies to tortious interference with contract and tortious interference with business expectancy claims, because both involve property rights injuries).

D. Other.

1. Lanham Act—claims based on social media.

Avepoint, Inc. v. Power Tools, Inc., Civ. A. No. 7:13CV00035, 2013 WL 5963034 (E.D. Va. Nov. 7, 2013) (Conrad, C.J.) (denying motion to dismiss because allegations that defendant created a fake LinkedIn profile using the plaintiff's mark in order to make contact with and poach the plaintiff's customers sufficiently alleges the use of the mark in commerce in connection with the sale, offering for sale, distribution, or advertising of goods or services that could create a likelihood of confusion and, thus, sufficiently stated a Lanham Act claim of trademark infringement; holding that allegations that defendant "(1) misrepresent[ed] the geographic origin of [plaintiff's] goods or services, and (2) impugn[ed] the quality of [plaintiff's] goods or services" on Twitter were sufficient to plausibly establish commercial speech supportive of a false advertising claim under the Lanham Act).

2. Property—easements.

Beach v. Turim, 287 Va. 223, 754 S.E.2d 295 (2014) (Lemons, J.) (holding that, to create an express easement, it is insufficient to identify only the location of the easement in the granting instrument, as the instrument must also identify the party and property benefited by the easement).

Clifton v. Wilkinson, 286 Va. 205, 210-11, 748 S.E.2d 372, 374-75 (2013) (Russell, J.) (clarifying that, in determining whether an easement by necessity was created, common ownership of the dominant and servient tracts (unity of title) at some previous time "is immaterial" when the tract "did not *become landlocked* by a conveyance from a former owner severing a former unity of title"; "an easement by necessity arises only when the grantor of the dominant tract conveys it to another *without providing any right of access to it*") (emphases added).

3. Property—interests.

Nejati v. Stageberg, 286 Va. 197, 203-04, 747 S.E.2d 795, 798 (2013) (Mims, J.) (holding that a transfer of property subdivided in violation of Va. Code Ann.

§ 15.2-2254 did not create ownership of the undivided parcels as tenants in common rather than as tenants by the severalty; explaining that the failure to obtain subdivision approval significantly limits "the *use* of the property by the owner, but it does not prevent conveyance of the property" and "it does not change the property interests conveyed").

4. Property—Takings Clause.

   Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (Alito, J.) (holding that when the government demands property from an applicant for a land-use permit, even when the government denies the permit or when the government's demand is for money, the demand must comply with the requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which held that approval of such a permit may not be conditioned on the owner's surrender of some portion of the property unless "there is a nexus and rough proportionality between" the demand for that property and the effects of the owner's proposed use of the land).

5. Sarbanes-Oxley Act—whistleblower protection.

   Lawson v. FMR LLC, 134 S. Ct. 1158 (2014) (Ginsburg, J.) (holding that the protections afforded to whistleblowers under 18 U.S.C. § 1514A(a) extend to employees of a public company's private contractors and subcontractors, in addition to the employees of public companies themselves).

6. The Patent Act—fee shifting.

   Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1755-56 (2014) (Sotomayor, J.) (holding that the term "exceptional case[]" in 35 U.S.C. § 285—the fee-shifting provision of the Patent Act—means "one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated," and that courts should exercise their discretion in determining which cases are indeed "exceptional"; declaring that the test set forth in *Brooks Furniture Manufacturing, Inc. v. Dutailier International, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005), on the proper determination of "exceptional cases" for the purpose of awarding attorney's fees was "unduly rigid, and [] impermissibly encumber[ing of] the statutory grant of discretion to district courts").

7. The Patent Act—patent eligible.

   Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013) (Thomas, J.) (holding that cDNA, unlike a DNA segment that is naturally occurring, is patent-eligible under Section 101 of the Patent Act because it does not occur naturally).

8. The Voting Rights Act of 1965.

Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013) (Roberts, C.J.) (holding that Section 4 of the Voting Rights Act of 1965, which made the restrictions of Section 5 of the Act applicable to Virginia, is unconstitutional because its formula for application is based upon 40-year-old facts and not upon current conditions of racial discrimination, and declaring that Congress may create a new formula reflective of current conditions).

9. Title VII—*prima facie* case of discrimination.

Scott v. Montgomery Cnty. Sch. Bd., 963 F. Supp. 2d 544 (W.D. Va. 2013) (Turk, J.) (holding that the *McDonnell Douglas* test for establishing a *prima facie* employment discrimination case does not neatly apply to allegations that the plaintiff was discriminated against for failing to share the religious beliefs of her supervisor; applying a modified test requiring that the plaintiff show that (1) she was subjected to some adverse employment action, (2) at the time of the adverse employment action, the plaintiff's job performance was satisfactory, and (3) additional evidence supports the inference that the adverse employment action was taken because of a discriminatory motive based on the plaintiff's failure to follow her employer's religious beliefs; holding also that, for purposes of summary judgment, the plaintiff established a *prima facie* case of employment discrimination under this modified test with evidence that (1) her employment contract was not renewed after being renewed for ten consecutive years, (2) prior employment evaluations and letters of recommendation written by the plaintiff's supervisors immediately after the plaintiff's termination suggested that plaintiff's work was satisfactory, and (3) there was sufficient evidence that the employee who raised initial concerns of the plaintiff's performance exhibited a religious animus towards the plaintiff; denying summary judgment because the defendant put forth sufficient evidence that there was an issue of disputed fact regarding whether there was a legitimate, non-discriminatory reason for the adverse employment action).

10. Title VII—retaliation.

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (Kennedy, J.) (holding that retaliation claims under Title VII require proof of but-for causation, not the causation test set forth in 42 U.S.C. § 2000e-2(m)).

11. Title VII—workplace harassment; "supervisor."

Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013) (Alito, J.) (holding that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim").

12. Title VII—hostile environment.

Freeman v. Dal-Tile Corp., No. 13–1481, 2014 WL 1678422 (4th Cir. Apr. 29, 2014) (Shedd, J.) (holding that employer can be held liable for sex- or race-based

harassment by a third party when the employer knows or reasonably should have known about the harassment and fails to take prompt, remedial action reasonably calculated to end the harassment).

13. Tolls as valid user fees.

Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 749 S.E.2d 176, 179 (2013) (Millette, J.) (holding that "the General Assembly did not unconstitutionally delegate its legislative power of taxation by authorizing the Virginia Department of Transportation ('VDOT') and Elizabeth River Crossings OpCo, LLC ('ERC') to charge tolls to motorists using existing river tunnels to help finance construction of various improvements to the transportation network, including an additional river tunnel crossing in another location; explaining that the tolls are valid user fees, and not unconstitutionally delegated taxes, because they provide "a particularized benefit not shared by the general public," they are not required of all drivers because drivers may avoid the road, and the funds collected from the tolls are not used to "raise general revenues" that are unrelated to the overall transportation project objectives).

14. Virginia Consumer Protection Act.

Fravel v. Ford Motor Co., Civ. A. No. 5:13cv014, 2013 WL 5347462, at *3-5 (W.D. Va. Sept. 23, 2013) (Urbanski, J.) (holding that, under Fed. R. Civ. P. 9(b), a Virginia Consumer Protection Act plaintiff must "state with particularity 'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby,'" and dismissing Virginia Consumer Protection Act claim (with leave to amend) for failure to allege any facts indicating the plaintiff's reliance on the alleged misrepresentations) (citations omitted).

15. Virginia Freedom of Information Act.

Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va., 756 S.E.2d 435, 439 (2014) (Lemons, J.) (holding: (1) that the Virginia Freedom of Information Act's higher education research exemption for "information of a proprietary nature" in Va. Code § 2.2-3705.4(4) is not limited to avoiding financial harm, but is intended also to avoid competitive harm as well and, thus, the appropriate definition of proprietary in this context is "a right customarily associated with ownership, title, and possession . . . an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls"; and (2) that a public body's statutory right to reimbursement of reasonable duplication and search costs also includes the cost of searching records to remove any information that must be excluded from production under applicable law).

16. Wrongful termination.

Lewis v. City of Alexandria, 756 S.E.2d 465, 2014 Va. LEXIS 65 (Apr. 17, 2014) (McClanahan, J.) (determining as a matter of first impression that, because front

pay and compensation for lost pension are not expressly mentioned in Virginia's wrongful Virginia Fraud Against Taxpayers Act, Va. Code § 8.01-216.8, which entitles a wrongfully terminated employee to relief that will make him or her "whole," they fall within the statute's provision for "special damages sustained as a result of the discrimination"; holding that such damages under the Act constitute equitable relief, which is a matter of the court's discretion and may properly be denied where other relief makes the plaintiff "whole").

17. Zoning.

Lamar Corp. v. City of Richmond, 241 Va. 346, 402 S.E.2d 31 (2014) (Hughes, Jr., J.) (holding that the 15-year non-conforming use provision of Va. Code § 15.2-2307 is not "merely enabling," but serves to prohibit local governments' authority to declare existing buildings or structures illegal after accepting taxes on them for 15 years or more).

Lamar Corp. v. City of Richmond, 241 Va. 346, 402 S.E.2d 31 (2014) (Lacy, J.) (holding that the proper standard for reviewing a board of zoning appeals' decision denying a request for a variance is not the "fairly debatable" standard, but is the standard found in Va. Code § 15.2-2314, which states that the board's decision is presumed correct, but that presumption may be rebutted by proof that the board either applied incorrect legal principles or that the decision was plainly incorrect).

Bd. of Supervisors v. Windmill Meadows, LLC, 287 Va. 170, 752 S.E.2d 837 (2014) (Koontz, J.) (affirming the trial court's finding that Va. Code § 15.2-2303.1:1(A), which provides that payment made pursuant to certain cash proffers shall be accepted by any locality only after the completion of the final inspection of the property, applies prospectively to proffers due on or after July 1, 2010, even if the proffers were made and agreed to before July 1, 2010).

V. PLEADING, PRACTICE AND PROCEDURE.

A. Statutes.

1. Foreign judgments.

2014 Va. Acts 462 (S. 473) (approved Mar. 31, 2014) (amending Code § 8.01-465.23 and enacting §§ 8.01-465.13:1 through 8.01-465.13:11 to replace the Uniform Foreign Country Money-Judgments Recognition Act with the version approved by the National conference of Commissioners on uniform State Laws in 2005, in order to clarify that a judgment entitled to full faith and credit under the United States Constitution is not enforceable under this Act, to expressly provide that a party seeking recognition of a foreign-country judgment has the burden of proving that the judgment is subject to the Uniform Act, to impose the burden of establishing a specific ground for non-recognition upon the party raising it, to address the specific procedure for seeking enforcement, and to provide a statute of limitations on enforcement of a foreign-county judgment).

2. Injunctions—objection to petition for review.

2014 Va. Acts 526 (S. 229) (approved Apr. 6, 2014) (amending Code §§ 2.2-5211 and 2.2-5212 to require a party that seeks review by the Virginia Supreme Court or Court of Appeals of the grant or denial of an injunction, to serve a copy of the petition for review on the counsel for the opposing party, and to allow the opposing party seven days after service to submit an opposition to the petition, unless the court determines a shorter time frame).

3. Judgment on an affidavit in action upon contracts or notes—grounds for dismissal.

2014 Va. Acts 688 (S. 230) (approved Apr. 6, 2014) (amending Code § 8.01-28 to provide that, in an action upon a contract or note for which the plaintiff is entitled to judgment on an affidavit, the plaintiff shall be entitled to a continuance in the event of a defect in the affidavit).

B. Rules.

1. Federal procedure—subpoenas.

Fed. R. Civ. P. 45 amended to specify that all subpoenas issued from a court in which a proceeding is pending require, as part of the notice requirement, that a copy of the subpoena be included with the notice; to permit nationwide service of subpoenas, thereby severing service from the limitations on the place of compliance; to revise subsection (c) to include all of the provisions regarding the place of compliance; to clarify that a subpoena cannot command a party or a party's officer who does not reside, is not employed, or does not regularly conduct business in person within the state to travel more than 100 miles for trial; to require that subpoenas be quashed or modified if they command compliance beyond the geographical limits of the Rule; and to permit a court in the place of compliance, under special circumstances, to transfer a motion related to a subpoena to the court where the proceeding is pending.

2. Foreign attorneys—admitted to practice in Virginia without examination.

Va. Sup. Ct. R. 1A:1 amended, effective February 1, 2014, to alter the language of, and add to, the requirements of subsections (a), (b), (c), and (d), and to add new subsections (e) (covering active membership), and (f) (removing requirement that prospective attorneys and attorneys previously admitted under this Rule intend to practice law as a member of the Virginia State Bar full time.

3. Foreign attorneys—revocation of Certificates.

Va. Sup. Ct. R. 1A:3 amended, effective February 1, 2014, to provide: "Following receipt of evidence that a person who was admitted to practice pursuant to Rule 1A:2 prior to July 1, 2000, has been disbarred pursuant to Part Six of the Rules, the Supreme Court will revoke the certificate issued to that person."

4. Pretrial Scheduling Orders.

Va. Sup. Ct. R. 1:18 amended, effective May 1, 2014, to move the last sentence of subsection (B) to the newly created subsection (C), and to change subsection (B) to provide: "In any civil case in which a pretrial scheduling order has not otherwise been entered pursuant to the court's normal scheduling procedure, the court may, upon request of counsel of record for any party, or in its own discretion, enter the pretrial scheduling order contained in Section 3 of the Appendix of Forms at the end of Part I of these Rules (Uniform Pretrial Scheduling Order). The court shall cause copies of the order so entered to forthwith be transmitted to counsel for all parties. If any party objects to or requests modification of that order, the court shall (a) hold a hearing to rule upon the objection or request or (b) with the consent of all parties and the approval of the court, enter an amended pretrial scheduling order."

5. Summary judgment.

Va. Sup. Ct. R. 3:20 amended, effective July 1, 2013, to add, as another exception to the prohibition on motions for summary judgment based on discovery depositions under Rule 4:5, motions that are "brought in accordance with the provisions of subsection B of § 8.01-420," which allows discovery depositions to be used to support summary judgment motions seeking dismissal of claims for punitive damages other than those based upon operation of a motor vehicle under the influence of drugs or alcohol.

6. Use of depositions in court proceedings.

Va. Sup. Ct. R. 4:7(e) amended, effective July 1, 2013, to remove "in any action at law" and "are received in evidence under Rule 4:7(a)(4) or all parties to the suit or action shall agree that such deposition may be so used," and to add "use of" and "is permitted by § 8.01-420," so as to now provide: "No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any depositions under Rule 4:5, unless such use of depositions is permitted by § 8.01-420."

C. Cases.

1. Amendments to pleadings.

Va. Innovation Scis., Inc. v. Samsung Elecs. Co., No. 2:12CV548, 2014 WL 1308699, at *8 (E.D. Va. Mar. 31, 2014) (Davis, J.) (finding, in light of the 2009

amendments to the Fed. R. Civ. P. 15 which abrogated Fed. R. Civ. P. 13(f)'s limitations on the addition of omitted counterclaims, that "an amended response [including additional counterclaims] may be filed without leave only when the amended complaint changes the theory or scope of the case, and then, the breadth of the changes in the amended response must reflect the breadth of the changes in the amended complaint" (internal quote marks omitted); holding that the defendant's addition of a counterclaim alleging inequitable conduct was commensurate with the plaintiff's amendment to the complaint adding a claim of willful patent infringement, and thus leave of court was not required).

2. Attorney's fees—Rule 3:25.

Baiden-Adams v. Forsythe Transp., Inc., No. 1:13CV272 JCC/IDD, 2013 WL 6824945, at *4 (E.D. Va. Dec. 20, 2013) (Cacheris, J.) (holding that the prevailing defendant was not entitled to attorney's fees under 42 U.S.C. § 1988 because, although the plaintiff's claim "ran contrary to Fourth Circuit precedent," it was not "foreclosed by a bright-line rule of which Plaintiff was made aware" and instead the plaintiff had lost based upon a "multi-factor[] analysis").

Shammas v. Focarino, No. 1:12–cv–1462, 2014 WL 31282 (E.D. Va. Jan. 3, 2014) (Ellis, J.) (holding that, when calculating attorneys' fees for government attorneys, the court should use prevailing market rates where the entitlement to fees is for "reasonable" attorneys' fees, but use the actual salaries where the entitlement is for "expenses" or "actual" expenses).

JTH Tax, Inc v. Grabert, Civ. No. 2:13CV47, 2014 WL 1255278 (E.D. Va. Mar. 26, 2014) (Davis, J.) (holding that, even where a defendant has failed to appear to contest the award of attorneys' fees, the court must independently assess the reasonableness of the award).

3. Attorney's fees—Court's inherent power.

ePlus Inc. v. Lawson Software, Inc., 946 F. Supp. 2d 472 (E.D. Va. 2013) (Payne, J.) (holding that a court in the Fourth Circuit can award attorneys' fees as an element of an award in a civil contempt proceeding where the contemnor's refusal to comply with the court order rises to the level of "obstinacy, obduracy, or recalcitrance").

4. Choice of law.

ePlus v. Lawson Software, Inc., 946 F. Supp. 2d 459 (E.D. Va. 2013) (Payne, J.) (holding that the law of the regional circuit governs a motion to prospectively dissolve an injunction under Fed. R. Civ. P. 60(b)(5) in a patent case).

Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857 (E.D. Va. 2013) (Lee, J.) (holding that, when a diversity action is transferred pursuant to 28 U.S.C. § 1404(a), the court should apply the substantive law of the state in which the action was originally brought).

Elderberry of Weber City, LLC v. Living Centers – Se., Inc., 958 F. Supp. 2d 623, 627-28 (W.D. Va. 2013) (Moon, J.) (holding that, under Virginia law, "questions of breach [of contract] are determined by the law of the place of performance" while "the validity, interpretation, or construction of a contract" is governed by the place of contracting, and, therefore, because the contract at issue was signed in Georgia, Georgia law applies to determine whether the contract is valid).

Ford Motor Co. v. Nat'l Indem. Co., 972 F. Supp. 2d 862 (E.D. Va. 2013) (Payne, J.) (holding that, when course of performance of an insurance contract was to be made in Michigan by virtue of wire transfer payments to Michigan, a tortious interference claim based on alleged nonpayment would be governed by Michigan law under Virginia's choice of law jurisprudence).

5. Class Action Fairness Act of 2005.

Mississippi ex rel. Hood v. AU Optronics Corp., 134 S. Ct. 736 (2014) (Sotomayor, J.) (holding that the Class Action Fairness Act's use of the phrase "100 or more persons" as applied to mass actions refers only to the named plaintiffs in the case, and does not include any unnamed persons who may be real parties in interest).

6. Class actions—commonality requirement.

Scott v. Family Dollar Stores, Inc., 733 F.3d 105 (4th Cir. 2013) (Gregory, J.) (affirming, in a divided decision, the dismissal of the original complaint in a putative class action that was filed pre-*Wal-Mart v. Dukes* with class allegations "virtually identical" to the class allegations held to be insufficient in *Dukes,* but reversing the lower court's denial of the plaintiffs' motion for leave to amend, because they had sufficiently alleged that several employment-related policies and practices were administered at a high enough level in the corporate hierarchy to be applicable to all putative class members).

7. Declaratory judgments.

Martin v. Garner, 286 Va. 76, 84, 745 S.E.2d 419, 423 (2013) (McClanahan, J.) (holding that complaint failed to allege a justiciable controversy where plaintiff sought a declaratory judgment that he held fee simple title to the entirety of an alley abutting his and several other individuals' properties, even though certain abutting owners had allegedly blocked the alley at various times; observing that "Martin's pleadings do not allege 'present facts' evidencing a 'specific adverse claim' between parties with 'true interest to oppose' Martin's claim to ownership of the alley").

8. Default judgment.

Evans v. Larchmont Baptist Church Infant Care Ctr., Inc., 956 F. Supp. 2d 695 (E.D. Va. 2013) (Leonard, J.) (entering default judgment even though defendant answered plaintiff's amended complaint because, as a result of the termination of

the defendant's corporate existence while the case was pending, it was unable to retain counsel and "otherwise defend" as required by Fed. R. Civ. P. 55(a)).

JTH Tax, Inc v. Grabert, Civ. No. 2:13CV47, 2014 WL 1255278 (E.D. Va. Mar. 26, 2014) (Davis, J.) (holding, in the context of default judgment, that factual allegations in the complaint are deemed admitted and the appropriate analysis is whether the face of pleadings establish the plaintiff's causes of action).

9. Derivative lawsuits—Fed. R. Civ. P. 23.1.

Morefield v. Bailey, 959 F. Supp. 2d 887, 895 (E.D. Va. 2013) (Lee, J.) (holding that Fed. R. Civ. P. 23.1 requires a plaintiff in a shareholder derivative lawsuit to plead with particularly that he has made a demand to the board of directors to take the requested action (or to explain the reasons for failing to make such a demand); "[p]leading both the demand and the corporation's refusal to comply therewith is a necessary precondition" to bringing the action; holding that, although Fed. R. Civ. P. 23.1 raises the pleading standard higher than the standard under Fed. R. Civ. P. 12(b)(6), the plaintiff's allegations are entitled to the same presumption of truthfulness in motions brought under both rules).

In re Capital One Derivative S'holder Litig., 952 F. Supp. 2d 770, 791 (E.D. Va. 2013) (Ellis III, J.) (holding that Fed. R. Civ. P. 23.1 requires that class action derivative suit plaintiffs must plead with particularity facts that demonstrate that a pre-suit demand of the board of directors would have been futile; "plaintiffs must plead particularized facts establishing a reason to doubt that 'the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand,' . . . not just that the directors face some risk of liability, but that their actions were so egregious that 'a substantial likelihood of director liability' exists") (citations omitted).

10. Indispensable parties.

Trans Energy, Inc. v. EQT Prod. Co., 743 F.3d 895 (4th Cir. 2014) (Gregory, J.) (allowing plaintiffs to cure, to the extent possible, defective jurisdictional allegations pursuant to 28 U.S.C. § 1653 where the pleadings alleged citizenship for two of the plaintiffs—an LLC and a partnership—on the basis of where the entities are organized and conduct their business, but failed to allege the citizenship of the members of each; concluding that the amended allegations left one plaintiff non-diverse from the defendant, but utilizing Fed. R. Civ. P. 21 to dismiss the non-diverse plaintiff from the case after determining that the plaintiff was not indispensable, especially where the plaintiffs requested dismissal with prejudice).

11. Motion to amend complaint.

CVLR Performance Horses, Inc. v. Wynne, No. 6:11–CV–00035, 2013 WL 5631023, at *2-3 (W.D. Va. Oct. 10, 2013) (Moon, J.) (holding, where the defendant argued that the Court should deny leave to amend the complaint

because the amendments added "allegations that are irrelevant, redundant and do not substantially or materially alter the nature of the claim," that "excessive amendment is not equivalent to the kind of bad faith or frivolousness that would be required to deny amendment" under Fed. R. Civ. P. 15(a)).

Morefield v. Bailey, 959 F. Supp. 2d 887 (E.D. Va. 2013) (Lee, J.) (denying leave to amend the complaint where plaintiff's counsel had indicated during oral argument that there were no additional facts that were not currently before the Court and, therefore, concluding that amendment would be futile).

12. Motions to dismiss—patent cases.

Macronix Int'l Co. v. Spansion, Inc., Civ. A. No. 3:13cv679, 2014 WL 934505 (E.D. Va. Mar. 10, 2014) (Payne, J) (holding that a Fed. R. Civ. P. 12(b)(6) motion to dismiss a patent case is governed by the law of the regional circuit, and that *Iqbal* and *Twombly* govern a complaint in a patent case, notwithstanding the decisions of the Federal Circuit in *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007), and *In re Bill of Lading Transmission Processing System Patent Litigation*, 681 F.3d 1323 (Fed. Cir. 2012); concluding that, as a result, a patent complaint that merely complied with Form 18 of the Appendix to the Federal Rules of Civil Procedure was insufficient under the requirements of Rule 8(a) as interpreted by the Fourth Circuit in light of *Iqbal* and *Twombly*).

13. Motion to extend expert disclosure deadline.

Ball v. Takeda Pharms. Am., Inc., 963 F. Supp. 2d 497 (E.D. Va. 2013) (Gibney, J.) (holding that the plaintiff failed to show good cause to extend the expert disclosure deadline (thereby amending the pretrial order) where plaintiff's counsel knew of the need to retain an expert witness, consistently informed the court that he was in the process of retaining an expert witness, and did not raise his difficulties in retaining an expert until the day that expert designations were due).

14. Privilege—work product doctrine.

Adair v. EQT Prod. Co., 294 F.R.D. 1 (W.D. Va. 2013) (Sargent, J.) (holding that routine hearings before the Virginia Oil and Gas Board were not adversarial, despite the ability to perform cross-examination in those hearings, and, thus, documents generated in preparation for the hearings are not protected by the work product doctrine).

15. Right to a jury trial.

Norfolk S. Ry. v. E.A. Breeden, Inc., 756 S.E.2d 420 (Va. 2014) (holding that a party had no right under Rule 3:22 to have a jury determine whether plaintiff was damaged by an alleged breach of contract, because plaintiff sought no money damages, only equitable relief for which there is no right to a jury trial).

16. Sanctions.

Shebelskie v. Brown, 287 Va. 18, 752 S.E.2d 877 (2014) (holding that sanctions against an attorney under Va. Code § 8.01-271.1 cannot be founded on the basis of oral argument, where the attorney neither signed a pleading, nor made an oral or written motion that was sanctionable).

17. Scope of review on remand.

ePlus Inc. v. Lawson Software, Inc., 946 F. Supp. 2d 459 (E.D. Va. 2013) (Payne, J.) (holding that the "mandate rule," which prohibits the district court from revisiting issues settled on appeal, prohibited the district court from dissolving *ab initio* a permanent injunction when the Court of Appeals had explicitly affirmed the scope of the injunction and stated that it rejected all claims on appeal not specifically addressed in its opinion).

18. Summary judgment.

DiQuollo v. Prosperity Mortg. Corp., No. 1:13cv00502 (LMB/TRJ), 2013 WL 6145709 (E.D. Va. Nov. 20, 2012) (Brinkema, J.) (holding that an unsigned affidavit (the truth of which was denied by the purported affiant) was insufficient to constitute direct evidence for an age discrimination claim to survive summary judgment).

VI. AFFIRMATIVE DEFENSES.

A. Statutes.

1. Statute of limitations.

2014 Va. Acts. 586 (H. 969) (approved Apr. 3, 2014) (amending Code § 8.01-243 to provide a five-year statute of limitations for actions for injury to property brought by the Commonwealth against a tortfeasor for expenses arising out of the negligent operation of a motor vehicle).

B. Cases.

1. Failure to plead.

New Dimensions, Inc. v. Tarquini, 286 Va. 28, 743 S.E.2d 267 (2013) (Goodwyn, J.) (holding that the statutory defenses provided in the Equal Pay Act are affirmative defenses under federal substantive law, but under Virginia procedural law are not waived if not pled, because the defenses are exceptions set forth in the language of the statute itself and, as such, there is little risk of unfair prejudice or surprise).

2. *Noerr-Pennington* immunity.

Ford Motor Co. v. Nat'l Indem. Co., 972 F. Supp. 2d 862 (E.D. Va. 2013) (Payne, J.) (holding that the *Noerr-Pennington* doctrine, which provides First Amendment immunity for petitioning the government, does not apply to the initiation of a private arbitration before the American Arbitration Association).

3. Preemption.

Alexander v. Se. Wholesale Corp., A. No. 2:13cv213, 2013 WL 5673311, at *5 (E.D. Va. Oct. 17, 2013) (Smith, J.) (holding that the Motor Vehicle Information and Cost Savings Act ("Odometer Act") does not preempt odometer tampering claims brought under the Virginia Consumer Protection Act because allowing claims based on consumer protection statutes does not interfere with the Odometer Act's stated objectives "'to prohibit tampering with motor vehicle odometers; and . . . to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers'" (citing 49 U.S.C. § 32701(b))).

4. Qualified immunity.

Raub v. Bowen, 960 F. Supp. 2d 602 (E.D. Va. 2013) (Hudson, J.) (denying defendant police officers' Fed. R. Civ. P. 12(b)(6) motion to dismiss based on qualified immunity because the complaint adequately alleged that the defendant officers made a mental health seizure of the plaintiff based not on the defendant officers' own observations regarding the plaintiff's danger to himself or others, but on third person accounts and, thus, lacked probable cause; permitting focused discovery on the defendant officers' personal knowledge about the plaintiff's mental status in order to potentially resolve qualified immunity issue on summary judgment).

5. Res judicata.

United States ex rel. May v. Purdue Pharma L.P., 737 F.3d 908, 913 (4th Cir. 2013) (Traxler, J.) (holding, in a *qui tam* action that the district court dismissed on *res judicata* grounds because of a similar *qui tam* action filed by the husband of one of the Relators, that "[a] judgment entered based upon the parties' stipulation, unlike a judgment imposed at the end of an adversarial proceeding, receives its legitimating force from the fact that the parties consented to it[; t]hus, where a dismissal is based on a settlement agreement, . . . the principles of *res judicata* apply (in a somewhat modified form) to the matters specified in the settlement agreement, rather than the original complaint"; concluding that the release executed in the earlier action applied only to the named Relator in that action and could not extend to others, even those who might be privies to that Relator).

Canterbury v. J.P. Morgan Acquisition Corp., 958 F. Supp. 2d 637, 646 (W.D. Va. 2013) (Moon, J.) (holding that *res judicata* barred a Truth in Lending Act rescission claim because the plaintiff had previously filed a lawsuit to thwart foreclosure by alleging failure to give certain notice required by the Deed of

Trust, and noting that "[b]oth cases involve the same 2007 refinancing credit transaction, the same Note, the same Deed of Trust, and the same Property . . . [a]nd, significantly, both cases were brought for the same purpose of preventing (or delaying) J.P Morgan's foreclosure of the Property").

6. Statute of limitation—equitable estoppel.

Doe v. Brennan, No. 1:13–cv–00639–GBL–JFA, 2013 WL 5883870 (E.D. Va. Nov. 4, 2013) (Lee, J.) (holding that the 45-day deadline for persons who believe they have been discriminated against by a federal agency to consult with an EEO Counselor is subject to equitable estoppel only upon a showing of "affirmative misconduct" by the agency that causes the plaintiff to miss the filing deadline).

7. Statute of limitations—retroactivity.

Cruz v. Maypa, Civ. A. No. 1:13–cv–862, 2013 WL 5561610 (E.D. Va. Oct. 4, 2013) (Hilton, J.) (holding that a plaintiff may not take advantage of a Congressional extension of a statute of limitations where the cause of action had accrued, but not expired, at the time of the extension and Congress gave no indication that the extension would operate retroactively).

8. Statutory employer.

Rodriquez v. Leesburg Business Park, LLC, 754 S.E.2d 275 (2014) (Kinser, C.J.) (reversing the dismissal of a wrongful death action and order sustaining the defendant's plea in bar, which claimed that the plaintiff's exclusive remedy for damages stemming from the death of her husband from injuries sustained in the course of his employment is under the Virginia Workers' Compensation Act (the "Act"); holding that where an owner simply claims it was a statutory employer and that the plaintiff's exclusive remedy falls under the Act, an owner fails to meet its burden of proof to show that the work performed was "part of the owner's trade, business, or occupation" when it proves only that the work performed by the employees "was indispensable to the success of its business").

VII. TRIAL PROCEEDINGS AND EVIDENCE.

A. Statutes.

1. Admissibility of business records.

2014 Va. Acts 398 (H. 301) (approved Mar. 31, 2014) (amending Code § 8.01-391 and enacting § 8.01-390.3 to provide that the authentication and foundation necessary for the admission of a business record under the business records exception to the rule against hearsay may be laid by (1) witness testimony, (2) a certificate of authenticity of, and foundation for, the record made by the record's custodian or another qualified witness, or (3) a combination of testimony and a certification; providing that if the proponent of the record intends to rely upon certification, he must give written notice and a copy of the certification to all

other parties no later than 15 days in advance of the trial or hearing, and if any party objects to the use of the certification, the authentication and foundation necessary for the admission of the record must be made by witness testimony).

2. Expert witness testimony.

2014 Va. Acts 391 (H. 191) (approved Mar. 31, 2014), 361 (S. 185) (approved Mar. 27, 2014) (amending Code §§ 8.01-401.2 and 8.01-401.2.1 to allow a properly qualified physician assistant to testify as an expert witness on certain matters within the scope of his activities as authorized under Virginia law, except in any medical malpractice action for or against (i) a defendant doctor of medicine or osteopathic medicine regarding standard of care, or (ii) a defendant health care provider regarding causation; adding "treatment" and "treatment plan" to those matters about which a chiropractor may testify as an expert witness).

B. Rules.

1. Experts—literature designations.

Va. Sup. Ct. R. 2:706(a) amended, effective July 1, 2013, in accordance with 2013 Va. Acts ch. 379 (SB 983) (amending Code § 8.01-401.1) to require, for literature designations made 30 days before trial, that the "specific" statements be "designated as literature to be introduced during direct examination"; further providing that "[i]f a statement has been designated by a party in accordance with and satisfies the requirements of this rule, the expert witness called by that party need not have relied on the statement at the time of forming his opinion in order to read the statement into evidence during direct examination at trial."

2. Hearsay—exceptions when declarant is unavailable

Va. Sup. Ct. R. 2:804(b)(5) amended, effective July 1, 2013, to provide: "For the purposes of this section, and in addition to corroboration by any other competent evidence, an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party. If authentication of the business record is not admitted in a request for admission, such business record shall be authenticated by a person other than the author of the entry who is not an adverse or interested party whose conduct is at issue in the allegations of the complaint."

C. Cases.

1. Courtroom coverage.

Virginia Broad. Corp. v. Commonwealth, 286 Va. 239, 749 S.E.2d 313 (2013) (holding that the General Assembly's 1992 revisions to Va. Code Ann. § 19.2-266 permit the court to determine "solely in its discretion" "whether to permit [or to prohibit] the taking of photographs in the courtroom or the broadcasting of

judicial proceedings by radio or television" and any party's objection to that decision must show good cause as to why it should be reversed).

2. Discovery violations—sanctions.

Projects Mgmt. Co. v. Dyncorp Int'l LLC, 734 F.3d 366 (4th Cir. 2013) (Agee, J.) (affirming the district court's invocation of its inherent authority to sanction a party for abusing the judicial process and the dismissal of plaintiffs' claims as a sanction for a series of discovery abuses; holding that, although the dismissal of claims is a sanction that should be levied "with the greatest caution," each of the six factors outlined in *United States v. Shaffer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993), had been satisfied, the most significant of which was that the client, not its counsel, was responsible for thwarting discovery and that the client had been given multiple chances to cure its deficiencies).

3. Judgment as a matter of law—specificity requirement.

Electro-Mech. Corp. v. Power Distrib. Prods., Inc., 970 F. Supp. 2d 485 (W.D. Va. 2013) (Jones, J.) (holding that defendants waived ability to file a post-verdict renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) because they never specified the grounds supporting their pre-verdict JMOL motion as required by Fed. R. Civ. P. 50(a); noting that the 2006 amendments to Fed. R. Civ. P. 50 allowing for pre-verdict JMOL motions at any time before the case is submitted to the jury (as opposed to at the close of all of the evidence) eliminated the basis for courts to take a forgiving approach to what constitutes a sufficient pre-verdict JMOL motion in order to preserve the ability to assert a post-verdict JMOL motion).

4. Jury verdicts.

Jones v. SouthPeak Interactive Corp. of Del., Civ. A. No. 3:12cv443, 2013 WL 5837756 (E.D. Va. Oct. 29, 2013) (Payne, J.) (upholding, in part, jury verdict that found both the corporate defendant and two individual defendants liable in a Sarbanes-Oxley retaliation action and imposed the plaintiff's compensatory damages against the individual defendants and her back pay damages against the corporate defendant; "generally verdicts are legally valid even if they are legally inconsistent").

5. Motion to set aside the judgment—fraud on the court doctrine.

Fox ex rel. Fox v. Elk Run Coal Co., 739 F.3d 131, 136 (4th Cir. 2014) (Wilkinson, J.) (holding that a company's failure to voluntarily disclose medical opinions obtained by the company that contradicted the opinion of the company's expert did not rise to the level of "fraud on the court" and, thus, did not support the defendant's motion under Rule 60(d)(3) to have the a judgment set aside more than one year after entry; noting that "fraud on the court" must involve not only an intentional plot to deceive the judiciary, but also "must also touch on the public interest in a way that fraud between individual parties generally does not"; finding

that it was of particular significance that the petitioner, acting pro se, did not seek the opinions in discovery).

6. *Pro se* representation.

Premium Prods., Inc. v. Pro Performance Sports, LLC, No. 1:13–CV–1119 GBL/JFA, 2014 WL 644398 (E.D. Va. Feb. 19, 2014) (Lee, J.) (holding that the rule that a corporation cannot appear *pro se*, but must appear through an attorney, applies to small closely-held corporations).

7. Remittitur.

Jones v. SouthPeak Interactive Corp. of Del., Civ. A. No. 3:12cv443, 2013 WL 5837756 (E.D. Va. Oct. 29, 2013) (Payne, J.) (holding that, when faced with a motion for remittitur of a jury award for the plaintiff's "emotional distress" in a Sarbanes-Oxley case, and where the Fourth Circuit had failed to enumerate any specific formula to guide a district court's analysis, the court would consider the factors governing whether or not an award for emotional distress for a constitutional deprivation is excessive as set forth in *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001); those factors include "attention resulting from the emotional duress[,] psychiatric or psychological treatment[,] the degree of such mental distress[,] the factual context in which the emotional distress developed[,] evidence corroborating the testimony of the plaintiff; the nexus between the conduct of the defendant and the emotional distress[,] mitigating circumstances, if any[,] physical injuries suffered as a result of emotional distress[,] and loss of income, if any").

Jones v. SouthPeak Interactive Corp. of Del., Civ. A. No. 3:12cv443, 2013 WL 5837756 (E.D. Va. Oct. 29, 2013) (Payne, J.) (holding that, when deciding a motion for remittitur, a court should look at the evidence presented and awards made in similar cases).

8. Taxation of discovery costs.

Country Vintner of N.C., LLC v. E. & .J Gallo Winery, Inc., 718 F.3d 249 (4th Cir. 2013) (Davis, J.) (holding, as a matter of first impression, that large categories of ESI-processing costs—specifically, the cost of flattening/indexing ESI, searching and reviewing and extracting metadata, bates-numbering and quality-control—are not taxable under 28 U.S.C. § 1920(4) as "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case …"; holding that the only costs that are fairly taxable under the statute are the cost of converting native files to .TIFF or .pdf images, but allowing, in a footnote, for the possibility that costs for extraction of metadata might be recoverable where that metadata is essential to the particular case).

9. Waiving objections.

Commonwealth v. Amos, 754 S.E.2d 304, 2014 Va. LEXIS 29 (Feb. 27, 2014) (Lacy, J.) (holding, in a proceeding where a witness was held in contempt and jailed without the opportunity to object to the contempt finding, that the plain language of Va. Code Ann. § 8.01-384(A) regarding contemporaneous objections does not require a litigant who was denied the opportunity to make a contemporaneous objection to "file a post-conviction objection or otherwise bring the objection to the court's attention at a later point" in order to preserve the issue for appeal; where the litigant was prevented from objecting, no prejudice on appeal shall result).

Cashion v. Smith, 286 Va. 327, 749 S.E.2d 526 (2013) (Mims, J.) (holding that, under Va. Code § 8.01-384, counsel did not waive objections or arguments on appeal regarding the trial court's order on a demurrer by endorsing the demurrer order with the phrase "We ask for this," nor did counsel signify agreement with portions of the order adverse to his client; finding that such an entry did not indicate a voluntary and knowing waiver, but simply requested that the court memorialize the order; distinguishing *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991) because the current version of Va. Code § 8.01-384 was not applicable to that case).

VIII. APPELLATE PRACTICE.

A. Rules.

1. Appeals to the Supreme Court of Virginia—petition for rehearing.

Virginia Rule 5:20(a), concerning Petitions for Rehearing after refusal or dismissal of Petitions for Appeal, amended, effective November 1, 2013, to add: "Attempts to incorporate facts or arguments from the petition for appeal are prohibited."

2. Appeals to the Supreme Court of Virginia—from the Virginia State Bar Disciplinary Board or a three-Judge Circuit Court Determination.

Va. Sup. Ct. R. 5:21(b)(5) amended, effective January 31, 2014, to add "or revoking," "or revocation," and "Any order of Admonition or Public Reprimand shall be automatically stayed prior to or during the pendency of an appeal of the order."

B. Cases.

1. Appellate jurisdiction—after voluntary dismissal of remaining claims.

Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27, 728 F.3d 354 (4th Cir. 2013) (Diaz, J.) (holding that, when the district court enters an order dismissing some, but not all, of the pending claims, and the parties

stipulate to a voluntary dismissal of the remaining claims, but not entirely with prejudice, this constitutes a type of "split judgment" that is not sufficiently final to trigger appellate jurisdiction under 28 U.S.C. § 1291; rejecting some circuits' approach of dismissing the appeal for lack of jurisdiction; adopting the Eighth Circuit's pragmatic approach of treating the remaining claims as dismissed "with prejudice," and considering the appeal).

2. Federal court—preservation of issues for appeal.

Bunn v. Oldendorff Carriers GmbH & Co., 723 F.3d 454, 468-69 (4th Cir. 2013) (Davis, J.) (holding that the issue of whether an instruction on "open and obvious" defense was erroneous had not been properly preserved and was waived because the appellant failed to comply with Rule 51(c)(1), which requires that "[a] party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection").

3. Finality—time for filing notice of appeal.

Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Particpating Emp'rs, 134 S. Ct. 773 (2014) (Kennedy, J.) (holding that after entry of judgment in U.S. District Court, a pending claim for attorneys' fees and litigation costs does not toll the 30-day period for filing a notice of appeal under Fed. R. App. P. 4(a); ruling that it makes no difference whether the basis for the attorneys' fee claim arises under a contractual fee-shifting provision or a statute).