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| Overview of the State of Virginia Court System |
| A. Trial Courts |
| 2 Levels: General District Court and Circuit Court |
| <p>General District Court (2 Divisions)</p> <p>(1) Smalls Claims (amounts in controversy not to exceed \$5,000): Pro se parties only; attorneys prohibited. If a party wants an attorney to represent him in a Small Claims case, case is automatically transferred to the regular General District Court docket upon the filing of the Notice of Appearance of Counsel.</p> <p>(2) Regular Docket (amounts in controversy \$5,001 - \$25,000): The General District Court has exclusive jurisdiction for matters less than \$4,500. It shares concurrent jurisdiction with the Circuit Court for matters between \$4,500 and \$25,000. Any case in the General District Court is tried without a jury. The General District Court is not a court of record.</p> <p>Circuit Court:</p> <p>The Circuit Court has concurrent jurisdiction with General District Court for any amount in controversy over \$4,500. It has original jurisdiction for amounts in controversy that exceed \$25,000.</p> <p>If a jury trial is prayed for an amount in dispute greater than \$25,000, a jury of seven, from not less than thirteen impaneled, will try the case. If the amount in dispute is less than \$25,000, a jury of five, out of not less than thirteen impaneled will try the case. If it is a special jury, twelve out of not less than twenty impaneled, will try the case. If it is a complicated case that may last for an unusual amount of time, the Court may seat alternate jurors. Va. Code § 8.01-359.</p> |
| B. Appellate Courts |
| <p>Any General District Court trial can be appealed <i>de novo</i> to the Circuit Court for a trial with or without a jury. The appeal must be made within 10 days of the entry of judgment at the General District Court level.</p> <p>The Virginia Court of Appeals hears domestic and criminal matter appeals only. The appeals are a matter of right. This level consists of ten judges elected by the Virginia General Assembly for a term of eight years.</p> |

The Virginia Supreme Court hears appeals from the Circuit Court. Circuit Court appeals require a petition for writ of certiorari. The Virginia Supreme Court is very conservative. Case law from this court is favorable to defendants in personal injury actions but liberal on insurance coverage issues. This level consists of seven justices elected by the Virginia General Assembly for a term of twelve years.

Procedural

A. Venue

Virginia Code § 8.01-262 sets out permissible venues:

1. Wherein the defendant resides or has his principal place of employment or, if the defendant is a corporation, wherein its mayor, rector, president or other chief officer resides;
2. Wherein the defendant has a registered office, has appointed an agent to receive process, or such agent has been appointed by operation of the law; or, in case of withdrawal from this Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;
3. Wherein the defendant regularly conducts substantial business activity, or in the case of withdrawal from this Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;
4. Wherein the cause of action, or any part thereof, arose;
5. In actions to recover or partition personal property, whether tangible or intangible, the county or city:
 - (a) Wherein such property is physically located; or
 - (b) Wherein the evidence of such property is located;

Wherein any of the plaintiffs reside if (i) all of the defendants are unknown or are nonresidents of the Commonwealth or if (ii) there is no other forum available under any other provisions of § 8.01-261 or this section.

Motions objecting to venue must state why venue is improper and where proper venue may be found. The motion must be filed within 21 days of service of process commencing the action or by order of the court. Any party may move the court for a change of venue and any party may oppose such motion. Va. Code § 8.01-265

B. Statute of Limitations

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| Personal Injuries: | 2 years after date of sustaining injuries. Va. Code §8.01-243(A). |
| Loss of Consortium: | Prohibited in Virginia. Va. Code §55-36. |
| Property Damage: | 5 years. Va. Code §8.01-243(B). |
| Legal Malpractice: | 5 years, if a written contract exists. Va. Code §8.01-246(2); |

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| | 3 years, if no written contract exists. Va. Code §8.01-246(4). |
| Contracts/Indemnity: | 5 years from the breach of the written contract. 3 years from the breach of the oral contract |
| Medical Payment Coverage: | 5 years on claims. Va. Code §8.01-246; Claimant may only claim reasonable and necessary medical expenses incurred within three years from the date of the accident. Va. Code §38.2-2201. |
| Wrongful Death: | 2 years after death. |
| Defamation: | 1 year Va Code § 8.01-247.1 |
| Assault and Battery: | 2 years Va Code § 8.01-243 and Va. Code § 8.01-248 |
| Catch-All: | Any action not specific by statute: 2 years. Va. Code § 8.01-246 |

As long as the plaintiff files the action within the time period provided by the Statute of Limitations, the Statute will be preserved. Virginia Rule 3:3 provides that a summons must be served within one year of its issuance, or the matter can be dismissed.

C. Time for Filing An Answer

General District Court, typically the first pleading served is a Warrant in Debt. The warrant simply serves as a date where the defendant must appear to state whether the matter is contested or uncontested. At that first return date, the court deems dates by which pleadings, including the Bill of Particulars and Answer and Grounds of Defense, will be due.

Circuit Court: 21 Days after Service of Summons and Complaint. If waiver of service occurs, the defendant has 60 days with which to answer. If the Defendant was served outside of the Commonwealth of Virginia, he has 90 days to file his answer. Va. Rule 3:8.

Strict Default Rules:

If the Defendant fails to file a responsive pleading within the required time period, even if the Plaintiff has granted an unlimited extension of time to file a responsive pleading, the Defendant is still technically in default. Rule 3:19. It is strongly urged that in any situation where you obtain an extension for filing an Answer that such agreement be made in writing. A Plaintiff need not move for default as it is automatic. If more than the required time for answering has elapsed, defense counsel should obtain and file an Agreed Order pursuant to Rule 1:9 and 3:19 to extend the time for filing an Answer or file a motion to extend time pursuant to those rules.

D. Dismissal Re-Filing of Suit

A non-suit is a legal means by which a plaintiff only may end a case before it is actually adjudicated. It can be done at anytime before the case is submitted to a jury or the court. A plaintiff is entitled to one non-suit as a matter of right although the court may allow additional non-suits upon reasonable notice to counsel of record for all defendants and upon a reasonable attempt to notify any party not represented by counsel, and they can re-file suit within the original statute of limitations or within six (6) months from the date of the non-suit. If additional non-suits are allowed, the court may assess costs and reasonable attorney's fees against the non-suiting party. When suffering a non-suit, a party shall inform the court of previous non-suits. Any order affecting a subsequent non-

suit shall reflect all prior non-suits along with the date of any previous non-suit and the court in which any previous non-suit was taken. Va. Code § 8.01-380.

Liability

A. Negligence

Virginia follows a contributory negligence rule which states that any negligence whatsoever on the part of the Plaintiff operates as a complete bar to recovery. Virginia does not recognize comparative negligence in any of its forms and is a strict contributory negligence jurisdiction.

B. Negligence Defenses

Contributory Negligence: Objective Standard, i.e. the actions of a reasonable person under the circumstances of the case. Defendant has burden to prove that Plaintiff was negligent and that Plaintiff's negligence was the proximate cause of Plaintiff's injuries.

Assumption of the Risk: Subjective Standard; i.e. the reasonableness of the actions of the defendant under the circumstances of the case. Defendant has burden to prove that Plaintiff fully appreciated the nature and extent of a known danger, that Plaintiff voluntarily exposed himself to the known danger and that Plaintiff was injured as a result of the danger assumed.

Sudden Emergency Doctrine: A sudden emergency is an event or combination of combination of circumstances that calls for immediate action without giving time for the deliberate exercise of judgment. If party was confronted with a sudden emergency and acted reasonably under the circumstances, he will not be found to be negligent. *Virginia Transit Co. v. Durham*, 190 Va. 979, 59 S.E.2d 58 (1950) (claimed by Defendant); *Frazier v. Conner*, 191 Va. 481, 61 S.E.2d 880 (1950) (claimed by Plaintiff).

Rescue Doctrine: A Plaintiff who exposes himself voluntarily to danger because he was attempting to rescue someone from imminent and serious danger is not negligent if he did not create the danger and his conduct was not rash and reckless under the circumstances. *Lassiter v. Warinner*, 235 Va. 274, 368 S.E.2d 258 (1988).

Last Clear Chance-Helpless Plaintiff: Contributory negligence by Plaintiff will not bar his recover if the preponderance of the evidence shows that:

- (1) Plaintiff negligently placed himself in a situation of peril from which he was physically unable to remove himself; and
- (2) Defendant saw, or should have seen, Plaintiff and realized, or should have realized, Plaintiff's peril; and
- (3) Thereafter, Defendant could have avoided the accident by using ordinary care.

Last Clear Chance-Inattentive Plaintiff: Contributory negligence by Plaintiff will not bar his recover if the preponderance of the evidence shows that:

- (1) Plaintiff negligently placed himself in a situation of peril; and
- (2) Plaintiff was physically able to remove himself from the situation, but he was unaware of his peril;
- (3) Defendant saw, or should have seen, Plaintiff and realized, or should have realized, Plaintiff's peril; and
- (4) Thereafter, Defendant could have avoided the accident by using ordinary

care.

Williams v. Harrison, 255 Va. 272, 447 S.E.2d 467 (1998).

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross Negligence: Degree of negligence which shows such indifference to others as constitutes an utter disregard of caution amounting to a complete neglect of safety of another person or another person's property. It is such negligence as would shock fair-minded people but less than willful recklessness. *Ferguson v. Ferguson*, 212 Va. 86, 181 S.E.2d 648 (1971).

Willful and Wanton Conduct: Acting consciously in disregard of another person's rights or acting with a reckless indifference to the consequences to another person when the defendant is aware of his conduct and is also aware, from his knowledge of existing circumstances and conditions, that his conduct would probably result in injury to another. *Alfonso v. Robinson*, 257 Va. 540, 514 S.E.2d 615 (1999).

D. Negligent Hiring and Retention

Negligent Hiring: doctrine of primary liability that can hold an employer principally liable for placing an unfit individual in an employment situation that involves an unreasonable risk of harm to others. *Interim Personnel of Central Virginia, Inc., v. Messer*, 263 Va. 435, 559 S.E.2d 704 (2002).

Negligent Retention: Based on the principle that an employer is subject to liability for harm resulting from the employer's negligence in retaining a dangerous employee who the employer knew or should have known was dangerous and likely to harm others. *Southern Apartments Management, Inc. v. Jackman*, 257 Va. 256, 513 S.E.2d 397 (1999)

E. Negligent Entrustment

The jury instruction for Negligence Entrustment defines an "unfit driver" as "a person who, because of his age [inexperience; physical condition; mental condition; drug/alcohol impairment] , is likely to use a motor vehicle in a manner involving unreasonable risk fo harm to others."

Plaintiff has the burden to prove by a preponderance of the evidence that:

- (1) Defendant expressly or impliedly permitted the driver to drive his vehicle; and
- (2) The driver was an "unfit driver"; and
- (3) Defendant knew, or should have known, that the driver was an "unfit driver"; and
- (4) The driver was negligent as a result of the unfitness; and
- (5) The driver's negligence was a proximate cause of plaintiff's injuries.

F. Dram Shop

Virginia does not recognize Dram Shop Liability.

G. Joint and Several Liability

Two or more tort-feasors that are found liable by a judgment or verdict jointly and

severally are liable to the Plaintiff for damages. If a verdict or judgment is rendered against two or more tort-feasors, each tort-feasor is required to pay his/her pro rata share of the judgment. Va. Code § 8.01-34.

H. Wrongful Death and/or Survival Actions

Virginia recognizes a cause of action for survival and a cause of action for wrongful death. If, however, the facts establish that the decedent died as a result of the injury complained of, and death resulted from the injury for which the action was originally brought, Va. Code § 8.01-56 requires the cause of action to be amended and brought as a wrongful death action, alone, under Va. Code § 8.01-50. Where causation is an issue, it is recommended that the case be bifurcated so as not to confuse the jury. *Centra Health, Inc. v. Mullins*, 277 Va. 59, 670 S.E.2d 708 (2009).

Virginia Code § 8.01-50 governs wrongful death claims. A personal representative may bring a cause of action seeking damages for the decedent's death arising from negligence acts or omissions.

Virginia Code § 8.01-25 governs the survival of claims and allows a personal representative to bring a cause of action seeking damages for the decedent's personal injuries prior to death as a result of negligent acts or omissions.

Statutory Beneficiaries

Virginia Code § 8.01-53 states:

- A. The damages awarded pursuant to § 8.01-52 shall be distributed as specified under § 8.01-54 to (i) the surviving spouse, children of the deceased and children of the any deceased child of the deceased or (ii) if there be none such, then to the parents, brothers and sisters of the deceased, and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent or (iii) if the decedent has left both surviving spouse and parent or parents, but no child or grandchild, the award shall be distributed to the surviving spouse and such parent or parents or (iv) if there are survivors under clause (i) or clause (iii), the award shall be distributed to those beneficiaries and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent. Provided, however, no parent whose parental rights and responsibilities have been terminated by a court of competent jurisdiction or pursuant to a permanent entrustment agreement with a child welfare agency shall be eligible as a beneficiary under this section. For purposes of this section, a relative is any person related to the decedent by blood, marriage, or adoption and also includes a stepchild of the decedent.
- B. The class and beneficiaries thereof eligible to receive such distribution shall be fixed (i) at the time the verdict is entered if the jury makes the

specification, or (ii) at the time the judgment is rendered if the court specifies the distribution.

I. Vicarious Liability

Respondent Superior: Employer is liable for damages proximately caused by the negligence of employee while acting within the scope of his employment. *Smith v. Landmark Communications, Inc.*, 246 Va. 149, 431 S.E.2d 306 (1993). Scope of employment is presumed if the weight of the evidence shows that the person was an employee. *United Board of Carpenters v. Humphreys*, 203 Va. 781, 127 S.E.2d 98 (1962), cert. denied, 371 U.S. 954 (1963). Employer is still responsible if employee had multiple motives if one of the motives was to serve the employer. *Kidd v. DeWitt*, 128 Va. 438, 64 S.E.2d 741 (1951).

Person who hires an independent contractor is not liable for his actions unless the work given was unlawful. *McDonald v. Hampton Training Sch. For Nurses*, 254 Va. 79, 486 S.E.2d 299 (1997).

J. Exclusivity of Workers' Compensation

Yes. However, some automobile insurance coverage (medical payment benefits; UM/UIM benefits) may be available to the employee depending on the facts of the case.

Damages

A. Statutory Caps on Damages

Punitive Damages: Not to exceed \$350,000; Jury is not informed about cap. Va.Code § 8.01-38.1

Medical Malpractice Cases: Currently \$2.05 Million (increases \$50,000 every July 1st) VA Code § 8.01-581.15

B. Compensatory Damages for Bodily Injury

Civil Pattern Jury Instruction No. 9.000 states, in relevant part, that the jury may consider the following:

- (1) Bodily injuries sustained and their effect on Plaintiff's health according to their degree and probable duration;
- (2) Any Physical pain and mental anguish suffered in the past and any he may reasonably suffer in the future;
- (3) Any disfigurement or deformity and any associated humiliation or embarrassment;
- (4) Any inconvenience caused in the past and any that probably will be caused in the future;
- (5) Any medical expenses incurred in the past and any reasonably expected in the future;
- (6) Any earning lost because he was made unable to work;
- (7) Any loss of earnings and lessening of earning capacity, or either, that he may be reasonably expected to sustain in the future;

(8) Any property damage he sustained.

C. Collateral Source

While Virginia Code § 38.2-2201 does not prohibit an insurance policy from allowing medical payment benefits to be paid to a workers' compensation claimant, Virginia courts have upheld exclusionary policy language prohibiting such payments. See *Scarbro v. State Farm Mut. Auto Ins. Co.*, 256 Va. 357, 504 S.E.2d 860 (1998).

Virginia Code § 38.2-2216 prohibits a policy from requiring that medical payment benefits offset a bodily injury claim. Similarly, Virginia Code § 38.2-2211 prohibits an automobile liability policy from providing for a credit against health insurance benefits. This entitles a claimant to receive the benefit of health insurance paying medical expenses as well as medical payment benefits in the same amount. Nothing in the statute allows the injured person to collect more than his actual medical expenses as a result of an accident from any one or any combination of all policies providing motor vehicle medical payment coverage applicable to the accident.

D. Pre-Judgment/Post judgment Interest

A jury may specify that interest may begin to run on a day prior to the judgment, but if it does not expressly do so, interest runs from the date of the judgment at the legal rate. Virginia Code § 8.01-382. The legal interest rate is set forth by Virginia Code § 6.1-330.54. The current interest rate is six percent.

E. Damages for Emotional Distress

Negligent Infliction of Emotional Distress: Plaintiff can recover if he proves negligence by a preponderance of the evidence AND proves that by clear and convincing evidence that Defendant's negligence was a proximate cause of a fright or shock which naturally resulted in a physical injury (even if no physical impact). *Gray v. Inova Health Care Services*, 257 Va. 597, 514 S.E.2d 355 (1999).

Intentional Infliction of Emotional Distress: Plaintiff can recover if he proves by clear and convincing evidence:

- (1) That the Defendant intended his specific conduct and that he knew, or should have known, that his conduct would cause the plaintiff emotional distress; and
 - (2) That the Defendant's conduct was outrageous and intolerable in that it offended generally accepted standards of decency and morality; and
 - (3) That the plaintiff suffered severe emotional distress; and
 - (4) That the plaintiff's emotional distress was caused by the defendant's conduct.
- McDermott v. Reynolds*, 260 Va. 98, 530 S.E.2d 902 (2000).

F. Wrongful Death and/or Survival Action Damages

Va. Code § 8.01-52 allows the following damages in a wrongful death action:

1. Sorrow, mental anguish and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;
2. Compensation for reasonable expected loss of (i) income of the decedent and (ii)

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| <p>services, protection, care and assistance provided by the decedent;</p> <p>3. Expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death;</p> <p>4. Reasonable funeral expenses; and</p> <p>5. Punitive damages may be recovered for willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others</p> |
| <p>G. Punitive Damages</p> <p>Permitted with showing of actual malice. <i>F.B.C. Stores v. Duncan</i>, 214 Va. 246, 198 S.E.2d 595 (1973).</p> <p>Punitive Damages: Not to exceed \$350,000; Jury is not informed about cap. Va.Code § 8.01-38.1.</p> |
| <p>H. Diminution in Value of Damaged Vehicle</p> <p>The Virginia case that states this is the following: "Where the automobile is damaged but not completely destroyed the measure of damages is basically the difference between market value at the time of the injury and market value after the injury, which, where the injury is susceptible of repairs, is ordinarily measured by the cost of reasonable repairs necessary to restore the automobile to its original condition together with the diminution in value of the injured property after repairs are made. <i>Averett v. Shircliff</i>, 218 Va. 202, 206-207, 237 S.E.2d 92 (1977)</p> |
| <p>I. Loss of Use of Motor Vehicle</p> <p>Virginia Code §8.01-66 provides that any person entitled to recover for damage to a motor vehicle is entitled to recover for loss of use of the vehicle. He shall be entitled to recover the reasonable costs which were actually incurred in hiring a comparable substitute vehicle for the period of time during which such person is deprived of the use of his motor vehicle. However, such rental period shall not exceed a reasonable period of time for such repairs to be made or if the vehicle is a total loss, a reasonable time to purchase a new vehicle. Nothing in the statute relieves the claimant of the duty to mitigate damages.</p> |
| <p>Evidentiary Issues</p> |
| <p>A. Preventability Determination</p> <p>Not applicable in Virginia law as this is understood.</p> |
| <p>B. Traffic Citation from Accident</p> <p>Under Virginia Code § 8.01-418, a plea of guilty or <i>nolo contendere</i> or forfeiture in a criminal prosecution or a traffic case arising out of the same occurrence as the civil action is admissible in the civil action. This includes when the person issued the citation signs a traffic ticket and pays the court fine simply to avoid appearing in traffic court.</p> |

Virginia traffic tickets clearly state that by signing the ticket and paying the fine to avoid court, it is an admission of guilt to the offenses of which the driver is charged. All drivers should consider entering a plea of not guilty and appearing in traffic court. A conviction, after a trial, is not admissible in a civil matter. It should be noted that the fact that a driver was not given a ticket is also not admissible in a civil action.

C. Failure to Wear a Seat Belt

Virginia Code § 46.2-1094 requires persons occupying the front seat to wear a safety belt. While failing to wear a seatbelt can lead to civil penalties, Va. Code 46.2-1094 limits the importance that a party failed to wear a seatbelt. For example, failing to wear a seat belt does not constitute negligence nor can it be considered in mitigation of damages of whatever nature. In addition, failing to wear a seatbelt is not admissible in evidence nor can it be the subject of comment by counsel in any action for the recovery of damages arising out of the operation, ownership, or maintenance of a motor vehicle.

D. Failure of Motorcyclist to Wear a Helmet

Virginia Code § 46.2-910 requires a motorcycle operator and passenger to wear a helmet. The statute specifically provides that the failure to wear a face shield, safety glasses or goggles, or protective helmets shall not constitute negligence per se in any civil proceeding

E. Evidence of Alcohol or Drug Intoxication

Virginia Code § 4.1-100 defines "intoxicated" as any person who has consumed enough alcoholic beverages to so affect his manner, disposition, speech, muscular movement, general appearance or behavior.

Virginia Code § 18.2-269 sets out the prosecution of a DUI. For prosecution for driving under the influence of alcohol, the amount of the alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of a sample of suspect's blood or breath, shall give rise to the following rebuttable presumption:

- (a) If there was at that time 0.08 percent or more by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants.
- (b) If there was at the time more than .05 percent but less than 0.08 percent by weight by volume of alcohol in the accused's blood, such fact shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such fact may be considered with other competent evidence in determining the guilt or innocence of the accused.
- (c) If there was at that time 0.05 percent or less by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcohol intoxicants at the time of the alleged offense.

Virginia trial courts may allow a jury to consider the issue of punitive damages arising out of drunk driving. The standard is whether "the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others." The Courts will review the facts of each case in determining whether punitive damages can go to the jury. *Doe v. Isaacs*, 265 Va. 531, 579 S.E.2d 174 (2003).

Virginia Code § 8.01-44.5 states that punitive damages may be awarded if the evidence proves that the defendant acted with malice toward the plaintiff or the defendant's conduct is found to be so willful and wanton as to evidence a conscious disregard for the rights of others. In motor vehicle accidents, the willful and wanton conduct may be established by the following:

1. Evidence of a blood alcohol of .15% or more at the time of the accident.
2. The Defendant's intoxication was a proximate cause of the accident.
3. The Defendant knew, or should have known, before or while drinking that his ability to operate a motor vehicle would be impaired or while operating a motor vehicle defendant knew or should have known that his ability to operate a motor vehicle was impaired.

Penalties for failure or refusal to take a breath or blood test include automatic suspension of the person's license for one year for a first offense. Virginia Code § 18.2-268.3.

A refusal to take the blood alcohol test does not eliminate the application of Virginia Code § 8.01-44.5 on the issue of evidence of punitive damages. The refusal to submit to the test can be utilized at trial on a civil case in the pursuit of punitive damages as long as the other criteria are met under § 8.01-44.5. A certified copy of the court's determination of an unreasonable refusal pursuant to § 18.2-268.3, in addition to any other form of proof, shall be *prima facie* evidence that the defendant unreasonably refused to submit to the test.

Virginia lawmakers recently passed a bill that amends § 8.01-44.5 and will become effective July 1, 2013. The amendment creates a rebuttable presumption that the blood alcohol concentration at the time of the incident was at least as high as the test result when the test was administered within three hours of the incident causing injury or death.

Similarly, the statute has been amended to allow that a party may submit either a copy of a certificate issued by the person administering the test or a certificate of analysis for a blood test. These certificates will constitute *prima facie* evidence of the facts they contain.

F. Testimony of Investigating Police Officer

Virginia Code § 46.2-379 prohibits the introduction of the police report as evidence and prohibits a police officer from using the accident investigation report to refresh his/her recollection of the accident at the time of trial.

G. Expert Testimony

Expert testimony is admissible when the subject matter is not within the range of a layperson's common experience. It is not admissible on matters of common knowledge when the jury is able to form an intelligent and accurate opinion as is the witness. *Tittsworth v. Robinson*, 252 Va. 151, 475 S.E.2d 261 (1996). The admission of expert testimony is within the sound discretion of the trial judge. *Patterson v. Commonwealth*, 3 Va. App. 1, 348 S.E.2d 285 (Ct. App. 1986). *Pelletier v. Commonwealth*, 42 Va. App. 406 (Ct. App. 2004).

For civil cases, Va. Code Ann. § 8.01-401.3(A) authorizes expert testimony in any situation where it would be helpful to the trier of fact.

The Virginia Rule, as applied in civil cases, follows the general outline of the Federal Rules of Evidence, Fed. R. Evid. 703 & 705, with notable exception. See, *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989) (expert may not testify as to hearsay opinion of others).

Va. Code Ann. § 8.01-401.1 provides, in part:

In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.

This statute is modeled after Fed. R. Evid. 703 and 705.

The expert may testify in terms of opinion or inference and give his reason therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. Va. Code Ann. § 8.01-401.1. The expert may be required to disclose the underlying facts or data on cross-examination.

Experts may express opinions and draw inferences from inadmissible sources. *M.E.D. v. J.P.M.*, 3 Va. App. 391, 350 S.E.2d 215 (Ct. App. 1986). However, the proponent of expert testimony may not elicit inadmissible materials such as hearsay on direct examination of the witness. *Todd v. Williams*, 242 Va. 178, 409 S.E.2d 450 (1991).

The question of whether to admit an expert's testimony is a matter of discretion for the court. The Supreme Court of Virginia is reluctant to overturn a trial court's decision in discretionary matters. See, e.g., *Poliquin v. Daniels*, 254 Va. 51, 486 S.E.2d 530 (1997) (refusing to overturn trial court's admission of evidence where witness was "qualified by the thinnest of reed under the statute"); *Lawson v. Elkins*, 252 Va. 352, 477 S.E.2d 510 (1996) (refusing to overturn trial court's determination of admissibility of

testimony in medical malpractice case). However, this discretion is not limitless. See, e.g., *Griffin v. The Spacemaker Group, Inc.*, 254 Va. 141, 486 S.E.2d 541 (1997) (reversing trial court for improper inclusion of expert testimony); *Countryside Corp. v. Taylor*, 263 Va. 549 (2002) (holding expert testimony on damages was inadmissible as based on fiction).

H. Collateral Source

Virginia law prohibits the introduction of collateral sources for payment of medical expenses. *Burks v Webb*, 199 Va 296, 99 SE 2d 629 (1957); *Walthev v Davis*, 201 Va 557, 111 SE 2d 784 (1960). The collateral source rule is founded on the principle that it is better the plaintiff receive a windfall in the form of double recovery for his bills, than the defendant escape, in whole or in part, liability for his wrongdoing. *Schlickling v Aspinall*, 235 Va 472, 368 SE 2d 172 (1988). Collateral sources for loss of income are inadmissible and shall not diminish provable damages for loss of income. Va. Code Section 8.01-35.

I. Recorded Statements

Va. Code § 8.01-417: Any person who takes from a person who has sustained a personal injury a signed written statement or voice recording of any statement relative to such injury shall deliver to such injured person a copy of such written statement forthwith or a verified typed transcription of such recording within 30 days from the date such statement was given or recording made, when and if the statement or recording is transcribed or in all cases when requested by the injured person or his attorney.

A recorded statement is hearsay and can only be used to refresh a witness' recollection when testifying. It may be admissible for impeachment purposes.

J. Prior Convictions

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Virginia Code § 19.2-269 permits the admissibility of prior convictions of felony or perjury. Additionally, Virginia allows prior convictions of misdemeanors involving moral turpitude to be admissible for impeachment purposes. *Johnson v. Commonwealth*, 41 Va. App. 77 (Ct. App. 2003).

The witness cannot generally be questioned as to whether or not he has been indicted or convicted of an ordinary misdemeanor.

K. Driving History

Generally not admissible.

L. Fatigue

Not discussed by statute in Virginia. Evidence of driver fatigue, if relevant to the case, may come into evidence through cross-examination.

M. Spoliation

Virginia law recognizes a spoliation or missing evidence inference which provides that "where on party has within his control material evidence and does not offer it, there is an inference that the evidence, if it had been offered, would have been unfavorable to that party." *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App. 565 (2003) (citing *Jacobs v. Jacobs*, 218 Va. 264, 237 S.E.2d 124 (1977)).

Virginia permits a spoliation inference in instances where the conduct was either

intentional or negligent. If the court determines that a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action, the court will allow the inference.

Settlement

A. Offer of Judgment

Virginia does not have offers of judgment as they are understood and used in the federal courts. Virginia Code § 8.01- 421 allows payments into the court in limited circumstances.

B. Liens

Virginia Code § 38.2-3405 prohibits a health insurance policy from containing a provision giving it a right of subrogation for the injuries from a third person. However, insurance policies qualifying under ERISA are permitted to have liens as a result of the federal statutes taking precedent over state statutes.

C. Minor Settlement

Virginia Code 8.01-424 governs minor settlements. A Petition for Compromise of an Infant's claim may be brought by any interested person or insurer before the Court for approval. Virginia courts require a Guardian Ad Litem be appointed to investigate the matter and recommend or dispute the settlement on behalf of the minor. The Court may required the funds to be paid into the General Receiver of the Court or to some fiduciary, including in some circumstances – the minor's parents, to be held in trust until the minor reaches the age of majority.

D. Negotiating Directly With Attorneys

Permitted

E. Confidentiality Agreements

Permitted

F. Releases

Virginia Code § 8.01-35.1 provides that when a release is given to one of multiple joint tortfeasors, the release does not discharge any other person from liability unless the release terms provide such a discharge of all. However, any amount recovered against the other person or any one of them must be reduced by any amount stipulated by the release, or in the amount of the consideration paid for it, whichever is the greater.

The release is not admissible into evidence in the trial of the matter but must be considered by the court in determining the amount for which judgment shall be entered. Additionally the release must discharge the person to whom it is given from all liability for contribution to any other person liable for the same injury. Similarly, a person who enters into a release with a claimant is not entitled to recover by way of contribution from another person whose liability for the injury is not extinguished by the release.

G. Voidable Releases

Virginia Code § 8.01-425.1 gives a claimant a right to rescind a settlement when he executes a release of liability as a condition of settlement in a claim or action for personal injury within thirty days of the incident giving rise to such claim. The claimant has a right of rescission until midnight of the third business day after the day on which

the release was executed, provided that he was not represented by counsel when the release was executed, the rescission was made in writing to the person or persons being released, their representative or insurance carrier, and the claimant returns to the person or persons being released any check or settlement proceeds received by the claimant prior to the rescission. The statute also provides that a release of liability executed within thirty days of the incident giving rise to the claim for personal injury by a person who is not represented by counsel shall contain a notice of the claimant's or the plaintiff's right to rescind conspicuously and separately stated on the release.

A fraudulently induced contract, compromise, or settlement is voidable. See *Robberecht Seafood Inc. v. Maitland Bros. Co.*, 220 Va. 109, 255 S.E.2d 682 (1979); *Nationwide Mut. Ins. Co. v. Martin*, 210 Va. 354, 171 S.E.2d 239 (1969). The defrauded party must show an intentional, knowing misrepresentation by a defendant of a material fact upon which a plaintiff has relied to its detriment. *Winn. v. Aleda Constr. Co.*, 227 Va. 304, 315 S.E.2d 193 (1984).

Transportation Law

A. State DOT Regulatory Requirements

Virginia Code § 52-8.4 is the statutory authority for the creation of regulations for the purposes of setting forth criteria relating to driver, vehicle, and cargo safety inspections with which motor carriers and transport vehicles shall comply, and shall be no more restrictive than the applicable provisions of the Federal Motor Carrier Safety Regulations of the United States Department of Transportation.

The regulations can be found at 19VAC30-20-20, et seq.

B. State Speed Limits

§ 46.2-870. Maximum speed limits generally.

Except as otherwise provided in this article, the maximum speed limit shall be 55 miles per hour on interstate highways or other limited access highways with divided roadways, nonlimited access highways having four or more lanes, and all state primary highways.

The maximum speed limit on all other highways shall be 55 miles per hour if the vehicle is a passenger motor vehicle, bus, pickup or panel truck, or a motorcycle, but 45 miles per hour on such highways if the vehicle is a truck, tractor truck, or combination of vehicles designed to transport property, or is a motor vehicle being used to tow a vehicle designed for self-propulsion, or a house trailer.

Notwithstanding the foregoing provisions of this section, the maximum speed limit shall be 70 miles per hour where indicated by lawfully placed signs, erected subsequent to a traffic engineering study and analysis of available and appropriate accident and law-enforcement data, on: (i) interstate highways, (ii) multilane, divided, limited access highways, and (iii) high-occupancy vehicle lanes if such lanes are physically separated from regular travel lanes. The maximum speed limit shall be 60 miles per hour where indicated by lawfully placed signs, erected subsequent to a traffic

engineering study and analysis of available and appropriate accident and law-enforcement data, on U.S. Route 29, U.S. Route 58, U.S. Route 360, U.S. Route 460, and on U.S. Route 17 between the town of Port Royal and Saluda where they are nonlimited access, multilane, divided highways.

C. Overview of State CDL Requirements

Virginia Code § 46.2-341.9 governs CDL requirements. With limited exception, a person is eligible if he:

- (1) Is domiciled in Virginia for at least six weeks;
- (2) Has applied for the license and passed the applicable vision test and knowledge and skills tests;
- (3) Surrenders any other CDL issued to him by another state;
- (4) Is 21 or older (with limited exception for someone 18-21).

Virginia Code § 46.2-341.5 provides authority for the promulgation of regulations relating to CDLs. They can be found at 24VAC20-60-10, et seq.

Insurance Issues

A. State Minimum Limits of Financial Responsibility

Virginia is not a compulsory insurance state. A vehicle owner is not required to carry motor vehicle insurance coverage of any type on any vehicle. However, if one elects not to have coverage, then one must pay a \$400 fee into the Uninsured Motorist Fund. Payment of the "Uninsured Motorist fee" to the Uninsured Motorist Fund is not a substitute for insurance coverage and provides no insurance protection whatsoever. Va. Code 46.2-705, 706 and 707.

If a policy is issued, there must be minimum limits of \$25,000 per person and \$50,000 per occurrence for bodily injury. Property damage limits of \$20,000 must also be provided. Virginia Code § 46.2-472.

B. Uninsured Motorist Coverage

"Uninsured motor vehicle" means a motor vehicle for which (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit of money or securities in lieu of such insurance, or (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of § 46.2-368. A motor vehicle shall be deemed uninsured if its owner or operator is unknown.

A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 (§ 46.2-435 et. seq.) of Chapter 3 of Title 46.2, is less than the total amount of uninsured

motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

Order of priority for uninsured motorist coverage:

1. The policy covering a motor vehicle occupied by the insured person at the time of the accident;
2. The policy covering a motor vehicle not involved in the accident under which the insured person is a named insured;
3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Coverage is mandatory in all automobile liability insurance policies issued. UM/UIM coverage is subrogable.

UM/UIM coverage can be stacked depending upon the language in the policy. Inter policy (between) stacking is always allowed. Intra policy (within) is permitted unless there is express language in the policy prohibiting stacking.

C. No Fault Insurance

Virginia law does not allow for personal injury protection benefit (PIP) benefits per se. Instead, benefits are provided for under the medical benefits provision of automobile insurance policies.

Coverage is not mandatory Virginia Code §38.2-2201.

There is no minimum limit of required coverage. The insurer and the insured may agree to any limit if the insured does not elect to purchase the \$2000 limit specified in the statute. See Virginia Code §38.2-2201.

Medical Payment Benefits cover all reasonable and necessary expenses for medical, chiropractic, hospital, dental, surgical, ambulance, prosthetic and rehabilitation services, and funeral expenses. Virginia Code §38.2-2201. Lost wages are a separate coverage and the insured may elect to purchase either or both. See §38.2-2201(A)(2).

Medical Payment benefit claims are not subrogable. Virginia Code §38.2-2209. Medical Payment benefits cannot offset a Bodily Injury claim.

A medical payment benefits claim is a contract claim and therefore the statute of limitations is five years. Virginia Code §8.01-246. However, Virginia Code provides that a claimant may only claim reasonable and necessary medical expenses incurred within three years from the date of the accident. Virginia Code §38.2-2202.

D. Disclosure of Limits and Layers of Coverage

Va. Code § 8.01-417 lays out the requirements for a claimant to obtain policy limits:

After he gives written notice that he represents an injured person, an attorney, or an individual injured in a motor vehicle accident if he is not represented by counsel, may, prior to the filing of a civil action for personal injuries sustained as a result of a motor vehicle accident, request in writing that the insurer disclose the limits of liability of any motor vehicle liability or any personal injury liability insurance policy that may be applicable to the claim. The requesting party shall provide the insurer with the date of the motor vehicle accident, the name and last known address of the alleged tortfeasor, a copy of the accident report, if any, and the claim number, if available. The requesting party shall also submit to the insurer the injured person's medical records, medical bills, and wage-loss documentation, if applicable, pertaining to the claimed injury. If the total of all such medical bills and wage losses equals or exceeds \$ 12,500, the insurer shall respond in writing within 30 days of receipt of the request and shall disclose the limits of liability at the time of the accident of all such policies, regardless of whether the insurer contests the applicability of the policy to the injured person's claim. Disclosure of the policy limits under this section shall not constitute an admission that the alleged injury or damage is subject to the policy. Information concerning the insurance policy is not by reason of disclosure pursuant to this subsection admissible as evidence at trial.

E. Unfair Claims Practices

Virginia Code § 38.2-510 states that no person or insurer shall commit the enumerated unfair settlement practices "with such frequency as to indicate a general business practice" and then proceeds to list the unfair practices. A violation of this statute only creates a cause of action for the Commission only.

F. Bad Faith Claims

Virginia Code § 8.01-66.1 allows an insured to recover costs and reasonable attorneys' fees against its insurer, if the trial court determines that the insured meets his burden of proof in showing by a preponderance of the evidence that the insurer was not acting in good faith when it denied coverage or refused payment under the policy. The statute is both remedial and punitive, and a standard of reasonableness should be applied in evaluating the conduct of the insurer. See *CUNA Mutual Insurance Co. v. Norman*, 237 Va. 33, 375 S.E.2d 724 (1989) for a discussion and application of the reasonableness standard. The statute provides a remedy for both first and third party claimants.

Bad faith is a contract action; therefore, no punitive damages are allowable unless an independent willful and wanton tort action is shown.

G. Coverage – Duty of Insured

The duty to defend is broader than the obligation to pay, and arises whenever the complaint alleges facts and circumstance, some of which, if proved, fall within the risk covered by the insurance policy. *Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co.*, 252 Va. 265, 475 S.E.2d 264 (1996).

H. Fellow Employee Exclusions

If there is a causal connection between the employee's injury and the conditions under which the employer requires the work to be done, an injury as a result of a fellow employee's actions is encompassed by the Worker's Compensation Act.

If, however, the fellow employee's act upon the plaintiff is personal and not directed against him as an employee or because of his employment, Virginia courts have found that the injury did not arise of the employment. *Butler v. Southern States Coop., Inc.*, 270 Va. 459, 620 S.E.2d 768 (2005).