Business Litigation in Virginia
Year-in-Review: 2011 (and early 2012)

I. ATTORNEY CONDUCT, MISCONDUCT & SANCTIONS

A. Motions to Disqualify

WINK, Inc. v. WINK Threading Studio, Inc., No. 2:10cv450, 2011 U.S. Dist. LEXIS 82379 (E.D. Va. July 26, 2011): The court granted a motion to disqualify the two lawyers who represented both the Defendant studio and the studio's former attorney. The court held that there was a conflict arising from the concurrent representation and that a client's willingness to prospectively waive a malpractice claim could not cure the identified conflict.

B. Sanctions

Bralley v. Carey, No. 3:10cv138, 2012 U.S. Dist. LEXIS 15191 (E.D. Va. Feb. 7, 2012): The Court held that Defendant was no longer in contempt for his failure to comply with post-judgment discovery orders, and the Court assessed a fine of $1,250.00 against Defendant for the six-day period during which he was in contempt. The question before the Court was whether "Defendant's recent supplemental discovery responses satisfy his outstanding discovery obligations." In holding that Defendant had indeed satisfied his discovery obligations, the Court noted that Defendant was entitled to answer Plaintiff's interrogatory requests by reference to documents provided pursuant to Rule 33(d) of the Federal Rules of Civil Procedure. Moreover, Plaintiff had not demonstrated how Defendant's answer under Rule 33(d) was inadequate. Therefore, Defendant had complied with all outstanding discovery obligations, and so Defendant was no longer in contempt.

Mercado v. Lynnhaven Lincoln-Mercury, Inc., No. 2:11cv145, 2011 U.S. Dist. LEXIS 122145 (E.D. Va. Oct. 21, 2011): The Court granted Plaintiff's motion for sanctions, finding that Defendant's attorney and her law firm were in violation of Rule 11 of the Federal Rules of Civil Procedure. This is because Defendant's counsel labeled as "Undisputed Material Facts" in its motion for summary judgment six statements that were fully disputed by Plaintiff. And counsel did this despite being aware of evidence in the record that directly contradicted her contention that the statements were "undisputed." Indeed, as the Court declared: "[t]he record is so clear as to the existence of material disputes with each of these statements that the Court finds [the attorney's] conduct to be egregious and in violation of Rule 11." Defendant's counsel had maintained that it was proper to designate the statements as "undisputed" because Plaintiff failed to provide “sufficient corroboration” of her own testimony; however, the Court clarified that “[t]here is no requisite level of corroboration necessary to render a fact disputed.”

Lester v. Allied Concrete Co., No. CL08-150, No. CL09-223, 2011 Va. Cir. LEXIS 132 (Charlottesville Oct. 21, 2011): Judge Edward L. Hogshire imposed $542,000 in sanctions against attorney Matthew B. Murray for hiding evidence and attempting to deflect blame for lapses in his disclosures to the court. That penalty set a record for sanctions imposed against a lawyer in Virginia state courts. Moreover, Judge Hogshire ordered Murray’s client, Isaiah Lester, to pay $180,000. The sanctions were awarded to defendants who were forced to incur considerable legal expenses in trying to uncover Murray’s deceptive activities, which included directing Lester to hide certain Facebook photographs. Despite Murray’s objections that the defense costs were excessive, Judge Hogshire found most of the costs to be “necessary and appropriate” in light of the “extensive pattern of deceptive and obstructionist conduct of Murray and Lester.”

E.I. duPont de Nemours & Co. v. Kolon Indus., 277 F.R.D. 286, 298 (E.D. Va. 2011): The court held that deposition errata sheets in which the deponents’ “corrected” their testimony exceeded the limits for substantive changes under Fed. R. Civ. P. 30(e). The court held that the changes reflected “lawyerly fixing” and struck the errata sheets for that reason, with the court likewise striking any revised errata sheets submitted after the thirty-day deadline in Fed. R. Civ. P. 30(e).

Stewart v. VCU Health Sys. Auth., No. 3:09cv738-HEH, 2011 U.S. Dist. LEXIS 153154 (E.D. Va. Nov. 22, 2011): Magistrate Judge Dohnal recommended dismissal of a *pro se* plaintiff’s employment discrimination suit as a sanction under Rules 37 and 41 due to plaintiff’s continued noncompliance with the Court’s discovery orders. Throughout the litigation process, plaintiff repeatedly refused to comply with several court orders and otherwise displayed a complete lack of respect for the Court’s authority. Moreover, the Court warned plaintiff on four separate occasions that his case would be dismissed if he continued to disobey court orders. Yet, among other things, plaintiff failed to cooperate at his continued deposition, during which he (1) evaded almost every question asked by opposing counsel, (2) did not bring his reading glasses, which he used as an excuse for his inability to read certain documents (though the record suggested that plaintiff could indeed read the documents), and (3) did not bring a battery to power his cell phone that purportedly contained certain recordings that the Court had previously ordered him to produce. Furthermore, after the Court overruled his objection and ordered him to produce his joint income tax returns, plaintiff failed to produce his actual tax returns (citing his initial objection), and instead prepared a series of forms purporting to be his returns to avoid providing the actual documents as he was ordered to do. Upon reviewing the five applicable factors, the Court found that no sanction short of dismissal would suffice. While *pro se* litigants are entitled to some deference, they too must respect court orders. Here, plaintiff provided no valid excuse for his continued noncompliance; his noncompliance evidenced willfulness to disobey; and he had been repeatedly warned that his case would be dismissed. Thus, the Court recommended that plaintiff's case be dismissed, and that opposing counsel file a Rule 54(d)(2) motion detailing attorney's fees arising from plaintiff's misconduct.

Hall v. Va. Int'l Terminals, Inc., 82 Va. Cir. 330 (Norfolk Mar. 28, 2011); *Hall v. Va. Int'l Terminals, Inc.*, 82 Va. 330 (Norfolk Mar. 4, 2011): In its opinion dated March 4, 2011, the Court, *inter alia*, imposed evidentiary and monetary sanctions against Plaintiff. The sanctions arose from Plaintiff's failure to disclose several critical facts during his signed answers to interrogatories and in his deposition. Such failures included the following: (1) Plaintiff claimed that he had only one conviction for a felony/crime involving moral turpitude, but he in fact had at least two such felony convictions and two such misdemeanor convictions; (2) Plaintiff failed to disclose one prior employer from which he was fired for threatening a fellow employee and possibly brandishing a knife; and (3) Plaintiff failed to disclose a previous event in which he was taken to a hospital by ambulance and claimed that he was paralyzed. While the Court recognized that the first two omissions were perhaps due to mere "forgetfulness," the third omission was of greater concern. Indeed, the Court could "not believe the failure to disclose this event, when combined with the other failures to disclose, was forgetfulness or inadvertence." Thus, monetary and evidentiary sanctions (and not dismissal) were appropriate. However, at that time, the totality of Plaintiff's failures to disclose was not fully known. In its opinion dated March 28, 2011, the Court detailed additional nondisclosures that opposing counsel had discovered, as well as modified the sanctions against Plaintiff. On March 14, 2011, the Court entered a nonsuit order regarding Plaintiff's claims; however, upon discovering additional undisclosed medical treatments that Plaintiff had received, opposing counsel brought a second motion for sanctions. Agreeing with Defendants' position, the Court found that "*this* plaintiff ought not be able to escape sanctions by suffering a nonsuit." Thus, finding that dismissing the action with prejudice would be "too severe," the Court imposed the following sanctions: (1) if Plaintiff re-files its action against Defendants, Plaintiff must (a) pay any stenographer's and transcription fees if Defendant chooses to depose him and (b) remit 20% of any jury verdict to Defendants; (2) Plaintiff must pay $6,000 to one Defendant; and (3) Plaintiff must pay $4,000 to the other Defendant.

N. Va. Real Estate, Inc. v. Martins, 720 S.E.2d 121 (Va. 2012): The Supreme Court of Virginia approved $272,096 in sanctions against a lawyer and his client in a case arising out of a Northern Virginia real estate listing contract. The real estate firm, its broker, and their counsel alleged claims against the competing firm, its real estate agent, and the sellers for conspiracy to harm in business, interference with contract expectancy, and defamation. However, they later decided to nonsuit their case. On appeal, the court found that the trial court did not lack jurisdiction to consider and impose sanctions because the court properly suspended the nonsuit order within the 21-day period provided for in *Va. Sup. Ct. R. 1:1*. The trial court retained jurisdiction over the suit until 21 days after the date upon which the trial court lifted the suspension of the nonsuit order and entered the final order in the case. Additionally, the trial court did not abuse its discretion in imposing sanctions because the court correctly applied an objective standard of reasonableness in concluding that the facts of the case could not support a reasonable belief that the plaintiff's claims alleging (1) interference with contract expectancy, (2) conspiracy to harm in business, and (3) defamation, along with the damages sought, were well grounded in fact or law, as required by Va. Code § 8.01-271.1.

Landrum v. Chippenham & Johnston-Willis Hosps., 282 Va. 346, 717 S.E.2d 134 (2011): Landrum brought a medical malpractice suit against Dr. Deitrick and Chippenham and Johnston-Willis Hospital. She was represented by an out-of-state attorney admitted pro hac vice. Under the court's pre-trial scheduling order, the plaintiff was to disclose her expert witnesses and the substance of the experts' opinions by a date certain. The trial court gave Landrum's counsel a seven-day extension of time to designate completely the experts' opinions. The counsel filed a supplementation within the seven days, but it was still not in compliance with the Rules. It was not signed by local counsel as required by Rule 1A:4(2). As such, it was a legal nullity that could not be amended. Because Landrum did not timely file a supplemental designation, she violated the court's order directing that the designation be supplemented within seven days. It was irrelevant that the defendants were not prejudiced by the lack of local counsel's signature. Rule 4:12(b)(2) permits a court to sanction a party that fails to obey an order to provide or permit discovery.

Nolte v. MT Technology Enterprises, LLC., Va. ___, ___ S.E.2d ___ (June 7, 2012): The Court held that prohibiting the defendants from opposing the plaintiff's claims at trial in any way, including cross-examining plaintiff's witnesses, was too harsh a sanction for the defendants' failure to comply with orders compelling discovery. The trial court's choice of sanction was permissible. It was not an abuse of discretion to impose the sanctions in response to the defendants' repeated failure to comply with the orders of the court. Barring a party from conducting cross-examination as a sanction for discovery abuses is not without precedent, but even a party in default is allowed to cross-examine on the issue of damages. "[I]n the particular circumstances of this case, we hold that it was an abuse of discretion to prohibit cross-examination and introduction of evidence by defendants in the damages presentation to the jury. The sanction was too harsh."

II. FEES AND COSTS

A. Attorney's Fees and Costs

Stewart v. VCU Health Sys. Auth., No. 3:09CV738-HEH, 2012 U.S. Dist. LEXIS 47355 (E.D. Va. Apr. 3, 2012): The Court granted, in part, Defendant's Petition for Attorney's Fees. The Court had previously determined that the *pro se* Plaintiff was required to pay Defendant "'reasonable expenses, including attorney's fees, caused by' [Plaintiff's] failure to comply with the rules and orders of [the] Court." Thus, the question before the Court was "what constitutes a 'reasonable' recovery of fees." Here, Defendant sought to recover $33,585 in attorney's fees generated from 93.7 hours of labor. Traditionally, the "lodestar" amount—calculated by multiplying the number of hours reasonably worked by a reasonable hourly fee—constitutes a presumptively reasonable fee. The Court first concluded that Defendant's attorneys' requested rates were reasonable because Defendant supported its motion with affidavits that demonstrated "satisfactory and specific evidence" of market rates in the area, which were commensurate with those charged by the attorneys. Furthermore, the Court found that 93.7 hours was reasonable because Defendant's request was "narrowly cabined to tasks arising from [Plaintiff's] non-compliance" and Defendant didn't seek to recover all of the attorneys' costs relating to those tasks. Thus, the lodestar amount was $33,585. However, a court has discretion to adjust the lodestar amount as it seems fit. Since the tasks for which Defendant sought recovery did not really pertain to the attorneys' expertise such that the premium fees would be justified, and because Plaintiff was a *pro se* litigant proceeding *in forma pauperis*, the Court reduced the lodestar amount by fifteen percent to $28,547.25.

Coles v. Deltaville Boatyard LLC, No. 3:10cv491-DWD, 2011 U.S. Dist. LEXIS 145551 (E.D. Va. Dec. 19, 2011): The Court granted in part and denied in part Plaintiff's motion for attorney's fees, awarding Plaintiff $62,439.26 in total. Plaintiff brought claims against Defendant, his former employer, alleging unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981. The Court had previously found that Defendant had "warned" two of Plaintiff's subsequent employers that Plaintiff might file an EEOC charge against them, and that it did so in retaliation for his having pursued a complaint against Defendant. Such retaliation had occurred with respect to two of Plaintiff's three subsequent employers. The Court awarded Plaintiff various damages for such acts. Of particular importance for the motion was the fact that, throughout the litigation, Defendant had repeatedly threatened Plaintiff with filing a Rule 11 motion for sanctions and attorney's fees against Plaintiff's counsel, although Defendant never filed such a motion. Nonetheless, due to the threats, Plaintiff's counsel and co-counsel spent extensive time researching and investigating numerous legal issues that might not otherwise have had to been researched so extensively. Plaintiff's counsel and co-counsel submitted detailed time and billing entries indicating that (1) counsel had worked 117.25 hours at a rate of $300 per hour totaling $35,175 and (2) co-counsel had worked 214 hours at a rate of $250 per hour totaling $53,500. The Court, however, determined that it was appropriate to reduce the total fee award by one-third. First, the Court found that an award of attorney's fees was proper in this case. Plaintiff's recovery at trail was not merely "nominal" based on Plaintiff's award of compensatory damages and based on application of the three "*Farrar-Mercer* Factors." Moreover, Plaintiff's requested fee award did not "shock the conscience," and so it was appropriate for the Court to engage in a lodestar analysis. The Court concluded that the requested rates and hours were reasonable. With respect to the hours, Plaintiff's counsel had to respond to four of Defendant's dispositive motions (though such motions were filed in good faith) and had to use considerable efforts to deal with Defendant's numerous Rule 11 threats. The repeated Rule 11 threats forced Plaintiff's attorneys to repeatedly evaluate the factual and legal basis of their claims well beyond the "reasonable" investigation mandated by Rule 11. The Court then calculated the lodestar to be $88,675. But the Court then adjusted the figure downward by a factor of one-third based on the following two variables: (1) Plaintiff failed to prove any economic losses, which were approximately one-third of the value of the total judgment actually obtained; and (2) Plaintiff proved at trial only two out of three acts of retaliation alleged. Thus, the appropriate fee award was $59, 116.67. However, there was also $3,322.59 in costs incurred in pursuit of the action that were properly taxed against Defendant as the non-prevailing party. Accordingly, the Court awarded Plaintiff $62,439.26 in total.

B. Summary Judgment

Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc., 673 F.3d 294, 299 (4th Cir. 2012): The court set forth the shifting burdens of proof relating to summary judgment on an affirmative defense. In particular, the court held: Where, as here, the movant seeks summary judgment on an affirmative defense, it must conclusively establish all essential elements of that defense. When the defendant has produced sufficient evidence in support of its affirmative defense, the burden of production shifts to the plaintiff to come forward with specific facts showing that there is a genuine issue for trial. However, where the movant fails to fulfill its initial burden of providing admissible evidence of the material facts entitling it to summary judgment, summary judgment must be denied, even if no opposing evidentiary matter is presented, for the non-movant is not required to rebut an insufficient showing."

C. Expert Witness Fees and Costs

Wiles v. Instrumentation & Control Sys. Eng'g, Inc., No. CL10-2577 (Richmond Cir. Ct. Feb. 15, 2012): After Plaintiff nonsuited on the third day of trial, Defendants moved to have Plaintiff pay Defendants' witness fees. Defendants invoked Virginia Code § 8.01-380(C) as grounds for its motion. The court held that the statute, under its plain meaning, did not apply to the case because it "evinces no intent to have plaintiff answer for a defendant's witness expenses if the right of a first nonsuit . . . is exercised during trial." The court reasoned that even though the statute seeks to prevent defendants from incurring costs only to have plaintiff nonsuit, it only does so "upon the absence of notice seven days out from the trial, not in the event of nonsuit taken at trial." Indeed, the court held that the statute does not provide for relief once a trial has commenced.

D. Prejudgment Interest

Cent. Tel. Co. of Va. v. Sprint Commc'n Co., No. 3:09cv720 (E.D. Va. Mar. 30, 2011): The case concerned the amount of prejudgment interest to be assessed against Defendant Sprint, and whether to require Sprint to pay Plaintiff CenturyLink's attorneys' fees, arising from Sprint's liability for breaching its contract with CenturyLink. The Court ordered Sprint to pay CenturyLink prejudgment interest amounting to $2,979,487, which reflected a 12% prejudgment interest rate applied to overdue amounts. And the Court refused to order Sprint to pay CenturyLink's attorneys' fees. With respect to the amount of prejudgment interest, the Court rejected CenturyLink's argument that the Court should apply a "blended-rate methodology" and assess an 18% interest rate. Rather, even though Fourth Circuit precedent gives district courts discretion to set the proper rate (instead of applying forum state law) where federal jurisdiction is based on federal question jurisdiction (*United States v. Dollar Rent A Car Sys., Inc.*, 712 F.2d 938 (4th Cir. 1983)), it was appropriate in this case to apply the 12% rate under the Virginia ICA. First, the contract between the parties provided that Virginia law would serve as a proxy for all other states' laws implicated by the action. Second, there was no reason that the proposed "blended-rate methodology" was more appropriate, particularly because Virginia law does not support such a methodology. Thus, application of Virginia law to the question of prejudgment interest was proper. Regarding the issue of attorneys' fees, the Court first refused to assess fees under the Telecommunications Act because the Court had earlier found that Sprint breached provisions in certain federally recognized contracts, not that Sprint violated the Act. Moreover, CenturyLink's argument for attorney's fees under its tariffs was unsuccessful. This is because CenturyLink had not declared an intention to claim attorneys' fees under either its interstate or intrastate tariffs in any previous pleading or post-trial findings of fact and conclusions of law. Therefore, the Court refused to award CenturyLink attorneys' fees.

III. PROCEDURE, DISCOVERY, AND JURISDICTION

A. Appellate Preservation of Error

Galumbeck v. Lopez, 283 Va. 500, 722 S.E.2d 551 (2012). The Supreme Court affirmed the trial court's numerous rulings adverse to the appellant where the appellant failed to ensure that an adequate record was made of the trial court proceedings to permit the Supreme Court to review and decide the assignments of error. Many of the rulings complained of were made during off-the-record side bar conferences. Trial counsel's attempted on-the-record proffer of the excluded evidence was insufficient because opposing counsel was not present at or aware of the after-hours proffer. Additionally, the trial court did not abuse its discretion in determining that juror misconduct did not prejudice the trial. Because many of the rulings that formed the bases of Dr. Galumbeck's assignments of error were made during sidebar conferences that were not on the record, the Court lacked a sufficient record to permit review of the assigned errors. It is the obligation of the appellant to ensure that the record is sufficient to evaluate and resolve the assignments of error. Dr. Galumbeck's "proffer" at the end of the day to the court reporter was not sufficient to make his record because opposing counsel was not present. Lopez could not have acquiesced or stipulated to Dr. Galumbeck's "proffer" because he was unaware that it was being made.

Brandon v. Cox, ____ Va. ____, S.E.2d _____ (June 7, 2012). The Court held that the appellant did not properly preserve an assignment of error when she first raised the argument in a motion to reconsider and she did not obtain the trial court's ruling on the motion to reconsider. In what it called a "case of first impression," the Court held that merely filing a motion to reconsider in the clerk's office does not properly preserve a litigant's argument for appeal when the record fails to reflect that the trial court had the opportunity to rule on that motion. The record must affirmatively demonstrate that the trial court was aware of the argument.

Arnold v. Wallace, 283 Va. 709, 725 S.E.2d 539 (2012). At trial, an objection of "lack of foundation" is not sufficient to apprise the court of the specific objection that a record sought to be introduced as a business record contains hearsay opinions. Citing the newly-enacted Virginia Rules of Evidence, the Court opined that the chart was hearsay, but was admissible if the business record exception applied. The Court rejected Arnold's assertion that establishing the factual nature of the statements in a document is a foundational requirement to the business records exception to the hearsay rule. While the business records exception does not "include opinions and conclusions of physicians or others recorded in hospital records," the lack of hearsay opinions is not part of the foundation for the admissibility of a business record. Instead, the presence of opinion in the proffered business record constitutes an independent ground for objection. In this case, Arnold did not object to the hearsay opinion in the chart. Arnold's objection to "foundation" did not apprise the trial court of her additional objection to the hearsay opinions contained in the chart.

B. Amended Pleadings

Bates v. Merritt, CL No. 64554 (Loudon County June 29, 2011): The Court granted Defendant-Partnership's ("Partnership") motion to dismiss because Plaintiffs neither timely filed their amended complaint nor requested a deadline extension. On March 4, 2011, the Court sustained the Partnership's demurrer and gave Plaintiffs leave to amend their complaint against the Partnership on or before April 18, 2011. The Court had initially scheduled to hear a second and third demurrer for other parties on April 4, 2011, but that hearing was postponed to April 19, 2011. Before April 4, however, the parties had agreed (out of court) that Plaintiffs would submit a global amended complaint after the Court heard all three demurrers. Plaintiffs then filed their global amended complaint on May 3, 2011. Thereafter, the Partnership filed its motion to dismiss. The Court first determined that "[b]y filing the Amended Complaint past the date it was conditioned on, the Plaintiffs no longer had leave by the Court to file it." Under such circumstances, the amended complaint lacked legal efficacy. The Court then rejected Plaintiffs' alternative theory that the Court should modify its March 4th order *nunc pro tunc* because to do so "would be to create a fiction that the Plaintiff had timely filed for a leave to extend the original filing date," which was not within the Court's power. Moreover, the Court rejected Plaintiffs' further alternative argument that the Court should use its discretionary power under Rule 1:9 to extend the filing deadline even though it had already passed. This is because Plaintiffs were responsible for filing separate amended complaints or requesting an extension once the hearing date was moved to April 19th. Indeed, Plaintiffs had "adequate notice that a global Amended Complaint could not be completed within the confines of the original order" and there was no allegation of fraud or bad faith on the part of Defendants. Since "no demonstrable extenuating circumstances" existed for Plaintiff's failure to timely file their amended complaint, the Court held "that there should be no extension to the original order."

C. Class Actions

Casey v. Merck & Co., 722 S.E.2d 842 (Va. 2012): On certification from the United States Court of Appeals for the Second Circuit, the Supreme Court of Virginia held that (1) Virginia law does not permit equitable tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction and (2) Code § 8.01-229(E)(1) "does not toll the statute of limitations for unnamed putative class members due to the pendency of a putative class action in another jurisdiction." In other words, Virginia law does not recognize either equitable or statutory tolling based on the pendency of a putative class action outside of Virginia.

D. Default

Adams v. Object Innovation, Inc., No. 3:11cv272-REP-DWD, 2011 U.S. Dist. LEXIS 151644 (E.D. Va. Dec. 5, 2011): Magistrate Judge Dennis Dohnal recommended, *inter alia*, that Defendant's motion to vacate a default judgment against it should be granted. Plaintiff-sales executive brought suit against Defendant-employer for breach of contract, and sought roughly $1,000,000 in damages and specific performance. Defendant's outside counsel, who was also a corporate officer, "mistakenly assumed that the Summons and Complaint were improperly served by mail" to the registered agent's personal residence. However, personal service was proper, and so default judgment was eventually entered against Defendant. Judge Dohnal determined that the issue should be evaluated under the less stringent "good cause" standard of Rule 55(c), as opposed to the more rigid Rule 60(b) standard. Defendant's basis for showing "good cause" was that outside counsel "misunderstood whether [Defendant's] registered agent . . . had been properly served with process." The Court then employed the Rule 55(c) six-factor analysis and determined that vacating the default judgment was proper.

Specialty Hosp., LLC v. Rappahannock Goodwill Indus., Inc., 722 S.E.2d 557 (Va. 2012): The Supreme Court of Virginia found that a trial court did not abuse its discretion in denying relief to a hospital company from a default judgment entered in favor of a laundry service with which the hospital company had contracted to provide linen services. In reaching this conclusion, the Court held that "a trial court is not required to find 'actual notice' to a defendant or to articulate its consideration of and findings with regard to the factors listed in Rule 3:19(d)(1) when denying a motion for relief from a default judgment." Here, the laundry service had properly served process to the hospital company's "statutory agent" (*i.e.*, the Secretary of the Commonwealth) pursuant to § 8.01-329, and the hospital company simply could not account for its failure to respond.

Elrod v. Busch Entm't Corp., No. 4:09cv164, 2011 U.S. Dist. LEXIS 69459 (E.D. Va. June 1, 2011) (adopted and approved in full in *Elrod v. Busch Entm't Corp.*, No. 4:09cv164, 2011 U.S. Dist. LEXIS 69456 (E.D. Va. June 27, 2011)): The magistrate judge recommended, and the district court adopted and approved in full, *inter alia*, that Defendant's motion for delay of entry of default judgment be granted. The case involved a tort suit by three female plaintiffs against Defendant-employee and Defendant-employer alleging that the former sexually assaulted Plaintiffs while working for the latter. Plaintiffs brought claims for intentional infliction of emotional distress and battery against both employee and employer (jointly and severally), and claims for negligent infliction of emotional distress, negligent supervision, negligence, and common carrier liability against employer alone. The district court, at the magistrate judge's recommendation, dismissed the claims for negligent infliction of emotional distress, negligent supervision, negligence, and common carrier liability against the employer. Defendant-employee, however, did not file an answer or pleading in response to Plaintiffs' summons and complaint, and did not appear in the case at all. Accordingly, Plaintiffs filed a motion for default judgment against Defendant-employee, and the clerk entered default against him under Rule 55(a). After the case was referred to the magistrate judge, Defendant-employer moved to delay entry of default against Defendant-employee until the case was resolved as to the employer. Since Plaintiffs alleged that Defendants are jointly and severally liable, the magistrate judge concluded that "[t]here is just reason for delaying entry of final default judgment against [Defendant-employee] until the conclusion of the action against [Defendant-employer], to avoid potentially inconsistent judgments." Moreover, since an Entry of Default had been entered against Defendant-employee, the Court held that he "los[t] standing in this case, including the right to receive notice of the proceedings and the right to present evidence at the trial."

E. Electronic Discovery

Moore v. Publicis Grp., No. 11 Civ. 1279, 2012 U.S. Dist. LEXIS 23350 (S.D.N.Y. Feb. 24, 2012): In this ground-breaking decision, Magistrate Judge Andrew Peck approved the use of "predictive coding" to search for electronically-stored information during the discovery process. While Judge Peck indicated that computer-assisted review will not be appropriate in all cases, he suggested that it should be employed in "large-data-volume cases" in order to save parties considerable sums of legal fees incurred during document review. In *Moore*, for example, predictive coding was particularly appropriate due to the enormous amount (roughly three million documents) of electronically-stored information that needed to be reviewed. Moreover, Judge Peck noted the critical importance of counsel crafting an "appropriate process" that contains "quality control testing" to ensure that the program generates relevant electronically-stored information.

F. Injunction

PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111 (4th Cir. 2011): In this Lanham Act suit in which baby-formula manufacturer PBM Products LLC ("PBM") won $13.5 million from Mead Johnson for its false advertising about PBM's formula, the Fourth Circuit upheld a district court injunction that applied to all advertising or promotional materials or statements, going forward, and concluded that the district court did not abuse its discretion in admitting evidence of prior litigation between the parties. Appellee PBM sued Mead Johnson under the Lanham Act, alleging that Mead Johnson distributed from than 1.5 million direct-to-consumer mailers that falsely claimed PBM's baby formula products were inferior to Mead Johnson's baby formula products. After a jury found that Mead Johnson had engaged in false advertising, the district court issued an injunction prohibiting Mead Johnson from making similar claims. The district court's order stated that the injunction applied to all advertising or promotional material or statements going forward. The Court disagreed with Mead Johnson's assertion that the district court wrongly concluded that false advertising was substantially synonymous with lying. Mead Johnson did not dispute that it distributed false statements concerning PBM's formulas on prior occasions. Accordingly, the statement was substantially true, and when read in context, it made clear that the "lies" referred to prior false advertising. Thus, summary judgment was warranted. The Court also concluded that the district court did not err by admitting expert survey evidence and evidence of prior Lanham Act litigation between the parties. Contrary to Mead Johnson's allegation, the prior litigation was relevant to the instant case and its probative value was not substantially outweighed by any danger of unfair prejudice. Moreover, the Court could not conclude that the district court abused its discretion by finding irreparable harm and in issuing a permanent injunction. Not only did the jury find that Mead Johnson misled consumers, but also the evidence at trial demonstrated the PBM's reputation was, and potentially continues to be, damaged. The Court was also persuaded that the injunction was not overbroad because it only reached the specific claims the district court found to be literally false.

G. Joinder of Parties

Michael E. Siska Revocable Trust v. Milestone Dev., LLC, 715 S.E.2d 21 (Va. 2011): The Supreme Court of Virginia refused to address the merits of the case, holding that an LLC, which had not been joined as a party, was a "necessary party" to the proceeding. The case concerned a derivative suit filed by a Trust on behalf of the LLC in which it was a member against other members of the LLC. The Trust's suit alleged that a transfer of LLC assets to a new member by the majority-interest members and without the Trust's approval was not in the best interests of the LLC or its members. The Trust did not join the LLC as a party to the derivative action. The circuit court dismissed the Trust's amended complaint, holding that the trust "cannot fairly represent the interests of the defendant shareholders." The Supreme Court of Virginia, on appeal by the Trust, first held that "the necessary party doctrine does not implicate subject matter jurisdiction." Even so, given the absence of the LLC as a party to the case, the Court had to determine whether it should refuse to exercise its subject matter jurisdiction. The Court held that "[a] limited liability company that is the subject of a derivative action must be a party to the suit." This is because "any claim or judgment in a derivative action against a limited liability company belongs to the limited liability company . . . including the member who brings the derivative action." Accordingly, since the LLC was a "necessary party" that had not been joined, the Court reversed the circuit court's judgment and remanded the case, apparently refusing to exercise subject matter jurisdiction under such circumstances.

Sheppard v. BAC Home Loans Servicing, LP, No. 3:11-cv-00062, 2012 U.S. Dist. LEXIS 7654 (W.D. Va. Jan. 24, 2012): The Court concluded that a homeowner who was challenging foreclosure on his home cannot get his case remanded to state court based on the alleged Virginia citizenship of MERS or of PFC, which would have destroyed complete diversity. This is because both MERS and PFC were fraudulently joined defendants. With respect to MERS, it was only named as defendant in count I, which was Plaintiff's quite title claim. The only discernible claim against MERS made by Plaintiff in that count is that MERS lacked authority to assign its rights under the deed of trust to BAC and therefore the assignment was invalid. As a beneficiary under the deed of trust, MERS only possessed legal title and had no beneficial interest in the note that the deed of trust secured. Thus, there was no reasonable basis to believe that Plaintiff could prevail against MERS in that regard, and so the Court had to disregard MERS's citizenship. PFC was also a fraudulently joined defendant because Plaintiff could not possible prevail against PFC in his quite title action because he failed to plead sufficient facts to demonstrate that the appointment of substitute trustees in the case was invalid. MERS has assigned its interest in the deed of trust to BAC, including its right to appoint substitute trustees. BAC therefore had authority to appoint PFC as substitute trustee. Moreover, the Court found that Plaintiff could not prevail against PFC on his claim that PFC breached its fiduciary duty by appointing itself as substitute trustee, participating in the assignment of MERS's rights under the deed of trust to BAC, initiating foreclosure proceedings and selling Plaintiff's property. Thus, since there was no reasonable basis to predict that Plaintiff could prevail in state court against PFC, it also had to be dismissed as a defendant, and so its citizenship had to be disregarded. Accordingly, since both MERS and PFC were fraudulently joined, which meant that their citizenships had to be disregarded, the Court denied the motion to remand.

H. Judicial Estoppel

Graves-Gillis v. Talaiver, No. 3:10CV883-JAG, 2011 U.S. Dist. LEXIS 37384 (E.D. Va. Apr. 4, 2011): The Court found that removal was proper, and so it refused to remand the case to state court. The issue was "whether the defendant's representations in state court estop her from removing the case to [federal court]." Plaintiff initially filed suit in state court. Defendant's counsel filed an Answer and a Motion Objecting to Venue ("Motion") in which counsel indicated that Defendant resided in Virginia. Counsel based its determination that Defendant resided in Virginia from Plaintiff's indication to that effect and a police report suggesting the same. However, one day after filing the Answer and the Motion, Defendant's counsel learned that Defendant in fact resided in Maryland. Immediately thereafter, counsel filed a Notice of Removal to federal court based on diversity jurisdiction. During that time, neither Plaintiff nor the state court acted in reliance on Defendant's representation. The Court found that Defendant was not estopped from asserting diversity jurisdiction and removing the case to federal court. This is because the second and third elements of the three-prong test for judicial estoppel were not met. While Defendant had adopted a factual position that was inconsistent with a prior stance, neither the federal nor state courts had formally accepted that initial position and Defendant did not act in bad faith (which is the "determinative factor" in judicial estoppel cases). Thus, the Court refused to remand the case to state court.

I. Motions to Compel

NewMarket Corp. v. Innospec Inc., No. 3:10cv503, 2011 U.S. Dist. LEXIS 35505 (E.D. Va. Apr. 1, 2011): The Court granted Plaintiffs' motion to compel and granted in part and denied in part Defendants' motion to compel. The case involved a fuel additive manufacturer and its subsidiary's lawsuit against a competitor and its subsidiary alleging federal and state antitrust, unfair trade practice and conspiracy claims. Plaintiffs' motion to compel concerned Defendants' answer to Interrogatory No. 4. While Defendants "confirm[ed]" that their answer contained all information that was available to them, they indicated to the Court that they did not need to make additional efforts to obtain the requested information, and that they would not ask their banks for such information. Accordingly, the Court found that "Defendants ha[d] not met their burden of making a reasonable inquiry and obtaining available information to answer Plaintiffs' interrogatory." Thus, Defendants' answer to Interrogatory No. 4 was "incomplete," and so the Court ordered Defendant "to seek reasonably available information" to respond to the interrogatory. Defendants' motion to compel, by contrast, concerned the inability of Plaintiffs' corporate designee to adequately address certain deposition topics. The Court granted Defendants' motion to compel with respect to Topics 4 and 5 because the designee "was not adequately prepared to answer questions related" to those topics. In addition to granting the motion, the Court ordered Plaintiffs to resume its Rule 30(b)(6) deposition as to those topics and "to produce an adequately prepared and knowledgeable corporate designee."

J. Personal Jurisdiction

George Mason Univ. Found., Inc. v. Morris, No. 3:11-CV-848, 2012 U.S. Dist. LEXIS 51152 (E.D. Va. Apr. 11, 2012): The United States District Court for the Eastern District of Virginia denied Defendants' motion to dismiss GMUF's suit for lack of personal jurisdiction, finding that the Court indeed had personal jurisdiction over Defendants. GMUF's suit against Defendants sought to enforce a judgment rendered in the Circuit Court of Virginia Beach that awarded GMUF $100,000 in a suit initiated by Defendants. Defendants fully appealed that judgment to the Court of Appeals of Virginia and the Supreme Court of Virginia, and both courts denied Defendants' petitions for appeal and rehearing. In holding that personal jurisdiction was proper, the District Court asserted that "a single act in Virginia is sufficient to confer jurisdiction on Virginia courts" pursuant to the Virginia long-arm statute. Here, Defendants "purposefully availed themselves of the privilege of conducting activities in Virginia by filing the original litigation which gave rise to the judgment at issue there." And Defendants' several appeals in Virginia evinced a "pattern of conscious and intentional utilization of the courts of the forum state." Moreover, the Court found that exercising personal jurisdiction was "constitutionally reasonable" because Defendants first selected a Virginia forum. Therefore, personal jurisdiction was proper.

Fred Hutchinson Cancer Research Inst. v. Branhaven, LLC, No. 3:11-cv-00710, 2012 U.S. Dist. LEXIS 46990 (E.D. Va. Apr. 2, 2012): The District Court denied Defendants' motion to dismiss Plaintiffs' patent infringement claim for lack of personal jurisdiction, finding that Plaintiffs alleged a prima facie case of personal jurisdiction with respect to both Defendants Branhaven LLC and Christopher Paxos. As a threshold matter, the Court noted that Federal Circuit law governs the question of personal jurisdiction in patent infringement cases. Regarding Defendant-Branhaven, the Court found that Plaintiffs sufficiently demonstrated that Branhaven "purposefully directed activities at Virginia by purchasing and controlling the assets related to the product at issue . . . ." This was in part because the assets acquired by Branhaven included, *inter alia*, the website from which the alleged infringing product was sold in Virginia. With regard to Defendant-Paxos, the Court found that Plaintiffs sufficiently demonstrated that he was subject to personal jurisdiction, in part, because of his "purposeful role in the infringing activities."

May v. Osako & Co., No. CL08002245-00, 2011 Va. Cir. LEXIS 111 (Roanoke Sept. 12, 2011): The court sustained Defendant's motion to contest personal jurisdiction and dismissed suit against Defendant. Defendant was a Japanese manufacturing company with its principal place of business in Japan. When Plaintiff's cause of action arose, Defendant had a single North American distributor for its products. Defendant's North American distributor sold a saddle stitcher machine to a Virginia company. Plaintiff—an employee of the Virginia company—was injured while using the machine, and brought suit for negligence and breach of warranties against Defendant in Virginia. In holding that the Virginia court lacked personal jurisdiction over the Japanese Defendant, the Court relied heavily on *Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) in which SCOTUS affirmed Justice O'Connor's "substantial connection analysis" articulated in *Asahi*. The Court noted that, in *Nicastro*, SCOTUS determined that "the mere placing of a product into the stream of commerce is not enough to subject the sender to jurisdiction in any place where the product ends up." Rather, the analysis must focus on the sender's "intent to serve a particular state." Here, like in *Nicastro*, Defendant itself had no physical location in the United States and the distributor was not a sub-entity of Defendant. Moreover, even though Defendant knew that its products would be generally sold in the United States, it did not have trade shows in Virginia and it did not otherwise specifically target Virginia. Thus, the Court found that Defendant did not have sufficient ties to subject it to personal jurisdiction in Virginia.

Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011): A unanimous Supreme Court ruled that foreign subsidiaries of a U.S. parent corporation could not be subjected to general personal jurisdiction in North Caroline when their only contact with the forum was placing their products in the "stream of commerce." Plaintiffs were North Carolina residents whose sons were killed in a bus accident outside Paris, France. Plaintiffs filed suit in North Carolina state court, alleging that the accident was caused by a defective tire. Defendants were an Ohio corporation and three foreign subsidiaries, organized and operated, in Turkey, France, and Luxembourg. One of the subsidiaries operated a plant in Turkey that manufactured the allegedly defective tire. The parent corporation had plants in North Carolina and regularly conducted commercial activity there. But the foreign Defendant subsidiaries were not registered to do business in North Carolina and had no places of business, employees, or bank accounts in North Carolina. Moreover, they did not design, manufacture, or advertise their products in North Carolina, nor did they sell or ship tires to North Carolina customers. Though a small percentage of their tires were distributed within North Carolina by other affiliates, the specific type of tire involved in the accident was never distributed in North Carolina.

K. Pleading Standards

Trident Prods. & Servs., LLC v. Canadian Soiless Wholesale, LTD, No. 3:10CV877-HEH, 2011 U.S. Dist. LEXIS 78337 (E.D. Va. July 19, 2011): The Court denied, *inter alia*, Defendants' motion to dismiss Count IV of Plaintiff's amended complaint, which claimed false advertising under the Lanham Act. Plaintiff's claim alleged that Defendants published certain statements intimating that Defendant had developed the formula for a product that Plaintiff had in fact developed. Without deciding whether Rule 9(b)'s heightened pleading standard applied (as Defendant had urged it did), the Court found that Plaintiff's allegations adequately stated a claim for false advertising under the Lanham Act under both Rule 8 and Rule 9(b). This is because (1) Plaintiff alleged "why the statements were false or misleading," (2) the statements were "material" because they concerned a competing product that Plaintiff claimed Defendants replicated, (3) the statements were designed to promote Defendants' product as an "exclusive product," and so the statements were "likely to influence the purchasing decision and cause injury to Plaintiff," and (4) Plaintiff's complaint indicated that the statements were published after Defendant allegedly began producing its competing product.

L. Removal and Remand

Brave Ventures, LLC v. Ambrester, No. 2:12cv153, 2012 U.S. Dist. LEXIS 51656 (E.D. Va. Apr. 9, 2012): The Court (1) granted one Defendant's motion to realign the parties and held that the other Defendant is realigned as a Plaintiff and (2) directed the moving Defendant to show cause as to why the case should not be remanded to state court based on that Defendant's waiver of its right to remove. With regard to the issue of realignment, the Court noted that the Fourth Circuit employs the "principal purpose test," which requires the court to "determine[] the primary issue in controversy and then aligns the parties with respect to their positions on that issue." The Court determined that one Defendant should be realigned as a Plaintiff because his position with respect to the issue of insurance coverage (the focus of the suit) was not properly aligned as a defendant. Regarding the issue of removal, the Court indicated that Defendant may have waived its right to remove by filing a voluntary counterclaim in the instant case in the state court before filing its motion to remove. This is because Fourth Circuit precedent establishes that "[a] Defendant may waive the right to remove by taking some [] substantial defensive action in the state court before petitioning for removal." Moreover, several other cases indicate that filing a counterclaim under such circumstances constitutes wavier of the right to remove. Thus, the Court directed Defendant to "show cause . . . why this case should not be remanded to state court as a consequence of its decision to files its counterclaim in state court."

Grandison v. Food Lion, LLC., No. 4:11cv80, 2011 U.S. Dist. LEXIS 92564 (E.D. Va. Aug. 17, 2011): The United States District Court for the Eastern District of Virginia granted Plaintiff's Motion to Remand the case to the Circuit Court of the City of Newport News. Plaintiff brought a negligence action against Defendants Food Lion, Pam-Joy Realty, and Elizabeth Duke for injuries allegedly sustained from a slip-and-fall that occurred in a Bottom Dollar Food store. Plaintiff filed her complaint in state court in Newport News, but Defendants Food Lion and Duke filed a motion to remove the case to federal court. In their motion, Food Lion and Duke noted that Defendant Pam-Joy "consents to this Removal." Defendant Pam-Joy then attempted to file a Notice of Consent to Removal with the circuit court, but did not file that Notice with the federal court using the "Electronic Case Filing system" as required by the federal court's local rules. Plaintiff then filed a Motion to Remand to State Court. The Court began by noting that there is a "rule of unanimity," which requires that each defendant "join in the removal in compliance" with § 1446(a) where multiple defendants seek to remove a case. In granting Plaintiff's motion, the Court determined that Defendants' Notice of Removal—claiming that Pam-Joy consented to the removal—was not sufficient to fulfill § 1446's procedural requirement that "all defendants, individually, or through their counsel, [] voice their consent before the court, not through another party's attorney." Moreover, the Court found that Pam-Joy violated Local Civil Rule 1 by failing to file its Notice through the Court's "Electronic Case Filing system." Thus, the Court held that since "there was no 'official and unambiguous' consent to removal within 30 days of Defendant Pam-Joy being served with the Complaint, Defendants cannot establish the unanimity of consent required by" § 1446(a). Accordingly, the Court granted Plaintiff's motion to remand the case to state court.

Paschall v. CBS Corp., No. 3:11CV431-HEH, 2011 U.S. Dist. LEXIS 104725 (E.D. Va. Sept. 14, 2011): The Court granted Plaintiff's Motion to Remand the case to the Circuit Court of the City of Richmond. The case concerned a wrongful death action that Plaintiff initially filed on March 10, 2010 in the Circuit Court. After the Circuit Court sustained demurrers to the initial complaint and after Plaintiff filed an amended complaint, Plaintiff filed a nonsuit order dismissing the majority of Defendants, including all of those Defendants that prevented diversity among the parties. The Circuit Court entered the order non-suiting the non-diverse defendants on April 6, 2011, at which time the order became part of the record. On April 12, 2011 the Circuit Court sustained a second demurrer at a hearing before the parties, and the Circuit Court entered that order on May 17, 2011. Plaintiff then filed a second amended complaint on June 6, 2011, naming the current Defendants, all of which are diverse as to the Plaintiff. Defendants filed a Notice of Removal on July 5, 2011, seeking to remove the case to federal court. In response, Plaintiff filed a Motion to Remand on July 11, 2011, arguing that Defendants' removal was time-barred by § 1446(b). In cases where diversity is not initially present (*i.e.*, where the case is not initially removable), § 1446(b) requires a notice of removal to "be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." Applicable precedent established that receiving an order granting a nonsuit as to a non-diverse party is sufficient to constitute the requisite notice of removability, and it is not necessary that the "paper" providing such notice originate from the court itself. Indeed, information learned during discovery may constitute "other paper" providing notice of removability. Moreover, to trigger the running of the thirty-day time limit to file for removal, the thing that provides notice "must be unequivocally clear and certain." The Court found that the case "remained active" from March 19, 2011 when Plaintiff filed the initial complaint. From then on, Defendants had the ability to remove the case once diversity became apparent. Since Defendants became aware of the nonsuit dismissing Plaintiff's claims as to all non-diverse parties on April 12, 2011 (during the second demurrer hearing), the Court determined that "[a]t that point the thirty day removal period began to run and subsequently expired on May 12, 2011." Defendants filed their Notice of Removal on July 5, 2011, and so "Defendants failed to remove the case within thirty days after receiving notification of the nonsuit order dismissing the [non-diverse] defendants." Thus, the Court granted Plaintiff's Motion to Remand the case.

Va. Beach Resort & Conference Ctr. Hotel Ass'n Condo. v. Certain Interested Underwriters at Lloyd's, London, 812 F. Supp. 2d 762 (E.D. Va. 2011): The Court granted Plaintiff's motion to remand, finding that Defendant waived its right of removal by filing a counterclaim in state court before filing a notice of removal. The Court noted that a Defendant may waive its 30-day right to removal by demonstrating a "clear and unequivocal" intent to remain in state court. Here, Plaintiff and Defendant concurred that the case became removable to federal court on July 15, 2011 when the state court nonsuited and dismissed an in-state defendant, which created complete diversity. However, on July 27, 2011 Defendant filed its answer and a counterclaim against Plaintiff in state court. Defendant then separately filed its notice of removal in federal court on August 4, 2011. While Defendant's filing an answer in state court was compulsory, its filing of a counterclaim was completely voluntary. By filing its counterclaim in state court, Defendant availed itself of that court's jurisdiction, and thus demonstrated the requisite intent to remain in state court. Defendant's later filing of the notice of removal was not sufficient to undermine that determination. Thus, the Court granted Plaintiff's motion to remand.

Lindsey v. Highwoods Realty Ltd. P'ship, No. 3:11CV447-HEH, 2011 U.S. Dist. LEXIS 108172 (E.D. Va. Sept. 22, 2011): The Court denied Plaintiff's motion to remand. The case concerned various health injuries that Plaintiff allegedly sustained from exposure to a certain pesticide that was used in office space that she rented. Plaintiff filed her original complaint in state court on June 23, 2010, and then filed an amended complaint on July 29, 2010. The following parties were named as Defendants: (1) the property owner and manager (collectively "Highwoods"); (2) the company that applied the pesticide ("Western"); and (3) an unnamed defendant who applied the pesticide ("John Doe"). However, Plaintiff waited until June 23, 2011 to serve Defendants. Highwoods then filed a Notice of Removal on July 13, 2011, and Western filed a consent order to the removal the next day. On August 11, 2011, Plaintiff filed her motion to remand, arguing that (1) Defendants failed to demonstrate complete diversity and (2) Defendants failed to timely file their notice of removal. With respect to the first issue (i.e., complete diversity), the Court found that Defendants met their burden of establishing diversity jurisdiction. This is because § 1441(a) expressly provides that "the citizenship of defendants sued under fictitious names shall be disregarded" in cases of removal based on diversity jurisdiction. Accordingly, the alleged citizenship of John Doe had to be disregarded, which meant that the parties were completely diverse. The Court therefore had to determine whether Defendants' notice of removal was timely filed under § 1446. Since (1) Defendants filed their notice of removal within thirty days after receipt of service, (2) Defendants removed the case over a year after Plaintiff filed her original complaint and (3) diversity jurisdiction was present at the time the original complaint was filed, whether Defendants' filing was timely implicated a "latent ambiguity" in § 1446(b)—"whether the one-year limitation on removal applies to all diversity cases, or only to those cases that were not removable as stated in the initial pleading." The Court rejected Plaintiff's argument that the one-year limitation applies to both the first and second paragraphs of subsection (b) because such an interpretation "would serve as an absolute bar to the removal of *all* diversity actions commenced over a year prior to removal, not just those actions that could not initially be removed." Instead, even though no Fourth Circuit precedent was on point, other jurisdictions and policy support the view that the one-year limitation on removal only applies to cases that are not initially removable (e.g., cases in which diversity was not present from the outset). Thus, since the instant case was removable at the time of commencement (by disregarding John Doe's citizenship), Defendants fully complied with 1446(b)'s procedural requirements by filing their notice of removal within thirty days of service. Accordingly, the Court denied Plaintiff's motion to remand.

M. Rule 59 and Rule 68

Ray v. Allergan, Inc., No. 3:10CV136, 2012 U.S. Dist. LEXIS 76585 (E.D. Va. May 31, 2012): The Court granted Defendant's Rule 59 motion for a new trial. Plaintiff brought suit against Defendant—the company that manufactured, tested, marketed, and sold BOTOX—seeking damages for debilitating injuries allegedly caused by the drug migrating to his central nervous system. All of Plaintiff's claims were dismissed, except for his negligent failure to warn claim. After trial, the jury found Defendant liable for $12,000,000 in compensatory damages and $200,000,000 in punitive damages, which was later reduced to $350,000 (the maximum allowed under Virginia law). Defendant then filed its Rule 59 motion. In its motion, Defendant argued, *inter alia*, that a new trial was warranted because "[Defendant] was substantially prejudiced by errors related to the admission of evidence, the questioning of witnesses, and instructions given to the jury, as well as improper argument by [Plaintiff's] counsel." Regarding the jury instruction issue, the Court determined that the absence of an instruction to the effect that Defendant could not have implemented a "black box" warning without prior FDA approval, in conjunction with various other circumstances including Plaintiff's counsel having made numerous hand gestures suggesting a black box, prejudiced Defendant on a "core issue" and that a new trial was the "only remedy." With respect to Plaintiff's closing argument, Defendant contended that Plaintiff's counsel (1) violated the bar against invoking the "Golden Rule principle" as stated in *Leathers v. Gen. Motors Corp.*, 546 F.2d 1083 (4th Cir. 1996) and (2) violated the principle stated in *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) by requesting the jury to award punitive damages because Defendant's alleged misconduct had also injured third-parties. The Court found that Plaintiff's counsel made two arguments that violated *Leathers*. First, Plaintiff's counsel asked the jurors to place themselves in Plaintiff's shoes and consider whether they would trade their lives for $12 million in damages. This argument, viewed in context, "came across as a suggestion for the displacement and substitution of the sort that *Leathers* forbids." Second, counsel's "can you imagine" argument, which came shortly after the previously-mentioned argument, constituted another appeal for "displacement and substitution" that violated *Leathers*. Moreover, the Court found that Plaintiff's counsel violated the *Williams* principle by inviting jurors to consider third-parties who were injured by BOTOX. That argument was also improper because there was no evidence indicating how many people were injured by BOTOX in the same manner as Plaintiff. However, there was an issue as to whether Defendant's failure to contemporaneously object to the "Golden Rule" and *Williams* arguments precluded the Court from granting a new trial. Although there was seemingly conflicting precedent on that issue, the Court concluded that "an argument that offends *Leathers* and/or *Williams* is excused from the contemporaneous objection requirement." Thus, a new trial was also warranted on the basis of Plaintiff's counsel's *Leathers* and *Williams* violations.

Bosley v. Mineral County Comm' n, 650 F.3d 408, 410, 413 (4th Cir. 2011): The court held that accepting the defendants' offer of judgment under Fed. R. Civ. P. 68 for $30,000 as "full and complete satisfaction of [plaintiff s] claims against ... Defendants" did not extinguish the plaintiff' s entitlement to $66,464 more in costs and attorney's fees as the prevailing party under the fee-shifting statute, 42 U.S.C. § 1988. Appellants could have easily drafted a Rule 68 offer either reciting that recoverable costs were included in the sum or specifying an amount for such costs. But they failed to do so, and it is this drafting failure that requires the result the district court reached here. When a Rule 68 offer of judgment is silent as to costs, a court faced with such an offer that has been timely accepted is obliged by the terms of the rule to include in its judgment an amount above the sum stated in the offer to cover the offeree's costs. Attorney' s fees under 42 U.S.C. § 1988 qualify as Rule 68 costs because the statute defines those fees as costs. Thus, the court held that because the offer in this case did not indicate that recoverable costs were included, the district court was required by Rule 68 to include an additional amount in its judgment for such costs.

N. Statute of Limitations

Dixon v. Hassell & Folkes, P.C., 723 S.E.2d 383 (Va. 2012): The Supreme Court of Virginia affirmed the circuit court's judgment that a property owner's breach of contract claim against a surveyor was time-barred by the three-year statute of limitations under Code § 8.01-246(4). In reaching that conclusion, the Court held that a proposal letter, which the property owner had argued constituted a written contract, was not a "contract . . . in writing" as contemplated by Code § 8.01-246(2). Under the applicable statute, claims on written contracts have a five-year statute of limitations, whereas claims on unwritten contracts only have a three-year statute of limitations. Since a three-year period had already passed, the property owner's claim turned on whether a written contract existed between him and the surveyor, such that the five-year statute of limitations would apply. Here, as conditions precedent for the surveyor's proposal letter to become a "written contract," the letter expressly required that the property owner (1) sign the letter in two places and (2) return a "fully executed copy" to the surveyor. While the Court noted that the property owner's failure to sign and return the letter as required did not preclude a binding contract between the parties, it did preclude the letter itself from becoming a "written contract" under Code § 8.01-246(2). Therefore, the three-year statute of limitations applied, and so the property owner's claim was time-barred.

Gerald T. Dixon, Jr., L.L.C. v. Hassell & Folkes, P.C., 283 Va. 456, 723 S.E.2d 383 (2012). A written proposal that was never signed by the plaintiff before the defendant fully performed the work was a contract, but it was not a written contract for the purposes of the five-year statute of limitations. The Court relied on a Texas case, which held: An unsigned agreement all the terms of which are embodied in a writing, unconditionally assented to by both parties, is a written contract....[T]he making of a valid contract requires no writing whatever; and even if there is a writing, there need be no signatures unless the parties have made them necessary at the time they express their assent. Hassell & Folkes required Dixon to "sign both copies of this proposal ... and return a fully executed copy to us." The proposal provided that the "executed copy will serve as our agreement" and "the executed copy will serve as the written agreement." Clearly, Hassell & Folkes did not intend for the proposal to become a written contract until it was signed by Dixon and returned. Dixon's failure to sign and return the proposal did not preclude the parties from having a binding agreement, but it did preclude them from having a written agreement for the purposes of the statute of limitations.

Laws v. McIlroy, 724 S.E.2d 699 (Va. 2012): The Supreme Court of Virginia reversed the judgment of the circuit court, holding that the circuit court erred when it granted Defendant-McIlroy's motions to dismiss, State Farm's motion to dismiss, and GEICO's plea in bar. The case concerned a personal injury action for damages arising from an automobile accident that occurred on June 8, 2007. Plaintiffs Laws and Tinker each submitted an order of nonsuit to the circuit court on January 8, 2010, but the orders were not entered at that time. The nonsuit orders were then resubmitted on January 28, 2010, and the circuit court entered the orders on February 4, 2010. Of particular importance was that Plaintiffs filed second, identical lawsuits in the circuit court on January 19, 2010, which was before the circuit court had entered the nonsuit orders. The circuit court held that the second complaints were not timely filed and so it dismissed both complaints. However, the Supreme Court reversed. Code § 8.01-229(E)(3), the tolling statute, states that a "plaintiff may recommence [an] action within six months from the date of the order entered by the court." "Recommence" means to start again. And the Court has always characterized an action filed in relation to a nonsuit as a "new" action. Moreover, the Court has recognized that it is permissible to have two identical suits pending in different venues. Additionally, the word "from" in the statute is a "starting point," but nothing in the statute requires that movement from that point has to be forward in time rather than backward. The statute clearly states that the new action must be filed "within six months from the date of the order," not "after" the date of the order. Here, the suits filed by Plaintiffs on January 19, 2010 were commenced "within" six months from the date of the order of nonsuit and therefore were governed by the plain and express language of the tolling statute. Thus, the circuit court erred in holding that the complaints were time-barred.

Casey v. Merck & Co., Inc., 283 Va. 411, 722 S.E.2d 842 (2012): The Court held that (1) Virginia law does not permit equitable tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction, and (2) Code § 8.01-229(E)(1) does not permit tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction; statutes of limitation are strictly enforced and may not be tolled in absence of clear statutory guidance, and any doubt must be resolved in favor of enforcing the time-bar. The

Court stated that although Code § 8,01-229(E)(1) tolls the limitations period when the same plaintiff files in a foreign jurisdiction, it does not apply to a plaintiff who is merely a member of a putative class represented by a different plaintiff in the other jurisdiction.

O. Subject-Matter Jurisdiction

Cent. W. Va. Energy Co. v. Mountain State Carbon, LLC, 636 F.3d 101 (4th Cir. 2011): In a West Virginia coal sales company's breach of contract action against a steel company, the Fourth Circuit reversed the district court's dismissal of the case for lack of subject matter jurisdiction, finding that the district court erred in holding that Severstal Wheeling, one of Defendant-LLC's member companies, had its principal place of business in Wheeling, West Virginia, instead of Dearborn, Michigan. For purposes of federal diversity jurisdiction, a corporation is a citizen of the states in which it is incorporated and in which it has its principal place of business. In a 2010 case, the Supreme Court of the United States clarified that "principal place of business" means "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities"—in other words, the corporation's "nerve center." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1186 (2010). Here, seven of Defendant Severstal Wheeling's eight officers, including its chief executive officer, chief operating officer, and chief financial officer, set corporate policies and oversee significant corporate decisions out of Dearborn, Michigan. Only the eighth corporate officer maintains his office in Wheeling, West Virginia. Moreover, none of its five directors is located in West Virginia, but two (who are also the company's CEO and CFO) are located in Dearborn, Michigan. Thus, under *Hertz*, Severstal Wheeling's "principal place of business" is Dearborn, Michigan, and so the district court erred in holding otherwise.

P. Venue

Rockingham Precast, Inc. v. Am. Infrastructure-Md., Inc., No. 5:11cv00024, 2011 U.S. Dist. LEXIS 130885 (W.D. Va. Nov. 14, 2011): The Court denied Defendant's motion to transfer venue. Plaintiff filed a breach of contract action against Defendant in federal court in Virginia—Plaintiff's home state. Defendant sought to transfer venue under § 1404(a) on grounds that federal court in Maryland (Defendant's home state) was a more convenient forum. The Court's decision to deny Defendant's motion rested on its analysis of the following three factors: "(1) the plaintiff's choice of venue; (2) witness convenience and access; (3) the convenience of the parties; and (4) the interest of justice." As a threshold matter, the Court noted that the movant bears a heavy burden in order to succeed on its motion to transfer venue such that the balance of factors must "strongly favor" the movant. Upon examining the first factor, the Court indicated that Plaintiff's choice of its home forum must be given "considerable deference," which means that that factor pushed against transfer. With respect to the second factor, the Court found (1) that Defendant had not demonstrated that its non-party witnesses would refuse to travel to

Virginia absent a subpoena, and (2) that Defendant did not establish that live testimony (as opposed to video depositions) was necessary. Moreover, the Court pointed out that transferring venue to Maryland "would serve only to shift the cost burden of securing witness testimony to [Plaintiff]. Thus, the second factor did not push strongly toward transfer. Regarding convenience to the parties, the Court again noted that transfer would serve only to shift the inconvenience to Plaintiff and that "transfers of venue are not available merely to shift inconvenience from one side to another." Furthermore, even though some physical evidence was located in Maryland, it was likely that some material evidence was also located in Virginia. Therefore, the third factor was deemed "neutral." The Court also engaged in a lengthy analysis regarding the interest of justice and concluded that that factor weighs against transfer. Thus, the Court held that transfer was improper and denied Defendant's motion.

Jones v. Custom Truck & Equipment, LLC, No. 3:10-CV-611, 2011 U.S. Dist. LEXIS 7025 (E.D. Va. Jan. 25, 2011): The United States District Court for the Eastern District of Virginia transferred the case to the Western District of Missouri pursuant to § 1404(a). The case involved Plaintiffs' claims alleging breach of three "separate but related contracts" that it had with Defendant. Those contracts included (1) an Asset Purchase Agreement, (2) a Lease Agreement, and (3) a Consulting Agreement. Both the Lease Agreement and the Consulting Agreement contained forum selection clauses, but those clauses conflicted because the former selected the Eastern District of Virginia and the latter selected "any state and federal court located in Jackson County, Missouri." Moreover, the Court noted that the conflicting clauses presented a further complication because the Lease Agreement clause was "permissive," whereas the Consulting Agreement clause was "mandatory." The distinction is summarized as follows: "A mandatory forum selection clause requires a plaintiff to sue in the designated forum, while a permissive clause authorizes, but does not require, the plaintiff to sue in that district." Among other things, the primary issues before the Court were (1) whether to divide the action (i.e., whether to enforce both forum selection clauses) and (2) if division is improper, whether to hear the entire case or transfer it to Missouri. As to the first issue, the Court held that it would be unreasonable to enforce both clauses because the claims "arise out of the same set of facts" and similar overlapping evidence will be necessary to prove each claim. Regarding the second issue, the Court held that it will transfer the case to the Western District of Missouri. The Court began by noting that the proper forum for claims relating to the Consulting Agreement must be Missouri because the forum selection clause was mandatory and the parties freely entered into it. Because of this, the Court found that "the interest in avoiding piecemeal litigation counsels that [the parties] should litigate any factually related claims [in Missouri] as well. Since Plaintiffs' claims relating to the Lease and Consulting Agreements "arise out of the same nucleus of operative fact," application of pendent venue was appropriate, and so the Court transferred those claims to Missouri federal court.

Argos Util. Corp. v. Perrin, No. CL10-2300 (Roanoke Sept. 9, 2011): A threshold issue in the case was whether venue should be transferred from the City of Roanoke. The original complaint named only one plaintiff. After Defendants timely filed answers and motions to transfer venue, the sole plaintiff moved to file an amended complaint and to add plaintiffs. The Court granted the motion and ordered that "Defendants shall have twenty-one (21) days from the entry of this Order to file responsive pleadings to the Amended Complaint." Plaintiff filed its amended complaint, which named two additional plaintiffs. Again, Defendants timely filed answers and grounds of defense. However, Defendants failed to question, challenge, object to, or otherwise mention venue within the 21-day period. The Court held that Defendants' initial "requests for venue transfer are procedurally barred, or waived." The Court began by noting that "[a]n amended complaint replaces the former complaint, unless the face of the amended complaint clearly demonstrates a different intention." Moreover, Virginia Code § 8.01-264, which provides that venue irregularities are waived unless a defendant timely files a motion to object, does not excuse a failure to file appropriate pleadings. Indeed, that statute "presupposes a motion properly before the court; it does not exempt one who responded to the original complaint from filing responses to an amended complaint." Therefore, the Court held that Defendants' failure to file a venue objection within the required 21-day period (as provided in the order granting Plaintiff leave to file an amended complaint) meant that Defendants "waived any right to ask the court to transfer venue." The Court also noted that a contrary holding would place Code § 8.01-264 in conflict with Code § 8.01-267, which would undermine the Court's charge to construe statutes consistently whenever possible.

Fried v. Town of Vienna, No. 1:11cv992, 2011 U.S. Dist. LEXIS 127643 (E.D. Va. Nov. 4, 2011): The Court denied Defendant-the Town of Vienna's motion to transfer the case. Plaintiff, a former Vienna police officer, brought suit against Vienna alleging violations of the Civil Rights Act of 1964. Plaintiff filed her original complaint with the Court, and her case was assigned to Judge Hilton. One day after filing her complaint, Plaintiff filed a notice of voluntary dismissal pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. A week later, Plaintiff refilled the same complaint in the same court, and her case was assigned to Judge Cacheris. Defendant then filed a motion to transfer the case back to Judge Hilton, arguing that Plaintiff's dismissal and subsequent refilling amounted to "judge-shopping." While Judge Cacheris recognized that judge-shopping is disfavored, the Court noted that Fourth Circuit precedent establishes that "[a] voluntary dismissal under Rule 41(a)(1) 'is available as a matter of unconditional right and is self-executing, *i.e.*, it is effective at the moment the notice is filed with the clerk and no judicial approval is required.'" Plaintiff had properly exercised her right to voluntarily dismiss her case, and so the Court reasoned that "[o]ne instance of an action that complied with the federal rule for dismissal cannot, on its own, amount to judge-shopping." Thus, the Court denied Defendant's motion to transfer the case back to Judge Hilton.

W. Sur. Co. v. Marco Enter., No. 2:11cv408, 2011 U.S. Dist. LEXIS 108396 (E.D. Va. Sept. 22, 2011): The Norfolk District Court granted the defendants' motion to transfer venue, and thus transferred the case to the Alexandria District Court. After applying Local Rule 3(C) in conjunction with § 1404(a) (which is the provision under which the defendants brought their motion), the Court concluded that venue in the Alexandria Division was not proper in the first instance for the following two reasons: (1) both defendants did not reside within Virginia; and (2) the pleadings did not indicate that "a substantial part of the events or omissions giving rise to the claim occurred" within the Alexandria Division. Indeed, with respect to the second point, the contracts at issue concerned projects outside of the Alexandria Division. And since one such contract concerned a project in Virginia Beach, which is within the Norfolk Division, Norfolk federal court was a proper venue. Thus, transfer under § 1404(a) would be improper because the Alexandria Division was not a division in which the case "might have been brought." However, since all parties agreed to the transfer, transfer to the Alexandria Division under was proper.

Q. Witness Designation

Walsh v. Wavy Broad., LLC, No. 2:11-cv-174, 2012 U.S. Dist. LEXIS 28853 (E.D. Va. Mar. 5, 2012): Plaintiffs' motion to designate witnesses out of time was granted in part and denied in part. After the parties' joint motion to amend the Rule 16(b) scheduling order was granted, Plaintiffs' Rule 26(a)(3) pretrial disclosures deadline was set for November 9, 2011. Plaintiffs timely submitted Rule 26(a)(3) disclosures naming, *inter alia*, two witnesses (who would later be designated as rebuttal witnesses); however, on November 18, 2011, Plaintiffs filed amended Rule 26(a)(3) disclosures adding case-in-chief witnesses. The Court noted that, with respect to Rule 26(a)(3) disclosures, the parties' Rule 16(b) scheduling order drew a distinction between [1] information relating to the case-in-chief and [2] information relating to rebuttal or impeachment, such that information relating to the latter would be excluded if not timely disclosed. In holding that Plaintiffs could not designate the additional case-in-chief witnesses, the Court found that Plaintiffs failed to demonstrate substantial justification or lack of harm to the opposing party. The Court indicated that Plaintiffs' initial "tactical decision" to exclude the relevant case-in-chief witnesses precluded a finding of substantial justification. However, the Court allowed Plaintiffs to designate two witnesses as rebuttal witnesses out of time because designation of rebuttal witnesses is not required upon Rule 26(a)(3) disclosures and theses witness would only serve as rebuttal witnesses.

IV. BUSINESS TORTS/CONTRACT

A. Contract

Scott & Stringfellow, LLC v. Am. Int'l Grp. Commercial Equip. Fin., Inc., No. 3:10CV825-HEH, 2011 U.S. Dist. LEXIS 68090 (E.D. Va. June 20, 2011): The Court denied Defendant's motion for summary judgment as to counts one, two, and three. The dispute concerned a contract between Plaintiff and Defendant in which Defendant agreed to "to pay [Plaintiff] a structuring/placement fee not to exceed one percent of the aggregate principal amount of the municipal assets securitized in a Transaction upon the close of each relevant Transaction." The contract did not define the term "structuring," and it did not expressly provide for a fee if the assets were disposed of by means other than securitization. When it became apparent that securitization would not generate the best possible return on the assets, Plaintiff explored other options including a direct sale of the assets. Thereafter, Plaintiff collaborated with Bank of America Merrill Lynch ("BAML") to develop a plan to handle the assets. After Plaintiff and BAML presented several options (including securitization and direct sale) to Defendant, Defendant decided to sell the assets without securitization to BAML at roughly $400,000,000. Defendant refused to pay Plaintiff any fee or compensation. Plaintiff then brought suit against Defendant alleging breach of contract, or alternatively quantum meruit and unjust enrichment. The Court denied summary judgment as to count one, which alleged breach of express contract. In so doing, the Court found that "the record demonstrates that the meaning of the term 'structuring' remains ambiguous because it is susceptible to multiple reasonable interpretations, thereby making this critical element of the contract a material fact in dispute." Moreover, there was ample extrinsic evidence demonstrating that Plaintiff intended the contract to mean something different than the interpretation that Defendant urged. Thus, the contractual language at issue was a material fact in dispute. The Court also denied summary judgment as to counts two and three, which alleged quantum meruit and unjust enrichment. While noting that precedent established that there cannot be recovery for implied contract where a valid contract existed, the Court found that the instant dispute concerned whether the contract at issue covered the services that Plaintiff performed. Accordingly, since that issue had not been resolved, Plaintiff was permitted to go forward in the alternative with its implied contract claims.

Aquilent Inc. v. Distributed Solutions Inc., No. 1:11-cv-00393 (E.D. Va. 2011): The Court eliminated several tort claims but refused to dispose of breach of contract allegations in Aquilent Inc.'s suit accusing a software subcontractor of unlawfully jeopardizing its efforts to execute a contract for the U.S. Department of Veterans Affairs. The Court granted subcontractor Distributed Solutions Inc.'s motion to dismiss fraud, constructive fraud, tortious interference with contract, tortious interference with business relations and business expectancy claims, while denying Defendant's bid to dispose of the remaining breach of contract and promissory estoppel claims. The ruling gave Aquilent two weeks to amend its April 14 complaint alleging that DSI's breach of an agreement to provide necessary software licenses and its secret partnership with a competitor that was vying for Aquilent's government contract several threatened Aquilent's ability to fulfill its contractual obligations with the VA.

Bennett v. Sage Payment Solutions, Inc., 710 S.E.2d 736 (Va. 2011): The court held that the trial court properly denied the employee's post-trial motion as, when the employee told the employer, four months into his year-long contract, that he would leave the company unless his demand for increased compensation was met, the jury could have found that the employee repudiated his obligation under the agreement. Because the agreement required continuous performance over a period of time, when the employee declared that he would leave his position as president unless his compensation was increased, the employer was entitled to rely on the employee's repudiation and treat it as a breach. Further, the trial court did not abuse its discretion in allowing the employer to amend its answer, by way of a motion made pursuant to Va. Code § 8.01-377 prior to the close of the employee's case-in-chief, to include a repudiation defense as the employee's own testimony, offered during his case-in-chief, established facts supporting the employer's repudiation defense. Substantial justice was promoted by instructing the jury how to properly frame the issues based on the evidence presented at trial.

B. Defamation

Mansfield v. Bernabei, 727 S.E.2d 69 (Va. 2012): A lawyer who said he was defamed by a draft legal complaint that described him as "an unethical lawyer and a racist" cannot sue for defamation, says a Fairfax Circuit Court. Claims made in a lawsuit generally are protected under the absolute privilege that attaches to judicial proceedings. But the law on when that protection starts and how far it goes was something of an open question in Virginia. Under the legal test used in this decision, lawyers who share draft complaints before filing in order to speed up settlement talks are protected from defamation claims that come from the complaint. In so holding, the Supreme Court of Virginia adopted the approach used in the Restatement (2nd) of Torts. The test, also used by a Norfolk Circuit Court in 1997, extends the absolute privilege to lawyers and parties for communications that come before a judicial proceeding, when the claims are proposed in good faith and the communications relate to that proceeding. The Court held that this approach, which has been adopted by a number of jurisdictions, advances the favorable policy of encouraging the early resolution of actions.

Shirvinski v. U.S. Coast Guard, 673 F.3d 308 (4th Cir. 2012): The Fourth Circuit affirmed summary judgment for Defendant-U.S. Coast Guard, holding that Plaintiff-sub-contractor could not sue the Coast Guard for defamation arising out of Plaintiff being terminated from an at-will contract and removed from a list of government contractors. In so holding, the Court noted that allowing Plaintiff's claims to proceed would "reward artful pleading and impermissibly constitutionalize state tort law." Plaintiff's initial defamation claim, which sought a declaratory judgment requiring Defendant to revise its records to indicate that the allegations against Plaintiff were false, was dismissed on summary judgment in favor of Defendant because the district court lacked jurisdiction to hear such a claim under the FTCA. Plaintiff's second amended complaint brought a federal procedural due process claim against Defendant based on the same allegedly defamatory conduct, and it too was dismissed on summary judgment in favor of Defendant. The Fourth Circuit affirmed, noting that Plaintiff had not suffered a "constitutionally cognizable injury." This is because "a government's allegedly 'defamatory' request that its prime contract no longer assign one of its subcontractors to a particular government contract fails to rise to the level of a constitutional injury."

Ortiz v. Panera Bread Co., No. 1:10CV1424, 2011 U.S. Dist. LEXIS 85463 (E.D. Va. Aug. 2, 2011): Among other things, the Court dismissed Plaintiff Ortiz's defamation claim against Defendant Panera. In addition to other claims, Ortiz brought a defamation *per se* claim against Panera, alleging that Panera told the General Manager of the store at which Ortiz was employed the reasons why Ortiz had been terminated from Panera. The Court found that Ortiz's claim failed because he had not established the first element of the cause of action—publication to a third party. The Court explained that Ortiz's claim is "subject to a qualified privilege" that extends to "statement[s] [] made between persons on a subject in which they have an interest or duty" in an employment context. In order to defeat the privilege, the plaintiff must prove "malice." Here, however, Ortiz only alleged that Panera explained to Ortiz's General Manager, and no one else, the reasons why Ortiz had been fired. In upholding the privilege under the facts of the case, the Court reasoned that "[a]ny discussions concerning Ortiz's termination were between members of management who were fulfilling their job responsibilities and acting on common, corresponding duties or interests" during such discussions. The Court also rejected Ortiz's theory that he was forced to defame himself when searching for other employment (i.e., by having to republish the allegedly false accusations). In so doing, the Court declared that "Virginia law does not recognize self-publication as a means of establishing the publication element of a claim for defamation."

Tomlin v. Int'l Bus. Mach. Corp., No. CL-2011-8763, 2012 Va. Cir. LEXIS 26 (Fairfax County Feb. 13, 2012): The Fairfax Circuit Court sustained demurrers by Defendants IBM and other individuals to Plaintiffs' claims for defamation, conspiracy, tortuous interference and negligent retention, arising from allegations that Plaintiffs were terminated because one Plaintiff supposedly violated IBM policy when she hired a family member and then attempted to "cover it up."

Shaheen v. Wellpoint Cos., No. 3:11-CV-077, 2011 U.S. Dist. LEXIS 127164 (E.D. Va. Nov. 3, 2011): The Court granted Defendant's motion for summary judgment. Plaintiff brought defamation and defamation *per se* claims against her former employer (Defendant) alleging that she was defamed when Defendant wrote in her employment records that she had been terminated for misconduct regarding statements that she had made about being cursed by another employee. Since Plaintiff did not allege that Defendant communicated the statements to an uninterested third-party, the issue was "whether Defendant's statements were made with common-law malice." In order to overcome Defendant's qualified privilege, Plaintiff needed to prove malice by "clear and convincing evidence." The Court found that Plaintiff failed to prove malice by the requisite showing. This is largely because (1) the alleged defamatory statements were all made internally during Defendant's investigation, (2) the other employee consistently denied cursing Plaintiff, (3) Plaintiff failed to produce a witness who could corroborate the incident as Plaintiff described it, and (4) Plaintiff was inconsistent about statements that the other employee had made to her during the incident. Thus, the Court rejected Plaintiff's defamation claim. The Court also rejected Plaintiff's defamation *per se* claim, which essentially alleged that Defendant's false statements accused Plaintiff of "professional incompetence." For similar reasons that Plaintiff failed to prove malice with respect to her defamation claim, the Court concluded that "Defendant's decision to terminate Plaintiff was rational and not negligently made" and that there was no evidence that "Defendant's statements were made with malice, ill will, or spite against Plaintiff." Thus, the Court granted summary judgment in favor of Defendant.

Whitaker v. Wells Fargo Advisors, LLC, No. 3:11CV380-HEH, 2011 U.S. Dist. LEXIS 111938 (E.D. Va. Sept. 28, 2011): The Court granted Defendant's motion to dismiss, *inter alia*, Plaintiff's defamation claim. Upon Plaintiff's termination from Defendant Wells Fargo, Defendant filed a Uniform Termination Notice for Securities Industry Regulation Form U5 ("U5"), which established the reasons for Plaintiff's termination. One such reason was that Plaintiff had been accused of "violating investment-related" standards of conduct. Defendant later filed an amended U5 that contained the same reason. Plaintiff contended that this statement was false because he had not been accused of violating any "investment-related" standard. The Court found that the relevant statement was "both true and non-defamatory." Plaintiff had essentially challenged Defendant's categorization of the reason for Plaintiff's termination. However, the Court found that Defendant's accusations clearly related to banking and therefore were "investment-related." Thus, Defendant's representation in its U5 was true as a matter of law. Moreover, Plaintiff failed to allege a "causal nexus" between the purportedly false statement and his "injury." Plaintiff's alleged injury related to a subsequent job offer being rescinded after Defendant published its amended U5. The amended U5 contained the same characterization of Plaintiff's misconduct as being "investment-related," and it more fully fleshed out the reasons that lead to Plaintiff being terminated, including that he had been accused of "check kiting." Plaintiff admitted that he suffered no injury from the initial publication of the U5 because the subsequent employer had extended him an offer with complete knowledge of it. Indeed, it was only upon Defendant filing the amended U5 that the subsequent employer rescinded its offer. Accordingly, the amended U5 triggered Plaintiff's alleged injury. But since both U5s contained the same alleged false statement, it was reasonable to conclude that the subsequent employer rescinded its offer because of the description of the accusations leading to Plaintiff's termination, and not the purported "misdescription" of those accusations as being "investment-related." Thus, "the purported falsity and the defamatory 'sting'" did not coincide as required. The Court therefore found as a matter of law that Plaintiff failed to state a plausible claim of defamation.

Lewis v. Kei, 708 S.E.2d 884 (Va. 2011): The Supreme Court of Virginia affirmed the circuit court's judgment sustaining a demurrer to Plaintiff's malicious prosecution and false imprisonment claims, and reversed the circuit court's judgment sustaining a demurrer to Plaintiff's defamation claim. Plaintiff had been publicly accused of attempting to abduct a child after a boy asked Plaintiff for a ride and Williams, a neighbor who saw the boy enter Plaintiff's car, called the police. Based solely on Williams' 911-call and without contacting the child, Williams, or Plaintiff, officer Kei obtained an arrest warrant for Plaintiff. Plaintiff was imprisoned for forty-one days. Thereafter, the prosecution dismissed all charges upon speaking with the boy, who corroborated Plaintiff's story. During that time, however, Plaintiff had been identified as the abductor on local television and in two local newspapers, based largely on a notice that Kei had published on the county website. Plaintiff then brought claims of malicious prosecution, false imprisonment, and defamation against Williams and Kei. The circuit court sustained a demurrer as to all claims against Williams and Kei. On appeal, the Supreme Court of Virginia ("Court") affirmed the circuit court's judgment with respect to the malicious prosecution and false imprisonment claims, but reversed on the defamation claim. Regarding the malicious prosecution claim, the Court held that "the circumstances known to Kei as alleged in the amended complaint were sufficient to 'excite the belief in a reasonable mind' that there was probable cause to believe that [Plaintiff] had committed the offense of abduction." This is because the complaint stated that Kei relied on statements made by Williams, who claimed to be an eyewitness, and Kei was permitted to rely on such statements. Moreover, the Court noted that the fact that Kei did not conduct any further investigation prior to seeking the warrant did not alone establish that Kei acted in bad faith or with malice. With regard to the false imprisonment claim, the Court held that "Kei did not falsely imprison [Plaintiff]" largely because Kei had sufficient probable cause to obtain Plaintiff's arrest warrant, which was properly issued by the magistrate. However, the Court reversed the circuit court with respect to its judgment sustaining the demurrer as to Plaintiff's defamation claim, holding that the circuit court erred in having done so because Plaintiff's amended complaint adequately stated a basis upon which Plaintiff could assert a defamation claim against Kei. This is because the Court found that (1) "a jury could find that Kei was negligent in making [certain] statements based solely upon Williams' 911 report without conducting any follow-up investigation," (2) the Court could not conclude "that the statements attributed to Kei by the [local newspaper] are objectively true or matters purely of opinion" when viewed under the applicable standards, and (3) since falsely accusing someone of committing a criminal act is typically sufficient to establish an injury to one's reputation, Plaintiff's allegations "adequately allege[d] an injury to [Plaintiff's] reputation arising from Kei's statements."

Cook, Heyward, Lee, Hopper & Feehan, P.C. v. Trump Va. Acquisitions LLC, 2012 U.S. Dist. LEXIS 72065 (E.D. Va. May 23, 2012): An ex-client's comment that he was "disappointed" with the work quality of a law firm that has company had to "re-do" the firm's work are statements of opinion that will not support a defamation claim, a federal judge in Richmond has held. In general, the court held that statements involving job performance are subjective expressions of opinion and do not rise to the level of defamation. The statements reflect the viewpoint of the speaker and cannot be proved false. The court quoted statements that the defendants were "very, very disappointed over [the firm's] work quality and their billing practices" and that "we needed to re-do their work multiple times in-house." The court held that, in general, statements of unsatisfactory job performance do not rise to the level of defamation.

C. Fraud

Vogen Funding, LP v. Wener, No. CL09-167 (Roanoke 2012): The Roanoke City Circuit Court sustained the Executive Defendants' demurrers to Vogen Funding's second amended complaint, and dismissed with prejudice Vogen's suit against the Executive Defendants. In its second amended complaint, Vogen alleged fraud in the inducement in negotiation of a loan agreement and sought to pierce the corporate veil. The question before the Court was whether Vogen has "stated facts sufficient to demonstrate that the Executive Defendants owed it a common law duty that arose independently of the Vogen-New River Loan Agreement[.]" The Court answered that question in the negative. The Supreme Court of Virginia has not yet decided "whether a claim for fraud in the inducement exists when the party engaging in the alleged fraudulent conduct is not a party to the contract fraudulently induced." Even though Vogen's claim was just that, the Court didn't need to address that question "both because Vogen allege[d] that New River (acting through its agents) was the party engaging in fraudulent conduct, and because Vogen has stated no facts from which the trier of fact could find 'breach of some duty imposed by law to protect the broad interests of social policy.'" Vogen's damages allegedly arose from New River's breach of contract; however, the Executive Defendants were not parties to that contract. Turning to Count II in which Vogen sought to pierce the corporate veil, Vogen alleged that "New River intended to mislead Vogen with [false] information and fraudulently induce Vogen to enter into the Loan Agreement' and that 'New River's [] conduct was malicious and engaged in with reckless disregard for Vogen's rights and interests.'" Here, Vogen's claim failed because the Executive Defendants were not, as stated in the pleadings, acting on their own behalf, but rather as corporate agents. Moreover, in order to pierce the corporate veil under Virginia law, the plaintiff must first obtain a judgment against the corporation. In this case, however, Vogen failed to plead that it had obtained such a judgment before seeking to pierce the corporate veil.

D. Tortious Interference

Wyatt v. McDermott, No. 111497, 2012 Va. LEXIS 92 (Va. Apr. 20, 2012): In this case of first impression, the Supreme Court of Virginia, on certification from a federal district court, held that Virginia law recognizes "tortious interference with parental rights" as a common law tort cause of action. The Court, citing to *Kessel v. Leavitt*, 511 S.E.2d 720, 765-66 (W.Va. 1998), outlined the elements of the tort as follows: "(1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's consent, or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference cause harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference." With respect to damages, the Court declared that the tort "encompasses both tangible and intangible damages, including compensatory damages for the expenses incurred in seeking the recovery of the child, lost services, lost companionship, and mental anguish," but although punitive damages are available as a jury question, equitable remedies (*e.g.*, injunctions, custody orders, etc.) are not. Moreover, the Court found that the traditional "preponderance of the evidence" burden of proof applies to this tort.

Dunn, McCormack & MacPherson v. Connolly, 708 S.E.2d 867 (Va. 2011): The Supreme Court of Virginia affirmed the circuit court's judgment in sustaining Defendant's demurrer and dismissing Plaintiff's action for tortious interference with contract rights. As a threshold matter, the Court noted that Virginia law recognizes tortious interference with contract rights as a cause of action. The elements of that cause of action are as follows: "(i) the existence of a valid contractual relationship or business expectancy; (ii) knowledge of the relationship or expectancy on the part of the interferor; (iii) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (iv) resultant damage to the party whose relationship or expectancy has been disrupted." However, in order to succeed on a claim for tortious interference with contract rights when the contract at issue is terminable "at-will" (as is the case here), the plaintiff must also prove that the defendant used "improper means" to bring about the interference. Moreover, the Court narrowly defines "improper" to only include interference that is "illegal, independently tortious" or that "violates an established standard of trade or profession." In this case, Plaintiffs alleged that Defendant tortiously interfered with Plaintiff's contract rights by causing Plaintiff's at-will contract to be terminated out of "personal spite, ill will and malice." The Court expressly rejected such grounds as constituting "improper" interference, noting the "limited nature" of what amounts to "improper" interference for purposes of claims involving tortious interference of at-will contract rights. Indeed, the Court declared that it "will not extend the scope of the tort to include actions solely motivated by spite, ill will and malice."

Whitaker v. Wells Fargo Advisors, LLC, No. 3:11CV380-HEH, 2011 U.S. Dist. LEXIS 111938 (E.D. Va. Sept. 28, 2011): The Court also granted Defendant's motion to dismiss Plaintiff's tortious interference claim. Aside from establishing the requisite elements, to state a valid claim for tortious interference with an at-will employment contract, a plaintiff must allege that the defendant's intentional interference involved "improper means." In this case, a showing of "improper means" required Plaintiff to alleged that Defendant's interference was "illegal, independently tortious, or violate[d] an establish standard of trade or profession." Since the Court had already found that Defendant's U5 forms were not defamatory, Plaintiff could not establish that Defendant's interference was independently tortious. Moreover, Plaintiff did not allege that Defendant acted illegally. Finally, since FINRA regulations required Defendant to file an amended U5 under the circumstances, Defendant neither violated industry standards nor intentionally interfered with Plaintiff's employment expectancy. The Court also rejected Plaintiff's argument that Defendant filed its amended U5 "with willful, wanton, and malicious" intent because the record did not support such contentions and Virginia law made clear that "ill intentions alone do not amount to 'improper' interference." Thus, the Court held that Plaintiff failed to state a valid claim of tortious interference because Plaintiff could not establish that Defendant's interference was intentional and improper.

Lewis-Gale Med. Ctr., LLC v. Alldredge, 710 S.E.2d 716 (Va. 2011): The Supreme Court of Virginia reversed the judgment of the circuit court confirming a jury verdict in favor of Dr. Alldredge ("Alldredge") and entered final judgment for Lewis-Gale Medical Center LLC ("Lewis-Gale"), holding that the circuit court erred by not striking Alldredge's evidence and by not granting summary judgment to Lewis-Gale. Southwest Emergency Physicians, Inc. ("SWEP") and Lewis-Gale had entered into an employment contract under which SWEP's physician-employees would exclusively staff Lewis-Gale's emergency department. Among other things, the contract provided that it could be terminated by either party without cause subject to a 90-day written notice. Alldredge was one such physician-employee who worked in Lewis-Gale's emergency department under the contract with SWEP. After being terminated for her involvement with a letter concerning various nurses' work-related complaints, Alldredge brought suit against Lewis-Gale claiming that Lewis-Gale tortiously interfered with her employment contract with SWEP. At trial, the circuit court took Lewis-Gale's motion for summary judgment under advisement and denied its motion to strike. A jury then returned a verdict for Alldredge, awarding her $900,000 in compensatory damages, and the circuit court confirmed that verdict. The Supreme Court of Virginia set aside the verdict because Alldredge could not prove that Lewis-Gale used "improper methods" to interfere with her employment contract. Since Alldredge's contract with SWEP was "at-will," she had to prove that Lewis-Gale (1) intentionally interfered with her contract and (2) employed "improper methods" to do so. Alldredge's claim alleged that Lewis-Gale acted improperly because it used "intimidation, duress, and undue influence" to leverage its ability to terminate the contract with SWEP, which would have financially ruined SWEP. The Court rejected this argument because "the inherent intimidation or duress experienced as a result of the very nature of [the] at-will contract cannot rise to the level of improper methods necessary to establish a cause of action for tortious interference with contract expectancy." The Court also rejected Alldredge's argument that certain statements made by Lewis-Gale's COO concerning Alldredge (e.g., that Alldredge was an "organizational terrorist") constituted improper methods. While such statements were "unwise, unprofessional hyperbole, and may even indicate a personal animus toward Dr. Alldredge," they did not "rise to the level of fraud, misrepresentation, deceit, or defamation that could constitute improper methods" of tortious interference. Thus, the Court found that Lewis-Gale's actions did not constitute "improper methods" as a matter of law.

Am. Traffic Safety Serv. Ass'n v. Sam Schwartz Eng'g PLLC, No. 1:11cv23, 2011 U.S. Dist. LEXIS 59548 (E.D. Va. May 31, 2011): The Court determined that Defendant New York corporation sued by Plaintiff, a traffic safety trade association based in Fredericksburg, over Defendant's contract to provide "Pedestrian Manager" training programs, did not sufficiently allege a counterclaim under New York law for Plaintiff's alleged tortious interference with Defendant's business relationship with the Port Authority of New York and New Jersey. Since Defendant's alleged injury—loss of its Port Authority contract to Allied Barton—was suffered in New York, the Court applied New York law. Under New York law, tortious interference requires, *inter alia*, that defendant acted with the "sole purpose" of harming plaintiff or used "wrongful means." Here, since Defendant alleged that at least one of Plaintiff's purposes was "its own financial gain," it precluded Plaintiff from having had a "sole purpose" of harming Defendant. Moreover, Defendant's conclusory and unsupported allegation that Plaintiff conspired with Allied Barton using fraud by omission fell well below the "level of severity" required to show "wrongful means." Thus, the Court dismissed Defendant's tortious interference counterclaim.

E. Trade Secrets

Collelo v. Geographic Serv., Inc., 721 S.E.2d 508 (Va. 2012): The Supreme Court of Virginia held, *inter alia*, that the trial court erred when it dismissed Plaintiff's claims under the Trade Secrets Act. The trial court's "ruling was based on the faulty premise that competition must be shown in order to have a cause of action based upon the Trade Secrets Act and that damages must flow from the proof of competition." However, the Court clarified that "the Trade Secrets Act does not require that one who is accused of misappropriating a trade secret use the allegedly misappropriated trade secret to compete with the holder of the trade secret."

RegScan, Inc. v. Bureau of Nat'l Affairs, Inc., No. 1:11cv1129, 2011 U.S. Dist. LEXIS 125919 (E.D. Va. Nov. 1, 2011): The Court granted Plaintiff's Motion to File Under Seal. Plaintiff alleged, *inter alia*, that Defendant misappropriated Plaintiff's trade secret in violation of the Virginia Uniform Trade Secrets Act. Plaintiff and Defendant had entered into a "Mutual Non-Disclosure Agreement" pertaining to a proposed joint venture between the two companies regarding a particular product. Plaintiff's misappropriation claim arose from its belief that Defendant released a product that "embodie[d] the precise concept proposed by [Plaintiff] to [Defendant] . . . ." In evaluating Plaintiff's Motion to File Under Seal, the Court began by noting that Fourth Circuit precedent establishes a "presumption in favor of public access to judicial records," but that a district court has power to seal such documents only "if the public's right of access is outweighed by competing interests." A well-established exception to public access is where "disclosure might reveal trade secrets." In the context of a claim under the Virginia

Uniform Trade Secrets Act, the Court has a duty to use "reasonable means" to "preserve the secrecy of the alleged trade secret." After considering all the alternatives, the Court concluded that "sealing the documents is most appropriate because the sealing is narrowly tailored to protect information related to trade secrets." Plaintiff had prepared public versions of the documents that only redacted material relating to the trade secrets. And the only document that Plaintiff sought to seal in its entirety was a confidential presentation containing Plaintiff's business plan to develop the product. Thus, the Court concluded that there was a strong "countervailing need to protect [Plaintiff's] trade secrets," and so sealing the documents was appropriate.

Trident Prods. & Servs., LLC v. Canadian Soiless Wholesale, LTD, No. 3:10CV877-HEH, 2011 U.S. Dist. LEXIS 78337 (E.D. Va. July 19, 2011): In addition to denying Defendants' motion to dismiss Plaintiff's false advertising claim (see above), the Court also denied Defendants' motion to dismiss Plaintiff's unjust enrichment claim. Defendants argued, in part, that Plaintiff's unjust enrichment claim was preempted by § 59.1-341 of the Virginia Uniform Trade Secrets Act ("VUTSA"). The Court rejected this argument, finding that it was too premature to dismiss Plaintiff's unjust enrichment claim at that juncture. While there was no binding precedent on the issue of whether unjust enrichment claims are preempted by the VUTSA, the Court adopted the standard of an earlier Eastern District case, which had held that "alternative claims are only preempted if it is clear at the motion to dismiss stage that the confidential information at issue is in fact a trade secret under the VUTSA." *Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652, 659 (E.D. Va. 2002). That court had reasoned that "unless it can be clearly discerned that the information in question constitutes a trade secret, the Court cannot dismiss alternative theories of relief as preempted by the VUTSA." *Id.* Here, Plaintiff's complaint alleged that certain of its proprietary information "include[d] trade secrets." However, based solely on that, the Court could not find that "*all* of the proprietary information at issue constitue[d] trade secrets under the VUTSA." Thus, the Court could not hold that Plaintiff's alternative theory (i.e., unjust enrichment) was preempted.

V. EVIDENCE

A. Exclusion of Expert Witness Testimony

Sanders v. UDR, Inc., No. 3:10-CV-459, 2011 U.S. Dist. LEXIS 24198 (E.D. Va. Mar. 10, 2011): The Court denied Plaintiffs' motion to exclude the testimony of Defendant's expert witness ("Plaintiffs' Motion") and denied Defendant's motion to exclude the pretrial reports and testimony of Plaintiffs' expert witness ("Defendant's Motion). The case concerned Plaintiffs' claims against Defendant-Landlord seeking damages arising from alleged unremediated mold contamination in Plaintiffs' apartment. Plaintiffs' motion argued that the testimony of Defendant's expert witness—a certified industrial hygienist—applied an "irrelevant standard of care," thereby rendering the testimony inadmissible under Rules 403 and 702 of the Federal Rules of Evidence. The Court disagreed. Defendant's expert had relied upon two of the documents expressly listed in Virginia Code § 8.01-226.12(A) as establishing the appropriate mold remediation standards. Moreover, the expert's reliance on another protocol not listed in the Code provision was permitted because "the Code itself allows for additional mold remediation protocols provided they are prepared by an industrial hygienist and consistent with other guidance documents." Plaintiffs' experts had admitted that the additional protocol used by Defendant's expert was authoritative, and so Plaintiffs' claim that the expert should be excluded because he didn't solely rely on the documents listed in the Code was "untenable." Thus, the Court denied Plaintiffs' Motion. The Court also noted that since the trial will be a bench trial, the Court itself "will be able to accept what testimony is relevant and worthy and to reject the testimony that falls below that standard."

21st Century Sys. v. Perot Sys. Gov't Servs., 726 S.E.2d 236, 238 (Va. 2012): The Supreme Court of Virginia reversed an award of goodwill damages to a government contractor, Perot Systems, against a competitor, 21st Century Systems, and two former Perot employees hired by 21CSI, because Perot's goodwill expert did not show the departing employees had goodwill value and that Perot's actual sale price several months later was affected by defendants' actions. Perot's expert defined good will as "the difference between the fair market value of the company, minus the fair market value of its identifiable assets." To estimate the good will lost as a result of defendants' actions, the expert examined the actual sale of PSC to Dell in the fall of 2009. He used figures reported by Dell to the SEC following its purchase of PSC. He subtracted the value of PSC's assets, $1.551 billion, from its sale price, $3.878 billion, to determine the good will associated with its sale, concluding that total goodwill was $2.327 billion. He determined Dell had assigned about $1.6 billion in goodwill to Perot. The expert then spread that goodwill over the contracts of Perot, and opined that for every dollar of revenue Perot had, his calculation demonstrated that there was $2.57 of goodwill. He testified Perot lost $1.45 million in revenue "that had gone over to 21CSI as a result of these individuals leaving." The Court held that because the expert and, by extension, Perot relied on PSC's actual subsequent sale to Dell, rather than a comparable sale, Perot was required to demonstrate that its sale price to Dell reflected an actual loss of goodwill as a result of the conspiracy, but it failed to do so. Trial evidence demonstrated Dell purchased PSC at a significant premium several months after defendants' alleged wrongful conduct. Perot introduced no evidence at trial explaining how or why Dell decided upon that particular premium – about 68 percent over and above the stock price at the time. And, without any evidence demonstrating that the departing employees had goodwill value with regard to the customer relationships necessary to retain contracts and that PSC's actual sale price to Dell was affected in any way by defendants' actions in this case, the Court held that Perot could not demonstrate that it actually lost any goodwill.

B. Spoliation

Sanders v. UDR, Inc., No. 3:10-CV-459, 2011 U.S. Dist. LEXIS 24198 (E.D. Va. Mar. 10, 2011): The Court granted Defendant-Landlord's motion to exclude Plaintiff-Tenants' evidence of personal property damage due to spoliation. Plaintiffs, in part, sought damages for destruction of personal property that was allegedly caused by unremediated mold contamination. However, after preparing an inventory of all the personal property that was allegedly destroyed, Plaintiffs simply discarded that property. Plaintiffs did not provide Defendant with any photographs of the damaged property, and Defendant was not given an opportunity to inspect the property before Plaintiffs disposed of it. The Court found that "Plaintiffs' actions present[ed] a classic case of spoliation." Once litigation was foreseeable, which was at least when Plaintiffs retained counsel (and that occurred before Plaintiffs discarded the evidence), Plaintiffs had a duty both to preserve evidence that is critical to their claims and to give Defendant access to the evidence. Moreover, despite providing Defendant with written notice of mold in the apartment, Plaintiff failed to provide any notice of mold contamination to their personal property. Thus, Defendant was greatly prejudiced because it could not adequately challenge Plaintiffs' claim. The Court therefore concluded that "Plaintiffs' disposal of their personal property [was] spoliation," and so the Court granted Defendant's motion to exclude evidence of damages for loss of personal property.

VI. ARBITRATION

Smith v. Tele-Town Hall, LLC, 798 F. Supp. 2d 748 (E.D. Va. 2011): The Court adopted the "demand approach" for purposes of determining the amount in controversy in a motion to confirm an arbitration award. Under the "demand approach," the amount in controversy is the amount demanded in the underlying arbitration, not the amount awarded. While this was a question of first impression, the Fourth Circuit, without resolving the issue, had previously indicated that courts have taken the following three approaches to determining the amount in controversy in an application to confirm, modify, or vacate an arbitration award: (1) the "award approach"; (2) the "demand approach"; and (3) the "remand" or "mixed" approach. *See Choice Hotels Int'l, Inc. v. Shiv Hospitality, LLC*, 491 F.3d 171, 175 (4th Cir. 2007). Here, after considering the alternative approaches, the Court found that the "demand approach" was "soundest because it avoids anomalous and unwarranted inconsistencies in a federal court's jurisdiction."

Bank of The Commonwealth v. Hudspeth, 282 Va. 216, 714 S.E.2d 566 (2011). The trial court erred in not staying a lawsuit against a bank and compelling the plaintiff to arbitrate his claim before the Financial Industry Regulatory Authority ("FIRA"). Hudspeth, a registered securities broker, was a vice president of a financial advisory affiliate of the Bank of the Commonwealth. He was terminated in 2008 and later filed a complaint against the Bank seeking unpaid compensation. The Bank moved to stay the action and compel arbitration, arguing that it was a "customer" and Hudspeth's claim should be arbitrated under FIRA's "Customer Code." The Court held that if the arbitration provision is broad, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Under Rule 12200 of the Customer Code, Hudspeth, as "an associated person of a member" would be required to arbitrate his dispute with the Bank if the Bank is a "customer." A "customer" is not comprehensively defined under the Customer Code, except that a "customer" is not a broker or dealer. The Court opined that Rule 12100 is ambiguous in its use of the term "customer."

VII. TRUSTS AND ESTATES

Keith v. Lulofs, No. 110433, 2012 Va. LEXIS 82 (Va. Apr. 24, 2012): The Supreme Court of Virginia affirmed the trial court's judgment that Plaintiff failed to prove that the "mirror image" wills at issue were irrevocable, reciprocal wills. At the outset, the Court noted that a will is not "irrevocable or unalterable simply because it is drafted to 'mirror' another testator's will." In order for such a will to become irrevocable, it must be contractual in nature. And the contractual nature of the "mirror image" wills must be "clear and satisfactory." Here, the Court held that the language of the wills, alone, was not sufficient to establish an irrevocable contract. In so holding, the Court distinguished the instant case from *Black v. Edwards*, 445 S.E.2d 107 (Va. 1994) in which the Court held that two "mutual and reciprocal" wills were irrevocable contracts based on the "unimpeached testimony" of the drafting attorney who testified that the testators' intent was to that effect. By contrast, in this case, the drafting attorney provided no testimony that would substantiate a finding that the testators intended the wills to be irrevocable. At bottom, the Court expressed concern that Plaintiff's interpretation of the wills "would create the very real risk that any testator who executes a will that 'mirrors' another will and contains language similar to that contained in the wills at issue here, would be unintentionally hamstrung by the death of the purportedly reciprocal testator." Furthermore, the Court held that Plaintiff failed to sufficiently corroborate his testimony regarding the contractual nature of the wills as required by the Virginia Dead Man's Statute.

Ott v. Monroe, 719 S.E.2d 309 (Va. 2011): The father and his wife formed the company, which was governed by an operating agreement. The father died. He had executed a will prior to the formation of the company. In his will, he bequeathed his entire estate to his daughter. The Supreme Court of Virginia held that the circuit court did not err in holding that the daughter inherited only the father's financial interest in the company, the right to share in profits and losses and to receive distributions. Because the daughter was not a member of the company, the circuit court did not err in holding that she lacked authority to remove the wife, who was the company's managing member, and the successor managing member. It was not within the daughter's power under the operating agreement unilaterally to convey to her the father's control interest and make her a member of the company upon his death because the agreement could not confer that power on him. Thus, the father was dissociated from the company upon his death, and the daughter became a mere assignee by operation of the Act, Va. Code § 13.1-1040.2, entitled under the Act, Va. Code § 13.1-1039, only to his financial interest.

VIII. PARTNERSHIPS/CORPORATIONS/LLCS

Russell Realty Assoc. v. Russell, 724 S.E.2d 690 (Va. 2012): The Supreme Court of Virginia affirmed a circuit court's judgment granting judicial dissolution of a partnership pursuant to Code § 50-73.117(5) on grounds that "the economic purpose of the Partnership is likely to be unreasonably frustrated." The case involved numerous disagreements between a brother and sister who were partners in a real estate investment partnership, the purpose of which was "to acquire, hold, invest in, and lease and sell investment properties." As a threshold matter, the Court found that a "strict standard" must be applied to the judicial dissolution of partnerships, as analogous to the standard applicable to dissolution of LLCs. The Court then proceeded to analyze the case under the "economic purpose" test, which was one of the bases under which the circuit court had concluded that judicial dissolution was proper. At the outset, the Court clarified that "financial failure" or poor economic performance of a partnership is not required to find that the partnership's economic purpose has been frustrated. Here, the partnership's purpose was not limited to realizing economic success; it also included "the ability to undertake [real estate investment] activities in an efficient and productive manner to maximize return to the partnership." In that respect, the relationship of "distrust and disagreement" between the partners had, *inter alia*, "imposed additional and unnecessary economic costs on the Partnership in a number of ways including preventing the partnership from taking advantage of and conducting its business in a timely and efficient manner." Indeed, the Court found that the partners' bad relationship had caused the Partnership to miss several lucrative business opportunities. Thus, judicial dissolution under the "economic purpose" test was proper, and so the Court affirmed the circuit court's judgment.

Orthopedic & Sports Physical Therapy Assoc. v. Summit Grp. Prop., Inc., 724 S.E.2d 718 (Va. 2012): The Supreme Court of Virginia reversed the judgment of the trial court, finding that the trial court erred in giving Instruction 15 to the jury and that the error was not harmless. The case concerned a dispute between a landlord-LLC and a tenant in which, among other things, the tenant brought a counterclaim against the LLC alleging fraud in the inducement and damages. With respect to the counterclaim, the LLC offered and the trial court gave as Instruction 15 that "In order for you to find that [the LLC] is guilty of fraud, you must find that the fraudulent activity was authorized by the members of [the LLC]." This instruction was based on Code § 13.1-1021.1(A)(3), which states that any act of a member "which is not apparently for carrying on in the ordinary course the [LLC] business or business of the kind carried on by the [LLC] binds the [LLC] only if the act was authorized by the other members . . . ." However, Instruction 15 omitted the "not apparently for carrying on in the ordinary course" language of the statute. That omission was significant because if the alleged fraud occurred in the ordinary course of the LLC's business, then Code § 13.1-1021.1(A)(2) would apply and bind the LLC to a single member's acts. Here, the tenant alleged that the LLC's fraudulent acts consisted of lies and omissions by a company whose members are three of the eight members of the LLC. Accordingly, the critical issue was whether the actions by the company's members were in the ordinary course of the LLC's business. Thus, it was error for the trial court to give the instruction. Moreover, the Court found that the error was not harmless. Based on a question that the jury had asked regarding Instruction 15, the Court inferred that the jury had considered whether some members of the LLC committed fraud. Since Instruction 15 omitted the critical language, the Court could not be certain that the jury was not misled into thinking that "to find [the LLC] liable the activity must have been authorized by the other members even if the fraudulent act was within the ordinary course of [the LLC's] business." Thus, the Court reversed the trial court's judgment and remanded the case.

Michael E. Siska Revocable Trust v. Milestone Development, LLC., 282 Va. 169, 715 S.E.2d 21 (2011). A limited liability company that is the subject of a derivative action must be named as a party to the suit. Motel Investments of Christiansburg, LLC ("MIC") was, as its name suggests, formed to build and operate a motel in Christiansburg. Initially, the Michael E. Siska Revocable Trust (the "Trust") had a 49% membership interest. The Supreme Court agreed that MIC was a necessary party to a derivative suit brought by one of its members on behalf of the company. The Court rejected the view of the Iowa Supreme Court that held that a corporation is not a necessary party to a derivative suit if all its stockholders are before the court and its interests are adequately represented. Does the absence of the necessary party require dismissal of the suit? The Court held that the "necessary party doctrine does not implicate subject matter jurisdiction, and we reject Milestone's argument that it does." Nevertheless, the Court declined to exercise its subject matter jurisdiction: "[W]e will not entertain this appeal on the merits because MIC is a necessary party to this proceeding and has not been joined." The case was reversed and remanded.

Comtois v. Rogers, 282 Va. 289, 715 S.E.2d 1 (2011). In winding up the affairs of a partnership pursuant to a judicial dissolution, the court must perform an accounting. The Supreme Court held that the trial court erred in not conducting an accounting before ordering the dissolution of the partnership. Code § 50-73.123(A) and (B) do not explicitly direct the court to perform an accounting as an incident to judicial dissolution, but the steps those sections require are identical to the historical accounting in equity. "The winding up of a partnership's business in equity thus necessarily includes the completion of an accounting." In this case, the trial judge did not determine the principal balances of the partners' accounts with the firm, whether the firm had any surplus after the satisfaction of its debts, and whether any partner owed money to the firm or was entitled to a distribution. "Accordingly, it is clear that the circuit court failed to perform the accounting necessarily inherent in a winding up of the [f]irm's business and prerequisite to a settlement of its accounts among the partners and its final judicial dissolution."