

MOST IMPORTANT OPINIONS OF 2021



You'll find more than 100 cases highlighted in this compilation of Important Opinions from January to December 2021. These are the cases chosen by our editors as most likely to impact law practice or a given subject area of law.

MOST IMPORTANT OPINIONS

OF THE YEAR

Administrative

Law firm liable for more than \$219K in unpaid taxes

Where the United States showed a law firm was liable for unpaid employment and unemployment taxes, funds which it withheld from its employees' wages but failed to remit to the IRS, the government was awarded \$219,496.82, plus statutory interest and penalties that have accrued since April 2020. *United States v. Miller Law Group PC*, Case No. 3:20-cv-00031, June 17, 2021. WDVA at Charlottesville (Moon). VLW 021-3-313. 6 pp.

Arbitration

Arbitrator can decide timeliness of grievance

Where a bargaining agreement was silent on whether an employee's failure to comply with the grievance procedure in a timely matter mandates dismissal, the arbitrator can resolve the issue. *Tecnocap Inc. v. United Steel Paper and Forestry Rubber Manufacturing Energy Allied Industrial and Service Workers International Union AFL-CIO CLC Local Union No. 152M*, Appeal No. 19-1263, Jan. 19, 2021. 4th Cir. (per curiam), from NDWVA at Wheeling (Bailey). VLW 021-2-031. 13 pp.

Arbitration

Shorter time frame does not render arbitration pact unconscionable

Where a trucker claimed an arbitration agreement was unconscionable because it shortened all applicable statutes of limitation to one year, the limited time period was not unreasonably short. *Bracey v. Lancaster Foods LLC*, Appeal No. 19-1292, Dec. 16, 2020. 4th Cir. (Quattlebaum), from DMD at Baltimore (Bennett). VLW 020-2-328. 9 pp.

Bankruptcy

Automatic stay extended to nondebtor lawyer

Where the nondebtor's finances were intertwined with those of the debtors, but she could not file for bankruptcy protection because it could put her law license, and the only source of income for the debtor, at risk, there was good cause to extend the automatic stay to her. *In re: Cornus Montessori LLC*, Nos. 21-10213, 21-10216, April 16, 2021. EDVA Bankr. at Alexandria (Kindred). VLW No. 021-4-004. 7 pp.

Bankruptcy

Confessed judgment may be nondischargeable

Where a confessed judgment was for breaching a payment obligation in a separation agreement, the ex-wife's complaint plausibly alleged it was nondischargeable as debt connected to a divorce. *Nonte v. Burstein*, No. 20-07016, March 3, 2021. EDVA Bankr. at Norfolk (Santoro). VLW No. 020-4-024. 10 pp.

Bankruptcy

Debtor had no obligation to hold funds in trust

Where the plain language of the Chapter 11 reorganization plan did not require the debtor to hold monies in trust for the general unsecured creditors, and an unsecured debtor did not identify extrinsic evidence showing an intent to create a trust, the bankruptcy court's order finding no trust was affirmed. *Deutsche Bank Trust Company Americas v. Gymboree Group Inc.*, Case No. 3:20-cv-419, Aug. 16, 2021. EDVA at Richmond (Lauck). VLW 021-3-394. 22 pp.

Bankruptcy

Destruction of loan documents not spoliation

Where a dispute arose over whether a loan guarantee was forged and the lender's practice was to scan and shred loan documents within a month of being signed, the documents here were executed/shredded in 2005 while the litigation did not commence until 2018, there was no spoliation. *David v. Summit Community Bank*, Case No. 1:20-cv-00721, May 4, 2021. EDVA at Alexandria (Alston). VLW 021-3-232. 17 pp.

Bankruptcy

First-time homebuyer IRS credit is not dischargeable

A \$7,500 first-time homebuyer credit that is recaptured by the IRS over the next 15 years is a tax that is not dischargeable in bankruptcy. *In re Shin*, No. 17-13509, Feb. 16, 2021. EDVA Bankr. at Alexandria (Kenney). VLW No. 020-4-023. 7 pp.

Bankruptcy

Trustee's claims against LeClairRyan founder may proceed

Where the bankruptcy trustee for the defunct law firm LeClairRyan sought to avoid and recover transfers made to Gary LeClair, one of the firm's founders, her claims may proceed because the transfers were allegedly made to hinder, delay or defraud creditors and entities to which the firm would become indebted and there was indicia of fraud. *Tavener v. ULX Partners LLC*, No. 20-03142, Nov. 3, 2021. EDVA Bankr. at Richmond (Huenekens). VLW No. 021-4-010. 28 pp.

Civil Practice

Challenge to COVID-19 treatment guidelines rejected

A doctor has third-party standing to bring an informed consent claim on behalf of his patients, but cannot bring a claim under the Virginia Health Care Decisions Act. He is not entitled to a temporary injunction because he is unlikely to succeed on the merits of his claim that the hospital he works for wrongfully banned the use of certain COVID-19 treatments. *Marik v. Sentara Healthcare*, Case No. CL21-13852, Nov. 23, 2021 Norfolk City Circuit Court (Lannetti). VLW 021- 8-127, 15 pp.

Civil Practice

Disassociated LLC members don't count for diversity

Where two members were disassociated from the LLC, that terminated their memberships in the LLC for purposes of federal diversity jurisdiction. *Rhyne v. MartianCraft LLC*, Case No. 2:20-cv-568, June 17, 2021. EDVA at Newport News (Young). VLW 021-3-308. 15 pp.

Civil Practice

Healthcare provider cannot sue insurer for unpaid bill

Where a patient's health insurer did not fully reimburse a medical care provider for services rendered, the circuit court incorrectly concluded that the provider has a private right to action to sue the insurer for the unpaid amount. *Health-Keepers v. Dominion Surgical Specialists*, Record No. 201106 (Order) June 3, 2021, Fairfax County Circuit Court. VLW 021-6-042, 6 pp.

MOST IMPORTANT OPINIONS OF 2021

Civil Practice

Plaintiff’s former counsel disqualified as defense counsel

Where defense counsel previously represented plaintiff in corporate matters, consulted on protecting trade secrets, and drafted and enforced employment contracts and noncompete agreements, plaintiff’s motion to disqualify defense counsel in a trade secret matter is granted. *Atlantic Diving Supply v. Komornik, et al.*, Case No. CL20-10185, May 11, 2021, Norfolk City Cir. Ct. (Migliozzi). VLW 021-8-075, 7 pp.

Civil Practice

Prior suit not res judicata for easement counterclaim

Because defendants in a suit concerning a lake access easement were not in privity with the plaintiff in a prior suit about the same easement, res judicata does not bar their counterclaim. *Webb v. Horn*, Case No. CL 2020-10220, March 3, 2021, Fairfax County Cir. Ct. (Gardiner). VLW 021-8-036, 8 pp.

Civil Practice

Rules do not allow ‘plea of the general issue’

Plaintiff’s motion to strike defendants’ pleas in bar is granted because defendants have actually filed pleas of the general issues, which are not allowed under the Rules of the Supreme Court. *Vdart, Inc. v. Arthur Grand Technologies, et al.* Case No. CL 2018-13745, Feb. 2, 2021, Fairfax Cir. Ct. (Gardiner). VLW 021-8-023, 6 pp.

Civil Practice

Second depo needed after errata sheet changes

A defense medical expert who made substantive changes on the errata sheet after his deposition must appear for a second deposition, with questions limited to the changes. *Preston v. Roberts*, Case No. 7:19-cv-00243, Jan. 15, 2021. WDVA at Roanoke (Urbanski). VLW 021-3-022. 6 pp.

Civil Practice

Statute allows substitute to confess judgment

A statute provides a method for appointing a substitute attorney after a confession of judgment, with no requirement that a successor be named in the instrument. Confession motion granted. *Rolston v. Quick, et al.*, Case No. CL 20-3390, March 16, 2021, Loudoun County Cir. Ct. (Fisher). VLW 021-8-040, 9 pp.

Civil Practice

Suspended lawyer’s firm must pay sanctions

Where plaintiff’s counsel’s license had been administratively suspended for not completing CLE credits, his signatures on a substitution order, discovery responses and discovery requests were invalid. *Channell v. Pariser Dermatology Specialists, et al.*, Case No. CL18-6963, Jan. 20, 2021, Norfolk City Cir. Ct. (Migliozzi). VLW 021-8-013, 6 pp.

Civil Practice

Video hearing OK for father seeking child’s return

Where a man seeking return of his daughter to Canada showed he could not travel to Roanoke for the hearing because of a military assignment, he can testify via video. *Nowlan v. Nowlan*, Case No. 5:20-cv-00102, Jan. 21, 2021. WDVA at Harrisonburg (Cullen). VLW 021-3-021. 5 pp.

Civil Rights

Acceptance of erroneous check doesn’t make wife a fiduciary

Where a pension fund erroneously sent a check to the wife of a deceased union member, her acceptance of that check didn’t necessarily make her a fiduciary under the Employee Retirement Income Security Act. *Graphic Communications Conference International Brotherhood of Teamsters National Pension Fund v. Rollins*, Case No. 4:21-cv-00009, Sept. 28, 2021. WDVA at Danville (Cullen). VLW 021-3-465. 8 pp.

Civil Rights

Advice of counsel sinks malicious prosecution

Where an Alleghany County Sheriff’s Department’s sergeant relied on advice from the commonwealth’s attorney and findings of probable cause by a neutral magistrate in seeking arrest warrants, qualified immunity barred the § 1983 malicious prosecution claims. *Shrewsbury v. Williams*, Appeal No. 20-1268, Feb. 11, 2021. 4th Cir. (per curiam), from WDVA at Roanoke (Urbanski). VLW 021-2-062. 7 pp.

Civil Rights

Nurse’s strip search should go to a jury

Where a nurse for a jail’s health care provider was subjected to a strip search on her first day of work at the regional jail, a jury will decide if prison officials violated her civil rights. *Amisi v. Riverside Regional Jail Authority*, Case No. 3:20-cv-218, Aug. 16, 2021. EDVA at Richmond (Novak). VLW 021-3-389. 45 pp.

Commercial

Plaintiff seeks payment for providing top-secret personnel

Although a contractor used personnel with top-secret clearances provided by the plaintiff to provide services to the government, and there was an expectation of compensation, because the amount of compensation was disputed a jury will decide if the contractor is liable for unjust enrichment. *Concord Crossroads LLC v. Human Capital Resources and Concepts Inc.*, Case No. 1:20-cv-0589, Nov. 16, 2021. EDVA at Alexandria (Alston). VLW 021-3-521. 6 pp.

Commercial

Public has presumptive right to information in suit

Where two defendants in an alleged price-fixing suit asked the court to reconsider its decision to not seal historic pricing information – request refused.

The public has a right of access to the information. *In re: Interior Molded Doors Antitrust Litigation*, Case No. 3:18-cv-718, Dec. 10, 2020. EDVA at Richmond (Gibney). VLW 020-3-629. 15 pp.

Constitutional

Landowners improperly awarded attorneys’ fees

Where the amount proposed by the government as compensation for land near a Marine Corps Air Station was closer to the amount awarded by the court than the sum requested by the land-owners, the landowners were not entitled to recover their attorneys’ fees. *United States v. 269 Acres Located in Beaufort*, Case No. 19-2212, April 16, 2021. 4th Cir. (Richardson), from U.S. District Court for the District of South Carolina at Beaufort (Gergel). VLW 021-2-139. 31 pp.

Consumer Protection

Informational injury won’t back Fair Debt standing

Where the plaintiff alleged only an “informational injury” stemming from an alleged misrepresentation in a letter from a debt-collection company, he lacked standing to assert his claims under the Fair Debt Collection Practices Act, or FD-CPA. *Blaise v. The Receivable Management Services LLC*, Case No. 4:21-cv-002, Aug. 24, 2021. EDVA at Newport News (Young). VLW 021-3-417. 18 pp.

Consumer Protection

Website alone can be a place of public accommodation

Although the Fourth Circuit has not addressed whether a website can constitute a place of public accommodation under the Americans with Disabilities Act, and other circuits have reached differing conclusions, the court agreed that places of “public accommodation” are not limited to physical, brick-and-mortar establishments and include commercial websites that offer goods and services. *Mejico v. Alba Web Designs LLC*, Case No. 7:20-cv-00039, Jan. 25, 2021. WDVA at Roanoke (Conrad). VLW 021-3-039. 22 pp.

Consumer Protection

Woman can sue hospital under Fair Debt Act

Where a patient was told she could only dispute medical debt in writing, but the Fair Debt Collection Practice Act does not restrict how consumers may dispute alleged debt, the patient was presumably damaged by having to purchase a stamp, thus providing her standing to assert her FDCPA claim. *Foley v. Mary Washington Healthcare Services Inc. d/b/a ODC Recovery Services*, Case No. 3:21-cv-239, July 28, 2021. EDVA at Richmond (Gibney). VLW 021-3-370. 11 pp.



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Contract

Brokerage account was not estate asset

Where a father and son jointly owned a brokerage account and contractually agreed that if the brokerage received conflicting instructions, both had to agree before the brokerage could act, the father’s other children gained no rights to the account after he died. Although the father instructed the brokerage to place the account proceeds in a separate account that only he controlled, the brokerage, having received a conflicting instruction, properly exercised its right to insist on signatures from both father and son. The conflict was not resolved when the father died. The son was thus entitled to the funds under his survivorship rights. *Helphrey, et al. v. Bass, Record No. 201148 (Unpublished Order) Oct. 21, 2021. Upon an appeal from a judgment rendered by the Circuit Court of Accomack County. VLW 021-6-072, 5 pp.*

Contract

Conversion, fraudulent transfer rulings vs. appellants vacated

Where a landlord obtained judgments for unpaid rent and sued the tenants and others for fraudulent and voluntary conveyances, the trial court’s rulings that defendants were jointly and severally liable for the unpaid rent, attorneys’ fees and sanctions are vacated. The trial court also erred by holding one defendant liable for conversion. *Grayson, et al. v. Westwood Buildings, Record No. 191413 (Kelsey) June 24, 2021, Fairfax Circuit Court (Bernhard). Alan M. Grayson, et al. v. Westwood Buildings L.P. Record No. 191413; Victor Kubli, et al. v. Westwood Buildings L.P. Record No. 191414; Carla G. Coleman v. Westwood Buildings Limited Partnership, Record No. 191475; VLW 021-6-046, 46 pp.*

Contract

Employees improperly denied disability benefits

Where an employee has to stand, walk or lie down as a break from sitting about every 10 minutes and requires heavy levels of narcotics to manage his pain, he is incapable of full-time employment and thus disabled under the plan and entitled to reinstatement. *Shupe v. Hartford Life & Accident Insurance Company, Case No. 19-1854, Dec. 7, 2021. 4th Cir. (Agee), from EDVA at Alexandria (Hilton). VLW 021-2-335. 27 pp.*

Contract

Indemnity contract limits fees and costs award

Where the parties’ indemnity agreement capped payments at \$4.9 million, the trial court’s award of more than \$1 million in attorney fees and costs to the prevailing party, which exceeded the cap, is reversed. The prevailing party is awarded \$24,999.94 in fees and costs, as limited by the payment cap. *Ehrhardt, et al. v. SustainedMED, LLC, Record No. 201160 (Goodwyn) Dec. 2, 2021, 2021. From the Circuit Court of Fairfax County. VLW 021- 6-075, 5 pp.*

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Contract

No signature, no binding settlement

A man injured while shopping agreed to settle his negligence claim for \$20,000, but Walmart required a signed agreement. Since no agreement was executed, there was no binding settlement. *Hairston v. Wal-Mart Stores East L.P., Case No. 2:18-cv-619, Dec. 31, 2020. EDVA at Norfolk (Allen). VLW 020-3-656. 9 pp.*

Contract

Party cannot tortiously interfere with its own contract

Where the designer and builder never identified a third party contract or business relationship that was interfered with through the defendant’s conduct, their tortious interference claim failed as a matter of law. At best, they showed they had a business expectancy with the defendant, which is insufficient for a tortious interference claim against that same party. *Clark Nexsen Inc. v. Rebkee Co., Case No. 3:20-cv-932, April 6, 2021. EDVA at Richmond (Gibney). VLW 021-3-182. 6 pp.*

Contract

Sibling spars with mother and brother over company payments

Where one brother alleged his brother and their mother improperly siphoned money from a family owned company in order to line their own pockets, his breach of fiduciary duty, breach of loyalty, joint tortfeasor and civil conspiracy claims survived a motion to dismiss. *Keil v. Seth Corporation, Case No. 3:21-cv-153, Nov. 2, 2021. EDVA at Richmond (Novak). VLW 021-3-507. 41 pp.*

Criminal

Amended traffic statutes are not retroactive

Where police stopped defendant for a defective tail light before statutory amendments prohibiting such stops became effective, a motion to exclude evidence based on retroactive application of the amendments is denied. *Commonwealth v. Eberhardt, Case No. 19-F-3402, 3403, Sept. 16, 2021, Richmond City Circuit Court (Marchant). VLW 021-8-129, 4 pp.*

Criminal

Appellant had contemporaneous communication with counsel

Where appellant’s daughter testified against him at his rape trial via closed-circuit television, the technology provided satisfied the relevant statute’s requirement to provide him “contemporaneous communication” with his counsel. *Ruff v. Commonwealth, Record No. 0694-20-2, July 27, 2021. CAV (Athey) from the Hanover County Circuit Court (Kelly). VLW 021-7-105, 7 pp. Published.*

neous communication” with his counsel. *Ruff v. Commonwealth, Record No. 0694-20-2, July 27, 2021. CAV (Athey) from the Hanover County Circuit Court (Kelly). VLW 021-7-105, 7 pp. Published.*

Criminal

Case dismissed after woman was deported

Where ICE deported the defendant to Romania while on pretrial release, and there is no active arrest warrant that would allow extradition, the fraud indictment against her was dismissed. *United States v. Pavel, Case No. 7:19-cr-94, March 3, 2021. WDVA at Roanoke (Urbanski). VLW 021-3-083. 10 pp.*

Criminal

Commonwealth’s witness did not ‘adulterate’ testimony

Where a second commonwealth witness was present in the courtroom when another commonwealth witness testified during defendant’s trial for making false Medicaid payment applications, the trial court properly ruled that allowing the second witness to testify would not prejudice defendant. *Ndunguru v. Commonwealth, Record No. 0855-20-4, Aug. 3, 2021. CAV (Haley) from the Fairfax County Circuit Court (Bernhard). VLW 021-7-117, 8 pp. Published.*

Criminal

Competency evaluation incorrectly denied

Where a trial judge failed to consider defense counsel’s representations concerning her client’s mental health, labeling her representations as “conclusions” or “opinions,” and asking for “evidence,” the judge’s denial of counsel’s motion for a competency evaluation was an abuse of discretion. Code § 19.2-169.1(A) “specifically references counsel’s representations as a basis for probable cause.” Appellant’s convictions are reversed. *Clark v. Commonwealth, Record No. 0017-21-1, Nov. 23, 2021. (CAV) Ortiz. From the Chesapeake City Circuit Court (Banks, final judgment; Smith, competency motion denial). VLW 021-7-163, 11 pp. Published.*

Criminal

Convictions vacated due to faulty jury instructions

Where jury instructions jointly proposed by the government and the defendants did not track the charges in the indictment involving crimes of violence, and had the effect of broadening the possible basis for conviction, the convictions on the assault counts were vacated. *United States v. Simmons, Case Nos. 18-4875, 18-4876, 18-4877, 19-4269, 19-4287, 19-4345, May 28, 2021. 4th Cir. (Agee), from EDVA at Norfolk (Davis). VLW 021-2-187. 65 pp.*

Criminal

Court won’t delay death penalty case indefinitely

Although the initial appearance and arraignment in a capital case were postponed because of COVID-19 concerns, the case will not be delayed until vaccines are generally available or because there might be a favorable change to the federal death penalty policy. *United States v. Silva, Case No. 2:20-cr-00017, Jan. 22, 2021. WDVA at Big Stone Gap (Jones). VLW 021-3-040. 3 pp.*

Criminal

Defendant’s statements partially waived attorney-client privilege

Where a defendant in a criminal copyright infringement case voluntarily disclosed to an FBI agent substantive legal advice he received from his attorney, he waived attorney-client privilege. *United States v. Dallmann, Case No. 1:19-cr-253, Dec. 11, 2020. EDVA at Alexandria (Ellis). VLW 020-3-622. 21 pp.*

Criminal

Defense counsel has no conflict of interest

Where counsel for a defendant accused of money laundering never formed an attorney-client relationship with another defendant, never obtained any privileged information from that defendant nor was ever consulted or communicated with his lawyer, there was no conflict of interest that prevented the counsel from representing the money laundering defendant in this case. *United States v. Becerra-Gonzalez, Case No. 4:20-cr-00009-004, April 6, 2021. WDVA at Danville (Dillon). VLW 021-3-174. 4 pp.*

Criminal

De novo circuit court trial cures any error in GDC

Defendant was found guilty of assault in GDC without the commonwealth’s participation. Commonwealth made a general appearance in circuit court. Any alleged denial of due process in the GDC is cured by the de novo trial of this matter. *Commonwealth v. Chastain, Case No. MI-2020-961, April 5, 2021, Fairfax Cir. Ct. (Kassabian). VLW 021-8-052, 6 pp.*

Criminal

Habeas granted because of prosecutor’s improper closing arguments

Where the prosecutor’s improper statements during closing arguments on charges of sexual assault, including asking the jury to convict the defendant based on the prospective sins of others, the remarks so prejudiced the defendant’s substantial rights that he was denied a fair trial. His habeas motion was granted. *Plymail v. Mirandy, Case No. 19-6412, Aug. 10, 2021. 4th Cir. (Richardson), from SDWVA at Huntington (Chambers). VLW 021-2-281. 20 pp.*

MOST IMPORTANT OPINIONS OF 2021

Criminal

Home monitoring is custody for escape statute purposes

Where appellant was placed in a home incarceration program, he was in the custody of “a court, jail or law enforcement agent,” and was properly charged with, and convicted of, felony escape after he removed his ankle GPS monitor. Affirmed. *King v. Commonwealth, Record No. 1216-20-4, July 13, 2021. CAV (Huff) from the Chesterfield County Circuit Court (Hauler).* VLW 021-7-089, 6 pp. Published.

Criminal

New hearing ordered because of attorney’s conflict-of-interest

Where an attorney argued during a plea withdraw hearing against his client’s motion to withdraw his guilty plea, that conflict of interest warrants a new hearing with conflict-free counsel. *United States v. Glover, Case No. 19-4801, August 9, 2021. 4th Cir. (Gregory), from DSC at Greenville (Cain).* VLW 021-2-276. 20 pp.

Criminal

No privacy expectation in packages sent to dead

Where FedEx packages containing cocaine were intentionally addressed to a deceased person, the intended recipient lacked any expectation of privacy in the packages when they were searched. *United States v. Rose, Case No. 19-4755, July 9, 2021. 4th Cir. (Keenan), from EDNC at Wilmington (Dever).* VLW 021-2-254. 36 pp.

Criminal

Question about illegal items in car wasn’t improper

Where a police officer asked two occupants in a stopped car whether there was “anything illegal” in the car, the motion to suppress firearms found in the car was denied because the question went to officer safety, given the time of night, the high drug area and the history and behavior of one of the occupants. *United States v. Buzzard, Case Nos. 20-4087, 20-4221, 20-4228, June 11, 2021. 4th Cir. (Diaz), from SDWVA at Charleston (Goodwin).* VLW 021-2-199. 14 pp.

Criminal

Tobacco products in plain view no basis for car search

Even though police saw tobacco products in plain view after stopping a car in which all occupants were too young to legally possess tobacco, this did not justify a vehicle search. *Commonwealth v. Decker, Case No. CR20-1003, Jan. 26, 2021, Virginia Beach Cir. Ct. (Duffan).* VLW 021-8-019, 4 pp.

Criminal

Unused witness declaration is work product

A declaration executed by a witness, but which was never used by the defendant, is the product of an attorney’s efforts in furtherance of a litigation strategy, and work product rules apply.

Huguely v. Clarke, Case No. 7:20-cv-30021, Feb. 15, 2021. WDVA at Roanoke (Cullen). VLW 021-3-064. 8 pp.

Domestic Relations

Alleged abuse of daughters not grounds for cruelty

Where wife has counterclaimed for a divorce on grounds of cruelty, her allegations that husband sexually abused the parties’ daughters when they were minors, and the effect this had on wife, “do not constitute cruelty for purposes of divorce under Virginia law.” The court sustains husband’s demurrer to the counterclaim. *Lucas v. Lucas, Case No. CL 20-6065, May 7, 2021, Fairfax County Cir. Ct. (Lannetti).* VLW 021-8-074, 14 pp.

Domestic Relations

Alleged paramour’s existing information must be disclosed

Where wife counterclaimed for a divorce on grounds of adultery, husband’s alleged paramour cannot claim a Fifth Amendment privilege in response to a civil subpoena duces tecum for existing personal, private information, even if such information is incriminating. *Burt v. Burt, et al., Case No. CL 2021-351, May 20, 2021, Fairfax Cir. Ct. (Oblon).* VLW 021-8-076, 7 pp.

Domestic Relations

Appeal improperly dismissed as sanction for violation

Where a father disclosed a sealed report to the children’s stepmother concerning a court-ordered independent psychological evaluation, the court erred by dismissing his de novo appeal of the J&RD court’s custody award to mother. Dismissal was an “unduly severe sanction” because the children were entitled to the circuit court’s consideration of their best interests. Lesser sanctions were available for “misconduct tangentially related to the underlying suit[.]” *Winters v. Winters, Record No. 0060-21-2, Oct. 26, 2021. (CAV) Humphreys. From the City of Richmond Circuit Court (Cavedo).* VLW 021-7-143, 15 pp. Published.

Domestic Relations

Business expenses deducted from income to determine child support

Where father receives child support payment from mother, father’s income from his rental units may be offset by his reasonable rental business expenses for purposes of calculating the child support guidelines. *Winslow v. Winslow, Case No. CL-2014-3101, Oct. 12, 2021, Fairfax Circuit Court (Oblon).* VLW 021-8-121, 8 pp.

Domestic Relations

Court articulates factors for awarding attorneys’ fees

Where the divorcing parties each seek attorneys’ fees from the other, the court provides the guidelines and considerations it uses to determine whether to shift attorneys’ fees. *Dwoskin v. Dwoskin, Case No. CL-2019-3494, March 5, 2021, Fairfax County Cir. Ct. (Oblon).* VLW 021-8-038, 9 pp.

Domestic Relations

Court lacked jurisdiction to issue support order

Where appellant wife served process of her divorce action on husband by publication, the circuit court correctly vacated a portion of the divorce decree ordering him to pay child support. The court never acquired personal jurisdiction over him. *Evans v. Evans, Record No. 201108 (Kelsey) July 15, 2021, COA. VLW 021-6-053, 15 pp.*

Domestic Relations

Court will not unseal mother’s expunged criminal records

In this custody dispute, where petitioner-father seeks to unseal mother’s expunged criminal records and to intervene in pending expungement proceedings, the court denies petitioner’s motions. *Weil v. No Defendant; Dietrich v. Commonwealth, Case No. CL-2021-7714; Case Nos. CL-2020-19281, CL-2020-19285, CL-2021-7734, June 14, 2021, Fairfax Circuit Court (Oblon).* VLW 021-8-081, 9 pp.

Domestic Relations

Equitable distribution award was based on evidence

Contrary to husband’s argument on appeal, the trial court considered his financial exhibits, along with other evidence, when awarding wife one-half of the marital equity in a residence husband owned before the marriage. The court’s division of this marital asset, along with an attorney’s fee award to wife, are summarily affirmed. Further, wife is entitled to appellate attorney fees, and fees incurred in the remand proceedings. *Botos v. Botos, Record No. 0385-21-3, Nov. 9, 2021. CAV (per curiam) from Salem City Circuit Court (Dorsey).* VLW 021-7-156, 8 pp. Unpublished.

Domestic Relations

Failure to give continuance after COVID concern error

Where the circuit court conducted a divorce trial even though wife notified the court that she had a possible COVID-19 exposure and had a fever, the court abused its discretion by not granting her a continuance. Moreover, the lack of a continuance injured wife because the court made decisions about equitable distribution, child and spousal support, and modified a custody agreement, based solely on husband’s evidence. *Marinaro v. Marinaro, Record No. 1160-20-1, Aug. 3, 2021. CAV (Athey) from the Virginia Beach City Circuit Court (Lewis).* VLW 021-7-115, 10 pp. Published.

Domestic Relations

Husband not entitled to spousal support

The court issues a final decree of divorce on the grounds that the parties have lived separate and apart, without cohabitation and without interruption for more than one year. The court cannot grant wife’s counterclaim for a divorce based on cruelty because there is no corroborating evidence. Further, husband is not entitled to spousal support from wife. *Barth v. Barth, Case No. CL2000762M-03, April 15, 2021, Newport News Cir. Ct. (Mills).* VLW 021-8-065, 12 pp.

Domestic Relations

Husband remains liable for marital debt despite refinancing

Under a PSA, husband was liable for all marital debts; his subsequent loan default and post-marriage refinancing by both parties did not make wife responsible for half of the new loan. *Price v. Peek f/k/a/ Price, Record No. 0852-20-3, Dec. 22, 2020. CAV (Decker) from Scott County Cir. Ct. (Hamilton).* VLW 020-7-240, 8 pp. Published.

Domestic Relations

Husband’s spousal support obligation eased

Where wife’s income and expense work-sheet “exaggerates her need for financial support,” the court will modify its previously issued pendente lite spousal support award. *Lamboy v. Lamboy, Case No. CL 20-6846, Feb. 24, 2021, Loudoun County Cir. Ct. Opinion and Order (Fisher).* VLW 021-8-031, 10 pp.

Domestic Relations

Mother must return child to Canadian father

Where the Canadian father established the minor child was “habitually resident” in Canada when she was removed by the mother, the removal was in breach of his Canadian rights and the mother failed to show the child was in grave risk of harm if returned, the child was ordered returned to the father. *Nowlan v. Nowlan, Case No. 5:20-cv-00102, June 10, 2021. WDVA at Harrisonburg (Cullen).* VLW 021-3-293. 85 pp.

Domestic Relations

No continuance after fourth lawyer withdrew

Where husband’s fourth lawyer withdrew from representation on the morning of trial, the circuit court correctly denied husband’s motion for a continuance. Further, the court’s rulings regarding the equitable distribution and child support credits are affirmed. *Fendley v. Fendley, Record No. 1430-20-2, Aug. 3, 2021. CAV (O’Brien) from Henrico County Circuit Court (Lilley).* VLW 021-7-118, 12 pp. Unpublished.

Domestic Relations

‘Well-settled’ child stays in U.S. over dad’s protest

A child whose mother refused to return her to Honduras will remain here. She regularly attends school, gets good grades, has become fluent in English and has a support network here. *Luis Alfonso V.H v. Banessa Cristina A.Z., Case No. 5:20-cv-00042, Jan. 8, 2021. WDVA at Harrisonburg (Dillon).* VLW 021-3-012. 23 pp.

MOST IMPORTANT OPINIONS OF 2021

Employment

Bad economy not cause to withhold deferred compensation

Where a furniture company claimed the economic downtown allowed it to suspend payment of deferred compensation to executives, that argument fails. Neither the plan documents nor the impossibility doctrine allowed the suspension of payments based on a poor economy. *Clark v. Stanley Furniture Company LLC, Case No. 4:20-cv-00063, Oct. 14, 2021. WDVA at Danville (Cullen).* VLW 021-3-488. 21 pp.

Employment

Corporate officers are not employers in unpaid wage case

A corporation’s president and its chair of the board are not “employers” for purposes of plaintiffs’ claim for unpaid wages under Code § 40.1-29(J). *Cornell, et al. v. Christian Psychotherapy Services, et al., Case No. CL21-747, June 11, 2021, Virginia Beach Circuit Court (Duffan).* VLW 021-8-092, 7 pp.

Employment

Employees sued for violating severance agreements

Where former Capital One employees agreed in their severance agreements not to file a collective action, but then did so, Capital One’s breach of contract counterclaim may proceed. *Cortez-Melton v. Capital One Financial Corp., Case Nos. 3:19-cv-127, 3:20-cv-404, 3:20-cv-415, Feb. 26, 2021. EDVA at Richmond (Lauck).* VLW 021-3-090. 22 pp.

Employment

Ex-employee prevails on claims of conversion, and conspiracy

Where a roofing company alleged its former salesperson received unauthorized payments, he prevails on the conversion claim because there was no evidence the payments were wrongful or unauthorized. Because there was no evidence he agreed to injure the company, he also prevails on the business conspiracy claim. *Modern Renovations LLC v. Wescott, Case No. 5:20-cv-00044, Oct. 22, 2021. WDVA at Harrisonburg (Urbanski).* VLW 021-3-497. 11 pp.

Employment

Ex-employee won’t been joined from new employment

An ex-employee violated a noncompete by taking a new position, but a requested injunction was denied; the evidence did not show extensive or specialized training sufficient to justify restrictions. *Adesa Inc. v. Lewis, Case No. 1:20-cv-00044, Jan. 20, 2021. WDVA at Abingdon (Jones).* VLW 021-3-017. 10 pp.

Employment

Jury to decide if director was terminated because of protected speech

Where the director of the Pittsylvania County Department of Social Services, or DSS, was terminated 15 days after she gave a speech that criticized the DSS board, a jury will decide whether the

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speech was the but-for cause of her termination. *Flanagan v. Searce, Case No. 7:19-cv-00413, Sept. 22, 2021. WDVA at Roanoke (Cullen).* VLW 021-3-455. 29 pp.

Employment

Nurse can sue, claims she was fired for whistleblowing

Where a registered nurse alleged that she was terminated four days after she complained that the hospital’s refusal to accept children in need of immediate emergency psychiatric care violated federal law, she plausibly stated a claim for whistleblower retaliation. *Hartman v. Centra Health Inc., Case No. 6:20-cv-00027, July 23, 2021. WDVA at Lynchburg (Moon).* VLW 021-3-362. 23 pp.

Employment

Punitive damages available in public policy discharge case

Where plaintiff alleges that he was fired after he complained to defendant employer that he was not being timely paid, he has stated a claim for discharge in violation of public policy. Further, defendant’s demurrer to plaintiff’s claim for punitive damages is overruled. However, the demurrer to plaintiff’s attorney fees claim is sustained. *Frank v. True Color Painters, Case No. CL 2021-7835, Oct. 4, 2021, Fairfax Circuit Court (Gardiner).* VLW 021-8-120, 5 pp.

Employment Discrimination

Court strikes ‘placeholder’ opposition brief

Where the plaintiff obtained an extension, but then filed a “placeholder” brief before filing a “corrected” brief three days later, the “corrected” brief was struck. Summary judgment granted. *Zhou v. Lowe’s Home Centers LLC, Case No. 1:20-cv-370, June 29, 2021. EDVA at Alexandria (Alston).* VLW 021-3-333. 27 pp.

Employment Discrimination

Creation of job-share not required by ADA

Where there was no existing “job sharing” position available for the pharmaceutical sales representative in the district, the company had no duty to create one in order to reasonably accommodate her disability. Although the company had previously permitted her to share a position, it was not required to do so again. *Perdue v. Sanofi-Aventis US LLC, Case No. 19-2094, June 8, 2021. 4th Cir. (Richardson), from WDNC at Asheville (Reidinger).* VLW 021-2-190. 15 pp.

Employment Discrimination

DEA special agent alleges he was compelled to resign

Where a former Drug Enforcement Agency special agent alleged facts supporting his claim that he was forced to resign after submitting an Equal Employment Opportunity complaint, his retaliatory constructive discharge claim survived the motion to dismiss. *Katz v. Department of Justice, Case No. 1:20-cv-554, Aug. 26, 2021. EDVA at Alexandria (Ellis).* VLW 021-3-422. 24 pp.

Employment Discrimination

Employee alleges he was fired for being a male

Where a male employee alleged that his employer made statements suggesting his gender was a motivating factor in his termination, he plausibly alleged a claim for Title VII sex discrimination. *Whitley v. SecTek Inc., Case No. 1:20-cv-01411, Aug. 13, 2021. EDVA at Alexandria (Alston).* VLW 021-3-403. 7 pp.

Employment Discrimination

Employee fired for belligerent behavior, not race or religion

Where the record showed the plaintiff was fired for his repeated belligerence and insubordination in the workplace, and that his race or religion played no role in the decision to fire him, his employer prevailed on bias and retaliation claims. *Lighty v. Gates Hudson & Associates Inc., Case No. 1:19-cv-1520, Sept. 28, 2021. EDVA at Alexandria (Alston).* VLW 021-3-463. 18 pp.

Employment Discrimination

Federal employees can’t sue for disparate impact under ADEA

The text, structure and legal landscape in which the Age Discrimination in Employment Act, or ADEA, was passed do not support a finding that the statute’s federal-sector provision encompasses disparate-impact liability. *DiCocco v. Garland, Case No. 20-1342, Nov. 17, 2021. 4th Cir. (Richardson), from EDVA at Richmond (Gibney).* VLW 021-2-310. 47 pp.

Employment Discrimination

Government contractor not plaintiff’s ‘employer’

Where the government contractor did not supervise plaintiff’s work product, determine her hours or provide her with equipment necessary to perform her duties, it lacked the degree of control over the essential terms and conditions of her work necessary to make it her “employer.” Because the Americans with Disabilities Act, or ADA, does not ex-

tend to independent contractors, it was not liable under that statute. *Smith v. CSRA, Case No. 20-1377, Sept. 1, 2021. 4th Cir. (Gregory) from EDVA at Alexandria (O’Grady).* VLW 021-2-289. 43 pp.

Employment Discrimination

Inapt comparators doom Equal Pay Act claim

Where a Virginia Department of Transportation coordinator alleged she was paid less than male coordinators, but the alleged comparators worked in a different regional district, and each of the department’s nine districts makes its own compensation decisions, her Equal Pay claim fails. *Winks v. Virginia Department of Transportation, Case No. 3:20-cv-420, Nov. 30, 2021. EDVA at Richmond (Hudson).* VLW 021-3-530. 12 pp.

Employment Discrimination

Jury to decide if firing of 60-year-old was based on age

Where the company claimed it terminated a long-time, 60-year-old employee because of poor performance, but there was conflicting testimony on whether his handling of general safety concerns was egregious enough to prompt termination, the company’s motion for summary judgment was denied. *Cannada v. Old Dominion Brush Company Inc., Case No. 3:20-cv-952, Nov. 19, 2021. EDVA at Richmond (Hudson).* VLW 021-3-527. 19 pp.

Employment Discrimination

Migraines substantially limit employee’s ability to work

Where an employee alleged her migraines were “debilitating” and rendered her unable to drive, travel, read printed material, view computer imaging or be in a heavily lit room, she plausibly alleged the migraines substantially limited her ability to work. *Dedrick v. Abilene Motor Express Inc., Case No. 1:21-cv-00027, Nov. 8, 2021. WDVA at Abingdon (Jones).* VLW 021-3-510. 21 pp.

Employment Discrimination

Nonselection for open job wasn’t retaliation

Where an Army employee who applied for an open position alleged her nonselection was the result of protected activity, but there was a several-month gap between the protected activity and her not being chosen for the post, there was no causal connection and the retaliation claim was dismissed. *Laurent-Workman v. McCarthy, Case No. 1:20-cv-01272, June 11, 2021. EDVA at Alexandria (Trenga).* VLW 021-3-304. 27 pp.

Employment Discrimination

Plaintiff’s own allegations doom age discrimination claim

Although a former executive administrative assistant alleged she was terminated because of her age, her own complaint stated her position was eliminated because much of her job had been absorbed by advances in technology and that other tasks were dispersed to other employees. *Jones v. Marriott International LLC, Case No. 1:20-cv-636, Oct. 29, 2021. EDVA at Alexandria (Alston).* VLW 021-3-504. 12 pp.

MOST IMPORTANT OPINIONS OF 2021

Employment Discrimination

Police officer was not wrongfully terminated

Where a former senior Chesapeake police officer had been disciplined in four separate incidents before he voluntarily resigned, he had not been satisfying the city’s legitimate expectations, dooming his race bias claim. *Satterfield v. City of Chesapeake Virginia, Case No. 4:20-cv-00005, Oct. 14, 2021. EDVA at Norfolk (Miller).* VLW 021-3-485. 25 pp.

Employment Discrimination

Reassignment backs failure-to-accommodate suit

In a case of first impression, the court held that where an employer transfers an employee from a position they could perform if provided with reasonable accommodations to a position they do not want, that could support a failure-to-accommodate claim. *Wirtes v. City of Newport News, Case No. 19-1780, April 30, 2021. 4th Cir. (Wynn), from EDVA at Newport News (Leonard).* VLW 021-2-159. 18 pp.

Employment Discrimination

Release may not bar Title VII claims

Where a company argued a prior release with the employee barred his Title VII claims, it was denied judgment on the pleadings because the employee argued that he never obtained the \$100 consideration required by the agreement, the consideration was inadequate and the “boilerplate” language was unenforceable. *Al-Rasheed v. DBI Services LLC, Case No. 2:20-cv-201, May 18, 2021. EDVA at Norfolk (Jackson).* VLW 021-3-256. 9 pp.

Employment Discrimination

Request for irritant-free workplace was unreasonable

Where a National Science Foundation employee requested no “airborne irritants” in the workplace, which would have included personal hygiene and standard cleaning products, her fatally vague and overbroad request was unreasonable as a matter of law. *Call v. Panchanathan, Case No. 1:20-cv-260, Sept. 15, 2021. EDVA at Alexandria (Ellis).* VLW 021-3-443. 16 pp.

Employment Discrimination

Virginia nonsuit rule not applicable in Title VII case

Virginia state courts allow a party to refile within six months after taking a voluntary nonsuit, even if the statute has expired; this rule is inapplicable in a federal case involving purely federal claims. *Dyson v. Henrico County School Board, Case No. 3:20-cv-547, Dec. 16, 2020. EDVA at Richmond (Lauck).* VLW 020-3-623. 11 pp.

Evidence

Burdens shift in fraudulent conveyance case

Where plaintiff established a presumption of a fraudulent conveyance, the trial court erred by ruling that only the burden of production, but not the burden of persuasion, shifted to defendants to over-

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come the presumption. *White v. Llewellyn, et al., Record No. 191599 (Goodwyn) May 6, 2021, From the circuit court of Henrico County (Wallerstein).* VLW 021-6-029, 11 pp.

Evidence

Corporate officers can’t claim privilege over documents

Where former corporate officers who were sued for an alleged unlawful online lending scheme claimed privilege over documents between the company and its counsel, the argument was denied because the privilege was lost when control of the company passed to new management. If the company believed the documents were privileged, it could intervene to assert that position. *Gibbs v. Stinson, Case No. 3:18-cv-676, Oct. 17, 2021. EDVA at Richmond (Lauck).* VLW 021-3-491. 27 pp.

Evidence

New counsel must ensure compliance with discovery

Where the defendant produced only four documents in response to plaintiff’s requests for production, and the plaintiff identified documents that should have been produced but were not, the defendant’s new counsel must ensure his client’s compliance with the federal rules. *Gilmore v. Jones, Case No. 3:18-cv-00017, April 21, 2021. WDVA at Charlottesville (Hoppe).* VLW 021-3-202. 6 pp.

Insurance

Carriers had duty to provide indemnity coverage to suits

Where the plaintiff was sued following a merger, the insurance carriers had a duty to provide indemnity coverage for any settlements or adverse judgments because an exclusion did not unambiguously exclude the merger from coverage. *Towers Watson & Co. v. National Union Fire Insurance Company of Pittsburgh PA, Case No. 1:20-cv-810, Oct. 5, 2021. EDVA at Alexandria (Trenga).* VLW 021-3-481. 25 pp.

Insurance

Exclusions bar COVID-19 coverage

Where a logistics and warehouse company submitted a claim for business losses caused by COVID-19 and shutdown orders, the complaint was dismissed because the virus and organic pathogen exclusions prohibit claims caused by a virus. *L&L Logistics & Warehousing Inc. v. Evanston Insurance Company, Case No. 3:20-cv-324, April 13, 2021. EDVA at Richmond (Payne).* VLW 021-3-199. 26 pp.

Insurance

Household residency not determined by intent alone

A woman who intended to live with her grandfather was not a member of his household and therefore not eligible for uninsured motorist coverage after she was injured in a traffic accident. Subjective intent is a factor in determining whether someone is a household member but “this intent must also be coupled with objective indicia of becoming a part of the household unit.” Those indicators were not present in this case. *Estep v. Hubbard, et al., Case No. CL20-2932; Sept. 14, 2021, Roanoke Circuit Court (Carson).* VLW 021-8-115, 4 pp.

Insurance

Plaintiffs may amend complaint to name correct corporate entity

Plaintiffs seeking fire coverage failed timely to name the correct defendant, but the corporate family had notice of the suit and would not suffer prejudice. Late amendment allowed. *Neale v. Liberty Mutual Insurance Company, Case No. 6:20-cv-42, Dec. 17, 2020. WDVA at Lynchburg (Moon).* VLW 020-3-615. 9 pp.

Insurance

Single-subscriber insurance plan not covered by ERISA

Where the insurance plan covered only the law firm owner as an insured subscriber, it was not an “employee benefit plan” under ERISA. No federal question, so case sent back to circuit court. *Doe v. Anthem Health Plans of Virginia Inc., Case No. 2:20-cv-408, Dec. 22, 2020. EDVA at Norfolk (Young).* VLW 020-3-642. 15 pp.

Insurance

Trustee not needed for distribution to adults

Where the children of the decedent were entitled to the \$500,000 in her life insurance policy, a trustee was not needed to monitor distribution of benefits; both are responsible adults. *The Northwestern Mutual Life Insurance Company v. Moore, Case No.1:19-cv-1312, Jan. 5, 2021. EDVA at Alexandria (Ellis).* VLW 021-3-006. 14 pp.

Insurance

Virus exclusion bars coverage for COVID order losses

Where a salon sought coverage under its business loss policy for losses suffered when it closed because of COVID orders, the insurer prevails because its virus exclusion precluded claims for business losses related to the COVID-19 pandemic. *Adorn Barber &*

Beauty LLC v. Twin City Fire Insurance Company, Case No. 3:20-cv-418, Oct. 18, 2021. EDVA at Richmond (Payne). VLW 021-3-492. 25 pp.

Intellectual Property

Abstract idea ineligible for patent protection

Where the plaintiff sought to patent a system and method for targeting specific content to individual users of a website, his application was properly denied because it was an abstract idea ineligible for patent protection under 35 U.S.C. § 101. *Nomula v. Hirschfeld, Case No. 1:20-cv-1417, Sept. 20, 2021. EDVA at Alexandria (Ellis).* VLW 021-3-457. 17 pp.

Labor

Notices on negotiations wasn’t unfair labor practice

Where the manufacturing company posted notices about then-ongoing negotiations with the union, but did so in a straightforward manner that expressed its position without directly or indirectly soliciting employee action, it did not commit an unfair labor practice. *Tecnocap LLC v. National Labor Relations Board, Case Nos. 19-2109, 19-2191, June 17, 2021. 4th Cir. (Agee), from National Labor Relations Board.* VLW 021-2-207. 37 pp.

Medical Malpractice

Challenge to damages cap premature

Where it has not been resolved yet whether healthcare professionals caused or exacerbated plaintiff’s injuries, he lacks standing to challenge the damages cap is unconstitutional. *J.S. v. Winchester Pediatric Clinic PC, Case No. 5:19-cv-0097, March 4, 2021. WDVA at Harrisonburg (Urbanski).* VLW 021-3-086. 18 pp.

Medical Malpractice

Untimely expert report dooms negligence suit

Where a woman suing for medical malpractice arising out of surgery to fix an abdominal hernia failed to file an expert report by the deadline, and then provided a late expert report that was deficient, her motion to permit a late expert disclosure was denied. The doctor was granted summary judgment because the patient could not establish a prima facie case of negligence. *Ricks v. Huynh, Case No. 2:20-cv-292, May 20, 2021. EDVA at Norfolk (Doumar).* VLW 021-3-260. 15 pp.

Negligence

Gross negligence claim against trucker proceeds

Where the parents of a 6-year-old killed in an automobile accident alleged the trucker that struck their vehicle continued to operate at full speed despite warnings of slowed traffic, they plausibly alleged a claim for gross negligence. *McCann v. Everette, Case No. 3:21-cv-00069, May 14, 2021. EDVA at Richmond (Novak).* VLW 021-3-262. 22 pp.

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Negligence

Gross negligence claim duplicative in malpractice suit

Where an ex-divorce client asserted a lawyer committed legal malpractice in her case, her claim for gross negligence was dismissed as duplicative of the legal malpractice claim. *Amari v. Griffin, Case No. 5:20-cv-00050, Jan. 27, 2021. WDVA at Harrison-burg (Dillon).* VLW 021-3-029. 11 pp.

Negligence

Law firm isn’t liable for its attorney’s auto accident

Where a skateboarder sued a law firm after being struck by a car driven by one of its attorneys, even if the attorney used his cellphone for work-related purposes at the time of the accident, the firm was not liable because he was not performing a “special assignment” or “errand” and was, instead, engaged in his everyday commute. *Garver v. Holbrook, Case No. 3:21-cv-235, June 30, 2021. EDVA at Richmond (Novak).* VLW 021-3-329. 14 pp.

Negligence

Negligent hiring claim fails, injury was to horse

Where the defendants were sued for negligently recommending a company to transport show horses, one of which was injured in an automobile accident, the claim failed because there can be no negligent hiring claim where there is no injury to a person. *Lowe v. JTF Leasing LLC, Case No. 5:20-cv-00054, April 28, 2021. WDVA at Harrisonburg (Dillon).* VLW 021-3-218. 3 pp.

Negligence

No claim for negligent supervision of nonemployee

Where the owner of two annuities alleged her financial adviser transferred the proceeds into a Ponzi scheme, her negligent supervision claim against a life insurance company failed because the adviser was not its employee. *Carlisle v. Allianz Life Insurance Company of North America, Case No. 2:19-cv-565, May 21, 2021. EDVA at Norfolk (Smith).* VLW 021-3-419. 17 pp.

Negligence

No duty to warn about wood dust

Where the plaintiff alleged his cancer was caused by exposure to wood dust from 1981-1992, but the link between wood dust and cancer was not known at the time, judgment was granted to the lumber manufacturers. *Lightfoot v. Georgia-Pacific Wood Products LLC, Case No. 20-1334, July 14, 2021. 4th Cir. (Niemeyer), from EDNC at Wilmington (Flanagan).* VLW 021-2-256. 22 pp.

Negligence

Opinion about future surgery not speculative

Where the expert for a woman injured in an automobile accident opined that she would need a future spinal fusion surgery, but that she would have to lose a substantial amount of weight before that

surgery, the weight loss contingency did not render the opinion speculative. *Jones v. Szczur, Case No. 7:20-cv-00647, June 25, 2021. WDVA at Roanoke (Cullen).* VLW 021-3-314. 9 pp.

Negligence

Removal after ad damnum increase proper

Where a shopper suing Walmart for injuries suffered when a box fell on her initially sought \$75,000 in damages in state court and then moved to increase her ad damnum, Walmart properly removed the case for diversity jurisdiction. *Dean v. Walmart Inc., Case No. 3:20-cv-766, Feb. 25, 2021. EDVA at Richmond (Hudson).* VLW 021-3-076. 5 pp.

Negligence

Sovereign immunity denied to deputy in car crash case

Plaintiff alleges she was hurt in a wreck caused by a deputy’s negligence while driving to serve legal papers, his plea of sovereign immunity is denied. Driving to serve papers was a ministerial act, incidental to the governmental duty being performed. *Freeman v. Walker, Case No. CL-2020-11547, April 7, 2021, Fairfax Cir. Ct. (Kassabian).* VLW 021-8-053, 6 pp.

Negligence

Treating physicians may testify regarding cause of injury

Where a woman’s treating physicians reached their opinions while treating her that a motor vehicle accident caused her spinal injury, no expert report was necessary. And where the opinions were disclosed during discovery and depositions, there was no prejudice to the defendant. *Fantauzzo v. Sperry, Case No. 2:21-cv-4, Nov. 10, 2021. EDVA at Norfolk (Miller).* VLW 021-3-516. 18 pp.

Negligence

Trooper’s testimony incorrectly admitted in car crash case

Where a police officer’s testimony amounted to his subjective interpretation of what plaintiff told him while he was investigating an accident, in which defendant rear-ended plaintiff’s car, the trial court should have excluded the testimony. *Grimsley v. Watkins, Record No. 201200 (Unpublished Order) Sept. 30, 2021. Upon an appeal from a judgment rendered by the Circuit Court of Albemarle County.* VLW 021-6-065, 5 pp.

Personal Injury

Claims arising from trash fire go forward

Where plaintiff firefighters claim they were injured while responding to a trash fire at defendant’s facility, the fireman’s rule does not bar their negligence and gross negligence claims. *Cockey v. Covanta Fairfax, Case No. CL-2019-0001502; Neuhaus v. Covanta Case No. CL-2019-0001504, Aug. 4, 2021, Fairfax County Circuit Court (Ortiz).* VLW 021-8-099, 13 pp.

Personal Injury

Nuisance claim for missing stop sign goes forward

Where plaintiff alleges that a city created a public nuisance by not replacing a missing stop sign at the intersection where another driver collided with her car, the city’s demurrer is overruled. However, the city’s special plea of sovereign immunity to plaintiff’s negligence claim arising from the same facts is sustained. *Graves v. Griggs and the City of Norfolk, Case No. CL20-4935, April 9, 2021, Norfolk City Cir. Ct. (Lannetti).* VLW 021-8-061, 11 pp.

Personal Injury

Statute of repose no barrier to wrongful death case

Where a trucker was killed when a machine malfunctioned, the circuit court characterized it as “ordinary building material” and incorrectly applied the five-year statute of repose to dismiss the case. *Potter v. BFK, Inc., Record No. 191716 (Powell) July 22, 2021, Loudoun County Circuit Court (Irby).* VLW 021-6-052, 8 pp.

Premises Liability

Hospital had constructive notice of wet floor

Where plaintiff was injured on a wet floor in defendant hospital, the circuit court erred by granting the hospital’s motion to strike based on plaintiff’s failure to state a prima facie case of negligence. *Barbour v. Carilion Medical Center, Record No. 200136 (Order), April 15, 2021. Upon an appeal from a judgment rendered by the Circuit Court of the City of Roanoke.* VLW 021-6-023, 5 pp.

Premises Liability

Store sanctioned for not preserving footage of slip, fall

Where a Kroger security camera recorded a customer’s slip and fall but failed to preserve the footage, multiple sanctions were imposed, including denial of summary judgment. *Butler v. Kroger Limited Partnership I, Case No. 2:19-cv-673, Dec. 18, 2020. EDVA at Norfolk (Smith).* VLW 020-3-639. 47 pp.

Products Liability

Post-sale duty to warn about defective product recognized

The Virginia Supreme Court has yet to recognize a post-sale duty to warn, but a maker could be liable for failing to warn of dangers discovered after sale if providing warnings was reasonable. *Dodson v. C.R. Bard Inc., Case No. 3:20-cv-596, Dec. 23, 2020. EDVA at Richmond (Novak).* VLW 020-3-641. 20 pp.

Real Estate

Claims reinstated in lis pendens case

Where the circuit court sustained, on the basis of absolute privilege, appellee’s demurrers to claims arising from a lis pendens filing on property, this was error. Absolute privilege is an affirmative defense, which may not be raised in a demurrer. *Givago Growth, et al. v. iTech AG, et al., Record No. 201267 (Mims) Oct. 14, 2021. From the Circuit Court of Fairfax*

County (Bernhard). VLW 021-6-067, 7 pp.

Real Estate

Reverter clause in 1875 charitable gift upheld

Where land was conveyed to a church under an 1875 deed that provided the land would revert to the grantors or their heirs if it was not used for church purposes, this was not an unreasonable restraint on alienation. As a result, when there was a default on a loan secured by the land, the trial court correctly dismissed an action to void the reverter clause filed by a developer who bought the land at a foreclosure sale. *Canova Land and Investment Co. v. Lynn, et al., Record No. 200476, April 8, 2021 (Mims). From the Circuit Court of Prince William County (Horan).* VLW 021-6-024, 10 pp.

Sanctions

Discovery failures result in default judgment on liability

Where a defense contractor that was sued for employment discrimination failed to make its initial disclosures and failed to respond to discovery despite a court order, and these actions prejudiced the former employee, a default judgment was entered on liability. *Burnett v. Blueforce Inc., Case No. 4:20-cv-183, Nov. 23, 2021. EDVA at Newport News (Young).* VLW 021-3-528. 9 pp.

Sanctions

No sanctions despite no preservation of documents

Where a defendant had a duty to preserve relevant documents and failed to do so, because there was no evidence he willfully destroyed evidence, no sanctions were imposed. *Flanagan v. Scearce, Case No. 7:19-cv-00413, Aug. 19, 2021. WDVA at Roanoke (Cullen).* VLW 021-3-406. 13 pp.

Sanctions

Record supports sanctions ordered by magistrate judge

Where a party demonstrated a lack of good faith by repeatedly violating the court’s discovery orders, its conduct caused its own counsel to make misleading statements and obstruct meaningful discovery, and the defendants suffered prejudice, a magistrate judge’s sanctions order was affirmed. *Trustee of the Harmon 1999 Descendants’ Trust v. Harmon, Case No. 1:20-cv-0144, Nov. 19, 2021. EDVA at Alexandria (Alston).* VLW 021-3-524. 21 pp.

Sanctions

Spoliation nets fee a ward of nearly \$97K

Where a software provider in a contract dispute over an agreement to provide services found CarMax allowed potentially relevant information to be wiped from laptops, thus depriving the software provider of discovery, it was awarded \$96,975.70 in attorneys’ fees and costs incurred in preparing its successful sanctions motion. *The Danville Group v. Carmax Business Services LLC, Case No. 1:20-cv-696, June 3, 2021. EDVA at Alexandria (Buchanan).* VLW 021-3-283. 7 pp.

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Taxation

Internet provider liable for city’s business tax assessment

An internet service provider must pay a city’s business tax assessments because the city began collecting the tax before the effective date of a federal law that bars taxation of internet service access revenues. *Cox Communications v. City of Norfolk, et al.*, Case No. CL19-4764, July 9, 2021 Norfolk City Circuit Court (Lan-netti). VLW 021-8-090, 13 pp.

Tort

Alleged defamatory statements lacked ‘sting’

Statements contained in a disciplinary form lacked the requisite “sting” to be actionable as defamation. Further, any republication of the statements and other statements made in proceedings before the VEC are absolutely privileged. *Bryant-Shannon v. Hampton Roads Community Action Program*. Record No. 200153, April 8, 2021 (Lemons). From the Circuit Court of the City of Newport News (Savage). VLW 021-6-021, 12 pp.

Tort

Hyperlinks don’t constitute republication

Where a woman who had been associated with former Trump National Security Advisor Michael Flynn brought defamation claims against several media organizations claiming a conspiracy to defame and injure her, neither linking to the original article via a hyperlink nor tweeting a link constitutes republication. *Lokhova v. Halper*, Case Nos. 20-1368, 20-1437, April 15, 2021. 4th Cir. (Thacker), from EDVA at Alexandria (Brinkema). VLW 021-2-134. 32 pp.

Tort

No breach of duty of loyalty despite competing with employer

Where three employees formed a company and competed with their current employer for a contract from another company, they did not breach a duty of loyalty owed to their employer because they were preparing for work that would begin after their employment was set to end. *Adnet Inc. v. Soni*, Case No. 1-21-cv-00130, Sept. 17, 2021. EDVA at Alexandria (Nachmanoff). VLW 021-3-458. 17 pp.

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Tort

No claim for ‘constructive fraud by omission’

Where an ophthalmologist alleged defendants fraudulently guaranteed geographic exclusivity of a medical device, his suit was dismissed because there is no claim for “constructive fraud by omission” in Virginia. Fraud by omission requires that the nondisclosing party deliberately fails to disclose a material representation while constructive fraud captures negligent (but otherwise innocent) omissions. *Northern Virginia Eye Institute PC v. Cynosure LLC*, Case No. 5:21-cv-00008, April 20, 2021. WDVA at Harrisonburg (Cullen). VLW 021-3-204. 10 pp.

Tort

Patient can sue for negligent supervision

A VA patient who was seduced into entering a sexual relationship with his therapist may pursue claims that the VA negligently supervised the therapist. *Lins v. United States*, Appeal No. 19-2069, Feb. 17, 2021. 4th Cir. (per curiam), from DMD at Baltimore (Hollander). VLW 021-2-067. 31 pp.

Tort

Prior lawyer not ‘necessary’ party in malpractice suit

Where the plaintiff sued her attorney for negligently representing her in a divorce action, and the defendant claimed a prior attorney was responsible, the former attorney was not a necessary party who needed to be involuntarily joined, even if he was a joint tortfeasor. *Amari v. Griffin*, Case No. 5:20-cv-00050, May 4, 2021. WDVA at Harrisonburg (Hoppe). VLW 021-3-227. 8 pp.

Tort

Private plaintiff has no right to injunctive relief under RICO

In an issue of first impression that has divided other circuits, the court held that the Racketeer Influenced and Corrupt Organizations, or RICO, Act does not give private plaintiffs a right to sue for injunctive relief. *Hengle v. Treppa*,

Case Nos. 20-1062, 10-1063, 20-1358, 20-1359, Nov. 16, 2021. 4th Cir. (Rushing), from EDVA at Richmond (Novak). VLW 021-2-309. 57 pp.

Trusts

No contest clause applies to sole beneficiary

A trust’s no-contest clause applies to the trustor’s suit against the trustees after they refused to distribute the trust proceeds to him. The clause operates against the trustor because while he is alive, he is the trust’s sole beneficiary. However, he can seek to terminate the trust under Code § 64.2-729 and sue the trustees for breaching their fiduciary duties. *Daniel H. McMurtrie, et al. v. Alexander B. McMurtrie Jr.*, Record No. 200404 (Order) April 22, 2021, Upon an appeal from a judgment rendered by the Circuit Court of Chesterfield County. VLW 021-6-027, 4 pp.

Wills and Trusts

Gift deed extinguished prior testamentary gifts

Although a will provided appellants gifts of two parcels of land, those gifts were extinguished when the decedent transferred the entire property without reserving the parcels for appellants. *Platt, et al. v. Griffith, et al.*, Record No. 190817, Jan. 21, 2021. Upon appeal from a judgment rendered by the Circuit Court of Henrico County. VLW 021-6-001, 5 pp.

Workers’ Comp

Appeal doomed by failure to comply with court rules

Where claimant does not challenge the Virginia Workers’ Compensation Commission’s ruling that his allergy symptoms were not causally connected to his workplace accident but instead seeks to have employer and its insurer pay him \$2 million and punitive damages, the appeal is dismissed because there is nothing for the court to review. *Murthy v. Frito Lay, et al.*, Record No. 1338-20-2, Aug. 31, 2021. CAV (per curiam) from the Virginia Workers’ Compensation Comm’n. VLW 020-7-127, 5 pp. Unpublished.

Workers’ Comp

Injuries in separate accidents bars permanent disability award

Where claimant injured his neck and left arm and hand in a work-related accident and later fell down some stairs at home and injured his left knee, the Court of Appeals erred by affirming the Virginia Workers’ Compensation Commission’s award of total disability. *Merck & Co. v. Vincent*, Record No. 200222 (Mims) May 27, 2021, CAV. VLW 021-6-038, 16 pp.

Workers’ Comp

Opinions properly weighed in coal dust disability case

The Virginia Workers’ Compensation Commission correctly weighed competing medical experts’ opinions to conclude that claimant, who worked for a coal company, had pneumoconiosis, which entitled him to permanent disability benefits. *Dickenson-Russell Coal Co., et al. v. Kiser*, Record No. 0328-21-3, Aug. 31, 2021. CAV (per curiam) from the Virginia Workers’ Compensation Comm’n. VLW 020-7-125, 6 pp. Unpublished.

Workers’ Comp

Reasonable notice required for attorney’s fee claim

The Workers’ Compensation Appellate Commission correctly interpreted its rules to require reasonable notice when requesting attorney’s fees from a health care provider. Although the relevant statute does not have a time requirement for filing a claim for attorney’s fees, the statute requires compliance with the commission’s Rule 6.2, which requires an attorney to provide a health care provider reasonable notice that an attorney’s fee motion will be filed. *Marks v. Henrico Doctors’ Hospital*, Record No. 0073-21-2, June 29, 2021. CAV (Huff) from the Virginia Workers’ Compensation Comm’n. VLW 021-7-076, 6 pp. Published.

Workers’ Comp

Traffic accident injuries did not arise from employment

Where the evidence showed that an employee driving to a work assignment faced no greater risk than others on the highway, the Virginia Workers’ Compensation Commission properly concluded that his injuries and eventual death resulting from a head-on crash did not arise from his employment. *Hazelwood v. Via Satellite, et al.*, Record No. 0389-21-2, Oct. 5, 2021. CAV (Humphreys) From the Virginia Workers’ Compensation Comm’n. VLW 020-7-132, 10 pp. Unpublished.