HEALTH CARE LAW

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Arguably, no other field of law in Virginia matches the complexity, magnitude, and universality of health care. It therefore comes as little surprise that Virginia's legislative and judicial branches of government devoted substantial attention to health care law issues in 2006 and 2007. Between April 2006 and April 2007—the time period covered by this article—the Supreme Court of Virginia decided a large number of cases directly affecting health care law in the Commonwealth. The 2007 legislative session also addressed a host of health care issues and those with the most impact are summarized herein. These judicial and legislative developments have altered Virginia's health care law landscape in notable ways, and this article summarizes and analyzes those changes.

I. JUDICIAL DEVELOPMENTS

Although several significant Supreme Court of Virginia opinions were handed down during the last year, reverberations from one of the court's 2006 cases in particular, *Riverside Hospital v. Johnson*,[1] are likely to be felt for quite some time. *Johnson* touches the heart of hospital-based care and the defense of resulting medical negligence litigation. It hints that a hospital's policies

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1. 272 Va. 518, 636 S.E.2d 416 (2006).

and procedures may be offered to establish the standard of care while, at the same time, holding that the facts contained in a hospital's incident reports are generally not considered privileged and can be discovered and admitted into evidence at trial under certain circumstances.

In addition to *Johnson*, several of the court's other health care-related decisions affect a wide range of substantive law. In *Castle v. Lester*[2] and *Kondaurov v. Kerdasha*,[3] the court addressed the extent to which a plaintiff can recover for emotional distress.[4] In *Holmes v. Levine*,[5] *Budd v. Punyanitya*,[6] and *Doherty v. Aleck*,[7] the court ruled on the admissibility of treating physician and expert witness testimony.[8] In *Lambert v. Javed*, the court held that a dismissal with prejudice for failure to comply with the statute of limitations is a dismissal on the merits sufficient to warrant application of the res judicata bar.[9] But the court held in *Hughes v. Doe* that an employee's dismissal with prejudice will not bar an action against the employer for the dismissed employee's negligence.[10]

In the area of contribution actions, the court held in *Sullivan v. Robertson* that a jury cannot be instructed to apportion damages among released tortfeasors if the plaintiff suffered an indivisible injury.[11] *Harmon v. Sadjadi*[12] and *Janvier v. Arminio*[13] presented the court with statute of limitations tolling issues.[14] Two other noteworthy decisions, *Ford Motor Co. v. Benitez*[15] and *Bio-Medical Applications v. Coston*,[16] are sure to alter health care liti-

2. 272 Va. 591, 636 S.E.2d 342 (2006).

3. 271 Va. 646, 629 S.E.2d 181 (2006).

4. *Castle*, 272 Va. at 600, 636 S.E.2d at 346; *Kondaurov*, 271 Va. at 656, 629 S.E.2d at 186.

5. 273 Va. 150, 639 S.E.2d 235 (2007).

6. 273 Va. 583, 643 S.E.2d 180 (2007).

7. 273 Va. 421, 641 S.E.2d 93 (2007).

8. *Holmes*, 273 Va. at 153, 639 S.E.2d at 236; *Budd*, 273 Va. at 586–87, 643 S.E.2d at 181; *Doherty*, 273 Va. at 426, 641 S.E.2d at 94.

9. 273 Va. 307, 309, 641 S.E.2d 109, 110–11 (2007).

10. 273 Va. 45, 48–49, 639 S.E.2d 302, 304 (2007).

11. 273 Va. 84, 91–93, 639 S.E.2d 250, 255–56 (2007).

12. 273 Va. 184, 639 S.E.2d 294 (2007).

13. 272 Va. 353, 634 S.E.2d 754 (2006).

14. *Harmon*, 273 Va. at 186, 639 S.E. at 295; *Janvier*, 272 Va. at 357, 634 S.E.2d at 755.

15. 273 Va. 242, 639 S.E.2d 203 (2007).

16. 272 Va. 489, 634 S.E.2d 349 (2006).

gation pleadings and practice in the future. Finally, in the laconic *Parikh v. Family Care Center* case, the court held that a nonprofessional corporation cannot practice medicine in Virginia[17]—a decision that may compel some health care providers to revise their incorporating documents or other operating agreements.

A. *Hospital Policies and Procedures and Incident Reports*

Riverside Hospital v. Johnson primarily touched on two substantive areas of health care law:[18] (1) the admissibility of a defendant-hospital's policies and procedures[19] and (2) the quality assurance privilege found at Virginia Code section 8.01-581.17 as it relates to a hospital's incident reports.[20]

The court's rulings on these two important issues emanated from a relatively straightforward and familiar set of facts. The administrator of Ms. Johnson's estate brought a personal injury action against Riverside Hospital alleging that the hospital negligently allowed Ms. Johnson to fall because it failed to identify her as a high fall-risk patient.[21] Because it did not identify Ms. Johnson as a high fall-risk patient, the hospital did not institute a fall-prevention plan for her.[22] The estate argued that an appropriate fall-prevention plan that included restraints, side bed rails, and a bed check alarm would have prevented her fall and resulting in-

17. 273 Va. 284, 290, 641 S.E.2d 98, 101 (2007).

18. 272 Va. 518, 526, 636 S.E.2d 416, 420 (2006). The court's opinion also contained an important ruling on procedural default. The defendants argued to the trial court in a motion *in limine* that the court should not allow the plaintiff to introduce evidence of Riverside Hospital's prior patient falls because they were irrelevant to plaintiff's negligence case. *See id.* The plaintiff countered that the prior patient falls were relevant to his punitive damages claim. *Id.* The trial court agreed the prior patient falls were relevant to the punitive damages claim and denied defendants' motion *in limine*. *Id.* The plaintiff later nonsuited the punitive damages claim, but the defendants did not renew their objection to the relevance of the prior falls to plaintiff's negligence case. *Id.* The court held that because the defendants did not renew their objection to the prior fall evidence once the plaintiff nonsuited his punitive damages claim, the objection to its presence in the plaintiff's negligence case was waived. *Id.* at 527–28, 636 S.E.2d at 420–21. This ruling provoked a dissent that focused on the provisions of Virginia Code section § 8.01-384. *Id.* at 539, 636 S.E.2d at 427–28 (Agee, J., dissenting); *see also* VA. CODE ANN. § 8.01-384 (Repl. Vol. 2000) ("No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court.").

19. *See Johnson*, 272 Va. at 528, 636 S.E.2d at 421.

20. *Id.* at 530, 636 S.E.2d at 422.

21. *Id.* at 523, 636 S.E.2d at 418.

22. *Id.*

juries.[23] The hospital countered that the standard of care did not require the institution of a fall-prevention plan because Ms. Johnson was not a high fall-risk patient.[24] The central liability issue in the case, therefore, was whether Ms. Johnson exhibited certain factors that would have compelled reasonably prudent hospital-employed nurses to conclude that she was a high fall-risk patient.[25]

During its case-in-chief, the estate elicited testimony from two hospital employees regarding how the hospital instructed new members of its nursing staff to identify high fall-risk patients.[26] The estate also elicited testimony regarding the hospital's affiliated School of Nursing curriculum as it pertained to fall-risk assessment.[27] The hospital objected to this testimonial evidence on grounds of relevancy, citing the Supreme Court of Virginia's prior rulings in *Virginia Railway & Power Co. v. Godsey*[28] and *Pullen v. Nickens*[29] that a defendant's "private rules" are not admissible to prove the standard of care.[30]

In rejecting the hospital's argument, the court noted the hospital's staff instructions and School of Nursing curriculum were not the "policies and procedures"[31] of the sort involved in *Godsey* and *Pullen* and, therefore, could not be described as "private rules."[32] The court did not elaborate on this distinction further, leaving future litigants to scour *Godsey* and *Pullen* for guidance on what constitutes a policy or procedure that can be described as an inadmissible private rule. *Godsey* and *Pullen* will be of little assis-

23. *See id.* at 524, 636 S.E.2d at 418–19.

24. *See id.* at 534, 636 S.E.2d at 425.

25. *See id.* at 523, 636 S.E.2d at 418 (defining the central issues of the case).

26. *See id.* at 528, 636 S.E.2d at 421.

27. *Id.*

28. 117 Va. 167, 83 S.E. 1072 (1915).

29. 226 Va. 342, 310 S.E.2d 452 (1983).

30. *Johnson*, 272 Va. at 529, 636 S.E.2d at 422.

31. The court offered two additional reasons in support of its holding that the trial court did not err in the admission of the testimonial evidence. First, it noted that the trial court and the estate "agreed" that the testimonial evidence would not be used to establish the standard of care. *Id.* Interestingly, the court reached this conclusion without explaining how the estate's argument that the evidence would be used to "corroborate" its expert's standard of care opinion differed in any material respect from using the evidence to establish the standard of care. *See id.* Second, the court noted that the evidence came in through the testimony of plaintiff's expert without objection and that "similar" evidence was offered by the hospital's own expert. *See id.* at 530, 636 S.E.2d at 422.

32. *Id.* at 529, 636 S.E.2d at 422.

tance in this effort because neither opinion contains a detailed discussion of why the private rules in those cases were labeled private rules.[33]

Though its ruling on the admissibility of private rules raises new questions for debate in future cases about the private rules doctrine, the court left little doubt that factual statements in incident reports are not privileged, even if later provided to a quality assurance committee.[34] This issue arose because the estate gained access during discovery to a risk management incident report that factually described the circumstances of Ms. Johnson's fall.[35] The hospital objected to the discovery and admission of the report on the grounds that it was a written communication provided to a quality assurance committee, and that Virginia Code section 8.01-581.17 cloaks such communications with privilege.[36] The trial court admitted the report into evidence over the defendant's objection.[37]

Although the Supreme Court of Virginia agreed that a "literal application" of the statute's phrase "communications . . . provided

33. In *Godsey*, the plaintiff brought a suit against the railway company alleging it caused her to fall when it started moving its railcar while the plaintiff was in the process of boarding. 117 Va. at 171, 83 S.E. at 1073. The plaintiff prevailed in the trial court and the defendant appealed on the ground that "certain rules of the company" were wrongly admitted into evidence. *Id.* at 168, 83 S.E. at 1072. The *Godsey* court did not describe these rules further except to note that they were intended for the guidance of the company's own employees and were not known by the plaintiff. *Id.* at 168, 83 S.E. at 1072–73.

In *Pullen*, the plaintiff, Nickens, sued an employee of Virginia's highway repair department for failing to post adequate warning signs identifying a section of highway he was repairing. 226 Va. at 344–45, 310 S.E.2d at 453–54. Pullen had posted signs only at the beginning and end of the work area, which was approximately eight miles long. *See id.* at 345, 310 S.E.2d at 453. The failure to post further warning indicia, according to Nickens, caused another car to swerve around repair equipment in the roadway and crash into Nickens. *See id.* At trial, Nickens introduced a document from the state highway department entitled "Typical Traffic Control for Work Area Protection" that contained a diagram with multiple cones placed around the work area. *Id.* at 345–46, 310 S.E.2d at 454. Although testimonial evidence indicated cones were not required to be placed around a worksite like that set up by Pullen, the court nevertheless held that these "private rules" were improperly admitted into evidence. *See id.* at 350–51, 310 S.E.2d at 456–57.

34. *Johnson*, 272 Va. at 533–34, 636 S.E.2d at 424–25.

35. *Id*. at 530, 636 S.E.2d at 422.

36. *See id.* The relevant portion of Virginia Code section 8.01-581.17(B) provides:

> "The proceedings, minutes, records, and reports of any . . . quality assurance, quality of care, or peer review committee . . . together with all communications, both oral and written, . . . provided to such committees or entities, are privileged communications which may not be disclosed or obtained by legal discovery proceedings . . . ."

VA. CODE ANN. § 8.01-581.17(B) (Cum. Supp. 2006).

37. *Johnson*, 272 Va. at 530, 636 S.E.2d at 422.

to such committees" would "impress the privilege" on the incident report at issue, it declined to interpret the statute in this literal manner.[38] Such an interpretation, the court held, would allow a hospital to cloak "every statement or document maintained by the facility" with privilege "simply by insuring that such statement or document was provided or available to a peer or quality review committee."[39] The court reasoned that the General Assembly did not intend for the privilege to apply so broadly, referencing the statute's exception for medical records as evidence of the legislature's true intent—because medical records contain factual information and are not privileged, the statute was not designed to shield factual information from disclosure.[40] Rather, the statute was intended to protect only "the deliberative [quality assurance or peer review] process and conclusions reached through that process."[41] The hospital's incident report did not evidence the deliberations or conclusions of the quality assurance process; it contained only factual information.[42] Although the court acknowledged that the factual information in an incident report necessarily initiates the quality assurance process, it concluded that the confidentiality of factual information is not essential to that process.[43] Applying this reasoning, the court held that the hospital's incident report was akin to a medical record and therefore was not privileged.[44]

This ruling has caused concern among Virginia health care facilities engaging in self-critical quality assurance and peer review analysis. But health care facilities can take some solace that *Johnson* focused on the *factual* information in an incident report, which is typically discoverable through other sources, rather than the deliberative analysis conducted by the quality assurance committees.[45] A strong argument survives that a quality assurance committee's deliberative analysis remains protected by the statute after *Johnson*. Drawing the line between discoverable factual investigation and privileged analytical deliberation will

38. *Johnson*, 272 Va. at 532, 636 S.E.2d at 424.
39. *Id.* at 532, 636 S.E.2d at 424.
40. *See id.* at 533, 636 S.E.2d at 424.
41. *Id.*
42. *See id.* at 534, 636 S.E.2d at 424–25.
43. *See id.* at 533, 636 S.E.2d at 424.
44. *Id.* at 534, 636 S.E.2d at 425.
45. *See id*. at 533, 636 S.E.2d at 424.

likely continue to be fodder for discovery combat in Virginia medical negligence cases.

B. *Emotional Distress*

The court's decisions in *Castle v. Lester*[46] and *Kondaurov v. Kerdasha*[47] are instructive regarding allegations of negligent infliction of emotional distress, a claim occasionally included in medical malpractice suits.

1. *Castle v. Lester*

In *Castle*, Karyn Lester and her infant son, Dusty Lester, filed personal injury actions against Dr. Castle alleging he negligently monitored and managed the labor and delivery of Dusty.[48] Dr. Castle's negligence caused Dusty to be born with severe physical injuries and neurological impairment.[49] Dr. Castle settled Dusty's case before trial and stipulated to liability in Ms. Lester's case.[50] Thus, Ms. Lester's case proceeded to trial against Dr. Castle on the issue of damages only, with a focus on the extent of her emotional distress as the mother of the injured child.[51]

At trial, Ms. Lester introduced evidence of her son's severe physical and neurological injuries, his daily care needs, and his shortened life expectancy to support her emotional distress claim.[52] Dr. Castle argued evidence of the child's injuries should not have been admitted in the mother's case because it essentially allowed the child to recover twice for his injuries; Dusty had already recovered once for these injuries in the settlement of his separate claim.[53]

Dr. Castle's double-recovery argument took issue with a long-standing paradox in this complex area of law. In short, the para-

46. 272 Va. 591, 636 S.E.2d 342 (2006).

47. 271 Va. 646, 629 S.E.2d 181 (2006).

48. *Castle*, 272 Va. at 595–96, 636 S.E.2d at 343.

49. Dusty's impairment was profound. Ms. Lester's expert testified that Dusty would likely never attain the functional level of a three-month-old child. *Id.* at 597–98, 636 S.E.2d at 344–45.

50. *Id.* at 596, 636 S.E.2d at 344.

51. *See id.*

52. *See id.*

53. *Id.*

dox is that damage suffered by a fetus in utero constitutes legal injury only to the mother—not the fetus—because a fetus in utero is not a person but rather part of the mother, except that if the fetus is born alive, the in utero damage constitutes legal injury to both the mother and the fetus, the latter—having been born alive—now a person that can recover for injuries sustained even when he was not a person but rather an appendage of his mother.[54] The problem for Dr. Castle was that the Supreme Court of Virginia had taken cognizance of this paradox in *Bulala v. Boyd*[55] and did not find it to be nearly as unsettling as he did.[56] Thus, Dr. Castle's appeal was essentially a plea to overturn *Bulala*.[57] Utilizing the familiar cliché that stare decisis is "more than a mere cliché" in Virginia, the court declined Dr. Castle's invitation to overturn *Bulala*.[58]

Barring an outright reversal of *Bulala*, Dr. Castle argued that, at the very least, *Bulala* should be limited to its specific language —a mother can recover for mental anguish associated with the *birth* of a defective child.[59] In other words, while Ms. Lester can recover for mental anguish resulting from the actual *birth process*, she should not be allowed to recover for mental anguish resulting from *living with and caring for* a child with severe physical and neurological injuries.[60] The court rejected this argument, noting first that Dusty's physical and neurological injuries were clearly relevant to Ms. Lester's emotional distress claim.[61] It noted second that any other holding would be contrary to established fundamental proximate causation principles, which estab-

54. *See* Lawrence v. Craven Tire Co., 210 Va. 138, 140–42, 169 S.E.2d 440, 441–42 (1969) (holding that a fetus has no right to recover for personal injuries because it is not a "person"); *see also* Kalafut v. Gruver, 239 Va. 278, 283–84, 389 S.E.2d 681, 683–84 (1990) (citing RESTATEMENT (SECOND) OF TORTS § 869(1) (1979)) (holding that a fetus born alive can recover for injuries it sustained while in the womb); Modaber v. Kelley, 232 Va. 60, 66, 348 S.E.2d 233, 237 (1986) (holding that a mother can recover for personal injuries when her fetus is injured in utero and stillborn because the fetus is part of the mother). *See generally* Fairfax Hosp. Sys., Inc. v. McCarty, 244 Va. 28, 37, 419 S.E.2d 621, 626–27 (1992) (upholding a jury verdict for a mother who claimed emotional distress resulting solely from injury to her fetus, not from any independent physical injury).

55. 239 Va. 218, 229, 389 S.E.2d 670, 675 (1990).

56. *See Castle*, 272 Va. at 603–04, 636 S.E.2d at 348.

57. *See id.* at 600, 636 S.E.2d at 346.

58. *Id.* at 601–02, 636 S.E.2d at 347.

59. *Id.* at 608, 636 S.E.2d at 350–51.

60. *See id.*

61. *See id.*, 636 S.E.2d at 351.

lish that a tortfeasor is liable for the reasonably foreseeable consequences of his negligence.[62]

Castle's ruling on the admissibility of the child's injuries to support the mother's emotional distress claims arguably makes birth injury cases—which already present high exposure for health care defendants because there are two patients, mother and baby, and thus potential liability of up to two medical malpractice caps—particularly dangerous when such actions are tried as two separate cases where each jury has an opportunity to hear and compensate for the mother's difficulties in caring for an injured child. The possibility of double recovery for such injuries, and the *Bulala* paradox, remain.

2. *Kondaurov v. Kerdasha*

While *Castle* seems to clarify and reaffirm existing law on the issue of emotional distress, *Kondaurov v. Kerdasha* may extend it. Although not a medical malpractice case, *Kondaurov* is instructive on how such claims may be addressed in the health care law context going forward. In *Kondaurov*, the plaintiff Kerdasha was traveling in a Jeep with her dog when a bus struck it from behind.[63] The collision with the bus set off a chain of events leading to the Jeep being struck by an ambulance, which flipped the Jeep onto its top.[64] Kerdasha sustained relatively minor physical injuries, such as bruises and cervical stiffness.[65] The same could not be said for her dog, who was thrown from the Jeep, sustained injuries to its tail, and had to have its tail partially amputated.[66]

In the ensuing lawsuit, the plaintiff did not allege that her relatively slight physical injuries caused her emotional distress but rather argued that her emotional distress emanated from concern about her dog.[67] Although the main issue in the case was whether the plaintiff could recover for emotional distress emanating from her worry about the dog,[68] the court's analysis of this is-

62. *Id.* at 608–09, 636 S.E.2d at 351.

63. 271 Va. 646, 650, 629 S.E.2d 181, 183 (2006).

64. *Id.*

65. *Id.* at 651, 629 S.E.2d at 183.

66. *Id.*

67. *See id.* at 656, 629 S.E.2d at 186.

68. *See id.* at 654, 629 S.E.2d at 185. Relying on the well-settled, though not altogether uncontroversial, rule that a dog is no more than personal property, *see* VA. CODE

sue arguably changed the factors necessary for recovery of emotional distress and the traditional understanding of the "eggshell psyche" rule.[69]

On the issue of the factors necessary for recovery for emotional distress, the court held that the plaintiff could "clearly" recover for emotional distress resulting from the physical *impact* of the crash.[70] In its discussion of the physical impact that entitled the plaintiff to recover for emotional distress, the court avoided any mention of plaintiff's actual physical injuries—bruises and cervical stiffness.[71] This analysis of physical impact—which appears just a few sentences after the court noted the plaintiff made no claim that her physical *injuries* caused her emotional distress—certainly gives the appearance that the plaintiff could recover for emotional distress resulting from something less than physical injury, that something less being physical impact.[72] But it is the connection between physical injury and emotional distress, according to established precedent, that normally makes a claim for emotional distress possible.[73] Consideration of this traditional connection, together with the structure of the court's analysis, suggests that the court held that emotional distress need not be connected to a physical *injury* if a connection to physical *impact* is

ANN. § 3.1-796.127 (Repl. Vol. 1994), and that emotional distress cannot emanate from damage to an item of personal property, no matter how dear the owner holds the property, *see, e.g.*, *Kondaurov*, 271 Va. at 657 n.4, 629 S.E.2d at 187 n.4 (citing no less than sixteen out-of-state cases that denied recovery for emotional distress emanating from injury or death to animals); White Consol. Indus., Inc. v. Swiney, 237 Va. 23, 30, 376 S.E.2d 283, 287 (1989) (stating that damages for injury to personal property is equivalent to the fair market value of the property before the injury less the fair market value of the injury), the court agreed the defendant was not entitled to an instruction to that effect. *Kondaurov*, 271 Va. at 657–58, 629 S.E.2d at 187.

69. *See infra* notes 82–88 and accompanying text.

70. *Kondaurov*, 271 Va. at 656, 629 S.E.2d at 186.

71. *See id.*

72. *See id*.

73. *See, e.g.*, Bruce v. Madden, 208 Va. 636, 640, 160 S.E.2d 137, 140 (1968) ("[I]t is well settled in this jurisdiction that mental anguish may be inferred in those instances where such would be the natural and probable consequence of bodily injury and that it is error in such a situation to refuse to instruct the jury that it may consider mental anguish as an element of damages."); Norfolk & W. Ry. Co. v. Marpole, 97 Va. 594, 599–600, 34 S.E. 462, 464 (1899) ("Where there is bodily injury . . . mental suffering necessarily enters into the consideration of the damages which should be allowed by the jury, if they find that the plaintiff is entitled to damages for the bodily injuries he has sustained by reason of the negligence of the defendant."). *But see* Naacesh v. Burger, 223 Va. 406, 416, 290 S.E.2d 825, 830 (1982) (allowing plaintiffs, a mother and father, to recover for emotional distress associated with "wrongful birth of a child in the absence of direct or indirect physical injury").

established.[74] But it is doubtful the court intended this result for at least two reasons.

First, the court perhaps unwittingly[75] gave the appearance that a dichotomy exists between physical impact and physical injury. In fact, prior cases have used the terms synonymously. Decades ago in *Hughes* the court rejected the so-called "physical impact" rule,[76] which allowed the plaintiffs to recover for emotional distress manifesting itself physically, but only if the negligence that caused the emotional distress also caused contemporaneous physical injury.[77] It was the contemporaneous-physical-injury requirement that the court sometimes referred to as a physical-impact requirement and that became the namesake of the rejected line of cases requiring it.[78] *Hughes* clarified that a plaintiff need not suffer contemporaneous physical injury (read "physical impact") to recover for emotional distress so long as the emotional distress physically manifested itself and there was an "unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury."[79]

Second, *Kondaurov* fits neatly into the rationale of *Hughes*, although reference to only the analysis portion of the opinion is unlikely to reveal this conclusion. From the factual portion of the opinion, it is evident the plaintiff's emotional distress manifested itself physically by worsening the symptoms of the plaintiff's multiple sclerosis.[80] But the connection between this physical manifestation and the plaintiff's emotional distress was omitted from the court's pronouncement that the plaintiff could "clearly" re-

74. *See supra* notes 71–72 and accompanying text (describing how the plaintiff could recover for a physical impact).

75. But then again, perhaps not.

76. *See generally* Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973). In *Hughes*, the defendant crashed his car into the plaintiff's front porch while she was standing in her living room. *Id.* at 28, 197 S.E.2d at 215. Although the plaintiff sustained no physical injury as a result of the crash, she developed severe anxiety after the crash. *Id.* This anxiety caused the plaintiff, who had recently given birth, to stop lactating and caused her menstrual period to start. *Id.*

77. *See id.* at 29, 197 S.E.2d at 216 (noting that the defendant argued that the plaintiff cannot recover for emotional distress in a negligence case where there was no contemporaneous physical injury to the plaintiff, i.e. where physical impact was lacking).

78. *See id.* at 33-34, 197 S.E.2d at 218-19 (noting that "[a] rapidly increasing majority of courts have repudiated or not followed the 'impact rule'" and citing numerous out-of-state cases).

79. *Id.* at 34, 197 S.E.2d at 219.

80. Kondaurov v. Kerdasha, 271 Va. 646, 651, 629 S.E.2d 181, 183 (2006). The emotional distress also caused tremors and motor tics. *Id.* at 652–53, 629 S.E.2d at 184.

cover for emotional distress resulting from the physical impact of the accident.[81] Had the court expressly made this connection, it would have demonstrated the causality *Hughes* required—from the negligent act to the emotional disturbance to a resultant physical manifestation—in cases where the emotional disturbance is not caused by physical injury contemporaneous with the act of negligence. Of course, it would also have made it a much less interesting opinion.

Kondaurov nevertheless remains notable for the impact it may have on the "eggshell psyche" rule in Virginia. To set the stage, *Hughes* made clear that although it would not follow the physical impact rule, recovery for emotional distress would still be "subject to familiar limitations."[82] One of these familiar limitations is a tortfeasor cannot be held liable for the mental and emotional disturbances of a hypersensitive person unless he has specific knowledge of the hypersensitivity before the commission of the tort.[83] In other words, tortfeasors do not take their plaintiffs' psyches as they find them even if they must so take their thin skulls.[84] *Kondaurov*, however, noted that the jury could properly consider as part of its evaluation of plaintiff's emotional distress claim whether the impact of the accident exacerbated the plaintiff's "pre-existing mental and physical conditions."[85] Although considering exacerbation of the plaintiff's preexisting physical condition is unobjectionable thanks to the "eggshell skull" rule, the "eggshell psyche" rule announced in *Hughes* militates against considering the preexisting mental state of Kerdasha, who was noted to be emotionally unstable before the accident.[86] Though this potential *sub silentio* change in the law was the subject of a

81. *See id*. at 656, 629 S.E.2d at 186; *see supra* note 71–73 and accompanying text.

82. *Hughes*, 214 Va. at 34, 197 S.E.2d at 219.

83. *Id.* ("Absent specific knowledge by a defendant of a plaintiff's unusual sensitivity, there should be no recovery for mental or emotional disturbance and consequent physical injury to a hypersensitive person where a normal individual would not be affected under the circumstances.").

84. The eggshell skull rule is shorthand for the rule that a "[a] defendant . . . must take the plaintiff as he finds him" when it comes to the plaintiff's preexisting physical condition. Bradner v. Mitchell, 234 Va. 483, 489, 362 S.E.2d 718, 722 (1987) (citing Ragsdale v. Jones, 202 Va. 278, 282–83, 117 S.E.2d 114, 118 (1960)) ("Although not responsible for the pre-existing condition itself, [the defendant] is liable for any exacerbation of it caused by his tortious conduct.").

85. *Kondaurov*, 271 Va. at 656, 629 S.E.2d at 186.

86. *See id.* at 651, 629 S.E.2d at 183 (noting that eighteen months before the accident the plaintiff acquired her dog "primarily to help her maintain emotional stability and prevent or moderate her 'stress attacks'").

motion for reconsideration that prompted an apparently fazed court to vacate its initial unanimous opinion,[87] the court became unfazed and left untouched in its second unanimous opinion the language allowing the jury to consider the exacerbation of plaintiff's preexisting mental condition.[88]

C. *Treating Physician and Expert Testimony*

Although *Kondaurov* will indirectly impact medical malpractice actions when, as is often the case, a plaintiff claims emotional distress, *Holmes*, *Budd*, and *Doherty* directly impact an issue that arises in nearly every medical malpractice case—the testimony of treating physicians and experts.

1. *Holmes v. Levine*

In *Holmes*, a wrongful death case, the plaintiff's estate appealed a defense verdict on several grounds, arguing primarily that the jury was wrongly instructed on the issue of proximate causation.[89] The estate's theory of liability in the case was that the defendant-radiologist failed to timely diagnose bladder cancer, and this failure, along with the bladder cancer itself, caused the decedent's untimely death.[90] The estate asked for an additional sentence to the model jury instruction on proximate cause,[91] proposing that the court add a statement that there can be more than one proximate cause of an event.[92] The trial judge denied the request, but the Supreme Court of Virginia reversed. The court held that the evidence fairly supported the estate's theory of the case that there were multiple causes of the plaintiff's death, and, therefore, it was entitled to the proposed additional

87. *See* Kondaurov v. Kerdasha, 270 Va. 356, 619 S.E.2d 457 (2005), *vacated and reh'g granted by* order dated November 10, 2005. For an excellent first-hand account of the procedural history of the case, along with additional discussion of *Kondaurov*'s impact, see Thomas C. Junker, *Did the Supreme Court of Virginia Really Hold that the "Eggshell Skull Rule" Extends to an "Eggshell Psyche," in Its Recent Decision in* Kondaurov v. Kerdasha, VSB Litig. News, Fall 2006, at 1, 4–7, *available at* http://www.vsb.org/sections/lg/archives/Fall%202006.pdf.

88. *See Kondaurov*, 271 Va. at 656, 629 S.E.2d at 186; *see also* Junker, *supra* note 87, at 6.

89. Holmes v. Levine, 273 Va. 150, 153, 639 S.E.2d 235, 236 (2007).

90. *Id.* at 159, 639 S.E.2d at 239.

91. VA. MODEL JURY INSTRUCTIONS § 5-2.

92. *Holmes*, 273 Va. at 157, 639 S.E.2d at 238.

language in the causation jury instruction, which correctly stated the law.[93] The court reversed the jury verdict on this ground and tackled two issues that were likely to arise on retrial.

The first issue involved a treating physician's testimony that "she 'did not think that an occasional red blood cell would qualify for microscopic hematuria.'"[94] The estate objected to the physician's opinion on the grounds that Virginia Code section 8.01-399(B)[95] prohibited its admission because it was a diagnosis that was not contemporaneously documented in the physician's chart and was not offered to a reasonable degree of medical probability.[96] The court rejected the estate's argument, concluding first that the physician's opinion was not a diagnosis per se, but was rather a mental impression the physician formed during her treatment of the decedent.[97] Because the opinion was not a diagnosis, the statute's mandate that "[o]nly diagnos[es] offered to a reasonable degree of medical probability shall be admissible at trial" did not apply.[98] The court also concluded that the statute's

93. *Id.* at 160, 639 S.E.2d at 240. The defendant did not argue that there was only one proximate cause of the decedent's death, choosing instead to argue that the jury instruction's use of the indefinite article "a" before the term "proximate cause" implied that there can be more than one proximate cause of death. Thus, an additional sentence was unwarranted. *See id.* at 159–60, 639 S.E.2d at 239–40. But the court found this unavailing, pointing to the trial transcript in which the trial judge used the definite article "the" when charging the jury. *Id.* at 160, 639 S.E.2d at 240.

94. *Id.* at 160, 639 S.E.2d at 240.

95. The relevant portion of Virginia Code section 8.01-399(B) provides:

> If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. . . . Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

VA. CODE ANN. § 8.01-399(B) (Cum. Supp. 2006).

96. *Holmes*, 273 Va. at 161, 639 S.E.2d at 240.

97. *See id.* at 162, 639 S.E.2d at 241. Indeed, under *Pettus v. Gottfried*, 269 Va. 69, 606 S.E.2d 819 (2005), this opinion would not only be non-diagnostic, it would be labeled as factual in nature. *See id.* at 77–78, 606 S.E.2d at 824–25 (holding that the physician's opinion in that case "was factual in nature because it served to explain the impressions and conclusions [the physician] reached while treating" the plaintiff and thus "was not subject to the general rule that a medical expert opinion must be rendered to a reasonable degree of medical probability"). *But cf.* King v. Cooley, No. 062502, 2007 Va. LEXIS 101, *6–8 (Sept. 14, 2007) (declining to decide whether a treating physician's diagnosis, which was reached during his care and treatment of the patient, was an expert opinion that had to be disclosed pursuant to the court's pretrial scheduling order).

98. *Holmes*, 273 Va. at 162, 639 S.E.2d at 241.

contemporaneous-documentation requirement was satisfied because the physician's medical record regarding this patient contained a reference to a trace amount of blood in the decedent's urine, although it had not used the word "hematuria."[99] Whatever distinction existed between the chart and the language used to articulate the physician's opinion at trial constituted proper grounds for cross-examination but not for exclusion of the testimony.[100]

The second issue the court addressed was whether the trial court erred in instructing the jury to disregard testimony elicited from the defendant's expert on cross-examination regarding the cause of death listed in decedent's death certificate, which was "[b]ladder cancer, metastatic."[101] The estate argued that Virginia Code section 8.01-401.1[102] allowed it to elicit this evidence on cross-examination because it contradicted the expert's causation opinion. The court determined Virginia Code section 8.01-401.1 actually prohibited the testimony because the expert never testified he relied on the cause of death listed in the death certificate—which is normally inadmissible evidence[103]—when forming his opinions.[104] In not so many words, the court held the statute permits an expert to testify about *inadmissible* evidence if, but only if, the expert *relied* on such inadmissible evidence in forming

99. *See id.* at 163 n.8, 639 S.E.2d at 241 n.8.

100. *See id.* at 163, 639 S.E.2d at 241–42.

101. *Id.* at 156, 163, 639 S.E.2d at 237, 242.

102. The relevant portion of Virginia Code section 8.01-401.1 provides:

> In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.
>
> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

VA. CODE ANN. § 8.01-401.1 (Repl. Vol. 2000 & Cum. Supp. 2006).

103. *Holmes*, 273 Va. at 163 n.10, 164, 639 S.E.2d at 242 n.10 (quoting Edwards v. Jackson, 210 Va. 450, 453, 171 S.E.2d 854, 856 (1970)) (noting that the cause of death listed in the death certificate is not competent evidence).

104. *See id.* at 164, 639 S.E.2d at 242 ("The record is devoid of any evidence that [the expert] *relied* on the death certificate and its statement as to the cause of Holmes' death in forming his opinions about which he testified.").

his opinions.[105] Under this analysis, the hook, as it relates to inadmissible evidence, is reliance.[106]

The estate apparently raised the concern that this view of Virginia Code section 8.01-401.1 essentially allows an expert to insulate himself from cross-examination if he testifies that he did not rely upon the information counsel seeks with which to cross-examine him. In its original opinion issued on January 12, 2007, the court discarded the estate's concern in a footnote without discussion.[107] But in a revised opinion issued March 27, 2007, the court added a sentence to the text of its opinion in an apparent attempt to assuage the same concern: "Our conclusion, however, does not mean that the Administrator was precluded from cross-examining [the expert] about whether he relied on the death certificate in formulating his opinions and, if not, why he discounted the information contained in the death certificate."[108] This concluding sentence, while providing comfort in that it limits the scope of the ruling and preserves an important aspect of cross-examination, creates the challenge for attorneys of walking the tight rope between cross-examining an expert about why he discounted certain inadmissible information and cross-examining an expert with the content of the actual inadmissible information. The *Holmes* opinion seems to permit the former, but prohibit the latter.

2. *Budd v. Punyanitya*

Budd involved a similar but more discrete subset of cross-examination allowed by Virginia Code section 8.01-401.1—the cross-examination of experts with medical literature deemed to be reliable authority. The relevant portion of the statute provides:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or

105. *See id.*

106. *See id.* A fair reading of the statute would suggest it does not prohibit cross-examination of an expert witness with *admissible* information, irrespective of whether that expert relied on such information.

107. *Id.* at 165 n.11, 639 S.E.2d at 242 n.11 ("We reject the Administrator's argument that the trial court's striking that portion of [the expert's] testimony deprived him of the opportunity to test [the expert's] credibility and to cross-examine him for bias.").

108. *Id*. at 165, 639 S.E.2d at 242–43.

> pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits. If the statements are to be introduced through an expert witness upon direct examination, copies of the statements shall be provided to opposing parties thirty days prior to trial unless otherwise ordered by the court.[109]

The plaintiff in *Budd* read the statute to require only that he identify thirty days prior to trial certain medical articles and statements therein that his expert would read into evidence on direct examination.[110] Budd did not comply with this notice requirement because he did not want his expert to read the articles or statements into evidence on direct examination.[111] Rather, he wanted his expert to opine on direct simply that the articles were "reliable authority."[112] Once established as reliable authority by his expert, Budd intended to use the articles and statements therein to cross-examine the defendant's experts.[113] Budd attempted to utilize this tactic because he feared the defendant's experts would not acknowledge the articles as reliable authority, thus preventing him from cross-examining them with the articles.[114] In an opinion notable for at least three pronouncements, the Supreme Court of Virginia disagreed with Budd's argument that the statute's notice requirement did not apply to him.

First, the court held that the purpose of the statute is to afford "meaningful cross-examination" of experts.[115] Budd's interpretation would frustrate that purpose because it would deny the opposing expert an "opportunity to review and formulate a response to the published statements."[116] Such an interpretation would additionally conflict "with traditional notions of fair play in the adversarial process."[117] Thus, Budd should have notified defense

109. VA. CODE ANN. § 8.01-401.1 (Repl. Vol. 2000 & Cum. Supp. 2006).
110. Budd v. Punyanitya, 273 Va. 583, 588, 643 S.E.2d 180, 182 (2007).
111. *Id.*
112. *Id.*
113. *Id.*
114. *See id.* at 594, 643 S.E.2d at 186.
115. *Id.*
116. *Id.*
117. *Id.* at 595, 643 S.E.2d at 186.

counsel thirty days before trial of the articles and the statements he intended to use for cross-examination purposes.[118]

Second, the court reaffirmed *Hopkins v. Gromovsky*,[119] an earlier case that stood for the proposition that a party could, without violating the hearsay rule, cross-examine an opposing party's expert with statements from reliable authority if "the statements . . . are used solely for the purpose of testing an expert's knowledge, reading and accuracy in a field of expertise, and are not read directly or indirectly to the jury as substantive evidence regarding the contents of the literature or the opinions of its author."[120] In this situation, neither the hearsay rule nor the notice requirements of Virginia Code section 8.01-401.1 are implicated.[121]

Third, the court gave tacit approval to Budd's strategy of utilizing his own experts to establish medical articles as reliable authority.[122] This tactic is specifically authorized in the Federal Rules of Evidence,[123] but had not been explicitly recognized by an appellate court in Virginia.[124]

3. *Doherty v. Aleck*

In *Doherty*, the court reiterated and applied its holding in *Bitar v. Rahman*[125] that a litigant must promptly object to an expert's

118. *Id.* at 595, 643 S.E.2d at 186–87.

119. 198 Va. 389, 94 S.E.2d 190 (1956).

120. *Budd*, 273 Va. at 594, 643 S.E.2d at 186.

121. *Id.*

122. *See id.* at 595, 643 S.E.2d at 186–87. ("[W]e hold that when a party intends to introduce into evidence statements from published literature during the cross-examination of an opposing expert, *but wishes to avoid the possibility that the opposing expert will not acknowledge that literature as a reliable authority on a particular matter at issue by having the party's own expert establish the literature as a reliable authority on direct examination*, the party must provide opposing counsel with copies of the statements in the literature thirty days before trial pursuant to Code § 8.01-401.1." (emphasis added)).

123. *See* FED. R. EVID. 803(18) advisory committee's note ("The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness.").

124. Although the facts of the case concerned plaintiff using his own experts, it stands to reason that the same tactic would be available to defendants. Barring some unusual circumstance, however, defendants' experts usually testify *after* plaintiffs' experts. Thus, to utilize the tactic employed in *Budd*, a defendant would have to convince a trial court to accept a proffer that his expert will testify that certain articles are reliable authority before crossing a recalcitrant plaintiff's expert with such articles.

125. 272 Va. 130, 630 S.E.2d 319 (2006).

testimony if it is not offered to a reasonable degree of medical probability.[126] Such an objection goes to the admissibility of the testimony, not to its sufficiency, and thus the objection comes too late if made for the first time in a motion to strike for insufficient evidence.[127] The court, therefore, rejected the defendant's argument in *Doherty* that the trial court's order sustaining a motion to strike could be upheld on the ground that the plaintiff's expert did not testify to a reasonable degree of medical probability.[128] The defendant had not objected to this flaw in the expert's testimony at the time, instead arguing in a motion to strike that the testimony lacked the necessary foundation.[129] Because no timely objection was made to the testimony, "the trial court should not have considered [the defendant's] argument in deciding whether there was sufficient evidence to sustain the jury verdict."[130]

D. *Vicarious Liability and Res Judicata*

In two cases this past year, the court addressed the application of the res judicata bar. While not unique to health care law, the ramifications of these decisions will be seen in medical malpractice cases that commonly involve multiple parties and respondeat superior issues. The first case, *Lambert*, holds that a dismissal with prejudice for failure to comply with the statute of limitations triggers application of the res judicata bar. In the second case, *Hughes*, the court held that dismissal with prejudice in favor of an employee on statute of limitations grounds was not sufficient for application of the res judicata bar in favor of the employer.

1. *Lambert v. Javed*

Lambert involved a procedural morass that arose from three nearly identical wrongful death actions filed against numerous health care providers. The first action was timely filed.[131] A few months later, the plaintiff filed a second action.[132] The second ac-

126. *See* Doherty v. Aleck, 273 Va. 421, 426, 641 S.E.2d 93, 95–96 (2007).
127. *Id.*, 641 S.E.2d at 95 (citing *Bitar*, 272 Va. at 139, 630 S.E.2d at 324).
128. *Id.*, 641 S.E.2d at 95–96.
129. *See id*., 641 S.E.2d at 95.
130. *Id.*, 641 S.E.2d at 96.
131. Lambert v. Javed, 273 Va. 307, 309, 641 S.E.2d 109, 110 (2007).
132. *Id*.

tion was filed beyond the limitations period.[133] After filing the second action, the plaintiff nonsuited the first action and then promptly filed a third action.[134] The third action would have been beyond the limitations period but for the provisions of Virginia Code section 8.01-229(E), which gave the plaintiff six months after the nonsuit of the first action to file the third action.[135] But while the third action was pending, the defendants secured a dismissal "with prejudice" of the second action because it was filed after the expiration of the statute of limitations.[136] The defendants then successfully applied the dismissal with prejudice of the second action to the third action, securing the latter's dismissal by application of res judicata.[137]

Upholding the dismissal, the court noted that a dismissal that includes the words "'with prejudice,' extinguishes the viability of plaintiff's claim against the dismissed party."[138] This is so even though the dismissal "may not be based on an adjudication of the merits of the cause of action" but rather on procedural grounds, like the statute of limitations.[139] Although this holding would have been enough to defeat the plaintiff's third action, the court also noted that the limitations period in a wrongful death action is a substantive element of the claim and that a dismissal for failure to comply with the limitations period is a dismissal on the merits of the claim.[140] This additional wrinkle "directly" sup-

133. *See id.* at 309–10, 641 S.E.2d at 110.

134. *Id.* at 309, 641 S.E.2d at 110.

135. In relevant part, the section provides:

> If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, . . . whichever period is longer.

VA. CODE ANN. § 8.01-229(E)(3) (Cum. Supp. 2006).

136. *Lambert*, 273 Va. at 309–10, 641 S.E.2d at 110.

137. *Id.* at 310, 641 S.E.2d at 110.

138. *Id.* at 310, 641 S.E.2d at 111.

139. *Id.* When read in conjunction with its decision in *Hughes*, *see infra* Part I(D)(2), and *Shutler*, *see infra* note 151, the court appears to have created a hybrid res judicata doctrine. While acknowledging that dismissals with prejudice on procedural grounds, like failure to comply with the statute of limitations, are not technically decisions on the merits, the court has held that such dismissals nonetheless "extinguish" the plaintiff's right to institute an action against the dismissed party. *See, e.g.*, Hughes v. Doe, 273 Va. 45, 48–49, 639 S.E.2d 302, 304 n. 2 (2007); *Lambert*, 273 Va. at 310, 641 S.E.2d at 111; Shutler v. Augusta Health Care for Women, P.L.C., 272 Va. 87, 93, 630 S.E.2d 313, 316 (2006).

140. *Lambert*, 273 Va. at 310, 641 S.E.2d at 111 (citing Riddett v. Va. Elec. & Power Co., 255 Va. 23, 28, 495 S.E.2d 819, 821–22 (1998)).

ported the application of res judicata to bar the plaintiff's third action.[141]

2. *Hughes v. Doe*

The court again considered the doctrine of res judicata in *Hughes*, but this time in the specific context of the employer-employee relationship. The plaintiff in *Hughes* filed a timely lawsuit against Pratt Medical Center alleging that one of its employees, who was unknown to the plaintiff at the time of filing, negligently performed a venipuncture procedure.[142] The plaintiff subsequently learned the employee's name—Melissa Lucas—and amended his lawsuit to include her.[143] By the time the plaintiff filed suit against Lucas, however, the statute of limitations had expired and Pratt obtained a dismissal with prejudice for Lucas on that ground.[144] Pratt then used that judgment in its own case to secure a dismissal.[145] On appeal, Pratt argued the claim against it was wholly derivative of the claim against its employee and the dismissal with prejudice of the claim against the employee constituted a decision on the merits sufficient to trigger the res judicata bar.[146]

The Supreme Court of Virginia rejected Pratt's argument that the derivative liability principle mandated application of the res judicata bar.[147] Rather, the court noted it has never applied the derivative liability principle in a case like this where the employee was dismissed on procedural grounds.[148] The principle has been applied in favor of an employer only when, in the same case, the employee is factually exonerated[149] or when, in a subsequent case, a decision *on the merits* was reached in prior litigation sufficient to justify application of the res judicata bar.[150] Neither cir-

141. *Id.*
142. *Hughes*, 273 Va. at 47, 639 S.E.2d at 303.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 47–48, 639 S.E.2d at 303.
147. *Id.* at 48, 639 S.E.2d at 303–04.
148. *Id.*, 639 S.E.2d at 304.
149. *Id.*, 639 S.E.2d at 303–04 (citing Roughton Pontiac Corp. v. Alston, 236 Va. 152, 156–57, 372 S.E.2d 147, 150 (1988); Rakes v. Fulcher, 210 Va. 542, 549, 172 S.E.2d 751, 757 (1970); Whitfield v. Whittaker Mem'l Hosp., 210 Va. 176, 183, 169 S.E.2d 563, 568 (1969); Va. State Fair Ass'n v. Burton, 182 Va. 365, 368, 28 S.E.2d 716, 717 (1944)).
150. *Id.* (citing Ward v. Charlton, 177 Va. 101, 115, 12 S.E.2d 791, 796 (1941)).

cumstance was present here because the dismissal of Lucas on statute of limitations grounds did not amount to an "affirmative finding of non-negligence."[151] Thus, the court held the dismissal with prejudice did not exonerate Pratt and the lawsuit against it could proceed.[152]

E. *Contribution:* Sullivan v. Robertson Drug Co.

Sullivan arose from a previous action filed by the plaintiff, Hopper, against Dr. Sullivan.[153] Hopper alleged that Dr. Sullivan negligently prescribed him unlimited refills of corticosteroids and that this over-prescription led Hopper to develop Cushing's syndrome.[154] Dr. Sullivan settled Hopper's claim but then pursued a contribution action against the pharmacist, Robertson, and his company, Robertson Drug, who filled the prescriptions.[155] At the trial on the contribution action, the evidence established that each injection of the corticosteroid had a "cumulative effect" on Hopper's development of Cushing's syndrome.[156]

On appeal, the court addressed two issues. The first issue was whether the jury was properly instructed to apportion damages based on its assessment of the relative degrees of fault of all the tortfeasors.[157] The court concluded this instruction was improper because Hopper's injury was indivisible, and established caselaw holds that, when a person's indivisible injury is caused by two

151. *Id.* The court also noted that its prior decision in Shutler v. Augusta Health Care for Women, P.L.C., 272 Va. 87, 630 S.E.2d 313 (2006), did not have to address whether the dismissal of an employee with prejudice on procedural grounds exonerated the employer because the order of dismissal in that case specifically indicated the case would continue against the employer. *Hughes*, 273 Va. at 48–49, 49 n.2, 639 S.E.2d at 304 n.2.

152. *See id.*, 639 S.E.2d at 304. As further support for its holding, the court noted that a plaintiff need not file a lawsuit against an employee in order to attack the employer on a theory of respondeat superior: "[n]o judgment against the employee individually is necessary for recovery [against an employer on a theory of respondeat superior]; only a finding that the employee was negligent." *Id.*

153. Sullivan v. Robertson Drug Co., 273 Va. 84, 87, 639 S.E.2d 250, 252 (2007).

154. *Id*.

155. *Id*. at 88, 639 S.E.2d at 253.

156. *Id*. at 89, 639 S.E.2d at 254.

157. *See id.* at 91, 639 S.E.2d at 254 ("Dr. Sullivan argues that the circuit court erred in giving [jury instructions that] permitted the jury to apportion the amount of damages based on the jury's assessment of Robertson's degree of negligence in causing Hopper's injury.").

tortfeasors, each tortfeasor is liable for the whole injury irrespective of his degree of fault.[158]

The resolution of the second issue rested on similar principles. Robertson argued that the jury should have considered the reasonableness of the settlement between Hopper and Sullivan to determine the amount of any judgment against him.[159] Robertson thus advocated an instruction that would have allowed the jury to consider the fact that the settlement compensated Hopper for damage not attributable to Robertson.[160] The court rejected this argument and the accompanying instruction because, again, established precedent does not allow for apportionment of damages based on the comparative negligence of multiple tortfeasors where there is an indivisible injury.[161] Although the court acknowledged that in a contribution action the jury can consider the reasonableness of the settlement, it can do so only in the context of determining whether the settlement fairly compensated the original plaintiff for his indivisible injury.[162]

F. *Statutes of Limitations*

1. *Harmon v. Sadjadi*

Harmon is notable because it overruled a prior case, *McDaniel v. North Carolina Pulp Co.*, which held that a person who qualifies out-of-state as the representative of an estate can file an action on behalf of the estate in Virginia which tolls the statute of

158. *See id.* at 92, 639 S.E.2d at 255 (citing Maroulis v. Elliott, 207 Va. 503, 511, 151 S.E.2d 339, 345 (1966); Von Roy v. Whitescarver, 197 Va. 384, 393, 89 S.E.2d 346, 352 (1955); Murray v. Smithson, 187 Va. 759, 764, 48 S.E.2d 239, 241 (1948); Richmond Coca-Cola Bottling Works, Inc. v. Andrews, 173 Va. 240, 250–51, 3 S.E.2d 419, 423 (1939)).

159. *Id.* at 93–94, 639 S.E.2d at 256 ("Robertson contends that although the settlement may have been reasonable with regard to Dr. Sullivan and Hopper's several claims against Dr. Sullivan, the settlement was unreasonable with regard to Robertson because it included claims, injuries, and damages that were not the product of the concurrent negligence of Dr. Sullivan and Robertson. We find no merit in Robertson's arguments.").

160. *See id.*

161. *See id.*

162. *See id.* (noting that "a fact finder may consider the reasonableness of the settlement agreement only with regard to the indivisible injury sustained and may not consider . . . whether the remaining tortfeasors caused the injuries that were the basis for the settlement. Robertson's argument addressing the reasonableness of the settlement is unpersuasive because it confuses these two concepts").

limitations.[163] *McDaniel*, the court held, was wrongly decided because it violated other precedent that establishes a lawsuit filed by a person who lacks standing has no legal effect.[164] Getting to that point, however, was challenging because the *Harmon* case involved a complex set of dates.

On June 6, 2001, Dr. Sadjadi performed surgery in Virginia on James Harmon, who was a resident of West Virginia.[165] A sponge was left inside Mr. Harmon's abdominal cavity at the conclusion of surgery.[166] It caused him weakness, pain, and dehydration until it was removed on November 8, 2001.[167] Mr. Harmon died on May 1, 2003 and on July 18, 2003, Dorothy Harmon qualified as his personal representative in West Virginia.[168] On October 29, 2003, Mrs. Harmon filed suit against Dr. Sadjadi in Virginia, but nonsuited the action approximately one year later.[169] On January 13, 2004, the administration of Mr. Harmon's estate in West Virginia closed.[170] On December 6, 2004, Mrs. Harmon qualified as personal representative of Mr. Harmon's estate in Virginia, and she filed a personal injury action on behalf of the estate in Virginia on March 24, 2005.[171] The defendant filed a plea of the statute of limitations to the March 24, 2005 action.[172] The trial court granted the plea, and Mrs. Harmon appealed.[173]

On appeal, Mrs. Harmon argued that the March 24, 2005 suit was timely because Virginia Code sections 8.01-229(B)(1) and (B)(6)[174] effectively allow a personal representative up to three

163. 273 Va. 184, 192–94, 197, 639 S.E.2d 294, 299–31 (2007) (overruling McDaniel v. North Carolina Pulp Co., 198 Va. 612, 95 S.E.2d 201 (1956)).

164. *See id.* at 193–94, 639 S.E.2d at 299–300.

165. *See id.* at 187, 639 S.E.2d at 295.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 187–88, 639 S.E.2d at 295–96.

173. *Id.* at 188, 639 S.E.2d at 296.

174. Virginia Code section 8.01-229(B)(1) provides, in relevant part:

> If a person entitled to bring a personal action dies with no such action pending before the expiration of the limitation period for commencement thereof, then an action may be commenced by the decedent's personal representative before the expiration of the limitation period . . . or within one year after his qualification as personal representative, whichever occurs later.

Virginia Code section 8.01-229(B)(6) provides:

> If there is an interval of more than two years between the death of any per-

years from the date of death to file a personal injury action,[175] which, in this case, would have been May 1, 2006. The court rejected this argument because Virginia Code section 8.01-229(B)(6), by its plain terms, applies only when there has been a delay of more than two years in the qualification of a personal representative.[176] In this case, Mrs. Harmon qualified on December 6, 2004, which was less than two years after Mr. Harmon's death on May 1, 2003. Thus, Mrs. Harmon could not take advantage of the tolling provisions in Virginia Code section 8.01-229(B)(6).[177]

Nevertheless, the court ultimately concluded that Mrs. Harmon could pursue her March 24, 2005 action because Virginia Code section 8.01-229(B)(1) allows a personal representative to file a personal injury action on behalf of the estate within the original limitations period or within one year after the qualification of the personal representative, whichever occurs later.[178] In reaching this conclusion, however, the court had to overrule *McDaniel*, which held that a suit filed in Virginia by a person qualified as a personal representative in another state tolls the statute of limitations in Virginia.[179]

The defendant used *McDaniel* to argue that if foreign qualification in that case had some legal effect, then the foreign qualifica-

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> son in whose favor or against whom a cause of action has accrued or shall subsequently accrue and the qualification of such person's personal representative, such personal representative shall, for the purposes of this chapter, be deemed to have qualified on the last day of such two-year period.

VA. CODE ANN. § 8.01-229(B)(1) (Cum. Supp. 2006).

175. *Harmon*, 273 Va. at 189, 639 S.E.2d at 296.

176. *Id.* at 191, 639 S.E.2d at 298.

177. *See id.*

178. Notably, there may have been an argument not raised by the defendant that Virginia Code section 8.01-229(B)(1) did not apply. By its terms, it appears the statute applies only when a person entitled to bring a personal injury action dies with no such action pending *before* the expiration of the original limitations period. An argument could be made (assuming the continuing treatment rule, *see generally* Farley v. Goode, 219 Va. 969, 252 S.E.2d 594 (1979), and the extension provision of Virginia Code section 8.01-243(c)(1) do not apply) that the original limitations period began to run on June 1, 2001 and expired on June 1, 2003, and that no personal injury action, which was not filed until October 2003, was pending *before* the expiration of the limitations period. Thus, the statute might not apply. But this argument hinges on the application of the word "before" to "no such action pending." If, instead, the word "before" applies to the death of the party, then Mr. Harmon's death in May 2003, which occurred before the expiration of the limitations period in June 2003, would trigger application of the statute.

179. *See Harman*, 273 Va. at 192–95, 639 S.E.2d at 298–300 (discussing its holding in *McDaniel*).

tion of Mrs. Harmon in West Virginia should also have legal effect.[180] That is, the one year period found in Virginia Code section 8.01-229(B)(1) should have started to run from July 18, 2003, the date Mrs. Harmon qualified as personal representative in West Virginia.[181] Defendant argued that although the one year period was tolled while the first case, filed October 29, 2003, was pending, it began to run again when the estate closed in West Virginia on January 13, 2004.[182] Adding all the relevant time periods under the defendant's analysis amounted to a seventeen-month delay between qualification in West Virginia and the filing of the action in Virginia, longer than the one year allowed by Virginia Code section 8.01-229(B)(1).[183]

The court rejected the defendant's analysis because it concluded that *McDaniel* was a "flagrant error."[184] *McDaniel* violated the well-established principle that a suit filed by a person who lacks standing has no legal effect.[185] *McDaniel* could not, therefore, support the defendant's argument that West Virginia qualification triggered the running of the Virginia statute's one year period.[186]

2. *Janvier v. Arminio*

Janvier involved three cases filed by plaintiff against his podiatrist for alleged malpractice.[187] The plaintiff timely filed the first case in May 2001, but it was nonsuited without notice to the defendant in June 2002.[188] The second case was filed in October 2002, but it too was nonsuited without notice to the defendant in December 2003.[189] The third case was filed in May 2004 and served in August 2004.[190] The defendant moved to dismiss the third case on the ground that it was barred by the statute of limitations, but the plaintiff countered that it was timely because it

180. *See id*. at 190–91, 639 S.E.2d at 297–98.
181. *See id.* at 191, 639 S.E.2d at 297.
182. *See id.*
183. *Id.*, 639 S.E.2d at 298.
184. *Id.* at 192, 639 S.E.2d at 299.
185. *Id.*
186. *Id.* at 197–98, 639 S.E.2d at 301–02.
187. *See* Janvier v. Arminio, 272 Va. 353, 359–60, 634 S.E.2d 754, 756–57 (2006).
188. *Id.* at 359, 634 S.E.2d at 756.
189. *Id.* at 359, 634 S.E.2d at 756–57.
190. *Id.* at 359, 634 S.E.2d at 757.

was filed within six months of the last nonsuit as allowed by Virginia Code section 8.01-229(E)(3).[191] The defendant riposted that the second nonsuit was a legal nullity because it was entered without notice to the defendant.[192] The trial court agreed and held that the second nonsuit was a legal nullity and void ab initio and, therefore, the third case was untimely because the six-month extension of Virginia Code section 8.01-229(E)(3) did not apply.[193] The court dismissed the second case because it had been pending longer than one year without service on the defendant in violation of Rule 3:5(e).[194]

The supreme court reversed and held that the nonsuit of the second case was not void ab initio because Virginia Code section 8.01-380[195] contains no express provision for notification of parties of a second nonsuit.[196] To rule otherwise would be to amend the statute by judicial fiat.[197] Because the second case nonsuit was effective, the third case benefited from the six-month extension and was timely filed.[198] Thus, the plaintiff could proceed against the defendant in the third case.[199]

The court noted in its opinion that the General Assembly would do well to amend the nonsuit statute to require notice to defen-

191. *See id.* at 359–60, 634 S.E.2d at 757. Virginia Code section 8.01-229(E)(3) provides, in relevant part:

> If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, . . . whichever period is longer.

VA. CODE ANN. § 8.01-229(E)(3) (Cum. Supp. 2006).

192. *See Janvier*, 272 Va. at 360, 634 S.E.2d at 757.

193. *See id.* at 361, 634 S.E.2d at 758.

194. *See id.* at 362, 634 S.E.2d at 758.

195. Virginia Code section 8.01-380(B) provides in pertinent part: "Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits or counsel may stipulate to additional nonsuits." VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2006). Although the defendant acknowledged the statute contains no express provision requiring notice of a second nonsuit, he argued that the court's discretion in granting a second nonsuit could be informed only with the participation of the defendants. *See Janvier*, 272 Va. at 366, 634 S.E.2d at 761.

196. 272 Va. at 365, 634 S.E.2d at 760.

197. *Id.* at 366, 634 S.E.2d at 760–61 (quoting McManama v. Plunk, 250 Va. 27, 32, 458 S.E.2d 759, 762 (1995)).

198. *Id.* at 367, 634 S.E.2d at 761.

199. *See id.*

dants of a second nonsuit.[200] The General Assembly responded and amended the statute accordingly.[201]

G. *Pleading and Practice*

1. *Ford Motor Co. v. Benitez*

In *Benitez*, the trial court sanctioned a defense attorney for including thirteen affirmative defenses in an answer to a recommenced nonsuited action.[202] The defense attorney included these defenses even though extensive discovery in the original action revealed no factual bases supporting them.[203] In the absence of supporting factual bases, the court held that the sanctions were appropriate under Virginia Code section 8.01-271.1, [204] which provides that "[t]he signature of an attorney or party constitutes a certificate by him that . . . he has read the pleading, motion, or other paper, [and that] . . . to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact."[205]

The court further rejected the defendant's argument that he was entitled to plead the numerous defenses because discovery might later reveal factual support for them.[206] This tactic is "oppressive," the court held, because it makes parties "shoulder the burden of preparing to meet" claims and defenses that may never have a basis in fact; Virginia Code section 8.01-271.1 was specifically designed to prevent this "abuse" of the pleading process.[207]

200. *See id.* at 357, 634 S.E.2d at 755 ("Both future plaintiffs and defendants might well benefit should the General Assembly amend Code § 8.01-380 by providing a requirement for notice or the exercise of due diligence to give notice to a defendant when a plaintiff seeks a second or subsequent nonsuit.").

201. Virginia Code section 8.01-380 was amended in 2007 and now requires that

> [W]hen suffering a nonsuit, a party shall inform the court if the cause of action has been previously nonsuited. Any order effecting a subsequent nonsuit shall reflect all prior nonsuits and shall include language that reflects the date of any previous nonsuit together with the court in which any previous nonsuit was taken.

VA. CODE ANN. § 8.01-380(B) (Repl. Vol. 2007).

202. Ford Motor Co. v. Benitez, 273 Va. 242, 247–48, 639 S.E.2d 203, 205–06 (2004).

203. *See id.*, 639 S.E.2d at 204–06.

204. *See id.* at 252, 639 S.E.2d at 207.

205. VA. CODE ANN. § 8.01-271.1 (Repl. Vol. 2007).

206. *Benitez*, 273 Va. at 251–52, 639 S.E.2d at 207.

207. *Id.* at 252, 639 S.E.2d at 207–08.

The proper remedy for a party who discovers facts during litigation that may support the assertion of a claim or defense is to move the court for leave to amend its pleading.[208] The court reiterated that failure to grant leave to amend is normally an abuse of discretion.[209]

2. *Bio-Medical Applications of Virginia, Inc. v. Coston*

In *Coston*, a medical malpractice case, the court clarified when a plaintiff may take a nonsuit under Virginia Code section 8.01-380 once a dispositive motion has been submitted to the trial court.[210] The dispositive motion before the trial court was the defendant's motion for summary judgment arguing that the plaintiff's case should be dismissed because he had no expert to testify that the defendant's actions fell below the standard of care.[211] The trial court heard oral argument from the defendant on the motion and heard from the plaintiff in response.[212] The trial court then stated it would hear the "final word" from defense counsel, who gave a brief rebuttal to plaintiff's response.[213] After the defendant's rebuttal, the trial court indicated that medical malpractice actions do indeed require expert testimony on the standard of care.[214] It then asked if any of the parties would like "to move the court."[215] Taking the hint, the plaintiff moved for a voluntary nonsuit, which was granted over the defendant's objection that it came too late.[216] On appeal, the Supreme Court of Virginia agreed that the nonsuit came too late.[217]

The court held that the nonsuit statute contemplates three conceptually distinct situations concerning the timing of a voluntary nonsuit.[218] The first situation involves those cases in which a motion to strike the plaintiff's evidence is submitted to the trial

208. *Id.*, 639 S.E.2d at 208.

209. *Id.* (citing Mortarino v. Consultant Eng'g Servs., 251 Va. 289, 295–96, 467 S.E.2d 778, 782 (1996)).

210. Bio-Med. Applications v. Coston, 272 Va. 489, 634 S.E.2d 349 (2006).

211. 272 Va. at 492, 634 S.E.2d at 350.

212. *Id*.

213. *Id*.

214. *Id.* Indeed, the supreme court believed the trial court ruled rather than simply "indicated." *See id.* at 494, 634 S.E.2d at 351.

215. *Id.* at 492, 634 S.E.2d at 350.

216. *See id.*

217. *Id*. at 495, 634 S.E.2d at 352.

218. *Id.* at 492, 634 S.E.2d at 350.

court after the plaintiff has presented his evidence to the jury and has rested.[219] In this first situation, a plaintiff can take a nonsuit up until the time the trial court actually sustains the motion to strike.[220]

The second situation contemplates cases where the jury has heard all the evidence, has been charged, and has retired from the bar to begin deliberations.[221] In this second situation, a plaintiff can take a nonsuit up until the time the jury has actually retired from the bar to begin its deliberations.[222]

The third situation contemplates an action that is in the hands of the trial judge for final disposition, either on the merits or on a dispositive motion.[223] The defendant's summary judgment motion in *Coston* placed the case in this third class because the action was in the hands of the trial judge for final disposition once all parties had briefed and presented oral argument on the matter.[224] Thus, the plaintiff's motion for nonsuit, which was interposed after oral argument concluded, came too late.[225]

H. *Corporate:* Parikh v. Family Care Center

Although *Parikh* involved the enforcement of a non-compete clause, the manner in which the ultimate decision was reached may force health care providers to reconsider their incorporating documents and employment agreements. This case involved an employment agreement between Family Care Center, Inc., which was originally organized as a professional corporation, and Dr. Parikh.[226] Family Care Center's lone shareholder was Dr. Burns, who died in an automobile accident in 2003.[227] Thereafter, his widow Mrs. Burns, who was not a doctor, became the sole shareholder.[228] In the absence of a professional shareholder, the profes-

219. *Id*.

220. *Id.* at 493, 634 S.E.2d at 351. This is the so-called "Berryman rule." *See* Berryman v. Moody, 205 Va. 516, 518–19, 137 S.E.2d 900, 902 (1964).

221. *Coston*, 272 Va. at 492–93, 634 S.E.2d at 350.

222. *Id*., 634 S.E.2d at 350–51.

223. *Id.*

224. *Id.* at 494, 634 S.E.2d at 351.

225. *Id.* at 495, 634 S.E.2d at 352.

226. Parikh v. Family Care Ctr., Inc., 273 Va. 284, 286, 641 S.E.2d 98, 99 (2007).

227. *Id.*

228. *Id.*

sional corporation converted to a simple corporation by operation of Virginia Code section 13.1-552(B).[229]

The employment agreement between Family Care Center and Dr. Parikh contained two provisions of import to the court's analysis. First, the agreement provided that Family Care Center was "engaged in the practice of medicine."[230] Second, the agreement contained a non-compete clause requiring that Dr. Parikh, for up to three years after termination of his employment, pay Family Care Center $10,000 a month for each month he practiced medicine within twenty miles of the Center.[231] Dr. Parikh violated the agreement and lost in the trial court on an action to enforce the non-compete clause.[232]

On appeal, the supreme court held that the non-compete clause should not be enforced because it did not further the "legitimate business interests" of Family Care Center.[233] Family Care Center, a non-professional corporation, had no right to practice medicine in Virginia pursuant to Virginia Code section 54.1-111(A), which provides that no person or corporation can practice a professional occupation without a license to do so.[234] Because Family Care Center had no license to practice medicine,[235] the corporate purpose—as set forth in the employment agreement—to "engage in the practice of medicine" was not "legitimate."[236] Thus, the non-compete clause could not be enforced.[237]

229. *Id.* Virginia Code section 13.1-552(B) provides, in relevant part:

> Whenever all shareholders of a corporation licensed under this chapter cease at any one time and for any reason to be licensed, certified or registered in the particular field of endeavor for which the corporation was organized, . . . the corporation thereupon shall be treated as converted into, and shall operate henceforth solely as, a corporation.

VA. CODE ANN. § 13.1-552(B) (Repl. Vol. 2006).

230. *Parikh*, 273 Va. at 287, 641 S.E.2d at 99.

231. *Id.*

232. *Id*.

233. *Id*. at 291, 641 S.E.2d at 101.

234. Virginia Code section 54.1-111(A) provides in part that "[i]t shall be unlawful for any person, partnership, corporation or other entity to engage in . . . [p]racticing a profession or occupation without holding a valid license as required by statute or regulation." VA. CODE ANN. § 54.1-111(A)(1) (Repl. Vol. 2005 & Cum. Supp. 2006).

235. Indeed, the court noted that the Board of Medicine apparently has no statutory authority to issue licenses to corporate entities. *Parikh*, 273 Va. at 290 n.3, 641 S.E.2d at 101 n.3.

236. *See id.* at 290–91, 641 S.E.2d at 101.

237. *See id*.

Although the court took pains to repeatedly reference the fact that Family Care Center was a "non-professional corporation" by concluding that it could not practice medicine, it seems a faithful application of Virginia Code section 54.1-111(A) would dictate the same conclusion even if it were a professional corporation.[238] Health care providers would do well, therefore, to closely examine their incorporating documents and employment agreements to ensure they do not evince an illegitimate purpose to engage in the practice of medicine.[239]

II. LEGISLATIVE AND ADMINISTRATIVE LAW DEVELOPMENTS

The 2007 General Assembly Session was active, with 3,067 pieces of legislation introduced.[240] Although the long-running controversy surrounding the General Assembly's efforts to fund the state's transportation needs continued, the legislative session adjourned on time with both a budget and a transportation bill. Some significant legislation in the health care area was also addressed. Health care remains a focus of the executive branch as well, with Governor Kaine creating a Healthcare Reform Commission in 2006, scheduled to provide a report and recommendations in September 2007.[241] Articulating the current policy emphasis on health care, the Governor stated:

> Ensuring access to quality healthcare that is safe and affordable is one of the most fundamental commitments we have to our citizens, . . . with more than one million Virginians lacking healthcare coverage, and growing shortages of health professionals in all disciplines across the Commonwealth and the nation, we must look for creative ways to further improve the delivery of healthcare to Virginians.[242]

238. Virginia Code section 54.1-111(A) does not distinguish between professional and non-professional organizations. VA. CODE ANN. § 54.1-111(A) (Repl. Vol. 2005 & Cum. Supp. 2007).

239. The court noted that Virginia Code section 13.1-542.1 allows non-professional corporations to "render" professional services. But the court specifically declined to address the extent to which this statute allows corporations to render medical services because neither party addressed the issue. *See Parikh*, 273 Va. at 289, 641 S.E.2d at 100.

240. The statistics regarding the disposition of those bills are: 1553 passed, 1869 failed, and 358 continued. Virginia General Assembly Legislative Information System, http://leg1.state.va.us/cgi-bin/legp504.exe?071+oth+STA.html (last visited Oct. 22, 2007).

241. *See* Press Release, Office of the Governor of Virginia, Governor Kaine Creates Healthcare Reform Commission (Aug. 8, 2006), *available at* http://www.governor.virginia.gov/mediarelations/newsreleases/viewrelease.cfm?id=206.

242. *Id.*

Summaries of those 2007 legislative enactments likely to be of particular interest to those in health care law are included below.

A. *Nursing Facility Quality Improvement*

The Department of Medical Assistance Services ("DMAS") has been directed to develop a Nursing Facility Quality Improvement program that utilizes Civil Money Penalty Funds to improve the health, safety, and welfare of residents in nursing homes.[243] This program will replace the role of nonprofit organizations in using Civil Monetary Penalty Funds collected by the DMAS.

B. *Power of Licensure Restriction*

Health regulatory boards have been given the power to summarily restrict licenses, certificates, registrations, or licensure privileges if the relevant board finds that there is a substantial danger to the public health or safety that warrants this action.[244] The board must schedule an informal conference within a reasonable time of the date of the summary action.[245] Previous statutes allowed a board only to *suspend* the authority to practice under such circumstances, but not to restrict it.[246]

C. *Patient Access to Their Laboratory Results*

Laboratory testing results are sent to the ordering physician, but typically not to the patient himself. As patients become more involved and knowledgeable about their own health care, many would like to see their own lab results. New legislation makes this feasible. Licensed practitioners who order laboratory tests or other examinations of the physical condition of any person may, if requested by the patient or their legal guardian, direct the laboratory or other facility conducting the test or examination to pro-

243. *See* Act of Mar. 19, 2007, ch. 474, 2007 Va. Acts 643 (codified as amended at VA. CODE ANN. § 32.1-353.1.3 (Cum. Supp. 2007)).

244. Act of Feb. 19, 2007, ch. 22, 2007 Va. Acts 21 (codified as amended at VA. CODE ANN. § 54.1-2408.1(B) (Cum. Supp. 2007)).

245. *Id*.

246. VA. CODE ANN. § 54.1-2408.1(A) (Repl. Vol. 2005).

vide a copy of the result directly to the patient or their legal guardian.[247]

D. *Long Term Care and Health Care Policy*

There have been a variety of pronouncements on health care policy in the Commonwealth, particularly in the long-term care area. The Secretary of Health and Human Resources has been designated to "serve as the lead Secretary for the coordination and implementation of the long-term care policy of the Commonwealth, working with the Secretaries of Transportation, Commerce and Trade, and Education, and the Commissioner of Insurance, to facilitate interagency service development and implementation, communication and cooperation."[248] The type of long-term care services that must be provided by the Commonwealth through the Department of Aging have been expanded to include transportation, educational and housing services, and opportunities for self-care and independent living.[249]

In the licensing of health care facilities, the Commissioner of Health is required to ensure that quality of care, patient safety, and patient privacy are the overriding goals of such licensure and related enforcements.[250]

The Commissioner is likewise required to coordinate with the Department of Health's emergency preparedness and response efforts and to ensure that prevention of disease and protection of public health remain the Department's overriding goals.[251]

Under current law, hospice facilities must be licensed as hospitals, nursing facilities, or assisted living facilities.[252] Some have raised concern about the relevance of assisted living facility regu-

247. Act of Apr. 4, 2007, ch. 887, 2007 Va. Acts 2401 (codified as amended at VA. CODE ANN. § 54.1-2409.4 (Cum. Supp. 2007)).

248. Act of Mar. 15, 2007, ch. 399, 2007 Va. Acts 567 (codified as amended at VA. CODE ANN. § 2.2-212 (Cum. Supp. 2007)).

249. Act of Mar. 23, 2007, ch. 747, 2007 Va. Acts 1137 (codified as amended at VA. CODE ANN. § 2.2-701 (Cum. Supp. 2007)).

250. Act of Mar. 23, 2007, ch. 797, 2007 Va. Acts 1218 (codified as amended at VA. CODE ANN. § 32.1-19(B) (Cum. Supp. 2007)); Act of Mar. 13, 2007, ch. 320, 2007 Va. Acts 453 (codified as amended at VA. CODE ANN. § 32.1-19(B) (Cum. Supp. 2007)).

251. Act of Mar. 13, 2007, ch. 320, 2007 Va. Acts 453 (codified as Amended at VA. CODE ANN. § 32.1-19(C), (D) (Cum. Supp. 2007)); Act of Mar. 23, 2007, ch. 797, 2007 Va. Acts 1218 (codified as amended at VA. CODE ANN. § 32.1-19(C), (D) (Cum. Supp. 2007)).

252. VA. CODE ANN. § 32.1-162.5 (Repl. Vol. 2004).

lations to hospices. To address this concern, new regulations will be developed that are specific to hospice facilities that are not inpatient facilities and are currently licensed as assisted living facilities.[253]

Another new law for assisted living facilities permits residents to stay in such a facility when the resident's condition deteriorates if the resident's physician, family, and assisted living facility agree to an appropriate treatment plan.[254] The assisted living facility must also agree to provide the services needed by the resident.[255]

E. *Multi-Line Telephone Systems and E911*

Multi-line telephone systems acquired or installed after July 1, 2009 must be maintained and operated so that calls to 911 from each telephone station on the system provide either automatic location and number identification information or an alternative method of providing call location information.[256] In any medical care facility or licensed assisted living facility, however, "telephone station" includes any telephone on a multi-line telephone system located in an administrative office, nursing station, lobby, waiting area, or other area accessible to the general public, but does not include a telephone located in the room of a patient or resident.[257] The Wireless E-911 Services Board is directed to monitor development in E-911 service and multi-line telephone system technologies.[258]

F. *Physician Extenders*

Licensed physician assistants are authorized to prescribe Schedule II through VI controlled substances and devices on or after July 1, 2007.[259] Properly trained personnel acting pursuant

253. Act of Mar. 15, 2007, ch. 397, 2007 Va. Acts 565 (codified as amended at VA. CODE ANN. §§ 32.1-162.1, -162.3, -162.5, 63.2-1806 (Cum. Supp. 2007)).

254. Act of Mar. 19, 2007, ch. 539, 2007 Va. Acts 736 (codified as amended at VA. CODE ANN. § 63.2-1805(C) (Cum. Supp. 2007)).

255. *Id*.

256. Act of Mar. 19, 2007, ch. 427, 2007 Va. Acts 595 (codified as amended at VA. CODE ANN. § 56-484.23 (Cum. Supp. 2007)).

257. *Id*. at 410 (codified as amended at VA. CODE ANN. § 56-484.19 (Cum. Supp. 2007)).

258. *Id*. (codified as amended at VA. CODE ANN. § 56-484.14 (Cum. Supp. 2007)).

259. Act of Feb. 19, 2007, ch. 16, 2007 Va. Acts 15 (codified as amended at VA. CODE

to a specific order for a patient, and under a doctor's direct and immediate supervision, can administer certain controlled substances, provided the method of administration is not intravenous, intrathecal, or epidural.[260] The prescriber of the controlled substance remains responsible for the administration.[261]

G. *Senior Alert Program*

Similar to the Amber Alert Program for missing children, the legislature has created a program for local, regional, and statewide notification of a missing senior adult.[262] "Missing senior adult" is defined as an individual over sixty years of age who suffers from a cognitive impairment, which renders him unable to provide care for himself without assistance (including a diagnosis of Alzheimer's Disease or dementia), whose whereabouts are unknown, and whose disappearance poses a credible threat to the adult's health and safety.[263] The bill also requires that no police or sheriff's department shall establish or maintain any policy which requires a waiting period before a missing senior adult report will be accepted.[264] Within two hours of receiving a report, the departments are required to enter identifying and descriptive information about the missing senior adult into the Virginia Criminal Information Network and the National Crime Information Center systems.[265] The departments are also required to forward the information to the Virginia Department of State Police, notify other law enforcement agencies in the area, and initiate an investigation of the report.[266]

ANN. § 54.1-2952.1 (Cum. Supp. 2007)).

260. Act of Feb. 19, 2007, ch. 17, 2007 Va. Acts 15 (codified as amended at VA. CODE ANN. § 54.1-3408(T) (Cum. Supp. 2007)).

261. *Id.*

262. *See* Act of Mar. 19, 2007, ch. 486, 2007 Va. Acts 660 (codified as amended at VA. CODE ANN. § 15.2-1718.1, 52-34.4 to -34.6 (Cum. Supp. 2006)); *see also* Act of Mar. 21, 2007, ch. 723, 2007 Va. Acts 1104 (codified as amended at VA. CODE ANN. §§ 15.2-1718.1, 52-34.5 (Cum. Supp. 2007)).

263. Act of Mar. 19, 2007, ch. 486, 2007 Va. Acts 660 (codified as amended at VA. CODE ANN. § 52-34.4 (Cum. Supp. 2007)).

264. *Id.* (codified as amended at VA. CODE ANN. § 15.2-1718.1(A) (Cum. Supp. 2007)).

265. *Id.*

266. *Id.*

H. *Statewide Emergency Medical Care System*

The legislature has made several revisions to the procedures related to orders of quarantine and isolation.[267] Additional persons not ordinarily authorized by law to administer or dispense medication can now dispense and administer all necessary drugs when the governor has declared a disaster or a state of emergency.[268] Electronic legal filings are authorized to protect the public from communicable diseases.[269] A joint subcommittee has been formed "to study the feasibility of offering liability protections to health care providers rendering aid during a state or local emergency."[270] The joint subcommittee will "examine the estimated benefits to the citizens of the Commonwealth of enhanced liability protections for health care providers" during emergencies, as well as determine how many other states have similar protections in place.[271]

The legislature has also added provisions for additional performance improvement measures and a requirement that the statewide Trauma Triage Plan be updated triennially.[272] In addition, the legislature granted localities the "authority to require the review of, and suggest amendments to, the emergency plans of nursing homes, assisted living facilities, adult day care centers, and child day care centers" within their locales.[273]

I. *Minimum Dollar Threshold for Reporting of Medical Malpractice Judgments and Settlements*

A bill initiated by the Medical Society of Virginia has resulted in legislation to better define the requirements of physician reporting of medical malpractice judgments and settlements to the

267. *See* Act of Mar. 21, 2007, ch. 699, 2007 Va. Acts 1060 (codified as amended in scattered sections of VA. CODE ANN.); *see also* Act of Mar. 23, 2007, ch. 783, 2007 Va. Acts 1195 (codified as amended in scattered sections of VA. CODE ANN.).

268. Act of Mar. 21, 2007, ch. 699, 2007 Va. Acts 1060 (codified as amended at VA. CODE ANN. § 32.1-42.1 (Cum. Supp. 2007)).

269. *Id.* (codified as amended at VA. CODE ANN. § 32.1-48.013:1 (Cum. Supp. 2007)).

270. *See* H.J. Res. 701, Va. Gen. Assembly (Reg. Sess. 2007); S.J. Res. 390, Va. Gen. Assembly (Reg. Sess. 2007).

271. *Id.*

272. *See* Act of Feb. 19, 2007, ch. 15, 2007 Va. Acts 13 (codified as amended at VA. CODE ANN. § 32.1-111.3 (Cum. Supp. 2007)).

273. Act of Mar. 8, 2007, ch. 129, 2007 Va. Acts 178 (codified as amended at VA. CODE ANN. § 44-146.19(H) (Cum. Supp. 2007)).

Board of Medicine.[274] Settlements or judgments of less than $10,000 no longer have to be reported by the licensee, provided the licensee has not paid another settlement or judgment within the previous twelve months.[275] This legislation also requires that the Board of Medicine shall not post any notice of disciplinary action on its website or online physician practice profile unless there has been an order finding a disciplinary violation and the Board establishes a process for removal of such notices already published that did not result in a disciplinary violation finding.[276]

J. *Expert Certification Statutes*

The statutes requiring that a plaintiff have a signed supportive statement from a qualified expert witness prior to requesting service of process in a medical malpractice suit[277] have been amended by the legislature to likewise impose the requirement where the defendant has agreed to accept service of process.[278] These statutes, as originally enacted, prevent defense counsel from obtaining information about the *identity* of the certifying expert, who need not be disclosed and who need not testify at trial.[279] The new legislation also restricts the defendant in such cases from obtaining information about the *qualifications* of the certifying expert.[280]

K. *Tanning Bed Regulations*

Tanning facilities must now require customers to sign a written statement warning of the potential dangers of tanning bed use.[281] Customers under fifteen, and not emancipated under Virginia law, must have a parent signature on such a form every six months.[282] Facility owners are also required by this legislation to

274. *See* Act of Apr. 4, 2007, ch. 861, 2007 Va. Acts 2332 (codified as amended at VA. CODE ANN. §§ 54.1-2900, -2910.1, -2910.2, -2912.3 (Cum. Supp. 2007)).

275. *Id.* (codified as amended at VA. CODE ANN. § 54.1-2910.1(C) (Cum. Supp. 2007)).

276. *Id.* (codified as amended at VA. CODE ANN. § 54.1-2910.2 (Cum. Supp. 2007)).

277. *See* VA. CODE ANN. §§ 8.01-20.1, -50.1, 16.1-83.1 (Cum. Supp. 2006).

278. *See* Act of Mar. 19, 2007, ch. 489, 2007 Va. Acts 663 (codified as amended at VA. CODE ANN. §§ 8.01-20.1, -50.1, 16.1-83.1 (Cum. Supp. 2007)).

279. *See id*.

280. *Id.*

281. Act of Mar. 19, 2007, ch. 575, 2007 Va. Acts 789 (codified as amended at VA. CODE ANN. § 59.1-310.3(B) (Cum. Supp. 2007)).

282. *Id.*

identify each customer's skin type using the Fitzpatrick scale[283] and to advise customers of their maximum time of recommended exposure.[284] Tanning facilities are prohibited from claiming that the use of tanning devices is safe, free from risk, or will provide health benefits.[285]

L. *Privileged Communications for Health Care Providers*

Legislation originally introduced in response to the Supreme Court of Virginia's ruling in *Johnson v. Riverside*[286] was unable to find consensus among the stakeholders. The portion of the original legislation intended to restore the privilege applicable to incident reports and other hospital-based quality assurance programs was ultimately struck from the final bill.[287] As amended, the bill clarifies the scope of the physician-based quality assurance programs to specify that the twenty-four hour exception to the protection from discovery of statements made as part of an investigation is applicable only to the physician office-based peer review programs, not to hospital-based peer review and quality assurance processes.[288]

M. *Direct Patient Access to Physical Therapy Services*

Patients can now access physical therapists without a referral from a physician under the following circumstances: (i) the patient is not under the care of a physician for the condition at issue; (ii) the patient identifies the physician from whom he or she will obtain care if the condition persists; and (iii) the physical therapist must notify the physician within three days of treatment and provide the physician with a copy of the patient evaluation and patient history.[289] The final legislation eliminates the previous diagnosis requirement and permits a physical therapist

283. *Id*.

284. Act of Mar. 19, 2007, ch. 575, 2007 Va. Acts 789 (codified as amended at VA. CODE ANN. § 59.1-310.5(B) (Cum. Supp. 2007)).

285. *Id.* (codified as amended at VA. CODE ANN. § 59.1-310.5(H) (Cum. Supp. 2007)).

286. *See supra* Part I.A.

287. *See* Act of Mar. 19, 2007, ch. 530, 2007 Va. Acts 726 (codified as amended at VA. CODE ANN. § 8.01-581.17 (Cum. Supp. 2007)).

288. *Id.* (codified as amended at VA. CODE ANN. § 8.01-581.17(B) (Cum. Supp. 2007)).

289. Act of Feb. 19, 2007, ch. 18, 2007 Va. Acts 18 (codified as amended at VA. CODE ANN. § 54.1-3482(B) (Cum. Supp. 2007)); Act of Feb. 19, 2007, ch. 9, 2007 Va. Acts 4 (codified as amended at VA. CODE ANN. § 54.1-3482(B) (Cum. Supp. 2007)).

to evaluate a patient and treat them for fourteen business days before a physician referral is needed.[290] This legislation requires that a direct access certification process be implemented for those physical therapists seeking to practice without referral under the new legislation.[291] The certification ensures that individuals practicing under the new law have appropriate education in medical screening and differential diagnosis.[292] Regulations to implement the certification process will be promulgated by the Board of Physical Therapy, and the new law will not go into effect until that process is completed.[293]

N. *Combating Childhood Obesity*

The legislature directed the Departments of Education and Health to work together to combat childhood obesity and other chronic health conditions that affect school-age children.[294]

O. *"Abraham's Law"*

This bill derived from the 2006 Eastern Shore case in which the department of social services alleged that the parents of a teenage boy named Starchild Abraham Cerrix committed medical neglect by respecting their son's decision to forego chemotherapy.[295] The bill allows children fourteen or older, jointly with their parents, to make a decision to refuse medical treatment—provided the child has sufficient maturity, all reasonable treatment options have been considered, and the parents believe refusing a particular treatment is in the child's best interests.[296]

290. Act of Feb. 19, 2007, ch. 18, 2007 Va. Acts 18 (codified as amended at VA. CODE ANN. § 54.1-3482(B) (Cum. Supp. 2007)).

291. *Id.* (codified as amended at VA. CODE ANN. § 54.1-3482.1 (Cum. Supp. 2007)).

292. *Id.*

293. *Id.*

294. Act of Feb. 19, 2007, ch. 43, 2007 Va. Acts 42 (codified as amended at VA. CODE ANN. § 22.1-23, 32.1-19 (Cum. Supp. 2007)); Act of Feb. 19, 2007, ch. 55, 2007 Va. Acts 53 (codified as amended at VA. CODE ANN. § 22.1-23, 32.1-19 (Cum. Supp. 2007)).

295. *See generally* Abraham's Journey, http://www.abrahamsjourney.com/ (last visited Oct. 22, 2007).

296. Act of Mar. 19, 2007, ch. 479, 2007 Va. Acts 649 (codified as amended at VA. CODE ANN. § 63.2-100(2) (Cum. Supp. 2007)); Act of Mar. 20, 2007, ch. 597, 2007 Va. Acts 810 (codified as amended at VA. CODE ANN. § 63.2-100(2) (Cum. Supp. 2007)).

P. *Smoking in Proximity to Hospital Oxygen Source*

The obviously dangerous practice of smoking in close proximity to an oxygen source in a health care facility, while likely a violation of the civil negligence duty, was not previously clearly identified as a criminal offense. This new legislation provides that "[a]ny person who smokes or uses an open flame within twenty-five feet of a[n] . . . oxygen source in a health care facility, . . . when the area is posted as an area where smoking and open flame are prohibited is guilty of a Class 2 misdemeanor."[297]

Q. *Revised Uniform Anatomical Gift Act ("UAGA")*

This new law regarding anatomical gifts was adopted, in substantial part, by the National Conference of Commissioners on Uniform State Laws in July 2006.[298] The Act clarifies current law in Virginia, addresses lack of uniformity among states, and brings state law into conformity with federal laws applicable to organ, tissue, and eye donation.[299] The revised Act addresses each step in the organ and tissue donation process and establishes rules of decision to resolve uncertainties and ambiguities that have arisen under prior versions of the UAGA.[300] It ensures that, if an individual wishes to make an anatomical gift or to refuse to make such a gift, those wishes will be respected without exception.[301] The Act preserves the right of other persons to make an anatomical gift if the decedent did not make a gift during life and clarifies, how, to whom, and for what purpose the gift can be made.[302] The Act also facilitates donations by expanding the list of persons who can make an anatomical gift and by establishing the priority and circumstances under which such persons may make a gift,

297. Act of Mar. 19, 2007, ch. 430, 2007 Va. Acts 599 (codified as amended at VA. CODE ANN. § 18.2-511.1 (Cum. Supp. 2007)).

298. Act of Feb. 23, 2007, ch. 92, 2007 Va. Acts 114 (codified as amended at VA. CODE ANN. §§ 32.1-291.1 to -291.25, -292.2, 46.2-342, 54.1-2982, -2984, 57-48 (Cum. Supp. 2007)); Act of Apr. 4, 2007, ch. 907, 2007 Va. Acts 2491 (codified as amended at VA. CODE ANN. §§ 32.1-291.1 to -291.25, -292.2, 46.2-342, 54.1-2982, -2984, 57-48 (Cum. Supp. 2007)).

299. *Id.*

300. *Id.* (codified as amended at VA. CODE ANN. §§ 32.1-291.4 to -291.25 (Cum. Supp. 2007)).

301. *Id.* (codified as amended at VA. CODE ANN. § 32.1-291.6 (Cum. Supp. 2007)).

302. *Id.* (codified as amended at VA. CODE ANN. §§ 32.1-291.9 to -291.10 (Cum. Supp. 2007)).

including when they will be considered available to exercise their right to consent to, or refuse, an anatomical gift.

There are also numerous default rules for the interpretation of a document of gift that lacks specificity. The Act affirms that procurement organizations will have access to documents of gift in donor registries, medical records, and DMV records.[303] It also provides that taking measures to preserve the viability of organs, tissues, and eyes for their donative purpose is not inconsistent with a health-care directive requesting the withholding or withdrawal of life support systems.[304] Other provisions address the relationship between the medical examiner and procurement organizations to ensure, to the maximum extent possible, that anatomical gifts are made from decedents under the jurisdiction of the medical examiner.[305] Finally, the revised Act creates a new crime of falsification of a gift document and continues to prohibit the sale of bodies or body parts and increases the criminal penalty from a Class 6 to a Class 4 felony.[306]

R. *Prohibition of Unauthorized Pelvic Exams*

Although one might wonder why such a law is necessary as it would seem that such conduct is otherwise prohibited by law, another new Virginia law specifically prohibits students participating in a course of professional instruction or clinical training program from performing a pelvic examination on an anesthetized or unconscious female patient.[307] Exceptions apply if a "patient or her authorized agent gives informed consent to such examination, the performance of such examination is within the scope of care ordered for the patient, or in the case of a patient incapable of giving informed consent, the examination is necessary for diagnosis or treatment of such patient."[308]

303. *Id.* (codified as amended at VA. CODE ANN. § 32.1-291.14 (Cum. Supp. 2007)).

304. *Id.* (codified as amended at VA. CODE ANN. § 32.1-291.14(J) (Cum. Supp. 2007)).

305. *Id.* (codified as amended at VA. CODE ANN. § 32.1-291.22 (Cum. Supp. 2007)).

306. *Id.* (codified as amended at VA. CODE ANN. § 32.1-291.17 (Cum. Supp. 2007)).

307. Act of Mar. 20, 2007, ch. 678, 2007 Va. Acts 1032 (codified as amended at VA. CODE ANN. § 54.1-2959(B) (Cum. Supp. 2007)).

308. *Id.*

S. *Involuntary Mental Health Commitment and Custody Orders*

A revision to Virginia Code sections 32.7-808 and -810 allows an emergency or temporary custody order to include transportation to a medical facility for a medical evaluation if required by a physician at the hospital to which the person is being transported.[309]

T. *Pregnant Women Support Act*

This new law requires that, as a routine component of prenatal care, every licensed practitioner who renders prenatal care shall provide information and support services to patients whose fetuses test positive for Down Syndrome or other prenatal conditions.[310] This bill also creates the Virginia Pregnant Women Support Fund "as a special nonreverting fund to be administered by the Board of Health to support women and families who are facing [an] unplanned pregnancy."[311]

U. *Medical Records*

Current Virginia law is more restrictive than the Health Insurance Portability and Accountability Act ("HIPAA") in some respects. HIPAA defers to state law where it is more restrictive; therefore, hospitals have had to deny law enforcement requests for certain patient information that HIPAA would allow to be disclosed but which Virginia law does not. A change in this law expands Virginia's health information disclosure authorization to allow disclosure of additional protected health information to law enforcement officials.[312]

Development of quality and compatible electronic health records in Virginia is also encouraged with new requirements that state operated or state-funded systems of electronic health re-

309. Act of Feb. 19, 2007, ch. 7, 2007 Va. Acts 3 (codified as amended at VA. CODE ANN. § 37.2-808(C), -810 (Cum. Supp. 2007)).

310. Act of Mar. 23, 2007, ch. 780, 2007 Va. Acts 1192 (codified as amended at VA. CODE ANN. § 54.1-2403.01(B) (Cum. Supp. 2007)).

311. *Id.* (codified as amended at VA. CODE ANN. § 32.1-11.6 (Cum. Supp. 2007)).

312. Act of Mar. 19, 2007, ch. 497, 2007 Va. Acts 673 (codified as amended at VA. CODE ANN. § 32.1-127.1:03(D)(28)–(30) (Cum. Supp. 2007)).

cords be interoperable or certified by a nationally recognized certification body.[313]

V. *Stem Cell Research*

The General Assembly has elected to continue the current study of issues related to stem cell research for another year, to monitor the progress of the Virginia Cord Blood Bank Initiative, established in 2006, and to review new and emerging issues in stem cell research.[314] New legislation was also enacted requiring that human research review committees of any state institution or agency must ensure that an overview of approved human research projects and their results are made public on the institution or agency's website unless the information is otherwise exempt from disclosure.[315]

W. *Confidentiality of Medical Examiner Reports and Findings*

The legislature provided some protection to the Medical Examiner from participation in discovery by requiring that all Medical Examiner's reports and findings shall be confidential and not available for discovery except as provided.[316] It also created additional exceptions for reports concerning the death of a prisoner committed to the custody of any local correctional facility.[317] In the case of the death of a committed prisoner:

> Upon request, the Chief Medical Examiner shall release such autopsy report to the decedent's attending physician and to the personal representative or executor of the decedent or, if no personal representative or executor is appointed, then at the discretion of the Chief Medical Examiner, to the following persons in the following order of priority: (i) the spouse of the decedent, (ii) an adult son or daughter of the decedent, (iii) either parent of the decedent, (iv) an adult sibling of the decedent, (v) any other adult relative of the decedent in order of blood relationship, or (vi) any appropriate health facility quality assurance program.[318]

313. Act of Mar. 20, 2007, ch. 635, 2007 Va. Acts 963.

314. *See* H.J. Res. 584, Va. Gen. Assembly (Reg. Sess. 2007).

315. Act of Mar. 15, 2007, ch. 413, 2007 Va. Acts 585 (codified as amended at VA. CODE ANN. § 32.1-162.19(E) (Cum. Supp. 2007)).

316. *See* Act of Apr. 4, 2007, ch. 868, 2007 Va. Acts 2343 (codified as amended at VA. CODE ANN. § 32.1-283(B)–(C) (Cum. Supp. 2007)).

317. *Id.*

318. *Id.* (codified as amended at VA. CODE ANN. § 32.1-283(C) (Cum. Supp. 2007)).

The bill also eliminates allowance for any form of disclosure other than aggregate or statistical form of disclosure.[319]

X. *Nursing Homes and Sex Offenders*

Nursing homes and assisted living facilities must inform the applicants and residents in writing how to obtain information about whether there are registered sex offenders in the facility.[320]

Y. *Certificate of Public Need*

Several bills were introduced in the 2007 legislative session that could have significantly impacted or even repealed the Certificate of Public Need ("COPN") law, which requires a determination of public need by the Department of Health before undertaking certain health care "projects."[321] The only bill to reach the governor's desk, however, was HB 2546. This bill increases flexibility in the COPN review process by raising the capital expenditure amount for projects not otherwise reviewable from $5 million to $15 million.[322] Projects between $5 million and $15 million that are not subject to some other statutory review provision must be registered with the Commissioner but are no longer subject to COPN review.[323] For projects that have already received approval from the Department of Health, this bill permits the Commissioner to approve a significant change in cost that exceeds the authorized capital expenditure by more than twenty percent if the applicant can demonstrate that the cost increases do not result in any material expansion of the project.[324]

In addition to legislation intended to reform the current COPN process, significant regulatory activity has occurred with respect

319. *Id.* (codified as amended at VA. CODE ANN. § 32.1-283.4(D) (Cum. Supp. 2007)).

320. Act of Mar. 8, 2007, ch. 120, 2007 Va. Acts 170 (codified as amended at VA. CODE ANN. § 32.1-138(A)(16) (Cum. Supp. 2007)).

321. *See* VA. CODE ANN. § 32.1-102.1 (Repl. Vol. 2004) (defining "project"); *see also* VA. CODE ANN. § 32.1-102.3 (Repl. Vol. 2004) (same). The following legislation failed or was withdrawn: HB 2274 sought repeal of Virginia's Certificate of Public Need laws; HB 2155 introduced significant reforms to the COPN process; HB 2276 sought reformation of the COPN application process and regional health planning operations; HB 2277 sought to eliminate the role of the regional health planning agencies in the COPN review process.

322. Act of Mar. 9, 2007, ch. 502, 2007 Va. Acts 684 (codified as amended at VA. CODE ANN. § 32.1-102.1 (Cum. Supp. 2007)).

323. *Id.*

324. *Id.* (codified as amended at VA. CODE ANN. § 32.1-102.2(B) (Cum. Supp. 2007)).

to the State Medical Facilities Plan ("SMFP").[325] The SMFP is a planning document adopted by the Board of Health that contains criteria and standards for the review of COPN projects.[326] The current SMFP was written in the early 1990s and is consequently outdated. In 2006, the Department of Health prepared a redraft of the SMFP, which went to a public hearing and a variety of review sessions. As a result of those sessions, the SMFP was further rewritten and will undergo a second public hearing with a goal of presenting the document to the State Board of Health for adoption at its fall 2007 meeting.

Compliance with the SMFP is only one of twenty statutorily required considerations the Commissioner must take into account when reviewing a COPN application.[327] A recent trend in the Commissioner's determinations has been the abandonment of the Department of Health's prior practice of accepting an applicant's demonstration that it has achieved the numerical standard set forth in the SMFP for a particular project as the principal, if not sole, basis for approval. In the past year, compliance with the SMFP has become merely a necessary but not sufficient condition; the decision now hinges upon the other nineteen statutorily required considerations.[328]

III. CONCLUSION

Longtime CBS-NEWS anchor personality Walter Cronkite once said: "America's health care system is neither healthy, caring, nor a system."[329] The dedicated professionals who work in this field might dispute this statement though most would agree the system falls short of its goals. We can expect the effectiveness of the system to continue to be debated in the public discourse,[330] and we can expect the law in Virginia to both lead and follow such discussions. President Bush has stated: "America needs a health care system that empowers patients to make rational and smart decisions for themselves and their families, a health care system

325. 12 VA. ADMIN. CODE §§ 5-230-10 to 5-360-70.

326. 12 VA. ADMIN. CODE § 5-230-20.

327. *See* VA. CODE ANN. § 32.1-102.3(B) (Repl. Vol. 2004).

328. *See* Comm's Decisions regarding COPN Request No. VA-7262 (Apr. 3, 2006) and COPN Request No. VA-7059 (Apr. 20, 2006) (on file with author).

329. *Borderline Medicine* (PBS television broadcast Dec. 17, 1990).

330. *See, e.g.*, SICKO (Michael Moore 2007).

in which the relationship between the patient and the provider are central, not a health care system where decisions are made by the federal government."[331] We can anticipate that the coming year will continue to bring debate and perhaps significant change in health law on a national level as well.

As the political landscape changes, we may see renewed efforts at national health care reform, as well as continued change in Virginia. Several significant controversial topics, including tort reform or revision to the medical malpractice damages cap,[332] the Virginia Birth-Related Neurological Injury Compensation Program, and charitable immunity, saw little change in 2007. The Supreme Court of Virginia's Commission on Mental Health Law Reform continues its work.[333] As of this writing, the Supreme Court of Virginia has also accepted two cases from the Charlottesville Circuit Court on the question of whether foundations set up to support teaching hospitals are entitled to charitable immunity.[334] The stakeholders are also preparing for debate and decision on the medical malpractice damages cap and the Birth Injury Fund at the General Assembly, so these issues look to be on the top of the dynamic Virginia health law agenda for the 2008 legislative session.

331. President George W. Bush, Remarks on Healthcare Initiatives (Apr. 4, 2006) *available at* http://www.whitehouse.gov/news/releases/2006/04/20060404.html.

332. VA. CODE ANN. § 8.01-581.15 (Cum. Supp. 2006).

333. *See* Commission on Mental Healthcare Reform, http://www.dmhmrsas.virginia.gov/OMH-MentalHealthCommission.htm (last visited Oct. 22, 2007).

334. *See* Morris v. Univ. of Va. Health Serv. Found., No. 05-163, 2006 Va. Cir. LEXIS 293 (Cir. Ct. Oct. 25, 2006) (Charlottesville City), *appeal docketed*, No. 070214 (Va. June 5, 2007); MacArthur v. Univ. of Va. Health Serv. Found., No. CL04-154, 2006 Va. Cir. LEXIS 294 (Cir. Ct. Dec. 8, 2006) (Charlottesville City), *appeal docketed*, No. 070475 (Va. June 6, 2007); *see also* Wright v. Silver, No. L05-2396, 2007 Va. Cir. LEXIS 14 (Cir. Ct. Feb 14, 2007) (Norfolk City).