

Update on 2013 Virginia Tort Reform

The 2013 Virginia General Assembly Session resulted in the passage of a package of compromise tort reform legislation, effective on July 1, 2013. The package consists of six laws that may provide some benefit in the defense of medical negligence and other litigation of interest for healthcare providers and their insurers. The legislation described below restricts Virginia law on permissible venue; authorizes use of depositions seeking summary judgment on punitive damages claims; provides trial courts with discretion to impose costs for nonsuits taken during trial; broadens corroboration options to address the "Deadman's Statute;" authorizes good cause *in camera* expert witness certification inspection; and codifies existing limits on rights of trespassers to seek recovery. Although these new laws do not significantly alter the tort landscape, they represent a helpful compromise negotiated with the Virginia Trial Lawyers and a coalition of various business interests. The new laws are summarized below.

Venue - Virginia Code § 8.01-262

The purpose of this venue reform is to help limit lawsuits being filed in localities that do not have any meaningful connection to the cause of action. Currently, venue for tort actions (Category B Venue) may be had where the defendant resides; has his principal place

of employment; where a CEO resides if the defendant is a company; where the cause of action or any part thereof arose; where the defendant has a registered office or appointed agent; or where the defendant regularly conducts substantial business. The "substantial business" provision can result in lawsuits being filed in jurisdictions that have no meaningful connection to the dispute at hand.

The new provision slightly restricts venue options. First, for defendant corporations, it eliminates the place of any CEO's residence as a proper venue option, and replaces it with the location of the principal office or principal place of business. Second, the legislation restricts venue options with respect to locations wherein the defendant conducted substantial business activity. The new law requires a practical nexus for proper venue, meaning some meaningful connection must exist between the cause of action and the location where the suit was filed. A meaningful connection might include the location of fact witnesses, the plaintiff's residence, or the location of other evidence. This tightening of the permissible venue statute may help to discourage the filing of lawsuits in jurisdictions that have no significant connection with the dispute at hand.

Summary Judgment and Depositions - Virginia Code § 8.01-420

Summary judgment, or judgment as a matter of law before trial, has historically been difficult to obtain in Virginia because state law does not allow the court to consider discovery depositions in support of summary judgment, unless the parties agree otherwise. The party defending against summary judgment usually does not agree.

The new law adds some limited exceptions to this rule. Specifically, it clarifies how requests for admission can be used to support summary judgment and allows depositions to combat punitive damages. The new law clarifies that answers to requests for admission may be used when submitted in support of a motion for summary judgment even when they include facts learned or referenced in discovery depositions. In such cases, however, the requests for admission cannot reference the deposition or require that the party admit the deponent gave certain testimony.

The new law also allows for the use of discovery depositions in supporting motions for summary judgment seeking dismissal of claims or demands for punitive damages, unless the claim is based on the operation of a vehicle under the influence of alcohol or drugs. This may prove to be a helpful procedural tool in combating

meritless claims for punitive damages by seeking summary judgment before trial.

Nonsuit - Virginia Code § 8.01-380

A nonsuit is the plaintiff's right to obtain a dismissal of the cause of action, allowing the plaintiff to re-file and effectively start over at any point within longer of the remaining statute of limitations or within six months of the nonsuit. A nonsuit can impose significant costs on a defendant where the case is dismissed by nonsuit after substantial expenses have been incurred. In an effort to mitigate that harm, the statute previously allowed for a discretionary assessment of costs against the nonsuiting party if the nonsuit was taken less than seven days before trial. Some courts interpreted this to mean that they did not have discretion to impose costs if the nonsuit was taken during trial.

The new legislation also specifies that nonsuit costs can be assessed against the nonsuiting party if the nonsuit is taken *during trial*. Costs include reasonable witness fees and travel costs of experts who are scheduled to appear at trial. At the court's discretion, the reasonableness of these expenses may be proven by invoices, receipts, or confirmations of payment, without the need to authenticate these documents with testimony. This statute provides some helpful economic relief to the defendant who faces a nonsuit during trial, after having incurred substantial costs to defend the case.

Deadman's Statute – Virginia Code § 8.01-397

This Virginia statute requires corroboration of certain evidence in

an action where one of the parties is now deceased, or otherwise incapable of testifying. Simply put, it states that corroboration is required before judgment can be founded upon the survivor's testimony. The "Deadman's Statute", as it is commonly called, imposes evidentiary challenges in medical malpractice lawsuits alleging wrongful death where the defendant health care provider wishes to explain his care, treatment, or communication and must have corroboration of certain testimony because the patient is now deceased.

The revised statute clarifies that business records can be a means of achieving sufficient corroboration, even if they were authored by the interested party seeking to introduce the evidence. By way of example, a physician could likely corroborate his testimony about discharge instructions given to a now deceased patient, with a medical record authored by that physician where the discharge instructions are stated.

A business record used for this or other purposes at trial typically needs to be "authenticated." The revised statute clarifies that the authenticity of the business record can be established by a Request for Admission. Or, if the authenticity of the record is not admitted by the opponent, then the proponent can establish authenticity with the testimony of an individual, other than the author of the entry, who is not an adverse or interested party whose conduct is at issue in the allegations of the complaint. For example, a medical record custodian, transcriptionist, or other witness who did not author the record but who can attest to its authenticity should be able to

satisfy the evidentiary obligation for admission of a medical record that corroborates the defendant's testimony.

Expert Witness Certification - Virginia Code §§ 8.01-20.1, 8.01-50.1, and 16.1-83.1.

This new law allows the court to inspect a plaintiff's expert certification document, *in camera*, when good cause exists to justify the procedure. In medical malpractice cases, a plaintiff's request for service of process is considered a certification that he obtained a signed written opinion from an expert witness, or witnesses; that the defendant(s) deviated from the applicable standard of care; and that this deviation proximately caused plaintiff's injuries. If the negligence complained of clearly lies within the jury's common knowledge, an expert certification is unnecessary. Va. Code §§ 8.01-20.1, 8.01-50.1, and 16.1-83.1.

Virginia's expert certification statute does not require that the plaintiff disclose the actual certification document, and precludes discovery into the identity and qualification of the certifying expert(s). The legislative change clarifies that the court may conduct an *in camera* review of the plaintiff's certifying expert opinion if good cause is shown. Some circuit courts assumed that they had this power, and now the statute makes clear that the option exists. Defining "good cause" to justify an *in camera* inspection will be left to the courts.

An *in camera* review will allow the court to ensure that a proper certification, from a qualified expert, was obtained in conformity with the requirements of the statute. This could prove helpful to

the defense in circumstances where there is some good cause to believe that the expert certification requirement has not been met.

The expert certification statute requires that the court “shall” impose sanctions if the expert certification statute has not been satisfied, and that the court “may” dismiss the case with prejudice. The statute continues to serve as an important safeguard against cases that require, but lack, expert support at the time of service of process. This change gives the

court an additional tool to enforce the statute’s requirements.

Trespass - Virginia Code § 8.01-219.1

Virginia common law holds that property owners owe no duty of care to trespassers except in very limited circumstances. This legislation preserves the current status of Virginia law and provides that a possessor of real property has no duty of care to a trespasser except as required by common law or statute. This provision of law helps protect against future expansion of duties owed

to trespassers by landowners, including health care facilities.

The attorneys at Hancock, Daniel, Johnson & Nagle, P.C. are able to provide assistance with all aspects of healthcare law and medical malpractice defense. For more information please contact Sean Byrne (sbyrne@hdjn.com) or Samantha Soller (ssoller@hdjn.com), they are available by phone at (804) 967-9604. Additional information can be found on the HDJN website at www.hdjn.com.

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