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LIABILITY AND DAMAGE ISSUES IN INJURY CASES INVOLVING MINOR PLAINTIFFS

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I. INTRODUCTION

Personal injury actions involving minors present a number of unique issues that cut across the spectrum of procedural and substantive law. In this survey, we summarize Virginia law governing the most important concepts.

II. THE MINOR AS REAL PARTY IN INTEREST

Minor as Real Party in Interest Filing Suit by Next Friend

Under Virginia and federal procedural law, personal injury actions brought by infants are filed by a parent as next friend, unless the infant has a general guardian, committee, conservator or other appointed representative.[1] The requirement that an action by an infant be brought by a next friend flows from the general duty of the court to protect the interests of infants and incompetents.[2]

Under the federal rule, if an infant is represented by a general guardian or conservator, a next friend lacks standing to maintain suit, absent express consent or a court order.[3]

In *Kirby v. Gilliam*, the Virginia Supreme Court held that because the minor is the real party in interest, an action filed by the mother of her minor daughter to annul a marriage was required to be brought in the minor's name

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[1] VA. CODE ANN. § 8.01-8 ("Any minor entitled to sue may do so by his next friend. Either or both parents may sue on behalf of a minor as his next friend.") (LexisNexis 2012); *Womble v. Gunter*, 198 Va. 522, 95 S.E.2d 213 (1956); FED. R. CIV. P. 17(c) ("A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian *ad litem*").

[2] *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978); *Noe v. True*, 507 F.2d 9, 11-12 (6th Cir. 1974); *see Kirby v. Gilliam*, 182 Va. 111, 124, 28 S.E.2d 40, 46 (1943) (Gregory, J., dissenting) ("An infant is a ward of the court and he can always rely upon the court to protect his personal rights and property whenever they are in jeopardy").

[3] *Garrick v. Weaver*, 888 F.2d 687 (10th Cir. 1989); *Susan R.M. v. Northeast Indep. School Dist.*, 818 F.2d 455, 458 (5th Cir. 1987); *Developmental Disabilities Advocacy Center, Inc. v. Melton*, 689 F.2d 281, 285-86 (1st Cir. 1982).

by the next friend, not in the name of the mother as next friend of the minor.[4] Thus, in Virginia an action filed in the parent's name "as mother and next friend" of the minor is properly subject to dismissal.[5] Furthermore, an amendment to substitute the minor by his parents as next friends will not be allowed, because the failure to name the proper party plaintiff cannot be cured by an amendment.[6]

Where a minor plaintiff suffered a voluntary nonsuit of personal injury claims brought in his own name, a subsequent nonsuit under Virginia Code Section 8.01-380(B) of claims filed by the minor plaintiff by his father as next friend would not be permitted. The minor plaintiff was the real party in interest in both actions, and both suits where therefore filed by substantially the same party.[7]

The next friend need not be appointed; any person may sue in the name of an infant as next friend, and he or she will ordinarily be recognized.[8] Next friends have no interest in the litigation, and act much like attorneys at law. They assume responsibility for the conduct of the litigation and for costs, but do not substitute for the real party in interest.[9] If objection is made, or it otherwise appears that the action is not for the benefit of the minor, the court will determine whether the next friend is an appropriate representative, and may dismiss the case without prejudice, assign another next friend, or make such order as deemed in the best interests of the infant.[10] In federal court, parents generally may not litigate the claims of their minor children without being represented by counsel.[11]

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[4] 182 Va. 111, 117-18, 28 S.E.2d 40, 43 (1943).

[5] *Herndon v. St. Mary's Hosp., Inc*., 266 Va. 472, 587 S.E.2d 567 (2003). In *Herndon*, the Court held that the 1998 amendment to Virginia Code Section 8.01-8, which added a sentence to the statute stating that "[e]ither or both parents may sue on behalf of a minor as his next friend," did not change the common-law rule requiring actions brought by minors to be filed in their name, by their next friend. *Id*. at 477, 587 S.E.2d at 570. Thus, the new statutory language "merely specifies that either or both parents may act as next friend on behalf of their minor child." *Id*.; *c.f. Plavcan v. Churchill*, 78 Va. Cir. 339 (Norfolk 2009) (motion for judgment which named "Jonathan Plavcan and Lora Plavcan, individually and as next friends of Lauren Jonae Plavcan, an infant," held not to be a nullity despite *Herndon*, where the pleading as a whole adequately identified the infant as the plaintiff).

[6] *Estate of James v. Peyton*, 277 Va. 443, 454-55, 674 S.E.2d 864, 869 (2009) (*dicta*). In *Kirby*, the Court affirmed the decree dismissing the action for annulment without prejudice to the action being refiled in the infant's name by her mother as next friend. *Id*. at 122-23, 28 S.E.2d at 45.

[7] *Halatyn v. Miller*, 69 Va. Cir. 236 (Fairfax 2005).

[8] *Wilson v. Smith*, 63 Va. (22 Gratt.) 493 (1872); *Kirby*, 182 Va. 111, 115-16, 28 S.E.2d at 42.

[9] *Kirby*, 182 Va. 111, 122, 28 S.E.2d at 45.

[10] *Id*., 182 Va. 111, 116, 28 S.E.2d at 42; *Wilson*, 63 Va. (22 Gratt.) at 505.

[11] *Meyers v. Loudoun Co. Pub. Schools*, 418 F.3d 395 (4th Cir. 2005); *Meeker v. Kerchner*, 782 F.2d 153 (10th Cir. 1986).

Necessity for Appointment of Guardian ad Litem

Under Rule 17(c) of the Federal Rules of Civil Procedure, the district court shall appoint a guardian *ad litem* for an infant not otherwise represented in an action, or make such other order deemed proper for the protection of the infant.[12] A guardian *ad litem* is "a representative of the court to act for the minor in the cause, with authority to engage counsel, file suit, and to prosecute, control and direct the litigation."[13] A federal district court cannot appoint a guardian *ad litem* when an infant already is represented by a next friend considered appropriate under state law.[14]

Generally, when a minor is represented by a parent who is a party and who shares the same interests as the minor, there is no inherent conflict of interest between them.[15] The failure to appoint a guardian *ad litem* is not error where the minor is represented by a parent bringing the action on behalf of the minor, and unless a conflict of interest exists between the representative and the minor, the question need not be considered.[16]

If, however, a conflict of interest develops between a minor plaintiff and the next friend, the court has a duty to determine whether a guardian *ad litem* is needed, and may appoint one.[17] A guardian *ad litem* or another next friend may also be appointed if the next friend fails to prosecute the action; disqualification of the original next friend is required.[18]

In Virginia state courts, minor parties represented by counsel licensed in Virginia do not need the appointment of a guardian *ad litem* "unless the court determines that the interests of justice require such appointment."[19]

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[12] *Slade v. Louisiana Power & Light*, 418 F.2d 125 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970).

[13] *Noe*, 507 F.2d at 12.

[14] *T.W. v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997).

[15] *Id*.; *Gonzalez v. Reno*, 86 F. Supp.2d 1167, 1185 (S.D. Fla. 2000), *aff'd* 212 F.3d 1338 (11th Cir. 2000).

[16] *Croce v. Bromley Corp*., 623 F.2d 1084, 1093 (5th Cir. 1980).

[17] *In re Chicago, Rock Island & Pac. R.R. Co*., 788 F.2d 1280, 1282 (7th Cir. 1986); *In re Air Crash Disaster Near Saigon*, 476 F. Supp. 521, 525 (D.D.C. 1979).

[18] *Brophy*, 124 F.3d at 895.

[19] VA. CODE ANN. § 8.01-9(B) (LexisNexis 2012). The statute provides that "[a]ny judgment or decree rendered by any court against a person under a disability without a guardian *ad litem*, but in compliance with the provisions of this subsection B, shall be as valid as if the guardian *ad litem* had been appointed." *Id*. In the case of minor defendants, the action "shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint a discreet and competent attorney-at-law as guardian *ad litem* to such defendant, whether the defendant has been served with process or not." *Id*. § 8.01-9(A).

III. STATUTE OF LIMITATIONS

General Principles of Tolling

Personal injury actions in Virginia are generally governed by a two-year statute of limitations.[20] Persons who are minors at the time of accrual may bring the action within the two years after the disability is removed.[21] Because the age of majority is 18 years,[22] the action must be filed before the minor reaches 20 years of age. The tolling does not apply to emancipated minors.[23]

If a minor becomes entitled to bring a cause of action *after* it accrues, "the time during which he is within the age of minority shall not be counted as any part of the period within which the action must be brought except as to any such period during which the infant has been judicially declared emancipated."[24]

Parental Claims for Medical Expenses and Lost Services

An important statutory exception to the tolling provisions applicable to the claims of minors is that actions by a parent or guardian for loss of services of the minor, or expenses of curing or attempting to cure him or her from the result of a personal injury, must be brought within five years after the cause of action accrues.[25] This statute is not subject to the tolling provision applicable to the claims of unemancipated minors.[26]

In the *nisi prius* opinion of *Delk v. Edens*, it was held that the five-year limitations period of Section 8.01-243(B) is limited to property or economic loss, and therefore did not apply to a parent's "personal" claim for loss of consortium or loss of society.[27]

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[20] VA. CODE ANN. § 8.01-243(A) (LexisNexis 2012) ("Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery . . . shall be brought within two years after the cause of action accrues").

[21] *Id*. § 8.01-229(A)(1).

[22] *Id*. §§ 1-203, 1-204, & 1-207.

[23] *Id.* § 8.01-229(A)(1). The emancipation of the minor must be pursuant to Virginia Code § 16.1-331 *et seq*.

[24] *Id*. § 8.01-229(A)(2).

[25] *Id*. § 8.01-243(B).

[26] *Hutto v. BIC Corp*., 800 F. Supp. 1367, 1372 n.8 (E.D. Va. 1992); *Mays ex rel. Mays v. Rockingham Mem. Hosp*., 42 Va. Cir. 19 (Rockingham Cir. 1996).

[27] 56 Va. Cir. 518 (Newport News Cir. 2001). The Fairfax Circuit Court, in *Peterson v. Fairfax Hospital System*, likewise relied on the language of Code § 8.01-243(B) to draw a distinction between medical expense claims and claims for emotional distress, ruling that a parents' claim for distress damages had been misjoined with the infant's claim for personal injuries. 21 Va. Cir. 70, 73-74 (Fairfax Cir. 1990). The court, however, refused to dismiss the action, citing Virginia Code Section 8.01-5 ("No action or suit shall abate or be defeated by the nonjoinder or misjoinder of parties").

In *Glascock v. Laserna*, the Virginia Supreme Court ruled that the statute did not apply to the parents' claim for medical expenses arising out of the "wrongful birth" of a child with congenital abnormalities after certain prenatal tests were erroneously reported as normal.[28] The Court held that the wrongful birth claim was an injury to the parents, not the child, and was personal in nature. It was therefore governed by the two-year statute of limitations of Section 8.01-243(A) because the parents "did not plead and do not have an action for injury to property. Rather, they pled that as parents, they were deprived of an informed opportunity to terminate the pregnancy."[29] The parents' argument for application of the five-year limitations period of Section 8.01-243(B) was rejected because-

> there is no allegation that the defendants caused 'personal injury' to their child; nor is there any allegation that the Glascocks suffered loss of services because of any act attributable to the defendants. Furthermore, the Glascocks cannot recover damages for loss of services because the basis of their claim is that they were deprived of an informed opportunity to terminate the pregnancy.[30]

Special Limitations Rule for Medical Malpractice Actions

The tolling period for minors with medical malpractice claims is reduced. Such actions must be commenced within two years of the date of the last act or omission giving rise to the cause of action, except that if the minor was less than eight years of age at the time of the malpractice, he or she has until the tenth birthday to commence an action.[31] Furthermore, it has been held that "[t]he foreign object and fraud 'discovery' rules of Code § 8.01-243[32] are also given

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[28] 247 Va. 108, 439 S.E.2d 380 (1994).

[29] *Id*. at 110, 439 S.E.2d at 381.

[30] *Id*. at 111, 439 S.E.2d at 381.

[31] *Id*. § 8.01-243.1.

[32] Virginia Code § 8.01-243 provides, in relevant part, that:

> The two-year limitations period specified in subsection A shall be extended in actions for malpractice against a health care provider as follows:
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> 1. In cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient's body, for a period of one year from the date the object is discovered or reasonably should have been discovered;
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> 2. In cases in which fraud, concealment or intentional misrepresentation prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exercise of due diligence, reasonably should have been discovered; and
>
> 3. In a claim for the negligent failure to diagnose a malignant tumor or cancer, for a period of one year from the date the diagnosis of a malignant tumor or cancer is communicated to the patient by a

precedence in minors' medical malpractice claims, so these doctrines may work to extend the window for a minor's claims . . . ."[33]

IV. PARENTAL IMMUNITY

Virginia recognizes the doctrine of parental immunity, with certain exceptions. The doctrine was first adopted in *Norfolk Southern Railroad v. Gretakis*,[34] an action for contribution by a railroad against the father of a child who was injured in a motor vehicle accident caused by the negligence of the father and the railroad. The Virginia Supreme Court declared that "according to the great weight of authority an unemancipated minor child cannot sue his or her parent to recover for personal injuries resulting from an ordinary act of negligence."[35]

The *Gretakis* Court distinguished circumstances in which the parent and child are in an employer/employee relationship, or where a child has brought a personal action against the parent's employer for injuries arising from the negligence of the parent/employee.[36] Five years later, the Court recognized an exception to the immunity rule where the parent is sued not for the violation of

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> health care provider, provided the health care provider's underlying act or omission was on or after July 1, 2008. Claims under this section for the negligent failure to diagnose a malignant tumor or cancer, where the health care provider's underlying act or omission occurred prior to July 1, 2008, shall be governed by the statute of limitations that existed prior to July 1, 2008.
>
> However, the provisions of this subsection shall not apply to extend the limitations period beyond ten years from the date the cause of action accrues, except that the provisions of § 8.01-229 A 2 shall apply to toll the statute of limitations in actions brought by or on behalf of a person under a disability.

Id. § 8.01-243(C).

[33] K. Sinclair, L. Middleditch, VA. CIVIL PROC. § 4.12(B) (5th ed. 2008) [hereinafter, Sinclair].

[34] 162 Va. 597, 174 S.E. 841 (1934).

[35] *Id*. at 600, 174 S.E. at 842. The justification for the rule is "to protect parental discipline, domestic felicity, and family tranquility." *Wright v. Wright*, 213 Va. 177, 178, 191 S.E.2d 223, 224 (1972). The effect of the rule is illustrated by the decision in *Wright*, in which a demurrer was affirmed because the claim that the father had negligently permitted his child to play on some dangerous metal awnings he had placed next to a storage shed "bespeaks only his failure to discharge the normal parental duty of supervising and providing a safe place for the child to play," notwithstanding the fact that the father was insured and used the shed for his contracting business. *Id*. at 179, 191 S.E.2d at 225. Similarly, in *Thomas v. Grupp*, it was held that an unemancipated child could not maintain an action against his father for personal injuries resulting from the father's negligent supervision. 12 Va. Cir. 62 (Albemarle Co. 1986).

[36] *Id*. at 600, 174 S.E. at 842.

"a moral or parental obligation, in the exercise of his parental authority," but "in his vocational capacity, as a common carrier."[37]

Parental immunity was recognized in *Gretakis* notwithstanding the fact that the father had voluntarily maintained a policy of auto insurance.[38] Nevertheless, 37 years later, in *Smith v. Kauffman*, the Court charted a new course on this issue, and abrogated intra-family immunity with respect to personal injuries resulting from motor vehicle accidents, based on the ubiquitous nature of automobile liability insurance.[39]

The parental immunity doctrine extends to those who, although not a natural parent of the injured child, stand *in loco parentis*.[40] The rule also bars actions for gross negligence.[41] The immunity does not, however, bar actions by emancipated minors.[42] Nor will the doctrine preclude an action against an unemancipated sibling who negligently injures another unemancipated sibling.[43]

In *Pavlick v. Pavlick*, the Virginia Supreme Court reaffirmed its commitment to the doctrine, "at least to the extent it still bars recovery by an unemancipated child against a parent for negligence in a non-automobile or

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[37] *Worrell v. Worrell*, 174 Va. 11, 27, 4 S.E.2d 343, 349 (1939) (daughter injured on a bus owned and operated by father's bus company due to gross negligence of employee/driver). The parent-child relationship in *Worrell* was considered to be "purely incidental" to the child's status as the passenger of a common carrier. The Court also noted that under Virginia law, the company was obligated to maintain insurance covering its passengers. Finally, the father's liability was "derivative" because "the injury was [not] inflicted by a personal act of the father . . . while the child was under his immediate parental control and discipline." *Id*. at 26, 4 S.E.2d at 349.

[38] *Gretakis*, 162 Va. 597, 598, 174 S.E. at 841.

[39] 212 Va. 181, 185, 183 S.E.2d 190, 194 (1971); *see also Evans v. Evans*, 280 Va. 76, 78 n.1, 695 S.E.2d 173, 174 n.1 (2010) (the "intra-family immunity rule is subject to exception when an action is brought by a child against a parent for injuries sustained in a motor vehicle accident"). The *Smith* Court distinguished *Gretakis* with the following observation:

> the very high incidence of liability insurance covering Virginia-based motor vehicles, together with the mandatory uninsured motorist endorsements to insurance policies, has made our rule of parental immunity anachronistic when applied to automobile accident litigation. In such litigation, the rule can be no longer supported as generally calculated to promote the peace and tranquility of the home and the advantageous disposal of the parents' exchequer.

212 Va. 181, 184, 183 S.E.2d at 194. The Court in *Worrell* also pointed to the compulsory nature of the insurance as a basis to distinguish *Gretakis*. 174 Va. 11, 26, 4 S.E.2d at 349.

[40] *Lyles v. Jackson*, 216 Va. 797, 223 S.E.2d 873 (1976).

[41] *Brumfield v. Brumfield*, 194 Va. 577, 74 S.E.2d 170 (1953).

[42] *Brumfield v. Brumfield*, 194 Va. 577, 74 S.E.2d 170 (1953).

[43] *Midkiff v. Midkiff*, 201 Va. 829, 113 S.E.2d 875 (1960).

non-business related situation."[44] Although declining to abrogate the rule, the *Pavlick* Court recognized a new exception where a parent's *intentional* act causes the death of an unemancipated child, declaring that, under such circumstances, the rule's rationale is "totally irrelevant."[45] The Court declared that the protections offered by the criminal law were insufficient to "redress the loss suffered by the survivors of a child whose death results from the intentional act of a parent."[46]

V. STANDARDS OF CARE INVOLVING MINORS

Heightened Standard of Care Owed to Minors

The fact that children do not exercise the same degree of care for their own safety as adults imposes a duty to act with greater care when dealing with them.[47] The Virginia Supreme Court long ago recognized that "[c]hildren of tender years may be expected to act heedlessly. . . . Adequate precautions, where adults are concerned, may as to them be gross negligence."[48]

Property owners must avoid intentionally or willfully injuring trespassers or bare licensees, whether adults or minors. The owner owes the trespasser a duty of reasonable care only after he knows of his danger, or might have known of it and avoided it by the use of ordinary care.[49]

The doctrine of attractive nuisance has not been adopted in Virginia.[50] However, owners or occupiers of land may be held liable in negligence for

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[44] 254 Va. 176, 181, 491 S.E.2d 602, 604 (1997).

[45] *Id*. at 182, 491 S.E.2d at 605.

[46] *Id*.

[47] *Gabbard v. Knight*, 202 Va. 40, 47, 116 S.E.2d 73, 78 (1960) ("the duty and liability of the driver of an automobile to adults and children are measured by different standards. Ordinary care toward an adult under certain circumstances might be gross negligence toward a child under the same conditions. The driver must increase his exertions in order to avoid danger to children whom he may see, or by the exercise of reasonable care should see, on or near the highway"); *Vought v. Jones*, 205 Va. 719, 139 S.E.2d 810 (1965) (following *Gabbard*); *Sullivan v. Sutherland*, 206 Va. 377, 380, 143 S.E.2d 920, 922 (1965) (holding that driver who saw child near the road had no right to assume child would exercise proper care for her own protection; driver "was charged with knowledge of the fact that a child acts thoughtlessly and upon childish impulses, and he was required to exercise such vigilance and precaution as the circumstances demanded"); *but see Ingle v. Clinchfield R. Co.*, 169 Va. 131, 192 S.E. 782 (1937) (principles controlling operation of vehicles on public highway where children may be do not apply to operation of trains by railroad company on its own tracks when children may be upon the right of way).

[48] *Filer v. McNair*, 158 Va. 88, 93, 163 S.E. 335, 337 (1932).

[49] *Appalachian Power Co. v. La Force*, 214 Va. 438, 201 S.E.2d 768 (1974); *Norfolk So. R. Co. v. Fincham*, 213 Va. 122, 189 S.E.2d 380 (1972); *Tiller v. Norfolk & Western*, 190 Va. 605, 58 S.E.2d 45 (1950); *Baecher v. McFarland*, 183 Va. 1, 31 S.E.2d 279 (1944).

[50] *Washabaugh v. Northern Va. Const. Co.*, 187 Va. 767, 769, 48 S.E.2d 276, 277 (1948); *Filer v. McNair*, 158 Va. 88, 93-94, 163 S.E. 335, 337 (1932); *Walker's Adm'r v. Potomac, Fredericksburg & Piedmont R. Co.*, 105 Va. 226, 53 S.E. 113 (1906).

injuries caused by having on their premises, easily accessible to children, an instrument, machine, or appliance which contains a hidden, concealed, or latent danger when handled by one unfamiliar with its use. For the "dangerous instrumentality" doctrine to apply,

1. the danger of the instrumentality must be hidden or latent,

2. the instrumentality must be easily accessible to children, and

3. it must be in a location where it is known that children frequently gather.[51]

Standard of Care Applicable to Minors

Ordinarily, a lesser degree of care is required of a minor than an adult. However, the standard of conduct to which a minor must conform for his own protection is that of a reasonable person of like age, intelligence, and experience under like circumstances.[52]

In Virginia, minors less than seven years of age cannot be guilty of negligence. Children between seven and fourteen years of age are presumed incapable of exercising care and prudence, unless rebutted by sufficient proof to the contrary.[53]

VI. CONSEQUENCES OF PARENTAL NEGLIGENCE

No Imputation to Minor

In Virginia, it is well-settled that the negligence of an adult parent or caretaker of a minor cannot be imputed to the minor.[54] The basis for the rule was explained in *Norfolk & W. R. R. Co. v. Groseclose's Adm'r* as follows:

> the parents' negligence is no defense, because it is regarded not as a proximate but as a remote cause of the injury. And the reason

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[51] *Daugherty v. Hippchen*, 175 Va. 62, 7 S.E.2d 119 (1940) (deadly explosives must be guarded and controlled with utmost care and caution, especially when it is known, or should be known, that children are accustomed to play at or near the same, and are likely to gain access to them); *Haywood v. South Hill Mfg. Co.*, 142 Va. 761, 128 S.E. 362 (1925) (owner negligent for leaving electrified, uninsulated wire within arm's length of child passing along sidewalk); *c.f. Washabaugh*, 187 Va. 767, 48 S.E.2d 276 (pond in quarry held not to constitute a dangerous instrumentality); *Baecher v. McFarland*, 183 Va. 1, 31 S.E.2d 279 (1944) (barbed wire contained no hidden danger, and owner was not responsible for injuries suffered by child who ran into or fell from same).

[52] *Norfolk & Portsmouth Belt Line R. Co. v. Barker*, 221 Va. 924, 929, 275 S.E.2d 613, 616 (1981) (quoting REST. (2D) TORTS § 464(2) (1965)); *Virginia-Carolina Ry. Co. v. Clawson's Adm'r*, 111 Va. 313, 316, 68 S.E. 1003, 1004-05 (1910).

[53] *Wash v. Holland*, 166 Va. 45, 56, 183 S.E. 236, 241 (1936); *American Tobacco Co. v. Harrison*, 181 Va. 800, 27 S.E.2d 181 (1943); *Morris v. Peyton*, 148 Va. 812, 820-21, 139 S.E. 500, 502-03 (1927).

[54] *Shelton v. Mullins*, 207 Va. 17, 20, 147 S.E.2d 754, 756-57 (1966); *American Tobacco Co.*, 181 Va. 800, 27 S.E.2d at 185; *Tugman v. Riverside & Dan River Cotton Mills*, 144 Va. 473, 479, 132 S.E. 179, 181 (1926); *Norfolk & Western R. Co. v. Groseclose*, 88 Va. 267, 270, 13 S.E. 454, 455 (1891).

> lies in the irresponsibility of the child, who, itself being incapable of negligence, cannot authorize it in another. It is not correct to say that the parent is the agent of the child, for the latter cannot appoint an agent. The law confides the care and custody of a child *non sui juris* to the parent, but if this duty be not performed, the fault is the parent's, not the child's. There is no principle, then, in our opinion, upon which the fault of the parent can be imputed to the child. To do so is to deny to the child the protection of the law.[55]

Under the Restatement (Second) of Torts, the rule against imputation extends to the negligence of a nonparental custodian of an injured child.[56] The Restatement specifies that the rule against imputation applies regardless of whether or not the child is so young that he cannot exercise reasonable care for his own protection, and regardless of whether the negligent parent has physical custody of the child at the time of injury.[57]

Parental Negligence as a Superseding Cause of Injury

Virginia common law has established a stringent test for superseding cause. In *Panousos v. Allen*, the Virginia Supreme Court held that "[i]n order to relieve a defendant of liability for his negligence, the negligence intervening between the defendant's negligence and the injury 'must so entirely supersede the operation of the defendant's negligence, that it alone, without the defendant's [negligence contributing] thereto in the slightest degree, produces the injury.'"[58] To the authors' knowledge, there is no reported Virginia case in which the negligence of a parent was held to be the superseding cause of a child's injuries.

A "superseding cause of an injury 'constitutes a new effective cause and operates independently of any other act, making it and it only the proximate cause of injury."[59] If the defendant foresaw or should reasonably have foreseen the act of the third party,[60] or if the intervening act was put into operation by the defendant's negligence,[61] the latter will not constitute an intervening cause.

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[55] 88 Va. 267, 271, 13 S.E. 454, 455 (1891).

[56] REST. (2D) TORTS § 488 cmt. d ("the . . . rule . . . is also applicable to the negligent custody of one to whom the parent has delegated his parental control of his child or who has either justifiably or unjustifiably taken custody of the child without its parent's consent").

[57] *Id*. cmts. a & c.

[58] 245 Va. 60, 65, 425 S.E.2d 496, 499 (1993) (quoting *Coleman v. Blankenship Oil Corp*., 221 Va. 124, 131, 267 S.E.2d 143, 147 (1980)).

[59] *Atkinson v. Sheer*, 256 Va. 448, 508 S.E.2d 68 (1998).

[60] *Spruill v. Boyle-Midway, Inc*., 308 F.2d 79 (4th Cir. 1962); *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S.E. 830 (1904).

[61] *Coleman*, 221 Va. 124, 131, 267 S.E.2d at 147; *Jefferson Hosp., Inc. v. Van Lear*, 186 Va. 74, 41 S.E.2d 441 (1947); *Hines v. Garrett*, 131 Va. 125, 137, 138, 108 S.E. 690 (1921); *see* REST. (2D) TORTS § 443 (1965) (an "intervening act of a human being or animal which is a

Illustrative Cases

In *Kellermann v. McDonough*, a 14-year-old girl was killed in an accident caused by the reckless operation of an automobile by a young, male driver. The decedent was at the time of the accident the invited guest of the defendants, who had asked that she stay overnight in their home to spend time with their own daughter. The decedent's parents told the defendants that they did not want their daughter riding in cars driven by boys. Nevertheless, the defendants either acquiesced in, or directed, that the decedent be brought home from a shopping mall by the driver, who had a reputation for reckless driving. It was held that the driver's reckless operation of the car was not, as a matter of law, a superseding cause of the decedent's death.[62]

In a products liability action brought by a four-year-old through her mother as next friend for hand injuries resulting from a commercial pizza dough roller, summary judgment for the manufacturer was reversed.[63] The contributory negligence of mother in permitting the child to stand on a chair and use the roller while her back was turned did not constitute an intervening cause barring the action.[64] Whether the incident constituted an unforeseeable misuse of the roller could not be decided on summary judgment.[65]

In *Spruill v. Boyle-Midway, Inc*., a 14-month-old infant developed fatal chemical pneumonia after ingesting a small quantity of furniture polish manufactured by the defendant.[66] The infant's mother, who was unaware of the lethal nature of the polish, left the bottle unattended for several minutes on a cloth covering a bureau adjacent to the crib; the infant obtained the bottle by pulling on the cover cloth. In the ensuing action for wrongful death, the United States Court of Appeals for the Fourth Circuit held that the act of leaving the bottle on the bureau was not so unforeseeable as to constitute an intervening cause as a matter of law, and that the issue was properly submitted to the jury.[67] The jury returned a verdict for the plaintiff, but excluded the mother from its verdict.[68]

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normal response to the stimulus of a situation created by the actor's negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about").

[62] *Kellermann v. McDonough*, 278 Va. 478, 684 S.E.2d 786 (2009).

[63] *Qura v. D R McClain & Son*, No. 95-1744, 1996 U.S. App. LEXIS 25510 (4th Cir. September 30, 1996) (*per curiam*).

[64] *Id*. at *6 - 8.

[65] *Id*. at *11-12.

[66] 308 F.2d 79 (4th Cir. 1962).

[67] *Id*. at 88.

[68] *Id*. at 83. In Virginia wrongful death actions, a beneficiary (including the personal representative) may be barred from recovery if he or she contributed to the injuries that caused death. *Ratcliffe v. McDonald's Adm'r*, 123 Va. 781, 97 S.E. 307 (1918). However, if

VII. CLAIMS FOR MEDICAL EXPENSES RESULTING FROM INJURY TO A MINOR

Recovery of Medical Expenses Incurred During Minority

When an unemancipated minor is tortiously injured, two causes of action arise: the minor has a claim for the injury itself, and the parent has a claim for necessary expenses incurred for the minor's treatment.[69] The Maryland courts have recognized that such expenses may include paid expenses, incurred but unpaid medical expenses, and future medical expenses needed by the minor prior to reaching the age of majority.[70] Parents may also recover the reasonable value of their own "extraordinary" services spent in the minor's recovery.[71]

The right of the parents to recover medical expenses during minority is based on the duty to support the child.[72] The claim accrues at the time the parent becomes liable to pay the medical bill.[73]

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there is more than one beneficiary, the contributory negligence of one will not bar all recovery. *City of Danville v. Howard*, 156 Va. 32, 157 S.E. 733 (1931).

[69] *Keene v. Yates*, 81 F. Supp. 2d 655 (W.D. Va. 2000) (parents of deceased child could maintain an action for medical expenses notwithstanding separately pending wrongful death action); *Virginia Farm Bureau Mut. Ins. Co. v. Frazier*, 247 Va. 172, 174, 440 S.E.2d 898, 899 (1994); *Moses v. Akers*, 203 Va. 130, 132, 122 S.E.2d 864, 866 (1961); *Watson v. Daniel*, 165 Va. 564, 573, 183 S.E. 183, 187 (1936) (noting that father was legally chargeable for son's medical expenses, and had a duty to provide child with the necessary medical attention); REST. (2D) TORTS § 703(b)("One who by reason of his tortious conduct is liable to a minor child for illness or other bodily harm is subject to liability to . . . the parent who is under a legal duty to furnish medical treatment for any expenses reasonably incurred or likely to be incurred for the treatment during the child's minority"). *See generally* L. Tellier, *What Items of Damages on Account of Personal Injury to Infant Belong to Him, and What to Parent*, 32 A.L.R.2D 1060.

[70] *Garay v. Overholtzer*, 332 Md. 339, 631 A.2d 429 (1993).

[71] J. Connelly, *Damages for Personal Injury or Death As Including Value of Care & Nursing Gratuitously Rendered*, 90 A.L.R.2D 1323, 1325 (1963). Under the majority rule, "the tortfeasor's liability is measured by the amount for which nursing and medical care by others could have been obtained." D. Knotts, *Valuing Damages in Personal Injury Actions Awarded for Gratuitously Rendered Nursing and Medical Care*, 49 A.L.R.5th 685, 696 § 2[a] (1997); 22 AM.JUR.2D *Damages* § 209.

[72] In Virginia, as in many other states, the parental duty of support finds expression in both statutory and common law. *Butler v. Commonwealth*, 132 Va. 609, 110 S.E. 868 (1922) (father has common law duty to support children); VA. CODE ANN. § 20-61 ("any parent who deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his or her child under the age of eighteen years of age, or child of whatever age who is crippled or otherwise incapacitated from earning a living, the . . . child or children being then and there in necessitous circumstances, shall be guilty of a misdemeanor").

[73] *Hutto v. BIC Corp.*, 800 F. Supp. 1367, 1372 (E.D. Va. 1992).

The usual situation[74] wherein the right to claim medical expenses lies with the parents is not universal. In certain circumstances, a minor may claim medical expenses during minority. A claim by the minor for pre-majority medical expenses may be asserted if:

1. the minor has paid or agreed to pay the expenses;

2. the minor alone is responsible for payment by reason of emancipation, or [because of] the death or incompetency of his or her parents;

3. the parent has waived the right of recovery in favor of the minor; or

4. recovery of the expense is permitted by statute.[75]

The parent's claim for medical expenses may be filed in the same court where the infant's case is pending, either separately or in the infant's action. If the claims are brought separately, any party may move, at least one week before the trial, to consolidate the cases for trial. If the case is tried to a jury, the verdicts and resulting judgments must be separate.[76]

Although the claims of the minor and of the parents are separate, when tried together the primary negligence determination will typically dispose of both, at least in the absence of affirmative defenses that apply solely to one claim. The characterization of the parent's claim as "derivative" of the minor's claim was expressed in *Norfolk Southern Railway Company v. Fincham*.[77]

In *Fincham*, the personal injury suit of the child and the parental claim for medical expenses were tried together under the former Virginia Code Section 8-629, the predecessor to Section 8.01-36.[78] The jury returned a verdict for the father on his claim, but failed to return a verdict for the minor because, as the jury foreman explained, it could not reach a unanimous verdict on the amount of damages.[79] The circuit court declared a mistrial in the minor's case, and

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[74] The "usual situation" has been described as:

> the situation of an injured child living with, supported by, and possibly rendering services or earnings (in whole or in part) to its parents or parent, the parent being legally entitled to its custody and services, and, at least primarily, accountable for its support and maintenance, including expenses reasonably and necessarily incurred in curing its injuries or attempting to effect their cure, and the parent having in no way lost his right of recovery of the items of damages accruing to him upon his child's being injured.

L. Tellier, 32 A.L.R.2D 1060 *II *2.

[75] *Moses v. Akers*, 203 Va. 130, 132-33, 122 S.E.2d 864, 866 (1961); *Commonwealth v. Lee*, 239 Va. 114, 116-17, 387 S.E.2d 770, 771 (1990).

[76] VA. CODE ANN. § 8.01-36 (LexisNexis 2012).

[77] 213 Va. 122, 189 S.E.2d 380 (1972).

[78] *Id*. at 123, 189 S.E.2d at 381.

[79] *Id*.

limited the retrial to the damages that the minor should recover.[80] There was no retrial of the father's case, and judgment was entered in his favor after the second jury returned a verdict for the minor.[81]

The Virginia Supreme Court held that the circuit court had erred in entering judgment for the father. The Court stated that "the father's cause of action for medical and incidental expenses was a derivative action. The trial court instructed the jury that it must return a verdict for [the minor] before his father was entitled to recover. Since there was no verdict in [the minor's] case there could be none in the father's case."[82]

Because the claim for medical expenses during minority belongs to the parent, it may be barred by the contributory negligence of the parent, or by the statute of limitations.[83] Absent statutory language to the contrary, parents are generally not entitled to rely on the tolling provisions available to minors.[84]

A parent who has a claim for medical expenses provided to his or her child during minority may waive their claim in favor of the minor and thereby allow them to be recovered in the minor's suit.[85] As one treatise has explained,

> The rule that the proper party to bring the action for medical expenses is the parent, and not the child, is one intended to protect the defendant from duplicate claims. Consequently, when the

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[80] *Id*.

[81] *Id*.

[82] *Id*. at 128, 189 S.E.2d 380, 384. Justices Carrico and Snead dissented from the decision because when questioned by the circuit court at counsel's request, the jury foreman had stated that they had all agreed that the defendant was liable to the minor plaintiff. The dissenters reasoned that the "colloquy . . . eliminated any questions and made it abundantly clear that the jury had found the railroad was liable to [the minor]. Hence, the father was entitled to recover for [his son's] medical expenses and judgment was properly entered on the reduced verdict in his favor." *Id*. at 128, 189 S.E.2d 380, 385.

For a decision applying the reasoning of *Fincham* to a parent's claim for emotional distress damages, see *Speet v. Bacaj*, 237 Va. 290, 298, 377 S.E.2d 397, 401 (1989), in which it was held that where the evidence was insufficient to establish that the defendant obstetrician was negligent in delivering the minor plaintiff, and the parents' claim for emotional distress was "wholly derivative" of the infant's claim, it followed that the evidence was also insufficient to prove the parents' claim.

[83] *See generally* J. Derrick, *Tolling of Statute of Limitations, on Account of Minority of Injured Child, as Applicable to Parent's or Guardian's Right of Action Arising Out of Same Injury*, 49 A.L.R.4TH 216 (2012).

[84] *Perez v. Espinola*, 749 F. Supp. 732 (E.D. Va.1990) (Va. Code § 8.01-229(A), which establishes a special tolling provision for minors, does not apply to parental claim for medical expenses; "to construe the tolling provision to apply to parents' actions would render the five-year limitations provision [of Va. Code § 8.01-243(B)] essentially meaningless"); *Hutto*, 800 F. Supp. at 1372; *Dewhirst v. Brown*, 18 Va. Cir. 116 (Fairfax Cir. 1989), *rev'd on other grounds*, 240 Va. 266, 396 S.E.2d 840 (1990).

[85] *See generally* 2 J. Stein, STEIN ON PERSONAL INJURY DAMAGES § 14.13 (2d ed. 1991) [hereinafter, STEIN].

> parent institutes an action on behalf of the child in which such expenses are claimed on the child's behalf, the institution of the action operates, in law, as an assignment of the parent's claim to the child. The waiver which bars the parent from recovering after the claim for medical expenses has been made part of the child's claim does not, of course, arise from the mere fact that the parent acts as guardian *ad litem* or next friend. In order to bar the parent's claim, he or she must have permitted the child to make a claim for the medical expenses.[86]

In settling a personal injury case in which claims on behalf of a minor and pre-majority medical expenses have been asserted, it is important to ensure that the parents execute the release in both their individual and representative capacity order to avoid exposure to post-settlement medical expense claims. The case of *Baumann v. Capozio*[87] illustrates the difficulties that may ensue if the parents are not included in the settlement.

In *Baumann*, the Virginia Supreme Court held that an implied waiver of a parent's right to recover pre-majority medical expenses in favor of a minor must be proved by clear and convincing evidence.[88] A minor filed an action by his parents as next friends for injuries suffered in a fight with the defendant. During discovery, plaintiffs identified and claimed medical bills incurred during minority. Prior to trial, however, the son reached the age of majority. The son settled the case, and signed a settlement agreement that released all known and unknown injuries and damages resulting from the incident. The parents, however, did not sign the release.[89]

After the case was dismissed, the parents filed a new lawsuit in their own names for the medical expenses that had been claimed in the first action.[90] The trial court sustained a plea in bar, concluding that the parents had waived the claim in favor of the son.[91] On appeal, however, this decision was reversed because the defendant had failed to prove that the parents had impliedly waived the right to recover by clear and convincing evidence.[92] In support of its decision, the Court stated that:

> Even though Tyler Baumann's mother signed an interrogatory in her capacity as next friend that identified medical bills as damages that Tyler's parents had incurred while he was an infant, the parents lost control of that litigation when their son reached the age of majority and signed a release that resulted in the settlement

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[86] *Id*.

[87] 269 Va. 356, 611 S.E.2d 597 (2005).

[88] *Id*. at 361, 611 S.E.2d at 600.

[89] *Id*. at 358, 611 S.E.2d 597, 598.

[90] *Id*. at 359, 611 S.E.2d 597, 598.

[91] *Id*. at 359, 611 S.E.2d 597, 599.

[92] *Id*. at 361, 611 S.E.2d 597, 600.

> of that lawsuit. Plaintiffs in this appeal were not parties to the release, and they had not filed a lawsuit in their own name to recover damages that they had incurred.[93]

In cases where a parental claim for medical expenses is asserted and the contributory negligence of a parent is at issue, plaintiffs may seek to avoid the defense by claiming that the right to recover the expenses has been expressly or impliedly assigned to the minor. It has been held, however, that such an assignment or waiver does not avoid affirmative defenses that would otherwise have been available had the claim remained with the parent.[94] This rule is rooted in long-standing precedent that the assignee of a claim "stands in the shoes" of the assignor, and can have no rights greater than the latter.[95]

When defending an infant personal injury case involving parents who are divorced or separated and in which only one parent has asserted a claim for medical expenses or lost services, it is prudent to obtain a copy of the divorce decree or settlement agreement in order to determine the rights of both parents to custody of the child and his or her pre-majority services, as well as ascertaining the responsibility for payment the child's medical bills or maintenance of health insurance. If, based on the decree or separation agreement a non-party parent may possess a potential claim, consideration should be given to moving to join him or her in order to avoid exposure to multiple or inconsistent obligations,[96] or otherwise obtaining a release.

In the Fourth Circuit Court of Appeals case of *Sims v. VEPCO*, the daughter of divorced parents was electrocuted by a power line while climbing a tree.[97] The mother had custody under a divorce decree which obligated the father to pay child support and maintain health insurance for the child.[98]

The child sued the power company by her mother as next friend. In the child's action, the mother waived the right to recover medical expenses in favor of her daughter, who later obtained a $475,000 settlement.[99] The father, although notified of the action, was not a party, and did not sign the release.[100]

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[93] *Id*.

[94] *See, e.g., Hutto*, 800 F. Supp. at 1372 (allowing assignment to extend statute of limitations would defeat purpose of five-year limitations period expressly given to such claims by the legislature); *Richmond, Fredericksburg & Potomac R.R. Co. v. Martin's Adm'r*, 102 Va. 201, 45 S.E. 894 (1903); *Norfolk & Western R. Co. v. Groseclose*, 88 Va. 267, 270, 13 S.E. 454, 455 (1891); *Doyen v. Lamb*, 75 S.D. 77, 59 N.W.2d 550 (1953); STEIN § 14.13.

[95] *Fidelity & Cas. Co. v. First Nat'l Exchg. Bank*, 213 Va. 531, 193 S.E.2d 678, 684 (1973); *National Bank & Trust Co. v. Castle*, 196 Va. 686, 85 S.E.2d 228 (1955).

[96] *See* VA. CODE ANN. §§ 8.01-5(A), 8.01-7; VA. SUP. CT. R. 3:12(a) (persons to be joined if feasible); Sinclair, *supra* note 33, at § 5.17[C].

[97] 550 F.2d 929 (4th Cir. 1977), *cert. denied*, 431 U.S. 925 (1977).

[98] *Id.* at 930.

[99] *Id*. at 931.

[100] *Id*.

After the settlement, the father brought a separate action and recovered a $35,000 verdict for medical expenses "incurred" during the daughter's recuperation from the injuries she had sustained.[101] The Fourth Circuit reversed the judgment because: (1) there was no evidence that he had actually paid or become liable for any of the expenses, (2) none of his obligations under the divorce decree with respect to child support or the payment of health insurance premiums had changed, and (3) the divorce decree had terminated his right to the daughter's services, subject only to modification of the decree, which had not occurred.[102]

The Fourth Circuit also rejected the father's argument that the collateral source rule permitted his recovery, declaring that the facts were distinguishable from two prior wrongful death cases in which the collateral source rule barred the defendants from arguing that the decedent's beneficiaries had recovered life insurance proceeds.[103] The Court stated that-

> The facts of our case are different. Sims has suffered no injury. He has not been physically hurt and has not been required to pay any money because of the injury to Jennifer. He paid the insurance premiums because of the divorce decree, not as cure for his daughter, and the amount thereof has not been increased because of her injury. A true situation for application of the collateral source doctrine might exist if VEPCO had tried to defend Marilyn's and Jennifer's action upon the ground that the medical and hospital expenses had been paid by an insurance carrier, but that is not the case before us. In our case, VEPCO has paid once for the expenses of cure in Marilyn's and Jennifer's suit, so depriving a like recovery to Sims does not result in the wrongdoer's diminishing its damages.[104]

In reaching its decision, the Fourth Circuit was careful to note that it did not "have before us a case in which a divorced parent in Sims' situation has been assessed or charged with, or is likely to be liable for, or has paid, expenses of cure for a child in the sole custody of the other parent, and we express no opinion on that question."[105]

Recovery of Post-Majority Medical Expenses

The parent's right to recover medical and related expenses resulting from personal injuries to their child is generally limited to the age of minority. The claim for medical expenses incurred after majority belongs to the child.[106]

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[101] *Id*. at 930.

[102] *Id.* at 933-34.

[103] *Id* at 932 (citing *Walthew v. Davis*, 201 Va. 557, 111 S.E.2d 784 (1960), & *Burks v. Webb*, 199 Va. 296, 99 S.E.2d 629 (1957)).

[104] *Id*. at 932.

[105] *Id.* at 933.

[106] *Garay*, 332 Md. 339, 373, 631 A.2d at 446.

VIII. PARENTAL CLAIMS FOR LOSS OF SERVICES, LOSS OF CONSORTIUM AND EMOTIONAL DISTRESS

Virginia recognizes claims for the loss of services of a minor child.[107] Parental claims for loss of consortium, however, are generally *not* recognized in Virginia.[108]

Parental claims for emotional distress damages have been allowed in birth-related injury claims where a physician-patient relationship exists between the parent and defendant, and in cases of "wrongful birth" in which parents allege that they were denied the opportunity to abort a defective fetus.

In *Naccash v. Burger*, the Virginia Supreme Court affirmed a judgment in favor of parents who suffered emotional distress after the mother gave birth to a child with Tay-Sachs disease following a negligently conducted blood test.[109] The mother, who was pregnant, was told that the father was not a carrier for the disease, and therefore decided to continue with her pregnancy rather than abort the fetus. The baby was born with the disease and died.

The "wrongful birth" emotional distress claim of the parents in *Naccash* did not fall within the exceptions previously recognized for recovery of emotional distress damages not directly resulting from tortiously caused physical injury. Those exceptions, established in *Hughes v. Moore*[110] and *Womack v. Eldridge*,[111] permitted recovery in the absence of physical impact:

> (a) "when physical injury results from the emotional distress and there is shown by clear and convincing evidence an unbroken chain between the negligent act, the emotional disturbance and the physical injury";[112] and

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[107] *Keene v. Yates*, 81 F. Supp. 2d 655 (W.D. Va. 2000); *Virginia Farm Bureau Mut. Ins. Co. v. Frazier*, 247 Va. 172, 440 S.E.2d 898 (1994).

[108] *Cocoli v. Children's World Learning Centers*, 41 Va. Cir. 589 (Fairfax Cir. 1994) (disallowing parent's claim for loss of injured child's consortium); *Delk v. Edens*, 56 Va. Cir. 518 (Newport News Cir. 2001) ("There would appear to be no support for the proposition that a derivative action of a parent for medical expenses or loss of services for an infant also allows, under the applicable statute, any claim for injury to the person of the parent, emotionally or otherwise, or for loss of society and companionship of a child"); *see Carey v. Foster*, 345 F.2d 772 (4th Cir. 1965) (holding that a wife may not maintain an action for loss of consortium resulting from negligent injury of the husband by virtue of Va. Code Ann. § 55-36, which bars consortium actions by husbands).

[109] 223 Va. 406, 290 S.E.2d 825 (1982).

[110] 214 Va. 27, 197 S.E.2d 214 (1973).

[111] 215 Va. 338, 210 S.E.2d 145 (1974).

[112] 223 Va. 406, 408, 290 S.E.2d at 825; *Hughes*, 214 Va. 27, 34, 197 S.E.2d at 219.

> (b) "when the tort is intentional or reckless, the tortfeasor's conduct is outrageous or intolerable, the wrongful conduct and emotional distress are causally connected, and the emotional distress is severe."[113]

Nevertheless, the Court concluded that the circumstances of the case justified a new exception to the general rule disfavoring such claims:

> The restrictions upon recovery imposed by the provisos in *Hughes* and *Womack* were designed to discourage spurious claims asserted by chance witnesses to physical torts involving others. The considerations prompting imposition of the limitations do not exist here; no one suggests that the Burgers' emotional distress was feigned or that their claim was fraudulent. Indeed, to apply the restrictions here, or to refuse to recognize an exception to the general rule, would constitute a perversion of fundamental principles of justice.
>
> Furthermore, we believe it would be wholly unrealistic to say that the Burgers were mere witnesses to the consequences of the tortious conduct involved in this case. In our view, the parents' emotional distress was no less a direct result of wrongful conduct than the distress endured by the plaintiffs in *Hughes* and *Womack*; the evidence shows an unbroken chain of causal connection directly linking the erroneous Tay-Sachs report, the deprivation of the parents' opportunity to accept or reject the continuance of Mrs. Burger's pregnancy, and the emotional distress the parents suffered following the birth of their fatally defective child.[114]

Following the Virginia Supreme Court's decision in *Naccash*, the Virginia circuit courts struggled with its application. In *Tucker v. Ware*,[115] a medical malpractice action, the Richmond Circuit Court (Johnson, R.) dismissed the parents' claim for emotional distress allegedly experienced "in witnessing the negligent acts of the defendants . . . during the birth of [their son] and the observation of the severely depressed medical and physical condition of their son . . . during the succeeding year."[116] The court distinguished *Naccash* on the ground that the Tuckers were not alleging direct injury in the form of a lost opportunity to abort the fetus. "Thus, any injury to the parents, including emotional distress, is an indirect injury and does not fit within the narrow exception created by *Naccash*. Indeed, to hold otherwise would allow recovery for emotional distress anytime a person witnesses a negligently-inflicted injury to a loved one."[117]

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[113] 223 Va. 406, 408, 290 S.E.2d at 825; *Womack*, 215 Va. 338, 342, 210 S.E.2d at 148.

[114] 223 Va. 406, 417, 290 S.E.2d at 831 (citation and internal quotations omitted).

[115] 10 Va. Cir. 454 (Richmond Cir. 1988).

[116] *Id.* at 457.

[117] *Id*. at 458.

In *Hobson v. Richmond Memorial Hospital*, Judge Johnson overruled an obstetrician's demurrer to an emotional distress claim arising out of alleged birth-related injuries suffered during the delivery of high-risk twins at an inadequately equipped hospital.[118] The Hobsons claimed that the defendant had failed to warn them of the risks involved in delivering the twins at the hospital, and that had they been informed of the risks, they would have decided to use a different hospital with better facilities.[119] The court found that the elements of *Naccash* had been pled because the motion for judgment alleged that the defendant had a duty to warn the parents of the "peculiar risks" involved in the delivery; that the defendant had breached that duty; that the failure to warn had caused injury because had the risks been disclosed, they would have sought a better-equipped facility; and that they had been deprived "of the opportunity to accept or reject" continued treatment at the birth hospital.[120]

Eight years after *Naccash* was decided, the Court, in *Myseros v. Sissler*, appeared to retreat from any expansive view of its earlier holding, declaring in *dicta* that *Naccash* was "confined to its particular facts."[121]

Boyd v. Bulala involved an action brought in federal district court by a child born with profound birth defects and his parents against an obstetrician-gynecologist to recover for the failure to provide appropriate medical care during labor and delivery.[122] At trial the father, who was present at birth and saw the infant in a severely depressed condition, recovered a $1.175 million verdict for compensatory damages.[123] The United States Court of Appeals for the Fourth Circuit determined that the father was entitled to recover damages for emotional distress arising from the birth of the impaired child, although the father had not sustained any physical injury.[124] Observing that Virginia does not ordinarily permit a claim for such damages in the absence of physical injury, the Fourth Circuit declared that the case fell under the *Naccash* exception:

> We think that Roger Boyd's claim for emotional distress fits well within the bounds of the *Naccash* exception and that the district court did not err in refusing to disturb the jury's verdict in his behalf. Roger Boyd had engaged Dr. Bulala to be his wife's attending physician. Roger Boyd was present at the birth. He did see his daughter immediately after delivery when she was in a severely distressed condition. Finally, Roger Boyd had planned to

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[118] 12 Va. Cir. 254 (Richmond Cir. 1988).

[119] *Id*. at 255, 257.

[120] *Id*. at 257.

[121] 239 Va. 8, 9 n.2, 387 S.E.2d 463, 464 n.2 (1990).

[122] *Boyd v. Bulala*, 647 F. Supp. 781, 784 (W.D. Va. 1986), *aff'd in part, rev'd in part*, 877 F.2d 1191 (4th Cir. 1989).

[123] *Id*.; *Boyd v. Bulala*, 877 F.2d 1191, 1198 (4th Cir. 1989).

[124] 877 F.2d at 1198.

> participate and assist in the delivery of his child. He was denied this opportunity by Dr. Bulala's indifference.[125]

On certified questions from the Fourth Circuit in *Boyd*, the Virginia Supreme Court held that based on her status as a patient of the defendant, the mother's emotional distress claim resulting from birth of her defective daughter was subject to the medical malpractice cap governing her personal injury claims resulting from the negligent perinatal care.[126] The father's emotional distress claim, and the parents' joint claim for medical expenses, were held to be derivative of child's medical malpractice claim, and therefore, were subject to the statutory cap of $750,000 applicable to the same.[127]

In *Fairfax Hosp. System, Inc. v. McCarty*, the Court followed its decision in *Boyd* to affirm a judgment for emotional distress damages recovered by the mother of an infant who suffered perinatal injuries.[128] The defendant's labor and delivery nurse had failed to timely notify the attending physician of the deteriorating condition of the fetus, which was born with permanent neurological impairments. In upholding the mother's recovery, the Court stated,

> The Hospital ignores our recent rulings on this issue. In *Bulala v. Boyd*, 239 Va. 218, 389 S.E.2d 670 (1990), we held that a mother who had given birth to an impaired child would be entitled to recover, as a part of her individual claim, for mental suffering resulting from the birth of the defective child. *Id*. at 229, 389 S.E.2d at 675. This was based on our decision in *Modaber v. Kelley*, 232 Va. 60, 348 S.E.2d 233 (1986), that an injury to a fetus constitutes injury to the mother because an unborn child is a part of the mother until birth. *Id*. at 66, 348 S.E.2d at 236-37. Additionally, because the mother was a "patient," within the meaning of Code § 8.01-581.15 placing a cap on the total amount recoverable for any injury to "a patient," she was "entitled to the benefit of one statutory cap for her compensatory damage claim." *Bulala*, 239 Va. at 229, 389 S.E.2d at 675. Consequently, the trial court did not err in entering judgment for the mother on her emotional distress claim.[129]

In the 1999 decision of *Gray v. INOVA Health Care Servs*., the Court refused to extend the holding in *Naccash* to a claim for emotional distress damages brought by the mother of a three-year-old girl who underwent a

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[125] *Id*. (citations, internal quotations omitted).

[126] *Bulala v. Boyd*, 239 Va. 218, 229, 389 S.E.2d 670, 676 (1990).

[127] *Id*. at 230, 389 S.E.2d at 676. Because it was not a question put to it by the Fourth Circuit, the Virginia Supreme Court did not determine whether the father had a cognizable emotional distress claim under *Naccash*. *Id*. ("Turning to the claim, *if any*, the father may have for emotional distress . . .").

[128] 244 Va. 28, 37, 419 S.E.2d 621, 626-27 (1992).

[129] *Id*. at 37, 419 S.E.2d 621, 627-28.

negligently administered lumbar puncture.[130] Unlike the pregnant mother in *Naccash*, the plaintiff in *Gray* was a "third-party bystander" to whom the hospital owed no duty of care.[131]

Similarly, nine years after *Gray*, in *Fruiterman v. Granata*, the Virginia Supreme Court affirmed a motion to strike the father's evidence in a wrongful birth action arising out of the birth of twins with Down's Syndrome, wherein it was alleged that the defendants had failed to inform the mother about a prenatal genetic test in the first trimester of her pregnancy.[132]

Unlike the mother of the three-year-old in *Gray*, the father could not be described as a "third-party bystander" because he had accompanied his pregnant wife to her obstetrical visit, and assisted with the completion of a genetic screening form.[133] Nevertheless, based on the definitions of "patient" and "health care" in the Virginia Medical Malpractice Act,[134] the Court held that the father had failed to establish a physician-patient relationship, reasoning that:

> Although Dr. Solos-Kountouris discussed and/or recommended amniocentesis and genetic counseling, the evidence demonstrates her "diagnosis, care, [or] treatment" on that day was directed to Julie, not to Joseph. In other words, there is no evidence that Joseph "entrusted his treatment to [Dr. Solos-Kountouris] and the physician accepted the case."
>
> Furthermore, Joseph and Julie did not allege that the Doctors breached the standard of care by failing to advise them as a couple about genetic counseling or to recommend genetic screening tests that either Joseph alone or both of them would need to undergo. Instead, they asserted that the Doctors breached the standard of care by failing to inform Julie about the availability of CVS during the first trimester of her pregnancy. Obviously, Julie is the only person who could consent to and undergo that procedure. Information about CVS was not an "act . . . which should have been . . . furnished" to Joseph.
>
> The medical expert witnesses' testimony about what constitutes health care does not alter our conclusion. In the context of a pregnancy, a husband may be entitled to receive such information about a fetus' risk of having genetic abnormalities. The

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[130] 257 Va. 597, 514 S.E.2d 355 (1999).

[131] *Id*. at 599-600, 514 S.E.2d at 356.

[132] 276 Va. 629, 668 S.E.2d 127 (2008).

[133] *Id*. at 640, 668 S.E.2d at 133-34.

[134] VA. CODE ANN. § 8.01-581.1 (LexisNexis 2012) ("Patient" means "any natural person who receives or should have received health care from a licensed health care provider"; "Health care" means "any act, professional services in nursing homes, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment or confinement").

> question whether Joseph had a physician-patient relationship with Dr. Solos-Kountouris, however, turns solely on the facts surrounding the April 19, 2002 appointment.[135]

IX. WRONGFUL DEATH AND SURVIVAL CLAIMS

Virginia has a Wrongful Death Act modeled after Lord Campbell's Act,[136] and a Survival Statute.[137] Actions for wrongful death are brought by the personal representative of the minor's estate;[138] similarly, if the plaintiff in a personal injury action dies while the lawsuit is pending, the personal representative may revive the action under the Survival Act.[139]

Typically, the parent or parents of a deceased minor qualifies as his or her personal representative. If the parents are divorced (or are seeking a divorce), estate administration is granted first to the parent who had custody of the minor under a court order or custody agreement.[140] The custodial parent may, however, waive the right to qualify and designate another person to serve.[141] If the custodial parent or designee fails to apply for administration of

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[135] 276 Va. 629, 644, 668 S.E.2d at 135-36 (citations omitted).

[136] *See Bulala v. Boyd*, 239 Va. 218, 235, 389 S.E.2d 670, 679 (1990); *Miller v. Bennett*, 190 Va. 162, 164, 56 S.E.2d 217, 218 (1949). Virginia Code Section 8.01-50(A) provides as follows:

> Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, . . . and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action . . . and to recover damages in respect thereof, then, and in every such case, the person who, or corporation . . . which, would have been liable, if death had not ensued, shall be liable to an action for damages . . . notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony.

[137] The Survival Statute, Virginia Code Section 8.01-25, "abolished the ancient common-law rule that personal actions die with the plaintiff by providing that every cause of action shall survive the death of either party." *McKinney v. Va. Surg. Assocs*., 284 Va. 455, 732 S.E.2d 27 (2012). The statute provides, in pertinent part, as follows:

> Every cause of action whether legal or equitable, which is cognizable in the Commonwealth of Virginia, shall survive . . . the death of the person in whose favor the cause of action existed . . . . Provided that in such an action punitive damages shall not be awarded after the death of the party liable for the injury. Provided, further, that if the cause of action asserted by the decedent in his lifetime was for a personal injury and such decedent dies as a result of the injury complained of with a timely action for damages arising from such injury pending, the action shall be amended in accordance with the provisions of § 8.01-56.

[138] VA. CODE. ANN. § 8.01-50(C).

[139] *Id*. § 8.01-56.

[140] *Id*. § 8.01-50(D).

[141] *Id*.

the infant's estate within 30 days of death, administration "shall be granted as in other cases."[142]

Actions for Fetal Death

Effective April 9, 2012, a "natural mother" may bring an action for "fetal death" under the Wrongful Death Act.[143]

"Fetal death" means death-

> prior to the complete expulsion or extraction from its mother of a product of human conception, regardless of the duration of pregnancy; death is indicated by the fact that after such expulsion or extraction the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.[144]

Before the passage of this legislation, an injury to a viable fetus that resulted in stillbirth was considered an injury to the mother, who could pursue a personal injury action.[145] Because the stillborn infant was not considered a "person" under Section 8.01-50, no wrongful death action could be maintained, and there could be no recovery for wrongful death damages such companionship or loss of income.[146]

An action for fetal death is brought by and in the name of the natural mother, i.e., "the woman carrying the child."[147] If she dies, is disabled, or becomes disabled, the administrator of her estate, her guardian, or her personal representative may bring the action.[148]

If the action is one for medical malpractice and the tortious conduct has caused the death of more than one fetus, or has resulted in the death or injury of the natural mother, recoverable damages are subject to the malpractice cap on damages for a single patient under Section 8.01-581.15.[149]

The new law does not create a cause of action for a fetal death *against* the natural mother of the fetus.[150]

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[142] *Id*.

[143] *Id*. § 8.01-50(B).

[144] *Id*.; § 32.1-249(2). Of course, an infant born alive with prenatal injuries may bring a personal injury action, or in the event the infant later dies, a wrongful death action may be filed. *Kalafut v. Gruver*, 239 Va. 278, 283-84, 389 S.E.2d 681, 683-84 (1990).

[145] *Modaber v. Kelley*, 232 Va. 60, 348 S.E.2d 233 (1986).

[146] *Id*.; *Kalafut v. Gruver*, 239 Va. 278, 389 S.E.2d 681 (1990); *Lawrence v. Craven Tire Co*., 210 Va. 138, 140-42, 169 S.E. 2d 440, 441-42 (1969).

[147] VA. CODE. ANN. § 8.01-50(E).

[148] *Id*. § 8.01-50(C).

[149] *Id*.

[150] *Id*. § 8.01-50(B).

Conversion of Personal Injury Action to Wrongful Death Action

If a minor plaintiff in a personal injury action dies as a result of the injury for which the action is pending, the action must be converted to a wrongful death action, which becomes the sole remedy.[151] If death results from an unrelated cause, the action may proceed by his or her personal representative under the Survival Act for all damages that the infant could have recovered, other than punitive damages.[152]

Requiring an Election

In some circumstances, the cause of death may be unclear and the personal representative may bring both survival and wrongful death claims. However, there can be only one recovery for the same injury;[153] consequently, the question arises whether, and under what circumstances, the plaintiff may be required to elect between proceeding with a personal injury/survival act claim, or a wrongful death claim.

The Virginia Supreme Court addressed this issue in *Centra Health, Inc. v. Mullins*,[154] where the issue of whether the defendant's negligence had caused death was contested, and the circuit court permitted the jury to consider alternative claims for survival and wrongful death.[155] The Court affirmed the circuit court's denial of the defendant's motion to force plaintiff to elect prior to trial.[156] It identified the following principles:

> 1. The mandatory requirement to convert a personal injury claim into wrongful death applies only where the facts establish that the decedent died as a result of the injury complained of.[157]
>
> 2. The plaintiff should not be compelled to make an election without a full opportunity to develop his or her case through discovery. Election is required "only at a time when the record sufficiently establishes that the personal injuries and the death arose from the same cause."[158] This may require submission of both claims to the jury when "compelling an election would put the administrator[] in the untenable, and manifestly unjust, position of having to elect between two potentially viable claims,

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[151] *McKinney*, 284 Va. 455, 459, 732 S.E.2d at 28; *Centra Health, Inc. v. Mullins*, 277 Va. 59, 77, 670 S.E.2d 708, 717 (2009).

[152] *McKinney*, 284 Va. 455, 459, 732 S.E.2d at 29.

[153] *Antisdel v. Ashby*, 279 Va. 42, 49, 688 S.E.2d 163, 167 (1210); *Hendrix v. Daugherty*, 249 Va. 540, 547, 457 S.E.2d 71, 75-76 (1995); *Lucas v. HCMF Corp*., 238 Va. 446, 449, 384 S.E.2d 92, 94 (1989).

[154] 277 Va. 59, 670 S.E.2d 708 (2009).

[155] *Id*. at 66, 670 S.E.2d at 711.

[156] *Id*. at 78-79, 670 S.E.2d at 718.

[157] *Id*. at 79, 670 S.E.2d at 718.

[158] *Id*.

which [the defendant] . . . contest[s] on separate and independent grounds."[159]

3. Although permitting the personal representative to present evidence on both the survival and wrongful death claims may subject a defendant to prejudice because the jury could conflate the differing elements of damages into a single verdict, this prejudice can be avoided by bifurcating the trial of liability and damages.[160]

Limitations Period for Wrongful Death Actions

Actions for wrongful death of an infant must be brought within the time limits specified in Virginia Code Section 8.01-244.[161] Generally, this is within two years of death.[162] If a wrongful death action is properly filed within two years of death but abates or is dismissed without a decision on the merits, the time the action was pending is not counted, and another action may be brought within the remaining period of the two years as if the first action had not been filed.[163]

The rule under Section 8.01-244(B) does not include voluntary nonsuits taken under Virginia Code Section 8.01-380. When a voluntary nonsuit is suffered, Virginia Code Section 8.01-229(E)(3)[164] applies, and the action must be refiled within the longer of-

six months of the date of the nonsuit order,

the original period of limitation, or

within the limitation period as provided by subdivision (B)(1) of Section 8.01-229.[165]

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[159] *Id*.

[160] *Id*. at 78, 670 S.E.2d at 718.

[161] VA. CODE ANN. § 8.01-50(C).

[162] *Id*. § 8.01-244(B).

[163] *Id*.

[164] *Id*. Section 8.01-229(E)(3) 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, or within the limitation period as provided by subdivision B 1, whichever period is longer*. This tolling provision shall apply irrespective of whether the action is originally filed in a federal or a state court and recommenced in any other court, and shall apply to all actions irrespective of whether they arise under common law or statute. (Emphasis added.)

[165] Subparagraph (B)(1) of Section 8.01-229 permits the personal representative to bring an action within one year of his or her qualification, where the decedent dies without having filed a personal action. It provides as follows:

Thus, a personal injury/medical malpractice action that was timely filed within two years of accrual, converted to a wrongful death action, nonsuited after the plaintiff determined that she was unable to prove that the defendant caused the decedent's death, and refiled within six months of the nonsuit order as a survival action under Virginia Code Section 8.01-25 was not untimely under Section 8.01-299(E)(3), because both the original and refiled actions were based on the same cause of action.[166]

Scope of Damages for Wrongful Death

The scope of damages for wrongful death is broadly defined. The fact-finder may award "such damages as to it may seem fair and just."[167] Damages "shall include, but may not be limited to:"

"Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;[168]

"Compensation for reasonably expected loss of (i) income of the decedent and (ii) services, protection, care and assistance provided by the decedent;[169]

> The death of a person entitled to bring an action or of a person against whom an action may be brought shall toll the statute of limitations as follows:
>
> 1. Death of person entitled to bring a personal action. -- 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 including the limitation period as provided by subdivision E 3 or within one year after his qualification as personal representative, whichever occurs later.

Id.

[166] *McKinney v. Virginia Surgical Assocs*., 284 Va. 455, 732 S.E.2d 27 (2012).

[167] VA. CODE ANN. § 8.01-52.

[168] In *Graddy v. Hatchett*, 233 Va. 65, 353 S.E.2d 741 (1987), a case for the wrongful death of a 17-year-old boy who was killed in an automobile collision and who was survived by his parents and siblings, it was held that a jury instruction regarding the decedent's life expectancy was properly given to determine the economic value of his companionship, comfort and assistance to the family. *Id*. at 71, 353 S.E.2d at 745. The Virginia Supreme Court noted that "[t]hese statutory elements contemplate assignment of a dollar value to these losses and recovery therefor whether or not the beneficiaries can establish their dependency on the decedent. Accordingly, the expectancy of continued life of the decedent is relevant and necessary to establish the extent of loss for those items." *Id*. at 71, 353 S.E.2d at 744-745. Recovery for the loss of the decedent's companionship, comfort and assistance was supported by evidence of interfamily devotion, household chores the decedent had performed, and his close, protective relationship with his younger brother. *Id*.

[169] The statute specifically provides that "[c]ompetent expert testimony shall be admissible" to prove pecuniary loss. *Id*. In the case of the death of an adult child, evidence that the decedent was contemplating marriage is relevant to a claim by the

"Expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death;

"Reasonable funeral expenses; and

"Punitive damages . . . ."[170]

Impact of Misconduct by Decedent or Beneficiary

In a wrongful death action, evidence regarding the decedent's character and habits is frequently admissible on the question of damages, particularly when beneficiaries claim pecuniary loss.[171] Such misconduct, however, must be relevant to the damages claimed. Thus, for example, in *Gamble v. Hill*,[172] an action for the death of a 16-year-old girl who had given birth to an illegitimate child and was pregnant with another baby out of wedlock at the time of death, the trial court excluded such evidence where the girl's family did not claim any pecuniary loss. The Virginia Supreme Court affirmed, stating:

> We agree with the trial court that the evidence tendered by the defendants was not relevant on the elements of damages submitted to the jury by this instruction. . . . The proffered evidence did not show or tend to show that because of her immoral conduct her parents and the other members of her family lacked affection for her or that her death brought no sorrow, suffering or mental anguish to them. Indeed, the fact that the parents allowed this daughter to remain at home where they cared for and supported her and her illegitimate child is evidence of their affection for her. It is a matter of common knowledge that despite such moral delinquencies the parents of a wayward child may have a deep affection for it. If authority for this position be needed, it is found in the parable of the Prodigal Son.[173]

The misconduct of a prospective beneficiary that has not contributed to the death does not bar an allocation of damages to the beneficiary, but it may diminish the amount of recovery.[174] As with evidence of misconduct by the decedent, such evidence must also be relevant to the damages being claimed. For example, in *Edwards v. Syrkes*, an action for the death of a young boy who

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surviving parents for lost financial support. *Sawyer v. United States*, 465 F. Supp. 282 (E.D. Va. 1978).

[170] *Id*.; *see, e.g., Fruiterman v. Waziri*, 259 Va. 540, 525 S.E.2d 552 (2000).

[171] *Norfolk & Western Ry. Co. v. Lumpkin's Adm'x*, 151 Va. 173, 191, 192, 144 S.E. 485 (1928).

[172] 208 Va. 171, 156 S.E.2d 888 (1967).

[173] *Id*. at 179, 156 S.E.2d at 894. The Court further noted that the evidence was prejudicial, and would have distracted the minds of the jury. *Id*.

[174] *Matthews v. Hicks*, 197 Va. 112, 87 S.E.2d 629 (1955) (evidence that wife had deserted her husband and had been living in adultery for two years before the accident that resulted in husband's death was admissible because it was relevant to wife's claim for sorrow and conjugal loss).

was killed while riding his bicycle, an award in favor of his mother and half-sister was reversed as inadequate because the circuit court erroneously admitted evidence that the decedent and the half-sister were illegitimate, and that the half-sister had become pregnant before her marriage.[175] "This evidence does not tend to show any lack of affection by the mother and half-sister toward Herman, or that his death brought them no sorrow, suffering or mental anguish. The prejudicial effect of this evidence went far beyond any probative value it could have had in this case."[176]

Court Approval of Wrongful Death Settlements

Court approval of wrongful death settlements is required, and the failure to obtain approval may have serious ramifications. One such example is *Caputo v. Holt*, where the defendants in a wrongful death action who failed to obtain court approval of their settlement were required to pay a second time.[177] Speller qualified as administrator for the estate of the decedent, who had been killed in an automobile accident, based on the belief that he was the decedent's son.[178] Speller brought a wrongful death action against the driver and owner of the truck that had struck and killed the decedent, and later settled the case for $20,000; however, the settlement was consummated without court approval.[179] A settlement draft was negotiated, and after payment of medical expenses, fees and costs, Speller received approximately $9,000.

The decedent's surviving sisters petitioned the court to remove Speller as administrator, and established that he was not, in fact, the decedent's son.[180] After Speller's removal, one of the sisters was appointed administratrix of the decedent's estate and promptly brought a wrongful death action. The defendants' plea of release was denied, and a trial resulted in a $25,000 verdict.

On appeal, the Virginia Supreme Court addressed the issue of whether the plea of release should have been sustained. Analyzing the legislative history of Code Section 8-639 relating to compromise of wrongful death claims, the court concluded that court approval is required of settlements in death cases.[181] Because no court approval had been obtained, the release given by Speller was not binding upon the statutory beneficiaries: "in his individual capacity, . . . Speller was a legal stranger to the class of beneficiaries created by the statute, and, absent court approval of the compromise, the accord he gave and the satisfaction he received in his representative capacity did not bind that class or satisfy its claim in whole or in part."

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[175] 211 Va. 600, 179 S.E.2d 902 (1971).

[176] *Id*. at 601, 179 S.E.2d at 903.

[177] 217 Va. 302, 228 S.E.2d 134 (1976).

[178] *Id*. at 303, 228 S.E.2d at 136.

[179] *Id*.

[180] *Id*.

[181] *Id*. at 304-05, 228 S.E.2d at 136-37. Section 8-639 is presently codified as Section 8.01-55. The requirement of court approval is maintained under the current statute.

Distribution to Beneficiaries

The distribution of wrongful death damages is governed by Virginia Code Section 8.01-53(A).[182] Frequently in death cases involving minors the decedent has no spouse or child, and the parents and siblings are the beneficiaries. The class of beneficiaries eligible to receive a distribution is fixed at the time of the verdict or judgment.[183]

Virginia wrongful death actions employ a very specific verdict form to set forth the various elements of damages, and allow the jury to make a separate award for each beneficiary.[184] If the case is tried to the court, the judge is required to determine the award for each beneficiary.[185] If the beneficiaries to a wrongful death settlement do not agree upon a distribution, the circuit court is permitted by statute[186] to direct such distribution as a jury might direct under Section 8.01-52.[187]

X. APPROVAL OF INFANT PERSONAL INJURY SETTLEMENTS

Virginia requires court approval of infant settlements, and approval will be granted if the settlement is in the interest of the minor.[188] For example, the

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[182] The statute provides as follows:

> The damages awarded pursuant to § 8.01-52 shall be distributed as specified under § 8.01-54 to (i) the surviving spouse, children of the deceased and children of any deceased child of the deceased or (ii) if there be none such, then to the parents, brothers and sisters of the deceased, and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent or (iii) if the decedent has left both surviving spouse and parent or parents, but no child or grandchild, the award shall be distributed to the surviving spouse and such parent or parents or (iv) if there are survivors under clause (i) or clause (iii), the award shall be distributed to those beneficiaries and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent or (v) if no survivors exist under clause (i), (ii), (iii), or (iv), the award shall be distributed in the course of descents as provided for in § 64.1-1.

VA. CODE ANN. § 8.01-53(A).

[183] *Id*. § 8.01-53(B).

[184] *Id*. § 8.01-54; *see* VA. MODEL JURY INSTRUCTIONS – CIVIL, No. 9.100.

[185] Va. Code Ann. § 8.01-54 ("the judgment of the court shall in all cases specify the amount or the proportion to be received by each of the beneficiaries").

[186] *Id*. § 8.01-55.

[187] *See, e.g., Squillaci v. Lewis-Gale Hosp., Inc*., 2006 Va. Cir. LEXIS 139 (Roanoke Cir. Sept. 1, 2006) (wrongful death beneficiaries should have their damages assessed independently and separately; any award requires proof of loss by the statutory beneficiary).

[188] Va. Code Ann. §§ 8.01-424, 8.01-2; *In re Peanut Corp. of Am*., Case No. 6:10CV027, 2010 U.S. Dist. LEXIS 91402, *20 (W.D. Va. Aug. 25, 2010); *Campbell v. Randall*, Case No. 4:06CV00030, 2007 U.S. Dist. LEXIS 64191 (W.D. Va. Aug. 30, 2007); *Allianz Ins. Co. v.*

circuit court in *Barnes v. Style-Rite of Richmond, Inc*., refused to enforce an alleged infant settlement because it had not been approved.[189]

State law requirements for approval of infant settlements are substantive, and therefore apply in federal actions.[190] A consent judgment following settlement is void under Fed. R. Civ. P. 60(b)(4) if the parties fail to follow state law requirements governing the settlement of a minor's claim.[191]

Although the circuit courts have the authority to approve settlements involving minors, that authority does not entail the power to force a compromise where none exists. In *Gunn v. Richmond Community Hospital*,[192] the guardian of a disabled person brought medical malpractice actions against doctors and a hospital. The cases were consolidated. Approximately one month before trial, counsel for the defendants moved to force the guardian (plaintiff) and his lawyer to accept a $750,000 offer, stating that "the court should approve the compromise and settlement as being in the best interests of the plaintiff."[193] Defendants claimed that refusal to accept the settlement proposal constituted mismanagement of the ward's estate, and that the court was obligated to prevent such mismanagement.

The court appointed an experienced lawyer as guardian *ad litem* for the purpose of making a report to the court on the motion. During the pendency of the motion, the plaintiff and the physicians reached a settlement that was approved by the court. The hospital offered to pay an additional $125,000 to compromise the plaintiff's claim, but it was rejected by the guardian and plaintiff's lawyer. The court, however, citing its inherent authority, ordered the guardian to accept the hospital's settlement offer.

On appeal, the hospital argued that the court had authority to "confirm" a guardian's prior approval, and that it could also "approve" a compromise on its own.[194] The Virginia Supreme Court rejected this argument. Observing that paragraph (B) of Section 8.01-424 authorized the circuit court to approve "the compromise," it held that:

> The word "compromise," in this context, means agreement to terminate a controversy. A compromise arises from an agreement and an agreement contemplates acceptance of an offer. When there

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Garrett, 153 F.R.D. 89, 92 n.4 (E.D. Va. 1994); *Franklin v. Franklin*, 59 Va. Cir. 390, 393 (Norfolk Cir. 2002); *Terry v. Harris*, 56 Va. Cir. 326 (Richmond Cir. 2001); *In re Ashe*, 35 Va. Cir. 333 (Richmond Cir. 1995).

[189] 7 Va. Cir. 10 (Richmond Cir. 1980).

[190] *Burke v. Smith*, 252 F.3d 1260 (11th Cir. 2001); *In re Peanut Corp. of Am*., Case No. 6:10CV027, 2010 U.S. Dist. LEXIS 91402, *20 (W.D. Va. Aug. 25, 2010).

[191] *Carter v. Fenner*, 136 F.3d 1000, 1009 (5th Cir. 1998).

[192] 235 Va. 282, 367 S.E.2d 480 (1988).

[193] *Id*. at 284, 367 S.E.2d at 481.

[194] *Id*. at 285, 367 S.E.2d at 482.

> is no meeting of the minds during settlement negotiations sufficient to create a valid contract, there is no agreement.
>
> In the present case, there was no meeting of the minds, there was no acceptance by the parties of an offer of settlement, and there was no agreement. Hence, there was no "compromise" for the court to approve.[195]

Appointment of Guardian Ad Litem

It is common for courts to appoint a guardian *ad litem* for the person under a disability in connection with applications to approve a settlement. Some circuit courts maintain an approved list of attorneys qualified to serve as guardians *ad litem*. The parties seeking approval of the compromise must schedule a hearing and give reasonable notice to all interested parties. Prior to the hearing, the guardian *ad litem* investigates the merits of the case and the circumstances of the disabled person, analyzes the reasonableness of the settlement, and recommends whether it ought to be approved.[196]

Settlements in excess of $25,000 are generally paid to a duly qualified fiduciary of the minor after approval of a bond.[197] Modest infant settlements not exceeding $25,000 may be paid into court and distributed without the intervention of a fiduciary to a person considered competent to administer the same for the minor's benefit, or directly to the minor if he or she "is considered by the court competent to expend and use the same in his behalf."[198] Settlements involving periodic payments exceeding $4,000 per year must be secured by a bond or guaranteed by an insurance carrier with at least an A+ rating by Best's.[199] Settlements involving annual periodic payments of $4,000 or less may be paid into court and distributed pursuant to Code Section 8.01-606.[200]

At the discretion of the court, an infant settlement may be paid to the parent or guardian of the infant to be held in trust for his or her benefit.[201] Any trust established to administer funds on behalf of a minor, including trusts funded by periodic payments, must be overseen by the county commissioner of accounts.[202] An inventory and annual accounting must be filed during the

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[195] *Id*. at 286, 367 S.E.2d at 482 (citations omitted).

[196] *See Breit v. Mason*, 59 Va. App. 322, 340, 718 S.E.2d 482, 491 (2011) ("axiomatic that the GAL's investigation of the facts must be independent of any other party's interests in the outcome of the litigation").

[197] VA. CODE ANN. § 8.01-424(D)(2) (LexisNexis 2012).

[198] *Id*. §§ 8.01-606(A), 8.01-424(D)(3).

[199] *Id*. § 8.01-424(D)(4).

[200] *Id*.

[201] *Id*. § 8.01-424(E).

[202] *Id*.

pendency of the trust, which may continue into adulthood if, for example, the minor is disabled.[203]

Confidentiality of Settlements

Because personal injury and death cases involving minors typically require court approval, when such claims are settled it may be difficult for litigants to prevent the financial terms of the compromise from becoming part of the public record, notwithstanding the incorporation of confidentiality clauses in the settlement agreement that otherwise preclude a party, typically the plaintiff, from disclosing the information to third parties. Two recent cases illustrate the changing attitude of the Virginia courts toward increased disclosure.

In *K.S. v. Ambassador Programs Inc.*,[204] the United States District Court for the Eastern District of Virginia (Ellis, J.), refused to seal an infant settlement. The court noted the long-standing commitment to public assess to judicial documents.[205] It concluded that the possibility that the defendants would suffer negative publicity did not constitute a potential improper purpose for which the records would be sought that would justify sealing the record, particularly where it had declared the settlement to be reasonable.[206] Nor was the court convinced that leaving the settlement unsealed would endanger the minor plaintiff's privacy interests, given that she had been identified only by her initials in the court papers.[207] Finally, it found the rationale of sealing the record to promote settlements would create an exception that would "swallow the rule."[208] The court concluded its opinion with the observation that-

> Settlement agreements, of course, do not generally become part of the public record because they do not ordinarily require judicial consideration or approval. When parties settle a case out of court, they are free to craft their own terms that suit their particular needs, including strict confidentiality clauses. This case is unusual, although not uncommon, in that it involves a minor plaintiff, and the laws of the Commonwealth of Virginia require that parties seek judicial approval in settling any case involving a minor or other person under a disability. By mandating judicial review, the statute ensures that the compromise serves the best interests of a party who lacks the legal capacity to enter a binding agreement. No good cause or persuasive reason has been adduced to warrant concealing judicial review of the settlement from public scrutiny.[209]

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[203] *Id*.

[204] No. 1:10cv439, 2010 U.S. Dist. LEXIS 92936 (E.D. Va. Sept. 3, 2010).

[205] *Id*. at *8.

[206] *Id*. at *10.

[207] *Id*. at *11.

[208] *Id*. at *11-12.

[209] *Id*. at *13-14 (citations, internal quotations omitted).

The case of *Perrault v. The Freelance-Star* involved four wrongful death claimants who sought court approval of settlements involving an "improperly formulated or contaminated" cardioplegia solution manufactured and distributed by the defendant.[210] No petition or notice of motion to approve the settlement was filed; instead, oral motions to approve the settlements were made in a closed, in-camera proceeding.[211]

Several area newspapers intervened and objected to the court-ordered confidentiality of the financial terms of the settlement.[212] Thereafter, the circuit court suspended its prior orders, and ordered the plaintiffs to file written petitions for approval of the settlements stating, for each of the settled cases, the compromise, its terms and the reasons therefor.[213] After hearing argument on the requirements for seeking approval of compromise settlements under Virginia Code Section 8.01-55, the court ordered that "the terms and conditions" of each settlement had to be disclosed in the petitions for approval, and denied the plaintiffs' motions to submit redacted copies of the settlement agreements which would have excluded the financial terms of the settlements.[214]

On appeal, the Virginia Supreme Court made three important rulings.

(1) Section 8.01-55 plainly requires the filing of a written petition to approval the settlement of a wrongful death action, and that the petition must include the monetary terms of the settlement.[215]

(2) The requirements of Section 8.01-55 "trump" the language of Code Section 8.01-581.22, whereby a mediated settlement agreement may be deemed confidential if the parties agree in writing. The Court explained this holding as follows:

> Although *Shenandoah Publishing* [*House, Inc. v. Fanning*[216]] did not involve a mediated settlement of a wrongful death claim, we nonetheless find the rationale underlying the decision in that case to be instructive. In *Shenandoah Publishing*, we stated that the legislative purpose underpinning Code § 8.01-55 served the public's "societal interest in learning whether compromise settlements are equitable and whether the courts are administering properly the powers conferred upon them." 235 Va. at 260, 368 S.E.2d at 256. This is so because "the people have a vital interest, one of personal

[210] 276 Va. 375, 380, 666 S.E.2d 352, 354 (2008).

[211] *Id*. at 381, 666 S.E.2d at 355.

[212] *Id*. at 382, 666 S.E.2d at 355.

[213] *Id*. at 382, 666 S.E.2d at 355-56.

[214] *Id*. at 383, 666 S.E.2d at 356.

[215] *Id*. at 385-86, 666 S.E.2d at 357-58. In support of its decision, the Court cited *Ramey v. Bobbitt*, 250 Va. 474, 481, 463 S.E.2d 437, 441 (1995), wherein it had held that portions of a release not made part of the settlement approved by the court were not binding on the parties to the release. *Id*. at 386, 666 S.E.2d at 358.

[216] 235 Va. 253, 368 S.E.2d 253 (1988).

> and familial as well as community concern, in cases involving claims of medical malpractice on the part of licensed practitioners and other health care providers." *Id*.
>
> Given the salutary purpose of Code § 8.01-55, we cannot conceive that the General Assembly intended to permit the confidentiality provisions allowed but not required by Code § 8.01-581.22 to trump the provisions of Code § 8.01-55 and, consequently, the right of public access provided for by Code § 17.1-208 in the context of the records of court approval of the compromise settlement of a wrongful death claim achieved through mediation.[217]

(3) Noting the discretion vested in the circuit courts to seal a record and the "strong presumption in favor of public access to judicial records," the Court held that the lower court had properly denied the request to file redacted settlement agreements.[218] Neither the defendant's concern for being subjected to nuisance claims nor the plaintiffs' privacy concerns of avoiding financial or emotional harm were sufficient to "override the presumption of openness" guaranteed to judicial records by Virginia Code Section 17.1-208.[219] The Court added that under its prior opinion in *Shenandoah Publishing*, motions to seal a record must be supported by specific facts, not conclusory or abstract assertions.[220]

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[217] 276 Va. 375, 389, 666 S.E.2d 352, 359.

[218] *Id*. at 389-92, 666 S.E.2d at 359-61.

[219] *Id*. at 391-92, 666 S.E.2d at 360-61. Section 17.1-208 provides that "[e]xcept as otherwise provided by law, any records and papers of every circuit court that are maintained by the clerk of the circuit court shall be open to inspection by any person and the clerk shall, when requested, furnish copies thereof, except in cases in which it is otherwise specially provided." VA. CODE ANN. § 17.1-208 (LexisNexis 2012).

[220] *Id*. at 390, 666 S.E.2d at 360. *See Shenandoah Publishing*, 235 Va. 253, 259, 368 S.E.2d at 256 ("the moving party must bear the burden of establishing an interest *so compelling that it cannot be protected reasonably by some measure other than a protective order*"(emphasis added)).