

DIGEST OF INSURANCE LAW

VIRGINIA

Courtesy of
Woods Rogers PLC
Roanoke, Virginia

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

General District Courts. Courts not of record having limited original civil jurisdiction.

Circuit Courts. Courts of record having limited original civil jurisdiction.

General District Courts have exclusive original jurisdiction over civil matters not exceeding \$4,500 and concurrent jurisdiction with Circuit Courts over matters in excess of \$4,500 but not exceeding \$15,000. Va. Code Ann. §16.1-77. Matters in excess of \$4,500 may be removed from General District Court to Circuit Court. Va. Code Ann. §16.1-92. Unless otherwise provided, the Small Claims Division of the General District Court shall have concurrent jurisdiction with the General District Court over actions specified in §16.1-77(1), if the amount claimed does not exceed \$2,000. Va. Code Ann. §16.1-122.2. Judgments of General District Court in excess of \$50 may be appealed to Circuit Court within ten days and tried de novo. Va. Code Ann. §16.1-106. Jurisdiction of claims against the Commonwealth for an amount greater than \$15,000 is limited to the Circuit Courts, and parties to any such action are entitled to a jury trial. Va. Code Ann. §8.01-195.4. Courts of Appeals of Virginia have original jurisdiction to issue writs of mandamus, prohibition and habeas corpus. Va. Code Ann. §17.1-404.

Appellate Courts

State Court of last resort is Supreme Court of Virginia, composed of a Chief Justice and six (6) Justices. Va. Code Ann. §17.1-300 *et seq.* Special Court of Appeals may be constituted to assist Supreme Court with docket. Decisions of Special Court have same finality as regular court. Court of Appeals of Virginia consists of eleven (11) judges who sit in panels of at least three (3) judges in various locations throughout state. Court of Appeals hears appeals of Circuit Court decisions on appeal from decisions of administrative agencies, the Virginia Workers' Compensation Commission, Circuit Court decisions involving domestic relations matters,

and criminal appeals. *See* Va. Code Ann. §17.1-400 *et seq.* and §19.2-400.

LAW

Abbreviations

F.2d – Federal Reporter, Second Series.
F.3d – Federal Reporter, Third Series.
F. Supp. – Federal Supplement.
F. Supp. 2d – Federal Supplement, Second Series.
S.E. – South Eastern Reporter.
S.E.2d – South Eastern Reporter, Second Series.
Va. – Virginia Reports.
Va. App. – Virginia Court of Appeals Reports.
Va. Cir. – Virginia Circuit Court Reports
Va. Code Ann. – Virginia Code Annotated as amended through 2000.

ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS”; “DISABILITY” and “WORKERS’ COMPENSATION.”

Definition. Accident and sickness insurance means insurance for sickness or bodily injury or death by accident or accidental means or from a combination of any or all of these perils. Also includes certain agreements insuring against losses from health care claims or expenses in excess of a specific or aggregate dollar amount. *See* Va. Code Ann. §38.2-109; *see Gudnason v. Life Ins. Co. of N. America*, 231 Va. 197, 343 S.E.2d 54 (1986).

Disease Induced by Accident. There must be evidence to show causal connection between accident and resulting disease for insured to recover disability compensation. *Winchester Milling Corp. v. Sencindiver*, 148 Va. 388, 138 S.E. 479 (1927).

Bodily Injury. While Virginia state courts have not interpreted meaning of “bodily injury,” federal court has held that term “bodily injury” limits policy coverage to physical injuries to body, and not claims for purely non-physical or emotional harm. *West Am. v. Bank of Isle of*



Wight, 673 F. Supp. 760 (E.D. Va. 1987). Allegations of physical or bodily contact do not necessarily imply bodily injury. *American & For. Ins. Co. v. Church Sch.*, 645 F. Supp. 628 (E.D. Va. 1986). However, allegation of “pain of the body” has been held sufficient to state claim for bodily injury. *Rockingham Mut. v. Daris*, 58 Va. Cir. 466 (2002).

Construction. If one construction of policy would provide coverage and other would not, court’s duty is to adopt construction that would result in coverage. *Lincoln Nat’l Life Ins. Co. v. Commonwealth Corrugated Container Corp.*, 229 Va. 132, 327 S.E.2d 98 (1985). In cases of doubt, court consistently construes insurance contracts in favor of interpretation which affords coverage. *Bituminous Cas. Corp. v. Sheets*, 239 Va. 332, 389 S.E.2d 696 (1990). However, construction must be reasonable and absurd results must be avoided. *GEICO v. Moore*, 266 Va. 155, 580 S.E.2d 823 (2003).

ACCIDENTAL MEANS

Definition. Accident is sudden, undesigned, and unexpected event. *Houchens v. American Home Assur.*, 927 F.2d 163 (4th Cir. 1991). Whether incident is unexpected or not is to be determined from viewpoint of insured. *Erie Ins. Exch. v. Sipos*, 2004 Va. Cir. LEXIS 21, at *5 (Feb. 5, 2004). If insured voluntarily provokes or encounters situation which he knows or reasonably should anticipate would have natural and probable consequence of his death or grave bodily harm, then his death or injury is not accidental within meaning of policy. *Harris v. Bankers Life*, 222 Va. 45, 278 S.E.2d 809 (1981).

Blood Transfusion. Insured, who while in good health and normal condition, submitted to blood transfusion to aid child, and died from shock or heart failure shortly after transfusion began, died from bodily injuries effected exclusively and wholly by external, violent and accidental means. *American Nat’l v. Belch*, 100 F.2d 48 (4th Cir. 1938).

Burden of Proof. Death presumed to be result of natural dissolution rather than accidental injury, burden of proof being upon plaintiff who seeks to recover for accidental death. *Life & Cas. Ins. Co. v. Daniel*, 209 Va. 332, 163 S.E.2d 577 (1968); *see also Aetna Life v. Hale*, 206 Va. 840, 147 S.E.2d 126 (1966).

Commission of Felony. Insurer had burden of proving insured was shot and killed in commission of felony. Where insured was killed after being startled awake and failing to lower rifle pointed at police investigating alleged burglary in home, court held insurer failed to meet this burden because it was not reasonable to conclude insured knew he was encountering police officers. *Cox v.*

Reliance Std. Life, 2002 U.S. App. LEXIS 16216 (4th Cir. 2002).

Deliberate Act. Death will be found non-accidental where insured deliberately exposed himself to substantial and foreseeable risk of serious injury or death, even if neither intended nor certain to result. *Patch v. Met. Life Ins. Co.*, 733 F.2d 302 (4th Cir. 1984). Under evidence that insured locked doors of his house to prevent intrusion at time when interruption was unlikely, that insured deliberately placed his neck into noose which he himself had designed and constructed, that insured intentionally and deliberately self-induced asphyxia, and he was hanged to death, although unintended, death was not by “accidental means” within meaning of double indemnity provision of life policy. *Runge v. Met. Life*, 537 F.2d 1157 (4th Cir. 1976).

Gun Play. Death resulting from gunshot wound where gun discharged in struggle in which victim was aggressor not caused by accidental means. *Wooden v. John Hancock Mut. Life*, 205 Va. 750, 139 S.E.2d 801 (1965); *see also Byrd v. Life*, 219 Va. 824, 252 S.E.2d 307 (1979); *Tucker v. Life Ins. Co.*, 228 Va. 55, 321 S.E.2d 78 (1984).

Heroin. Death resulting from voluntary heroin overdose did not occur by “accidental means.” *Patch v. Met. Life Ins. Co.*, 733 F.2d 302 (4th Cir. 1984).

Misconduct. Death while violating law held not by accidental means and misconduct of insured barred recovery. *Smith v. Combined Ins.*, 202 Va. 758, 120 S.E.2d 267 (1961).

Poison. Death resulting from drinking wood alcohol, believing it to be whiskey, held death by accidental means. *Modern Woodmen v. Lawson*, 110 Va. 81, 65 S.E. 509 (1909); *see also Reserve Life Ins. Co. v. Hosey*, 208 Va. 568, 159 S.E.2d 633 (1968); *American Nat’l v. Dozier*, 172 Va. 376, 2 S.E.2d 282 (1939).

Pre-existing Condition. Death held due to pre-existing weakened physical condition, resulting from treatment for metastasized cancer and not directly from accident. *Gay v. American Motorists*, 714 F.2d 13 (4th Cir. 1983). Where death would not have occurred but for pre-existing noncovered condition, insurer relieved of liability. *Id.* If an accident cooperates with some pre-existing disease or bodily infirmity and produced results which but for pre-existing condition would not have occurred, there is no liability. *Mutual Benefit v. Ryder*, 166 Va. 446, 185 S.E. 894 (1936).

Suicide. When beneficiary making claim has proven death by violent and external means, presumption arises that death was accidental. There is a presumption against suicide. Burden then shifts to insurer to



prove suicide by clear and satisfactory evidence. *Atkinson v. Life*, 217 Va. 208, 228 S.E.2d 117 (1976).

Voluntary Act. Death of insured which results directly from insured's voluntary act is not death by "accidental means," within meaning of policy insuring against loss of life through accidental means, even though results may be such as to constitute accidental injury. *Runge v. Metropolitan*, 537 F.2d 1157 (4th Cir. 1976).

ADJUSTERS

No license required for independent claims adjusters.

AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE" and "NEGLIGENCE."

The word "adult" shall be construed to mean a person eighteen years of age or over. Va. Code Ann. §1-13.42 (3).

AGENTS AND BROKERS

Agent. Individual or business entity (other than sole proprietorship) that sells, solicits, or negotiates contracts of insurance or annuity in Virginia. Va. Code Ann. §38.2-1800. Other than licensed surplus lines broker, any agent of foreign insurance company not licensed to transact business in Virginia is guilty of Class 1 misdemeanor and personally liable upon insurance contract or policy sold, solicited, or negotiated either by him or with his assistance. Va. Code Ann. §38.2-1802.

Contract of Agency. Company may terminate upon agent's failure of performance. *Citizens Home Ins. Co. v. Glisson*, 191 Va. 582, 61 S.E.2d 859 (1950). "Expirations" are property of general agent and cannot be interfered with by company upon termination of agency in absence of default by general agent. *V. L. Phillips & Co. v. Pennsylvania Threshermen & Farmers*, 199 F.2d 244 (4th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953).

Effective 9/1/02, Va. Code Ann. §38.2-1803 repealed. Statute had previously provided that countersignature of licensed resident agent not required on insurance policy covering subject resident, located, or to be performed in Virginia.

For Whom. Where insurance company knowingly permits one to act so as to justify third person in believing he is company's agent, company will be held to have waived provision in policy that no one shall be deemed agent of insurance company unless such person be authorized in writing, signed by officer of company. *Creech v. Massachusetts Bonding Co.*, 160 Va. 567, 169 S.E. 545 (1933). Licensed agent is held to be agent of

insurer that issued insurance sold, solicited, or negotiated by such agent in any controversy between insured and insurer. Va. Code Ann. §38.2-1801.

Fraud. Insurer who puts agent in position to commit fraud upon third persons is subject to liability despite insurer's innocence. *Dudley v. Estate Life Ins. Co.*, 220 Va. 343, 257 S.E.2d 871 (1979). Fraud of agent in securing life insurance policy for uninsurable persons is a misdemeanor, punishable by fine and suspension or revocation of license. Va. Code Ann. §§38.2-3103, 38.2-3403. Insurer not estopped from relying on fraud of agent as defense when fraud unknown to insurer, and if insured participated, insurer not responsible under policy. *Mutual Ben. Health & Accident Ass'n v. Ratcliffe*, 163 Va. 325, 175 S.E. 870 (1934). But where applicant is blameless, the insurer is liable. *Gilley v. Union Life Ins. Co.*, 194 Va. 966, 76 S.E.2d 165 (1953). Incontestability clause statute may preclude insurer from asserting such fraud as defense. Va. Code Ann. §38.2-3107. If individual has valid interest in life insurance proceeds, cannot be defeated by fraudulent change of beneficiary in which the agent participated. *Overstreet v. Kentucky Cent. Life Ins. Co.*, 950 F.2d 931 (4th Cir. 1991); *Nyon-teh v. Peoples Security Life Ins. Co.*, 958 F.2d 42 (4th Cir. 1992).

Knowledge of Agent. Knowledge gained by agent through application is imputed to company where there is good faith on applicant's part. *Reserve Life Ins. Co. v. Ferebee*, 202 Va. 556, 118 S.E.2d 675 (1961). However, where agent records answers and applicant knows there are misrepresentations therein, and that they are material, there is fraud in inducement. *Mutual Ben. Health & Accident Ass'n v. Ratcliffe*, 163 Va. 325, 175 S.E. 870 (1934).

Liability of Agent for Failure to Procure Policy. Suit against agent for negligently failing to list builder as a named insured fails where policy would not have covered loss actually suffered. *National Housing Bldg. Corp. v. Accordia of Va.*, 267 Va. 247, 591 S.E.2d 88 (2004). However, where insurance would have covered loss, plaintiff can recover damages for negligent performance of contractual obligation by proving it (or its agent) was in privity with insurance agent. *Accordia Ins. Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377, 560 S.E.2d 246 (2002). Rule of non-liability of disclosed principle applies only with respect to contracts an agent makes as an agent for principal. *House v. Kirby*, 233 Va. 197, 255 S.E.2d 303 (1987).

Limitation of Authority. Insured not bound by unknown limitation on agent's authority. *Virginia Auto Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 46 S.E.2d 377 (1948). Agent's power is prima facie co-extensive with the business entrusted to his care, and are not narrowed



by limitations not communicated to insured. *Liverpool & London & Globe Ins. Co. v. Bolling*, 176 Va. 182, 10 S.E.2d 518 (1940). Where agent was special agent with authority only to solicit applications for insurance and to receive premiums, and such status was made known to applicant, issuance of receipt for initial premium by agent did not cause policy to bind on company, when required medical examination was not complete. *Elliott v. Interstate Life & Accident Ins. Co.*, 211 Va. 240, 176 S.E.2d 314 (1970).

Licensing and Regulation. No person shall act and no insurer or licensed agent shall knowingly permit a person to act, as an insurance agent without first obtaining license in manner prescribed by Virginia Insurance Commission. Va. Code Ann. §38.2-1822. Applicants for license must meet various requirements. See Va. Code Ann. §38.2-1814 *et seq.* Temporary individual license shall be issued under certain circumstances providing for life and health authority or property and casualty insurance authority. See Va. Code Ann. §38.2-1830. Commission may place on probation, refuse to issue or renew license, or suspend or revoke license whenever it finds the applicant or licensee is guilty of any activity enumerated in Va. Code Ann. §38.2-1831.

ARBITRATION

Clause in policy providing for arbitration or appraisal of loss or damage as condition precedent to suit by policyholder to recover is inserted for protection of insurer and as general rule may be waived expressly or by implication. *Eden Corp. v. Utica Mut. Ins. Co.*, 350 F. Supp. 637 (W.D. Va. 1972).

Virginia has adopted Uniform Arbitration Act, which addresses both validity of agreement to arbitrate and procedure for arbitration. Va. Code Ann. §§8.01-577, *et seq.*

ATTORNEYS

New Rules of Professional Conduct went into effect, January 1, 2000.

Conflict of Interest. Attorney-client relationship precludes attorney from having personal interest antagonistic to those of client or from obtaining personal advantage out of relationship without knowledge or consent of client. *Byars v. Stone*, 186 Va. 518, 42 S.E.2d 847 (1947). Burden on attorney to show: 1) transaction fair, 2) entered freely by client, 3) client fully understood nature and extent of rights and thoroughly comprehended scope and effect of transaction. *In re Decker*, 295 F. Supp. 501 (W.D. Va. 1969) (applying *Thomas v. Turner's Adm'r*, 87 Va. 1, 12 S.E. 149 (1890)).

Legal Malpractice. Every attorney liable to client for damages sustained by him by neglect of duty. Va. Code Ann. §54.1-3906. Any attorney, by virtue of relationship to client, obligated to perform with fidelity and reasonable care and skill. Failure to perform duty gives rise to personal liability to client for resulting loss. *Fowler v. Tobacco Growers*, 195 Va. 770, 80 S.E.2d 554 (1954). Decision adverse to criminal defendant in post-conviction proceeding bars recovery for defense attorney malpractice. *Adkins v. Dixon*, 253 Va. 275, 281, 482 S.E.2d 797, 801, *cert. denied*, 522 U.S. 937 (1997). Former criminal client must plead post-conviction relief and actual innocence, except where allegations show that what convicted of was not a crime. *Taylor v. Davis*, 265 Va. 187, 576 S.E.2d 445 (2003).

Statute of Limitations. Generally governed by contract (3 years oral, 5 years written). Cause of action may not accrue until completion of particular legal undertaking by attorney. *Keller v. Denny*, 232 Va. 512, 352 S.E.2d 327 (1987).

Fees. In civil suit by insured against insurer to determine existence or extent of coverage, insured entitled to recover costs and reasonable attorney fees from insurer if trial judge determines insurer in bad faith either denied coverage or failed or refused to make payment to insured. Va. Code Ann. §38.2-209. This provision does not apply to Medicare Supplement Policies. Va. Code Ann. §38.2-4214. Where insurer made thorough investigation of claim, and its denial was based on an undecided coverage issue, insurer acted reasonably and award of attorneys' fees was reversed. *Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 524 S.E.2d 649 (2000). In any action against unlicensed insurer upon an insurance contract issued or delivered in Virginia, court may allow plaintiff a reasonable attorney fee if insurer failed to make payment in accordance with contract terms for thirty days after demand and refusal was vexatious and without reasonable cause. Va. Code Ann. §38.2-807.

AUTOMOBILES

See Law Digest Tables.

See also "LIABILITY INSURANCE"; "NEGLIGENCE"; "NO-FAULT."

Age for drivers. Persons 18 years of age or over, may be licensed to operate automobiles. Persons 16 years and 3 months of age, or over, may be licensed to operate automobile with driver's education and with consent of parent or guardian. Va. Code Ann. §46.2-334. Temporary instruction permit may be issued to person 15 years and 6 months of age. Va. Code Ann. §46.2-335. Special temporary driver's license may be issued to persons under eighteen years of age who hold valid driver's



license from another state but have not completed driver education program. Va. Code Ann. §46.2-334. Driver of public passenger vehicle must be at least 18 years of age. Va. Code Ann. §46.2-810.

Agency. Employer responsible for injuries caused by employee operating own car if at time employee was acting within scope of employment with implied authority to operate it. *Barber v. Textile Mach. Works*, 178 Va. 435, 17 S.E.2d 359 (1941). Mere fact employee twice convicted of DUI, had failed to pay fines or attend counseling, and had been declared habitual offender would not place employer on notice or make it foreseeable that employee would steal truck and cause accident. *Interim Personnel v. Messer*, 263 Va. 435, 559 S.E.2d 704 (2002). Test for negligent entrustment is whether owner knew or had reason to know that auto is being entrusted to unfit driver. *Kingrey v. Hill*, 245 Va. 76, 425 S.E.2d 798 (1993).

Compulsory Insurance Coverage. Every motor vehicle owner's policy shall describe vehicles intended to receive coverage, insure the person named and any person using vehicle with named insured's permission, and insure the insured or other person against loss from liability for damages. Va. Code Ann. §46.2-472. Every driver's policy shall insure person named against loss from liability for damages. Va. Code Ann. §46.2-473.

Contributory Negligence. Any negligence of plaintiff which is proximate cause of accident will bar recovery. *Litchford v. Hancock*, 232 Va. 496, 352 S.E.2d 335 (1987).

Alcohol/DWI. Evidence of intoxication may be used to show negligence, but does not per se justify punitive damages and alone cannot be used to enlarge damages beyond fair compensation for plaintiff. *Baker v. Marcus*, 201 Va. 905, 114 S.E.2d 617 (1960). Where negligence admitted and punitive damages not proper, evidence of intoxication not admissible. *Eubank v. Spencer*, 203 Va. 923, 128 S.E.2d 299 (1962). While jury would have been justified in finding from evidence that defendant was under influence of alcohol, in absence of some evidence of why and how accident occurred, there is no inference that defendant's intoxication was proximate cause of accident. *Waters v. Holloman*, 216 Va. 726, 222 S.E.2d 549 (1976). Mere odor of alcohol on person's breath insufficient to establish intoxication or lack of control. *Baker v. Taylor*, 229 Va. 66, 326 S.E.2d 669 (1985). Contributory negligence of plaintiff's decedent, guest passenger, measured by opportunity to observe and warn of danger. Evidence of voluntary consumption of alcohol by guest admissible as having probative value on question of guest's contributory negligence and assumption of risk. *Major v. Hoppe*, 209 Va. 193, 163 S.E.2d 164 (1968).

Damages. There may be recovery for negligent conduct, notwithstanding lack of physical impact, provided injured party pleads and proves by clear and convincing evidence that physical injury was natural result of fright or shock proximately caused by defendant's negligence. In absence of specific knowledge by defendant of plaintiff's unusual sensitivity, no recovery for hypersensitive mental or emotional disturbances where a normal individual would not be affected. *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (1973). Medical bills discharged in bankruptcy admissible to show pain and suffering. *Barkley v. Wallace*, 267 Va. 369, 593 S.E.2d 190 (2004). Rear end accident caused by hit and run driver not sufficient to support punitive damages claim. *Doe v. Isaacs*, 265 Va. 531, 579 S.E.2d 174 (2003).

Family Purpose Doctrine. Family Purpose Doctrine is not recognized in Virginia. *Hackley v. Robey*, 170 Va. 55, 195 S.E. 689 (1938).

Guests. Gratuitous automobile passenger transported by owner or operator of such vehicle may recover against such owner or operator for damages resulting from negligent operation of vehicle. Va. Code Ann. §8.01-63. Guest may be guilty of contributory negligence and/or assumption of the risk if he knows or reasonably should have known that his driver is intoxicated and that such would affect his driving, and such guest voluntarily continues to occupy car after reasonable opportunity to leave. *Budzinski v. Harris*, 213 Va. 107, 189 S.E.2d 372 (1972); *Young v. Lambert*, 253 Va. 237, 482 S.E.2d 823 (1997). Guest passenger in automobile not contributorily negligent as matter of law for failing to take over steering wheel of car when he realized that driver was not going to put his hands back on wheel. *Terry v. Fagan*, 209 Va. 642, 166 S.E.2d 254 (1969).

Imputed Negligence/Joint Enterprise. For there to be joint enterprise in operation of automobile so that negligence of driver imputable to others there must be 1) community of interest in purpose of undertaking and 2) equal right to direct conduct of each in respect to it. No joint enterprise where defendant simply pushing friend's car as courtesy. *Miller v. Query*, 201 Va. 193, 110 S.E.2d 198 (1959). In joint enterprise, to impute negligence of one party to another, each must have power of control. *Virginia Transit Co. v. Simmons*, 198 Va. 122, 92 S.E.2d 291 (1956).

Last Clear Chance. Applies in two instances: 1) Helpless plaintiff: has negligently placed himself in position of peril from which he is physically unable to remove himself; 2) Inattentive plaintiff: has negligently placed himself in position of peril from which he is physically able to remove himself, but is unconscious of



peril. *Williams v. Harrison*, 255 Va. 272, 497 S.E.2d 467 (1998).

Ownership/Title. Every person who owns a motor vehicle shall, before it is operated on any state highway, register with the Department and obtain the vehicle's registration card and certificate of title. Every person who owns a motor vehicle shall, within 30 days of the purchase or transfer, apply to the Department for a certificate of ownership. Va. Code Ann. §46.2-600 *et seq.* Vehicle is no longer owned by transferee and no longer covered by her insurance policy even though she left the name of the transferee blank when endorsing Certificate of Title. *Allstate Ins. Co. v. Atlantic Cas. Co.*, 530 S.E.2d 161 (2000).

Pedestrians. Absent statutory provision to contrary, rights of motorists and pedestrians are equal along portion of highway prescribed for use of each. *Schutt v. Brockwell*, 214 Va. 38, 196 S.E.2d 921 (1973). Pedestrian has right of way when crossing within crosswalk, any regular pedestrian crossing, or any intersection where legal maximum speed does not exceed 35 miles per hour, except at intersections where traffic is regulated by officers or direction devices. Va. Code Ann. §46.2-924. Pedestrian crossing at regulated intersection must still use reasonable care, *McManama v. Wilhelm*, 222 Va. 335, 281 S.E.2d 813 (1981), and if crossing between intersections, must exercise extra vigilance. *Tolston v. Reeves*, 200 Va. 179, 104 S.E.2d 754 (1958). See Va. Code Ann. §46.2-923 *et seq.*

No-Fault insurance laws not enacted in Virginia.

Motorized Bicycles. Va. Code Ann. §38.2-124, which provides medical payment coverage to an insured while upon a motor vehicle, superseded inconsistent policy provision which referred to limited coverage to injuries sustained while occupying an automobile. Insured entitled to medical payments coverage for injuries sustained while riding motorcycle. *State Farm Mut. Auto Ins. Co. v. Seay*, 236 Va. 275, 373 S.E.2d 910 (1988). Fact that Virginia statute excluded mopeds from definition of motor vehicles subject to insurance requirements did not operate to exclude mopeds from policy language coverage providing coverage for accidents involving uninsured motor vehicles. Ambiguity and contract language is resolved in favor of coverage. Statutory language does not supersede broader insurance policy language. *Hill v. State Farm Mut. Auto Ins. Co.*, 237 Va. 148, 375 S.E.2d 727 (1989).

Seat Belts. Installation required for front seats of private vehicles used on public highways, manufactured for year 1963 and subsequent years. Va. Code Ann. §46.2-1092. Occupants at least 16 years old in front seats of motor vehicles required to use safety lap belts

and shoulder harnesses. Va. Code Ann. §46.2-1094. Any person who violates this section shall be subject to civil penalty of 25 dollars. No assignment of demerit points shall be made and no court costs shall be assessed. No citation for a violation of this section shall be issued unless the officer issuing such citation has cause to stop or arrest the driver of such motor vehicle for the violation of some other provision in the code of operation, ownership, or maintenance of a motor vehicle. *Id.* Driver of motor vehicle manufactured after January 1, 1968 must ensure that children less than sixteen (16) years of age are provided with and properly secured by an appropriate safety belt system, except for those required to be secured in a child restraint device. Va. Code Ann. §46.2-1095. Driver shall insure that any child through age five (5) whom he transports is properly secured in a child restraint device approved by the U.S. Department of Transportation. *Id.* Any person who violates this section shall be subject to civil penalty of fifty dollars (\$50), but no assignment of demerit points shall be made and no court costs shall be assessed. Va. Code Ann. §46.2-1098. A standard seat belt may be used for child who is at least four (4) but less than six (6) years old, if child's weight and size make the use of such seatbelt practical and the use of an approved child restraint impractical. Va. Code Ann. §46.2-1100. Failure to use safety belts or harnesses after installation shall not be deemed negligence. Va. Code Ann. §46.2-1092. Evidence concerning nonuse of auto seat belts and shoulder straps shall not be considered in mitigation of damages. Va. Code Ann. §46.2-1092.

Service of Process upon Non-resident Motorists. Operation of motor vehicle by non-resident on highway in Commonwealth deemed appointment of Commissioner of Division of Motor Vehicles as attorney or agent upon whom process may be served in any action arising out of operation. Va. Code Ann. §8.01-308. Appointment deemed irrevocable and binding upon executor, administrator, or other personal representative of such non-resident whether non-resident dies before or after commencement of suit. Va. Code Ann. §8.01-310. Commissioner must, unless address unknown, send to non-resident by registered or certified mail with return receipt requested, notice of service and copy of process or notice, and file affidavit of compliance with papers in action. Va. Code Ann. §8.01-312.

Speed Limit. Maximum speed limits generally. See Va. Code Ann. §46.2-870 *et seq.*

Trailer/Weight Limits. Length of vehicles. See Va. Code Ann. §46.2-1112. Length of house trailers See Va. Code Ann. §46.2-1115. Vehicles with more than one trailer. See Va. Code Ann. §46.2-1116.



Uninsured and Underinsured Endorsements. While liability insurance carrier has duty to defend insured and exercise good faith to settle meritorious claims within policy limits, this is not required of uninsured motorist's carrier. *United Servs. Auto. Ass'n v. Nationwide Mut. Ins. Co.*, 218 Va. 861, 241 S.E.2d 784 (1978). Counsel may not inform jury that punitive damages claim would not serve a deterrent purpose because insurance company would be payment source. *Allstate Ins. Co. v. Wade*, 265 Va. 383, 579 S.E.2d 180 (2003). Underinsured motorist coverage applicable to self-insured motor vehicles. Va. Code Ann. §46.2-368. Self insured rental car company is required to provide primary liability coverage for amounts mandated by statute where driver's personal policy provided only excess coverage. *USAA Cas. Ins. Co. v. The Hertz Corp.*, 265 Va. 450, 578 S.E.2d 775 (2003). Provision in uninsured motorist portion requiring insured to secure insurer's consent prior to settlement with any person or organization "who may be legally liable" is valid. *Virginia Farm Bureau Mut. Ins. Co. v. Gibson*, 236 Va. 433, 374 S.E.2d 58 (1988). Where single accident involves collision with two negligent uninsured motorists, insurer's liability limited to policy total for one accident. *Drewry v. State Farm Mut. Auto. Ins. Co.*, 204 Va. 231, 129 S.E.2d 681 (1963). Where one negligent uninsured motorist, but two policies of uninsured motorist coverage, plaintiff entitled to recover under policy of car that he was driving as well as under his uninsured motorist policy. *Bryant v. State Farm Mut. Auto Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965). Passenger may recover under both liability and underinsured motorist coverages of insured's policy in two vehicle accident where second driver was underinsured. *Dyer v. Dairyland*, 267 Va. 726, 594 S.E.2d 592 (2004). "Stacking" allowed: when two or more automobiles are included in same policy and separate premium is paid for each vehicle, multiple uninsured motorist coverage is provided to named insured and he may accumulate uninsured motorist coverage for each such vehicle. *Cunningham v. Insurance Co. of N. America*, 213 Va. 72, 79, 189 S.E.2d 832 (1972); *Lipscombe v. Security Ins. Co.*, 213 Va. 81, 189 S.E.2d 320 (1972). Resident wards or foster children of named insured and spouse included as "insureds" under statute. Va. Code Ann. §38.2-2206. Child living with mother and her "male companion" is not "foster child". *Va. Farm Bureau v. Gile*, 259 Va. 164, 524 S.E.2d 642 (2000). Other insureds, such as employee occupying vehicle, are in second class and are limited to coverage provided for vehicle they were using or in which they were riding as passenger or guest. However, UM carrier may deny UM coverage to plaintiff/employee injured while driving employer's truck where plaintiff settled with his own UM carrier without consent of employer's carrier. *Osborne v. National Union Fire Ins. Co.*, 251 Va. 53, 465

S.E.2d 835 (1996). Uninsured motorist statute and policy endorsement obligate insurer to pay for underinsured motorist; insurer cannot reduce obligation to limits or tort-feasor's liability policy. *Nationwide Mut. Ins. Co. v. Scott*, 234 Va. 573, 363 S.E.2d 703 (1988). Uninsured motorist legislation, providing in part that no policy or contract shall be issued or delivered unless it contains provisions undertaking to pay insured all sums which he shall be legally entitled to recover as damages from owner or operator of uninsured motor vehicle up to policy limits (Va. Code Ann. §§46.2-705 to 46.2-710, §38.2-2206, §§38.2-3000 to 38.2-3001), provides protection for damages resulting from negligence of uninsured motorist. *Yellow Cab Co. v. Adinolfi*, 204 Va. 815, 134 S.E.2d 308 (1964). Insured entitled to recover under uninsured motorist provisions of own policy of liability insurance where tort-feasor held policy of liability insurance applicable to accident but issued by company which had become insolvent. *State Farm Mut. Auto Ins. Co. v. Brower*, 204 Va. 887, 137 S.E.2d 277 (1964). Underinsured motorist provision of tort-feasor's automobile liability insurance policy is not available to satisfy claims of passengers who are insureds under the same policy and whose claims exceed the limits of the policy's liability coverage. *Superior Ins. Co. v. Hunter*, 258 Va. 338, 520 S.E.2d 646 (1999). Insured who obtains joint judgment against known and unknown tort-feasor can seek satisfaction from own insurance company under uninsured motorist provision before exhausting known tort-feasor's insurance. *Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 789 F.2d 272 (4th Cir. 1986). Motorist was "an uninsured motorist" where insurer denied coverage. *McDaniel v. State Farm Mut. Ins. Co.*, 205 Va. 815, 139 S.E.2d 806 (1965). Uninsured motorist not in actual physical control of the car at time of accident, but out of car and carrying spare tire away from car, was "operator" of car covered by policy's uninsured motorist endorsement. *Colonial Ins. Co. v. Rainey*, 237 Va. 270, 377 S.E.2d 393 (1989). Pedestrian in parking lot sustained injuries "arising out of the use of a vehicle" when her purse was snatched by passenger in vehicle driven alongside her and she was dragged by vehicle before letting go of purse. *Nationwide v. Smelser*, 264 Va. 109, 563 S.E.2d 760 (2002). Plaintiff was "using a vehicle" where he was standing approximately 10-30 feet behind tractor trailer and was giving driver hand signals to assist driver in backing out of driveway and parking on side of road for purpose of unloading construction equipment, when he was struck by another vehicle. *Slagle v. Hartford Ins. Co.*, 267 Va. 629, 594 S.E.2d 582 (2004). A meter maid was using vehicle when she was writing a parking citation and owner of vehicle rushed to and jumped in vehicle, striking meter maid several times with car door as owner attempted to leave scene. *Fireman's Fund Ins. Co. v. Sleight*, 267 Va.



768, 594 S.E.2d 604 (2004). Payments made by or on behalf of uninsured motorist should be applied first to reduce loss of injured party and not to reduce liability of injured party's insurer, and insurer has no right of subrogation against tort-feasor until injured party received full satisfaction of his judgment. *Martin v. State Farm Mut. Auto Ins. Co.*, 375 F.2d 720 (4th Cir. 1967). "Supplemental payments" provision of insurance policy does not apply to suits under uninsured motorist endorsement and therefore uninsured motorist carrier not liable for interest on entire amount of judgment obtained against tort defendant, but only liable for interest that accrued on judgment obtained directly on said uninsured motorist carrier. *Bryant v. Liberty Mut. Ins. Co.*, 407 F.2d 576 (4th Cir. 1969). Employee protected by uninsured motorist provision of employer's policy when damages result from accident involving uninsured motorist who is stranger to employee's employment. *Fidelity & Cas. Co. v. Futrell*, 211 Va. 751, 180 S.E.2d 502 (1971). Uninsured motorist carrier held estopped to deny coverage on basis of its participation in state "proceedings involving same parties and by participation in settlement of state court case." *Dairyland Ins. Co. v. Hughes*, 317 F. Supp. 928 (W.D. Va. 1971). Where self-insured municipal corporation had unlimited uninsured motorist coverage it was liable for damages in excess of workers' compensation payments and driver's uninsured motorist coverage. *Dale v. City of Newport News*, 243 Va. 48, 412 S.E.2d 701 (1992). Under Virginia law, self-insured may limit uninsured motorist liability to minimum required by statute. *Kiernan v. Agency Rent-A-Car*, 940 F.2d 917 (4th Cir. 1991). Underinsured motorist provision in auto liability insurance policy not available to satisfy claims of passengers also insureds under same policy. *Superior Ins. Co. v. Hunter*, 258 Va. 338, 520 S.E.2d 646 (1999). State employee entitled only to uninsured motorist coverage (and not underinsured motorist coverage under state's risk management plan) when his vehicle was struck by uninsured motorist as plan could not be underinsured with respect to itself in order to provide additional coverage. *Kramer v. Commonwealth*, 263 Va. 128, 556 S.E.2d 761 (2002). Virginia law does not preclude parents of deceased child killed in auto accident from suing their UM carrier for medical payments for child's injuries even though an action for wrongful death is pending. *Keene v. Yates*, 81 F. Supp. 2d 655 (W.D. Va. 2000). Waiver of maximum UIM coverage required by Va. Code Ann. §38.2-2206(A) was effective, despite defects in waivers, since there was a clear course of dealing between insurer and insured that was sufficient to establish insured's selection of lower coverage. *Gov't Employees Ins. Co. v. Hall*, 260 Va. 349, 533 S.E.2d 615 (2000). When insurance company denied coverage to driver, vehicle became uninsured motor vehicle as defined by statute and insurance company was obligated to

pay policy limit. *Allstate Ins. Co. v. Jones*, 261 Va. 444, 544 S.E.2d 320 (2001).

Rejection of Additional Coverage. When any named insured in household rejects additional uninsured motorist coverage and so notifies insurer, rejection binding upon all insureds in household. Va. Code Ann. §38.2-2206. Statute authorizes release of certain DMV records to insurance company representatives. Va. Code Ann. §46.2-208.

AVIATION

Generally. Regulation and liability of airplanes and airports. See Va. Code Ann. §5.1-1 *et seq.*

Limits to Liability. No insurance policy issued or delivered in Virginia covering loss, expense, or liability arising from loss, maintenance, or use of aircraft shall act to exclude or deny coverage because aircraft is operated in violation of federal regulations or any state or local ordinance. Va. Code Ann. §38.2-2227. This section does not prohibit use of exclusions or conditions in any policy related to certification of an aircraft or pilot by the Federal Aviation Administration, requirements for pilot experience, or restricting the use of the aircraft to purposes stated in policy. *Id.* No insurance policy shall require greater pilot experience than prescribed by Federal Aviation Administration, except for pilots operating air taxis or aircraft applying chemicals, seed, or fertilizer. Va. Code Ann. §38.2-2204. Insurance company rightfully refused coverage on plane when pilot failed to cooperate with insurer's investigation as policy required. *U.S. Specialty Ins. v. Skymaster of Va.*, 2001 U.S. App. LEXIS 26786 (4th Cir. December 17, 2001).

Service of Process. Secretary of the Commonwealth serves as statutory agent for service of process in any action against nonresident owner or operator of aircraft involved in accident occurring within or above the state. Va. Code Ann. §8.01-309.

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Defined. See Va. Code Ann. §38.2-113. The taking of a car, without requisite intent to permanently deprive owner of the car, is not within the coverage of theft insurance policy. *Travelers Indem. Co. v. Ford*, 208 Va. 151, 156 S.E.2d 606 (1967).



CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

Accident and sickness policies may contain provision that insurer may cancel policy at any time by written notice delivered to insured or mailed to last address as shown by records of insurer, stating when, no less than . . . days thereafter the cancellation shall be effective. After policy has been continued beyond its original term, insured may cancel by written notice delivered or mailed to insurer, effective upon receipt or on later date specified in such notice. In event of cancellation, insurer shall return promptly unearned portion of any premium paid. For policies issued, renewed or executed on or after January 1, 2000, unearned portion shall be returned within seven (7) days (weekly premium), 10 days (monthly premium), or 31 days (all other policies). Va. Code Ann. §38.2-3504 (8a) & (8b).

Written notice of cancellation of motor vehicle insurance policies must be sent by registered or certified mail or, if sent via regular mail, copy of notice must be retained together with receipt from post office department showing the name and address of insured. Va. Code Ann. §38.2-2208. Insurer bears burden of proving proper notice was sent to the insured before termination of coverage, where the policy so requires. *Herndon v. Massachusetts Gen. Life Ins. Co.*, 28 F. Supp. 2d 379 (W.D. Va. 1998). Code provision part of insurance contract by its terms, and party seeking to cancel has burden of proving strict compliance. Unsigned or blank certificate of mailing does not comply with statutory requirement for signature. *Gregory v. Providence Wash. Ins. Co.*, 214 Va. 134, 198 S.E.2d 616 (1973). Automobile dealer who in connection with sale of automobile also procures policy of collision insurance has no implied authority to waive required notice of cancellation or to accept cancellation for the purchaser. *Harleysville Mut. Ins. Co. v. Dollins*, 201 Va. 73, 109 S.E.2d 405 (1959). Insured bound by his action as to date of cancellation notice if he does not specify later date of cancellation. *State Farm Mut. Auto Ins. Co. v. Miller*, 194 Va. 589, 74 S.E.2d 145 (1953). Policy effectively cancelled in accordance with Va. Code Ann. §38.2-2208 where evidence shows substantial compliance. *Motley v. Regal Ins. Co.*, 245 Va. 97, 425 S.E.2d 506 (1993).

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

Construction of Policy. Statutes prescribing scope and effect of insurance contracts and obligations thereunder, incorporated into contract and cannot be waived. *Aetna Cas. & Sur. Co. v. National Union Fire Ins. Co.*, 233 Va. 49, 353 S.E.2d 894 (1987). However, pertinent statutes not read into policy of insurance where provisions of policy more favorable to insured and where policy and statutory provisions were designed for same purpose and conflicting, as insurer is bound by more favorable provision in agreement. *Ambrose v. Acacia Mut. Life Ins. Co.*, 190 Va. 189, 56 S.E.2d 372 (1949); *State Farm Mut. Auto Ins. Co. v. Duncan*, 203 Va. 440, 125 S.E.2d 154 (1962). Where provisions of accident and sickness policy conflict with pertinent statutes more favorable to insured, policy will be construed in accord with statute. Va. Code Ann. §38.2-3510.

In construing contract, court will read as single document, and while liberally construing it in favor of insured, will not write new contract of insurance. *Quesenberry v. Nichols*, 208 Va. 667, 159 S.E.2d 636 (1968).

Conflicts. No insurance contract delivered or issued for delivery in Virginia, and covering subjects located in Virginia, may contain provision requiring contract to be construed according to laws of another state or country, except to comply with financial responsibility laws of other state or country. Va. Code Ann. §38.2-312. Normal conflict of law rules applicable to contracts governing insurance agreements, so law of place where insurance contract was delivered governs its interpretation. *Hardware Mut. Cas. Co. v. Wedlinger*, 146 F.2d 984 (4th Cir. 1944), *cert. denied*, 324 U.S. 882 (1945).

DAMAGES

Damages recoverable only to extent ascertained with reasonable certainty. *Carr v. Citizens Bank & Trust Co.*, 228 Va. 644, 325 S.E.2d 86 (1985).

There are two broad categories of damages which arise out of breach of contract: direct damages (those which naturally flow from breach) and consequential damages (brought out by intervention of special circumstances not ordinarily predictable). Consequential damages may be recovered only if special circumstances were within contemplation of both parties at execution of contract. *Long v. Abbruzzetti*, 254 Va. 122, 487 S.E.2d 217 (1997). "Contemplation" includes both circumstances that are actually foreseen and those that are reasonably foreseeable. *Id.*

Business Damages. Damages for lost profit of new or unestablished business may be recoverable even though no history of profits can be established, Va. Code



Ann. §8.01-221.1, although they are not recoverable in wrongful death and personal injury actions, except ones for defamation. *Id.*

Excessive Verdicts. Trial judge has power and duty to correct verdicts which are so excessive as to shock conscience or compel conclusion that verdict was product of passion or prejudice or some misunderstanding of facts or law. *Hogan v. Carter*, 226 Va. 361, 310 S.E.2d 666 (1983). This process is called “remittitur”.

Indemnification/Contribution. Contribution between joint tort-feasors. Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude. Va. Code Ann. §8.01-34. Where one joint tort-feasor obtains release or covenant not to sue, he is discharged of all liability for contribution to any other joint tort-feasor. Remaining joint tort-feasors however are not discharged. Va. Code Ann. §8.01-35.1. Indemnity and contribution may be enforced by third party claim. Va. Code Ann. §8.01-281. Judgment against one of several joint wrongdoers shall not bar prosecution of claim against others. Full satisfaction of judgment against joint wrongdoer, accepted by plaintiff, discharges joint wrongdoers except as to costs. Va. Code Ann. §8.01-443. Absent an express indemnification clause between defendants, before contribution will be permitted, right of action by plaintiff must exist against joint tort-feasors against whom contribution is sought. *VEPCO v. Wilson*, 221 Va. 979, 277 S.E.2d 149 (1981). Where action for injuries allegedly caused by concurring negligence of three defendants was dismissed as to one defendant on ground that plaintiffs had been compensated under Workers’ Compensation Act, defendant as to whom action had not been dismissed could not hold dismissed defendant liable for contribution or indemnity for portion of whatever it might be obligated to pay. *Id.*

Psychic Injuries-Mental Pain and Suffering. Evidence establishing that automobile passenger’s elbow injury caused her to hold her arm in peculiar position, sufficient to support damages instruction entitling jury to assess damages on basis of deformity, and jury also entitled to assess damages for humiliation or embarrassment despite absence of direct evidence that passenger’s injuries had such effect. *Armstead v. James*, 220 Va. 171, 257 S.E.2d 767 (1979). Damages for negligent infliction of emotional distress generally not recoverable unless they result directly from physical impact or are accompanied by physical injury. *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (1973). Intentional infliction of emotional distress may lie where physical injury absent and emotional distress is severe. *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974).

Punitive Damages. Punitive damages recoverable “only where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others.” *Giant of Virginia, Inc. v. Pigg*, 207 Va. 679, 685, 152 S.E.2d 271, 277 (1967). Defendant’s conduct will support punitives where blood alcohol is 0.15 percent and other conditions met. Va. Code Ann. §8.01-44.5. In actions accruing on or after July 1, 1988, there is a \$350,000 limit on punitive damage awards. Va. Code Ann. §8.01-38.1. The plain meaning of the section dictates that the cap on punitive damage awards applies to the action as a whole and not to each defendant. *Al-Abood v. El-Shamari*, 217 F.3d 225 (4th Cir. 2000). Public policy in Virginia permits purchase of insurance coverage for punitive damages arising from negligence, including willful and wanton negligence, but not intentional acts. Va. Code Ann. §38.2-227. Punitive damages also available where plaintiff was subject to intimidation, harassment, violence, or vandalism motivated by plaintiff’s race, ethnicity or religion, Va. Code Ann. §8.01-42.1, stalking, Va. Code Ann. §8.01-42.3, and interception of communications. Va. Code Ann. §19.2-69. Generally, punitive damages not allowed for breach of contract. However, where conduct constituting breach amounts to criminal indifference or independent willful tort, due to oppressive, malicious, or wanton behavior by breaching party, punitive or exemplary damages may be recoverable. *Morgan v. American Fam. Life Assur. Co.*, 559 F. Supp. 477 (W.D. Va. 1983). See also *Booth v. Robertson*, 236 Va. 269, 374 S.E.2d 1 (1988); *Kamlar Corp. v. Haley*, 224 Va. 699, 299 S.E.2d 514 (1983). Finding of compensatory damages is prerequisite to award of punitive damages. *Gay v. American Motorists Ins. Co.*, 714 F.2d 13 (4th Cir. 1983). 1982 amendment to Code allows recovery for punitive damages in wrongful death actions where death resulted from willful or wanton conduct, although amendment is not retroactive. *Estate of Armentrout v. International Harvester Co.*, 547 F. Supp. 136 (W.D. Va. 1982). Punitive damages not recoverable upon death of party liable for injury. Va. Code Ann. §8.01-25.

Collateral Source Rule. Designed to strike balance between two competing principles of tort law: 1) plaintiff entitled to compensation sufficient to make him whole, but no more; 2) defendant liable for all damages that proximately result from his wrong. Plaintiff who received double recovery for single tort receives windfall; defendant who escapes liability enjoys windfall. Law favors victim rather than wrongdoer. *Schickling v. Aspinall*, 235 Va. 472, 369 S.E.2d 172 (1988). Defense evidence that certain medical bills were reduced or “written-off” by health care providers is not admissible to challenge plaintiff’s special damages claim under the collateral source rule. *Acuar v. Letourneau*, 260 Va. 180,



531 S.E.2d 316 (2000). Medical bills discharged in bankruptcy are admissible for limited purpose of showing plaintiff's pain and suffering. *Barkley v. Wallace*, 267 Va. 369, 593 S.E.2d 190 (2004). Also, precludes evidence that employer paid plaintiff salary during period of disability; plaintiff may recover full amount as lost income. *Bullard v. Alfonso*, 267 Va. 743, 595 S.E.2d 284 (2004).

Wrongful Birth. In wrongful birth action brought by parents of child with Tay-Sachs disease against physician, parents may recover damages for expenses incurred in care and treatment of child. Damages for emotional distress, where there is physical injury resulting therefrom, permissible despite lack of physical impact provided that there is shown by clear and convincing evidence an unbroken causal connection between negligent act, emotional disturbance, and physical injury. *Naccash v. Burger*, 223 Va. 406, 290 S.E.2d 825 (1982).

Attorneys' Fees. Attorneys' fees generally not recoverable unless provided for by contract. *East Tex. Salvage & Mach. v. Duncan*, 226 Va. 160, 306 S.E.2d 896 (1983). Attorneys' fees can be assessed against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Robinson v. Ritchie*, 646 F.2d 147 (4th Cir. 1981). Attorneys' fees also available under common fund doctrine in cases involving decedent's estates and creditor's rights, *DuPont v. Schackelford*, 235 Va. 588 (1988), and under an express indemnification agreement, including fees incurred to enforce indemnity agreement. *C & P Tel. Co. v. Sisson & Ryan*, 234 Va. 492, 362 S.E.2d 723 (1987).

DEATH

See Law Digest Tables.

Abatement and Survival. Statute of limitations generally tolled when potential or actual party dies. Va. Code Ann. §8.01-229 B. Cause of action survives death of either party. Va. Code Ann. §8.01-25.

Action for Wrongful Death. See Law Digest Tables and Va. Code Ann. §8.01-50 *et seq.* Virginia Wrongful Death Statute requires showing by statutory beneficiary of loss to that beneficiary. When sole statutory beneficiary was illegitimate son and there was no evidence adduced at trial of loss to that son by decedent's death, wrongful death statute not intended to benefit decedent's estate and not error to exclude evidence of decedent's wage and prospective retirement benefits. *Marshall v. Goughnour*, 221 Va. 265, 269 S.E.2d 801 (1980). In wrongful death action, evidence regarding magnitude and seriousness of decedent's injuries and extent of body mutilation inadmissible on question of damages because of inflammatory and prejudicial effect on jury. *Breeding,*

Adm'r v. Johnson, 208 Va. 652, 159 S.E.2d 836 (1968). *Cf. Virginia Iron, Coal and Coke v. Odle's Adm'r*, 128 Va. 280 (1920) (mental anguish of beneficiaries may be increased by mental and physical suffering of decedent). No cause of action in Virginia for wrongful death of stillborn infant. *Myrick v. United States*, 723 F.2d 1158 (4th Cir. 1983). Stillborn infant not "person" within meaning of statute. *Id.* However, personal representative of infant born alive who suffered an injury in utero does have such a cause of action. *Kalafut v. Gruver*, 239 Va. 278, 389 S.E.2d 681 (1990).

Damages in Action for Wrongful Death. Jury or court may award such damages as are fair and just, including, but not limited to, damages for sorrow and mental anguish; compensation for reasonably expected loss of income of decedent and services provided by the decedent; expenses for care and treatment of decedent related to injury resulting in death; and reasonable funeral expenses. Punitive damages may be recovered for willful or wanton conduct or recklessness showing a conscious disregard for others. Va. Code Ann. §8.01-52.

Unexplained Absence. Presumption of death from seven years unexplained absence. Va. Code Ann. §64.1-105. Six months satisfies presumption if disappearance on high seas. Va. Code Ann. §64.1-105.2. Although beneficiary of life insurance policy entitled to presumption that insured was dead, beneficiary failed to show death was accidental as necessary to be entitled coverage under life policy. *Houchens v. American Home*, 927 F.2d 163 (4th Cir. 1991).

DISABILITY

See "ACCIDENT AND SICKNESS INSURANCE" and "WORKERS' COMPENSATION."

Partial Disability. Injured person may recover for partial disability proper compensation for being unable, because of injury, to follow such calling or business as he could have otherwise followed. *Chesapeake & O. Ry. v. Meadows*, 119 Va. 33, 89 S.E. 244 (1916).

Total Disability. Total and permanent disability, as used in insurance policies, does not mean absolute incapacity, mental and physical. The term, as almost unambiguously interpreted, means the inability to do substantially all the material acts necessary for any occupation for profit in the usual manner of that occupation. *Glens Falls Indem. Co. v. Harris*, 168 Va. 438, 191 S.E. 644 (1937). Total and permanent disability provisions should be construed liberally in favor of insured and only ambiguity resolved against the insurer. *Ohio Natl. Life Assur. Corp. v. Crampton*, 822 F. Supp. 1230 (E.D. Va. 1993), *aff'd*, 53 F.3d 328 (4th Cir. 1995).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; "AUTOMOBILES."

FIRE INSURANCE

Appraisal. Appraisal provisions in Va. Code Ann. §38.2-2105 concerning standard provisions, conditions, stipulations and agreements for fire insurance policies do not unconstitutionally deprive insured of jury determination of damages. If failure to submit loss to appraisal was some fault of insurer, and insured free from fault, then insured absolved from compliance with appraisal provision. *Eden Corp. v. Utica Mut. Ins. Co.*, 350 F. Supp. 637 (W.D. Va. 1972).

Arson. Common law definition: Arson is the malicious and wilful burning of the house of another man and includes other structures appurtenant thereto within the curtilage. *Daniels v. Commonwealth*, 172 Va. 583, 1 S.E.2d 333 (1939). Statutory definition: Va. Code Ann. §18.2-77. Arson occurs if any person maliciously (i) burns, or by use of any explosive devise or substance destroys, in whole or in part, or causes to be burned or destroyed, or (ii) aids, counsels or procures the burning or destruction of any dwelling house or manufactured house whether belonging to himself or another, or any occupied hotel, hospital, mental health facility, or other house in which persons usually dwell or lodge, any occupied railroad car, boat, vessel or river craft in which persons usually dwell or lodge, or occupied jail or prison, or any occupied church or occupied building owned or leased by a church that is immediately adjacent to a church. Extended to include referenced items that are unoccupied.

Assignment. Statutory form prohibits assignment of fire policy without written consent of insurer. Va. Code Ann. §38.2-2104. After the risk insured against is terminated by fire, interest of insured becomes a chose in action which may be assigned without permission of company notwithstanding policy language that provides that the policy shall be void in case of change in interest, title or possession without consent of insurer. *Aetna Ins. Co. v. Aston*, 123 Va. 327, 96 S.E. 772 (1918). Fire policy may be transferred as collateral security without violating "assignment without consent" provision. *Hartford Fire Ins. Co. v. Mutual Sav. & Loan Co., Inc.*, 193 Va. 269, 68 S.E.2d 541 (1952) (involving fire policy on automobile).

Cancellation. See also "CANCELLATION." Cancellation does not affect rights which have already accrued under policy. *Insurance Co. of N. Am. v. United States*, 159 F.2d 699 (4th Cir. 1947).

Co-Insurance. With consent of Commission, two or more licensed insurers may jointly issue policy. The in-

surers executing policy are severally liable for the full amount of any loss or damage according to terms of policy. Va. Code Ann. §38.2-2116. Condition in fire insurance policy providing it is void if insured has or gets, without consent, other insurance is valid. *Fire Ass'n of Philadelphia v. Hogwood*, 82 Va. 342, 4 S.E.617 (1886).

Contract-Policy. No fire insurance policy on any property in state shall be issued unless policy meets requirements of Va. Code Ann. §38.2-2100 *et seq.*; *Hitt Contracting, Inc. v. Industrial Risk Insurers*, 258 Va. 40, 516 S.E.2d 216 (1999). While temporary contract for fire insurance for period not exceeding sixty days need not be in writing, contract of insurance for period more than sixty days must be in writing and must comply with Standard Policy provisions. Va. Code Ann. §38.2-2112; see *Eastern Shore of Va. Fire Ins. Co. v. Kellam*, 159 Va. 93, 165 S.E. 637 (1932).

Contribution between Companies. There is no contribution between insurer of warehouseman's interest in goods on storage and insurer of owner's interest in goods. *Home Ins. Co. v. Gwathmey*, 82 Va. 923, 1 S.E. 209 (1887).

Damages. See Va. Code Ann. §§38.2-2104, 2105, 2107. Generally, measure of damages is difference in value of property immediately before and immediately after fire. *Weinstein v. Commerce Ins. Co.*, 196 Va. 106, 82 S.E.2d 477 (1954). In policy allowing insurer to repair, rebuild or replace with material of like kind, if insurer waives right to repair or rebuild and agrees to pay amount in cash, basis of the estimation is the same. *Id.* Depreciation not allowed in new materials used for repair. *Harper v. Pennsylvania Mut. Fire Ins. Co.*, 199 F. Supp. 663 (E.D. Va. 1961).

Defined. Insurance against loss or damage to any property resulting from fire, including loss or damage from extinguishing a fire or salvaging property. Va. Code Ann. §38.2-110.

Excepted Risks. Explosion. When there is a hostile fire on the premises of the insured which then causes an explosion, insurer under fire policy responsible for damage caused by both fire and explosion. However, if explosion came first and then there was a fire, then insurer under fire policy is only responsible for damages from the fire itself. *Merrimack Mut. Fire Ins. Co. v. Lanasa*, 202 Va. 562, 118 S.E.2d 450 (1961).

Expiration Notice. Under Va. Code Ann. §38.2-2114, insurer required to give notice of cancellation or termination within policy period, but not of expiration. *Compton v. Nationwide Mut. Ins. Co.*, 480 F. Supp. 1254 (W.D. Va. 1979); *de Butts v. Montgomery Mut. Ins. Co.*, 47 Va. Cir. 119 (Cir. Ct. Loudon Co. 1998).



Friendly Fires. Defined as one which remains confined within place intended - *i.e.*, furnaces, stove or other usual place. *Merrimack Mut. Fire Ins. Co. v. Lanasa*, 202 Va. 562, 118 S.E.2d 450 (1961). When fire burns where intended to burn, although damages may have resulted where none intended, fire is friendly fire, and insurer not liable for resulting damages. *Id.*

Insurable Interest. Defined in Va. Code Ann. §38.2-303 to mean "any lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary loss." There is tendency to broaden definition of insurable interest; indeed, neither legal nor equitable title is necessary. Daughter-in-law in possession and use of premises, which she reasonably expected to receive by gift from her father-in-law, had insurable interest therein. *Liverpool & London & Globe v. Bolling*, 176 Va. 182, 10 S.E.2d 518 (1940). Car dealer as bona fide purchaser had insurable interest in stolen car, since interest was economic, substantial and lawful, the latter word being distinguished from the word "legal." *Castle Cars v. United States Fire Ins. Co.*, 221 Va. 773, 273 S.E.2d 793 (1981). Contractor and architect had insurance interests in building that was substantially complete and occupied but for which final payment for services had not yet been received as such property would constitute inchoate security for payment of contract debts. *Blue Cross v. McDevitt & Streeb*, 224 Va. 191, 330 S.E.2d 825 (1987).

Limitation. See Va. Code Ann. §38.2-2105. For first party claims - within two years after inception of loss. Commencement of limitation period not delayed until after the period for insurer to pay loss expires. *Ramsey v. Home Ins. Co.*, 203 Va. 502, 125 S.E.2d 201 (1962). Failure to initiate suit within the two-year mandatory provisions contained in Va. Code Ann. §38.2-2105 barred claim for replacement coverage under the policy. *Hitt Contracting, Inc. v. Industrial Risk Insurers*, 258 Va. 40, 516 S.E.2d 216 (1999). Limitations period are different for third-party claims and can turn on the theory advanced - negligence or breach of contract/breach of warranty. *Stone v. Ethan Allen*, 232 Va. 365, 350 S.E.2d 629 (1986).

Mortgage Clause. Where clause provides that loss shall be payable to mortgagee as his interest may appear, contract as to mortgagee merely collateral to principal undertaking to pay mortgagor. Mortgagee merely appointee of fund; his right no greater than rights of insured, as rights wholly derivative and cannot exceed those of the mortgager; breach by insured will void policy as to mortgagee in absence of union mortgage cause. *Provident Fire Ins. Co. v. Union Trust Corp.*, 195 Va. 415, 78 S.E.2d 584 (1953).

Notice. Violation of notice requirement by additional insured who failed to give notice of loss until over two years later is substantial violation. Insurer need not prove prejudice. *State Farm Fire & Cas. Co. v. Walton*, 244 Va. 498, 423 S.E.2d 188 (1992).

Peril Not Covered. Insurer not liability for loss by fire caused by neglect of insured to use all reasonable means to save and preserve property at and after a loss. Va. Code Ann. §38.2-2105. One spouse's act of arson prohibits innocent spouse from recovering any amount, when ownership interests of insured are deemed joint and nonseparable. *Rockingham Mut. Ins. Co. v. Hummel*, 219 Va. 803, 250 S.E.2d 774 (1979). Innocent additional insured denied recovery notwithstanding severable interest in property as, under insurance contract, there was joint duty to refrain from defrauding insurer and committing dishonest or criminal acts since breach by one was chargeable to all. *K&W Blds. v. Merchants & Bus. Men's Ins.*, 255 Va. 5, 495 S.E.2d 473 (1998) (the term "you" in policy read to include named insureds and additional insureds.) After insured's son intentionally burned their home, insured could collect under homeowner's insurance policy, since policy only denied coverage to insureds who committed loss and insured had nothing to do with fire. *Montgomery Mut. Ins. Co. v. Dyer*, 170 F. Supp. 2d 618 (W.D. Va. 2001). No fraudulent acts of agent or third person, even if such is a relative of insured, will void policy unless insured is implicated in fraud. *Aetna Ins. Co. v. Carpenter*, 170 Va. 312, 196 S.E. 641 (1938).

Proof of Loss. Insurer must, within fifteen days after written request, furnish forms for proof of loss. Va. Code Ann. §38.2-320. Whether proofs of loss are sufficient is question for court as the filing of sufficient proofs of loss is a condition precedent to right to bring suit. *Security Bank v. Equitable Life*, 112 Va. 462, 71 S.E.647 (1911). Substantial compliance with provisions of policy as to proofs of loss is sufficient. *Prudential Fire Ins. Co. v. Alley*, 104 Va. 356, 51 S.E. 812 (1905). Where policy requires proofs of loss to be file in specified time, while Va. Code Ann. §38.2-314 sets out that time taken in effort to adjust loss is not to be counted, this code section is not applicable with regard to the running of the limitations period or a first party claim under a fire policy. *Ramsey v. Home Ins. Co.*, 203 Va. 502, 125 S.E.2d 201(1962).

Reformation. Court of equity will reform contract of fire insurance after loss and attach standard mortgage clause if clearly evident that such clause mistakenly omitted by agent. *Dickenson County Bank v. Royal Exch. Assur.*, 157 Va. 94, 160 S.E. 13 (1931). Mutual mistake of insurer's agent and insured is basis for reformation. *Bankers Fire Ins. Co. v. Henderson*, 196 Va.



195, 83 S.E.2d 424 (1954). Suit in equity for reformation of fire insurance policies not barred by election or estoppel because of adverse judgment in prior actions at law which did not reach merits of claim. *Weinstein v. Glens Fall Ins. Co.*, 202 Va. 722, 119 S.E.2d 497 (1961).

Repair. Where apartment house insured under standard fire insurance policy providing for payment not exceeding cost of repair, insurer's liability limited to cost of repair and insured not entitled to recover full value of house, despite fact the building would not meet zoning regulations for use as apartment house upon repair from the fire. *Weinstein v. Commerce Ins. Co.*, 196 Va. 106, 82 S.E.2d 477 (1954).

Replacement Value. Because an insured had not replaced damaged property, he could not recover its replacement value but only its actual cash value. *Whitmer v. Graphic Arts Mut. Ins. Co.*, 242 Va. 349, 410 S.E.2d 642 (1991). Suit for replacement coverage subject to same limitation period spelled out in Va. Code Ann. §38.2-2105; *Hitt Contracting, Inc. v. Industrial Risk Insurers*, 258 Va. 40, 516 S.E.2d 216 (1999).

GUEST CASES

See "AUTOMOBILES, guests."

HOSPITALS

Evidence-Records. Under Virginia law, hospital records may be admissible hearsay under Shopbook Rule exception for proof of facts or events within the personal knowledge and observation of the recorder to which he or she could testify if called as witness. *Neeley v. Johnson*, 215 Va. 565, 211 S.E.2d 100 (1975). However, Virginia Supreme Court has refused to extend exception to allow into evidence opinions and conclusions of physicians or others recorded in hospital records. *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989). The admission of such evidence is conditioned on proof that the document comes from the proper custodian, and it is a record kept in the ordinary course of business made contemporaneously with the event by persons having the duty to keep a true record. *Lee v. Commonwealth*, 28 Va. App. 571, 507 S.E.2d 629 (1998). Blood alcohol test is admissible as a hospital business record in a prosecution for driving under the influence if the test was taken in a hospital emergency room. Such tests are not considered confidential medical records and anyone who takes blood, conducts tests, or offers testimony is immune from civil liability for breach of confidentiality or unauthorized release of medical records. Va. Code Ann. §19.2-187.02.

Liens. A hospital treating a person for personal injuries caused by negligence shall have a lien against per-

son or corporation causing such injuries. Va. Code Ann. §8.01-66.2. Such lien is limited to \$2,000 in the case of a hospital or nursing home; \$500 for each physician, nurse, physical therapist, or pharmacy; and \$200 for each ambulance service. *Id.*

Sovereign Immunity. Under the doctrine of sovereign immunity, a hospital that is an organ of the state is immune from actions in tort, and an administrator who performs supervisory functions or exercises discretionary judgment within the scope of his employment is also immune. *Banks v. Sellers*, 224 Va. 168, 294 S.E.2d 862 (1982).

Charitable Immunity. Where a hospital charter lacks any limitations of a charitable character, and where prices were set above the "break-even" point for at least 20 years and collection efforts were vigorously pursued, it was an error to sustain a plea of charitable immunity. *Purcell v. Mary Washington Hosp.*, 217 Va. 776, 232 S.E.2d 902 (1977). A hospital is not immune from liability for negligence or other tort on grounds it is charitable institution unless it renders exclusively charitable medical services, no bills for services rendered, no charges ever made to patient, or unless party alleging such negligence or other tort was accepted as patient in express written agreement executed by hospital and delivered at time of admission to the patient or person admitting patient providing that all medical services furnished to be supplied on charitable basis without financial liability to patient. Va. Code Ann. §8.01-38. Va. Code Ann. §8.01-38 eliminated charitable immunity for most hospitals, essentially limiting its application to hospitals providing medical care free of charge. *Davidson v. Colonial Williamsburg Found.*, 817 F. Supp. 611 (E.D. Va. 1993). 26 U.S.C. §501(c)(3) tax exempt hospitals have limited liability. *Power v. Arlington Hosp.*, 42 F.3d 851 (4th Cir. 1994).

Patient Health Records Privacy. Patient medical records maintained by hospitals and other health care providers covered by privacy statute, which also governs method of discovering such records during litigation. Va. Code Ann. §32.1-127.1:03. Discovery procedures amended in 2003 to conform to federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and attendant regulations.

HUSBAND AND WIFE

Community Property. Virginia is not a community property state.

Interspousal Immunity. Common-law defense of interspousal immunity abolished as to certain causes of action arising on or after July 1, 1981. Va. Code Ann. §8.01-220.1.



Loss of Consortium. See Va. Code Ann. §55-36. Loss of consortium not recoverable in Virginia. *Carey v. Foster*, 345 F.2d 772 (4th Cir. 1965).

INFANTS

See "AUTOMOBILE, Age"; "NEGLIGENCE, Age."

Generally. A child of very tender years is not chargeable with contributory negligence. *Holbert v. Evans*, 209 Va. 210, 163 S.E.2d 187 (1968). Greater care is owed a child than to an adult, in view of a child's inexperience and lack of judgment. *Sullivan v. Sutherland*, 206 Va. 377, 143 S.E.2d 920 (1965).

Negligence. Children between seven and fourteen have a rebuttable presumption that they are incapable of negligence. *P. L. Farmer, Inc. v. Cimino*, 185 Va. 965, 41 S.E.2d 1 (1947); *Norfolk & Portsmouth R.R. v. Barker*, 221 Va. 924, 275 S.E.2d 613 (1981). Presumption can be rebutted by showing infant did have capacity to understand peril. *Endicott v. Rich*, 232 Va. 150, 348 S.E.2d 275 (1986).

INLAND MARINE

Defined. Marine Insurance. See Va. Code Ann. §38.2-126 *et seq.*

Damages. Commercial insured entitled to recovery on losses from a massive earth subsidence beneath one of insured's plants under an "all risk" policy which contained no exclusion for subsidence losses. District Court's ruling that loss was "fortuitous," in that no major damage was thought likely, and insured had protected against such loss. *Insurance Co. of N. Am. v. U.S. Gypsum Co., Inc.*, 870 F.2d 148 (4th Cir. 1989).

Exclusions. Failure of drilling rod not caused by mining, tunneling or similar operations excluded by policy. *Caldwell v. Transportation Ins. Co.*, 234 Va. 639, 364 S.E.2d 1 (1988).

LIABILITY INSURANCE

Bad Faith. Judgment creditor of insured may maintain suit against insured's liability insurance carrier, as a third-party beneficiary to the insurance contract, for damages, including excess coverage, allegedly resulting from insurer's wrongful failure to compromise suit against insured within policy limits. *Davis v. National Grange Ins. Co.*, 281 F. Supp. 998 (E.D. Va. 1968). Legal analysis of *Davis* was questioned in *Rowe v. USF&G*, 421 F.2d 937 (4th Cir. 1970) (however, because bad faith cause of action was survivable and assignable, could go forward), but same analysis was recognized in *United States v. Nationwide Mut. Ins. Co.*,

218 Va. 861, 241 S.E.2d 784 (1978). For claims of \$3,500.00 or less under a motor vehicle policy, insurance company licensed in Virginia may be liable for bad faith to pay claim; liability equals double amount due under policy plus reasonable attorney's fees and expenses. Va. Code Ann. §8.01-66.1. Bad faith refusal to pay first-party claim under motor vehicle policy in excess of \$3,500.00 will make insurer liable to pay claim, reasonable attorney's fees, expenses and interest at double legal rate from date claim submitted. *Id.* Insurance company did not act in good faith when it paid only \$379.00 with regard to a health-care bill of \$1,960.00 for chiropractic care for boy injured in automobile accident. *Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 1, 524 S.E.2d 649 (2000).

Cancellation. Grounds and procedure for cancellation of or refusal to renew motor vehicle insurance policies. See Va. Code Ann. §38.2-2212. Requirements of notices of cancellation of motor vehicle policies. See Va. Code Ann. §38.2-2208. Warning concerning cancellation required to appear on application of motor vehicle liability insurance. See Va. Code Ann. §38.2-2210.

Contribution. Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude. Va. Code Ann. §8.01-34. Before contribution may be had, cause of action must exist in favor of injured party against alleged wrongdoer from whom contribution is sought. *Pierce v. Martin*, 230 Va. 94, 334 S.E.2d 576 (1985).

Cooperation of Insured. "Cooperate" is a simple word that means "aid and assistance." *State Farm Mut. Auto. Ins. v. Arghris*, 189 Va. 913, 55 S.E.2d 16 (1949). In context of cooperation clause and allegation of non-cooperation, "willful" defined to mean "intentional, knowing, or voluntary." *Angstadt v. Atlantic Mut. Ins. Co.*, 254 Va. 286, 492 S.E.2d 118 (1997). Va. Code Ann. §38.2-2204 provides that an insurer with actual notice of the motion for judgment or complaint being served on its insured, shall not be able to use as a defense that insured failed to give insurer suit papers, and this failure does not relieve insurer of other obligations provided insured otherwise cooperates. However, if failure or refusal to cooperate prejudices insurer, then policy obligations are voided. *Id.* Burden of proof is on insurer to establish by preponderance of the evidence that insured failed in material manner to comply with cooperation clause. *Bryant v. Liberty Mut. Ins. Co.*, 407 F.2d 576 (4th Cir. 1969). To constitute a breach of cooperation clause by the insured, there must be a lack of cooperation in some substantial and material respect; a technical or inconsequential lack of cooperation or misstatement to insurer is immaterial. *State Farm Mut. Auto. Ins. v. Arghris*, 189 Va. 913, 55 S.E.2d 16 (1949). Fail-



ure to cooperate existed where insured (a) did not inform insurer of accident or forward suit papers, (b) refused to give insurer his local address, (c) only talked freely with insurer's attorney, and (d) threatened not to cooperate until insurer paid a fine connected with an out-of-state offense. *Bryant v. Liberty Mut. Ins. Co.*, 407 F.2d 576 (4th Cir. 1969). Question of fact in a law action concerning issue of cooperation under policy to be decided by a jury. *Indemnity Ins. Co. of N. Am. v. Davis*, 150 Va. 778, 143 S.E. 328 (1928). However, issue of cooperation in an action in equity to be decided by the chancellor. *Angstadt v. Atlantic Mut. Ins. Co.*, 254 Va. 286, 492 S.E.2d 118 (1997).

Coverage. Omnibus Clause. Permissive Use. No policy insuring owner of motor vehicle against liability for injuries, death or property damage arising from negligent operation thereof shall be issued unless it contains a provision insuring owner and any person using vehicle with consent, express or implied, of owner against such liability. Va. Code Ann. §38.2-2204. Virginia rejects notion that express permission for use for one purpose equals implied permission for all purposes. *State Farm Mut. Auto. Ins. v. Cook*, 186 Va. 658, 43 S.E.2d 863 (1947). Implied permission may arise from course of conduct involving mutual acquiescence or lack of objection to continued use of automobile. *Hartford Acc. Ind. Co. v. Peach*, 193 Va. 260, 68 S.E.2d 520 (1952). Burden of proof is on party seeking benefits of omnibus coverage clause of policy. *Id.* To defend on grounds of lack of consent, owner has burden of proof that vehicle was driven or being used without his express or implied permission. Va. Code Ann. § 8.01-65. One with whom named insured has left vehicle for general use may permit its use by another, who will be deemed to have permission of named insured. *Virginia Farm Bureau Mut. Ins. Co. v. Appalachian Power Co.*, 238 Va. 72, 321 S.E.2d 84 (1984). Generally, coverage under the omnibus clause does not extend beyond first permittee when named insured has expressly prohibited use by third party, but implied consent exception arises in emergency situations. *State Farm Auto. Ins. Co. v. GEICO Indem. Co.*, 241 Va. 326, 402 S.E.2d 21 (1991). Where driver of car at time of accident was only occupant who had not smoked marijuana and was asked to drive, driver had implied permission to drive under emergency circumstance exception. *Government Employees Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 58 Va. Cir. 572 (Cir. Ct. Fairfax Co. 2000). The omnibus clause does not attach to a policy issued for only personal liability of insured. *Commercial Union Ins. Co. of New York v. St. Paul Fire & Marine Ins. Co.*, 211 Va. 373, 177 S.E.2d 625 (1970). Nor does the omnibus clause apply to umbrella policies. *Government Employees Ins. Co. v. Moore*, 266 Va. 155, 580 S.E.2d 823 (2003). Each liability policy is to furnish

permissive user same coverage afforded named insured. Va. Code Ann. §38.2-2204(A). Permissive user is entitled to identical protection in every respect to which named insured is entitled. *Hardware Mut. Cas. Co. v. General Accident Fire & Life Assur. Corp., Ltd.*, 212 Va. 780, 188 S.E.2d 218 (1972).

Duty to Defend. Duty to defend is broader than duty to pay. *Va. Elect. & Power Co. v. Northbrook Prop. & Cas. Ins. Co.*, 252 Va. 265, 475 S.E.2d 264 (1996). When pleadings allege facts, some of which could, if proven, fall within the risk covered by policy, insurer is obliged to defend its insured. *Parker v. Hartford Fire Ins. Co.*, 222 Va. 33, 278 S.E.2d 803 (1981). The insurer is relieved of a duty to defend only when it clearly appears from the initial pleading the insurer would not be liable under the policy contract for any judgment based upon the allegations. *Reisen v. Aetna Life & Cas. Co.*, 225 Va. 327, 302 S.E.2d 529 (1983). Where allegations leave it in doubt whether case alleged is covered by policy, insurer's failure to defend is at its own risk. *United States Fire Ins. Co. v. Aspen Bldg. Corp.*, 235 Va. 263, 367 S.E.2d 478 (1988).

Exclusions. Since general rule is to construe policies, in cases of doubt, in favor of coverage, policy language excluding certain events from coverage will be construed most strongly against insurer and it is insurer's burden to prove exclusion applies. *Bituminous Cas. Corp. v. T.A. Sheets*, 239 Va. 332, 389 S.E.2d 696 (1990). Where insured intends the act, but not the result, the fact that the act is intentional does not avoid coverage. *Atlantic Perm. Fed. Sav. & Loan Ass'n v. American Cas. Corp. of Reading, Pa.*, 839 F.2d 212 (4th Cir.), cert. denied, 486 U.S. 1056 (1988). Clause in homeowner's policy excluding coverage for bodily injury arising out of business pursuits of insured such as day care services was ambiguous where it provided coverage for incidental business activities or any insured person regarding babysitting. *Smith v. Allstate Ins. Co.*, 241 Va. 477, 403 S.E.2d 696 (1991). Exclusion stating that insurance does not apply to bodily injury due to rendering or failing to render service or treatment conducive to health was ambiguous and construed against insurer, invoking duty to defend. *Granite State Ins. Co. v. Bottoms*, 243 Va. 228, 415 S.E.2d 131 (1992). Exclusion, which provides that medical payments coverage does not apply to an insured or relative while occupying a motor vehicle owned or regularly used by such person and which is not an insured motor vehicle, is valid. *Cotchan v. State Farm Fire & Cas. Co.*, 250 Va. 232, 462 S.E.2d 78 (1995). Exclusion for medical expenses that were payable under worker's compensation statute was clear and unambiguous, and not void. *Scarbrov v. State Farm Mut. Auto. Ins. Co.*, 256 Va. 357, 504 S.E.2d 860 (1998). Husband not entitled to medical payments benefits under



wife's policy since his car not insured vehicle under her policy and exclusion is clear and unambiguous. *Pauley v. State Farm Mut. Auto. Ins. Co.*, 260 Va. 1, 530 S.E.2d 414 (2000). Automobile owned by governmental entity and furnished to employee for transportation to and from work and for transportation needs of employee while away from home is within employee's personal insurance liability exclusion clause as "not owned by, or furnished for regular use of named insured by any government unit or agency." *Quesenberry v. Nichols*, 208 Va. 667, 159 S.E.2d 636 (1968). Regular use does not mean primarily for personal use. *State Farm Mut. Auto. Ins. Co. v. Jones*, 238 Va. 467, 383 S.E.2d 734 (1989).

Garage Policy. Every policy insuring against motor vehicle liability must contain a provision that the insurance coverage applicable to the motor vehicle shall not be applicable to anyone other than the named insured and his employees in the course of their employment, if there is any other valid and collective insurance applicable to the same loss that covers the other person under a policy with limits at least equal to the financial responsibility requirements specified in Va. Code Ann. §46.2-472 (\$25,000 for death or bodily injury to one person; \$50,000 for death or bodily injury to two or more people; and \$20,000 for property damage to others). Va. Code Ann. §38.2-2205(A)(1). Such provision applies to motor vehicles that are loaned for the purpose of demonstration to the other person as prospective purchaser, loaned or leased to the other person as a convenience during the servicing of a vehicle or the other person, or leased to the to the person for a period of six months or more. *Id.* Liability insurance policy issued to owner of motor vehicle shall be primary insurance applicable to his operation of motor vehicle on which he places license tags from another vehicle. Va. Code Ann. §46.2-721.

Insolvency or Bankruptcy of Insured. Liability insurer not released from obligation under policy or contract by virtue of insolvency or bankruptcy of insured. Va. Code Ann. §38.2-2200.

Household. "Household" is a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character under one roof. *State Farm Mut. Auto. Ins. Co. v. Smith*, 206 Va. 280, 242 S.E.2d 562 (1965). Residence emphasizes membership in a group rather than an attachment to a building. *Allstate Ins. Co. v. Patterson*, 231 Va. 358, 344 S.E.2d 890 (1986). Driver, son of separate parents who lived with his mother, was not a resident of father's household and, therefore, was properly denied coverage for underinsured motorist benefits by father's insurance company. *St. Paul Mercury Ins. Co. v. Nationwide Mut. Ins. Co.*, 209 Va. 18, 161 S.E.2d 694 (1968). Burden of proof on

issue of household residency is on one seeking the benefits of such membership. *Phelps v. State Farm Mut. Auto. Ins. Co.*, 245 Va. 1, 426 S.E.2d 484 (1993). To determine whether college-aged daughters were residents of mother's household for purposes of non-owned auto provisions of policy, the issue to live independently of mother's household controls. *Id.* A minor subject to joint custody arrangement can be member of both households for insurance coverage purposes. *Nationwide Mut. Ins. Co. v. Robinson*, 36 Va. Cir. 193 (Cir. Ct. Richmond City 1995). Minor child with liberal visitation with father not a member of father's household. *Brogdon v. Clark*, 63 Va. Cir. 85 (Cir. Ct. Richmond City 2003). "Foster child" is child who receives "foster services"; since child did not receive such services, she was not covered under insured's policy as his "foster child." *Virginia Farm Bureau Mut. Ins. Co. v. Gile*, 259 Va. 164, 524 S.E.2d 642 (2000).

Misrepresentation by Insured. Insurer has burden of proving "clearly" that representations made by applicant during application process were both untrue and material to risk assumed by insurer. Va. Code Ann. §38.2-309; *Time Ins. Co. v. Bishop*, 245 Va. 48, 425 S.E.2d 489 (1993). If applicant's representations are offered as true "to the best of [applicant's] knowledge and belief," then insurer must also prove representation were knowingly false as opposed to untrue. *Time Ins. Co. v. Bishop*, 245 Va. 48, 425 S.E.2d 489 (1993). To prove the falsity is not sufficient; the insurer must prove clearly that truthful answers would have reasonably influenced the company's decision to issue the policy. *Montgomery Mut. Ins. Co. v. Riddle*, 266 Va. 539, 587 S.E.2d 513 (2003). While insurer's burden is to "clearly prove," this does not rise to the level of clear, cogent and convincing evidence. *Old Republic Life Ins. Co. v. Bales*, 213 Va. 771, 195 S.E.2d 854 (1973). Since application process is merely an offer to enter into contract, parol evidence rule does not come into play and trial court can receive testimony as to oral questions posed and answered. *Smith v. Colonial Ins. Co. of California*, 258 Va. 30, 515 S.E.2d 775 (1999).

Notice. Performance of the notice provision of an automobile liability insurance policy is a condition precedent to coverage requiring substantial compliance by the insured. *State Farm Fire & Cas. Co. v. Scott*, 236 Va. 116, 372 S.E.2d 383 (1988). The requirement that notice be given "as soon as practicable" means that it must be given within a reasonable time after the accident, and what constitutes a reasonable time depends upon the facts and circumstances of each case. *Id.* Notice given 155 days after accident given "as soon as practicable" where insured driver was eighteen-year old with tenth grade education and did not know that mother's insurance policy afforded him coverage while driving

third person's automobile. *National Grange Ins. Co. v. Taylor*, 292 F. Supp. 986 (W.D. Va. 1968). However, violation of notice requirement by additional insured by failing to give notice of loss until over two years later is substantial violation and insurer need not prove prejudice. *State Farm Fire & Cas. Co. v. Walton*, 244 Va. 498, 423 S.E.2d 188 (1992). While umbrella policy called for denial of coverage for "refusal" to notify insurer of claim, "refusal" not equal to "failure" and, as such coverage remained in place. *Craig v. Dye*, 259 Va. 533, 526 S.E.2d 9 (2000). Condition in policy requiring written notice of accident or loss is reasonable and enforceable and is condition precedent to recovery. *American Mut. Liab. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 293 F. Supp. 256 (W.D. Va. 1968), *aff'd*, 411 F.2d 605 (4th Cir. 1969). Insured's failure to notify insurer of receipt of suit papers in property damage action in court not of record, resulting in default judgment, which judgment, however, was later vacated and thereafter insured cooperated in the fullest did not constitute such substantial violation of usual policy provisions requiring all suit papers to be forwarded to insurer such that policy obligations could be voided when examined in totality of circumstances including that insured was uneducated and confused about the paperwork received. *North River Ins. Co. of New York v. Gourdine*, 205 Va. 57, 135 S.E.2d 120 (1964). Insurance company held to have waived objection to lack of timely notice though is denied coverage on other grounds, where objection to timely notice not raised until morning of trial. *Lumbermen's Mut. Ins. Co. v. Hodge*, 205 Va. 36, 135 S.E.2d 187 (1964).

Primary Insurance. Liability insurance policy issued to owner of motor vehicle shall be primary insurance applicable to his operation of motor vehicle on which he palace license tags from another vehicle. Va. Code Ann. §46.2-721. Rental car company cannot, by rental contract with customer, decline primary coverage position in favor of excess coverage position. *USAA Cas. Ins. Co. v. Hertz Corp.*, 265 Va. 450, 578 S.E.2d 775 (2003). Passenger, a minor, in a vehicle driven by permissive user was involved in an accident with an uninsured motorist. Passenger entitled to uninsured coverage from owner, driver, and her father (as member of household). Supreme Court determined owner's insurance company had primary coverage with other two in an excess coverage position which would split remaining amount of judgment upon exhaustion of primary policy for uninsured motorist benefits. *State Farm Mut. Auto. Ins. Co. v. United Serv. Auto. Ass'n*, 211 Va. 133, 176 S.E.2d 327 (1970); *see also* Va. Code Ann. §38.2-2206 (B) (sets out priority for stacking uninsured and underinsured motorist coverage).

Punitive Damages. By statute, punitive damages are capped at \$350,000. Va. Code Ann. §8.01-38.1. Insurer under a "blanket liability" policy is obligated to defend punitive damage claim and failure to do so can result in award of defense costs, which include reasonable attorney's fees. *Lerner v. General Ins. Co. of America*, 219 Va. 101, 245 S.E.2d 249 (1978).

Rights of Injured Party Against Insurer. Liability insurance policy must provide that in case the execution on the judgment against the insured be returned unsatisfied, then an action may be maintained against the insurer for the amount of such judgment not exceeding limits of coverage. Va. Code Ann. §38.2-2200. Discharge in bankruptcy by insured does not relieve insurer of obligations, including payment of coverage, under policy. *Id.* Judgment creditor stands in the shoes of insured when it sues insurer for amount of unsatisfied judgment; such action is on insurance contract and insurer may interpose any defense it might have against insured. *Ampy v. Metropolitan Cas. Ins. Co. of New York*, 200 Va. 396, 105 S.E.2d 839 (1958). Passenger in an insured car entitled to medical payment benefits of policy covering car even though passenger had previously settled tort claim for personal injury with insurer and tort claim included claimed medical expense. *Moorman v. Nationwide Mut. Ins. Co.*, 207 Va. 244, 148 S.E.2d 874 (1966).

Use. Where child was crossing street to board school bus and was hit by a car, accident arose out of "loading" the bus and was covered by school board's policy. *Wagoner v. Benson*, 256 Va. 260, 505 S.E.2d 188 (1998).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Limitations in Contract. No provision valid if it limits time within which action may be brought to less than one year after cause of action accrues is valid. Va. Code Ann. §38.2-314. Action for negligence of architect in performing professional services, while sounding in tort, is action for breach of contract and governed by statute of limitations applicable to contract. *Virginia Mil. Inst. v. King*, 217 Va. 751, 232 S.E.2d 895 (1977). For improper design, statute of repose runs from date of approval of plans. *Id.*

Accrual. Product liability suit for personal injuries subject to two-year statute of limitations. Right of action accrues when injury occurs, not when manifested symptomatically. *Large v. Bucyrus-Erie Co.*, 707 F.2d 94 (4th Cir. 1983). "Date of discovery" rule not applied in Virginia. *Id.* But *see* Va. Code Ann. §8.01-243 (c), rec-



ognizing discovery rule under limited situation where foreign object left in body by physician, or where initial discovery is prevented by fraud; one year limitation period applies with ten year statute of repose. Claim for fraud accrues when fraud is or should have been discovered in exercise of due diligence. *Al-Abood v. El-Shamari*, 217 F.3d 225 (4th Cir. 2000). Cause of action for medical malpractice may accrue upon termination of a course of continuing treatment. *Farley v. Goode*, 219 Va. 969, 252 S.E.2d 594 (1979). Continuing treatment must involve same or similar illness. *Justice v. Natvig*, 238 Va. 178, 381 S.E.2d 8 (1989).

Generally, limitation on right to sue for personal injuries begins to run when wrong done and not when plaintiff discovers that he has been injured; therefore, lack of knowledge on part of plaintiff does not toll statute of limitation. *Morgan v. Schlanger*, 374 F.2d 235 (4th Cir. 1967). In case involving mesothelioma from asbestos exposure, court held that limitation period begins when injured party suffers harm or damage rather than when breach of duty occurred; test not when harm or damage discovered or should have been discovered, but when, to reasonable medical certainty, harm or damage occurred, which may be proven by expert medical testimony. *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981). Statutory amendment provides that a cause of action relating to asbestos exposure does not accrue until the diagnosis is first communicated to the person by a physician. Va. Code Ann. §8.01-249.

Miscellaneous. Five year statute of repose applies to any action to recover for bodily injury, wrongful death, or property damage arising out of defective and unsafe condition of an improvement to real property, or to any action to recover for contribution or indemnity for damages sustained as a result of such injury. Va. Code Ann. §8.01-250. However, this statute of repose does not apply to the manufacturer or supplier of any equipment or machinery installed in a structure on real property, nor to any owner or tenant in actual possession of the improvement at the time of injury; rather the usual statute of limitations in Va. Code Ann. §8.01-243 or 8.01-246 applies. *Id.* 1973 statutory amendment deleting five-year statute of limitations for negligent installation of machinery completely abrogates five-year statute of limitations as to installations; therefore, two-year personal injury statute of limitations applies. *Hupman v. Cook*, 640 F.2d 497 (4th Cir. 1981). Actions for violations of civil rights laws governed by two-year limitation. *Williams v. Westbrook Psychiatric Hosp.*, 420 F. Supp. 322 (E.D. Va. 1976); *Runyon v. McCrary*, 427 U.S. 160 (1976). Claim for recovery of back premiums which insurer erroneously credited to account is one for restitution based on implied contract and is subject to three-year statute of limitation. *Liberty Mut. v. Williams Int'l Indus.*, 780 F.

Supp. 359 (E.D. Va. 1991). Wrongful death action barred by statute of limitations two years after death even though beneficiary was infant and there is no estoppel where insurance company had simply made offer of settlement which was not accepted before statute ran. *Beverage v. Harvey*, 602 F.2d 657 (4th Cir. 1979). Two-year statute of limitations, Va. Code Ann. §8.01-248, not the 5-year period under Va. Code Ann. §8.01-243(B) applied where plaintiff allegedly sustained personal financial damage and not property damage from the defendant's refusal to advance additional funds in exchange for a further security interest. *J.F. Toner & Son, Inc. v. Staunton Production Credit*, 237 Va. 155, 375 S.E.2d 530 (1989).

Two-year statute of limitations under Va. Code Ann. §8.01-243 applies to every personal injury action, including breach of implied warranty, whether based on tort or contract. *Friedman v. Peoples Serv. Drug Stores*, 208 Va. 700, 160 S.E.2d 563 (1968). But statute of limitations in action for personal injuries received as result of breach of warranty begins to run from date of injury and not from date of purchase. *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 168 S.E.2d 257 (1969). Reinstatement application for life insurance policy created new limitations period for contestability. *Nyonteh v. Peoples Sec. Life Ins. Co.*, 958 F.2d 42 (4th Cir. 1992). For causes of action without specified limitation period, catchall period is two years after accrual. Va. Code Ann. §8.01-248.

Tolling. If plaintiff takes a voluntary non-suit, the tolling provisions of Va. Code Ann. §8.01-229(E)(3) (Virginia Voluntary Non-suit Statute) freeze the statute of limitations during the commencement of the non-suited action, and the action may be re-filed within six months of the date of the non-suit order or within the remainder of the original period of limitation, whichever is longer. For purposes of Va. Code Ann. §8.01-229(E)(1), dismissal with prejudice is determination on merits. *Gilbreath v. Brewster*, 250 Va. 436, 463 S.E.2d 836 (1995). Tolling provision does not apply to parents' claim for child's medical expenses. *Perez v. Espinola*, 749 F. Supp. 732 (E.D. Va. 1990). Plaintiff may file suit, fail to serve process, then take nonsuit to effectively extend limitations period by six months, refile after original limitations period had expired. *McManama v. Plunk*, 250 Va. 27, 458 S.E.2d 759 (1995). Since §8.01-229(E)(1) refers to "any action" that abates or is otherwise concluded without a ruling on merits, it is applicable to certain actions commenced in federal court. *Welding, Inc. v. Bland County Service Auth.*, 261 Va. 218, 541 S.E.2d 902 (2001). Where renewed action was not commenced during original two-year limitations period, nor filed within six-month period from date of non-suit order, action is barred by statute of limitation. *Simon v.*



Forer, 265 Va. 483, 578 S.E.2d 792 (2003). Action for damages tolled during pendency of criminal prosecution arising out of same facts. Va. Code Ann. §8.01-229(k).

Waiver. Statute of limitations is affirmative defense which must be raised in responsive pleadings or deemed waived. *Bedford County Mem. Hosp. v. Heckler*, 583 F. Supp. 367 (W.D. Va. 1984), *aff'd*, 769 F.2d 1017 (4th Cir. 1985).

MALPRACTICE

See also "HOSPITALS."

Medical Malpractice. *Generally See* Va. Code Ann. §§38.2-2800 to 2814.

Failure to comply with former Va. Code Ann. §8.01-581.2 notification of medical malpractice requirement did not deprive court of subject matter jurisdiction. *Morrison v. Bestler*, 239 Va. 166, 387 S.E.2d 753 (1990).

The plaintiff or defendant may within 30 days from the filing of a responsive pleading in any action for medical malpractice file a request for review by Medical Malpractice Review Panel, composed of two attorneys, two health care providers, and one sitting or retired judge of circuit court who shall serve as chairman. Medical Malpractice Review Panel is selected by Chief Justice of Supreme Court of Virginia. Va. Code Ann. §8.01-581.2, 581.3.

Either party to medical review panel has right to hearing before panel, and to present oral evidence at hearing. Both parties entitled to discovery prior to hearing. Member of medical malpractice review panel may be deposed. *Klarfeld v. Salsbury*, 233 Va. 277, 355 S.E.2d 319 (1987). Admissibility of evidence determined by judge of panel, who also rules upon disputed procedures during discovery. Va. Code Ann. §8.01-581.4. Within thirty (30) days after receipt of all evidence, medical review panel has duty to render one or more of following opinions: 1) Evidence does not support conclusion that health care provider failed to comply with appropriate standard of care; 2) Evidence supports conclusion that health care provider failed to comply with appropriate standard of care and that such failure is proximate cause in alleged damages, 3) Evidence supports conclusion that health care provider failed to comply with appropriate standard of care and that such failure is not proximate cause in alleged damages; or 4) Evidence indicated that there is material issue of fact, not requiring expert opinion, bearing on liability for consideration by court or jury. Va. Code Ann. §8.01-581.7.

Panel's opinion is admissible as evidence in action brought by plaintiff in court of law. Opinion not conclu-

sive and either party has right to call any member of panel except judge as witness. Va. Code Ann. §§8.01-581.7:1, 8.01-581.8. *See also, Speet v. Bacaj*, 237 Va. 290, 377 S.E.2d 397 (1989).

Arbitration. Medical malpractice claims may be submitted to arbitration. Va. Code Ann. §8.01-581.12.

Sovereign Immunity. Under the doctrine of sovereign immunity, a hospital that is an organ of the state is immune from actions sounding in tort. *Hall v. Roberts*, 548 F. Supp. 498 (W.D. Va. 1982). When considering a state employee's motion for sovereign immunity, a Virginia court must consider the nature of the function performed by the employee; the extent of the state's interest and involvement in that function; the degree of control and direction exercised by the state over the employee; and whether the act complained of involved the use of judgment and discretion. *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980). *James* court refused to grant immunity from a malpractice action to group of resident physicians employed at University Hospital. Although the doctors performed both as educators employed by the state and as private doctors, they were acting as private doctors at the time of the alleged negligence; therefore, they were not truly subject to state control. Furthermore, state's interest in the treatment of a private patient by an attending physician was not sufficiently compelling to deny plaintiffs a cause of action against the doctors. *Id.* *See also Garguilo v. Ohar*, 239 Va. 209, 387 S.E.2d 787 (1990); *Lee by Lee v. Bourgeois*, 252 Va. 328, 477 S.E.2d 495 (1996). Trial court did not err in ruling that physician's professional corporation is not immune from paying damages under Virginia Birth-Related Neurological Injury Compensation Act, Va. Code Ann. §38.2-500 *et seq.* *Jan Paul Fuiterman, M.D. v. Waziri*, 259 Va. 540, 525 S.E.2d 552 (2000). Allegation in complaint that doctor in charge of Medical College of Virginia's neonatal health care unit had been so negligent toward plaintiff's decedent as to take himself outside scope of employment insufficient to avoid bar of sovereign immunity. *Hurst v. Kirkpatrick*, 491 F. Supp. 29 (E.D. Va. 1980). Internist with Virginia Department of Vocational Rehabilitation as independent contractor as matter of law, since state had no control over work performed within scope of his examinations; therefore, internist was not entitled to sovereign immunity. *Atkinson v. Sachno*, 261 Va. 278, 541 S.E.2d 902 (2001).

Statute of Limitation for Minors. Any medical malpractice action accruing on or after July 1, 1987 on behalf of person who was a minor when action accrued against health care provider shall be commenced within two years of date of last act or omission giving rise to cause of action except minor less than eight at time of occurrence shall have until tenth birthday to commence



action. Minor ten years or older on or before July 1, 1987 shall have no less than two years from date within which to commence action. Va. Code Ann. §8.01-243.1. Medical malpractice statute of limitations for minors does not violate due process clauses of United States Constitution or Constitution of Virginia. *Willis v. Mullett*, 263 Va. 653, 561 S.E.2d 705 (2002).

Statute of limitations for medical malpractice due to ineffective sterilization ran from date of pregnancy, since plaintiff suffered no “positive, physical or mental hurt” related to wrongful conception action until point of conception. *Nunnally v. Artis*, 254 Va. 247, 492, S.E.2d 126 (1997).

Standard of Care. Standard of care in medical malpractice case is degree of skill and prudence practiced by reasonably prudent practitioner of Commonwealth; otherwise, party alleging different standard of care available and customary in locality and more appropriate than statewide standard must prove it. Standard of care required of medical specialist in state is that of other licensed specialists in good standing, in same or similar localities; regard must also be given to standard of development of medical science at time of incident in controversy. *Little v. Cross*, 217 Va. 71, 225 S.E.2d 387 (1976). Applicable standard of care combines in one test exercise of best judgment and use of ordinary care. *Teh Len Chu v. Fairfax Emerg. Med. Assoc.*, 223 Va. 383, 290 S.E.2d 820 (1982). Testimony of qualified expert witness to statewide standard admissible. Trier of fact to determine issues of standard of care. Va. Code Ann. §8.01-581.20. Standard of care matter of substantive law, requiring application of Virginia law in federal diversity case. *Chapman v. Edgerton*, 529 F. Supp. 519 (W.D. Va. 1982). It is duty of physician in exercise of ordinary care to warn patient of possible bad consequences of using remedy, but failure to warn not per se act of negligence. *Bly v. Rhoads*, 216 Va. 645, 222 S.E.2d 783 (1976). The “related field of medicine” requirement of §8.01-581.20 is met where expert performs the procedure at issue in his own clinical practice and where the standard of care for performing the procedure is the same. *Sami v. Varn*, 260 Va. 280, 535 S.E.2d 172 (2000). Statutory presumption that physician is presumed to know standard of care in physician’s specialty or field not rebutted in case involving removal of cyst on urachus where expert witness had knowledge in performance of laparoscopic surgery in female pelvic region. Physician employed in same medical practice as plaintiff’s medical expert may serve as defendant’s expert where no confidential information was exchanged. *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004). Absent showing of good cause, each party is limited to designating no more than two expert witnesses per medical discipline on any issue presented. This limita-

tion, however, does not apply to number of treating physicians who may be called as expert witness. Va. Code Ann. §801-581.20(C) In absence of evidence that physician assumed responsibility for patient either directly, by contract, or by hospital policy, no doctor/patient relationship arose between decedent and on-call attending physician, and thus no duty of care existed. *Prosise v. Foster*, 261 Va. 417, 544 S.E.2d 331 (2001).

When master and servant are sued together for same act of negligence, and master’s liability, if any, rests wholly upon servant’s negligence, verdict for servant necessarily exonerates master. *Whitfield v. Whittaker Mem. Hosp.*, 210 Va. 176, 169 S.E.2d 563 (1969). Physician holds himself as possessing knowledge and ability necessary to conduct effective practice of medicine. However, he is not insurer nor is he held to highest degree of care known to his profession. *Id.*

In verdict returned against health care provider in action for malpractice where act or acts of malpractice occurred on or after October 1, 1983, whether tried by judge or jury, amount shall not exceed \$1,000,000. After August 1, 1999 shall not exceed \$1.5 million. Maximum recovery of \$1.5 million shall increase on July 1, 2000 and each July 1 thereafter by \$50,000.00 per year. However, annual increase on July 1, 2007 and July 1, 2008 shall be \$75,000.00. Each annual increase applies to acts occurring on or after the effective date of the increase. July 1, 2008 is final increase. Va. Code Ann. §8.01-581.15. See also *Power v. Alexandria Phys. Group, Ltd.*, 887 F. Supp. 845 (E.D. Va. 1995), *aff’d*, 91 F.3d 132 (4th Cir. 1996), *cert denied*, 136 L. Ed. 2d 403, 117 S. Ct. 514 (1996) (single cap applies to all of patient’s “malpractice” claims, regardless of the particular theory on which they are based). Medical malpractice cap held constitutional by Virginia Supreme Court. Cap was appropriate response to problem affecting health, safety and welfare of Virginia citizens. *Etheridge v. Medical Ctr. Hosp.*, 237 Va. 87, 376 S.E.2d 525 (1989).

Expert medical testimony necessary to establish damage to determine if medical malpractice has occurred. *Little v. Cross*, 217 Va. 71, 225 S.E.2d 387 (1976). Alleged failure to diagnose hip fracture and to supervise treating physician were not matters of common knowledge and therefore required expert testimony. *Perdieu v. Blackstone Family Practice*, 264 Va. 408, 568 S.E.2d 703 (2002).

Surgical operation on body of person technical battery or trespass unless he or some authorized person consented to it. It was immaterial to issue of battery in medical malpractice action that jury found that surgery which plaintiff received from defendant not negligently performed. *Pugsley v. Privette*, 220 Va. 892, 263 S.E.2d 69 (1980). Evidence indicating that physician exceeded



scope of consent by performing cervical discectomy at two levels is sufficient to create factual issue on claim of battery. *Washburn v. Klara*, 263 Va. 586, 561 S.E.2d 682 (2002).

Sexual molestation occurring during course of medical treatment comes under the Virginia Medical Malpractice Act. *Hagan v. Antonio*, 240 Va. 347, 397 S.E.2d 810 (1990). Female psychiatric patient can sue a hospital for negligence and intentional emotional distress for its alleged failure to protect her from sexual assault by another patient who was HIV-positive. *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 523 S.E.2d 826 (2000).

NEGLIGENCE

See Law Digest Tables.

Age. Negligence and contributory negligence of infants discussed. *Harris v. Wright*, 172 Va. 67, 200 S.E. 597 (1939). Defendant owes child over age of fourteen only duty of exercising ordinary care. *Claypoole v. King*, 212 Va. 132, 183 S.E.2d 167 (1971). Under seven years of age, child conclusively presumed incapable of contributory negligence. Between seven and fourteen years of age, rebuttable presumption of incapacity. Standard of conduct is of children of same age, experience and maturity. *Virginia Elec. & Power Co. v. Dungee*, 258 Va. 235, 520 S.E.2d 164 (1999). Infant trespasser's own testimony that he knew he could get hurt hopping trains rebutted presumption against capacity for negligence and established contributory negligence as matter of law. *Id.*

Assumption of Risk. Plaintiff's voluntary assumption of risk of injury is a complete defense to negligence claim. *Landes v. Arehart*, 212 Va. 200, 183 S.E.2d 127 (1971). Assumption of risk involves "venturousness" (as distinguished from contributory negligence which involves carelessness). *E.g.*, *VEPCO v. Winesett*, 225 Va. 459, 303 S.E.2d 868 (1983). "Application of the defense of assumption of risk requires use of a subjective standard, which addresses whether a particular plaintiff fully understood the nature and extent of a known danger and voluntarily exposed herself to that danger." *Thurmond v. Prince William Baseball Club*, 265 Va. 59, 64, 574 S.E.2d 246, 249 (2003). Virginia has rejected doctrine of "inherent risk," which utilizes objective standard of risks involved in activity. *Nelson v. Great Eastern Resort Mgmt.*, 265 Va. 98, 574 S.E.2d 277 (2003). However, the Supreme Court of Virginia has held adult spectator of ordinary intelligence, who is familiar with the game of baseball, "assumes the normal risks of watching a baseball game, including the danger of being hit by a ball batted into an unscreened seating area of a stadium." *Thurmond v. Prince William Baseball Club*, 265 Va. 59, 66, 574 S.E.2d 246, 250 (2003).

Attractive Nuisance. To children, doctrine discussed. *Baecher v. McFarland*, 183 Va. 1, 31 S.E.2d 279 (1944). Attractive nuisance doctrine repudiated. However, liability may exist when child of tender age injured by instrument, machine, or appliance which contains hidden, concealed or latent defects when handled by one unfamiliar with use, and with use, and easily accessible to children. *Washbaugh v. Northern Va. Constr. Co.*, 187 Va. 767, 48 S.E.2d 276 (1948).

Comparative Negligence. Not recognized. *Waynick v. Walrond*, 155 Va. 400, 154 S.E. 522 (1930).

Contributory Negligence. Is complete defense. *Morris v. Dame's Ex'r*, 161 Va. 545, 171 S.E. 662 (1933). Contributory negligence shall not constitute defense unless pleaded or shown by plaintiff's evidence. Rule 3:16 (d) Rules of Supreme Court of Virginia. Contributory negligence and assumption of risk are concepts which occasionally overlap but are generally distinguishable; "contributory negligence" connotes carelessness; "assumption of risk" connotes venturousness voluntarily incurring risk, nature and extent of which are fully appreciated. *VEPCO v. Winesett*, 225 Va. 459, 303 S.E.2d 868 (1983). Plaintiff pedestrian has duty to exercise ordinary care for own safety and question of contributory negligence properly left for jury. *Johnson v. Wilmoth*, 209 Va. 82, 161 S.E.2d 682 (1968). Failure to file timely responsive pleadings is admission of defendant's negligence and concession of no contributory negligence. *Funkhouser, Adm'r v. Million*, 209 Va. 89, 161 S.E.2d 725 (1968). Passenger in motor vehicle approaching railroad crossing who fails to exercise ordinary care to look, listen, and alert driver is guilty of contributory negligence to bar recovery against driver. *Norfolk & Western Ry. Co. v. Gilliam*, 211 Va. 542, 178 S.E.2d 499 (1971). For trial court to instruct jury on patient's contributory negligence in medical malpractice case, there must be more than a scintilla of evidence introduced on the subject. *Gravitt v. Ward*, 258 Va. 330 (1999). In addition, in order to bar recovery in medical malpractice action plaintiff's contributory negligence must be concurrent with defendant's negligence. *Sawyer v. Comerci*, 264 Va. 68, 563 S.E.2d 748 (2002). After auto accident in which his fiancée was killed, defendant could not claim she was contributorily negligent for continuing to ride with him after she knew he had been drinking, where no corroborating evidence in the record. *Rice v. Charles*, 260 Va. 157, 532 S.E.2d 318 (2000).

Damages. "Mental anguish" and "mental suffering" are used interchangeably and should be included in instruction on physical pain if evidence creates reasonable inference thereof. *Bruce v. Madden*, 208 Va. 636, 160 S.E.2d 137 (1968). Court's instruction which included amount of plaintiff's claim in "ad damnum" clause of his



Complaint was misleading. *Smith v. Brady*, 390 F.2d 176 (4th Cir. 1968). It is not against public policy of Virginia for person to purchase coverage for punitive damages, Va. Code Ann. §38.2-227, but not for intentional acts. Under collateral source rule, tortfeasor could not deduct from the full compensation owed an injured party any part of the benefits the injured party received from his health insurance carrier. *Radvany v. Davis*, 262 Va. 308, 551 S.E.2d 347 (2001). Plaintiff entitled to claim full amount of reasonable medical expenses without any reduction for amounts “written off” by health care providers. *Acuar v. Letourneau*, 260 Va. 180, 351 S.E.2d 316 (2000). Medical bills which have been discharged in bankruptcy nonetheless relevant to plaintiff’s damage claim and admissible for limited purpose of showing plaintiff’s pain and suffering. *Barkley v. Wallace*, 267 Va. 369, 593 S.E.2d 190 (2004). “[U]nder the collateral source rule and Code §8.01-35, compensation paid by an employer to an employee during the period of the employee’s disability is not deductible from the quantum of damages the tortfeasor owes.” *Bullard v. Alfonso*, 267 Va. 743, 749, 595 S.E.2d 284, 287 (2004). Evidence of employee’s loss of income is therefore admissible, while fact of reimbursement by employer is excluded. *Id.* Evidence of husband’s sorrow, mental anguish, and solace was sufficient to support jury’s \$1.7 million wrongful death award in vehicle accident case. *Shepard v. Capitol Foundry of Virginia*, 262 Va. 715, 554 S.E.2d 72 (2001).

Duty. Blood bank association that set standards for screening tainted blood owed duty of care to child who received HIV-contaminated blood in 1983 and died from AIDS in 1988. *Jappell v. Am. Ass’n of Blood Banks*, 162 F. Supp. 2d 476 (E.D. Va. 2001).

Governmental Immunity. Defendant’s plea of governmental immunity sustained on ground that selecting and adopting plan for construction of streets, traffic regulation, maintenance of traffic signals, are governmental functions; traffic lights, warning signals, road markings, railings, barriers and guardrails all exist for control and regulation of traffic, which is governmental function; determining need for and decision to install traffic regulation devices is governmental function. *Freeman v. City of Norfolk*, 221 Va. 57, 266 S.E.2d 885 (1980). This immunity applies to claims that the governmental entity abused its discretion in approving plans or in failing to require additional safety features in plans. *Taylor v. City of Charlottesville*, 240 Va. 367, 397 S.E.2d 832 (1990).

Liquor Liability/Dram Shop Act. No liability on seller of intoxicating liquor for negligence resulting from personal injuries sustained by third parties as a result of negligence of patron after leaving seller’s establishment.

Webb v. Regua Ltd., 624 F. Supp. 471 (E.D. Va. 1985), *aff’d*, 811 F.2d 840 (4th Cir. 1987).

Imputed Negligence. Negligence of operator not imputed to passenger, *Chesapeake & O. Ry. v. Folkes*, 179 Va. 60, 18 S.E.2d 309 (1942), nor of husband to wife, *Southern Fruit Distrib. Inc. v. Fulmer*, 107 F.2d 456 (4th Cir. 1939), nor of mother to pedestrian child, *Shelton v. Mullins*, 207 Va. 17, 147 S.E.2d 754 (1966). Negligence of one participant in joint enterprise imputed to all participants. *Alban Tractor Co. v. Sheffield*, 220 Va. 861, 263 S.E.2d 67 (1980).

Joint Enterprise. Where one party had no right to control other’s operation of truck, and other had no right to control first-mentioned party’s operation of backhoe, and neither was agent of other, there was, as matter of law, no joint enterprise, and joint enterprise question should not have been submitted to jury. *Alban Tractor Co. v. Sheffield*, 220 Va. 861, 263 S.E.2d 67 (1980).

Last Clear Chance. Rule stated. *Greear v. Noland Co.*, 197 Va. 233, 89 S.E.2d 49 (1955). Doctrine applies where 1) a helpless plaintiff negligently placed himself in a position of peril from which he is physically unable to remove himself, and 2) an inattentive plaintiff has placed himself in position of peril from which he is physically able to remove himself but is unconscious of peril. *Pack v. Doe*, 236 Va. 323, 374 S.E.2d 22 (1988).

Negligence per se. See *Smith v. New Dixie Lines, Inc.*, 201 Va. 466, 111 S.E.2d 434 (1959); *VEPCO v. Savoy Constr. Co., Inc.*, 224 Va. 36, 294 S.E.2d 811 (1982). Violation of statute constitutes negligence per se, and for recovery, such negligence must have been proximate cause of plaintiff’s injury. *White v. Gore*, 201 Va. 239, 110 S.E.2d 228 (1959); and plaintiff must prove that he is member of class statute was designed to protect. *Smith v. Virginia Transit Co.*, 206 Va. 951, 147 S.E.2d 110 (1966). In order for party to invoke violation of statute as negligence per se, he must show that party who is alleged to have violated statute had reasonable time within which to comply with requirements of statute. *Roberts v. Mundy*, 208 Va. 236, 156 S.E.2d 593 (1967), *overruled on other grounds by Vanlandingham v. Vanlandingham*, 212 Va. 856, 188 S.E.2d 96 (1972). Contributory negligence is still available as a defense even though defendant was negligent as a matter of law. *O’Neill v. Windshire-Copeland Associates*, 267 Va. 605, 595 S.E.2d 281 (2004).

Premises Liability. Owner of premises liable to social guest for injury due to condition of premises if he knew or had reason to know of condition, should have known it created unreasonable risk of harm, should have expected that guest would not discover danger and failed to exercise reasonable care to make premises safe or to

warn of danger, if guest did not and had no reason to know of danger. *Busch v. Gaglio*, 207 Va. 343, 150 S.E.2d 110 (1966). Social guest not invitee, but bare licensee to whom landowner owes lesser standard of care. *Bauer v. Harn*, 223 Va. 31, 286 S.E.2d 192 (1982). Owner required to give notice or warning of unsafe condition known to him and unknown to invitee unless dangerous condition open and obvious to reasonable person exercising ordinary care. *City of Suffolk v. Hewitt*, 226 Va. 20, 307 S.E.2d 444 (1983). But no premises liability where owner of property lacks knowledge of danger or imminent danger. *Wright v. Webb*, 234 Va. 527, 362 S.E.2d 919 (1987). This includes danger of criminal acts. *Burns v. Johnson*, 250 Va. 41, 458 S.E.2d 448 (1995). Before any duty arises with regard to the conduct of third persons, there must be a special relationship between defendant and either plaintiff or the third person. *Burdette v. Marks*, 244 Va. 309, 421 S.E.2d 419 (1992). Examples of such relationship between defendant and plaintiff include common carrier-passenger, business proprietor-invitee, and innkeeper-guest. *Klingbeil Mgmt. Group Co. v. Vito*, 233 Va. 445, 357 S.E.2d 200 (1987). Where defendant juvenile was known to defendant skating rink to be violent and had committed assaults on other invitees in the past, allegations of the defendant juvenile's presence on the skating rink's premises were sufficient to state a claim that defendant skating rink was on notice that plaintiff was in danger of being injured in a criminal assault. *Thompson v. Skate Am., Inc.*, 261 Va. 121, 540 S.E.2d 123 (2001). As exception to general rule, business owner must protect invitee from criminal assault only when owner knows assaults against persons were occurring or about to occur on the premises, which indicate an imminent probability of bodily harm to invitee. *Dudas v. Glenwood Golf Club*, 261 Va. 133, 540 S.E.2d 129 (2001). Requiring a business owner to give warnings of remote but potential dangers of assaultive criminals, after the business has been victimized by such criminals through no fault of its own, would unfairly burden the business owner. *Id.* Although hundreds of criminal incidents previously occurred around the premises of plaintiff's apartment complex before he moved in, plaintiff did not allege facts sufficient to show there was "an imminent probability of harm," since he lived in complex for one year and nine months before he was injured. *Yuzefovsky v. St. John's Wood Apts.*, 261 Va. 97, 540 S.E.2d 134 (2001). Recreational use statute protects owner of property made available for use by public for recreational purposes, without charge, from liability for simple negligence, but not for gross negligence or willful or malicious failure to guard or warn. Va. Code Ann. §29.1-509.

Proximate Cause. *Roanoke Ry. and Elec. Co. v. Whitner*, 173 Va. 253, 3 S.E.2d 169 (1939). If reason-

able men may differ whether negligent act was proximate or efficiently contributing cause of accident, trier of facts should determine issue. *Farrish v. VanFossen*, 212 Va. 815, 188 S.E.2d 201 (1972). Foreseeability relevant to determination of proximate cause. *VEPCO v. Savoy Constr. Co., Inc.*, 224 Va. 36, 294 S.E.2d 811 (1982). Because defendant oil company's oil spill caused hazardous road condition which put into operation presence of Highway Department employees whose actions might have been negligent, Highway Department's action not intervening superseding cause. *Coleman v. Blankenship Oil Corp.*, 221 Va. 124, 267 S.E.2d 143 (1980).

Res Ipsa Loquitur. Discussion of applicability of doctrine. *See Norfolk & W. Ry. v. Anderson*, 207 Va. 567, 151 S.E.2d 628 (1966). Doctrine not available if object which causes damage not under exclusive control of defendant. *Cooper v. Whiting Oil Co., Inc.*, 226 Va. 491, 311 S.E.2d 757 (1984).

Sudden Emergency. Burden on party asserting. *Pickett v. Cooper*, 202 Va. 60, 116 S.E.2d 48 (1960). Doctrine does not apply if emergency resulted in whole or in part from conduct of party seeking to invoke its benefits. *Terry v. Fagan*, 209 Va. 642, 166 S.E.2d 254 (1969). Defendant's good faith in rendering emergency assistance by driving wounded friend to hospital, where accident occurred in private hospital driveway, did not immunize him from civil liability; Virginia's Good Samaritan Statute (Va. Code Ann. §8.01-225) expressly excludes motor vehicle operator; court correctly submitted to jury question of whether decedent's gunshot wounds caused automobile accident rather than defendant's own negligent motor vehicle operation. *Penn v. Manns*, 221 Va. 88, 267 S.E.2d 126 (1980). No doctrine of excusable negligence in Virginia. One is either chargeable with negligence or not. Therefore, driver of auto stricken with sudden illness with no prior warning and of which he had no reason to anticipate and which renders it impossible for him to control vehicle is not chargeable with negligence. *Witt v. Merricks*, 210 Va. 70, 168 S.E.2d 517 (1969). Caveat: Sudden emergency and unavoidable accident doctrines rarely applicable in Virginia.

NO-FAULT INSURANCE

Virginia has not adopted no-fault insurance.

PENALTIES AND ATTORNEY FEES

Penalties. Any person who knowingly or willfully violates any provision of Title 38.2 or any insurance rule or regulation issued pursuant to the Title shall be punished for each violation by a penalty of no more than \$5,000. Va. Code Ann. §38.2-218. Violations without



knowledge or intent may be punished by a penalty of no more than \$1,000, but a series of similar violations resulting from the same act are limited to an aggregate penalty of no more than \$10,000. Any violation resulting solely from a mechanical or electronic malfunction shall not be subject to a penalty. *Id.* Restitution in the amount of the direct actual financial loss may be required in certain circumstances. *Id.* In addition to or in lieu of penalties imposed by Va. Code Ann. §38.2-218, the Insurance Commission may place a person on probation or suspend, revoke or refuse to renew a person's license in certain circumstances. *See* Va. Code Ann. §38.2-1831. Any person who violates Va. Code Ann. § 38.2-1916 shall also be subject to additional penalty provisions under Va. Code Ann. §38.2-1916.2. "Punitive damages are never awarded to compensate an insured." *Bettius & Sanderson v. Nat. Union Fire Ins.*, 839 F.2d 1009 (4th Cir. 1988). The Virginia legislature has provided for punishment and deterrence without authorizing actual punitive damages against insurance companies. *Id.*

Attorney Fees. An insured may be awarded attorney fees resulting from a suit against its insurer for a determination of coverage under the policy if the insured shows that the insurer, not acting in good faith, denied coverage or failed or refused to make payments to the insured under the policy. *Ryder Truck Rental, Inc. v. UTF Carriers, Inc.*, 790 F. Supp. 637 (W.D. Va. 1992); Va. Code Ann. §38.2-209.

PRIVILEGED COMMUNICATIONS

Attorney/Client. Elements of attorney-client privilege are: 1) holder of privilege is or seeks to be client; 2) person to whom communication made is member of bar or subordinate, acting as such; 3) communication relates to facts of which lawyer was informed by client without presence of strangers, and for purpose of securing primarily opinion of the law or legal services or assistance in legal proceedings and not for purpose of committing crime or tort; and 4) privilege had been claimed and not waived by client. *Hawkins v. Stables*, 148 F.3d 379 (4th Cir. 1998).

Clergy/Penitent. No regular minister, priest, rabbi or accredited practitioner over age 18, of any religious organization or denomination referred to as church, shall be required in civil action to disclose information communicated to him in confidential manner, entrusted in professional capacity and necessary to discharge functions of office where person communicating information is seeking spiritual counsel relative to information imparted. Va. Code Ann. §8.01-400.

Doctor/Patient. Except at request of, or with consent of patient, no licensed practitioner of healing arts shall be required to testify in civil action respecting in-

formation acquired in attending, examining or treating patient in professional capacity if information necessary to furnish professional care; provided, however, if physical or mental condition of patient at issue in a civil action, the diagnosis or treatment plan of the practitioner, as documented in the patient's medical record, during the time of the practitioner's treatment, together with the facts communicated to or learned by the practitioner in connection with treatment or examination shall be disclosed in discovery or through testimony at trial. Va. Code Ann. §8.01-399. To be admissible at trial, the diagnosis must be offered to a reasonable degree of medical probability. *Id.* Recent regulations under HIPAA, 42 U.S.C. Ann. §1320d, *et seq.*, have impacted subpoenaing of medical records and resulted in make-over of Va. Code Ann. §32.1-127.1:03. Subpoenas must now allow 15 days waiting period and then notify healthcare provider if no motion to quash served or it is resolved.

Spousal. Husband and wife shall be competent to testify for and against each other in civil actions; provided neither shall, without consent of other, be examined as to communications privately made by one onto the other while married, nor permitted, without consent, to reveal after marriage ceases communications made while marriage subsisted. Va. Code Ann. §8.01-398. This code section does not apply where the law of Virginia confers upon a spouse a right of action against the other spouse. *Id.*

PRODUCTS LIABILITY

Strict Liability. Although Virginia courts have borrowed their definition of "defect" from Restatement (Second) of Torts, §402A, strict liability in tort under that section has not been adopted by any Virginia court. *Harris v. T.I. Inc.*, 243 Va. 63, 71, 413 S.E.2d 605, 610 (1992); *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 424 n.4, 374 S.E.2d 55, 56-58 (1988). A limited form of strict liability is imposed, however, in cases of blasting and other "ultrahazardous" activities. *M.W. Worley Constr. Co. v. Hungerford, Inc.*, 215 Va. 377, 210 S.E.2d 161 (1974). Virginia has not adopted the Restatement (Third) of Torts: Products Liability. Negligence and breach of warranty (both express and implied) are two most common theories of recovery. Under either theory, injury complained of must be attributable to a "defect" in product at issue. *See e.g., Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1114 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988); *Logan v. Montgomery Ward & Co*, 216 Va. 425, 427-29, 218 S.E.2d 685, 687-88 (1975).

Types of Defects. There are three generally recognized types of defects: 1) design defects; 2) manufacturing defects; and 3) defects in warnings or instructions.

Design defect exists if product is imprudently designed; manufacturing defect is a product deficiency that exists because product was not made as intended; and defect in warnings or instructions exists if there are no warnings or instructions, or if warnings and instructions given are inadequate to inform a consumer or user of product's hazardous properties. *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1043 (4th Cir. 1983); *Lust v. Clark Equip. Co.*, 792 F.2d 436, 438-39 (4th Cir. 1986). Under Virginia law, product is defective if 1) goods were unreasonably dangerous for their ordinary or reasonably foreseeable use; and 2) unreasonably dangerous condition existed when goods left defendant's hands. *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975). Test is the same whether plaintiff proceeds on negligence or breach of warranty theory. *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979). Difference between the two theories is that in negligence, focus is on conduct of manufacturer, while in warranty, focus is on product itself. See *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331 (4th Cir. 1991), cert. denied, 502 U.S. 820 (1991).

Warranty. Warranty actions are usually based on Article 2 of the Uniform Commercial Code governing sales. Va. Code Ann. §§8.2-101 through 8.2-107 (1991 Rep. Vol.).

Express Warranty. Seller creates express warranty by any affirmation of fact, promise or demonstration by sample or model to buyer which relates to goods, *i.e.*, part of their character, quality or condition, and becomes part of the basis of bargain. Va. Code Ann. §8.2-313 (1991 Rep. Vol.). Seller must make assurance of fact, not merely express opinion or engage in "puffing." See *Daughtrey v. Ashe*, 243 Va. 73, 413 S.E.2d 336 (1992). If one who has superior knowledge makes a statement about the goods sold and does not qualify the statement as his/her opinion, then the statement will be treated as a statement of fact for express warranty purposes. *Id.* In order to state a claim for breach of express warranty the plaintiff cannot merely recite the statutory language setting forth the legal bases for creation of such a warranty, but must plead facts showing that an express warranty was made and the substance of the warranty. *Pulte Home Corp. v. Parex, Inc.*, 265 Va. 518, 579 S.E.2d 188 (2003).

Implied Warranty of Merchantability. Under Va. Code §8.2-314, seller-merchant impliedly warrants that its product is fit for ordinary purposes for which goods are used. *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251-52, 217 S.E.2d 863, 868-69 (1975). To establish breach of implied warranty of merchantability, plaintiff must prove that (a) the goods sold were unreasonably dangerous for use to which they

would ordinarily be put (or for some other reasonably foreseeable purpose) and (b) that condition existed when goods left the defendant's hands. *Bly v. Otis Elevator Co.*, 713 F.2d 1040 (4th Cir. 1983). Implied warranty of merchantability does not apply where product is misused, *i.e.*, used in unforeseeable manner. *Turner v. Maxwell, Manning & Moore*, 216 Va. 425, 219 S.E.2d 685 (1975). Implied warranty of merchantability arises by operation of law, not by agreement of parties, *Whittle v. Timesavers, Inc.*, 614 F. Supp. 115 (W.D. Va. 1985), and is implied in every sale made by merchant unless excluded in a manner which is effective under Code of Virginia. *Id.* It arises at time product is sold to purchaser. *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552 (W.D. Va. 1984), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985). A manufacturer may breach the implied warranty of merchantability by failing to warn or instruct concerning dangerous propensities or characteristics of a product even if that product is flawless in design and manufacture. *Bly v. Otis Elevator Co.*, 713 F.2d 1040 (4th Cir. 1983).

Implied Warranty of Fitness for Particular Purpose. Seller impliedly warrants that product is fit for particular purpose if it knows purpose for which goods are required and buyer relies on seller's skill or judgment to select or furnish suitable goods. Va. Code Ann. §8.2-315; *Layne-Atlantic Co. v. Koppers Co.*, 214 Va. 467, 474, 201 S.E.2d 609, 614 (1974). To recover under Va. Code §8.2-315, buyer must prove: 1) seller had reason to know particular purpose for which buyer required goods, 2) seller had reason to know buyer was relying on seller's skill or judgment to furnish appropriate goods, and 3) buyer in fact relied upon seller's skill or judgment. *Medcom, Inc. v. Arthur Weaver Co.*, 232 Va. 80, 348 S.E.2d 243 (1986). Where "particular purpose" is purpose described in contract, that purpose cannot be considered in isolation or divorced from specifications of contract. *Layne-Atlantic Co. v. Koppers Co.*, 214 Va. 467, 201 S.E.2d 609 (1974).

Negligence-Negligent Design. Under Virginia law, manufacturer has "duty to exercise ordinary care to design a product that is reasonably safe for the purpose for which it is intended." *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975). Thus, to prevail on negligence claim, plaintiff must establish that manufacturer breached its duty to exercise reasonable care. As part of this proof, plaintiff must establish that: "(1) the product was unreasonably dangerous for its intended or reasonably foreseeable uses; and (2) the unreasonably dangerous condition existed when the product left the manufacturer's control." *Marshall v. H.K. Ferguson Co.*, 623 F.2d 882, 885 (4th Cir. 1980); *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975). Proof that fore-

seeable accident occurred is not sufficient in and of itself to prove negligence. Rather, manufacturer is liable for negligent design only if it is proven that design is “unreasonably dangerous” due to manufacturer’s failure to exercise due care. *Id.* In addition, Virginia law is clear that product manufacturers are not liable for injuries resulting from negligent, unforeseeable acts of product users. *Besser Co. v. Hansen*, 243 Va. 267, 415 S.E.2d 138 (1992). “A manufacturer is not an insurer of its product’s safety.” *Owens-Corning Fiberglass Corp. v. Watson*, 243 Va. 128, 134, 413 S.E.2d 630, 634 (1992). Furthermore, manufacturer is not required to design accident proof product or to incorporate ultimate in safety features. *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 963, 252 S.E.2d 358, 367 (1979). Nor is defendant required to provide layers of safety devices in case one or more safety features is ignored. *Brown v. Hobart Corp.*, 57 Va. Cir. 269 (Cir. Ct. for the City of Roanoke, 2002). Although Virginia recognizes consumer expectation test as a method by which plaintiff may prove product was defective, conclusory statement by plaintiff that product did not meet expectations is insufficient to establish a defect. *Gibson v. Wal-Mart Stores, Inc.*, 189 F. Supp. 2d 443 (W.D. Va. 2002).

Negligent Manufacture. Manufacturing defect is generally considered deviation from manufacturer’s own plans or specifications. Negligent manufacturing claim is established if defect during manufacturing process renders product “unreasonably dangerous” for its intended use or for reasonably foreseeable uses. *Southern States Coop. v. Doggett*, 223 Va. 650, 292 S.E.2d 331 (1982). Plaintiff need only establish that product deviated from manufacturer’s plans and specifications, that this deviation or nonconformity was proximate cause of injury, and that defect existed at time product left manufacturer’s control. See *White Consol. Indus., Inc. v. Swiney*, 237 Va. 23, 376 S.E.2d 283 (1989). Evidence of manufacturing defect will support finding of negligence or breach of warranty. *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1043 (4th Cir. 1983); *Matthews v. Ford Motor Co.*, 479 F.2d 399, 400 (4th Cir. 1973).

Negligent Failure to Warn. Virginia has adopted Restatement (Second) of Torts §388 (1965), which holds manufacturer of chattel will be subject to liability when it (a) knows or has reason to know that chattel is or is likely to be dangerous for use for which it is supplied; and (b) has no reason to believe that those for whose use chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of facts which make it likely to be dangerous. *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 962; 252 S.E.2d 358, 366 (1979). Duty to warn extends not only to immediate purchaser, but also to any reasonably foreseeable consumer.

However, under subsection (b) of §388 of the Restatement (Second), manufacturer does not have duty to warn of dangers about which users of product are aware. Moreover, manufacturer does not have a duty to warn about danger that is open and obvious. *Spangler v. Kranco, Inc.*, 481 F.2d 373, 375 (4th Cir. 1973). Manufacturer is under a duty, however, to warn of dangers associated with foreseeable misuse. *Barnes v. Litton Indus. Prods. Inc.*, 555 F.2d 1184, 1187 (4th Cir. 1977). Adequate warning is reasonable warning, not necessarily best possible one. It should give sufficient instruction as to danger involved and how to avoid it. *Pfizer, Inc. v. Jones*, 221 Va. 681, 272 S.E.2d 43, 45 (1980). However, manufacturer is only required to warn against engaging in improper conduct and is not required to explain exactly how danger against which user has been warned might operate. *Cotton v. Buckeye Gas Products Co.*, 840 F.2d 935, 938-39 (D.C. Cir. 1988) (applying Virginia law).

Defenses-Contributory Negligence. Virginia does not recognize doctrine of comparative negligence, but continues to follow common law contributory negligence rule. *Smith v. Virginia Elec. & Power Co.*, 204 Va. 128, 133, 129 S.E.2d 655, 659 (1963). Under Virginia law, contributory negligence is a complete bar to recovery in negligence action. *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 373 (4th Cir. 1983). This is true even if defendant was negligent as a matter of law. *O’Neill v. Windshire-Copeland Assocs.*, 267 Va. 605, 595 S.E.2d 281 (2004). However, contributory negligence is not a defense to breach of warranty claim. *Brockett v. Harrell Brothers, Inc.*, 206 Va. 457, 462-63, 143 S.E.2d 897, 902 (1965).

Assumption of Risk. Under Virginia law, “[T]he essence of assumption of the risk is ‘venturousness in voluntarily incurring a risk the nature and extent of which are fully appreciated.’” *Stevens v. Ford Motor Co.*, 226 Va. 415, 421, 309 S.E.2d 319, 323 (1983)(quoting *Virginia Elec. & Power Co. v. Winesett*, 225 Va. 459, 471, 303 S.E.2d 868, 875 (1983)). Assumption of risk is a defense to claim based on negligence. *Amusement Slides Corp. v. Lehmann*, 217 Va. 815, 818-19, 232 S.E.2d 803, 805 (1977). However, because Virginia law deems warranty claims to sound in contract, assumption of risk has been held not to be a defense to claims for breach of implied warranty. *Wood v. Bass Pro Shops, Inc.*, 250 Va. 297, 301, 462 S.E.2d 101, 103 (1995).

Superseding/Intervening Cause. Defendant is not liable for negligence in contributing to plaintiff’s injury if a second instance of negligence or wrongful conduct so entirely supersedes defendant’s negligence that it alone is proximate cause of injury. *Cooper v. Ingersoll*



Rand Co., 628 F. Supp. 1488, 1493 (W.D. Va. 1986). Defendant is not relieved of liability, however, if intervening act was put into operation by defendant's negligence. *Coleman v. Blankenship Oil Corp.*, 221 Va. 124, 131, 267 S.E.2d 143, 147 (1980). If plaintiff's injury resulted from one of two causes, one for which defendant was responsible, and other for which he was not responsible, and if plaintiff is not able to prove by preponderance of evidence that defendant's negligence caused injury, then defendant is relieved of liability. *Cape Charles Flying Serv., Inc. v. Nottingham*, 187 Va. 444, 451, 47 S.E.2d 540, 544 (1948); see *Honsinger v. Egan*, 266 Va. 269, 585 S.E.2d 597 (2003).

Material Alteration. Manufacturer will not be held liable, under negligence or breach of warranty theory, for injuries caused by product if product has been materially altered, alteration was not reasonably foreseeable, and alteration is proximate cause of plaintiff's injury. *Jones v. Meat Packers Equipment Co.*, 723 F.2d 370, 373 (4th Cir. 1983); *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 964, 252 S.E.2d 358, 368 (1979).

Product Misuse. Manufacturer is not relieved of liability if plaintiff has used product in manner other than that intended by manufacturer, if use was reasonably foreseeable. *White Consolidated Indus., Inc. v. Swiney*, 237 Va. 23, 29, 376 S.E.2d 283, 286 (1989). Plaintiff cannot recover on negligence or warranty theory, however, if there has been unforeseeable misuse of product. *Besser Co. v. Hansen*, 243 Va. 267, 278, 415 S.E.2d 138, 144 (1992).

Buyer Specifications. Product manufacturer is not liable for injuries resulting from product manufactured according to buyer's plans and specifications, unless plans are so obviously dangerous that they should not reasonably be followed. *Spangler v. Kranco, Inc.*, 481 F.2d 373, 375 (4th Cir. 1973).

Knowledgeable Employer/Sophisticated User. Virginia recognizes sophisticated user defense in failure to warn claims. *Morgen Industries, Inc. v. Vaughan*, 252 Va. 60, 66-67, 471 S.E.2d 489, 491 (1996). Manufacturer has no duty to warn industrial purchaser's employees of dangers in use of its product if employer had equal or greater knowledge of such dangers and manufacturer has reason to believe that employer was or would be acting to protect its employees from harm. *Buettner v. R. W. Martin & Sons*, 47 F.3d 116, 120 (4th Cir. 1995).

Open and Obvious Danger. Virginia law bars recovery for injuries which result from product hazards that are open and obvious. *Austin v. Clark Equip. Co.*, 48 F.3d 833 (4th Cir. 1995). It is hazard which must be obvious, not just defect. *Freeman v. Case Corp.*, 118 F.3d

1011, 1014-15 (4th Cir. 1997), *cert. denied*, 522 U.S. 1069 (1998). Defense applies to claims of negligence or breach of warranty. *Wood v. Bass Pro Shops, Inc.*, 250 Va. 297, 301, 462 S.E.2d 101, 103 (1995).

Privity of Contract. Generally, plaintiff is not required to show he was in privity with defendant in suit for personal injuries or damage to property other than product itself. Va. Code Ann. §§8.01-233, 8.2-318. However, for sales that occurred prior to enactment of 1962 anti-privity statute, privity may be required for breach of warranty claim. *Derflinger v. Ford Motor Co.*, 866 F.2d 107 (4th Cir. 1989). In addition, Va. Code §8.01-223 does not eliminate privity requirement in negligence action for purely economic loss. *Redman v. John D. Brush and Co.*, 111 F.3d 1174, 1182-83 (4th Cir. 1997).

Warranty Disclaimers. Implied warranties may be excluded or modified in accordance with provisions of Va. Code Ann. §8.2-316, and subject to Title I of Magnuson-Moss Warranty Act (15 U.S.C. §§2301 to 2312 (1982)) which prohibits certain disclaimers in sales of consumer goods. To validly disclaim implied warranty of merchantability, disclaimer must mention "merchantability" and must be conspicuous. Va. Code Ann. §8.2-316. Language to exclude all implied warranties of fitness must be by writing and conspicuous. *Id.* All implied warranties are generally excluded by language such as "as is," "with all faults," or other language "which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." *Id.* Disclaimers of implied warranties have been upheld in context of sales of industrial goods, even when claim involved personal injuries. *Buettner v. R. W. Martin & Sons*, 47 F.3d 116, 118 (4th Cir. 1995). Implied warranties may be excluded where buyer has examined or refused to examine product, Va. Code Ann. §8.2-316(3)(b), unless defects are hidden. *Twin Lakes Mfg. Co. v. Coffey*, 222 Va. 467, 473, 281 S.E.2d 864, 867 (1981).

Post-Sale Duties. Federal Courts applying Virginia law have reached conflicting results on question of whether product manufacturer has duty to warn of defects or hazardous conditions which become known or reasonably ascertainable only after time of manufacture and sale. *Compare Ambrose v. Southworth Products Corp.*, 953 F. Supp. 728 (W.D. Va. 1997) (no post-sale duty to warn under Virginia law) and *Estate of Kimmel v. Clark Equip. Co.*, 773 F. Supp. 828 (W.D. Va. 1991) (same) with *McAlpin v. Leeds & Northrup Co.*, 912 F. Supp. 207 (W.D. Va. 1996) (Virginia law imposes post-sale duty to warn under a negligence theory) and *Bly v. Otis Elevator Co.*, 713 F.2d 1040 (4th Cir. 1983) (same). Supreme Court of Virginia has not yet ruled directly on



this issue. *See Harris v. T.I., Inc.*, 243 Va. 63, 413 S.E.2d 605 (1992) (court assumed, without deciding, that Virginia would recognize post-sale duty to warn, but held that “no such duty could arise under the facts alleged”). Every court that has addressed question, has held that, after manufacture and sale, manufacturer has no duty under Virginia law to retrofit products. *McAlpin v. Leeds & Northrup Co.*, 912 F. Supp. 207, 212 (W.D. Va. 1996); *Buettner v. Super Laundry Machinery*, 857 F. Supp. 471, 477-78 (E.D. Va. 1994) (same), *aff'd*, 47 F.3d 116 (4th Cir. 1995).

Damages. Personal Injury. Plaintiff may recover compensatory damages for past and future medical expenses, past and future pain and suffering, lost earnings, loss of earning capacity, and permanent disability or disfigurement. *E.g., TransiLift Equip., Ltd. v. Cunningham*, 234 Va. 84, 360 S.E.2d 183 (1987). Virginia does not recognize action for loss of consortium. *See Floyd v. Miller*, 190 Va. 303, 57 S.E.2d 114 (1950).

Wrongful Death. Types of damages recoverable in wrongful death action are set forth in the Virginia Death by Wrongful Act statutes. Va. Code Ann. §8.01-5. Statute, however, states that damages are not limited to these items and that trier of fact “may award such damages as to it may seem fair and just.”

Collateral Source Rule. Under collateral source rule, tortfeasor cannot deduct from full compensation owed an injured party any part of benefits injured party received from his health insurance carrier. *Radvany v. Davis*, 262 Va. 308, 551 S.E.2d 347 (2001). Plaintiff entitled to claim full amount of reasonable medical expenses without any reduction for amounts “written off” by health care providers. *Acuar v. Letourneau*, 260 Va. 180, 351 S.E.2d 316 (2000). Medical bills which have been discharged in bankruptcy nonetheless relevant to plaintiff’s damage claim and admissible for limited purpose of showing plaintiff’s pain and suffering. *Barkley v. Wallace*, 267 Va. 369, 593 S.E.2d 190 (2004). “[U]nder the collateral source rule and Code §8.01-35, compensation paid by an employer to an employee during the period of the employee’s disability is not deductible from the quantum of damages the tortfeasor owes.” *Bullard v. Alfonso*, 267 Va. 743, 749, 595 S.E.2d 284, 287 (2004). Evidence of employee’s loss of income is therefore admissible, while fact of reimbursement by employer is excluded. *Id.*

Property Damage. Plaintiff may recover for damage to property, other than product itself, under either tort or breach of warranty theories. *E.g., White Consol. Indus., Inc. v. Swiney*, 237 Va. 23, 376 S.E.2d 283 (1989). Generally, measure of damages is fair market value of property before loss, minus fair market value of property after loss, plus any necessary and reasonable expenses in-

curred incident to loss. *Id.* In warranty, measure of damages is difference between value of goods as received and their value if they had been as warranted. *Wharton, Aldhizer & Weaver v. Savin Corp.*, 232 Va. 375, 350 S.E.2d 635 (1986). Damages may include costs to complete contract or to repair defective product, unless this measure would be “grossly disproportionate to the results to be obtained” or would result in “unreasonable economic waste.” *Klaiber v. Freemason Associates*, 266 Va. 478, 587 S.E.2d 555 (2003).

Economic Loss Rule. “Economic loss rule,” according to Virginia Supreme Court, “limit[s] tort recovery against parties not in privity with the purchaser of a product to cases in which negligent manufacture or design has resulted in a product which constitutes a danger to the safety of persons or property other than the product itself.” *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 424, 374 S.E.2d 55, 57 (1987). Purely economic losses, unaccompanied by injury to person or property other than product itself, are not recoverable in tort or breach of warranty action by a party not in privity of contract. *Blake Constr. Co. v. Alley*, 233 Va. 31, 353 S.E.2d 724 (1987); *Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc.*, 254 Va. 240, 491 S.E.2d 731 (1997).

Punitive Damages. Punitive damages are available in Virginia if defendant’s conduct was willful, wanton, malicious, or in conscious disregard of rights of others. *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 675 (1982). Supreme Court of Virginia has upheld award of punitive damages in products liability case where evidence showed that defendant knew of hazards of product and actively concealed them from product purchasers and users. *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 144, 413 S.E.2d 630 (1992). If awarded, punitive damages should bear some reasonable proportion to actual damages sustained and punishment required. *Stubbs v. Cowden*, 179 Va. 190, 201, 18 S.E.2d 275, 280 (1942). In any action accruing on or after July 1, 1988, total amount of punitive damages which may be awarded against all defendants found to be liable cannot exceed \$350,000. Va. Code Ann. §8.01-38.1.

RELEASE

See Law Digest Tables.

Consideration. Releases not under seal require valuable consideration. *Ferries Co. v. Brown*, 121 Va. 13, 92 S.E. 813 (1917).

Accord and Satisfaction. Accord and satisfaction is a method of discharging contract or cause of action by substituting an agreement and performing on that agreement. “Accord” is agreement and “satisfaction” is



performance of agreement. *Atkins v. Boatwright*, 204 Va. 450, 132 S.E.2d 450 (1963). Accord and satisfaction differs from release in that accord and satisfaction requires both agreement and performance of agreement, while release requires only agreement. *United States v. Centex Constr. Co.*, 638 F. Supp. 411, 413 (W.D. Va. 1985).

Covenant not to Sue. Va. Code Ann. §8.01-35.1 abrogates Virginia common law rule regarding release of joint tort-feasors. Statute now allows plaintiff to enter into covenant not-to-sue with one joint tort-feasor without releasing remaining joint tort-feasors. Statute applies to property damage claims as well as personal injury and wrongful death cases. Va. Code Ann. §8.01-35.1. Release or covenant not to sue shall not be admitted into evidence in trial of matter but shall be considered by court in determining amount for which judgment shall be entered. Statute applies to all such covenants not to sue executed on or after July 1, 1979 and to all releases executed on or after July 1, 1980, regardless of date cause of action affected thereby accrued. Virginia statute which, on day release was given, provided that "when covenant not to sue is given in good faith to one of two or more persons liable in tort for same injury or same wrongful death" did not apply to release, as releases and covenants not-to-sue are not same. Va. Code Ann. §8.01-35.1; *Perdue v. Sears, Roebuck & Co.*, 694 F.2d 66 (4th Cir. 1982). When a claimant executes release of liability as a condition of settlement in a claim or action for personal injury, such claimant has right to rescission until midnight of third business day after day release was executed, provided certain circumstances are met. See Va. Code Ann. §8.01-425.1.

Fraud and Misrepresentation. When evidence is contradictory, jury question exists whether release obtained by fraud or fraudulent misrepresentation. *Provident Life & Accident Ins. Co. v. Walker*, 190 Va. 1016, 59 S.E.2d 126 (1950). Release given in bad faith that is product of collusion or other tortious or wrongful conduct is void. *Dacotah Mktg. & Research, LLC v. Versatility, Inc.*, 21 F. Supp. 2d 570 (E.D. Va. 1998).

Infants/Capacity. Appropriate method to enter into valid, binding release with infant is to have proposed compromise approved pursuant to Va. Code Ann. §8.01-424. See *Fairfax Hosp. Sys. v. McCarty*, 244 Va. 28, 419 S.E.2d 621 (1992).

Joint Tort-feasors. Joint tort-feasor executing release or covenant not-to-sue may not recover contribution from other tort-feasors, nor may any of them recover same from him. Va. Code Ann. §8.01-35.1.

Mistake. Mistake as to how long symptoms from injuries would last when extent of injuries known is not

such mistake of fact as to invalidate release. *Cotman v. Whitehead*, 209 Va. 377, 164 S.E.2d 681 (1968). Fact that doctor later changed his opinion regarding permanency of injuries is mere mistake as to time which would be required for recovery and not such mistake as will enable party to avoid release. *Valentine v. Jester*, 210 Va. 83, 168 S.E.2d 94 (1969). Mutual mistake must be based on mistake of fact and not mistake of law. *Piedmont Trust Bank v. Aetna Cas. & Sur. Co.*, 210 Va. 396, 171 S.E.2d 264 (1969).

REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Statements, declarations and descriptions in application deemed representations and not warranties and will not bar recovery upon policy, or be construed as warranties, anything in policy to contrary notwithstanding, unless clearly proved that such statement was material to risk when assumed and was untrue. Va. Code Ann. §38.2-309. Under Va. Code Ann. §38.2-3514, pre-existing impairment does not exclude insurer from liability unless applicant might reasonably have been expected to know of impairment at time policy was issued. *Sharp v. Richmond Life Ins. Co.*, 212 Va. 229, 183 S.E.2d 132, (1971).

Materiality. Materiality of misrepresentation on application for life insurance is question of law. *Mutual of Omaha v. Echols Adm'rs*, 207 Va. 949, 154 S.E.2d 169 (1967). Test of materiality is whether reasonably careful and intelligent men would consider fact as substantially increasing risk of loss and not whether company would have issued policy had it known of fact. *Buckeye Union Cas. Co. v. Robertson*, 206 Va. 863, 147 S.E.2d 94 (1966). But see *Hawkeye-Security Ins. Co. v. GEICO*, 207 Va. 944, 154 S.E.2d 173 (1967), wherein court stated that misrepresentation is material to risk to be assumed by insurance company if such misrepresentation would reasonably influence company's decision to issue policy. Where deceased misrepresented his marital status in application for family plan insurance policy, it was held material to risk assumed by company and was therefore valid defense to action on policy, whether or not misrepresentation was knowingly or wilfully made. *Chitwood v. Prudential Ins. Co.*, 206 Va. 314, 143 S.E.2d 915 (1965). Statement need not be willfully false or fraudulently made. *Insurance Co. of N. Am. v. U.S. Gypsum*, 639 F. Supp. 1246 (W.D. Va. 1986).

Misrepresentation. False statements in denying prior accidents and traffic violation convictions in automobile liability policy application render policy void. *State Farm Mut. Auto Ins. Co. v. Butler*, 203 Va. 575, 125 S.E.2d 823 (1962). Statement by applicant for auto liability insurance in application that he had never been refused auto insurance by another insurance company



held to be material to risk and voided policy ab initio. *Hawkeye-Security Ins. Co. v. GEICO*, 207 Va. 944, 154 S.E.2d 173 (1967). And, false statements in life insurance policy application held material to risk and barred recovery under policy where plaintiff insured did not disclose that he was under treatment for psychoneurotic condition at time of application. *Fidelity Bankers Life Ins. Corp. v. Wheeler*, 203 Va. 434, 125 S.E.2d 151 (1962). However, insurer denied summary judgment despite applicant's non-disclosure of new provisional diagnosis of cancer because application was ambiguous. *Wheeler v. Crown Life Ins. Co.*, No. 95-0038-L, 1996 U.S. Dist. LEXIS 2186 (W.D. Va. 1996). Mere nondisclosure would not be sufficient for fraud if an investigation is conducted. *Insurance Co. of N. Am. v. U.S. Gypsum*, 639 F. Supp. 1246 (W.D. Va. 1986). In case involving smoker's misrepresentations, where life insurance company did not attach copy of application to policy on issue date, insurer forfeited defense of material misrepresentation based upon application. *Evans v. United Life & Accident Ins. Co.*, 871 F.2d 466 (4th Cir. 1989). Actual fraud requires showing by clear and convincing evidence that false representation of material fact was intentionally and knowingly made with intent to mislead. Injured party must have been damaged as a result of reliance on misrepresentation. Constructive fraud occurs when misrepresentation not made with intent to mislead, but made innocently or negligently. *Nationwide Mut. Ins. Co. v. Hargraves*, 242 Va. 88, 405 S.E.2d 848 (1991). Given evidence of applicant's excessive drinking, including doctor's warnings to abstain, representations of insured that he had never been treated for alcohol use were knowingly false. *Time Ins. Co. v. Bishop*, 245 Va. 48, 425 S.E.2d 489 (1993). Under Va. Code Ann. §38.2-3304, insurer cannot assert defense of misrepresentation or omission in insurance application unless application was attached to or made part of insurance policy. *Hammond v. Pacific Mut. Life Ins. Co.*, 2003 U.S. App. LEXIS 1063 (4th Cir. 2003).

SERVICE OF PROCESS

See Law Digest Tables.

Upon Non-Resident Motorist. Commissioner of the Department of Motor Vehicles serves as agent for service of process. Va. Code Ann. §8.01-308.

Upon Domestic Corporation. Process may be served on corporation created by state law by personal service on any officer, director, or registered agent of such corporation, or by substituted service. Va. Code Ann. §8.01-299. Process may be serviced through substituted service on stock corporations in accordance with Va. Code Ann. §13.1-637. Process may be served through substituted service on nonstock corporations in

accordance with Va. Code Ann. §13.1-836. In circuit court cases, a plaintiff may now ask a domestic corporation to accept service of process by executing a waiver of service of process in lieu of formal service. The corporation is under a duty to respond to the request for waiver so as to avoid unnecessary costs of service of process. Va. Code Ann. §8.01-299.

Personal jurisdiction also authorized over non-resident corporation that transacts business in Virginia by Va. Code Ann. §13.1-758. Service of process affected through Clerk of State Corporation Commission if no director, officer or agent of corporation may be found.

Virginia long-arm statute (Va. Code Ann. §§8.01-328 to 8.01-330) is remedial in nature and has retroactive effect for service of process. *Walke v. Dallas, Inc.*, 209 Va. 32, 161 S.E.2d 722 (1968). Statute extends jurisdiction of Virginia courts to outer limits of due process. *ePlus Technology, Inc. v. Aboud*, 313 F.3d 166 (4th Cir. 2002).

Where there was substantial basis to conclude that plaintiff knew where defendant could be located for service of process, plaintiff could not give necessary affidavit required by the long-arm statute and service of process on defendant was defective. *Khatchi v. Landmark Restaurant Ass'n*, 237 Va. 139, 375 S.E.2d 743 (1989). Where plaintiff failed to file affidavit showing non-resident defendant's last known address, failure constituted material failure to comply with statute governing construct service of process. *O'Connell v. Bean*, 263 Va. 176, 556 S.E.2d 741 (2002).

Service by Facsimile. Service may be made upon corporations by facsimile where registered agent has authorized it and returns an acknowledgement of receipt to sheriff. Va. Code Ann. §13.1-637.

SUBROGATION

See Va. Code Ann. §§8.01-251(F), 38.2-207, -2206(G), -2209, -3405, 49-27, 65.2 -309, -309.1, -311, -812.

In General. Insurer who paid loss to mortgagee covering only part of mortgage debt acquires against mortgagee no right to demand and take from mortgagee evidence of debt until the mortgage satisfied in full. *Phoenix Ins. Co. v. First Nat'l Bank*, 85 Va. 765, 8 S.E. 719 (1889). Where builder's insurer had no obligation to pay homeowners, since they were not named insureds under builder's policy, homeowners' insurer was not entitled to subrogation. *Ohio Cas. Ins. Co. v. State Farm Fire & Cas. Co.*, 262 Va. 238, 546 S.E.2d 424 (2001).

Right of contribution is not personal right of tortfeasor but is chose in action to which insurer may be



subrogated. *McKay v. Citizens Rapid Transit Co.*, 190 Va. 851, 59 S.E.2d 121 (1950).

Subrogation provision requiring insured to do nothing after loss to prejudice insurer's rights held valid. *Virginia Farm Bureau v. Gibson*, 236 Va. 433, 374 S.E.2d 58 (1988).

Surety. Surety completing contract on default of principal entitled to proceeds of contract against bank holding assignment as security for loan. *School Bd. of Carroll County v. First Nat'l Bank*, 161 Va. 127, 170 S.E.2d 625 (1933).

Workers' Compensation. Under Workers' Compensation Act, the employer/insurer is subrogated to an employee's rights against a third party responsible for injuries, occupational diseases, or death benefits giving rise to the payment of compensation. See Va. Code Ann. §65.2-309. The purpose of the statute is to reimburse an employer who is compelled to pay compensation as a result of a third party's negligence and to prevent an employee from obtaining a double recovery of funds. *Tomlin v. Vance Intl., Inc.*, 22 Va. App. 448, 470 S.E.2d 599 (1996). See *Gartman v. Allied Towing Corp.*, 467 F. Supp. 439 (E.D. Va. 1979).

WAIVER AND ESTOPPEL

Va. Code Ann. §38.2-2226, which provides that insurer on policy of liability insurance waives right to rely on breach of terms or conditions of insurance contract by insured if it fails to notify claimant of intent to rely on such breach within 45 days after discovery of breach, is inapplicable to claim by insured under uninsured motorist endorsement because such coverage intended only to indemnify insured and not "liability insurance." *Maxe v. Doe*, 217 Va. 22, 225 S.E.2d 359 (1976); See also *Liberty Mut. Ins. v. SAFECO Ins.*, 223 Va. 317, 288 S.E.2d 469 (1982). Since contractor's liability insurer discovered contractor's breach of contract provisions more than three months before notifying claimants, it did not satisfy statutory notice requirement and waived right to raise the defense. *Morrel v. Nationwide Mut. Fire Ins. Co.*, 188 F.3d 218 (1999).

Party asserting waiver has burden of establishing that other party waived contractual requirements. *Service Steel Erectors Co. v. SCE, Inc.*, 573 F. Supp. 177 (W.D. Va. 1983). There can be no waiver unless person against whom it is claimed had full knowledge of rights and facts which will enable him to take effectual action for their enforcement. *Hammond v. Pacific Mut. Life Ins. Co.*, 159 F. Supp. 2d 249 (E.D. Va. 2001).

Where policy provides for arbitration and award before suit brought, insurer must ask for arbitration promptly or be held to have waived provision in policy.

Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S.E. 120 (1890). In absence of fraud or collusion, insurer who is bound by contract to defend suit against insured is bound by outcome of suit where insurer has been notified of suit and given chance to appear. *Guaranty Title & Trust Corp. v. Virginia-Carolina Tie & Wood Co., Inc.*, 152 Va. 698, 148 S.E. 815 (1929). Although policy in ice plant provides that in case building is unoccupied for ten consecutive days policy will be forfeited, where character of business is such that continuous operation cannot be contemplated by insured or insurer, insurer cannot set up as defense to action on policy fact that plant was out of operation for ten days. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S.E. 487 (1895). If general agent of insurance company with broad powers agrees that no rider is necessary where property covered is subject to contract of sale, insurance company estopped to set up forfeiture under conditional and sole ownership clause in policy. *Atlantic Trust & Sec. Co. v. Girard Fire & Marine Ins. Co.*, 156 Va. 15, 157 S.E. 570 (1931). Insurer's right to rely upon endorsement on back of checks given insured in accident policy as release of claim where printed form for endorsement states that endorsement release is waived where insurer continues to send insured payments on claim. *Provident Life & Accident Ins. Co. v. Nicholson*, 157 Va. 345, 160 S.E. 5 (1931). Where insurer alone responsible for misdescription of character of building covered by fire insurance policy and there is no evidence of bad faith on part of insured, insurer estopped from setting up misdescription. *Westchester Fire Ins. Co. v. Rose*, 159 Va. 633, 166 S.E. 469 (1932).

Insured's collusive submission to service of process in Tennessee amounted to non-cooperation, relieving insurer of duty to defend, where accident occurred in Kentucky and policy was issued in Virginia but insured and his wife, the plaintiff, arranged for service in Tennessee where the law was more favorable to interpersonal claims. *Mayflower Ins. Co. v. Osborne*, 326 F.2d 461 (4th Cir. 1964).

Settlement by insurer of claim against insured for personal injuries pursuant to policy provisions, but without consent of insured, does not estop insured from bringing action against claimant for insured's own damages arising out of same accident. *Eller v. Blackwelder*, 204 Va. 292, 130 S.E.2d 426 (1963).

Where insurer's right to rely upon forfeiture has been waived, it cannot be revived. *Hartford Fire Ins. Co. v. Mutual Sav. & Loan Co.*, 193 Va. 269, 68 S.E.2d 541 (1952). Policy provisions for forfeiture or avoidance on breach of condition may themselves be waived, *Virginia Auto Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 46 S.E.2d 377 (1948), as may right to rely as ground for rescission



on materiality of untrue statements made in application for policy. *Virginia Mut. Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 204 Va. 783, 133 S.E.2d 277 (1963). Insured does not forfeit rights under policy by failing to forward legal process to company where company has disclaimed liability under policy. *Andrews v. Cahoon*, 196 Va. 790, 86 S.E.2d 173 (1955).

Doctrine of estoppel applies against insurer only when insured can prove he justifiably relied on insurer's conduct and, thus, was misled by company's actions into believing that the policy was still in force. *Harris v. Criterion Ins.*, 222 Va. 496, 281 S.E.2d 878 (1981). See also *Employers Commercial Union Ins. Co. v. Great Am. Ins. Co.*, 214 Va. 410, 200 S.E.2d 560 (1973). In waiver, both knowledge of the facts basic to the exercise of the right and the intent to relinquish that right are essential elements. *Id.*

The doctrine of judicial estoppel does not apply where the parties to the proceedings are not the same and one defendant's liability in the suit before the court is not derivative of the liability of another defendant in another suit. *Lofton Ridge, LLC v. Norfolk Southern Ry. Co.*, 268 Va. 377, 501 S.E.2d 648 (2004). The doctrine of judicial estoppel does not prevent a party from asserting an inconsistent position if the prior inconsistent position was not successful in the earlier litigation. *Bentley Funding Group L.L.C. v. SK&R Group L.L.C.*, 269 Va. 315, 609 S.E.2d 49 (2005).

WORKERS' COMPENSATION

Generally. Virginia's Workers' Compensation Act. See Va. Code Ann. §65.2-100 *et seq.*

Jurisdiction. Workers' Compensation Commission vested with jurisdiction to determine all questions arising under the Workers' Compensation Act. Va. Code Ann. §65.2-700. Includes power to enforce its orders and resolve coverage and payment disputes. *Combustion Eng., Inc. v. Lafon*, 22 Va. App. 235, 468 S.E.2d 698 (1996). Commission not authorized to apply laws of another state. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 65 L. Ed. 2d 757 (1980). Jurisdiction limited to issues directly related to employee's right to compensation for work-related injury, and does not extend to litigation between two insurance carriers. *Hartford Fire Ins. Co. v. Tucker*, 3 Va. App. 116, 348 S.E.2d 416 (1986). When an impairment does not fall within scope of Act, plaintiff is not required to submit claim to Commission before proceeding with common law claim. *Adams v. Alliant Techsystems, Inc.*, 261 Va. 594, 544 S.E.2d 354 (2001).

Appellate Jurisdiction. In most circumstances, appeal from first hearing of worker's compensation matters

may be made to full three person Commission. Va. Code Ann. §65.2-705. Appeal of right lies to Virginia Court of Appeals from full Commission. Va. Code Ann. §17.1-405. Virginia Supreme Court hears appeals from Court of Appeals on discretionary basis. Va. Code Ann. §17.1-411.

Benefits-Wages. For total incapacity to work, injured employee entitled to receive 2/3 of pre-injury average weekly wage, subject to a floor of 25% and a ceiling of 100% of average weekly wage of Commonwealth. Va. Code Ann. §65.2-500. If limited in ability to work, employee is entitled to 2/3 of difference between pre-accident average weekly wage and post-accident average weekly wage. Va. Code Ann. §65.2-502.

Medical. Va. Code Ann. §65.2-603 requires employer to furnish medical care causally related to covered injury for life of employee.

Disability. Va. Code Ann. §65.2-503 sets out number of weeks compensation for loss of use of specified body parts. Compensation is payable at rate of 2/3 of average weekly wage. Va. Code Ann. §65.2-503. Certain severe injuries (paralysis, loss of two limbs, etc.) entitle employee to compensation at 2/3 of average weekly wage for life. Va. Code Ann. §§65.2-503, 65.2-500.

Death. Injuries causing death require employer to make payments of average weekly wage to "total dependents" as defined by Va. Code Ann. §65.2-515 for 500 weeks or, if no total dependents exist, to those determined to be "wholly dependent" under §65.2-515 for 400 weeks. Va. Code Ann. §65.2-512. Employer also responsible for burial expenses not exceeding \$10,000 and transportation expenses not exceeding \$1,000. Va. Code Ann. §65.2-512.

Medical expenses for disc surgery following automobile accident are recoverable and compensation award properly extended where such surgery causally related to prior industrial back injury aggravated by automobile accident. *Fairfax Hosp. v. DeLaFleur*, 221 Va. 406, 270 S.E.2d 720 (1980). Claimant's false statement as to felony convictions in employment application did not preclude claimant from receiving workers' compensation benefits, since there was no causal relationship between work-related injury and misrepresentation. *Prince William County Serv. Auth. v. Harper*, 256 Va. 277, 504 S.E.2d 616 (1998). Illegal immigrant could not be denied workers' compensation benefits because he misrepresented his immigration status on employment application, since misrepresentation was not causally related to his injury. *Granados v. Windson Dev. Corp.*, 257 Va. 103, 509 S.E.2d 290 (1999). When employee is injured on job while in concurrent employment, average weekly wage based on combined earnings of both jobs,



but only if jobs are related or similar. *First Va. Banks, Inc. v. McNeil*, 8 Va. App. 342, 381 S.E.2d 357 (1989). See also *Mercy Tidewater Ambulance Serv. v. Carpenter*, 29 Va. App. 218, 511 S.E.2d 418 (1999); *Dinwiddie County Sch. Bd. v. Cole*, 258 Va. 430, 520 S.E.2d 650 (1999) (holding that worker's earnings from two jobs should be combined when determining average weekly wage, since they were performed for same employer, even though jobs were dissimilar.) Although claimant, self-employed contractor, continued to receive draws of profits from his business while disabled from work-related accident, still entitled to receive workers' compensation benefits. *Smith v. Smith*, 32 Va. App. 242, 527 S.E.2d 463 (2000).

Employment Defined. Under Workers' Compensation Act employer-employee relationship exists only if control over employee exists which includes power to control not only result accomplished but also means and methods by which result is to be accomplished. *Richmond Newsps. v. Gill*, 224 Va. 92, 294 S.E.2d 840 (1982). Employment that is not permanent or periodically regular, but occasional or by chance and is not in usual course of employer's trade or business is casual employment and Act does not apply. See Va. Code Ann. §65.2-101; *Board of Supervisors v. Boaz*, 176 Va. 126, 10 S.E.2d 498 (1940). By statute, aliens and minors are employees under the Act. Va. Code Ann. §65.2-101.

Exclusive Remedy. Act is exclusive remedy for employee against employer. Va. Code Ann. § 65.2-307. An employee subject to the Act cannot file an independent tort action against his employer or any fellow employee for injuries received in the course of employment. *Hudson v. Jarrett*, 269 Va. 24, 606 S.E.2d 827 (2005). Sole proprietor, an independent contractor, may rely upon exclusive nature of Workers' Compensation Act to defeat claim by employee of another contractor on same project. *Evans v. Hook*, 239 Va. 127, 387 S.E.2d 777 (1990). Injury to reputation is not injury within scope of exclusive remedy provision of Act. *Snead v. Harbaugh*, 241 Va. 524, 404 S.E.2d 53 (1991). Where partners elect to be included as employees under Workers' Compensation Act, they are subject to all provisions including exclusive remedy provision. *Counts v. Stone Container Corp.*, 239 Va. 152, 387 S.E.2d 481 (1990).

An employee's negligence suit against employer not barred by worker's compensation where sexual assault occurred at work place and rape did not arise out of the employment, even though rapist took money from employer's cash box and purse of employee. *Reamer v. National Serv. Indus.*, 237 Va. 466, 377 S.E.2d 627 (1989).

Arising out of and in the course of. Uncontradicted medical reports that employee's injury resulted from "accident" sufficient to make injury compensable. Expressions "arising out of" and "in course of" are conjunctive as used in Virginia Workers' Compensation law. If employee is required to be at location of accident because of her employment, she fulfills test of "in course of" her employment. *Reserve Life Ins. Co. v. Hosey*, 208 Va. 568, 159 S.E.2d 633 (1968). However, accident must also "arise out of" employment. Injury not compensable merely because claimant on job at time of injury. *County of Chesterfield v. Johnson*, 237 Va. 180, 376 S.E.2d 73 (1989). See Va. Code Ann. §65.2-101.

Truck driver could not recover for injuries related to "unexplained" single vehicle accident - injuries did not "arise out of" employment. *Hill v. Southern Tank Transport, Inc.*, 44 Va. App. 725, 607 S.E.2d 730 (2005). Traffic flagger's heatstroke and heart attack "arose out of" employment and were compensable when conditions of job (lack of breaks and water) combined with high temperature to cause injury. *Kjellstrom & Lee, Inc. v. Saunders*, 42 Va. App. 673, 594 S.E.2d 281 (2004).

Injury resulting from willful and intentional assault of either fellow employee or third person is an accidental injury within meaning of act. *Haddon v. Metropolitan Life Ins.*, 239 Va. 397, 389 S.E.2d 712 (1990) (overruled on other grounds). In order for claimant to be awarded benefits as result of an assault, claimant must establish assault was directed against him as an employee, or because of his employment. *Smithfield Packing Co. v. Carlton*, 29 Va. App. 176, 510 S.E.2d 740 (1999).

Injury to employee caused by motor vehicle accident where employer was furnishing employee transportation as convenience to employee, and no benefit derived by employer, and no agreement, express or implied, that employer would furnish transportation, and transportation not connected in any way with any duty expected of employee, held not to have occurred in course of or arising out of employee's employment, and Workers' compensation was denied in such case. *Le-White Constr. Co. v. Dunn*, 211 Va. 279, 176 S.E.2d 809 (1970). Hospital clerk who had left work, but came back inside to give colleague a ride, was not within course of her employment when she slipped and injured her knee. *Norfolk Comm. Hosp. v. Smith*, 33 Va. App. 1, 531 S.E.2d 576 (2000). Since employer resumed trip to employee's home in fulfillment of agreement to provide transportation to and from work, injuries sustained by employee arose out of and in the course of employment despite fact that accident occurred when employer lost control of vehicle after drinking alcohol. *Vaughan's Landscaping & Maint. v. Dodson*, 262 Va. 270, 546



S.E.2d 437 (2001). Employer's promise to pay employee's parking costs or subway fares did not mean employer had to pay workers' compensation when employee was struck by car while walking to subway stop. *Blaustein v. Mitre Corp.*, 36 Va. App. 344, 550 S.E.2d 336 (2001).

Occupational Disease. Defined. Disease arising from course of employment, but not disease general public is exposed to outside of employment. Va. Code Ann. §65.2-400. Must have a causal link between disease and employment. *Id.* Pneumonia contracted by service station attendant who worked without boots, overshoes or raincoat in rainy, snowy and cold weather during which there was standing water around gasoline pumps was not injury by accident compensable under Workers' Compensation Act. *Robinette v. Kayo Oil Co.*, 210 Va. 376, 171 S.E.2d 172 (1969). Claimant's allergic contact dermatitis was compensable as occupational disease. *A New Leaf, Inc. v. Webb*, 257 Va. 190, 511 S.E.2d 102 (1999). Presumption of occupational disease if firefighters or Department of Emergency Management hazardous materials officers suffer respiratory diseases causing death or disability unless such presumption is overcome by a preponderance of competent evidence. Va. Code Ann. §65.2-402(A). Presumption of occupational disease if certain workers suffer from hypertension or heart disease causing death or disability unless such presumption is overcome by a preponderance of competent evidence. Va. Code Ann. §65.2-402(B). Presumption of occupational disease if certain workers, who have contact with a toxic substance in the line of duty, suffer from specified forms of cancer causing death or disability unless such presumption is overcome by preponderance of competent contrary evidence. Va. Code Ann. §65.2-402(C). Presumptions in §65.2-402(A)-(C) shall only apply if workers underwent pre-employment physical examinations, if requested by the private employers, and such examinations were free of the respective diseases at that time. Presumption of occupational disease if certain workers suffer from hepatitis, meningococcal meningitis, tuberculosis or HIV causing death or disability when workers were exposed to blood or body fluids. To invoke presumption, workers must have undergone pre-employment physical examinations if requested. Presumptions are effective until six months following examinations. Va. Code Ann. §65.2-402.1.

Mental Injury. Psychological injuries that are consequence of other compensable injury are compensable. *Bassett Burkeville Veneer v. Slaughter*, 21 Va. App. 575, 466 S.E.2d 127 (1996) (major depression related to cartilage tear in chest covered by Act). Purely psychological injury must be causally related to physical injury or causally related to obvious sudden shock or fright arising in the course of employment to be compensable. *Ches-*

terfield County v. Dunn, 9 Va. App. 475, 389 S.E.2d 180 (1990) (post traumatic stress disorder in firefighter related to treating accident victims not covered by Act).

Pre-existing Injury. Employer takes employee as employer finds him or her. *Kemp v. Tidewater Kiewit*, 7 Va. App. 360, 373 S.E.2d 725 (1998). Pre-existing condition "accelerated or aggravated" by injury sustained in industrial accident establishes causal connection between injury and disability and is compensable. *Southern Iron Works, Inc. v. Wallace*, 16 Va. App. 131, 428 S.E.2d 32 (1993).

Fellow Employee Rule. Construction worker and architectural engineering firm are not statutory fellow employees where work done by firm was not result of "employer's" business purpose of providing mass transportation services. Act did not preclude common law negligence action against firm. *Nichols v. VVKR, Inc.*, 241 Va. 516, 403 S.E.2d 698 (1991). Subcontractor furnishing building trusses was performing services under general contract and not "other party" within wording of compensation Act, and general contractor's employee injured by subcontractor had no right of action against subcontractor. *Haynes v. James H. Carr, Inc.*, 427 F.2d 700 (4th Cir.), cert. denied, 400 U.S. 942, 91 S. Ct. 238 (1970). Independent contractor performing services for "statutory employer" cannot be "other party" liable in common law action, and contractor's employees are therefore barred from suing their employer to same extent that they are barred from suing owner who is their statutory employer; likewise, employee of owner cannot sue independent contractor for injuries caused by contractor's negligence, if it is performing normal work of owner. Va. Code Ann. §65.2-302; *Farish v. Courion Indus., Inc.*, 754 F.2d 1111 (4th Cir. 1985). Since Workers' Compensation Act does not bar personal injury claim where defendants are strangers to the particular business of injured party's employer, employee erroneously dismissed personal injury action against architect, contractor, and subcontractors employed by owner of plant at which plaintiff worked. *Stone v. Door-Man Mfg. Co.*, 260 Va. 406, 537 S.E.2d 305 (2000). However, where store's employee and contractor were engaged in common goal of keeping store clean, attractive and safe, contractor was not a "stranger to business" and trial court correctly dismissed a personal injury suit against him. *Fowler v. Int'l Cleaning Service*, 260 Va. 421, 537 S.E.2d 312 (2000).

Liens. Language of Va. Code Ann. §§65.2-309 and -310 when considered together permits employer to assert its statutory lien against any recovery obtained in action brought against third party liable for employee's injury or death. *Liberty Mut. Ins. Co. v. Fisher*, 263 Va. 78, 557 S.E.2d 209 (2002). If employee receives pro-



ceeds of settlement or verdict subject to employer's lien without lien being satisfied, employer has right to recover on lien through credit against benefits or by bringing suit against person receiving proceeds. Va. Code Ann. §65.2-309(D). Employer is entitled to "reasonable notice" of court actions brought by employee against third parties in order to ascertain amount of employer's lien. Va. Code Ann. §65.2-310.

Attorney's Fees. Attorney's fees not to be assessed against employer's insurance carrier where it had reasonable grounds for defending Workers' compensation claim. *Hawkeye-Security Ins. Co. v. McDaniel*, 210 Va. 209, 169 S.E.2d 582 (1969). Fees subject to approval and award of Commission. Va. Code Ann. §65.2-714.

Subrogation. Employer authorized under Va. Code Ann. §65.2-309 to pursue action against third party causing injury to employee that results in worker's compensation claim against employer. No settlements of such actions may be made without approval of Worker's Compensation Commission and injured employee or representative of deceased employee. Va. Code Ann. §65.2-309. Employer may recover workers' compensation payments from the proceeds of third-party recoveries paid to employees from the uninsured or underinsured motorist coverages of employers' motor vehicle insurance policies. Va. Code Ann. §§65.2-309.1; 38.2-2206.