MARKS & HARRISON POINTS of LAW

By Marks & Harrison Attorneys

Volume 4 | Number 2 | Summer 2026

IN THIS ISSUE

Daniel E. Savage

Statutory Punitive Damages for Hit-and-Runs: A New Tool for Victims

By Daniel E. Savage

On July 1, 2025, on a rural highway in Virginia, miles away from the closest town, Frank Jones rear-ended Nancy Smith on a highway. As a result of the collision, Nancy hits her head on the steering wheel, causing her nose to bleed and a knot to develop on her head. Immediately after the collision, Nancy Smith looks in her rearview mirror, sees Frank Jones's license plate and writes down his license plate number. After writing down Frank Jones's license plate number, Nancy notices her nose is bleeding, that she has neck pain and is dizzy. When Frank Jones comes to her window, she tells him that she is injured and he tells her that her vehicle has sustained significant damage Before emergency personnel arrive at the scene, Frank Jones flees the scene of the collision leaving Nancy Smith alone, injured, and unable to safely operate her vehicle. While officers eventually are able to track Frank Jones down and charge him for causing the collision and leaving the scene of the collision, that is a cold comfort to Nancy Smith who was traumatized from Frank Jones abandoning her for injuries he had caused her to suffer.

Continued on next page

Continued from previous page

While emergency personnel arrived at the scene, Nancy Smith does not immediately recover from her injuries. EMTs rush her to Bon Secours Southside Medical Center and then she has a round of physical therapy to treat her concussion symptoms and neck pain. At the end of her treatment, her bills are a little over $10,000. She hires counsel to represent her related to a personal injury action against Frank Jones.

Meanwhile, although Frank Jones is unrepentant for rear-ending Nancy Smith and fleeing the scene, the Commonwealth fails to punish him. At Frank Jones's criminal trial, it is revealed that the officer who arrested Frank Jones has retired and moved to Alaska, making him unavailable for trial and dooming the Commonwealth's case against Frank Jones.

After negotiations are unable to resolve the case pre-suit, Nancy Smith's counsel contemplates filing a suit against Frank Jones. Nancy Smith expresses to her counsel that Frank Jones's conduct is so egregious that she would like to look beyond just compensating herself for her injuries and into punishing Frank Jones. Nancy Smith's counsel agrees that Frank Jones's conduct *should* be sufficient to punish him for his actions. Therefore, Nancy Smith's counsel files a lawsuit against Frank Jones not only for compensatory damages but also punitive damages.

Boom! The moment that the case is assigned to Frank Jones's counsel, she springs into action filing a demurrer related to Nancy Jones's punitive damages claim against Frank Jones. In quick succession, Frank Jones's counsel notices a hearing on the demurrer and the Court sustains Frank Jones's counsel demurrer to Nancy Jone's punitive damages claim. In what seems like a flash, Nancy Smith's punitive damage claim against Frank Jones is extinguished and Frank Jones's conduct after the collision is irrelevant to the case.

Before this year, this hypothetical was all too common in the Commonwealth under controlling case law of *Doe v. Isaacs,* 265 Va. 531, 579 S.E.2d 174 (2003). In the underlying collision related to those consolidated cases, the undisputed facts are as follows: the Isaacs (Mr. and Mrs. Issacs) were rear-ended by a motorist who struck the Issacs' car. That unknown motorist, hereinafter referred to as "John Doe," staggered to the Issacs' vehicle on foot after the collision. When John Doe spoke to the Isaacs, his speech was slurred and he asked them not to call the police. After speaking to the Isaacs, John Doe drove away from the scene of the collision before the police arrived. John Doe's identity was never revealed.

On appeal, although the jury had awarded $175,000 in punitive damages in each case, the Supreme Court of Virginia reversed the judgments for punitive damages. The standard that the Court applied was the same contemplated in *Booth v. Robertson*, which stated "that negligence which is so willful or wanton as to evince a conscious disregard of the rights of others, as well as malicious conduct, will support and award of punitive damages in a personal injury case." 236 Va. 269, 273, 374 S.E.2d 1, 3 (1988). Reviewing the facts in *Isaacs*, the Court noted that John Doe's bad behavior was the following: failure to keep a proper lookout of vehicles stopped ahead of him, failure to keep his vehicle under proper control, probable intoxication and feloniously leaving the scene of the collision. *Isaacs*, 265 Va. at 538, 579 S.E.2d at 178. However, the Court also noted that there was no evidence the John Doe was driving an unreasonable speed under the circumstances or that he was driving

Continued on next page

Continued from previous page

on the wrong side of the road. *Id*. Ultimately, the *Isaacs* Court found that although John Doe's behavior was grossly negligent, it did not rise to a level of being so willful or wanton as to show a conscious disregard for the rights of others. *Id*.

Since 2003, the *Isaacs* ruling has explicitly prevented Plaintiffs from seeking common law punitive damages against hit-and-run drivers.

Enter House Bill No. 1479. On April 8, 2026, Governor Abigail Spanberger signed this bipartisan bill, sponsored by Delegate Will P. Davis (R–Franklin and Roanoke) and Delegate Rae C. Cousins (D–Richmond), into law and it was entered into the Acts of Assembly on the same day. That law, which will be a new, stand-alone statute codified as Virginia Code § 8.01-44.5:1 reads, in its entirety: "In any action for personal injury or death arising from conduct that constitutes a felony violation of § 46.2-894, punitive damages may be awarded to the plaintiff."

By referencing § 46.2-894, lawyers must review that statute to fully understand § 8.01-44.5:1. It states:

> The driver of any vehicle involved in an accident in which a person is killed or injured or in which an attended vehicle or other attended property is damaged shall immediately stop as close to the scene of the accident as possible without obstructing traffic, as provided in § 46.2-888 (code section regarding stopping on highways), and report his name, address, driver's license number, and vehicle registration number forthwith to the State Police or local law-enforcement agency, to the person struck and injured if such person appears to be capable of understanding and retaining the information, or to the driver or some other occupant of the vehicle collided with or to the custodian of other damaged property. The driver shall also render reasonable assistance to any person injured in such accident, including taking such injured person to a physician, surgeon, or hospital if it is apparent that medical treatment is necessary or is requested by the injured person.
>
> Where, because of injuries sustained in the accident, the driver is prevented from complying with the foregoing provisions of this section, the driver shall, as soon as reasonably possible, make the required report to the State Police or local law-enforcement agency and make a reasonable effort to locate the person struck, or the driver or some other occupant of the vehicle collided with, or the custodian of the damaged property, and report to such person or persons his name, address, driver's license number, and vehicle registration number.
>
> Any person convicted of a violation of this section is guilty of (i) a Class 5 felony if the accident results in injury to or the death of any person, or if the accident results in more than $1000 of damage to property or (ii) a Class 1 misdemeanor if the accident results in damage of $1000 or less to property.

This statute prescribes what a driver must do following a collision involving injuries, death or damage to property, effectively punishing those who flee the scene of a collision. It specifically says that any person convicted of violating this section shall be guilty of a Class 5 felony if the accident resulted in an injury, death, or property damage that was over $1,000. Most importantly for analysis of personal injury cases, this low threshold is met for all personal injury cases.

Returning back to § 8.01-44.5:1, note that only felony hit-and-run conduct, as outlined in § 46.2-894, is required under to seek punitive damages under § 8.01-44.5:1, so this punitive vehicle is *not* dependent on a felony *conviction*. In a personal injury case, in which by definition the Plaintiff was injured, this conduct rises to the level of warranting punitive damages under § 8.01-44.5:1 if the Defendant flees the scene of the collision.

Moreover, the use of the word "any" is very important in the statute because it allows for punitive damages *even in cases in which John Doe is never identified*. The purpose of common law punitive damages is

Continued on next page

Continued from previous page

three-fold: to punish the defendant, to protect the public, and to serve "as a warning and example to deter [the defendant] and others from committing like offenses." *Baker v. Marcus,* 201 Va. 905, 909, 114 S.E.2d 617, 620 (1960). Presumably, only a part of those considerations would apply to having punitive damages in a John Doe case. However, because this is a statutory right that has explicit text, the General Assembly clearly intends to allow the Plaintiff to seek punitive damages even if the felonious hit-and-run driver is unknown. *Cf.* Va. Code § 8.01-25 ("punitive damages shall not be awarded after the death of the party liable for the injury").

Another important word in the new statute is "may," as in "punitive damages may be awarded to the plaintiff." So even if a personal injury plaintiff can satisfy the prerequisites for the statute to apply, an award of punitive damages remains discretionary. *See Wal-Mart Stores East, LP v. State Corp. Comm'n*, 299 Va. 57, 70 & n.5, 844 S.E.2d 676, 682 & n.5 (2020) (statutory use of the word "may" connotes something permissive and discretionary).

And in this regard, it is equally important to recognize what the new statute does *not* say. Similar to the new statute, the existing statute for punitive damages provides:

> In any action for personal injury or death arising from the operation of a motor vehicle, engine or train, *the finder of fact may, in its discretion, award punitive damages* if the evidence proves that the defendant acted with malice toward the plaintiff or the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others.

Va. Code § 8.01-44.5 (emphasis added).

Unlike the new statute, however, the existing statute goes further, providing that "A defendant's conduct *shall be deemed sufficiently willful or wanton as to show a conscious disregard for the rights of others* when the evidence proves that" (i) the defendant's BAC was at least 0.15; (ii) the defendant knew or should have known that his ability to operate a vehicle was impaired; and (iii) the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff. Va. Code § 8.01-44.5 (emphasis added).

So although initially couched in permissive terms ("may"), when the requisites of § 8.01-44.5 are met, punitive damages become mandatory ("shall"). Being that the mandatory words "shall" or "must" are both absent from the text of the new statute, even proof of felonious hit-and-run conduct does not guarantee an award of punitive damages under § 8.01-44.5:1. *See City of Richmond v. Va. Elec. & Power Co.*, 292 Va. 70, 75, 787 S.E.2d 161, 164 (2016) ("[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional.").

Back to Nancy Smith. Can she seek punitive damages under § 8.01-44.5:1 against Frank Jones? Unfortunately, no. This new law does not take effect until July 1, 2026. "Unless a contrary legislative intent is manifest," statutes are generally considered to apply prospectively rather than retroactively. *McCarthy v. Commonwealth,* 73 Va. App. 630, 647, 864 S.E.2d 577, 585 (2021). This presumption can be overcome if the General Assembly uses explicitly retroactive legislation or if the law only affects procedure and not substantive rights. *Montgomery v. Commonwealth,* 75 Va. App. 182, 190, 875 S.E.2d 101, 105 (2022). Here, there is no retroactive language. Additionally, this bill affects her right to file a punitive damage claim against Frank Jones, so it affects her substantive rights. *See Finney v. Hearn,* 35 Va. Cir. 89 (Fairfax 1994) (expressly holding that Code § 8.01-44.5 was substantive and thus not entitled to retroactive effect).

Although Nancy Jones's claim for punitive damages against Frank Jones was unsuccessful, after July 1, 2026, lawyers who represent victims of hit-and-run collisions will have a powerful new tool in their arsenal when seeking justice for their clients.

Tort Claims Against the Commonwealth of Virginia

By Steven G. Friedman

Bringing suit against the government implicates rules and procedures not applicable to the usual private-party tort case. The following is part two of a three-part series summarizing the various specialized process for bringing a negligence claim against local, state, and federal governmental entities. The following article addresses filing a tort claim against the Commonwealth of Virginia. Please note, however, that the question of whether a particular governmental entity is immune or otherwise not liable is beyond the scope of this writing.

Pre-Suit Notice

Pursuant to the Virginia Tort Claims Act ("VTCA"), Va. Code §§ 8.01-195.1 through -195.9, a tort claim "against the Commonwealth or a transportation district[1] shall be forever barred unless the claimant or his agent . . . has filed a written statement of the nature of the claim . . . within one year after such cause of action accrued." Va. Code § 8.01-195.6(A). "However, if the claimant was under a disability at the time the cause of action accrued, the tolling provisions of § 8.01-229 shall apply." *Id.*[2]

The requisite written notice must not only state "the nature of the claim" but also include "the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable." Va. Code § 8.01-195.6(A). "'Agency' means any department, institution, authority, instrumentality, board or other administrative agency of the government of the Commonwealth of Virginia and any transportation district created pursuant to the Transportation District Act of 1964 (§ 33.2-1900 et seq.)." Va. Code § 8.01-195.2. A notice that does not explicitly include the agency or agencies alleged to

[1] "Transportation district" does not mean VDOT but rather is "limited to any transportation district or districts which have entered into an agreement in which the Northern Virginia Transportation District is a party . . . to provide passenger rail services[.]" Va. Code § 8.01-195.

[2] Furthermore, the failure to provide a written notice "shall not bar a claim . . . provided that" the person or office who should have received the written notice "had actual knowledge of the claim, which includes the nature of the claim, the time and place at which the injury is alleged to have occurred, and the agency or agencies alleged to be liable, within one year after such cause of action accrued." Va. Code § 8.01-195.6(A).

Continued on next page

Continued from previous page

be liable is insufficient, even where such information is easily inferred from the notice. *See Phelan v. Commonwealth*, 291 Va. 192, 781 S.E.2d 567 (2016).

When providing the place where the injury occurred the claimant must provide sufficient detail so that a reasonable person could identify the location of the incident. *Compare Halberstam v. Commonwealth,* 251 Va. 248, 467 S.E.2d 783 (1996) (dismissed a claim for an injury that occurred in a university parking lot because the notice did not specify in which parking lot the injury occurred) *with Bates v. Commonwealth,* 267 Va. 387, 593 S.E.2d 250 (2004) (where there was only one university medical center in the city where the alleged events took place and the plaintiff's notice of claim stated that decedent was admitted to that hospital and was injured by the alleged negligence of the employees of that hospital, the combination of these assertions reasonably identified the place of injury; plaintiff was not required to identify the floor or room within the hospital at which the alleged injury as that degree of specificity was unnecessary to satisfy the statute).

There is even less guidance on whether "the nature of the claim" stated in the notice limits the claims that can later be pursued in litigation. However, the limited authority available suggests that the phrase should not be strictly construed but rather the claim is subject to some expansion as more details are learned. *See Dixon v. City of Chesapeake,* 93 Va. Cir. 426, 429 (Chesapeake 2016) ("[T]he theory put forward by the plaintiff that the icy bridge conditions were, at least in part, caused by the City's alleged failure to remove or make necessary repairs to a hazardous depression that caused draining issues, does not change the 'nature of the claim.' To apply the City's rationale would result in a plaintiff being limited to only those facts and theories known at the time notice is given to the municipality, and would, in essence, obviate the need for the discovery process."); *Vivian v. Honda Motor Co.,* 64 Va. Cir. 297, 297-98 (Fairfax 2004) (where claimant's notice specified "negligent design" of a roadway "among other things," court rejected the Commonwealth's argument that plaintiff "be strictly limited to the negligent design claim"; "Plaintiff's notice ensured that the Commonwealth could investigate the incident, cure any dangerous conditions, and enter into settlement negotiations; it therefore ensured that the policy goals [of pre-suit notice] were met.").

Regarding to whom to deliver the written notice:

> If the claim is against the Commonwealth, the statement shall be filed with the Director of the Division of Risk Management or the Attorney General, except as otherwise provided herein. If the claim is against a transportation district, the statement shall be filed with the chairman of the commission of the transportation district. If the claim is against the Commonwealth [ex rel.] the Department of Transportation, then notice of such claim shall be filed with the Commissioner of Highways.

Va. Code § 8.01-195.6(B). Note that a claim against VDOT or a transportation district must be made to the Commissioner or chairman, respectively, but a claim against any other Commonwealth defendant can be filed with either the Attorney General or the Director of Risk Management.

Significantly, the notice is only deemed filed upon receipt, not mailing. *See* Va. Code § 8.01-195.6(C). "The notice may be delivered by hand, by any form of United States mail service (including regular, certified, registered or overnight mail), or by commercial delivery service." *Id.* "If notice is to be filed with the Commissioner of Highways, it may also be delivered electronically in a manner prescribed by the Commissioner of Highways." *Id.* Given that the statute expressly allows for e-delivery to the Commissioner, it is likely that e-delivery is not permitted for any other person under the VTCA. *See City of Richmond v. VEPCO,* 292 Va. 70, 75, 787 S.E.2d 161, 164 (2016) ("[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the

Continued on next page

Continued from previous page

Code, we must presume that the difference in the choice of language was intentional.").

The claimant bears the burden of proving compliance with the pre-suit notice. *See* Va. Code § 8.01-195.6(D). "A signed United States mail return receipt indicating the date of delivery, or any other form of signed and dated acknowledgment of delivery given by authorized personnel in the office of the official with whom the statement is filed, shall be prima facie evidence of filing of the notice under this section." *Id.* Accordingly, it is important that the claimant obtain objective written proof of successful delivery, such as a signature from the recipient (certified U.S. Mail or other handwritten note) or proof of delivery by a commercial delivery service.

Service of Process

"In all actions against the Commonwealth commenced pursuant to [the VTCA], the Commonwealth shall be a proper party defendant . . . . In all such actions against a transportation district, the district shall be a proper party[.]"Va. Code § 8.01-195.4.

"In all actions against the Commonwealth commenced pursuant to [the VTCA], . . . service of process shall be made on the Attorney General. . . . In all such actions against a transportation district, . . . service of process . . . shall be made on the chairman of the commission of the transportation district."Va. Code § 8.01-195.4.

A complaint pursuant to the VTCA can only be filed after an administrative denial of the claim, and a claim is deemed denied if not affirmatively rejected within 6 months after filing the notice.

> An action may be commenced . . . (i) upon denial of the claim by the Attorney General or the Director of the Division of Risk Management or, in the case of a transportation district, by the chairman of the commission of that district or (ii) after the expiration of six months from the date of filing the notice of claim unless, within that period, the claim has been compromised and discharged pursuant to § 8.01-195.5.

Va. Code § 8.01-195.7.

"[S]ubject to the tolling provision of § 8.01-229 and the pleading provision of § 8.01-235," the statute of limitations for claims under the VTCA is "18 months after filing the notice of claim, or . . . two years after the cause of action accrues."Va. Code § 8.01-195.7 (emphasis added). Given these time requirements, the claimant may actually have less than the usual two years after the incident to file suit. For example, if the incident takes place on July 1, 2026, and you deliver the requisite written notice on November 1, 2026, then the lawsuit must be filed by May 1, 2028 (18 months after written notice) which is two months prior to the two-year statute of limitations expiring on July 1, 2028. In other words, the statute of limitation is the shorter of 18 months after pre-suit notice or 2 years after the cause of action accrues.

This can create a conundrum for the claimant. As with any tort suit, you may want to quickly notify the tortfeasor of the claim and expressly request that any potential evidence be preserved, such as video of the incident, a vehicle's event data recorder, or other tangible thing. But if such spoliation letter also meets the specific statutory requirements for pre-suit notice, then the claimant will be reducing the otherwise applicable limitations period for filing suit, perhaps even before the claimant is able to fully assess the extent of the injury suffered. So, if the claimant issues a spoliation letter to an agency of the Commonwealth, be aware that such letter could potentially qualify as the required written notice of claim, thus triggering the 18-month window in which suit must be filed against the Commonwealth.

Alexandria
1725 Duke Street
Suite 750
Alexandria, VA 22314
(703) 884-1863

Charlottesville
440 Premier Circle
Charlottesville, VA 22901
(434) 244-0024

Chesterfield
15001 Dogwood Villas Drive
Chesterfield, VA 23832
(804) 662-5882

Fredericksburg
10209 Patriot Highway
Fredericksburg, VA 22407
(540) 735-0999

Harrisonburg
1300 S. Main Street
Harrisonburg, VA 22801
(540) 433-1738

Hopewell
2141 E. Hundred Road
Hopewell, VA 23860
(804) 458-2766

Louisa
4549 Davis Highway
Louisa, VA 23093
(540) 967-2350

Petersburg
2618 South Crater Road
Petersburg, VA 23805
(804) 748-0999

Richmond
1500 Forest Avenue
Suite 100
Richmond, VA 23229
(804) 282-0999

Roanoke
34 Campbell Avenue, SW
Suite 130
Roanoke, VA 24011
(540) 258-4215

Staunton
206 Greenville Avenue
Staunton, VA 24401
(540) 887-1200

Tappahannock
602 Church Lane
Tappahannock, VA 22560
(804) 443-0043

Warrenton
50 Culpeper Street
Warrenton, VA 20186
(540) 410-1886

Washington, D.C.
1003 K Street NW
Suite 404
Washington, D.C. 20001
(202) 839-9286

John D. Ayers - D | M | V
Melisa Azak - V
Michael J. Braggs - V
Lee J. Bujakowski - V
Andrea R. Carver - V
Roger T. Creager - V
Leslie C. Dalton - V
Charles W. Davis, Jr. - V
Joseph E. Dean II - V
Alistair D. Edwards - D | M
David M. Erwin - V
Alyssa B. Fetterolf - V
Berkley D. Foltz - V
Steven G. Friedman - V
David S. Galeski - V
Garrett A. Handegan - V
Fletcher W. Harkrader, III - V
James G. Harrison, III - V
Vanessa E. Hicks - V
Gregory S. Hooe - V
Mark S. Lindensmith - V
James A. McCauley - V
Joel R. McClellan - D | M | V
Kevin M. McGowan - V
Bryan L. Meadows - D | V
Robin M. Nagel - D | V
Daniel E. Savage - V
John C. Shea - V
William R. Sievers - V
R. Jamie Sinnott - V
J. Westwood Smithers, III - V
Ryan T. Walker - V
Heidi M. Wolff-Stanton - D | M

D - Licensed in Washington, D.C.
M - Licensed in Maryland
V - Licensed in Virginia

MARKS & HARRISON
marksandharrison.com

804-282-0999 800-283-2202

Alexandria • Charlottesville • Chesterfield
Fredericksburg • Harrisonburg • Hopewell • Louisa
Petersburg • Richmond • Roanoke • Staunton
Tappahannock • Warrenton • Washington, D.C.