MARKS & HARRISON POINTS of LAW

By Marks & Harrison Attorneys

Volume 3 | Number 2 | Summer 2025

IN THIS ISSUE


Michael J. Braggs

Misuse of the Plea in Bar

By Michael J. Braggs

Under Virginia law, a "plea in bar" or "special plea" is "a pleading which alleges a single state of facts or circumstances . . . which, if proven, constitutes an absolute defense to the claim." *Nelms v. Nelms,* 236 Va. 281, 289, 374 S.E.2d 4, 9 (1988). This statement can easily be misinterpreted by defense attorneys who hope to eliminate a plaintiff's claims prior to a full jury trial. Consider, for example, a case where the plaintiff claims that a truck driver negligently caused his injuries and alleges that the defendant trucking company is vicariously liable because the truck driver was the employee or agent of the trucking company. Can counsel for the trucking company use a "special plea" to have the issue of employment or agency decided prior to trial? Defense counsel will argue that the "special plea" is asserting a single state of facts which, if proven, completely eliminates the plaintiff's vicarious liability claim. Is this a "special plea" which is authorized by Virginia law?

Continued on next page

Disclaimer: *Except where otherwise indicated, these articles address the law in Virginia, are provided for general informational purposes only, and may not reflect the current law. These articles should not be construed as legal advice from the author and/or Marks & Harrison, P.C., or as creating an attorney-client relationship. These articles should not be treated as a substitute for legal counsel. Readers of these articles must seek appropriate legal or other professional advice on the particular facts, circumstances, issues, and law involved from a lawyer licensed in the appropriate licensing jurisdiction(s) who has expertise in the areas of law involved.*

Continued from previous page

The answer under Virginia law is an unequivocal "No." Using a "special plea" to raise an issue of agency or employment would not be a proper use of a "special plea" but instead would be a "plea of the general issue" which is no longer allowed under Virginia law. *See Va. Sup. Ct. R. 3:8(a).*

It is useful to begin a discussion of special pleas by providing a summary of the types of issues which are properly raised by a special plea. In *Nelms,* the Supreme Court of Virginia listed the following:

> Familiar illustrations of the use of a plea would be: The statute of limitations; absence of proper parties (where this does not appear from the bill itself); *res judicata;* usury; a release; an award; infancy; bankruptcy; denial of partnership; *bona fide* purchaser; denial of an essential jurisdictional fact alleged in the bill, etc.

Nelms, 236 Va. at 289, 374 S.E.2d at 9 (quoting E. Meade, *Lile's Equity Pleading and Practice,* § 199, p. 114 (3d ed. 1952) (footnote omitted)).

Using a special plea to dispute agency or employment differs from the foregoing examples of permissible special pleas because agency and employment are a substantive part of the plaintiff's claim. In order to recover against the trucking company on the basis of vicarious liability, the plaintiff must prove that the truck driver was the agent or employee of the trucking company and was acting in the course and scope of his employment or agency at the time that his negligence caused the plaintiff's injury. A plea which disputes some fact that the plaintiff would have to prove as part of his claim is not a "special plea" but instead is a "plea of the general issue." "At common law, a plea of the general issue was a traverse, a general denial of the plaintiff's whole declaration or an attack upon some fact the plaintiff would be required to prove in order to prevail on the merits." *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 617-18, 611 S.E.2d 600, 604 (2005). Pleas of the general issue are no longer permitted in Virginia. See *id; Va. Sup. Ct. R.* 3:8(a).

In *Stockbridge*, the Supreme Court of Virginia held that the trial court had properly denied a plea in bar because it raised a factual issue related to the merits and thus was a prohibited plea of the general issue. Although the trial court properly denied the plea in bar, it ultimately made the factual determination which was raised by the defendant's plea and granted summary judgment based upon the matters presented at a hearing on the plea in bar. The plaintiff objected to this procedure on the basis that he "had a right to a jury trial on the issue" raised by the defendant's plea. 269 Va. at 617, 611 S.E.2d at 604. On appeal, the Supreme Court agreed and reversed the summary judgment.

Circuit courts from around Virginia have consistently rejected attempts to use a plea in bar to short-circuit litigation and carve out and dispute a particular fact which is necessary to plaintiff's claim. The use of any such procedural mechanism over objection would violate the fundamental right to a jury the *Virginia Constitution*, Virginia statutes, Virginia common law, and the *Rules of Supreme Court of Virginia.*

In *Holmes v. Reid,* 80 Va. Cir. 514 (Norfolk 2010), the plaintiff brought a premises liability claim for wrongful shooting death of the plaintiff's decedent at a Norfolk entertainment facility. *Id.* at 515. The defendants filed a plea in bar which asserted that the defendants could not be held liable because the defendants were not the owners or managers of the

Continued on next page

Continued from previous page

facility where the shooting occurred and had no employment or agency relationship with any of the people whose negligence allegedly caused the death. *Id.* at 516. The court held that the plea in bar raised factual issues which it could not properly decide on a plea in bar but instead had to be decided by the jury at trial. 80 Va. Cir. at 519-20.

In *Ratcliffe v. Fogus,* 80 Va. Cir. 186 (Rockingham 2010), the plaintiff brought a claim for malicious prosecution. *Id.* at 186. The defendant filed a plea in bar which asserted that the plaintiff would not be able to prevail at trial because there was probable cause for the criminal complaint against the plaintiff. *Id.* After reviewing the *Nelms* case, the court held that Virginia law did not empower the defendant to have the court, over the objection of the plaintiff, make pretrial factual determinations. *Id.* at 187.

Similarly, in *Joyce v. Center for Brief Counselling, Inc.*, 29 Va. Cir. 209 (Fredericksburg 1992), the defendant filed a plea in bar which purported to raise the issue of the soundness of the decedent's mind at the time he took his life. The defendant argued that the trial court should decide the factual issue raised by the plea in bar prior to trial. The trial court rejected that argument and held that because the plaintiff insisted upon the right to jury trial the issue raised by the special plea would be part of the factual determinations made by the jury at trial. The court overruled the plea in bar as an impermissible plea of the general issue. *Id.* at 211.

In *Fee v. Ellison,* 90 Va. Cir. 251 (Norfolk 2015), the defendants filed a special plea to raise the same type of issue raised in *Joyce*. The court said that holding a separate evidentiary hearing would improperly adjudicate an element of the plaintiff's case before trial. The court explained:

> "[A] defendant may not use a plea in bar as a plea of the general issue of the case, or more specifically, to attack the plaintiff's ability to prove a certain part of his case." *Ratcliffe v. Fogus,* 80 Va. Cir. 186 (Rockingham Cnty. 2010) (citing *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 617-18, 611 S.E.2d 600 (2005)). Nor may a defendant use a "special plea in bar to pluck one essential ingredient from the plaintiff's case and cause it to be adjudicated—with a jury, if requested—prior to trial." *Mea v. Spiegel,* 44 Va. Cir. 122, 123 (Norfolk 1997) (citing *Joyce v. Center for Brief Counselling, Inc.*, 29 Va. Cir. 209, 211 (Fredericksburg 1992)).

90 Va. Cir. at 252. *See also VDart, Inc. v. Arthur Grand Techs., Inc.*, 107 Va. Cir. 206, 209 (Fairfax 2021) (a plea in bar which disputed the plaintiff's allegations of an employment relationship was a plea of the general issue and was not permitted); *Doe v. Va. Church of God,* 2022 Va. Cir. LEXIS 33, at *9 (Waynesboro Cir. Ct. Mar. 4, 2022) (same).

The efforts of defendants and their counsel to use the "special plea" or the "plea in bar" also often raise important issues relating to the right to trial by jury under Virginia law. Those issues will be discussed in a future article.

Virginia Legislative Update

By Steven G. Friedman[1]

The following is a short summary of new Virginia legislation going into effect July 1, 2025 that may be of particular interest to personal injury claimants and their attorneys. As always, the exact language of these laws must be examined to determine the details of the law.

Va. Code § 8.01-42.6: This is a wholly new statute that expands the vicarious liability of employers for the tortious conduct of an employee in certain kinds of cases. The statute has the effect of undoing, at least in a limited context, the narrowing of Virginia's common law principles governing vicarious liability which occurred in a series of recent decisions by the Supreme Court of Virginia starting with *Parker v. Carilion Clinic,* 296 Va. 319, 819 S.E.2d 809 (2018). The statute provides that in an action for personal injury or death by wrongful act brought by a vulnerable victim (as defined in the statute) or the personal representative of a deceased vulnerable victim against an employee, a finding that the employee's employer is vicariously liable for such employee's conduct shall be based on several factors, including the likelihood of the employee coming into contact with such vulnerable victim and the employer's failure to exercise reasonable care over the employee. The statutory definition of a "vulnerable victim" includes patients of health care providers, persons under a disability, residents of assisted living facilities, passengers of common carriers (with certain exceptions), passengers of nonemergency medical transportation carriers, and business invitees of an esthetics spa or a business offering massage therapy. This new statute applies only to causes of action that accrue on or after July 1, 2025. The statute makes clear that its provisions are "[i]n addition to any other available grounds for the determination of the course and scope of employment." Notably, the statute applies to "an action for personal injury or death by wrongful act brought . . . against an employee" (emphasis added) which meets the other statutory requirements. In view of this language, Plaintiffs and their attorneys should perhaps be careful to include both the employer and the employee as defendants (and not to nonsuit the individual employee at any time) rather than pursuing only the employer on a vicarious liability claim.

Va. Code § 8.01-223.2: This statute was amended to expand immunity for statements "made at or in connection with any formal review or hearing authorized by law, including a written or oral statement made pursuant to a report or complaint," beyond just public hearings before local governing bodies, which was the case under prior law. However, this immunity does not apply to statements that the person knew or should have known were false or made with reckless disregard for their truthfulness.

[1] The author wishes to thank Venus Amadi for her valuable assistance on this article. Ms. Amadi is serving as a law clerk at Marks & Harrison this summer and she anticipates graduating from William and Mary Law School in May of 2026.

Continued on next page

Continued from previous page

Va. Code § 46.2-373: This statute was amended to increase the minimum property damage amount that triggers mandatory police collision reports to the DMV from $1,500 to $5,000. Thus, automobile collisions with property damage more than $1,500 but less than $5,000 will no longer automatically generate official written collision reports for DMV records. This change affects evidence availability for lower-value injury claims that often accompany moderate property damage accidents. Essentially, plaintiffs in smaller personal injury cases may have less official documentation to support their claims if property damage falls below the new $5,000 threshold.

Va. Code § 8.01-229(K): This statute was amended to expressly extend the tolling of the statute of limitations for wrongful death actions while related criminal cases are ongoing. This change recognizes that families may wait for criminal proceedings to conclude before pursuing civil wrongful death claims and the passage of time may cause them to lose their right to sue. The amendment ensures that lengthy criminal prosecutions do not inadvertently bar families from seeking civil damages in a wrongful death action. As a practical matter, the amendment allows families to focus on criminal justice proceedings first without the pressure of simultaneously filing civil suits to preserve their legal rights. This provision applies only to causes of action that accrue on or after July 1, 2025.

Va. Code § 16.1-79 and **Va. Code § 16.1-81:** These statutes were amended to extend the date by which a person served with a warrant or motion for judgment in a civil action in general district court may be required to appear. Under the new law, a person now has "90 days from the date of service" to appear rather than the previous timeline of "60 days from the date of service."

Va. Code §§ 8.01-20.1, 8.01-50.1, 16.1-83.1: Each of these statutes were amended to clarify and modify the expert certification provisions applicable to medical malpractice claims. The amendments provide that that the plaintiff is automatically required "[w]ithin 21 days of an answer being filed" to certify to the defendant that s/he has complied with the expert certification requirement. Previously, the plaintiff was required to certify that the expert certification requirement had been met only if the defendant made a written request to the plaintiff. The amendments provide that the expert certification must be obtained by the time the plaintiff first requests service of process upon the defendant or requests the defendant to accept service of process. The amendments set forth the exact language of the certifying expert opinion that must be obtained and also provide that "[n]o further statement or opinion from the expert witness shall be required" and that the plaintiff may have separate certifications for standard of care and causation. The amendments state that "[e]ach defendant who is the subject of an expert witness's certification shall be identified in the certification." The amendments further provide that the plaintiff's certification that the expert witness certification requirements had been satisfied must include "a statement that reads: This is to certify that the plaintiff has complied with" the pertinent statute requiring expert certification. The amendments should be carefully examined and complied with because under both the previous statutes and the amended statutes a failure to comply with the expert certification requirements results in the imposition of sanctions which may include dismissal of the case with prejudice.

Continued on next page

Continued from previous page

Chapter 498, HB 2627: This Act directs the Secretary of Transportation to create a working group to develop draft legislation governing the regulation of autonomous driving systems and to report its findings to the General Assembly by November 1, 2026. This group will include representatives from the Department of Transportation, the Department of State Police, and the Department of Motor Vehicles, along with selected members of the House of Delegates and the Senate. By examining the operational, technical and legal issues, this initiative aims to ensure legal preparedness regarding the governance of autonomous driving systems in Virginia.

Va. Code § 38.2-2131: This is a new statute that prohibits the assignment or transfer of duties, rights, or benefits under a fire insurance policy (or a fire insurance policy combined with other coverages) without the written consent of the insurer. Specifically, the bill adds a new section to the Virginia Code that makes any such assignment or transfer void and unenforceable. However, the bill does allow some exceptions. It still permits insureds to authorize payments to service providers for covered losses and to assign rights to recover tort damages exceeding the insured's liability coverage. The goal of the new law appears to be preventing unauthorized transfers of insurance claims and protecting insurers' ability to control and manage their policy obligations.

Va. Code § 8.01-420.9: This is a new statute which allows a nonparty in a civil proceeding to move to quash or modify a subpoena duces tecum seeking that nonparty's financial records or, if the nonparty is an attorney, records subject to attorney–client privilege. It also bars financial institutions and certain other businesses from conditioning compliance with a subpoena on payment of fees for producing those records. The bill directs the Supreme Court of Virginia to revise its rules accordingly. Finally, the bill tasks the Boyd Graves Conference with studying whether other nonparties should have standing to quash subpoenas for other types of records and requires a report to the Chair of the Courts of Justice Committee by November 1, 2025.

Va. Code § 46.2-1094: This statute was amended to require all adult persons occupying any seat in a motor vehicle equipped with safety belts to wear those belts while the vehicle is in motion on a public highway. Previously, only front-seat adult passengers were required to buckle up. Under both the previous statute and the revised statute all passengers under the age of 18 years have already been and remain subject to the safety device requirements of Virginia Code § 46.2-1095. The revised statute makes no change in the numerous existing exceptions to and other provisions of Virginia Code § 46.2-1094 (a violation shall not constitute negligence, be considered in mitigation of damages, be admissible in evidence, or be the subject of comment by counsel in any action for recovery of damages arising out of the operation, ownership, or maintenance of a motor vehicle; nothing in the statute shall change any existing law, rule, or procedure pertaining to any civil action; law-enforcement officers cannot stop a motor vehicle for violation of the statute; no evidence discovered or obtained as a result of a stop in violation of the statute shall be admissible in any trial, hearing, or other proceeding).

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 Dr.
Chesterfield, VA 23832
(804) 662-5882

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

Harrisonburg
337 East Market 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 - VA, MD, DC
Genoveva I. Border*
Michael J. Braggs - VA
Lee J. Bujakowski - VA
Charles R. Calton - VA
Andrea R. Carver - VA
Roger T. Creager - VA
Leslie C. Dalton - VA
Charles W. Davis, Jr. - VA
Joseph E. Dean II - VA
Alistair D. Edwards - MD, DC
David M. Erwin - VA
Alyssa B. Fetterolf - VA
Robert C. Flowers - MD, DC
Berkley D. Foltz - VA
Steven G. Friedman - VA
David S. Galeski - VA
Fletcher W. Harkrader, III - VA
James G. Harrison, III - VA
Vanessa E. Hicks - VA
Gregory S. Hooe - VA
Mark S. Lindensmith - VA
James A. McCauley - VA
Joel R. McClellan - VA, DC
Kevin M. McGowan - VA
Bryan L. Meadows - VA
Robin M. Nagel - VA, DC
Daniel E. Savage - VA
John C. Shea - VA
William R. Sievers - VA
J. Westwood Smithers, III - VA
Ryan T. Walker - VA
Heidi M. Wolff-Stanton - MD, DC

*Staff Attorney. Not Licensed in the United States.

VA - Licensed in Virginia
MD - Licensed in Maryland
DC - Licensed in Washington, D.C.

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.