2024 EDITION

Virginia Law and Practice: A Handbook for Attorneys

Virginia CLE® Publications

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VIRGINIA LAW AND PRACTICE: A HANDBOOK FOR ATTORNEYS

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CHAPTER 1

AGENCY IN VIRGINIA

1.1 THE AGENCY RELATIONSHIP

1.101 Agency Relationship. "Agency is a fiduciary relationship resulting from one person's manifestation of consent to another person that the other shall act on his behalf and subject to his control, and the other person's manifestation of consent so to act."[1] There is no presumption that an agency relationship exists, and in fact "one is legally presumed to be acting for himself and not as the agent of another."[2] The party alleging the existence of an agency relationship has the burden of proof.[3] Whether "an agency relationship exists is a question to be resolved by the fact finder unless the existence of the relationship is shown by undisputed facts or by unambiguous written documents."[4] In making the determination of whether an agency relationship exists, control is an important factor.[5] Agency can be inferred from the surrounding facts and circumstances as well as the parties' conduct.[6]

"The relationship of parties to a contract does not depend on what the parties themselves call the relationship, but rather on what the relationship actually is in law."[7]

1.102 Agent's Duties to Principal. "An agent is a fiduciary with respect to matters within the scope of his agency."[8] "The significance of imposing fiduciary duties upon an agent is that it restricts the permissible range of the agent's actions and requires that the agent act solely in the interests of his principal."[9]

[1] *Reistroffer v. Person*, 247 Va. 45, 48, 439 S.E.2d 376, 378 (1994) (citations omitted); *see Hartzell Fan, Inc. v. Waco, Inc.*, 256 Va. 294, 300, 505 S.E.2d 196, 200 (1998); *see also* Restatement (Third) of Agency § 1.01 (2006).

[2] *Raney v. Barnes Lumber Corp.*, 195 Va. 956, 966, 81 S.E.2d 578, 584 (1954) (citations omitted); *see State Farm Mut. Auto. Ins. Co. v. Weisman*, 247 Va. 199, 203, 441 S.E.2d 16, 19 (1994), *superseded by statute on other grounds*, 1995 Acts ch. 189 (codified as amended at Va. Code § 38.2-2206(A)).

[3] *Allen v. Lindstrom*, 237 Va. 489, 496, 379 S.E.2d 450, 454 (1989).

[4] *State Farm Mut. Auto. Ins. Co.*, 247 Va. at 203, 441 S.E.2d at 19, *superseded by statute on other grounds,* 1995 Acts ch. 189 (codified as amended at Va. Code § 38.2-2206(A)).

[5] *Allen*, 237 Va. at 496, 379 S.E.2d at 454.

[6] *Drake v. Livesay*, 231 Va. 117, 121, 341 S.E.2d 186, 189 (1986) (citing *Royal Indem. Co. v. Hook*, 155 Va. 956, 970, 157 S.E. 414, 419 (1931)).

[7] *Hartzell Fan, Inc. v. Waco, Inc.*, 256 Va. 294, 300-01, 505 S.E.2d 196, 201 (1998).

[8] Restatement (Second) of Agency § 13.

[9] *Wilson v. Miller Auto Sales, Inc.*, 47 Va. Cir. 153, 157 (Winchester 1998) (citing generally Restatement (Second) of Agency §§ 387-98).

> An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship, and the agent has a duty to refrain from doing any harmful act to the principal. Although an agent's interests are often concurrent with those of the principal, the general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship.[10]

"A special agent cannot be charged with duties to his principal which cover subject matter outside the limited authority the principal has conferred upon him."[11] As stated in the Restatement (Second) of Agency, unless it is otherwise agreed between a principal and agent, an agent has a duty not to compete with the principal regarding the subject matter of his or her agency.[12] However, once the agency relationship is terminated, the agent may compete with his or her principal.[13] An agent also has "a duty to keep, and render to his principal, an account of money or other things which he has received or paid out on behalf of his principal."[14] A principal may request the aid of a court of equity in order to require an accounting by his or her agent, and in such an action the agent has the burden of proving he or she paid the principal or properly disposed of the funds or items he or she received from the principal.[15]

1.103 Principal's Duties to Agent. A principal owes an agent a duty to deal fairly and in good faith but does not owe an agent a fiduciary duty.[16] As established in the Restatement (Second) of Agency, the principal has duties of compensation, indemnity, and protection.[17] "In addition, the principal is subject to liability to the agent, as to any third person, for conduct which would be tortious aside from the relation, and he is subject to restitutional liability if he is unjustly enriched at the agent's expense."[18]

[10] 3 Am. Jur. 2d Agency § 192 (2015).

[11] *Stacy v. J. C. Montgomery Ins. Corp.*, 235 Va. 328, 331, 367 S.E.2d 499, 501 (1988).

[12] Restatement (Second) of Agency § 393.

[13] *Hilb, Rogal & Hamilton Co. v. DePew*, 247 Va. 240, 249, 440 S.E.2d 918, 923 (1994) (citing *Peace v. Conway*, 246 Va. 278, 281-82, 435 S.E.2d 133, 135 (1993)).

[14] Restatement (Second) of Agency § 382.

[15] *Bain v. Pulley*, 201 Va. 398, 403, 111 S.E.2d 287, 291 (1959) (citations omitted).

[16] 3 Am. Jur. 2d Agency § 226 (2015).

[17] Restatement (Second) of Agency § Scope.

[18] *Id.*

1.2 LIABILITY OF PRINCIPAL TO THIRD PARTIES FOR CONTRACTS ENTERED BY AN AGENT

"An agent commonly represents the principal in the creation and performance of contracts with third parties."[19]

> The general rule is that as between the principal and agent and third persons, the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, in which event the principal is estopped to deny that the agent possessed the authority which he exercised.[20]

1.201 Actual Authority. An agent's actual authority is determined by examining the agency agreement, if one exists.[21] An agent may have express or implied actual authority.[22] However, "the powers of a special agent are to be strictly construed; he possesses no implied authority beyond what is indispensable to the exercise of the power expressly conferred, and must keep within the limits of his commission."[23]

1.202 Apparent Authority. "The definition of the term 'apparent authority' presupposes the existence of an agency relationship and concerns the authority of the agent."[24] "[W]hen an agent, acting within the scope of his apparent agency, enters into a contract with a third person 'the principal becomes immediately a contracting party, with both *rights* and liabilities to the third person.'"[25]

[19] *Acordia of Va. Ins. Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377, 385, 560 S.E.2d 246, 250 (2002) (citing *Virginia Iron, Coal & Coke Co. v. Odle's Adm'r*, 128 Va. 280, 287, 105 S.E. 107, 109 (1920)).

[20] *Bardach Iron & Steel Co. v. Charleston Port Terminals*, 143 Va. 656, 673, 129 S.E. 687, 692 (1925).

[21] *Glorious Church of God in Christ v. Aetna Cas. & Sur. Co.*, 44 Va. Cir. 302, 307 (Richmond 1998).

[22] *DHA, Inc. v. Leydig*, 231 Va. 138, 140, 340 S.E.2d 831, 832 (1986) ("Where an entire business is placed under the management of an agent, the authority of the agent is presumed to be commensurate with the necessities of the situation. He has implied authority to do whatever is ordinarily incidental to the conduct of such business, whatever is necessary to the efficient execution of the duties, or whatever is customary in a particular trade.").

[23] *Bowles v. Rice*, 107 Va. 51, 53, 57 S.E. 575, 576 (1907).

[24] *Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 304, 618 S.E.2d 331, 333 (2005).

[25] *Equitable Variable Life Ins. Co. v. Wood*, 234 Va. 535, 539, 362 S.E.2d 741, 744 (1987) (quoting Restatement (Second) of Agency § 8 cmt. d (1957)).

> A third party is entitled to believe the agent has the authority he purports to exercise when the third party is reasonable [sic] justified in his or her determination of apparent authority. Apparent authority is not determined by the relationship of the principal to the agent, but by how the principal holds the agent out to the third party.[26]

"The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no obligation to inquire into the agent's actual authority."[27] A principal is bound by the acts of his or her agent within the scope of the agent's apparent authority, and if an agent has exceeded his or her actual authority to the detriment of the principal, the principal can only look to the agent for redress.[28]

1.203 Ratification. Even if an individual acts as an agent without the authorization of the purported principal, his or her acts may be subsequently ratified by the principal. In Virginia, "the act of an unauthorized agent, subsequently ratified by the principal, is as binding as though previously authorized."[29] The ratification is given retroactive effect and operates from the date when the original contract was entered into by the agent for the principal.[30] However, a contract can only be ratified by the individual or entity that would have had the power to authorize it initially. Absent the power to make the contract a party cannot subsequently ratify said contract.[31]

[26] *Avery-Craft v. Young Hee Moon Kang*, 77 Va. Cir. 53, 54 (Prince William 2008) (citing *Walson v. Walson*, 37 Va. App. 208, 556 S.E.2d 53 (2001)).

[27] *Singer Sewing Mach. Co. v. Ferrell*, 144 Va. 395, 404, 132 S.E. 312, 315 (1926) (quoting *J.C. Lysle Milling Co. v. S.W. Holt & Co.*, 122 Va. 565, 572, 95 S.E. 414, 416 (1918)).

[28] *Daniel v. Yearick*, 187 Va. 396, 403, 46 S.E.2d 333, 336 (1948).

[29] *Richmond U.P.R. Co. v. N.Y. S.B.R. Co.*, 95 Va. 386, 391, 28 S.E. 573, 575 (1897); *see Kern v. J.L. Barksdale Furniture Corp.*, 224 Va. 682, 685, 299 S.E.2d 365, 367 (1983) ("Retention by the principal of the benefits of a contract made by an agent without authority can constitute a ratification of the contract."); *Winston v. Gordon*, 115 Va. 899, 907, 80 S.E. 756, 760 (1914) (citing *Kelsey v. National Bank of Crawford Cnty.*, 69 Pa. 426, 429 (1871)) ("It is well settled, and is agreeable to reason, that an act of an agent, from which the agent derives no personal benefit, but which is done in good faith for the benefit of his principal, and which was apparently necessary and would redound to his advantage, will be held to have been ratified or acquiesced in, and be thereby rendered valid upon slight evidence. If the principal knows that an agent has transcended his authority, he must promptly disavow the act, or he makes it his own.").

[30] *Terminal Rd. Assocs. v. Hall*, 32 Va. Cir. 64, 65 (Fairfax 1993) (citing *Moncier v. Green*, 182 Va. 127, 27 S.E.2d 921 (1943)).

[31] *Amalgamated Clothing Workers v. Kiser*, 174 Va. 229, 237, 6 S.E.2d 562, 565 (1939).

1.204 Liability of Principal. The principal is liable to third parties to the extent he or she holds an agent out as having authority to act on his or her behalf. In addition, under the doctrine of ratification, even if the agent did not originally have the authority to enter into the contract, if the principal accepts the benefit of the contract thus ratifying it, he or she will be bound by it. "Having accepted its benefits, [he] must assume its burdens."[32]

1.205 Liability of Agent. "Where an agent makes a full disclosure of the fact of his agency, and the name of his principal, and contracts only as the agent of the named principal, he incurs no personal responsibility."[33] However, if at the time of entering into the contract the agent does not disclose his or her agency, the agent will be personally responsible, and the principal will also be responsible.[34]

1.206 Liability of Third Party. If the principal has been disclosed, only the principal may sue to enforce a contract against a third party.[35] On the other hand, in the case of an undisclosed principal, either the agent or the principal may sue to enforce the contract.[36] "Virginia law treats an undisclosed principal as a party to any written contract entered into by its agent on the principal's behalf. As such, the undisclosed principal has standing to bring actions alleging breaches of such contracts."[37]

1.3 LIABILITY OF PRINCIPAL TO THIRD PARTIES FOR TORTS OF AN AGENT

1.301 *Respondeat Superior*. A principal may also be liable to a third party for torts committed by his agent. "Under the doctrine of *respondeat superior*, an employer is liable for the tortious act of his employee if the

[32] *Southern Amusement Co. v. Ferrel-Bledsoe Furniture Co.*, 125 Va. 429, 433, 99 S.E. 716, 717 (1919).

[33] *Richmond U.P.R. Co. v. N.Y. S.B.R. Co.*, 95 Va. 386, 395, 28 S.E. 573, 575 (1897).

[34] *Silliman v. Fredericksburg, O. & C.R.R. Co.*, 68 Va. 119, 132 (1876); *see also Leterman v. Charlottesville Lumber Co.*, 110 Va. 769, 772, 67 S.E. 281, 283 (1910) ("Where a person enters into a simple contract, oral or in writing, other than a negotiable instrument, in his own name, when he is in fact acting as the agent of another and for his benefit, without disclosing his principal, the other party to the contract may, as a general rule, hold either the agent or his principal, when discovered, personally liable on the contract. But he cannot hold both.").

[35] *Equitable Variable Life Ins. Co. v. Wood*, 234 Va. 535, 539, 362 S.E.2d 741, 743-44 (1987) ("The other party to a contract made by an agent, . . . acting within his . . . apparent authority . . . is liable to the principal, as if he had contracted directly with the principal." (quoting Restatement (Second) of Agency § 292)).

[36] *Thomas Branch & Co. v. Riverside & Dan River Cotton Mills, Inc.*, 147 Va. 522, 536, 137 S.E. 614, 618 (1927).

[37] *Carlen v. T.C. Gifford, LLC*, 90 Va. Cir. 430, 433 (Norfolk 2015).

employee was performing his employer's business and acting within the scope of his employment."[38]

In the *respondeat superior* context, "punitive damages cannot be awarded against a master or principal for the wrongful act of his servant or agent in which he did not participate, and which he did not authorize or ratify."[39]

1.302 Employer/Employee Relationship

A. Independent Contractors. The doctrine of *respondeat superior* imposes tort liability on an employer for the negligent acts of its employees, but not for the negligent acts of an independent contractor.[40] "An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result."[41] There are exceptions to the general rule that an employer is not liable for injuries to third parties caused by an independent contractor's negligence.

> [T]he doctrine of *respondeat superior* may become applicable, if the independent contractor's torts arise directly out of his use of a dangerous instrumentality, arise out of work that is inherently dangerous, are wrongful per se, are a nuisance, or are such that it would in the natural course of events produce injury unless special precautions were taken.[42]

B. Right to Control. In considering whether an employer-employee relationship exists for purposes of *respondeat superior* liability courts will consider four factors: (i) selection and engagement of the servant, (ii) payment of compensation, (iii) power of dismissal, and (iv) power of control. "The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative."[43]

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[38] *Kensington Assocs. v. West*, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987) (citing *McNeill v. Spindler*, 191 Va. 685, 694, 62 S.E.2d 13, 17 (1950)).

[39] *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 635, 831 S.E.2d 460, 478 (2019) (citing *Egan v. Butler*, 290 Va. 62, 74, 772 S.E.2d 765, 772 (2015)).

[40] *Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 304, 618 S.E.2d 331, 334 (2005).

[41] *Craig v. Doyle*, 179 Va. 526, 531, 19 S.E.2d 675, 677 (1942) (quoting *Epperson v. DeJarnette*, 164 Va. 482, 486, 180 S.E. 412, 413 (1935)).

[42] *Kesler v. Allen*, 233 Va. 130, 134, 353 S.E.2d 777, 780 (1987).

[43] *Naccash v. Burger*, 223 Va. 406, 418, 290 S.E.2d 825, 832 (1982) (citations omitted).

C. Borrowed Employees. A master may lend his servant to another master.[44] In determining whether an individual is a borrowed servant, the right to control the employee is the most important factor, although it may not be dispositive. Other factors that are generally considered in someone's status as a borrowed servant are:

> (1) who has control over the employee and the work he is performing; (2) whether the work performed is that of the borrowing employer; (3) was there an agreement between the original employer and the borrowing employer; (4) did the employee acquiesce in the new work situation; (5) did the original employer terminate its relationship with the employee; (6) who is responsible for furnishing the work place, work tools and working conditions; (7) the length of the employment and whether it implied acquiescence by the employee; (8) who had the right to discharge the employee; and (9) who was required to pay the employee.[45]

Where an employee is under the borrowing employer's exclusive control, that employee becomes a servant of the borrowing employer and the borrowing employer is responsible for the employee's negligence. By contrast, if the lending employer retains control over its employee then the lending employer remains responsible for the employee's negligence.[46]

1.303 Scope of Employment. "In determining whether an agent's tortious act is imputed to the principal, the doctrine's primary focus is on whether the activity that gave rise to the tortious act was within or without the agent's scope of employment."[47] The Virginia Supreme Court has stated that

> the test of the liability of the master for the tortious act of the servant, is not whether the tortious act itself is a transaction within the ordinary course of the business of the master, or within the scope of the servant's authority, but whether the service itself, in which the tortious act was done,

[44] *Ideal Steam Laundry v. Williams*, 153 Va. 176, 179, 149 S.E. 479, 480 (1929).

[45] *Metro Mach. Corp. v. Mizenko*, 244 Va. 78, 83, 419 S.E.2d 632, 635 (1992) (citations omitted).

[46] *Tidewater Stevedoring Corp. v. McCormick*, 189 Va. 158, 168, 52 S.E.2d 61, 65 (1949) (citing *Standard Oil Co. v. Anderson*, 212 U.S. 215, 221 (1909)).

[47] *Commercial Bus. Sys. v. Bellsouth Servs.*, 249 Va. 39, 44, 453 S.E.2d 261, 265 (1995) (citations omitted).

> was within the ordinary course of such business or within the scope of such authority.[48]

When a plaintiff presents evidence sufficient to establish the existence of an employer-employee relationship, there is a prima facie case that the employee was acting within the scope of employment. The burden then shifts to the employer who may prove that there was a departure from the scope of employment.[49] As the Virginia Supreme Court succinctly outlined

> [g]enerally, an act is within the scope of the employment if (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, "and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account."[50]
>
> Both [the second and third Restatements of Agency] make clear that a servant's tortious act "is withi[n] the scope of employment if, but only if . . . it is actuated, *at least in part,* by a purpose to serve the master," Restatement (Second) of Agency § 228(1)(c) (1958) (emphasis added), or, put another way, "[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve *any* purpose of the employer," Restatement (Third) of Agency § 7.07(2) (2006) (emphasis added).[51]

1.304 Negligent Hiring and Retention. Virginia recognizes the tort of negligent hiring.[52] Citing to a law review article, the court in *Victory*

[48] *Davis v. Merrill*, 133 Va. 69, 77-78, 112 S.E. 628, 631 (1922) (citing *Henry Myers & Co. v. Lewis*, 121 Va. 50, 71, 92 S.E. 988, 994 (1917)).

[49] *Majorana v. Crown Cent. Petroleum Corp.*, 260 Va. 521, 526, 539 S.E.2d 426, 429 (2000) (citation omitted).

[50] *Kensington Assocs. v. West*, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987) (quoting *Broaddus v. Standard Drug Co.*, 211 Va. 645, 653, 179 S.E.2d 497, 504 (1971)).

[51] *Parker v. Carilion Clinic*, 296 Va. 319, 340, 819 S.E.2d 809, 821-22 (2018).

[52] *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 208, 372 S.E.2d 391, 393 (1988); *see also Weston's Adm'x v. Hospital of St. Vincent*, 131 Va. 587, 107 S.E. 785 (1921); *Davis v. Merrill*, 133 Va. 69, 112 S.E. 628 (1922).

Tabernacle explained the distinction between *respondeat superior* and negligent hiring as follows:

> [T]he two causes of action differ in focus. Under respondeat superior, an employer is vicariously liable for an employee's tortious acts committed within the scope of employment. In contrast, negligent hiring is a doctrine of primary liability; the employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others. Negligent hiring, therefore, enables plaintiffs to recover in situations where respondeat superior's "scope of employment" limitation previously protected employers from liability.[53]

With regard to a claim for negligent hiring,

> [l]iability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.[54]

There is also an independent tort of negligent retention.[55] In *Jackman*, the issue was whether the apartment management company should have known that the employee would break into an apartment in the middle of the night and assault a tenant. The plaintiff had pled both negligent hiring and negligent retention. The court addressed the separate torts of negligent hiring and negligent retention but reversed the trial court's award of damages because it found that the employer had made reasonable inquiries about the worker's background that had not revealed any problem. The court explained that liability attaches on a claim of wrongful retention when an employer gains

[53] *Victory Tabernacle Baptist Church*, 236 Va. at 211, 372 S.E.2d at 394 (quoting *Minnesota Developments-Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 Minn. L. Rev. 1303, 1306-07 (1984)).

[54] *Southeast Apts. Mgmt., Inc. v. Jackman*, 257 Va. 256, 260, 513 S.E.2d 395, 397 (1999) (quoting *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983)).

[55] *Southeast Apts. Mgmt., Inc.*, 257 Va. at 260, 513 S.E.2d at 397 (citing *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 401, 368 S.E.2d 268, 279 (1988)).

negative knowledge about an employee but fails to act on that information and negligently retains the offending employee.[56]

The difference between a negligent hiring claim and a negligent retention claim "is the timing of the employer's actual or imputed awareness of the possibility of dangerous behavior by the employee."[57] In order to allege either claim, a plaintiff must allege more than a propensity for bad acts by the offending employee; a plaintiff must allege specific acts or facts that "if true, alerted or should have alerted a reasonable employer that the employee posed a threat."[58]

1.305 No Claim for Negligent Supervision. Virginia does not recognize the tort of negligent supervision. The Virginia Supreme Court has held that no negligence can be found without reference to a breach of some legal duty, and "there is no duty of reasonable care imposed upon an employer in the supervision of its employees under these circumstances and we will not create one here."[59]

1.306 Nature of the Plaintiff's Injury. Although some courts have ruled that physical injury to the plaintiff is required to support a claim of negligent hiring or retention or both,[60] this does not seem to be a settled requirement.[61] The United States District Court for the Eastern District of Virginia recognized the unsettled nature of the "the issue of whether the tort

[56] *Id.*; *see also Heckenlaible v. Virginia Peninsula Reg'l Jail Auth.*, 491 F. Supp. 2d 544, 554 (E.D. Va. 2007) (no negligent retention claim because no evidence to indicate employer should have known of danger until assault occurred and once employer learned of assault, it acted swiftly to investigate and take appropriate measures against employee).

[57] *Beach v. McKenney*, 82 Va. Cir. 436, 443 (Charlottesville 2011).

[58] *Id.* at 444.

[59] *Chesapeake & Potomac Tel. Co. v. Dowdy*, 235 Va. 55, 61, 365 S.E.2d 751, 754 (1988). *But see Hernandez v. Lowe's Home Ctrs., Inc.*, 83 Va. Cir. 210 (Norfolk 2011) (distinguishing *Dowdy* and allowing for possibility of negligent supervision claim by third party non-employee: "under the right circumstances, a claim for negligent supervision and/or negligent training of an employee may allow direct liability against a defendant employer").

[60] S*ee, e.g., Investors Title Ins. Co. v. Lawson*, 68 Va. Cir. 337, 338 (Henry 2005); *Wolf v. Fauquier Cnty. Bd. of Supervisors*, 555 F.3d 311, 320 (4th Cir. 2009); *Zeng v. Electronic Data Sys. Corp.*, No. 1:07cv310 (JCC), 2007 U.S. Dist. LEXIS 44412, at *7 (E.D. Va. June 18, 2007); *Parker v. Geneva Enters.*, Inc., 997 F. Supp. 706, 714 (E.D. Va. 1997).

[61] *See Investors Title Ins. Co.*, 68 Va. Cir. 337, 338 (noting the Virginia Supreme Court has never ruled on the issue and referring to circuit court decisions in which the opposition conclusion was reached); *Courtney v. Ross Stores, Inc.*, 45 Va. Cir. 429, 430 (Fairfax 1998) (tracing history of cause of action and finding no requirement of physical injury); *Flanary v. Roanoke Valley SPCA*, 53 Va. Cir. 134, 139 (Roanoke City 2000) (finding physical injury not required element of negligent retention).

of negligent retention requires a showing of physical injury," but found the position requiring physical injury to be most persuasive:

> To require that the employee is "dangerous" and "likely to cause harm" clearly demands something more than an emotionally insensitive, offensive individual—but instead an individual that threatens the safety of others through some physical altercation, such as battery or assault. While discrimination and retaliation are hardly to be taken lightly, the Court will not extend the cause of action of negligent retention so far as to include the offensive and unprofessional, even if they are racist, sexist, and xenophonbic [sic].[62]

The Fourth Circuit again recognized the unsettled nature of this issue stating that "[a]lthough the Virginia Supreme Court would certainly be free to adopt a broad definition of harm extending beyond physical injury as an element of negligent hiring, we decline to do so on our own."[63]

1.307 Potential Claims of Immunity. Some classes of employers may avoid liability through claims of immunity. For example, in *Niese v. City of Alexandria,*[64] the Supreme Court of Virginia found the doctrine of sovereign immunity protected the City of Alexandria from a claim for negligent retention as to its decision to retain a specific police officer as this was an "integral part of the governmental function of maintaining a police force." However, as the Supreme Court of Virginia held in *J. v. Victory Tabernacle Baptist Church,*[65] "the independent tort of negligent hiring operates as an exception to the charitable immunity of religious institutions just as it does with regard to charitable hospitals." Furthermore, "the public policy rationale that shields a

[62] *Zeng v. Electronic Data Sys. Corp.*, No. 1:07cv310 (JCC), 2007 U.S. Dist. LEXIS 44412, at *7 (E.D. Va. June 18, 2007).

[63] *Wolf v. Fauquier Cnty. Bd. of Supervisors*, 555 F.3d 311, 320 (4th Cir. 2009); *see also Elrod v. Busch Entm't Corp.*, 479 Fed. Appx. 550, 551 (4th Cir. 2012) (affirming denial of amendment for negligent retention without physical injury as futile and stating: "Virginia law case law generally recognizes that a plaintiff may not recover for emotional injury resulting from the defendant's negligence without proof of contemporaneous physical injury. . . . The Virginia Supreme Court has not specified whether this rule applies to claims of negligent retention, and lower courts have reached differing results on this issue.").

[64] 264 Va. 230, 240, 564 S.E.2d 127, 133 (2002),

[65] 236 Va. 206, 210, 372 S.E.2d 391, 394 (1988).

charity from liability for acts of simple negligence does not extend to acts of gross negligence and willful and wanton negligence."[66]

1.4 DUAL AGENCY IN REAL ESTATE TRANSACTIONS

1.401 Dual Agency. Va. Code § 54.1-2130 *et seq.*, sets forth a framework within which two agents from the same brokerage house are permitted to work on opposite sides of a transaction. This arrangement—commonly known as "dual agency"—was formerly in conflict with many common law agency duties, but in 1995 the common law of agency was expressly abrogated "relative to brokerage relationships in real estate transactions to the extent inconsistent" with the statute.[67]

1.402 Common Law Before the Statute's Dual-Agency Amendment. Because of the fiduciary duties incumbent upon a broker in the principal-agent relationship, it logically follows that the broker should not represent both sides of any transaction in a dual agency. Obviously, undisclosed dual agency would be a breach of duty to both parties, because the broker is under a duty to disclose any involvement with an adverse interest related to a transaction in which his or her principal is involved and to act in the principal's sole interest to the exclusion of any adverse interest. Other fiduciary duties such as fidelity and loyalty could also be breached by a broker's undisclosed dual agency.

"The chief object of the principle is not to compel restitution, where actual fraud has been committed, or unjust advantage gained, but it is to prevent the agent from putting himself in the position, in which to be honest is to be a strain upon him, and to elevate him 'to a position where he cannot be tempted to betray his principal.'"[68]

But what if the dual agency was disclosed? Virginia courts had long maintained an exception to the dual-agency prohibition: a broker could represent both parties in a transaction if he or she obtained "the intelligent consent

[66] *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 488, 603 S.E.2d 916, 919 (2004). See also *Kern v. Allee*, No. CL05000090, 2006 Va. Cir. LEXIS 19, at *1 (Nelson Feb. 8, 2006), in which the circuit court found that the sovereign immunity doctrine would not protect a school principal when his actions constituted gross negligence.

[67] Va. Code § 54.1-2144 ("The common law of agency relative to brokerage relationships in real estate transactions to the extent inconsistent with this article shall be expressly abrogated.").

[68] *Williams v. Bolling*, 138 Va. 244, 266, 121 S.E. 270, 275 (1923) (citations omitted).

of both."[69] Even with such consent however, the preceding paragraph illustrates how difficult it is to reconcile dual agency with common-law agency duties owed to the principal.

1.403 Legislative Action. Virginia's apparent judicial approval of disclosed dual agency was in sharp contrast to other states in which courts went only so far as to prohibit undisclosed dual agency but never explicitly sanctioned disclosed dual agency. Maryland was formerly one of these jurisdictions[70] but in 1994 became the first of the three District of Columbia-metro area jurisdictions to enact specific legislation to provide a procedure for brokers to follow in practicing disclosed dual agency.[71] Even though Virginia's common law already appeared to permit disclosed dual agency, Virginia enacted its own dual-agency provisions in 1995, which was followed by the District of Columbia's enactment of provisions nearly identical to Virginia's in 1997.[72]

1.404 Statutory Framework.

A. Requirement for Disclosure of Dual-Agency Status.

1. "Standard" Versus "Limited Service" Agency. The statute permits a licensee to act as either a "standard agent" (one who performs all the statutory duties owed to the client),[73] or a "limited service agent" (one who, by contract, opts out of performing one or more of the required statutory duties) in a residential real estate transaction.[74] By a 2016 amendment, Va. Code § 54.1-2130 now defines "agent" as "a real estate licensee who is acting as (i) a standard agent in a residential real estate transaction, (ii) a limited

[69] *Id.* (noting that "nothing is better settled than that a man cannot be the agent of both the buyer and seller in the same transaction, without the intelligent consent of both"); *see also Price v. Martin*, 207 Va. 86, 89, 147 S.E.2d 716, 718 (1966); *Olson v. Brickles*, 203 Va. 447, 450, 124 S.E.2d 895, 898 (1962).

[70] *See Proctor v. Holden*, 75 Md. App. 1, 540 A.2d 133 (1988); *Lewis v. Long & Foster Real Estate, Inc.*, 85 Md. App. 754, 584 A.2d 1325 (1991) (holding that the undisclosed dual agency of both buyer and seller is not permitted; neither case discusses whether disclosed dual agency would be acceptable).

[71] *See* Md. Code Ann. [Bus. Occ. & Prof.] § 17-530(c), (d) (dual agency is prohibited except as specifically authorized under the statute).

[72] *See* D.C. Code § 42-1701 *et seq.* (formerly 45-1921 *et seq.*). The dual-agency statute originally enacted was for all intents and purposes identical to Virginia's law (*see* D.C. Code § 45-1934.1(h)); *see* D.C. Code § 42-1703(i) for current dual-agency provisions.

[73] Va. Code § 54.1-2130 ("Standard agent" defined as "a licensee who acts for or represents a client in an agency relationship . . . [and who has] the obligations as provided in [the statute] and any additional obligations agreed to by the parties in the brokerage agreement.").

[74] *Id.* ("Limited service agent" defined as "a licensee who acts for or represents a client . . . pursuant to a brokerage agreement that provides that the limited service representative will not provide one or more of the duties set forth [in the statute].")

service agent in a residential real estate transaction, or (iii) an agent in a commercial real estate transaction. This amendment specifies that "[a]ny real estate licensee who acts for or represents a client in an agency relationship in a residential real estate transaction shall either represent such client as a standard agent or a limited service agent." There is no distinction in the context of a commercial real estate transaction. Because the statute did not authorize limited service representation until 2006, the statute's original dual-agency provisions, enacted in 1995, made no distinction between these two agency types and referred generically to dual agency as "dual representation." However, by a 2011 amendment, the statute was modified to distinguish between the two permitted types of agency under the statute. Chapter 461 of the 2011 session amended the statute's original dual-agency section (Va. Code § 54.1-2139) and added several more sections dealing with disclosed and designated dual agency and representation. Chapter 750 of the 2012 session in turn repealed several of those sections. (Va. Code §§ 54.1-2139.2 and 54.1-2139.3) and consolidated their provisions in current §§ 54.1-2139 and 54.1-2139.1, as further amended. The 2012 Act also added § 54.1-2139.01, which authorizes disclosed dual agency and representation in commercial transactions.

2. Disclosure in Dual-Agency Representation. Disclosed "standard" dual agency is authorized pursuant to Va. Code § 54.1-2139, which lists mandatory items to be included in a "written disclosure of the consequences of dual agency," to which "all parties to the transaction" must give their "written consent."[75]

Va. Code § 54.1-2139(B) requires that the standard disclosure provided in that section be given to both clients. This requirement applies to independent contractor representatives as well as agents.

Even if a licensee has been engaged by a seller, the licensee does not breach any duty or obligation owed to the seller by showing alternative properties to prospective buyers, whether as clients or customers, or by representing other sellers who have other properties for sale.

3. Disclosure in Limited Service Representation. Va. Code § 54.1-2138.1(A) requires that limited service agents in a residential real estate transaction disclose dual representation "in accordance with § 54.1-2139." Va. Code § 54.1-2139(A) states: "A dual agent has an agency relationship under the brokerage agreements with the clients. A dual represen-

[75] Va. Code § 54.1-2139(A).

tative has an independent contractor relationship under the brokerage agreements with the clients." The section does not distinguish between the disclosures required of a dual agent and a dual representative, and it provides a single model form for use by either. The model form provides check boxes for indicating whether the licensee is a standard agent, a limited service agent, or an independent contractor. The section further states that "[t]he obligation to make the disclosures required by this section shall not relieve the licensee of the obligations set out in subsection B of § 54.1-2137 requiring all brokerage relationships to be set out in a written agreement between the licensee and the client."[76]

4. Disclosure in Independent Contractor Representation. The status of "independent contractor" was added to Va. Code § 54.1-2130 in 2011. The inclusion of "independent contractor" allows a licensee and his or her client to provide, by their contract, that the licensee is not acting as an "agent" under the statute. The licensee as an independent contractor owes to the client only the duties agreed to in the brokerage agreement and a limited number of additional duties set forth in specified subdivisions of §§ 54.1-2131 through 54.1-2135, and has none of the other obligations contained in those sections.[77] One of the enumerated statutory duties in those sections is the obligation to "disclose brokerage agreements pursuant to the provisions of [the statute]."[78] Therefore, independent contractors, despite not being "agents," are covered under the statute's "dual representation" provisions as limited service representatives.[79]

5. Disclosure in Mixed Standard Agency and Independent Contractor Representation. A licensee who represents one party as an independent contractor and another party as a "standard" agent must make the disclosure of dual agency or dual representation contained in current Va. Code § 54.1-2139(H) to both clients. Use of the model disclosure form, or a disclosure that substantially conforms to its provisions, is required for all dual agency or dual representation, whether the licensee is acting as a standard agent, limited service agent, or independent contractor. The form provides check boxes for indicating the capacity in which the licensee is acting.

[76] Va. Code § 54.1-2139(E).

[77] Va. Code § 54.1-2130 (definition of "independent contractor").

[78] *See* subsection (E) of §§ 54.1-2131 through 54.1-2134 and subsection (C) of § 54.1-2135.

[79] *See* Va. Code § 54.1-2139.

6. Disclosure in Commercial Transactions. Va. Code § 54.1-2139.01 addresses dual agency or representation in commercial real estate transactions. The section provides a model form with provisions that must be substantially conformed to in order to comply with the disclosure obligation. As in the residential disclosure form in Va. Code § 54.1-2139, the commercial form requires the disclosure of the parties' respective character as seller, buyer, landlord, or tenant. Unlike the residential form, however, the commercial disclosure does not contain any provisions relating to "mixed" representations involving one existing and one new client.

7. Disclosure of Ownership Interest in Specific Real Property. Va. Code § 54.1-2138.2 , enacted in 2022, provides that a real estate licensee has an affirmative duty, upon having substantive discussions about specific real property, to disclose in writing to the purchaser, seller, lessor, or lessee of the property if he or she, any member of his or her family, his or her firm, any member of his or her firm, or any entity in which he or she has an ownership interest has or will have an ownership interest as a party to the transaction and must also disclose in writing that he or she is a licensee. It also requires that an owner of a residential dwelling unit who has actual knowledge of a lis pendens filed against the dwelling unit must provide to a prospective purchaser a written disclosure of such fact on a form provided by the Real Estate Board on its website.

B. When Disclosure Must Be Given and Consent Obtained. The regulations require that a licensee acting as a dual or designated agent or dual or designated representative obtain the written consent of all clients to the transaction "at the earliest practical time."[80] The regulations also state that the "disclosure shall be given to, and consent obtained from, (i) the buyer not later than the time an offer to purchase is presented to the licensee who will present the offer to the listing agent or seller, and (ii) the seller not later than the time the offer to purchase is presented to the seller."[81] Va. Code § 54.1-2139(A) now requires that the dual agency or representation disclosure "be in writing and given to both parties prior to the commencement of such dual

[80] *See* 18 VAC 135-20-220(A)(3); *see also* 18 VAC 135-20-310(1) (requiring prompt delivery of instruments).

[81] 18 VAC 135-20-220(A)(3).

agency or dual representation."[82] Limited service agents are required to follow the same disclosure practices.[83]

C. Statutory Form of Disclosure Presumed Proper. The statute contains a form that the broker may use for compliance with the mandated disclosure requirements.[84] Disclosures and consents that comply substantially with the statutory model form are presumed valid.

D. Combining Dual-Agency Disclosure with Other Information. The ability to combine dual-agency disclosures with other information varies depending upon the type of transaction. For commercial transactions, Va. Code § 54.1-2139.01(B), and designated standard agency transactions, Va. Code § 54.1-2139.1(B), the disclosure may appear in combination with other disclosures or information, but only if it is "conspicuous, printed in bold lettering, all capitals, underlined, or within a separate box."[85] For residential transactions involving dual agency or dual representation, the statute provides that the standard disclosure "shall not be deemed to comply with the requirements set out in this section if . . . given in a purchase agreement, lease or any other document related to a transaction."[86] This requirement appears to prohibit combining the disclosure regardless of the conspicuousness of its presentation.

E. Disclosure Alone Cannot Terminate Brokerage Relationship. The purpose of this dual-agency provision of the statute is to provide a mechanism by which a broker gives all parties complete disclosure, unfettered by any fear that the disclosure itself will result in either party bringing suit for breach of fiduciary duties. If the disclosure is done properly, the statute protects the disclosing broker from suit, and the disclosure does not result in termination of any brokerage relationship between the broker and any of the involved parties simply by the disclosure having been made.[87]

[82] For a form for disclosure of dual agency or dual representation in a residential real estate transaction, see Va. Code § 54.1-2139(H). For a form for disclosure of dual agency or dual representation in a commercial real estate transaction, see Va. Code § 54.1-2139.01(B). For a form for disclosure of designated agents or representatives in a residential real estate transaction, see Va. Code § 54.1-2139.1(B).

[83] Va. Code § 54.1-2138.1(A).

[84] Va. Code §§ 54.1-2139(H) (residential transactions), 54.1-2139.01(B) (commercial transactions), 54.1-2139.1(B) (designated agents).

[85] Va. Code §§ 54.1-2139.01(B), 54.1-2139.1(B); *see also* 18 VAC 135-20-220(A)(4).

[86] Va. Code § 54.1-2139(D).

[87] Va. Code §§ 54.1-2139(F) (residential transactions), 54.1-2139.01(D) (commercial transactions), 54.1-2139.1(D) (designated licensees).

F. Separate Licensees in Same Firm Representing Each Side of Transaction.

1. Permissive Versus Mandatory Designation. This is one of the more curious sections of the dual-agency statute, providing that a principal or supervising broker is permitted but not required to assign designated agents or representatives from his or her office to represent each party in the residential real estate transaction.[88] While Maryland's dual-agency statute requires that separate salespersons be so designated, Virginia's version and the District of Columbia's version both allow a single salesperson to be the disclosed dual agent of both parties to the transaction, as long as the parties give the consent required under the statute. The Virginia statute, while specifying that designated agents representing separate clients are not dual agents, states that "the principal or broker who is supervising the transaction shall be considered a dual agent or representative."[89] This difference between Maryland and Virginia may be due to the differences in the common law in each jurisdiction before their respective statutory enactments for disclosed dual agency.

2. The Supervising Broker Is the Dual Agent. If the supervising broker assigns separate designated salespersons, it is the supervising broker who will be considered a dual agent rather than the individuals assigned.[90]

3. Separate Designated Representatives Recommended. Although not required, it is highly recommended that the supervising broker designate separate licensees to represent each side of the transaction in order to promote the separate, fiduciary-type structure that is so vital to the principal/agent relationship.

4. Designated Licensees Must Be Disclosed to All Parties and Their Consent Obtained. The use of designated licensees must be disclosed to all parties and their respective written consents obtained.[91] The statute provides a form that can be used for this purpose and that must be substantially complied with for a disclosure to be effective. This disclosure can be given in combination with other disclosures or with other information, but

[88] Va. Code § 54.1-2139.1(A).

[89] *Id.*

[90] *Id.*

[91] Va. Code § 54.1-2139.1(B).

only if it is conspicuous, in bold lettering, all capitals, and underlined or within a separate box.[92] The best practice is to use the statutory form.

G. Confidential Information Must Remain Confidential. The statute expressly provides that a dual agent or representative "may not disclose to either client any information that has been given to the dual agent or representative by the other client within the confidence and trust of the brokerage relationship except for that information which is otherwise required or permitted by [the statute] to be disclosed."[93] Identical language appears in the model form in Va. Code § 54.1-2139.01(B) for commercial transactions.[94] Designated agents or representatives

> may not disclose, except to the affiliated licensee's broker, personal or financial information received from the clients during the brokerage relationship and any other information that the client requests during the brokerage relationship be kept confidential, unless otherwise provided for by law or the client consents in writing to the release of such information.[95]

H. Failure to Obtain Consent. If a client refuses to consent to a disclosed dual agency or representation, the licensee may withdraw from the representation without liability and terminate the brokerage relationship with that client. The licensee may continue to represent the other (consenting) party in the transaction and may also represent the non-consenting party in other transactions not involving dual representation.[96]

[92] *Id.*

[93] Va. Code § 54.1-2139(H) (residential transactions) (quotation from form disclosure language).

[94] See also 18 VAC 135-20-300(5) (failure to keep such information confidential constitutes misrepresentation or omission by a licensee).

[95] Va. Code § 54.1-2139.1(A).

[96] Va. Code §§ 54.1-2139(G) (residential transactions), 54.1-2139.01(E) (commercial transactions), 54.1-2139.1(E) (designated agent or representative).