Getting a Case Ready for Trial and Getting Ready to Get Back Into the Court Room

February 20, 2021
Presented to the Old Dominion Bar Association

James A. Cales III, Esquire
Brittany A. McGill, Esquire

Furniss, Davis, Rashkind, and Saunders, PC
6160 Kempsville Circle, Ste 341B
Norfolk, Virginia 23502
757-461-7100
757-461-0083 (facsimile)

Pleadings

Complaint

A. Service of a Complaint

The suit is initiated by the plaintiff's filing of a complaint. Upon finding that a complaint has been filed, defense counsel should first confirm that the defendant has been properly served with the suit. In state and federal court, service of process consists of the complaint *and* a summons. Va. Sup. Ct. R. 3:5(a)-(b); Fed. R. Civ. P. 4(c)(1).

In state court, process must be served within one year of the filing of the complaint. Va. Sup. Ct. R. 3:5(e)). In federal court, process must be served within 90 days of the filing of the complaint. Fed. R. Civ. P. 4(m).

B. Contents of a Complaint

In essence, a complaint must adequately inform the defendant of the plaintiff's claim(s). Va. Sup. Ct. R. 1:4(d) requires the complaint to "state the facts on which the [plaintiff] relies in numbered paragraphs, and... clearly inform the [defendant] of the true nature of the claim...." Fed. R. Civ. P. 8(a) requires the complaint to include a "short and plain statement of the grounds for the court's jurisdiction," "a short and plain statement of the claim showing that the pleader is entitled to relief;" and "a demand for the relief sought."

A complaint requesting an award of money damages must include an *ad damnum* clause stating the amount of damages sought. Va. Sup. Ct. R. 3:2(c)(ii). A general allegation of negligence is sufficient without specifying the particulars of the negligence. Va. Sup. Ct. R. 3:18(b). A claim for punitive damages cannot survive when it is not expressly made in the prayer for relief or *ad damnum* clause. *Harrell v. Woodson*, 233 Va. 117, 122 (1987).

Responsive Pleadings

A. Timing

Responsive pleadings must be filed within 21 days after service of process. Va. Sup. Ct. R. 3:8(a); Fed. R. Civ. P. 12(a)(1)(A)(i). If service has been waived upon the request of the plaintiff, the time is extended to 60 days after the request for waiver was sent. a. Sup. Ct. R. 3:8(a); Fed. R. Civ. P. 12(a)(1)(A)(ii).

Failure to respond within the appropriate time frame puts the defendant in default and subject to default judgment for the plaintiff. Va. Sup. Ct. R. 3:19; Fed. R. Civ. P. 55.

B. Answer

An answer responds to each paragraph of the complaint with an admission or denial. Va. Sup. Ct. R. 3:8(a); Fed. R. Civ. P. 8(b)(1)-(2). Some paragraphs contain multiple allegations. Counsel should break down each paragraph into subparts and respond to each allegation within each paragraph. *See* Fed. R. Civ. P. 8(b)(4). Failure to deny an allegation amounts to an admission. Va. Sup. Ct. R. 1:4(e); Fed. R. Civ. P. 8(b)(6). If the defendant lacks knowledge or information sufficient to form a belief about the truth of an allegation, counsel should state that; it will be treated as a denial. Rule 1:4(e); Fed. R. Civ. P. 8(b)(5).

In federal court, counsel may, in good faith, make a general denial of allegations—including the jurisdictional grounds—contained within the complaint. Fed. R. Civ. P. 8(b)(3). If all allegations are not denied, counsel must either specifically admit/deny each allegation, or generally deny all except those specifically admitted. *Id.* General denials are not permitted in state court. Va. Sup. Ct. R. 3:8(a).

All potential affirmative defenses should be included in the Answer. In state court, "Contributory negligence shall not constitute a defense unless pleaded or shown by the plaintiff's evidence." Va. Sup. Ct. R. 3:18(c). In federal court, the defendant *must* plead any and all affirmative defenses. Fed. R. Civ. P. 8(c)(1). In addition to contributory negligence, common affirmative defenses include:

- Failure to mitigate damages
- Assumption of the risk
- Estoppel
- Res judicata

C. Other Types of Responsive Pleadings

In state court, a demurrer, plea, motion to dismiss, and motion for bill of particulars is deemed a responsive pleading that satisfies the 21/60-day response requirement. Va. Sup. Ct. R. 3:8(a). When the court overrules all motions/demurrers/pleas, the defendant must file an answer within 21 days of the entry of the order. Va. Sup. Ct. R. 3:8(b).

Fed. R. Civ. P. 12(b) outlines certain motions that, if the defendant so chooses to file, must be filed before the defendant files an answer.

- Lack of subject-matter jurisdiction
- Lack of personal jurisdiction
- Improper venue
- Insufficient process
- Insufficient service of process
- Failure to state a claim upon which relief may be granted

- Failure to join a party under Rule 19

If the federal court denies a motion or postpones its decision until trial, the defendant must file an answer within 14 days after notice of the court's action. Fed. R. Civ. P. 12(a)(4)(A).

When the complaint fails to state a cause of action, the defendant should file a demurrer or a motion to dismiss for failure to state a claim upon which relief may be granted.

Demurrer (Va. Code § 8.01-273(A))

Standard of Review:

> A demurrer, of course, only tests the sufficiency of the factual allegations in plaintiff's Complaint to determine whether they state a cause of action. *Fun v. Virginia Military Institute*, 245 Va. 249, 252 (1993). A demurrer is heard at the initial pleadings stage. Though a court considers plaintiff's factual allegations as true on a demurrer, plaintiff must, nevertheless, do more than simply plead conclusions; it must plead actual facts to support each and every claim. See e.g. *Vaughan v. DynCorp.*, 38 Va. Cr. 516, 517 (Fairfax Co. 1994); *Steelman v. Fitzgerald*, 69 Va. Cir. 393, 396 (Northampton County 2005). In addition, a court is not bound by plaintiff's conclusions of law in evaluating a demurrer. *Fox v. Custis*, 236 Va. 69, 71 (1988).

*Motion to Dismiss for Failure to State a Claim (*Fed. R. Civ. P. 12(b)(6))

Standard of Review:

> The principles of law governing the resolution of a motion to dismiss for failing to state a claim upon which relief can be granted are beyond dispute in federal court. Specifically, the court must accept as true all facts pleaded by the plaintiff and construe those facts in the light most favorable to plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Martin Marietta Corp. v. Int'l Telecomm. Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992); *Davis v. Hudgins*, 896 F.Supp. 561, 566 (E.D.Va. 1995). The averments in the complaint must be plausible and rise above a merely speculative level to demonstrate a reasonable expectation that the plaintiff is entitled to the relief sought. Within the last few years, the standard for consideration of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure has undergone considerable refinement. In light of Supreme Court authority that redefined the landscape, a complaint must state "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To satisfy this plausibility requirement, the plaintiff's submission must "demonstrate more than a 'sheer possibility that a defendant has acted unlawfully,'" but

must make a showing of facts sufficient which, if true, are enough to show that the plaintiff is entitled to relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). The mere offering of labels and conclusions in a formulaic pleading is not sufficient, and the district courts are free to discount such insufficient and "unadorned" allegations. Id. In sum, the age of boilerplate complaints that survive simply because the drafter is familiar with the elements of a cause of action has passed, and the well-pleaded facts of a claim will now govern its viability.

In resolving a motion to dismiss, the Court can only consider those allegations set forth in the complaint and those documents set forth as exhibits or incorporated by reference. *Simons v. Montgomery County Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985). Additionally, the Court may also consider those documents which are necessarily at issue in the proceedings and not appended to the Complaint without conversion of the Rule 12(b)(6) motion to a Rule 56 motion for summary judgment. *Gasner v. Bd. of Sup. Of County of Dinwiddie*, Va., 162 F.R.D. 280, 282 (E.D.Va. 1995) ("when a plaintiff fails to introduce a pertinent document as part of his complaint, the defendant may attach the document to a motion to dismiss").

A motion for bill of particulars (Va. Sup. Ct. R. 3:7) or motion for a more definite statement (Fed. R. Civ. P. 12(e)) asks the court to order the plaintiff to better explain a complaint that is so vague or ambiguous that it does not adequately notify the defendant of the claim asserted such that the defendant cannot prepare a response. In state court, the defendant must file a responsive pleading within 21 days after the plaintiff files a bill of particulars; in federal court the defendant has 14 days to file a responsive pleading after the bill of particulars is filed.

A motion to dismiss asks the court to dismiss the suit, or a particular count for a certain reason, such as lack of jurisdiction, failure to serve process within one year (Va. Code § 8.01-227(B)), or the reasons provided in Fed. R. Civ. P. 12(b) (cited above).

A plea in bar presents a single issue of fact, which if proven, bars recovery. *Hawthorne v. VanMarter*, 279 Va. 566 (2010). It "constitutes either a complete defense to the complaint, or to that part of the complaint to which it is pleaded." *Smith v. McLaughlin*, 289 Va. 241, 252 (2015) (internal quotation marks and citation omitted). Common pleas include statute of limitations (Va. Code §§ 8.01-228 – 8.01-256, sovereign/municipal immunity, res judicata (Rule 1:6), and collateral estoppel (issue preclusion).

D. Additional Potential Motions/Actions

- Counterclaim (Va. Sup. Ct. R. 3:9; Fed. R. Civ. P. 13)
- Cross-claim (Va. Sup. Ct. R. 3:10; Fed. R. Civ. P. 13)
- Motion for Joinder of Additional Parties (Va. Sup. Ct. R 3:12; Fed. R. Civ. P. 19; Fed. R. Civ. P. 20)
- Third-Party Complaint (Va. Sup. Ct. R 3:13; Fed. R. Civ. P. 13)
- Objection to Venue and Motion to Transfer Venue (Va. Code § 8.01-264; Fed. R. Civ. P. 12(b)(3))

Pretrial Discovery

Scheduling Order/Pretrial Order

In Federal Court, this will be handled by the Court in both Norfolk and Newport News Divisions.

In State Court, ask for one every time. Do not be afraid to alter timing requirements on experts and objections to allow for a pretrial hearing on motions and objections in advance of trial.

Calendar EVERY date on the Orders.

General Discovery Rules/Concepts

Parties may discover information regarding any matter, not privileged, which is relevant to the subject matter involved in the action, whether it relates to the claim or defense of either party. Va. Sup. Ct. R. 4:1(b)(1); Fed. R. Civ. P. 26(b)(1). Information sought need not be admissible at trial if it is reasonably calculated to lead to the discovery of admissible evidence. Parties have a duty to amend/supplement/correct their discovery responses as new information becomes available or as the party learns that a previously served response is materially incorrect or incomplete. Va. Sup. Ct. R. 4:1(e); Fed. R. Civ. P. 26(e).

Protective orders may be issued as protection from annoyance, embarrassment, oppression, or undue burden/expense. Va. Sup. Ct. R. 4:1(c); Fed. R. Civ. P. 26(c).

Materials prepared in anticipation of litigation or for trial are protected from discovery under the work-product doctrine unless the requesting party has substantial need for the materials and is unable to, without undue hardship, obtain the substantial equivalent by other meas. Va. Sup. Ct. R. 4:1(b)(3); Fed. R. Civ. P. 26(b)(3). When a party withholds information under the work-product doctrine, the party must expressly claim the privilege/protection and describe the nature of the materials not produced or disclosed in a manner that enables the other party to assess the applicability of the privilege. Va. Sup. Ct. R. 4:1(b)(6); Fed. R. Civ. P. 26(b)(5).

Required Disclosures in Federal Court (Fed. R. Civ. P. 26(a))

In federal court, the parties must exchange certain information without awaiting a discovery request. Federal Rule 26(a)(1)(A) requires the disclosure of possible witness information, documents that may be used to support a claim or defense, a computation of damages, and insurance policies that may be used to satisfy the judgment. The timing of these disclosures is governed by the required discovery conference pursuant to Fed. R. 26(f).

Federal Rule 26(a)(3) outlines the required pretrial disclosures of trial witnesses and exhibits.

Interrogatories (Va. Sup. Ct. R. 4:8; Fed. R. Civ. P. 33)

Interrogatories must be answered in writing under oath. Objections must be stated in writing and served with the responses.

	State	Federal
Time to Respond	Within 21 days after service of the interrogatories Defendant: 28 days if served with the complaint **Best practice is to serve objections within 21 days.**	30 days after service of the interrogatories, or as provided in Rule 16(b) Order. **Pursuant to Local Rule 26(C) (E.D. Va.) Objections must be made within 15 days or they are waived.**
Amount Permitted	30 maximum, including all parts and subparts. May request leave of court to serve more for good cause.	25 maximum, including all subparts. May request leave of court to serve more.

Request for Production (Va. Sup. Ct. R. 4:9; Fed. R. Civ. P. 34)

A party may request production or inspection of documents, drawings, photos, graphs, electronically stored information, and tangible items. A party may also request entry onto land or property for inspection, surveying, photographing, etc. The materials or land/property must be within the responding party's possession, custody, or control. Requests must be described with reasonable particularity.

In state court, the defendant's written objections and responses are due within 28 days after service of the complaint, and the plaintiff's written objections and responses are due within 21 days after service of the request for production. In federal court, both parties must respond within 30 days. Objections must be specifically stated and must state whether any responsive materials are being withheld on the basis of that objection. Objections to part of a request must specify the part and produce/permit inspection of the rest.

Request for Production from Non-Parties (Va. Sup. Ct. R. 4:9A; Fed R. Civ. P. 45)

In state and federal court counsel may issue a subpoena *duces tecum* for production/inspection from non-parties. The scope of permissible discovery is the same as the scope under Va. Rule 4:9/Federal Rule 34. Patient health records are protected by the privacy provisions of Va. Code § 32.1-127.1:03.

Independent Physical/Mental Examination (Va. Sup. Ct. R. 4:10; Fed. R. Civ. P. 35)

The party's physical or mental condition must be at issue in the action. The examination is ordered by the court for good cause on motion of the adverse party.

Requests for Admission (Va. Sup. Ct. R. 4:11; Fed. R. Civ. P. 36)

Requests for admission ask the opposing party to admit the truth of any matters within the scope of permissible discovery. The request may relate to (1) statements/opinions of fact; (2) the application of law to fact; or (3) the genuineness of a document. A request to admit the genuineness of a document must include a copy of the document unless the document has been otherwise furnished or made available for inspection and copying.

•	State •	Federal
Time to Respond	Defendant: 28 days after service of the complaint Plaintiff: within 21 days after service of the requests	30 days after service of the requests
Amount Permitted	Requests relating to the genuineness of documents: no limit Requests not relating to the genuineness of documents: 30, including all parts and subparts. Leave for additional requests may be granted in the interests of justice.	No maximum

Answers must specifically admit, deny, or state in detail why the party cannot truthfully admit or deny it. A party may not state ack of information/knowledge as a reason for failure to admit or deny unless the party confirms reasonable inquiry has been made and that the information known/readily obtainable is insufficient to enable

admission/denial. In the case of a partial admission, counsel should specify the part admitted and qualify or deny the rest. Objections must be stated in writing. The requesting party may file a motion for the court to determine the sufficiency of answers/objections.

In state court, requests for admissions and answers or objections Any admitted matter is conclusively established for purposes of the pending action only and may not be used against that party any other proceeding. The requests and answers become part of the record when the court admits them into evidence at trial.

Depositions

Depositions are a topic unto themselves. Rule 4:5 governs depositions in State Court, and Rule 30 of the Federal Rules of Civil Procedure govern depositions in federal court. Here are some specific pointers:

- Prepare, prepare, prepare your client and witnesses. Take them through areas of inquiry. Make sure they know that they are required to testify as to facts, but not render legal conclusions.
- There are only three acceptable reasons to instruct a client/witness not to answer a question: (1) privilege, (2) the inquiry violates a court ruling, or (3) the inquiry is harassing. Preparation is also key in the event the court rules the questions proper.

Expert Discovery

Act early in forming your expert plan. Among the hardest and most stressful portions of pretrial litigation is securing potential expert testimony.

Virginia Rule 4:1(b)(4) outlines the permissible expert discovery through interrogatories. Usually, the pretrial scheduling order governs the timing of expert disclosures. Disclosures must be supported by adequate opinions and a detailed explanation of the basis for those opinions. Failure to do so will result in opinions being excluded, even if the information is disclosed in a deposition of an expert. *John Crane, Inc. v. Jones*, 274 Va. 581 (2007). New opinions cannot be introduced at trial that had not previously been disclosed. *Mikhaylov v. Sales*, 291 Va. 349 (2016). See also the excellent article on *John Crane* pitfalls authored by Jonathan Petty. https://www.joshsilvermanlaw.com/pdfs/John_Crane_Pain.pdf

Federal Rule 26(a)(2) governs the required expert disclosures in federal court. Note disclosure and report requirements of retained experts and when experts are already involved in the subject matter at issue. Retained experts must typically file a signed report, subject to the requirements of Rule 26(a)(2)(b). The report must contain:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness

in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.

Summary Judgment

A party is entitled to summary judgment when the moving party shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Summary Judgment in Federal Court (*Fed. R. Civ. P. 56)*)

The standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is well established and beyond dispute. Specifically, the Court may award summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Dawson v. Leewood Nursing Home, Inc.* 14 F.Supp. 2d 828, 830, (E.D. Va. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 LEd2d 265 (1986); *Evans v. Technologies Applications and Serv. Co.,* 80 F.3d 954, 958 (4th Cir. 1996). Once a defendant's "Motion for Summary Judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists." *Norloff v. Virginia*, 51 F.Supp. 2d 699, 702 (E.D. Va. 1998) (citing *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 LEd2d 538 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 LEd2d 202 (1986). Of course, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," when performing the examination of the record to determine whether, in fact, the genuine issue of material fact exists. *Id*. at 255, 106 S. Ct. at 2513-14; *Johnson v. Quinones*, 145 F.3d 164, 167 (4th Cir. 1998); *Terry's Floor Fashions, Inc. v. Spurlington Indust., Inc.*, 763 F.2d 604, 610 (4th Cir. 1985). Thereafter, the nonmoving party must set forth specific facts to show genuine issues for trial. *See Celotex*, 477 U.S. at 324. The nonmoving party may not, however, manufacture a genuine issue of material fact "through mere speculation or the building of one inference upon another." *Adams v. Drew*, 906 F.Supp. 1050, 1053 (E.D.Va. 1995) (citing *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256,1260 (4th Cir. 1993). Importantly, "[a] genuine issue of material fact

is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984).

Summary Judgment in State Court (Va. Sup. Ct. R. 3:20)

In state court, good luck. Rule 3:20 and Va. Code § 8.01-420(A) prohibit the use of Rule 4:5 deposition testimony in support of summary judgment, and a fair reading of the Rule and statutory provisions prohibits the use of affidavits in support of summary judgment except in a business context not present in municipal claims. Although provided for under the Virginia Supreme Court Rules, as a practical matter summary judgment is essentially unavailable; limited exceptions include situations where a plaintiff has abandoned a claim and the Virginia Prison Litigation Reform Act. Affidavits and depositions may be used in support of a partial motion for summary judgment on punitive damages cases not involving DUI claims. *See* Va. Code 8.01-420(B).

Requests for admission for which the responses are submitted in support of a motion for summary judgment may be based in whole or in part upon any discovery depositions under Rule 4:5 and may include admitted facts learned or referenced in such a deposition, provided that any such request for admission shall not reference the deposition or require the party to admit that the deponent gave specific testimony.

Judge or Jury?

If you have a choice, how do you decide?

Jury Verdict Research

Does your case justify the time and expense of mock juries, focus groups, etc.?

Discussion of some vendors, options

Mike Liffrig, J.D., First Court, Inc.;
http://www.firstcourt.com

Dr. Jeffrey T. Frederick, Director
Jury Research Services Division
National Legal Research Group, Inc.
2421 Ivy Road, P.O. Box 7187
Charlottesville, Virginia 22906
Phone: 434-817-6574 • Fax: 434-817-6570
Toll-free: 1-800-727-6574
www.nlrg.com/jury

Blog: www.nlrg.com/blogs/jury-research/

David Ball, Durham, N.C.
http://www.consultmmb.com

Rick Fuentes
R & D Strategic Solutions
2300 Bethel View Road
Suite 110
Box 321
Cumming, GA 30040
770-888-7664
www.rd-ss.com

Sarah "Sam" Miller
Trialcraft, Inc.
150 Addison St., # 108
Berkeley, CA 94794
510-898-1292
smiller@trialcraft.com

What information is available in your locality, court? Can your locality (properly) assist?

Jury Pool Investigation

What information does your local court system, or different jurists within it, provide or allow?

> Va. Code § 8.01-353 (A): "Upon request, the clerk or sheriff or other officer responsible for notifying jurors to appear in court for the trial of a case shall make available to all counsel of record in that case, a copy of the jury panel to be used for the trial of the case at least three full business days before the trial. Such copy of the jury panel shall show the name, age, address, occupation and employer of each person on the panel. Any error in the information shown on such copy of the jury panel shall not be grounds for a mistrial or assignable as error on appeal, and the parties in the case shall be responsible for verifying the accuracy of such information."

Can your locality (properly) assist?

> What method does your local court system, or different jurists within it, employ?

What about co-defendants? How are strikes to be shared; must they be shared?

Voir dire

Va. Statutes

- § 8.01-357 (selection of jury panel)
- § 8.01-358 (voir dire examination of persons called as jurors)
- § 25.1-229 (additional rules in condemnation cases)

Va. Sup. Ct. Rules

- Rule 1:21. Preliminary Voir Dire Information
- Rule 3:22A. Examination of Prospective Trial Jurors

Federal Rules

- Rule 47 Selecting Jurors
- Rule 48 Number of Jurors; Verdict; Polling

Elimination of duty to exchange voir dire from standard Uniform Scheduling Order

The Uniform Pretrial Scheduling Order referenced in Rule 1:18 (B), and set out in the Appendix of Forms following Part One of the Rules, no longer requires proposed voir dire questions to be exchanged before trial. But your local procedures, or the order routinely used in a given jurisdiction, may dictate otherwise. Where no such routine order, system or practice exists, it is suggested that you seek an agreement from adverse counsel, or failing that, a separate order from the court, mandating such an exchange, so as to avoid surprises and mistrials.

Do you need special voir dire questions or methods in sensitive or publicized cases?

"While the examination of veniremen is a matter of right, the scope of the examination is a matter which rests within a trial court's sound discretion. *Davis v. Sykes*, 202 Va. 952, 956, 121 S.E.2d 513, 516 (1961). A trial court's ruling on the matter, therefore, will not be disturbed on appeal unless it shall plainly appear that the court abused its discretion." *Speet v. Bacaj*, 237 Va. 290, 377 S.E.2d 397 (1989).