2017 Convention
Champions for Justice

5. What We Are Learning About Protecting Your Verdict on Appeal in 2017

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PLAINTIFF'S JUDGMENTS **AFFIRMED** BY THE SUPREME COURT

Wakole v. Barber, 283 Va. 488 (2012)

Bodily injury, auto collision ($30K)
Holding: Plaintiffs may ask juries to award specific amounts for each component of their claims, and are not limited to asking the jury for a single lump sum.
Key quote: "Today, we hold that, as long as there is evidence to support an award of non-economic damages, plaintiff is allowed to break the lump sum into its component parts and urge a 'fixed amount' for each element of damages claimed as long as the amount is not based on a per diem or other fixed basis." 283 Va. at 494.
Takeaway: The plaintiff's lawyer wisely avoided using a mathematical standard to calculate individual components of her claim, thus dodging the Supreme Court's prohibition of giving "formulas" to juries. This case is best seen as validating a useful trial tactic instead of announcing substantive law.

Galumbeck v. Lopez, 283 Va. 500 (2012)

Wrongful death, medical malpractice ($2M)
Holdings: Defendant doctor's assignments of error held waived by failure to make a proper proffer and by the doctor's offering evidence of the same character in his case in chief.
Key quote: "It is clear that Dr. Galumbeck's 'proffer' was recorded after court had adjourned for the day and outside the presence of opposing counsel. . . . It can hardly be said that Lopez acquiesced or stipulated to a statement that he was unaware Dr. Galumbeck was making." 283 Va. at 508.
Takeaway: Like *Wakole*, this ruling is not about substantive tort law. *Galumbeck* offers valuable lessons in preservation of issues for appeal, but precious little guidance about medical-negligence litigation.

John Crane, Inc. v. Hardick, 284 Va. 329 (2012)

Bodily injury (eventual death), asbestos exposure, Jones Act ($1M)
Holding: Estate may recover damages for seaman's pain and suffering where it pleads and proves a survival claim.
Key quote: "Because the Jones Act permits recovery for the losses suffered during a decedent seaman's lifetime in a survival action, Hardick's estate may recover for his pre-death pain and suffering." 284 Va. at 335.
Takeaway: This was the Supreme Court's second opinion in this appeal. The original judgment was for 50%, (John Crane's assigned share) of $6 million, and in the court's

first opinion, 283 Va. 358 (2012), it reduced the $6M by $3.15M, so the estate would collect less than $1.5M overall. This decision on rehearing reinstated a $2M survival claim, a net benefit of $1M to the estate. The revised opinion recognizes the effect of existing federal caselaw that defines the claims that an estate may advance.

Allied Concrete v. Lester, 285 Va. 295 (2013)

Wrongful death and bodily injury, automobile collision ($6.45M, remitted from $10.6M verdict)
Holdings: (1) Trial court's response to intentional spoliation and to claimed juror misconduct was within its discretion; (2) trial court improperly remitted verdict by comparing a husband's loss with a parent's.
Key quote: (1) "While we recognize that Lester's conduct was dishonest and Murray's conduct was patently unethical, the role of the Court in the present case is limited to determining whether the litigants had a fair trial on the merits." 285 Va. at 307 n. 7. (2) "The trial court provided no basis for us to ascertain, nor can we independently ascertain, whether the amount of the recovery after remittitur bears a reasonable relation to the damages disclosed by the evidence.'" *Id*. at 313.
Takeaway: In this appeal, the Supreme Court not only affirmed the plaintiff's recovery; it enhanced it by reinstating an additional $4 million that the trial court had remitted. The egregiousness of the lawyer's and the plaintiff's misconduct required a response from the trial court. The justices approved of that response, including the facts that the defendants received a fee award for litigating the spoliation claim, and they actually got to introduce the concealed evidence. The ruling on remittitur emphasizes how hard it is for a judge to reduce a verdict and make that reduction stick on appeal. If the judge makes an incomplete record, the justices will reinstate the verdict without remanding to allow the judge to make a better record.

Byrd Theatre Found. v. Barnett, 287 Va. 291 (2014)

Bodily injury, premises liability ($750K)
Holding: Trial court correctly denied a plea of charitable immunity.
Key quote: "Based on the Foundation's articles of incorporation and amended bylaws, its charitable aim was to cultivate an appreciation for the performing arts. . . . The foundation was neither organized nor operated for the purpose of providing theater organ enthusiasts an opportunity to repair or restore the Byrd Theatre organ." 287 Va. at 297.
Takeaway: Unlike *Wakole* and *Galumbeck*, *Byrd Theatre* does explore substantive law, not merely procedure. It is, however, constrained by its narrow facts. The critical inquiry in the case was whether a volunteer repairman was a beneficiary of the foundation's charitable purpose. In effect, the justices ruled that it was the other way

around – the foundation was the beneficiary of the repairman's work – so immunity did not bar recovery.

RGR, LLC v. Settle, 288 Va. 260 (2014)

Wrongful death, truck/train collision ($2.5M)
Holdings: (1) Trial court properly instructed jury on duty of care by a landowner adjacent to public right-of-way. (2) Whether decedent was contributorily negligent was properly given to the jury to decide.
Key quote: (1) "Recognition that 'a duty of care is ordinarily owed to avoid conduct that creates risks of harms to others' is the majority view of both courts and commentators. . . . This general duty is owed to those within reach of a defendant's conduct." 288 Va. at 276. (2) "Even if [the decedent] in fact did not look [before driving onto the tracks], that failure was not contributory negligence as a matter of law because the jury could have inferred that, based on the circumstances, looking would have been futile due to the location of RGR's lumber stacks within Norfolk Southern's right-of-way. Thus, RGR's contention . . . is essentially an argument that [the decedent] was legally required to stop in order to look and listen. But this has never been the law." *Id*. at 290-91.
Takeaway: *RGR v. Settle* is a rare animal. Originally decided 5-2 in favor of the landowner, based solely on the contrib issue, it morphed into a 4-3 win for the estate after a grant of rehearing. In the process, the majority and dissenting opinions grew from 19 pages to over 63, including an extensive new discussion of the duty issue. Early commentators seized upon the eventual dissent's opening salvo to summarize what the court had wrought: "the Court imposes an abstract duty to mankind generally, based on general maxims." *Id*. at 298 (McClanahan, J., dissenting). The two key quotations above have plenty of cousins that may prove useful in various litigation contexts. While this holding was welcome news for plaintiffs, practitioners should exercise caution in relying on it, especially in attempting to push the bounds of legal duties. Two of the four members of the majority (Kinser, Millette) are gone from the court. If either of their replacements (Kelsey, McCullough) sees the issue differently, the *Settle* doctrine could have a limited shelf life.

Fiorucci v. Chinn, 288 Va. 444 (2014)

Bodily injury, dental malpractice ($300K)
Holding: Trial court correctly excluded evidence of risk-of-surgery discussions before negligent extraction of a wisdom tooth. Applies *Wright v. Kaye* to pre-operative negligence, including diagnosis.
Key quote: "Chinn's awareness of the risks of the extractions was not a defense against his claim that Dr. Fiorucci deviated from the standard of care in misdiagnosing the condition of Chinn's wisdom teeth or negligently performing the surgery. Therefore,

evidence of the informed consent discussions . . . were 'neither relevant nor material to the issue of the standard of care.'" 288 Va. at 448.

Takeaway: This ruling reinforces the holding in *Wright* that even if he understands the risks, a patient "does not consent to negligence." This largely prevents medical providers from defending on the basis that a patient assumed the risk that the procedure – and now, the diagnosis – might include negligence by the provider.

PLAINTIFF'S JUDGMENTS **REVERSED** BY THE SUPREME COURT

Burns v. Gagnon, 283 Va. 657 (2012)

Bodily injury; failure to protect ($1.25M)
Holding: School official's actions, in responding to threatened assault by one student against another, are protected by official immunity (simple-negligence claims only).
Key quote: "In light of these decisions that Burns had to make upon receiving Diaz's report, we conclude that his response (or lack thereof) was not simply a ministerial act; instead it was an act involving the exercise of judgment and discretion." 283 Va. at 677.
Takeaway: Overcoming official immunity is hard. Unless the action taken (or not taken) is purely ministerial – no judgment calls involved – you probably won't be able to state a simple-negligence claim. You can, however, maintain a gross-negligence claim, which an official's immunity does not cover. *Burns* was remanded for trial on Gagnon's gross-negligence count.

Hale v. Maersk Line Ltd., 284 Va. 358 (2012).

Bodily injury; Jones Act; failure to protect seaman while on shore leave; related claims ($2M, remitted from $25M)
Holding: No liability of shipowner for injuries to seaman while on shore leave.
Key quote: "Maersk had no duty to either supervise Hale's leisure activities on shore leave or to escort the intoxicated Hale back to the vessel." 284 Va. at 380.
Takeaway: The Supreme Court clearly is unwilling to make the shipowner liable for events away from the ship. But Hale's other claims, under the Jones Act and for unseaworthiness, were remanded for retrial. At that second trial, Hale obtained a judgment for $5 million – 2 ½ times the original judgment. Maersk appealed again, and the parties argued that appeal to the full Supreme Court on February 28. A decision will likely arrive in April or May.

Omega Protein v. Forrest, 284 Va. 432 (2012)

Bodily injury; Jones Act ($538K)
Holding: Jones Act's relaxed causation standard still requires proof that shipowner's negligence caused the injury, at least in part.
Key quote: "The fact that Omega hired Forrest without having him undergo an MRI does not mean that Omega caused him to suffer injury, when Forrest presented no evidence that the MRI would have indicated he was unfit for the job." 284 Va. at 440-41.
Takeaway: The Supreme Court entered final judgment for the shipowner, because the Jones Act is not a no-fault scheme such as the Workers' Compensation Act, and

shipowners are not insurers of their crews' health. Relying on the "featherweight" standard can be dangerous if you try to make too tenuous a connection between the owner's acts and the injury.

Exxon Mobil v. Minton, 285 Va. 115 (2013)

Bodily injury, mesothelioma from asbestos exposure ($17.4M)
Holdings: (1) Trial court erroneously excluded Exxon's evidence about Newport News Shipbuilding's awareness of dangers of asbestos exposure; (2) Longshoreman's Act does not permit punitive-damage awards.
Key quote: "Evidence tending to show the Shipyard's knowledge of the danger and its ability and intent to remedy the danger is relevant in the determination of whether Exxon had a duty to intervene to protect Minton. . . . Such evidence . . . supported Exxon's argument that it had no duty to intervene because Exxon would have been acting reasonably in relying upon the Shipyard to adequately protect the Shipyard's own workers."
Takeaway: The plaintiff sought to exclude this blame-shifting evidence because under federal law, the Shipyard is immune from liability. Justice Millette's opinion, in the final sentence quoted above, seeks to frame this issue as one of common sense: If the real expert on asbestos danger, the Shipyard, didn't see a need to take special precautions to protect its workers, how can we expect a company with less expertise (Exxon) to know better? The case was remanded for retrial, but the Supreme Court dismissed the $5 million punitive-damage claim.

Commonwealth v. Peterson, 286 Va. 349 (2013)

Wrongful death ($100K)
Holding: A public university does not have a duty to warn students about third-party criminal acts unless the school knew, or could reasonably have foreseen, the harm.
Key quote: "Based on information available at the time, the defendants believed that the shooter had fled the area and posed no danger to others. . . . Based on the limited information available to the Commonwealth prior to the shooting in Norris Hall, it cannot be said that it was known or reasonably foreseeable that students in Norris Hall would fall victim to criminal harm." 286 Va. at 359.
Takeaway: Establishing liability for third-party criminal acts is always challenging. A prospective plaintiff must look for a special relationship between the defendant and the victim. Here, the justices assume without deciding that the university owed to its students the higher duty owed by innkeepers and common carriers, with the knowledge/foreseeablility component, and rule that the facts don't rise to that level. Plaintiffs had obtained a $4M verdict that was reduced to the VTCA cap of $100K; this ruling enters final judgment for the defendants.

Hyundai Motor v. Duncan, 289 Va. 147 (2015)

Bodily injury (traumatic brain injury), products liability ($14M)
Holding: Plaintiff's mechanical-engineering expert should not have been permitted to testify. He performed no testing, and based his opinion on assumptions that a different car design would have prevented the injury. In the absence of admissible expert testimony, the manufacturer is entitled to final judgment.
Key quote: "Mahon's opinion that the 2008 Tiburon was unreasonably dangerous was without sufficient evidentiary support because it was premised upon his assumption that the side airbag would have deployed if the sensor was at his proposed location – an assumption that clearly lacked sufficient factual basis and disregarded the variables he acknowledged as bearing upon the sensor location determination." 289 Va. at 156.
Takeaway: The Achilles heel in this case was Mahon's admission that he conducted no testing, relying instead on Hyundai's design tests. He explained to the jury that the test data "spoke to me . . . as one skilled in the art." This trespassed over the court's time-honored boundary between acceptable expert testimony and "the *ipse dixit* of the expert." Mahon admitted on cross-examination that if he had to choose a location for the sensor, he would choose one that Hyundai hadn't tested. There was accordingly no quantitative engineering support for the opinion. To avoid this problem, litigants must insist on testing by their experts in products cases – even if it's only computer modeling.

Cosby v. Clem, 290 Va. 1 (2015)

Bodily injury, auto collision ($183K)
Holding: Trial court erroneously set aside as inadequate a $9K verdict and ordered a new trial. The Supreme Court vacated the larger judgment and entered final judgment on the first verdict.
Key quote: "While Dr. Decker testified that he believed the trauma Clem sustained in the accident caused the stimulator to malfunction, he admitted his opinion was based *solely* on Clem's statement to him . . .. Dr. Decker did not send that part of the stimulator he removed to the manufacturer for testing or otherwise attempt to determine why the part of the system he removed was not working. As Clem's treating physician, his primary concern was to implant a functioning stimulator rather than determine the cause of any malfunction . . .." 290 Va. at 3.
Takeaway: While this isn't a products-liability case, note the similarity to the holdings in the products cases on the lack of testing. Plaintiff here asked the jury to find that the collision damaged her implanted stimulator, but the evidence in her favor was essentially her own say-so, since the doctor had no knowledge independent of her report to him. Because the original jury was free to disbelieve her and award only nominal damages, the $9K verdict was not, as a matter of law, inadequate.

Mikhaylov v. Sales, 291 Va. 349 (2016)

Bodily injury, assault and battery ($302K)
Holdings: (1) Criminal guilty plea does not bar the defendant from contesting liability in a subsequent tort action; (2) where a litigant does not timely disclose expert testimony, her opponent is not required to move in limine to exclude it, but may object at trial when the opinion is offered.
Key quote: (1) "A guilty plea 'shall be admissible' evidence 'in any civil action' involving the 'same occurrence.' [But] it does not constitute 'a preclusive bar' under the doctrine of judicial estoppel 'unless the parties are the same.'" 291 Va. at 357. (2) "It was Sales, not Mikhaylov, who violated the court's pretrial scheduling order and the expert discovery rules. Thus it was Sales, and not Mikhaylov, who had the duty to attempt to cure the violation prior to trial." *Id*. at 360.
Takeaway: The first ruling is simply a matter of overreach by the plaintiff at trial, attempting to get too large a benefit from a vital admission by the defendant. The second reflects the courts' disinclination to help litigants who cut procedural corners. This case gives Justice Kelsey the opportunity to implant into Supreme Court jurisprudence his "juristic bluff" observation, which can be a valuable tool for plaintiffs as well as defendants. Note that Sales did not defend her judgment on appeal; she did not file a brief of appellee and was not permitted to argue the case to the justices. The case is now on remand and is set for trial in the Sumer of 2017.

Holiday Motor v. Walters, 292 Va. 461 (2016)

Bodily injury (quadriplegia); products liability ($20M; $32M including interest)
Holdings: (1) An automaker has no duty to design a convertible in such a way that it protects the occupants in roll-overs; (2) there was no foundation for plaintiff's engineering expert's opinions about the product defect, as he had not performed the required tests. Final judgment for the manufacturer.
Key quotes: (1) "There is certainly no evidence that Mazda or any other manufacturer of convertibles in fact designs or markets soft tops to provide occupant rollover protection or that consumers reasonably expect such protection." 292 Va. at 482. (2) "Though Mundo compared the design of the Mazda latching system to that of the Ford Mustang, he performed no testing or analysis of the Ford latching system and could not say that the Ford latches would have remained connected in this crash. His declaration that 'the crash spoke for itself' did not supply the necessary foundation for his opinion." *Id*. at 484. "Mundo agreed that while one would need to run physical tests or computer analyses to make such determinations, he had not done so." *Id*.
Takeaway: Perhaps the most important effect of this ruling is the Supreme Court's embrace, for the first time, of the relevance of consumer expectations in products-liability

analysis. *Future products suits must account for this factor*. The second ruling, relating to the expert, is best seen as an indication of the court's eagerness to overturn this judgment. Usually when the court reverses a judgment, it declines to take up other assignments unless it remands for retrial. Once the justices concluded that Mazda owed no duty, the case was over; the subsequent expert-witness ruling is technically dicta. But don't ignore it, as it indicates the Supreme Court's distaste for the kind of *ipse dixit* expert pronouncements that it condemned in *Hyundai v. Duncan*.

Mayr v. Osborne, 293 Va. ____ (795 S.E.2d 731) (2017)

Battery during disk-fusion surgery ($150K; $225K including interest)
Holding: The trial court erroneously allowed a battery claim, based on the surgeon's fusing the wrong disks, to go to the jury where there was no evidence that the surgeon intended any unpermitted contact.
Key quote: "A physician is not liable for a battery unless the plaintiff establishes a prima facie case that the physician performed an operation 'against the patient's will or substantially at variance with the consent given.'" Slip op. at 12.
Takeaway: In future such litigation, the fulcrum of the case will be whether the doctor's actions were "*substantially at variance* with the consent given." If it's a close call, a plaintiff should protect herself by suing for medical negligence. This opinion clearly signals the Supreme Court's view that a negligence claim is the right kind of action for a claim like this. That's because battery is an intentional tort; where a doctor makes a mistake in surgery, it won't be regarded as a battery absent proof that "the physician intended to disregard the patient's consent regarding the procedure or the scope of the procedures."