2017 Convention
Champions for Justice

19. Case Law Update

Stephanie E. Grana
Cantor, Stoneburner, Ford, Grana & Buckner
7130 Glen Forest Dr.
Suite 400
Richmond VA 23226-3754
Tel: 804-343-4389
Email: sgrana@VirginiaTrialFirm.com
Website: http://www.virginiatrialfirm.com/

Thomas G. Smith
Shevlin Smith
3975 University Dr.
Suite 405
Fairfax VA 22030-2520
Tel: 703-591-0067
Email: tsmith@shevlinsmith.com
Website: http://www.shevlinsmith.com/

VTLA Convention Case Law Update
April 1, 2017

Index to Cases

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Stephanie E. Grana & Thomas G. Smith
CSFGB Shevlin Smith

Civil Procedure

Virginia Supreme Court

JSR Mech., Inc. v. Aireco Supply, Inc., 291 Va. 377 (2016)
Opinion by Justice Leroy F. Millette, Jr.

The dispositive issue in this statutory-interpretation case was whether, once a plaintiff has complied with the timeliness and notice requirements of Code § 8.01-335(B), the circuit court has discretion to deny a plaintiff's motion to reinstate based on lack of "good" or "just" cause. Finding the statutory language ambiguous, the Court looked to the legislative intent behind the statute and held that the circuit court did not have discretion to deny a procedural motion to reinstate a case that had been discontinued or dismissed when the party seeking reinstatement had complied with the statute's timeliness and notice requirements.

The plaintiff filed a complaint alleging breach of contract and negligence on July 23, 2010, and the defendant answered on August 19, 2010. There were no further pleadings by either party for the next four years. On January 31, 2014, pursuant to Code § 8.01-335(B), the trial court entered a final order stating that the case had been pending for over three years with no proceedings and was therefore discontinued and stricken from the docket. On January 23, 2015, the plaintiff filed a motion to reinstate the action, which was denied by the trial court based on a lack of "just cause and sufficient grounds."

Code § 8.01-335(B) provides: "Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after." The defendant argued that the use of "may" rather than "shall" in the statute indicated a plain and deliberate choice by the legislature to allow judicial discretion as to the reinstatement of the case, while the plaintiff argued that the use of the word "may" showed that this is a permissive provision, giving the plaintiff the option to reinstate if he or she so chooses. The Supreme Court found the statutory language to be ambiguous on this point and looked to statutory intent.

Finding the legislative history "particularly informative" in resolving this statute's ambiguity – in particular, the General Assembly's insertion of a "for cause" element in 1997 and a subsequent deletion of that element in 1999 – the Court concluded that the General Assembly was aware of the issue and specifically did not intend any additional requirements other than the formal ones of timeliness and notice. Because the plaintiff satisfied the timeliness and notice requirements of Code § 8.01-335, it was reversible error for the trial court to deny the plaintiff's motion to reinstate the action.

Mikhaylov v. Sales, 291 Va. 349 (2016)
Opinion by Justice D. Arthur Kelsey.

The issues in this civil trial on claims of assault and battery were (1) whether a guilty plea in a criminal case constituted a judicial estoppel in a civil case arising out of the same conduct; and (2) whether undisclosed expert opinions on future medical expenses were properly allowed at trial. The Virginia Supreme Court held that the circuit court misapplied principles of judicial estoppel with regard to the effect of a prior guilty plea and conviction to assault and battery on a subsequent civil care arising out of the same incident. The VSC also found that the circuit court erroneously failed to exclude expert testimony on future medical treatment that had not been disclosed in discovery. Judgment in plaintiff's favor was reversed and remanded.

Mikhaylov pleaded guilty to assault and battery of Ms. Sales. His plea was accepted and he was found guilty. Ms. Sales then filed a civil action seeking monetary damages for injuries incurred in the alleged assault.

Sales moved for partial summary judgment alleging that the guilty plea was admissible evidence and "sufficient" to establish Mikhaylov's liability as a matter of law. Sales did not argue any estoppel or issue preclusion basis for her motion. Defendant admitted that his plea was admissible, but that he was free to explain the circumstances of the plea at a trial.

At the motion hearing, the judge asked defendant *sua sponte* if he were familiar with the doctrine of judicial estoppel? Defendant responded that he was familiar with the doctrine, but argued that it did not apply in this case because there was no identity of parties in the two cases; the Commonwealth, not the victim, was the party in the criminal case. The trial court rejected this contention and held that defendant could not deny at trial that he had committed an assault and battery on the grounds of the judicial estoppel doctrine. At trial, defendant's testimony that he did not attack plaintiff was stricken and the jury was instructed to disregard defendant's testimony that he did not attack plaintiff.

The trial court also allowed plaintiff's expert witness to testify as to future medical expenses that were not disclosed by expert designation or in deposition. The court overruled defendant's objection to the testimony based upon the view that Mikhaylov should have raised his objection before trial by motion *in limine* or protective order. Had he done so, it would have spared plaintiff from having the objection "suddenly … thrust upon" her during "the middle of trial."

The Supreme Court reversed both rulings. It held that the court erred in applying judicial estoppel in a civil suit based upon the defendant's guilty plea in an earlier criminal case because the parties were not the same in the two actions. The plea was admissible, but it did not establish a preclusive bar.

In deciding the expert opinion issue, the court cited the Pretrial Scheduling Order that warns that experts "will not ordinarily be permitted to express any nondisclosed opinions at trial." The trial court must distinguish between the ordinary case (in which nondisclosed opinions should be excluded) and the extraordinary case (in which it should not). The court acknowledged that there is not an inflexible list of factors governing this discretionary judgment call. However, in this case, the court identified a variable that clearly does not belong on that list. The trial court cannot create a *de facto* waiver rule, i.e., a rule that provides that an objection to an expert's testimony is waived if it is not made pretrial. The defendant was under no obligation to file a pretrial motion to contest admissibility of an opinion that had never been disclosed to him.

Cherrie v. Va. Health Servs., _____ Va. _____, 787 S.E. 2d 855 (Va. 2016)
Opinion by Justice D. Arthur Kelsey.

The issue in this case was whether the Virginia Administrative Code provided a private right of action for the enforcement of a regulation requiring nursing homes to have written policies and procedures and to make these policies available for review, upon request, to residents and their designated representatives. The Virginia Supreme Court affirmed the circuit court's dismissal of plaintiffs' declaratory judgment, but on a different ground. The VSC held that the Virginia Administrative Code did not create a private right of action to enforce the regulation. Enforcement of the regulation rested exclusively with the Board of Health.

12 VAC § 5-391-140(G) provides that a nursing home must have written policies and procedures and must make those policies and procedures available, upon request, to residents and their designated representatives. The personal representatives of the estates of two former nursing home residents requested policies and procedures. The nursing home refused to provide the documents claiming that only current residents were entitled to them.

In response, a declaratory judgment was filed by the decedents' estates seeking to assert a private right of action for the production of the policies and procedures pursuant to 12 VAC § 5-371-140(G). The circuit court dismissed the case, holding that only current residents, not former residents, could bring an enforcement action under this provision.

The Supreme Court did not rule on that issue, but instead held that the circuit court's decision should be affirmed for a different reason: there is no private right of action to enforce 12 VAC § 5-371-140(G) granted under the Constitution of Virginia, the common law, or statutory law. The Court found that nothing in Title 32.1, Chapter 5, which imposes various obligations on nursing homes and authorizes the Board of Health to promulgate regulations, authorizes a private party to bring a civil action to enforce regulations of the Board of Health. The governing statutes and regulations recognize only two methods of enforcing the Board's regulations: (i) administrative sanctions and adjudications subject to the Virginia Administrative Process Act; and (ii) civil enforcement actions filed by the Commissioner in circuit court. The only role for private parties in the enforcement process is to file administrative complaints against the nursing home. The Board then investigates and enforces the regulations, if necessary.

Virginia Circuit Courts

Black v. Rhodes, 2016 Va. Cir. LEXIS 140 (Roanoke Sept. 29, 2016)
Opinion by Circuit Court Judge David B. Carson.

The issue in this case deals with deposition objections and how to handle them. The Circuit Court held that there is no "Mason's oath" privilege recognized in Virginia.

In this employment case against a chiropractor alleging sexual harassment, constructive discharge, and sexual assault, discovery disputes arose. The defendant's employer sent a cease and desist letter to plaintiff that was purportedly authored by an attorney. Nothing in the letter identified the firm's address or other contact information, and plaintiff's counsel was not able to find the firm or the lawyer signing the letter.

During defendant's deposition, counsel tried to ask questions about the "phantom" attorney and the cease and desist letter. Defense counsel directed her client not to answer and asserted the "Masons' privilege." In his opinion, Judge Carson held that there is no Masons'

privilege under Virginia law. He also addressed what should happen when an objection is made at deposition. Rule 4:5(c) provides that the objection should be made on the record, and the witness should then answer, subject to the objection. If a privilege claim is disputed or someone is behaving unreasonably, the deposition should be suspended and a judge contacted. Rule 4:5(d). A deponent must answer questions unless they implicate privileged communications or trade secrets.

The court also quoted Justice Brennan: "[D]iscovery is not a game. It is integral to the quest for truth and the fair adjudication of [the issues in the case]. Violations of discovery rules thus cannot go uncorrected or undeterred without undermining the truthseeking process."

The court wrote that it was inclined to enter an order prohibiting the defense from opposing plaintiff's claims and sanctioning defense counsel. Entry was stayed for fourteen days to allow the defense to provide the discovery answers sought.

U.S District Courts

Gilbert v. Dick's Sporting Goods, 2016 U.S. Dist. LEXIS 59563 (E.D. Va. May 4, 2016)
Opinion by United States District Judge Henry Hudson.

The issue in this case is whether diversity jurisdiction existed or was manufactured by the plaintiff. The U.S. District Court remanded the case to the Virginia state court. The Virginia defendant was alleged to be one of the key actors in the alleged negligent conduct and was not fraudulently joined.

Plaintiff, a 60-year old woman, was injured when she wrecked a bike in Dick's Sporting Goods. Plaintiff alleged that defendants were negligent in putting her on a 26" bicycle with gears and hand brakes when she had never ridden a bike like that before. The store employees allowed her to ride down an aisle where she crashed into a display cabinet injuring herself. Plaintiff filed suit in state court and defendants removed to federal court alleging complete diversity jurisdiction. One of the defendants, Myers, was a store employee who allegedly put the plaintiff on the bike. Myers was a Virginia resident. Defendants contended Myers was fraudulently joined to the lawsuit to avoid diversity.

The district court found that Myers was neither just a nominal party or fraudulently included in the lawsuit. In fact, plaintiff alleged that Myers was one of the employees that placed her on the bike. She seemed to be the primary actor. Removal is strictly construed. The case is remanded back to state court.

FireClean, LLC v. Tuohy, 2016 U.S. Dist. LEXIS 96294 (E.D. Va. July 21, 2016)
Opinion by United States District Judge James C. Cacheris.

Plaintiff FireClean is a Virginia company that manufactures and sells a patent-pending gun oil called "FIREClean" that is advertised to reduce carbon buildup in firearms. Defendant Tuohy is an Arizona citizen who maintains a firearms blog called "Vuurwapen," and accompanying Facebook page. Defendant Baker is a chemistry student at MIT and a New Hampshire citizen who maintains a firearms blog called "Granite State Guns." Various blogs and social media websites promulgated by the Defendants began to publish that FIREclean was nothing more that vegetable oil or Crisco. Plaintiffs sued defendants for defamation for alleged

false statements relating to testing and composition of FIREClean that purportedly asserted their product is no better than cooking oil. Defendants moved to dismiss for lack of jurisdiction.

"Courts, including the 4th Circuit, have altered the traditional analysis slightly to account for technological advances that have facilitated the exchange of products and ideas." The 4th Circuit's standard modifies the test from *Zippo Mfg. Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), slightly by focusing on defendant's level of "*purposeful* targeting of a particular forum, not just the level of interactivity of the website at issue." The test under *ALS Scan Inc. v. Digital Serv. Consultants Inc.*, 293 F.3d 707 (4th Cir. 2002), "reconciles the increased interconnectivity of the Internet Age with the maxim that 'technology cannot eviscerate the constitutional limits on a State's power to exercise jurisdiction over a defendant.'"

Here, defendant Tuohy has not purposefully availed himself of doing business Virginia in relation to his allegedly defamatory statements made on his blog and on Facebook. Plaintiff also notes that at least 90 of the 9,181 people who "like" the Vuurwapen Facebook page live in Virginia, some of Tuohy's readers may have arranged to receive emails from Tuohy when he posts a blog article or Facebook comment and some Virginia servers may have processed Tuohy's online content. Plaintiff also emphasizes that Tuohy aimed his statements at a Virginia company with full awareness that FireClean would feel the harmful effects of those statements in Virginia. However, the court found that all of these contacts were insufficient to exercise personal jurisdiction over Tuohy. He has no home, office, or property in Virginia. He did not write any of the allegedly defamatory statements in Virginia. He has no on-going business in Virginia and his only communications into Virginia consisted of "several" phone calls, texts or emails to one the plaintiffs regarding FIREClean's formula.

Tuohy's traditional contacts – presence in or travel to Virginia – do not demonstrate that he has purposefully availed himself of doing business in Virginia. The various phone calls, texts or emails to one of the plaintiffs regarding FIREClean's formula is negligible because they do not form the basis of plaintiffs' defamation claims. Plaintiff's reliance on the samples it sent from Virginia to Arizona is also unavailing. The plaintiff unilaterally sent the FIREclean samples, not Tuohy and the origin of the samples does not have any apparent connection to the substance of the allegedly defamatory statements. To the extent that a hosting company transmits Tuohy's online content through servers located in Virginia, those unilateral actions by the hosting companies are not evidence of Tuohy's purposeful targeting of Virginia. The articles and comments at issue also fail to demonstrate an attempt to attract a Virginia audience. Defendant Tuohy was dismissed for lack of personal jurisdiction.

Likewise, defendant Baker has not purposefully availed himself of doing business in Virginia. To support personal jurisdiction over Baker, plaintiff argues that Tuohy's Virginia contacts apply to Baker because the two were co-conspirators. But, the facts alleged fail to show that Baker and Tuohy had a preconceived plan to conduct a fraudulent test so as to attract more readers to their blogs by declaring FIREClean to be the same as Crisco. The lack of conspiracy proves an additional basis for not imputing Tuohy's contacts onto Baker for jurisdictional purposes.

The Alexandria U.S. District Court ruled that neither defendants' phone calls, texts and emails, nor their websites, online articles or Facebook activity, showed that defendants purposefully availed themselves of Virginia. The case was dismissed for lack of personal jurisdiction.

Kellington v. Bayer Healthcare Pharms., Inc., 2016 U.S. Dist. LEXIS 130151 (W. D. Va. Sept. 23, 2016)
Opinion by United States District Judge Elizabeth K. Dillon.

The issue in this case was whether discovery should be granted with respect to an expert who was no longer serving as an expert witness in the case, but whose writings were relied on by other experts for plaintiff. In this medical products liability case involving Mirena, a levonorgestrel-releasing intrauterine system, the United States District Court ruled that defendant was entitled to additional discovery from a third-party academic in Canada who was no longer serving as an expert witness in Mirena-related cases, but whose research article was relied on by plaintiff's remaining experts.

Although there is little discussion in the case about what the underlying claim involves, it appears to be a product liability case that alleges that Bayer's Mirena intrauterine product was defective and caused injury to plaintiff. Bayer filed a motion asking the court to issue a "Letter of Request" to the proper judicial authorities in Canada to allow Bayer to conduct discovery in Canada of a former expert for plaintiff, including document requests and the expert's deposition.

The expert, Dr. Etminan, had written the only article published in any peer reviewed journal on the risk of intracranial hypertension for patients using Mirena. Dr. Etminan was originally designated as an expert for the plaintiff and was deposed by Bayer. The parties were working to schedule a second day for a deposition, in a related case, when Dr. Etminan withdrew as an expert in all cases. Plaintiff's remaining experts all relied on Dr. Etminan's article to support their causation opinions.

Bayer contended that it needed to conduct fact discovery concerning the article to allow it to challenge adequately the other experts' reliance on the article. Plaintiff argued that allowing third-party medical researchers to be deposed would open the floodgates of discovery and would have a chilling effect on researchers.

The court held that the requested discovery should be allowed. The court noted that no privilege or prohibition against discovery applied, and the facts of this case were unique. Etminan was previously named as an expert, was deposed, but then withdrew before his deposition could be completed. Moreover, all of plaintiff's other experts relied on the article for their causation opinions. Thus, the Etminan article is important and central to the crucial disputed issue of causation.

<u>Fourth Circuit Court of Appeals</u>

Ripley v. Foster Wheeler LLC, 841 F.3d 207 (4th Cir. 2016)
Opinion by Circuit Judge Stephanie D. Thacker.

The issue in this case is whether the government contractor defense is available in failure to warn of asbestos hazards cases to provide federal subject matter jurisdiction for removal. The 4th Circuit reversed a district court order remanding to Virginia state court an asbestos products liability suit removed to federal court pursuant to the federal officer removal statute. The district court erred in remanding the case under precedent denying the government contractor defense in failure to warn cases. The Eastern District of Virginia is "clearly an outlier" in so ruling.

This mesothelioma case alleging failure to warn against asbestos hazards present in products manufactured for the Navy was filed in the Newport News Circuit Court. Defendants

filed a Notice of Removal to federal court asserting a federal contractor defense, thereby implicating federal subject matter jurisdiction. The United States District Court granted plaintiff's motion to remand back to state court following a decades-old practice in the Eastern District that denied the government contractor defense in failure to warn cases.

The Fourth Circuit found that the Eastern District was clearly an outlier in failing to apply the government contractor defense to failure to warn claims. The defense had been applied by the Second, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits, and no Circuit was in agreement with the Eastern District of Virginia. The Fourth Circuit "… now join[s] the chorus and hold[s] that the government contractor defense is available in failure to warn cases." The order to remand was reversed.

Criminal

Oprisko v. Dir. Of the Dep't of Corr., ___ Va. ___, 795 S.E.2d 739 (Va. 2017)
Opinion by Justice S. Bernard Goodwyn.

In this case, the Supreme Court of Virginia affirmed the habeas court's determination that the rule announced by the United States Supreme Court in *Florida v. Jardines*, 569 U.S. 1 (2013) – that use of a drug-sniffing dog on a homeowner's porch constituted a search within the meaning of the Fourth Amendment – did not apply retroactively, because the *Jardines* decision represented the announcement of a new constitutional rule of criminal procedure, rather than the application of established law.

The Court began its analysis by quoting its previous decision in *Mueller v. Murray*, 252 Va. 356, 361 (1996), where the Court noted that, "in *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court stated that, on habeas corpus review, constitutional error must be evaluated together with the interests of comity and finality" and that "[b]ased on these multiple considerations, a [U.S.] Supreme Court decision articulating a 'new' constitutional rule of criminal procedure generally will not be applied to a conviction which has become final before the rule is announced."

A case announces a "new" rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. Thus, in considering Oprisko's appeal, the Court had to (1) determine the date on which Oprisko's conviction became final; (2) survey the legal landscape as it existed on that date to determine whether existing constitutional precedent compelled the conclusion which the defendant sought; and (3) decide whether a rule, even though "new," falls within one of the two exceptions to the retroactivity principle. Because Oprisko did not argue that either of the two recognized exceptions applied, the Court did not reach the third step in its analysis under *Teague*.

The *Oprisko* Court concluded that the U.S. Supreme Court broke new ground in *Jardines* by determining that, based on a property-rights analysis (rather than a "reasonable expectation of privacy" analysis), use of a drug-sniffing dog within the curtilage revealed an improper purpose for the intrusion onto the curtilage, which made the officer's conduct objectively unreasonable. Noting that several federal courts of appeal and state courts of last resort had concluded that use of a drug-sniffing dog at a residence or within the curtilage thereof did not constitute a Fourth Amendment search, the Court concluded that the *Jardines* rule "was not apparent to all reasonable jurists" and thus was not compelled by existing precedent.

Thus, the Court concluded that because the controlling legal landscape when Oprisko's conviction became final did not dictate that use of a drug-sniffing dog within the curtilage of private property was a search within the meaning of the Fourth Amendment, and neither of the exceptions recognized in *Teague* applied, the habeas court was correct in ruling that *Jardines* did not apply retroactively to Oprisko's conviction.

Damages

Virginia Supreme Court

Gilliam v. Immel, _____ Va. _____, 2017 Va. LEXIS 1 (Va. Jan. 19, 2017)
Opinion by Justice Elizabeth A. McClanahan.

The issue in this case is whether a jury can render a verdict for the plaintiff in a car crash personal injury case on liability and then award zero damages. The Virginia Supreme Court ruled that in a personal injury action where the jury returned a verdict in favor of the plaintiff but awarded her no damages, the trial court did not err in denying plaintiff's motions to set aside the verdict and for a new trial. The jury was free to find that plaintiff was not credible.

Defendant admitted liability in this rear-end crash. There was no discernible damage to plaintiff's car. Plaintiff was taken from the scene of the crash to the hospital. She complained of neck and back pain immediately, and shoulder pain later. She saw her primary care physician, an orthopedic surgeon, and a physical therapist. Medical bills totaling $73,000.00 were admitted into evidence. The jury returned a zero-dollar verdict in favor of plaintiff.

Defendant contended that the shoulder injury and shoulder surgery were unrelated to the accident, but did not offer evidence contesting the back and shoulder injuries. Plaintiff contended that, at a minimum, the jury should have awarded damages for six weeks of back and neck pain because that evidence was uncontroverted. The Court held that the jury was free to discount the plaintiff's testimony on her injuries and to reject the opinion of her doctor that was based on plaintiff's subjective complaints. The defendant's admission of liability did not relieve plaintiff of the burden of proving her damages by a preponderance of the evidence.

Defamation

Virginia Circuit Courts

Lucido v. Maxwell, 2016 Va. Cir. LEXIS 99 (Fairfax June 6, 2016)
Opinion by Circuit Court Judge Stephen C. Shannon.

The issue in this case is whether Virginia had personal jurisdiction over a Tennessee resident who posted allegedly defamatory statements on an online game site and on Facebook. A Fairfax Circuit Court ruled that it did not have personal jurisdiction over a Tennessee resident who allegedly defamed a Virginia resident on an online game site that used servers in Northern Virginia. The alleged facts did not show sufficient minimum contacts of the defendant with Virginia to satisfy the Due Process Clause requirements.

Plaintiff was a Virginia resident and his game site used bandwidth and servers in Virginia. There was no allegation that Defendant sent the messages from a computer in Virginia. There was no allegation that Facebook used Virginia servers.

The court looked at two potential bases for personal jurisdiction under Virginia's Long-Arm Statute, Va. Code § 8.01-328.1: causing tortious injury in Virginia and/or committing an act in Virginia. While conceding that the allegations arguably might constitute tortious injury in Virginia and an act in Virginia, the Court held that applying personal jurisdiction to the defendant would not pass Due Process analysis.

The court found that the defendant did not have sufficient minimum contacts with Virginia such that he should reasonably anticipate being brought to court in Virginia. There was no showing that defendant intended the harm to be felt in Virginia. There was insufficient showing that he intended to target Virginia or published the statements with a specific intent to reach a Virginia audience.

Phi Kappa Psi v. Rolling Stone, 2016 Va. Cir. LEXIS 161 (Charlottesville Aug. 31, 2016) Opinion by Circuit Court Judge Richard E. Moore.

On November 9, 2015, Plaintiff The Virginia Chapter of Phi Kappa Psi Fraternity ("PKP") filed a complaint against Defendants Rolling Stone LLC, Wenner Media LLC, Straight Arrow Publishers, LLC and Sabrina Erdely. PKP's claims are based on the content of an article describing a violent rape that takes place at the PKP fraternity house at UVA that appeared in *Rolling Stone* magazine on November 19, 2014. PKP or versions of the word "fraternity" are mentioned multiple times in the article. Plaintiff's complaint alleges that the print and on-line version of the article are defamatory of PKP. Defendants filed a demurrer alleging that PKP cannot prevail, and that it has not stated a cause of action.

This opinion cites and discusses the Virginia Supreme Court cases of *Webb v. Virginian-Pilot Media Companies, LLC*, 287 Va. 84, 752 S.E.2d 808 (2014) and *Pendleton v. Newsome*, 290 Va. 162, 772 S.E.2d 759 (2015). The court states that, in considering a demurrer, it should not engage in evaluating evidence outside of the pleadings. So it is the facts as pleaded upon which the court must make its ruling. For anything outside of the pleadings, the court would have to reserve its gatekeeping function for trial, before submission to the jury. However, since the entire *Rolling Stone* article was made a part of the pleading, the court considered the article in overruling the Demurrer. Whether the complaint states a cause of action for defamation turns on three points or inquiries: Whether the article is of, about, concerning or focused on plaintiff; if so, whether the article is defamatory of plaintiff; and whether the statements are factual in nature and susceptible of being proved true or false, or just opinion. Here, Judge Moore refused to dismiss the defamation suit on all three grounds finding that the article, as pleaded, could be reasonably viewed as "of and concerning" PKP, as being defamatory in content and that it was factual and the statements could be proved as true or false. So, the Complaint withstands the demurrer as it contains enough allegations such that PKP may prevail if proved to be true, and the jury could so find.

U.S District Courts

Eramo v. Rolling Stone, LLC, 2016 U.S. Dist. LEXIS 129392 (W.D. Va. Sept. 22, 2016) Opinion by United States District Judge Glen E. Conrad.

Nicole Eramo, Associate Dean of Students at UVA, filed this defamation action against defendants Rolling Stone, LLC, Sabrina Erdely and Wenner Media. On November 19, 2014, defendants published an article entitled "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA." The article contained a graphic depiction of the alleged gang-rape of a UVA student, referred to as "Jackie," at a Phi Kappa Psi fraternity party. According to the article, Jackie's mother informed an academic dean that Jackie had a "bad experience" at a party and the academic dean put Jackie in touch with Eramo. After its release, the article created a "media firestorm" and was viewed online more than 2.7 million times. The complaint asserts that the article and subsequent media appearances destroyed Eramo's reputation as an advocate of sexual assault victims. Upon further investigation, key components of Jackie's story could not be substantiated. In April 2015, Rolling Stone "officially retracted'' and removed the article from its website.

Both sides moved for summary judgment on the issue of whether plaintiff was a public official or a "limited-purpose public figure." Judge Conrad ruled that: (1) defendants had met their burden of establishing that, at the time of the publication, plaintiff was a limited-purpose public figure who must show "actual malice" to recover for defamation, and (2) that she has presented evidence from which a jury could find actual malice. Actual malice "requires at a minimum that the statements were made with reckless disregard for the truth." The court denied defendants' motion for summary judgment and said the case will go to trial.

Domestic Relations

Virginia Supreme Court

Luttrell v. Cucco, 291 Va. 308 (2016)
Opinion by Justice William C. Mims.

This is an appeal from the Court of Appeals of Virginia. In this appeal, the Virginia Supreme Court considered whether same-sex couples can "cohabit[] . . . in a relationship analogous to a marriage" for the purposes of Va. Code § 20-109(A).

The Fairfax Circuit Court and the Court of Appeals erred in dismissing husband's motion for adjustment of spousal support concluding that only opposite-sex couples can "cohabit" in a "relationship analogous to marriage" for purposes of Code § 20-109(A). In this case, it was alleged that wife was engaged to, and living with, her same-sex "fiancée" for more that one year. The Court of Appeals erred in concluding that the Virginia General Assembly intended the phrase "habitually cohabiting with another person in a relationship analogous to a marriage," as set forth in Va. Code § 20-109(A) to refer only to opposite-sex relationships. Notably the Virginia Supreme Court did not look to the recent United States Supreme Court decision, *Obergefell v. Hodges*, on same-sex marriage. Instead, the Court focused on the statute's legislative history and the decision to make the language gender-neutral. The Court found that the legislative history demonstrated the General Assembly's clear intention to extend the application of the statute beyond opposite-sex relationships, and the fact that same-sex marriage was not legal in 1997 when the statue was revised, was irrelevant.

This Court held that the judgment of the Court of Appeals was reversed, the award of attorney's fees to the wife was vacated, and the case was remanded for an evidentiary hearing consistent with the opinion to determine whether the former wife "cohabited" with her fiancée within the meaning of Va. Code § 20-109(A) and for reconsideration of attorney's fees pursuant to the property settlement agreement at the time of the rehearing.

E-Discovery

Virginia Circuit Courts

Myers v. Riverside Hosp., Inc., 2016 Va. Cir. LEXIS 53 (Newport News Apr. 21, 2016)
Opinion by Circuit Court Judge Bryant L. Sugg.

In this case, the Newport News Circuit Court denied the defendant hospital's Motion to Quash Subpoena *Duces Tecum* and for Protective Order regarding medical-records metadata, ordering the defendant to provide the metadata on USB drives, but requiring the plaintiff to compensate the defendant for the added cost of such delivery.

The plaintiff served upon the defendant a subpoena requesting "any audit trails, metadata, electronic medical record, designated record set, and other identifiable health information." The defendant conceded that Plaintiff was entitled to the information, but the parties disputed the form in which it should be produced, with the defendant hospital producing the medical records, but none of the underlying metadata.

The plaintiff wanted the defendant to load her medical file and its accompanying metadata onto USB drives, while the defendant offered to set aside a computer terminal at one of its locations for Plaintiff's counsel to access at an agreed-upon time. Applying Virginia Code § 8.01-413 (allowing access to medical records before a lawsuit is filed) and Code § 32.1-127.1:03 (Virginia Health Records Privacy Act), the court concluded that the plaintiff was entitled to "receive the entirety of her medical record, electronic derivatives included," thereby rejecting the defendant's contention that subsection (E) of the Health Records Privacy Act absolved it from producing electronic material if in doing so it would incur *any* additional cost.

However, the court also ruled that subsection (J) of the Health Records Privacy Act required the plaintiff to shoulder the expense of "preparing the electronic materials in her preferred format." The court ordered the defendant to place the metadata on USB drives and to make a good-faith estimate of such cost, and if the plaintiff disagreed with the amount, the court would hold a hearing to determine reasonable compensation.

Employment

Johnston v. William E. Wood & Assocs., 292 Va. 222 (2016)
Opinion by Justice Stephen R. McCullough

In this case, the Supreme Court of Virginia held that the "reasonable notice" requirement in the termination of an at-will employee does not include a temporal element, and instead only requires "effective notice" of the end of the employment relationship.

The Court noted that "[m]ore than 100 years ago, we held that when an employment contract does not specify a time period for its duration, 'either party is ordinarily at liberty to terminate it at-will on giving *reasonable notice* of his intention to do so.'" (quoting *Stoneage Coal & Coke Co. v. Louisville & Nashville R.R. Co.*, 106 Va. 223, 226 (1906) (emphasis in original)). In *Johnston*, the plaintiff was terminated without advance notice after working for 17 years, and alleged wrongful discharge and breach of an implied term of her employment contract. The Court affirmed the trial court's grant of defendant's demurrer, rejecting the plaintiff's contention that "reasonable notice" required advance notice in at least some circumstances.

The Court stated that the "at-will doctrine constitutes a cornerstone of the Commonwealth's employment law" and noted that, while it had "repeatedly stated that the notice given must be 'reasonable,' [it had] not addressed what 'reasonable notice' means and, specifically, whether reasonable notice means advance notice." The Court refused to equate reasonable notice with any sort of advanced notice in an at-will employment, stating that "[i]mposing a requirement of reasonable advance notice is antithetical to the flexibility that lies at the heart of the at-will doctrine and would undermine the indefinite duration element of at-will employment."

The Court held that the phrase "reasonable notice" simply means *effective* notice that the employment relationship has ended, and does not include any temporal element. Without such notice, a terminated employee may continue to work, not realizing he is no longer an employee, or an employer who has not received effective notice that an employee has quit may continue to pay the employee who no longer works there. Although a requirement of effective notice makes sense to avoid this problem of uncompensated effort or undeserved compensation, the Court said that any further change to the at-will doctrine was a task for the legislature rather than the courts.

Robinson v. Salvation Army, _____ Va. _____, 791 S.E. 2d 577 (Va. 2016)
Opinion by Justice Cleo E. Powell.

The issue in this case was whether termination of employment for refusing to commit fornication was an exception to the employment-at-will doctrine for a violation of public policy. The Virginia Supreme Court held that termination from employment for refusing requests of a supervisor to have sex do not support a public policy Bowman claim for wrongful termination since the fornication statute (Va. Code § 18.2-344) has been declared unconstitutional as applied to consenting adults.

Plaintiff alleged that she was fired from her job at the Salvation Army because she refused the requests of her store manager for sex. She recorded her manager making these requests, played the tape for her Human Resources officer, and then she was fired. The Salvation Army moved for summary judgment and asserted that plaintiff could not prove that she was fired for refusing to commit the crime of fornication because the statute, Code § 18.2-344, had been ruled unconstitutional. Summary judgment was granted.

On appeal, the Court recognized that an exception to the employment-at-will doctrine existed for a violation of public policy. However, those public policy exceptions are narrow. One such exception noted in the *Bowman* case is that an at-will employee who is discharged based on a refusal to engage in a criminal act may have a valid cause of action for wrongful discharge. However, since the statute making fornication a crime between consenting adults has

been deemed unconstitutional, demands for fornication and refusing those demands, can no longer provide the basis for a wrongful termination. Judgment affirmed.

Estate, Gift and Trust

Virginia Supreme Court

McGrath v. Dockendorf, __ Va. __, 793 S.E.2d 336 (Va. 2016)
Opinion by Justice Stephen R. McCullough.

This appeal arises from a trial in the Circuit Court of Fairfax County. On August 25, 2012 Ethan Dockendorf proposed to Julia McGrath and she accepted. Dockendorf offered McGrath an engagement ring worth $26,000. In September 2013, he broke off the engagement. Dockendorf filed an action in detinue seeking, among other things, the return of the ring. McGrath demurred to Dockendorf's complaint, arguing that it was barred by Va. Code § 8.01-220, known as the Virginia "heart balm" statute. The trial court agreed with Dockendorf and found that the ring was a conditional gift. It also held that Code § 8.01-220, does not bar such an action to recovery property transferred as a conditional gift, such as an engagement ring, given in contemplation of marriage. The trial court found as fact that the ring was given as a conditional gift in contemplation of marriage. The court ordered McGrath to either return the ring in 30 days or it would enter judgment in the amount of $26,000 for Dockendorf.

This Court noted that Virginia has previously recognized suits for breach of a promise to marry. Such suits allowed an aggrieved fiancée to recover damages for improper breach of an engagement. The heart-balm statute, Code § 8.01-220, does not bar an action in detinue for recovery of an engagement ring following the breakoff of the engagement. The statute bars three specific civil actions: alienation of affection, breach of promise to marry, and criminal conversation, but the statute says nothing about the law of conditional gifts, and an action for recovery of property exchanged in contemplation of marriage is still determined by existing law and common law principle. Detinue differs from an action for breach of a promise to marry in significant ways. "To succeed in a detinue action, a plaintiff much establish the following: (1) the plaintiff mush have property in the thing sought to be recovered; (2) he must have the right to its immediate possession; (3) it must be capable of identification; (4) the property must be of some value, and (5) the defendant must have had possession at some time prior to the institution of the action."

Appellee gave appellant a gift of a ring, which was a conditional gift, and when the condition upon which the gift was made did not occur, appellee could institute an action in detinue to recover the ring or its value. The trial court found as fact that the ring was given as a conditional gift in contemplation of marriage. The marriage did not occur. The trial court thus did not err in ordering either a return of the ring or the entry of a judgment for the amount of the ring. Judgment affirmed.

Immunity

Virginia Supreme Court

Pike v. Hagaman, 292 Va. 209 (2016)
Opinion by Justice Stephen R. McCullough.

This is an appeal from the City of Richmond Circuit Court. The opinion explores the contours of Virginia's sovereign immunity doctrine under the standard of *James v. Jane* and affirmed the decision of the trial court that a nurse at Virginia Commonwealth University enjoyed sovereign immunity for an alleged lapse in patient care. In April 2011 Douglas Pike had a complex operation, involving microsurgical reconstruction of his oral cavity, at the Virginia Commonwealth University Health System Authority (VCUHSA). The surgery went well, and Pike was moved to the Surgery and Trauma Intensive Care Unit for post-operative care. As part of his care, it was essential that his head and neck remain upright and motionless; but on at least two occasions his head and neck shifted, causing injury, further surgery and disfigurement. Pike sued VCUHSA and the nurse assigned to his post-operative care, Kathryn Hagaman. He alleged Hagaman's negligence allowed his head to shift out of position and caused the ensuing damages. Defendants entered a plea of sovereign immunity. At the outset of the hearing, Pike's counsel conceded VCUHSA was immune, so the remaining issue was whether Nurse Hagaman enjoyed derivative immunity. Both parties agreed the question must be decided by applying the four-part test outlined in *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980).[1]

The chief areas of disagreement involved the second and fourth prongs of the test: respectively, the extent of the state's interest in Hagaman's task, and whether that task involved the exercise of discretion. For the extent of state interest question, Hagaman relied on Va. Code Ann. 23-50.16:2(4), which created VCUHSA. The code section lists VCUHSA's various missions (including patient care), and then explicitly states: "*all of which missions constitute essential governmental functions.*" Hagaman argued her expertise in specialized nursing was essential to VCUHSA's mission of patient care: thus the state had a strong interest in her work. Meanwhile the plaintiff drew a distinction between hospital functions focusing on education and research, and those focusing on patient care. Pike pointed out that *James v. Jane* itself states that sovereign interest and involvement in the treatment of specific patients is "slight." The Court acknowledged the force of this argument, but ultimately found for Hagaman. Judge Rupe wrote: "The Court cannot ignore that the state's interest in these [patient care] functions is statutorily defined as 'essential.'" At the close of his opinion he admitted misgivings about the result, but noted: "this situation is one created by the General Assembly and the Supreme Court of Virginia, and the trial court in the instant matter is powerless to change this legal reality."

The trial court also found for Hagaman on the issue of whether her task involved the use of judgment. Pike argued that the task of keeping his head and neck still was a simple ministerial act, not entitled to the protection of sovereign immunity. However, the Court held that even if keeping Pike's head erect was a direct order - a point of contention - how to do so was within Hagaman's judgment and discretion. Judge Rupe found that Hagaman was entitled to sovereign immunity. Defendant's plea in bar of sovereign immunity was granted and the case was dismissed with prejudice.

[1] 1) Function performed by the employee; 2) extent of the state's interest in that function; 3) degree of state control and direction over the employee; 4) whether the act involved the use of judgment and discretion.

The decision started with a quote that the doctrine of sovereign immunity is "alive and well in Virginia." The majority opinion then reviewed *James v. Jane,* 221 Va. 43 (1980) wherein this Court declined to impose a bright line rule to determine whether an allegedly negligent state employee is protected by the shield of sovereign immunity. Rather, this Court developed a list of four non-exclusive factors to assess whether a plea of sovereign immunity should be sustained. These four factors include: the function the employee was performing; the state's interest and involvement in that function; whether the act performed involved the use of judgment and discretion; and the degree of control and direction exercised by the state over the employee.

By providing specialized health services not widely available in the commonwealth through the Surgical Trauma Intensive Care Unit, Nurse Hagaman was serving an "essential governmental function," pursuant to Va. Code § 23-50.16:2. The trial court found that nurse Hagaman has a great depth of expertise in offering this kind of specialized care, and that her actions were essential to carrying out the express interest of the commonwealth as embodied in Code § 23-50.16:2(4). This Court agreed with the trial court's assessment finding that the first two factors of the *James* test had been met, supporting a finding of sovereign immunity.

The Court went on to find that the evidence does not support plaintiff's claim that Nurse Hagaman was performing a ministerial act. First, the evidence established that Nurse Hagaman had to exercise her discretion to determine how to carry out the doctor's orders to avoid pressure in the vicinity of plaintiff's neck incision and to keep his head in a neutral position. Second, the specific omissions alleged, i.e., Nurse Hagaman's failure to monitor the position of plaintiff's head and failure to avoid pressure near the incision, cannot be viewed in artificial isolation. The exercise of judgment and discretion is unavoidably contextual. Nurse Hagaman's sphere of responsibility extended beyond simply positioning the patient and avoiding pressure near the neck incision. She had to prioritize and address many tasks. According to the evidence, she was required to provide "minute to minute" care by, among other things, monitoring a patient's drugs, checking his vital signs and consulting with residents. She was exercising discretion in caring for plaintiff. The trial court found that the hospital had a high degree of control over Nurse Hagaman, who was supervised by more senior nursing staff, and that she was subject to the hospital's policies. The state hospital paid her wages and determined her schedule and whether she can take leave.

Upon assessment of the four factors analysis and the facts of this specific case, the majority affirmed the dismissal on sovereign immunity grounds.

- **Dissent from Justice Mims, joined by Justice Goodwyn.**
  The dissenters opined that the application of the enumerated *James v. Jane* analysis did not entitle Nurse Hagaman to sovereign immunity. The stated statutory objectives of providing high-quality patient care and promoting health and welfare at the VCU Medical Center are indistinguishable from the objectives of any health care facility, public or private. The Commonwealth's interest in the performance of one particular nurse in the treatment of one particular patient is the same regardless of the character of the facility where the treatment occurs. "The only difference, under the majority opinion, is that a nurse at a private facility may be held liable for his or her professional negligence while a nurse at an identical facility owned and operated by the State cannot be. Whatever benefit this disparity may yield for the public treasury, and thus indirectly for the taxpayer, it promotes neither conscientious and competent performance by

> medical professionals employed at state medical facilities compared to their private sector counterparts, nor diligent and practice supervision of such employees at state facilities that are immune from the consequences of their negligence. In short, the majority's holding makes it less likely, rather than more likely, that the Commonwealth's stated objective of providing high-quality patient care will be met." For those reasons, the dissenters would reverse the circuit court decision and remand the case for further proceedings.

Clark v. Dep't of State Police, ___Va. ___, 793 S.E. 2d 1 (Va. 2016)
Opinion by Justice D. Arthur Kelsey.

The issue in this case was whether sovereign immunity of the State applied to bar a suit filed under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), a federal statute purporting to give a right to sue in state court. The Virginia Supreme Court affirmed the trial court's ruling that sovereign immunity barred the plaintiff's suit against the Virginia Department of State Police, an arm of the Commonwealth.

Plaintiff filed a USERRA claim against the Virginia State Police ("VSP") alleging that he was denied a promotion because of his service in the United States Army Reserves. VSP responded with a plea of sovereign immunity. VSP argued that it could not be sued on a federal right of action in state court absent a waiver of sovereign immunity. The trial court agreed and granted the plea of sovereign immunity.

Plaintiff and the United States, appearing as amicus, argued on appeal that the Commonwealth's sovereign immunity had been lawfully abrogated by USERRA. The Court engaged in a long and interesting discussion of dual sovereignty of the federal and state governments and how the doctrine of state sovereign immunity has been a mainstay of federalism principles from "the beginning of the Republic." Blackstone's *Commentaries,* multiple Federalist papers, and James Madison and John Marshall speaking at the Virginia convention to ratify the Federal Constitution, were cited by the Court to support the enduring role of state sovereignty in a Federal system.

The Court affirmed the trial court and held that sovereign immunity barred plaintiff's claim against the VSP, an arm of the Commonwealth, because the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts.

Legal Malpractice

Virginia Supreme Court

Thorsen v. Richmond SPCA, 292 Va. 257 (2016)
Opinion by Justice Leroy F. Millette, Jr.

The issue in this case is whether an intended third-party beneficiary of a will contract, who failed to successfully take under the will due to the drafting attorney's error, may sue the attorney for malpractice.

In 2003, Alice Dumville, age 43, met with James B. Thorsen, Esquire to prepare her will. Upon death, it was her intent to convey all of her property to her mother, age ~80, if her mother survived her, and, in the event her mother predeceased her, to the Richmond SPCA. Thorsen prepared the will. Dumville execute the will as drafted by Thorsen. Dumville died in 2008, her mother having predeceased her. In his capacity as a co-executor of the estate, Thorsen notified the RSPCA that it was the sole beneficiary of Dumville's estate. Thorsen was then informed that, in the opinion of the title insurance company, the will left only the tangible estate (~$72k), not real estate, to the Richmond SPCA. The intangible estate (~$675k) passed intestate to Dumville's two heirs at law. The Richmond SPCA then sued Thorsen in Richmond Circuit Court for breach of contract, as a third-party beneficiary of the contract between Thorsen and Dumville. Thorsen demurred arguing that the Richmond SPCA was not an intended third-party beneficiary of the contract and that an action by a third-party beneficiary arises under Va. Code § 55-22 and requires a written agreement. Thorsen also filed a plea in bar based on the statute of limitations. The court overruled the demurrer and denied the plea in bar. At trial, the parties stipulated that Thorsen had a duty to incorporate Dumville's intent into her will accurately and he failed to do so. The circuit court found for the Richmond SPCA and awarded damages in the amount of $603,409.90. Thorsen appealed.

Virginia Code § 55.22 is silent as to oral contracts and applies only to written contracts. It did not apply here to an oral contract between an attorney and a testator where it did not abrogate the common law which allowed third-party beneficiaries to sue upon oral contracts. For this reason, the demurrer was properly overruled. While, as a general rule, strangers to a contract acquire no rights under such contract, third-party beneficiary contracts represent a well-recognized exception in our law under which a nonparty can nevertheless enforce the contract under certain circumstances. With regard to standing, the majority held that the facts sufficiently alleged that the contract was entered into for the benefit of Dumville's mother and the Richmond SPCA. When Thorsen accepted the contract to prepare Dumville's will as she specified, the Richmond SPCA became both the intended beneficiary of Dumville's will as well as the intended beneficiary of her contract of employment with Thorsen. Thus, the Richmond SPCA had standing to sue Thorsen for breach of contract.

Thorsen's plea in bar maintained that, if he breached the contract, it was made when he drafted the will in April 2013 and, it expired three years later, in April 2016. The majority disagreed and ruled that the plea was properly denied as the Richmond SPCA's cause of action did not accrue until the testator's death. A cause of action is the operative set of facts giving rise to a right of action." *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 81-82, 301 S.E.2d 8, 13-14 (1983); *Locke v. Johns-Manville Corp.*, 221 Va. 951, 959, 275 S.E.2d 900, 905 (1981). "A right of action cannot arise until a cause of action exists because a right of action is a *remedial right to presently enforce* an existing cause of action." *Van Dam v. Gay*, 280 Va. 457, 460, 699 S.E.2d 480, 481 (2010). No testamentary beneficiary has a cause of action prior to the death of the testator. The three-year statute of limitations cannot begin to run as to the testamentary beneficiary until a cause of action accrues, after the death of the testator.

- **Dissent by Justice McClanahan.**
  The dissent points out that the privity of contract requirement has not been abolished in Virginia. Therefore, this Court should not carve out exceptions such that the Richmond SPCA does not have standing to sue for breach of the contract between Dumville and her attorney, Thorsen. This Court has held that this policy underlying the requirement of privity precludes a testamentary

beneficiary from suing an attorney for legal malpractice "with whom an attorney-client relationship never existed." *Johnson v. Hart*, 279 Va. 617, 625, 692 S.E.2d 239, 244 (2010). The primary policy reason underlying the rule of privity is preservation of the sanctity of the attorney-client relationship. It also serves to protect against potential conflicting duties owed to clients and third parties by the attorney. Finally, the dissent points out that the abandonment of privity raises concerns over uncertain and unlimited liability for lawyers. In the context of estate planning, this is "particularly troublesome" since an attorney may be held liable for legal malpractice decades after the will was drafted for the client. Finally, the decision of whether to abolish the privity requirement in legal malpractice actions and create a new cause of action against attorneys in favor of third-party beneficiaries should be left to the legislature.

Medical Malpractice

Virginia Supreme Courts

Mayr v. Osborne, 2017 Va. LEXIS 3 (Va. Feb. 2, 2017)
Opinion by Justice Stephen R. McCullough.

The issue in this case is whether a patient can proceed in a medical malpractice case on a battery theory alone rather than on a negligence theory in a surgical error case in which the surgeon operated at the wrong disk level, i.e., at a level for which plaintiff did not give consent. The Virginia Supreme Court held that the surgeon's actions in operating at the wrong level did not constitute a battery. Judgment in favor of plaintiff was reversed.

The patient signed a consent form allowing Dr. Mayr to fuse the C5-C6 level of the spine. Dr. Mayr mistakenly fused C6-C7. Plaintiff sued under a battery theory alleging that the surgery at the wrong level exceeded the scope of consent and constituted a battery. Plaintiff did not put on expert testimony on the standard of care and relied solely on a battery theory. The defense expert testified that operating at the wrong level was a known complication of the operation and can occur even if the surgeon uses due care. At the conclusion of the bench trial, the court entered judgment for the plaintiff on the battery claim.

On appeal, the court distinguished prior battery cases allowed in the medical malpractice context from the present case. Prior battery cases alleged that the defendant intentionally exceeded the scope of consent by operating without the presence of a particular doctor requested by the plaintiff; or operated at a disk level *in addition* to the level plaintiff consented to; or performed a partial mastectomy instead of an exploratory biopsy. These were not unintentional acts contrary to the consent given. A technical battery exists where (1) the patient placed terms or conditions on consent and the doctor ignored those terms or conditions; (2) the doctor intentionally performed an additional procedure; or (3) the physician intentionally performed a different procedure or one that differs significantly in scope from the procedure for which the patient provided consent.

In the instant case, the physician set out to do the exact procedure the patient consented to, but unintentionally performed a procedure on the same structure (the spine) but at a different

location. The court held that, as a matter of law, this conduct did not constitute a battery and liability for the error would be governed by negligence principles. To be liable for battery, the defendant's healthcare provider must have done two things. First, the healthcare provider must have intentionally made physical contact with the patient and, second, that contact must have been deliberately against the patient's will or substantially at variance with the consent given.

The court wrote that to accept plaintiff's theory of technical battery would effectively jettison the required showing of intent, and battery is an intentional tort. A physician is not liable for 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.

OrthoVirginia, f/k/a West End Orthopaedic Clinic v. Jurewicz, Record No. 160703 (Petition for Rehearing denied on February 3, 2017).

This unpublished case involved the trial court's refusal to give the "bad outcome ≠ negligence" model jury instruction in a medical malpractice case. Upon consideration of the petition of the appellant to set aside this Court's October 12, 2016 judgment finding no reversible error in the judgment of the Richmond Circuit Court and granted a rehearing thereof, the prayer of said petition is denied.

This appeal stemmed from a jury verdict on January 29, 2016 in the amount of $500,000 plus interest on medical bills totaling $179,735.44 in a medical malpractice case in the Circuit Court of the City of Richmond in favor of a woman who had undergone two knee surgeries by an orthopedic surgeon employee of Defendant OrthoVirginia. The verdict was challenged by OrthoVirginia's motion for a mistrial on the basis of a refused jury instruction. At the conclusion of the evidence, OrthoVirginia tendered VMJI 35.040: "The fact that a doctor's efforts on behalf of his patient were unsuccessful does not, by itself, establish negligence." Plaintiff objected to VMJI 35.040 as argumentative, unnecessary and cumulative. Circuit Court Judge Hughes declined this jury instruction on the ground that it was cumulative of other jury instructions to be given in the case stating: "That's the one that I won't give because I think its covered by all other instructions just as it would be in a garden variety case. You've got your instruction on the burden of proof and the defenses to it and it's covered." During jury deliberations, when the trial court was considering giving an *Allen* instruction, OrthoVirginia asked the court to reconsider its decision on VMJI 35.040 based on statements made during plaintiff's rebuttal, which motion the court took under advisement. After approximately 9 hours of deliberations, the jury rendered a verdict for the plaintiff. OrthoVirginia renewed its motion for a mistrial which the court denied, but permitted the parties to file post-trial motions. The trial court denied those motions.

OrthoVirginia appealed asserting that the law is well-settled in Virginia that a jury instruction is properly submitted to the jury if it is (1) a correct statement of the law and (2) supported by more than a scintilla of evidence. *Holmes, v. Levine*, 273 Va. 150, 159, 639 S.E.2d 235, 239 (2007). OrthoVirginia added that VMJI 35.040 is a proper statement of the law and there was sufficient evidence to support VMJI 35.040 and the plaintiff did not contest this. Finally, it was the argument of OrthoVirginia that plaintiff's closing and rebuttal argument was improper because it suggested to the jury that that negligence should be presumed from the outcome, and it is clearly the type of argument that is to be protected against by VMJI 35.040. The failure to grant VMJI significantly prejudiced OrthoVirginia. This Court has recognized

"error is presumed to be prejudicial unless it plainly appears that it could not have affected the result." *Spence v. Miller*, 197 Va. 477, 482, 90 S.E.2d 131, 135 (1995).

In response, the plaintiff argued that when a jury has been sufficiently instructed on the principles of law applicable to the facts of the case, no further instructions are required, and cumulative instructions are disfavored. *See Harman v. Honeywell*, 288 Va. 84, 104 (2014); *Lawlor v. Com.*, 285 Va. 187, 256 (2013); *National Union Fie Ins. Co. of Pittsburg, Pa. v. Bruce*, 208 Va. 595, 601 (1968). Moreover, where an instruction is argumentative, or an incomplete statement of the law based on the facts of the case, it should not be given. *See, e.g., H. W. Miller Trucking Co. v. Flood*, 203 Va. 934, 937 (1962). Lastly, a party must timely move for a cautionary instruction or a mistrial, at the time when allegedly objectionable statements are made. If the objecting party fails to do so before the jury retires, a motion for a mistrial "is untimely and properly refused." *Maxwell v. Com.*, 287 Va. 258, 265 (2014); *Cheng v. Com.*, 393 S.E.2d 599 (1990).

This Court denied OrthoVirginia's Petition for Appeal and their subsequent Petition for Rehearing.

Virginia Circuit Courts

Brown v. Tashman, 2016 Va. Cir. LEXIS 120 (Fairfax May 2, 2016)
Opinion by Circuit Court Judge Grace Burke Carroll.

In this case, the Fairfax County Circuit Court denied defendant's plea in bar based on the statute of limitations, applying the continuing-treatment rule in a case involving a series of plaintiff's pregnancies. The plaintiff alleged that the defendant doctor acted negligently at the conclusion of her second pregnancy and during the course of her third pregnancy, and that she suffered physical and emotional damages during her third pregnancy. The defendants contended that plaintiff's injury occurred in March 2012, approximately four months before the birth of her third child on July 26, 2012, and that the complaint (filed on July 24, 2014) was therefore time-barred by the two-year statute of limitations. The court rejected defendants' argument and applied the continuing-treatment rule, concluding that the statute of limitations was tolled through the birth of plaintiff's third child on July 26, 2012.

Plaintiff suffered from Rh alloimmunization, a condition that can cause a pregnant woman's immune system to develop antibodies to attack Rh-positive blood cells, which can then attack the fetus's Rh positive blood cells, causing fetal anemia. As a result of this condition, Plaintiff became sensitized to the Rh-positive blood type of her second child, born May 27, 2009. Plaintiff's second child was apparently not harmed by this condition, but Plaintiff's third child suffered respiratory insufficiency, anemia, hyperbilirubinemia, thrombocytopenia, pulmonary hypertension, tricuspid regurgitation, patent foramen ovale and pulmonary artery branch stenosis. Plaintiff alleged that the doctor was negligent in failing to administer a RhoGAM injection in 2009, during her second pregnancy, and for his failure to treat Plaintiff for abnormal levels of antibodies during her third pregnancy.

Noting that in the case of pregnant women, injury to the fetus is injury to the mother, the Court ruled that the doctor's alleged negligence in 2009 (during the second pregnancy) for failure to administer RhoGAM did not constitute an injury until March 2012 (during the third pregnancy), when the Plaintiff's sensitized blood crossed the placenta and intermingled with the fetus' red blood cells, thereby injuring the fetus.

Finding no continuous or substantially uninterrupted care for Plaintiff's blood sensitization-related issues from 2009 through the delivery of Plaintiff's third child in 2012, the court nevertheless dismissed the plea in bar since the defendant doctor's continued treatment of Plaintiff throughout her third pregnancy constituted continuing treatment, and the statute of limitations was tolled at least until the birth of the third child on July 26, 2012. Because she filed suit on July 24, 2014, her action was not time-barred.

Negligence

Virginia Supreme Court

Elliott v. Carter, ___ Va. ___, 791 S.E.2d 730 (Va. 2016)
Opinion by Justice S. Bernard Goodwyn.

On June 25, 2011, Caleb McKinley Smith, a 13-year-old Boy Scout, was on an overnight camping trip with his troop along the Rappahannock River near Sharps, Virginia. Trevor Carter, then 16, was the Senior Patrol leader. Caleb had been taking lessons to learn how to swim – he had had one lesson from Carter that morning – but could not yet swim. Carter led Caleb and two other Scouts (Scott and Elijah) into the river along a partially submerged sandbar. They were not wearing lifejackets. Carter and Scott decided to swim back to shore. Carter told Caleb and Elijah to walk back to shore along the sandbar. As they walked back, they both fell into deeper water. Caleb yelled to Carter for help. Carter attempted to swim back and rescue him. Elijah, who also could not swim, was rescued. Neither Carter nor three adult Scout leaders were able to save Caleb.

Elliott filed a wrongful death action in the Circuit Court of Richmond County against Carter, four adult Scout leaders, the Boy Scouts of America and the affiliated Heart of Virginia Council, Inc. The trial court granted Defendants' demurrer asserting charitable immunity. Elliott amended her complaint to allege both gross and willful and wanton negligence by Carter and gross negligence by the four adult Scout leaders, and demanded a jury trial. Defendants filed a motion for summary judgment. The court granted the motion for summary judgment as to all Defendants.

Gross negligence is "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person." *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 487, 603 S.E.2d 916, 918 (2004). Gross negligence "requires a degree of negligence that would shock fair-minded persons." *Id.* "Ordinarily, the question whether gross negligence has been established is a matter of fact to be decided by a jury. Nevertheless, when persons of reasonable minds could not differ upon the conclusion that such negligence has not been established, it is the court's duty to so rule." *Frazier v. City of Norfolk*, 234 Va. 388, 393, 362 S.E. 2d 688, 691 (1987).

Here, even viewing the evidence in the light most favorable to appellant administrator, the non-moving party, the undisputed material facts support the conclusion that Carter, the Patrol Leader, exercised some degree of care in supervising Caleb. Therefore, his conduct did not constitute gross negligence.

First, it is not alleged that Caleb had any difficulty walking out along the sandbar with appellee. Second, there is no allegation that Carter was aware of any hidden danger posed by the

sandbar, the river or its current. Third, Carter instructed Caleb to walk back to shore along the same route he had taken out into the river, and there was no evidence that conditions changed such that doing so would have been different or more dangerous than initially walking out, which was done without difficulty. Finally, Carter tried to swim back and assist Caleb once he slipped off the sandbar, which is indicative that Carter was close enough to render assistance when Caleb fell into the water, and that Carter did attempt to render such assistance. Although his efforts may have been inadequate or ineffectual, they were not so insufficient as to constitute the indifference and utter disregard of prudence that would amount to a complete neglect for Caleb's safety, which is required to establish gross negligence.

The circuit court did not err in finding that no reasonable jurist could find that Carter did nothing at all for Caleb's care. There was no question for the jury, and the circuit court properly granted summary judgment for defendant.

- **Dissent from Justice McCullough, joined by Justice Mims.**
  Here, Caleb could not swim, a fact that was known to the defendants. He did not walk out on his own into the river. Rather, he was led, without a life jacket or other safety equipment, over a partially submerged sandbar far into the river. The complaint alleges the Rappahannock River is a major river with a strong current. Caleb was then abandoned on a sandbar in the middle of the river and told to walk back. A partially submerged sandbar in the middle of a river with a strong current is a very dangerous place to be, particularly for a non-swimmer without a life vest. Carter then swam away too far to effectuate a rescue should the younger boy slip and fall into the river. The dissent found that reasonable persons could differ upon whether the cumulative effect of these circumstances constitutes a form of recklessness or a total disregard of all precautions, an absence of diligence or lack of even slight care.

  Also, the purported acts of slight care, separated in time and place from the gross negligence at issue, do not take the issue away from the jury. When the defendant has led the plaintiff into danger, an ineffectual and doomed-to-fail rescue attempt does not in my judgment take away from the jury the question of gross negligence.

  The dissenters would reverse and remand the case for a trial by jury.

Coutlakis v. CSX Transportation, ___ Va. ___, 2017 Va. LEXIS 26 (Mar. 9, 2017)
Opinion by Justice Cleo E. Powell.

The issue in this case was whether defendant's demurrer was properly sustained on the basis that plaintiff's decedent was contributorily negligent as a matter of law. The Virginia Supreme Court held that the Complaint's allegations adequately triggered the last clear chance doctrine as plaintiff's decedent had negligently placed himself in a position of peril and was unconscious of his peril, i.e., he was an inattentive plaintiff. Reversed and remanded.

Plaintiff's Complaint alleged that James Coutlakis was walking adjacent to railroad tracks owned by CSX. He was listening to music on his cell phone through earbuds. As a result, James was unaware that a train was approaching from behind. It was further alleged that the train's conductor and engineer had a chance to avoid the accident, as they saw James while he was several hundred yards in front of the train. However, as James walked along unaware of the train's approach, neither the conductor nor engineer took any steps to alert James or to avoid a

collision. James was struck and killed by a part of the train that extended out from the side of the body of the train. Defendants claimed that these allegations, even viewed in the most favorable light to plaintiff, established contributory negligence as a matter of law. The trial court agreed and sustained the demurrer.

Plaintiff appealed and argued that she pleaded sufficient facts to support her allegation that the last clear chance doctrine may apply. The Supreme Court agreed and reversed and remanded to the trial court. The Court reaffirmed that the last clear chance doctrine applies to at least two types of plaintiffs: the plaintiff who negligently placed himself in a position of peril and cannot extricate himself and the inattentive plaintiff. An inattentive plaintiff has negligently placed himself in a position of peril, is physically able to remove himself from the peril, but is unconscious of his peril. The Court found that the Complaint sufficiently alleged that James was unaware of his peril, that the conductor and the engineer saw James, that they knew or should have known that James was in peril, and they had sufficient time to take action to avoid the accident, had they used reasonable care. He was the inattentive plaintiff.

The VSC rejected the argument that a plaintiff's continuing negligence to the point of injury automatically preludes application of the last clear chance doctrine. The Court also refused to accept the argument that the allegations of the Complaint established that plaintiff was guilty of willful and wanton negligence. That determination is a question of fact for the jury.

Virginia Circuit Courts

K.I.D. v. Jones, 2016 Va. Cir. LEXIS 103 (Richmond, June 8, 2016)
Opinion by Circuit Court Judge Harry Taliaferro, III.

The issue in this case on demurrer was whether a claim was stated against a school principal and teacher for sexual abuse allegedly perpetrated by a school resource officer/coach/counselor Mr. Jones. The Circuit Court held that the Complaint stated a cause of action against the principal and teacher. The teacher was allegedly negligent *per se* for failing to accurately record the student victim's daily attendance in his class when he was aware that the student was with the teacher and the principal had warned the teacher about the behavior. The principal was allegedly negligent *per se* for failing to supervise the teacher in taking class attendance.

The suit alleged that a female student had been sexually abused at school, over the course of two years, by the school resource officer/coach/counselor. Officer Jones often had the student excused from class so they could meet in his office causing the student to be consistently absent from many of her classes. He violated policy by closing the door and the blinds to his office. It happened so often that the student's first period teacher stopped marking her absent. Teachers and staff expressed concern multiple times that female students visited Jones' office too often.

The principal, Mr. Dixon, promoted Mr. Jones by representing to the student and her parents that Mr. Jones could be a "counselor" to the student. The principal knew of the concerns about female students in Jones' office and spoke to Jones on multiple occasions about compliance with the open door/open blinds policy and the students need to be in class. Other than verbal warnings, the principal took no disciplinary steps with Jones.

The principal and teacher generally demurred to all counts on the grounds (1) that they did not owe a duty to plaintiff and could not be liable for the criminal acts of third parties and (2) that the plaintiffs' claims were barred by virtue of the doctrine of sovereign immunity. The court

acknowledged that generally there is no duty to control the conduct of a third person in order to prevent physical harm to another, particularly where assault is involved, because acts of criminal behavior cannot reasonably be foreseen. The exceptions to that general rule are where a special relationship exists (1) between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or (2) between the defendant and the plaintiff which gives a right to defendant to protect the plaintiff.

The court sustained the demurrers to all counts pleaded except one. Va. Code § 22.1-259 provides that every teacher in every school shall keep an accurate daily record of attendance of all children to allow truancy enforcement. Plaintiffs claimed that the teacher was negligent *per se* for not keeping an accurate attendance record, and the principal was negligent *per se* in that he willfully caused a condition which rendered the student to be a child in need of supervision for being truant in violation of Va. Code § 18.2-371(1). It was pled that the principal was aware that the student was in school, but not in class; that he knew his verbal warnings to Jones had no permanent effect; that missing class interfered with the student's academic achievement; that the absences continued with the principal's approval and encouragement; and that he never took steps to get her back in class. The court held that these allegations were sufficient to support a negligence *per se* cause of action against principal Dixon and the teacher based on violation of a statutory standard of conduct designed to protect school students from harm.

Carpenter v. Hawkins, 2016 Va. Cir. LEXIS 104 (Augusta County June 14, 2016)
Opinion by Circuit Court Judge Victor V. Ludwig.

This Augusta County Circuit Court held that an assertion that Defendant Hawkins was a "life-long opiate addict" who knew his withdrawal symptoms during the 48 hours prior to his traffic accident would include confusion, distractibility and "overall impairment of driving ability," did not state a common law claim for punitive damages.

Referencing *Cain v. Lee*, 290 Va. 129 (2015), the opinion noted that this was a common law claim for punitive damages, not a statutory one. *Cain* involved the application of Va. Code § 8.01-44.5, which authorizes an award of punitive damages if certain criteria are established. However, neither that case nor Code § 8.01-44.5 have any application to this case because plaintiff cannot assert a claim based on the statute.

The common law standard (which consistently describes a "conscious disregard of the rights of others"), as applied by the Supreme Court, demands that the defendant harbor some cognizable sense that his conduct or condition poses a risk to others. Moreover, the defendant recognizes, *after he has begun driving*, that his conduct or condition creates the risk and that his recognition be based on empirical evidence and not merely a recognition of his own physical or mental impairment. That is, none of the cases approve a finding of punitive damages when the claim is based on defendant's initial decision to drive. All of the cases which affirm the issue of punitive damages being submitted to the fact finder or which approve the award of punitive damages involve events that occurred after the defendant was behind the wheel (e.g., weaving, colliding with other vehicles, falling asleep) because it is events that occurred while he was driving that should have resulted in his conscious recognition of the egregious nature of his conduct.

In the case at bar, there is nothing to indicate that, once the defendant began driving, there was any event that caused him to realize that his condition had a significant negative impact on his driving. There is no allegation that there was any external event that alerted him to

the fact that his ability to drive was impaired or that his conduct was in conscious disregard of the rights of others. Defendant's driving with knowledge of the potential effect of his withdrawal symptoms is indistinguishable from the defendant who drives while knowing he is under the influence of alcohol. The circuit court found that insufficient to justify an award of punitive damages and granted defendant's demurrer.

Product Liability

Dorman v. State Indus., 292 Va. 111 (2016)
Opinion by Justice Cleo E. Powell.

In this product liability case involving a defective water heater, Caroline Dorman, Elizabeth Burgin, Nichole Howarth, and Kristin Julia, (collectively "appellants") appealed a judgment from the Circuit Court of the City of Richmond finding that State Industries, Inc. ("State") was not liable for their breach of warranty and negligence claims.

On August 17, 2007, appellants moved into an apartment in Collegiate Suites Apartments. Two days later, a technician for Atmos Energy measured high levels of carbon monoxide at the front door of the apartment. After receiving no answer from the occupants, he entered the apartment and found the appellants unconscious in their bedrooms. Five days later, the atmospheric-vented gas fired hot water heater was tested. They were able to recreate the "back draft and carbon monoxide" conditions of August 19th only when the water heater was running, all the bedroom doors were closed and the air conditioning was running. The atmospheric heater was connected to the air handler of the central air conditioning unit that was also manufactured by State.

At trial, both sides presented expert testimony. Appellants' expert opined that the atmospheric heater was defective while State's expert opined that the installation of new carpet in the apartment days earlier created a situation with no return of air from the bedrooms when the bedroom doors were closed. State's expert also testified that there were about 60 million atmospheric gas heaters operating in the United States. The trial court overruled appellants' motion to exclude State's "empty chair" evidence and, over appellants' objection, granted State's proposed jury instruction which stated: "A superseding cause is an independent event, not reasonably foreseeable, that completely breaks the connection between the defendant's negligent act and the plaintiff's injury. A superseding cause breaks the chain of events so that the defendant's original negligent act is not a proximate cause of the plaintiffs' injury in the slightest degree." The jury returned a verdict for State on all claims. The trial court then denied appellants' motion to set aside the verdict and motion for new trials.

On appeal, this Court found that proof of the sales volume of the product was not impermissible evidence of the absence of other injuries, but relevant to the merchantability of the product shown by its acceptance in the marketplace. "The number of atmospheric heaters sold was directly related to the issue of whether the atmospheric heater would 'pass without objection in the trade' as demonstrated by evidence as to whether a 'significant segment of the buying public' would object to buying the product. This Court found no abuse of discretion.

Turning to the superseding cause issue, evidence as to other potential causes in products liability cases may be important in a products liability action, and here there was evidence from which the jury could have found that the defendant's negligence, if it existed, was superseded by

other causes, and the trial court did not abuse its discretion in admitting defense evidence of superseding causation. A proper superseding-cause jury instruction was given in this case, and the plaintiffs' objection to that instruction, premised on its failure to mention the burden of proof on a defendant asserting superseding causation, was waived because plaintiffs failed to tender a proposed instruction containing such language. The judgment in favor of State was affirmed.

- **Dissent by Chief Justice Lemons, joined by Justice Millette.**
  The dissenters opined that Jury Instruction 22 was given in error and the judgment should be reversed and the case remanded for a new trial. The dissent discusses the Court's prior superseding cases, including the two cases referenced in the majority opinion. "A superseding cause is a new cause of a plaintiff's injury, becoming the only proximate cause of that injury." *Williams v. Joynes*, 278 Va. 57, 63, 677 S.E.2d 261, 264 (2009). In those two cases – *Banks v. City of Richmond* and *Chereskin v. Turkoglu* – there were extraordinary unforeseeable actions that served to break the chain of causation. Such unforeseeability is not present in this case.

  The dissenters noted that the factors identified by State as "superseding" causes are actually "intervening" causes. Without the original open exhaust design, these factors could not have caused appellants' injuries. And in order to constitute a superseding cause, "it must so entirely supersede the operation of the defendant's negligence, that it alone, without the defendant's contributing negligence thereto in the slightest degree, produces the injury." *See City of Richmond v. Gay*, 103 Va. 320, 324, 49 S.E. 482, 483 (1905). On this record, it cannot be said that State's design of an open exhaust, which allowed carbon monoxide to escape the exhaust vent and enter the living space, was not contributing "in the slightest degree" to the appellants' injuries. Therefore, it was error of the trial court to grant the superseding causation jury instruction. Accordingly, the dissenters would reverse the judgment of the trial court and remand the case for a new trial.
  [The dissent made no mention of the number of sales of the water heaters.]

Holiday Motor Corp. v. Walters, __ Va. __, 790 S.E.2d 447 (Va. 2016)
Opinion by Justice Elizabeth A. McClanahan.

This is an appeal from a $20 million dollar jury verdict awarded to Shannon Walters who suffered a serious cervical spine injury when she swerved to avoid a large object in her lane of travel causing her Mazda Miata convertible to overturn. Walters had been driving with the soft top closed and the latches on each side of the vehicle engaged. Her Miata landed on its top with the driver's side pushed up against a tree, with the windshield separating from the soft top and collapsing inward. Walters sued, contending that the Mazda defendants were negligent because they designed, manufactured and placed into the stream of commerce the Mazda Miata convertible, which was unreasonably dangerous for its ordinary and/or foreseeable use "in that it would not provide reasonable occupant protection in a foreseeable rollover while being used in its closed top configuration" due to design defects. At trial, the jury agreed and awarded monetary damages to Walters.

On appeal, Mazda argues that it owed no legal duty to design the soft top or the latches to provide occupant rollover protection because it is not the intended or foreseeable purpose of a

convertible soft top, including the latching system, to provide such protection. Walters contended that Mazda sold a dual-purpose product and that when the top was in use, it was a foreseeable purpose that the top and latching system would provide the same occupant rollover protection as a sedan with a permanent roof structure.

The issue on appeal to be determined as a matter of law is whether a manufacturer of a soft top convertible owes a legally recognized duty to design or supply a soft top or its latching system to provide occupant rollover protection. Walters does not claim that a defect in the Miata caused the rollover crash; rather, she seeks to hold Mazda liable for failing to design the soft top latching system to provide occupant protection during a rollover crash. Prior Virginia case law has rejected the "crashworthiness" doctrine. Therefore, if a duty to design convertible soft tops to provide occupant rollover protection exists, it must be found within the scope of a vehicle manufacturer's duty to exercise reasonable care to design a product that is reasonably safe for the purpose for which it is intended.

The manufacturer is only under a duty to exercise ordinary care to design a product that is reasonably safe for its intended purpose. Similarly, an implied warranty of general merchantability arises when the product is being used in its intended manner. The standard of safety of goods imposed on the manufacturer of a product is essentially the same whether the theory of liability is labeled warranty or negligence. The product must be fit for the ordinary purpose for which it is to be used.

The determination of whether a vehicle manufacturer owes a duty to design a convertible soft top to provide occupant rollover protection, therefore, requires that we consider whether such protection is the intended or reasonably foreseeable use given the inherent characteristics, market purposes and utility of a convertible soft top. Foreseeability of harm is not to be equated with duty. While the possibility that convertible may be involved in a rollover is undoubtedly foreseeable, common knowledge of a danger from the foreseeable misuse of a product does not alone give rise to a duty to safeguard against the danger of that misuse.

Imposing a duty on manufacturers of convertible soft tops to provide occupant rollover protection defies both "common sense" and "good policy." While the National Highway Transportation Safety Administration (NHTSA) established strength requirements for the passenger compartment roof of specified vehicles, it expressly excluded convertibles from such requirements. There are no safety standards in existence, promulgated either by the government or the automotive industry, that require convertible soft tops or their latches to provide occupant rollover protection. For these reasons, the Court held that no duty extended to Mazda to design the soft top, including the latches, so that it would provide occupant rollover protection.

Even if Mazda owed a duty to design the soft top to provide occupant rollover protection, the Court further concluded that plaintiff's expert's [Mundo] opinion that the soft top's latching system was defectively designed was inadmissible. The opinion was premised on at least two unfounded assumptions: that the latches would not have disconnected if they had been designed differently, and that the front end of the roof structure would not have collapsed if the latches had remained connected. The inadmissibility of Mundo's opinion was fatal to Walters' claims for negligence and breach of implied warranty of merchantability. The circuit court's abuse of its discretion in this regard provides a separate and independent basis for entering judgment as a matter of law for Mazda.

U.S. District Courts

King v. Blackpowder Products, 2016 U.S. Dist. Lexis 95660 (Roanoke July 22, 2016)
Opinion by United States District Judge Glen E. Conrad.

The issue in this case was whether the distributor of a muzzle loader was entitled to summary judgment on plaintiff's express warranty claim. The United States District Court denied the motion for summary judgment. The defendant made an affirmation of fact that creates a prima facie express warranty claim.

Plaintiff King bought a 50-caliber muzzle loader at a Walmart in Galax. Blackpowder was the U.S. distributor of the gun. Plaintiff went home, loaded the gun, pulled the trigger, the barrel ripped apart, and his thumb and forefinger were blown off. Blackwater claims that it never made any express warranty to plaintiff. Blackpowder helped draft the warranty booklet that accompanied the sale. The booklet said that the rifle could handle a magnum load up to 150 grams of powder. King's load was within those parameters, but King never read the booklet and did not rely on the information in it for his purchase.

The Court applied Virginia express warranty law. An express warranty can be established in two ways:

(1) any affirmation of fact or promise made by the seller to the buyer, which relates to the goods sold, and becomes a basis of the bargain, creates an express warranty that the goods shall conform to the affirmation or promise; or

(2) any description of the goods sold which is made a basis of the bargain creates a warranty that the goods shall conform to the description.

However, neither an affirmation of value or a statement of opinion creates an express warranty.

The Court held that the language in the manual was sufficient to establish that Blackwater had made an affirmation of fact that the rifle could handle up to 150 grams of powder. The Court also held that plaintiff's failure to read the manual or rely on the manual language to buy the gun was not fatal to his express warranty claim. It is unnecessary that the buyer actually rely upon the description of the product for it to become a basis of the bargain. Absent "clear proof" that the parties intended to exclude the seller's description of the goods from their bargain, that description becomes an express warranty. Partial summary judgment was denied.

Snider-Jefferson v. Amigo Mobility, International, Inc., 2016 U.S. Dist. LEXIS 109319 (E.D. Va. Aug. 17, 2016)
Opinion by United States Magistrate Judge Lawrence R. Leonard.

The issue in this case is whether the opinions of plaintiff's expert established a prima facie case that a product was defectively designed. A plaintiff whose ankle was injured when struck by an electronic shopping cart at a Wal-Mart store did not establish a prima facie case for negligent design based on testimony that the cart would have been safer with a rubber bumper. The expert's report failed to demonstrate the violation of an industry standard or of reasonable consumer expectations.

Plaintiff was injured when she was struck by another shopper at Walmart who was driving an Amigo motorized cart. The cart had a metal platform and that struck plaintiff. Plaintiff's expert witness testified that a rubber bumper on the platform would have been safer

and would have caused less injury to the plaintiff. His testimony was supported by a computer model. He did not testify to: industry or government standards concerning the cart design; whether the cart met consumer expectations; how the cart compared to competitors' carts; or published literature. He did not research other cart accidents or injuries.

Defendant's expert testified to Underwriter Laboratory standards in support of his opinions. In rebuttal, plaintiff's expert commented on these standards and disputed their application and defendant's compliance with them. He also offered, for the first time, an opinion that the metal platform was inferior and dangerous.

The Court noted that to prevail plaintiff must prove a defect that makes the product unreasonably dangerous for ordinary use. To prove a defect, plaintiff must present expert testimony that the product violated an industry or government standard. If no standard exists, plaintiff must present expert testimony that the product violated the reasonable expectation of consumers (actual industry practices), practices set forth in published literature, or direct evidence of what reasonable purchasers considered defective.

The court held that plaintiff's expert opinions were inadequate to establish a defect. The expert testified to what could have been done to make the product safer, not what was required to be done. Summary judgment was granted.

Fourth Circuit Court of Appeals

Nease v. Ford Motor Co., 2017 U.S. App. LEXIS 1781 (4th Cir. Feb. 1, 2017)
Opinion by Circuit Court Judge William B. Traxler, Jr.

The issue in this product liability case was whether plaintiff's expert's testimony should have been admitted under *Daubert* standards and whether plaintiff's judgment should be set aside and judgment entered for defendant Ford. The 4th Circuit reversed the trial court's judgment in plaintiff's favor and remanded the case for entry of judgment for Ford. The court held that plaintiff's expert's testimony should have been excluded because the expert did not test his hypothesis on the subject vehicle or another Ford Ranger. There was also no evidence that the expert's opinions had been subject to peer review and published and no evidence that his theory was generally accepted.

Plaintiff was driving a used 2001 Ford Ranger pickup truck with 116,000 miles on it. He was traveling 45-50 mph when he discovered that the truck would not slow down when he released the accelerator pedal. Applying the brakes did not slow the truck. In order to avoid running into the pedestrians or other cars, he steered the truck into a brick building. The tires continued to spin for 25-30 seconds after the truck hit the wall. There was no evidence that the truck had ever manifested problems with the accelerator, cruise control, or throttle.

Plaintiff filed suit against Fort alleging that Ford negligently designed the accelerator pedal-to-throttle assembly. Causes of action for strict liability, negligence, and breach of warranty were pled. A jury in West Virginia awarded plaintiff $3,012,828.35 in damages. Ford filed a post-trial motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure alleging that plaintiff's expert's testimony should have been excluded. Alternatively, defendants sought a new trial contending that the court's instruction on strict liability was improper. The district court denied the defense motions.

Plaintiff's expert, an electrical engineer, testified that the Ford Ranger had an accelerator cable that passed through a guide tube. The cable design employed by Ford permitted dirt and

other contaminants to enter the tube through which the cable passed and was known to cause the cable to bind or get stuck. He further testified that, in his opinion, this design was defective, that contaminants got in the tube and caused the cable to bind, thereby causing the crash. He also testified that safer, feasible alternatives were available and known to Ford.

To reach these conclusions, plaintiff's expert examined the car's speed control assembly with a scope. At the time of his examination, he did not find any contaminants wedged into the guide tube, and the cable moved freely. He noticed some striations on the guide tube that he felt were indicative of previous binding. He surmised that sufficient debris had accumulated to create the "wedging effect" needed to keep the throttle open even when the accelerator pedal was released. He had no evidence as to how much contaminant had been in the tube or whether it was enough to cause binding. On cross-examination, the expert testified that he had never found a bound speed cable assembly in any vehicle that he had inspected in his career. He did not conduct testing to determine whether enough debris could accumulate in the tube cap to cause the throttle to stick open. He also failed to test any of the alternate designed speed cables he testified were safer to see if they would have prevented the accident.

The 4th Circuit found that the district judge had abdicated his gatekeeping function under *Daubert*. The court has an obligation to ensure that an opinion offered by an expert is reliable and is relevant to the task at hand. Factors to look at to determine reliability include, but are not limited to: can the theory be tested; has the theory been subjected to peer review and published; what is the known or potential rate of error in testing; and is the theory generally accepted. The district court did not make any reliability findings.

The court held that the plaintiff's expert's opinions should have been excluded because he did not test his hypothesis on the subject vehicle or another Ford Ranger. The court stated that the expert's theory was plausible, and may even be right, but without testing it is just a hypothesis, not knowledge. Additional support for the exclusion of the expert's testimony was that there was no evidence that his theory had been subject to peer review and published, and there was no evidence that it was a generally accepted theory.

The court also held that the expert's testimony that safer alternative designs were available should not have been admitted because he did no testing and performed no studies to test his hypothesis on other designed accelerator systems. There were no data offered to support the conclusion that these designs were safer.

Reversed and remanded for entry of judgment in Ford's favor. The jury instruction issue was not addressed.

Res Judicata

Funny Guy, LLC v. Lucego, LLC, ___ Va. ___, 795 S.E.2d 887 (Va. Feb. 16, 2017)
Opinion by Justice D. Arthur Kelsey.

In this case, the Virginia Supreme Court affirmed the trial court's dismissal of plaintiff's suit against the defendant on the basis of res judicata. The plaintiff (Funny Guy) contended that it was not paid for work it did for the defendant (Lucego), and filed two successive lawsuits containing three theories of recovery. In the first suit, Funny Guy alleged that, after the dispute arose, Lucego agreed to pay 97% of the money it allegedly owed as part of a settlement agreement (the settlement theory). After the trial court found that no such settlement agreement

ever existed and dismissed the action, Funny Guy filed a second lawsuit in which it alleged (1) that Lucego's initial promise to pay constituted a binding oral contract (oral-contract theory); and alternatively (2) that Lucego should pay anyway even if no binding contract ever existed (quantum-meriut theory). Because the plaintiff could have joined all three of its claims in a single suit, and no disqualifying principle of res judicata applied, Rule 1:6 prohibited the plaintiff from filing a second suit after losing its first suit on the merits.

Noting that under Virginia law res judicata involves both issue and claim preclusion, the Court stated that the "thought is really no more complicated than saying that . . . litigants must make the most of their day in court. . . . The law should afford one full, fair hearing relating to a particular problem – but not two." Claim preclusion has always been "the stepchild of pleading and joinder rules" and thus, determining which claims *should* have been brought in earlier litigation largely depends on which claims *could* have been brought.

The Court explained that, in *Davis v. Marshall Homes, Inc.*, 265 Va. 159 (2003), the Court "adopted a strict view of the same-evidence test that was wholly out of synch with the prior, and far broader, same-subject-matter test." The *Davis* decision redefined the doctrine of res judicata, causing it to become a source of confusion, and the doctrine generally became "unglued in Virginia." According to the Court, such problems resulted in the adoption of Rule 1:6, which returned Virginia res judicata law to the traditional same-subject-matter test, thereby paralleling the "same transaction or occurrence" formulation of Code §§ 8.01-272 and 8.01-281 (along with the Second Restatement of Judgments).

Under Rule 1:6, it did not matter that Funny Guy's second suit included alternate legal theories or would require evidence not present in the first suit. Instead, Rule 1:6 parallels the "same transaction or occurrence" scope of Code §§ 8.01-272 and 8.01-281, such that if the underlying dispute produces different legal claims and *can* be joined in a single suit under the joinder statutes, Rule 1:6 provides that they *should* be joined unless a judicially-recognized exception to res judicata exists. Noting "the broad scope of joinder in Virginia," the Court agreed with the trial court's refusal to view the contest – Lucego's initial promise to pay and its later promise to pay what it had earlier promised to pay – as two wholly separate litigable disputes.

The Court further explained that, for purposes of res judicata, deciding what constitutes a single transaction or occurrence under Rule 1:6 should be a practical analysis, where the court asks "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." (quoting Restatement (Second) of Judgments § 24(2)). No single factor is indispensable or determinative, and they should be considered pragmatically with a view toward uncovering the true underlying dispute between the parties.

The Court found that every one of the above factors supported the trial court's application of res judicata, and Funny Guy's three legal theories "all fit within a single factual narrative that easily forms a convenient trial unit." Thus, the Court affirmed the trial court's dismissal of Funny Guy's second lawsuit.

Though not a primary focus of the Court's opinion, it is worth noting that, in several places, the Court stated that "claims are joinable only if they arise out of the same transaction or occurrence." It is important to emphasize that, while "same transaction or occurrence" may be required for joining the contract and quantum-meruit claims at issue in *Funny Guy* (or, similarly, for joining contract and tort claims, as in a products-liability action), the Court's opinion appears to leave untouched the traditional common-law rule that tort claims can be joined where there is

a single indivisible injury, regardless of "same transaction or occurrence." *See, e.g., Fox v. Deese*, 234 Va. 412, 422 (1987) (stating that "under our system of pleading, *unless the acts of independent tort-feasors concur in producing a single indivisible injury or damage*, they may not be sued jointly in a single action") (emphasis added, internal punctuation omitted). Because there may be cases where "single indivisible injury" is easier to prove than "same transaction or occurrence," plaintiff's counsel should be on the lookout for attempts to take the *Funny Guy* Court's comments about "same transaction or occurrence" out of context.

- **Dissent from Justice Mims, joined by Justices Goodwyn and McCullough.** Stating that his "disagreement with the majority can be reduced to one issue: the majority's position is that there is only one dispute here, involving Funny Guy's expectation to be paid for the work that it did under the oral agreement, so it can arise from only one conduct, transaction, or occurrence." The dissent agreed with Funny Guy that it had alleged two wholly separate, though sequential, disputes that arose from different conduct, transactions or occurrences. The dissent rejected the majority's view that the settlement agreement and the original agreement to pay for services represented the Funny Guy's single purpose of getting paid for its work.

Sanctions

Virginia Supreme Court

Ragland v. Soggin, 291 Va. 282 (2016)
Opinion by Justice Donald W. Lemons.

The issue in this appeal is whether the trial court erred in imposing sanctions of $200 each on two trial lawyers who inadvertently submitted an erroneous jury instruction during trial while defending a riding instructor in a wrongful death case.

In *Environmental Specialist, Inc. v. Wells Fargo Bank Northwest, N.A.*, 291 Va. 111, 728 S.E.2d 147 (2016), this Court held that a trial court's inherent power to discipline attorneys does not include the power to issue monetary sanctions. Rather, a trial court may only impose a monetary sanction against an attorney if the authority to do so is granted to the trial court by a statute or rule. Similarly, in this case, the trial court failed to identify the authority under which it was sanctioning defense counsel. Clearly, it cannot be the trial court's inherent authority to discipline attorneys, as that authority does not extend to issuing monetary sanctions. *See Nusbaum v. Berlin*, 273 Va. 385, 400-01, 641 S.E. 2d 494, 502 (2007).

The Court's analysis then sought to determine whether the trial court had authority to sanction defense counsel under either a Rule of Court or a statute. This Court found no Rule of Court that applies. It also does not appear that the trial court had authority to issue these sanctions pursuant to its summary contempt powers under Code § 18.2-456. That statute also gives courts the power to issue attachments for contempt and punish summarily, under certain circumstances. For more than a century, Virginia courts have required the element of intent in order to sustain a criminal contempt conviction.

Here, the trial court specifically found that the mistake was inadvertent. Without the element of intent, the trial court lacked authority to sanction defense counsel under its contempt powers.

Although nothing in the record indicates the trial court relied upon Code § 8.01-271.1 as a basis for its ruling, we will nonetheless consider whether the sanctions are justified pursuant to that statute. Defense counsel argues that the mistake was not made in a jury instruction that was part of any signed pleadings or papers certified by counsel and so the statute does not apply.

However, the statute applies to oral motions to the court, and submitting a jury instruction to a trial court and asking that a particular instruction be given to a jury is the equivalent of making an oral motion to the court. This statute may serve as the basis for sanctions related to the submission of jury instructions by an attorney or party.

The pertinent instructions, as originally drafted, were consistent with defense counsels' argument for modification of existing law under the equine activity liability statutes. The record demonstrates that numerous modifications were made to multiple instructions during a brief recess at trial in a rather rushed fashion, and it does not appear that defense counsel, plaintiff's counsel, or even the trial judge, read the revised instructions carefully. Surprisingly, no one caught the error when the findings instruction was read aloud to the jury.

While this Court noted its appreciation with the trial court's frustration with the manner in which the jury instructions in this case were handled, there is nothing in Code § 8.01-271.1 or any other statutory authority under which the trial judge has authority to impose monetary sanctions on an attorney for what she found was an inadvertent mistake. Consequently, this Court held that the trial court abused its discretion in sanctioning the trial lawyers in the amount of $200 each.

Standing

Virginia Supreme Court

Ricketts v. Strange, 2017 Va. LEXIS 5 (Va. Feb. 16, 2017)
Opinion by Justice William C. Mims.

The issue in this case is whether the plaintiff had standing to pursue a personal injury claim after filing a Chapter 7 bankruptcy petition or whether the case had to be filed in the name of the bankruptcy trustee. The Virginia Supreme Court held that the plaintiff did not identify her personal injury claim with enough specificity in her schedule of assets or her claim of exempt assets to remove the claim from the bankruptcy estate. The circuit court ruling that plaintiff did not have standing to bring the lawsuit was affirmed. The circuit ruling denying plaintiff's motion to substitute the trustee as the plaintiff was also affirmed. A new plaintiff cannot be substituted for an original plaintiff who lacked standing.

Plaintiff was involved in a car crash. Shortly before the statute of limitations was to expire, plaintiff filed her personal injury complaint. Defendant filed a summary judgment motion alleging that plaintiff had filed bankruptcy, that she did not exempt this personal injury claim from the bankruptcy estate, and therefore did not have standing. The circuit court granted summary judgment on the ground that the bankruptcy trustee was the proper plaintiff. The circuit court then denied plaintiff's motion to substitute the trustee as the plaintiff.

The Supreme Court was called upon to decide the level of specificity by which an asset must be identified in the bankruptcy schedules to exempt it from the bankruptcy estate. Plaintiff listed in her Schedule B assets a generic reference to "possible … proceeds related to claims or causes of actions that may be asserted by the debtor…" but did not list the personal injury claim specifically. She also listed the generic claims/causes of actions as exempt property under Schedule C. Plaintiff claimed that this generic listing was sufficient to keep her personal injury claim out of the bankruptcy estate.

The court acknowledged that the Bankruptcy Code offered no guidance as to the specificity with which assets must be described. However, the debtor's description of assets and exemptions must contain sufficient detail to enable the trustee to determine whether further investigation into a claimed exemption is warranted. That level of detail is asset dependent.

The court found that plaintiff's asset description was overly general at best and boiler plate at worst. It provided no useful information that would lead the trustee to discover the personal injury claim. The court held that the personal injury claim was not exempt from the bankruptcy estate and plaintiff had no standing to bring the action.

The court also denied plaintiff's motion to substitute the trustee as the plaintiff. A new plaintiff cannot be substituted for an original plaintiff who lacked standing.

Lopez-Rosario v. Habib, 291 Va. 293, 785 S.E. 2d 214 (2016)
Opinion by Justice S. Bernard Goodwyn.

The issue in this case was whether an incapacitated person for whom co-guardians had been appointed had standing to bring a lawsuit in her own name. The Virginia Supreme Court held that the trial court did not err in dismissing a medical malpractice complaint filed in the name of a woman with cognitive and physical disabilities for whom guardians had been appointed by the court. The guardianship was not limited and the guardians, not plaintiff, had standing to sue.

The plaintiff functioned at a six-year old level. A court had found her to be incapacitated and unable to care for her person and estate. Her parents were named as co-guardians by the court. The guardians' action was prompted by the hospital's desire to enable the parents to make medical decisions. A malpractice action was filed with the incapacitated person as the plaintiff. Defendants filed a plea in bar/motion to dismiss alleging that plaintiff did not have standing to file a lawsuit in her own name since her parents had been named as general guardians. The lower court granted the plea in bar and the Virginia Supreme Court affirmed.

Plaintiff argued on appeal that her parents' authority as co-guardians was limited to medical decisions and did not prevent her from filing a suit in her own name. However, the Court looked to the language of the order to determine the breadth of the guardianship. The Court conceded that the immediate purpose for filing the guardianship was to enable the parents to make medical decisions. However, the language of the guardianship order was broader, and included the right to make decisions regarding "support, care, health, safety, habilitation, therapeutic treatment and residence…" The order was silent as to the right to bring a lawsuit, but did not specify any limitations on the guardianship. The Court found that the parents were full guardians, not limited, and thus had standing to sue for the ward. The ward did not have standing and the dismissal of her case was affirmed.