

IN BRIEF

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Recent Issues and Opinions in Virginia Law
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ATTORNEYS AT LAW

Can a Plaintiff be awarded damages based solely on her claim of severe emotional distress brought on by the temporary loss and injury to her "service" dog?

In our culture many dog owners are emotionally attached to their pets. Pets are often surrogate children or companions, and they often provide needed services to their owners. In the term that ended this past April, the Virginia Supreme Court decided a case where the plaintiff alleged that, because of her close attachment to her dog, she was entitled to damages based *solely* on the emotional distress produced by the temporary loss of the dog and injuries that the animal sustained in a car accident.

In the case of Kondaurov, et al. v. Kerdasha, 270 Va. 356, 619 S.E.2d 457 (2006), the plaintiff was driving with her dog in the back seat of the car when she was rear-ended by a bus. Her car was involved in two additional impacts before tumbling onto its side and skidding to rest on its roof. The plaintiff escaped with minor injuries. Two years before the accident the plaintiff was diagnosed with multiple sclerosis. She got a dog, Sushi, eighteen months prior to the accident primarily to help her maintain emotional stability and prevent the "stress" attacks brought on by her medical condition. The plaintiff had developed a close emotional bond with Sushi. She was extremely upset when she learned that Sushi had been ejected from her vehicle during the accident. A witness later saw the dog running away with its tail bleeding. The dog was located about fourteen hours later in a veterinary clinic where its injured tail had been partially amputated. The defendants admitted liability, and the case was tried on the issue of

damages. The jury found for the plaintiff and awarded her damages in the amount of \$300,000. The defendants appealed.

The Supreme Court considered three issues in the appeal of this case. The first involved the trial court's denial of the defendants' Motion to Strike the evidence relating to the plaintiff's claim of emotional distress caused by the injury to her dog. During the plaintiff's case, witnesses testified about the extremely close emotional bond between the plaintiff and Sushi. The plaintiff's psychiatrist testified as an expert that the plaintiff was "devastated by what happened emotionally and by what happened to her dog". Defense counsel allowed this testimony without objection until the close of the plaintiff's case. At that time defense counsel moved the court to strike the evidence as it related to "the condition of the dog [or] fear arising out of loss of the dog". The defense contended that "The law is very clear that there can be no emotional distress, anxiety damages flowing from witnessing . . . injury to another". The motion was denied. Defense counsel renewed their objection after all of the evidence had been presented, and the court again denied the motion. The Supreme Court found that the trial court did not err in denying the motions. The evidence was appropriate for the jury because it helped to demonstrate the severity and totality of the accident. The Court considered the previously unexplored question of "what, if any, limitations apply to the sources of emotional distress for which the plaintiff may be compensated in damages?" Had the plaintiff claimed emotional distress as a result of the physical impact that she sustained in the accident, she would clearly have been able to recover. However, the plaintiff's claim of emotional distress was almost entirely based on her emotional trauma.

The second issue examined by the Court was "whether the trial court erred in refusing to instruct the jury that damages could not be awarded for emotional distress the plaintiff suffered because of her concern for the dog". The trial court denied the following instruction offered by the defense:

Instruction T

The Court instructs the jury that in considering the question of the Plaintiff's damages, the law of Virginia provides that Plaintiff may not recover for emotional or mental anguish she claims to have suffered either because of her concern for her dog's injuries in the accident or because of her concern for the dog's physical or emotional condition thereafter.

The Supreme Court found that the law in Virginia clearly states that animals, regardless of their service, companionship, or bond with their owner, are considered personal property. *See* Virginia Code Ann. § 3.1-796.127. The Court has never allowed an award for emotional distress based on negligently inflicted injury to personal property. Therefore, the trial court erred in refusing the defendants' jury instruction which would have informed the jury that, under Virginia law, it could not award damages based on the plaintiff's distress over losing her dog or over the injuries the dog received.

The third issue addressed by the Court was "whether the trial court erred in instructing the jury that the defendants were responsible for all the injurious consequences of their negligence 'even though they might not reasonably have been expected to result'." The general rule for recovery is that "liability ensues when injury results from a risk or hazard which may be reasonably foreseen, although the precise

injury may not be foreseen”. Maroulis v. Elliott, 207 Va. 503, 509-10, 151 S.E. 2d 339, 344 (1966). However, this rule is not applicable to claims for damages arising solely from emotional distress and physical injury resulting entirely from emotional distress. The Court has set up certain safeguards in order to preclude fraudulent and exaggerated claims in these cases. One such safeguard is that “absent specific knowledge by a defendant of a plaintiff’s unusual sensitivity, there should be no recovery for mental or emotional disturbance and consequent physical injury to a hypersensitive person where a normal individual would not be affected under the circumstances”. Hughes v. Moore, 214 Va. 27, 24, 197 S.E. 2d 214, 219 (1973). In this case, where the plaintiff claimed damages arising solely from emotional distress with no claim of willful, wanton, or vindictive conduct by the defendant, the jury should have been instructed that “the defendant is only responsible for such emotional distress as could reasonably be expected to be sustained by a person of normal sensitivity and normal reactions under the circumstances of the case”. See Kondaurov at 370.

The case was reversed and remanded on the basis of the errors in the jury instructions. This case had the potential for opening up a Pandora’s box of problems for the defense. Plaintiffs could have claimed all sorts of deep emotional attachments to items damaged in their cars during accidents. These claims would have been nearly impossible for the defense to dispute. By upholding the twin safeguards that emotional distress cannot be based on witnessed injury to property and that the standard for distress must be that of a person of normal sensitivity, the Court has maintained a level playing field regarding emotional distress issues.

**DECISIONS BY THE SUPREME COURT OF VIRGINIA
REGARDING INSURANCE INDUSTRY ISSUES
JUNE 5, 2006 SESSION**

The case summaries that follow involve insurance litigation issues. We have downloaded these summaries directly from the Virginia Supreme Court website. We offer them to you without further legal analysis. However, if you would like a brief legal analysis or the full text of any of these cases, please make your request by return e-mail. If you would like to discuss the ramifications of any of the decisions, please call (804) 378-7600: ext. 3304 for Ray; 3305 for Kevin or 3316 for Mark.

[Venunadh Kone, Administrator of the Estate of Jampal R. Gummalla, Deceased v. Claude W. Wilson, M.D., et al.](#)
Record No. 052025

In this appeal, the Supreme Court of Virginia considered whether the administrator of a decedent's estate may file a wrongful death action pro se. Venunadh Kone, the plaintiff, qualified as the administrator of the estate of a man who died at Bon Secours-St. Mary's Hospital, Inc. following complications from a medical procedure performed by Dr. Claude W. Wilson. Kone, represented by counsel, timely filed wrongful death actions in the circuit court alleging that the death was caused by the negligence of Dr. Michael D. Mandel, Dr. Wilson, and various hospital employees (the defendants). The actions were consolidated and terminated by nonsuit. Five months

later, Kone, who is not licensed to practice law in Virginia and proceeded without counsel, filed a single wrongful death action against all three defendants. When the defendants moved to strike the motion for judgment, arguing that Kone was involved in the unauthorized practice of law, the circuit court granted him leave to retain a licensed Virginia attorney.

After Kone retained a licensed attorney, the defendants again moved to strike the motion for judgment, arguing that Kone failed to file any pleading that would have tolled the statute of limitations. The circuit court granted the motion to strike the pleadings. On appeal, Kone argued that in a wrongful death action, a personal representative “steps into the shoes” of the decedent and can initiate an action pro se. Kone also asserted that the circuit court abused its discretion by refusing to allow his attorney to file an amended motion for judgment, or to permit his attorney's signature to relate back to the date of the initial pleading.

The Supreme Court affirmed the judgment of the circuit court, holding that because Kone's right of action existed only to permit him to prosecute the cause of action belonging to the decedent's statutory beneficiaries, and not to maintain any cause of action personal to Kone himself, he was not entitled to file the wrongful death action pro se. The Supreme Court also held that Kone's initial motion for judgment was invalid and without legal effect because he signed the pleading in a representative capacity and was not authorized to practice law in this Commonwealth. Therefore, there were no pleadings before the circuit court that could have been amended. Finally, the Supreme Court determined that a circuit court may not authorize amendments to pleadings to relate back to the date of an original pleading in a case where the defect is a signature.

[Jessica Luann Burroughs v. Leslie Keith Keffer, et al.](#)
Record No. 051745

In this personal injury action arising from a motor vehicle accident, the Supreme Court of Virginia considered whether the trial court erred in setting aside a jury verdict on the ground that the plaintiff, Jessica Luann Burroughs, was contributorily negligent as a matter of law. The Supreme Court reversed the judgment of the trial court, holding that because reasonable persons could differ regarding whether Burroughs was guilty of contributory negligence, that issue was a question of fact for the jury and therefore the trial court erred in setting aside the verdict for Burroughs.

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