

IN BRIEF

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Sinnott Nuckols & Logan, PC
ATTORNEYS AT LAW

SETTLING CASES WITH MULTIPLE DEFENDANTS: FUTURE DIFFICULTY?

Has a recent Supreme Court decision made settling some cases much more difficult and problematic? The Court's decision in COX v. GEARY, January 2006, may adversely affect a plaintiff's willingness to settle contract cases which involve multiple defendants (such as a construction defect claim) or those cases which involve an indivisible injury (such as a failed f.a.s. delivery service), or both. This decision is not a change in the existing law, but rather appears to be a statement of *judicial policy*.

The Supreme Court recognizes that the Virginia Code allows a settlement with one *tortfeasor* without releasing all joint tortfeasors. See Va. Code § 8.01-35.1. However, the rule of Cox is that in any case, not arising from a tort but involving *one indivisible injury*, when a settlement has been consummated with one defendant, the unconditional release of that defendant bars recovery against all other parties, although allegedly liable, regardless of the theory upon which liability is predicated. Again, this has been the law of the Commonwealth for many years, but the way in which the Court announced this decision indicates that the decision is meant to be some form of a policy statement by the Court.

Whatever the Court's intention in deciding Cox as it did, the Court's opinion in this case will have an immediate and direct affect on many pending cases, especially those involving construction defects. In the immediate future, this decision means that any case which alleges joint and several liability or alleges an indivisible injury will not settle piecemeal. The typical plaintiff will almost certainly be unwilling to risk the chance of having his claims against other defendant(s) barred by a settlement with one defendant. In the typical construction defect case, the Cox decision will make the

plaintiff extremely reluctant to settle with a smaller defendant while there are any relatively better-funded defendants still active in the litigation.

In the longer term, there may be a silver lining in that this decision will encourage plaintiffs to properly plead their cases with more appropriate causes of action, against the proper party defendants and make reasonably discrete claims of damages against each defendant whenever it is possible to do so. Should cases settle under this decision they will likely tend towards some form of 'master settlement' – with all the defendants contributing towards a single settlement of all claims brought by the plaintiff.

CONCLUSION

Until the impact of Cox begins to affect the pleadings, structures and filings of plaintiffs' cases, the short term impact will likely be additional delays and expenses as all defendants are held in each litigation.

DECISIONS BY THE SUPREME COURT OF VIRGINIA REGARDING INSURANCE INDUSTRY ISSUES NOVEMBER 3, 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.

052371 **Baker v. PoolService Company** 11/03/2006

In a wrongful death action, the trial court did not err in sustaining a swimming pool service company's demurrer because plaintiff alleged duties that are not recognized in Virginia law. Similarly, there was no error in granting a pool products manufacturer's plea in bar because the action was filed after the expiration of the five-year period of repose applicable to ordinary building materials under Code § 8.01-250. The judgments dismissing the claims against both parties are affirmed.

052600 **Parson v. Carroll** 11/03/2006

In a defamation case, the circuit court erred in granting summary judgment for the defendant where the material factual allegations of plaintiff's motion for judgment remained in dispute. Plaintiff did not, by entering an Alford plea to criminal charges arising out of the allegedly defamatory statements, make any concessions of fact which, through application of the doctrine of judicial estoppel, raised a legal bar to his action. The judgment is reversed and the case is remanded for further proceedings.

052635 Tronfeld v. Nationwide Mutual Insurance Co. 11/03/2006

In a defamation action by an attorney against an insurance company and its employee, the trial court erred in sustaining a demurrer asserting that the statements sued upon were opinion that could not form the basis for a cause of action. The defamatory statements alleged had a provably false factual connotation, and could prejudice plaintiff in his profession, thus supporting an action for defamation. The judgment is reversed and the case is remanded for further proceedings.

052679 Castle v. Lester 11/03/2006

In a medical-malpractice claim arising from the birth of a neurologically impaired child, the defendant doctor's argument for overruling prior settled law is rejected. Thus the trial court did not err in instructing the jury that injury to an unborn child is physical injury to the mother, or in admitting evidence on the mother's claim for damages for mental suffering due to the birth of her impaired son, including the nature of the child's injuries, his daily care needs and life expectancy, as well as the mother's depression and loss of income. Denial of a mistrial after inadvertent improper testimony was not an abuse of discretion. The judgment is affirmed.

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