

# IN BRIEF

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Recent Issues and Opinions in Virginia Law  
By

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ATTORNEYS AT LAW

## **DOES A REPAIR CONTRACTOR HAVE A DUTY TO WARN OF A DANGEROUS CONDITION THAT IT DID NOT CREATE?**

Is a repair contractor an insurer of the safety of a product that it did not build or design? Believe it or not, this question had never been definitively addressed in Virginia until November 2006 when the Supreme Court of Virginia released its decision in *Baker v. Poolservice Company*.<sup>1</sup>

It is a frightening scenario for contractors: imagine that a homeowner finds your company's name in the telephone book and calls you to request some repair work. Your worker arrives at the job site, performs a simple repair, writes up an invoice, accepts payment, and leaves—all in the span of less than an hour. Unbeknownst to anyone, the device that your worker just repaired had a design flaw that made it quite dangerous. Two years later, a fire breaks out at the customer's residence. Suddenly, your repair company faces exposure for a risk that it never could have anticipated, and the once-satisfied customer files a claim against your company. Perhaps such a scenario seems outlandish, but at least one plaintiff has tried to pursue such a claim.

Last term, the Supreme Court of Virginia was asked to address this very issue. In *Poolservice*, a repair contractor was hired to perform routine annual maintenance on an

<sup>1</sup> 272 Va. 677, 636 S.E.2d 360 (2006).

outdoor spa and the adjoining pool and to determine why the spa was not working to its full capacity. The contractor arrived at the customer's home and performed the requested maintenance. It also restored the spa to full working capacity by simply removing a clog from the pump.

Unfortunately, the case then took a tragic turn. Several days later after the repair work, a young girl was pinned underwater to the spa's drain cover due to the suction and drowned. The girl's father filed a wrongful death suit in the Circuit Court for the City of Fairfax against both the repair contractor and the manufacturer of the spa. He alleged that the repair contractor negligently failed to warn the homeowners of the inherently dangerous condition of the spa, even though he acknowledged that the contractor was neither the manufacturer nor the installer of the spa or any of its component parts.

The contractor responded by filing a demurrer to the plaintiff's claims, arguing that no such duty to warn existed under Virginia law. It asserted that the lawsuit effectively sought to impose duties on the contractor to retro-fit an existing spa that it did not manufacture, sell, or install, and to initiate campaigns for safety. The trial court agreed and dismissed the plaintiff's negligence claim against the contractor.

The plaintiff appealed to the Supreme Court of Virginia on the grounds that the contractor owed (1) "a duty not to create or exacerbate a risk of physical harm in the course of making repairs to the spa" and (2) "a duty to make use of the company's superior knowledge to warn the homeowners about that risk."<sup>2</sup> The Court rejected these arguments and upheld the trial court's decision. It held that returning a product to its normal, working condition was not a basis for potentially open-ended liability. Although a repair contractor could certainly be held liable for injuries resulting from any improper performance of its contractual duties, a contractor has no independent duty to warn under Virginia law.

Although this November 2006 decision flew slightly under the radar in comparison to the much-publicized ruling in *Tronfeld v. Nationwide Mutual Insurance Co.*,<sup>3</sup> this case has a wide-ranging impact on the insurance industry. Repair and service contractors are only responsible for the result of the work that they actually perform. Although this seems like a logical conclusion, the outcome of *Poolservice* easily could have been different. Had the Court instead agreed with the plaintiff, contractors would have been transformed into insurers of products manufactured by others and therefore would be subject to nearly unlimited exposure.

Instead, they (and their liability carriers) can rest a bit more easily after the *Poolservice* decision.

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<sup>2</sup> *Id.*

<sup>3</sup> 272 Va. 709, 636 S.E.2d 447 (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 trial court's decision was reversed and the case was remanded for further proceedings.

**DECISIONS BY THE SUPREME COURT OF VIRGINIA  
REGARDING INSURANCE INDUSTRY & LITIGATION ISSUES  
JANUARY 7-11, 2007 SESSION**

The case summaries that follow involve insurance and litigation issues. We have downloaded these summaries directly from the website of the Supreme Court of Virginia. We offer them to you with brief clarifications (in green) where necessary. However, if you would like a more complete 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.

[051769](#) **Ford Motor Co. v. Benitez** 01/12/2007

The trial court did not abuse its discretion in imposing monetary sanctions against an attorney under Code § 8.01-271.1 where, under an objective standard of reasonableness, the attorney had knowledge at the time of signing a pleading, formed after reasonable inquiry, that there was no factual support for several affirmative defenses asserted therein. The trial court's judgment is affirmed.

[052137](#) **Doe v. Terry** 01/12/2007

In a personal injury action, the circumstantial evidence adduced was insufficient to establish by a preponderance of the evidence that an unknown driver threw an object that struck and injured plaintiff as he was performing maintenance work inside an interstate highway tunnel. Thus, there was insufficient evidence of John Doe's negligence to permit plaintiff to recover against the defendant insurer. The jury verdict in the plaintiff's favor is reversed and final judgment is entered in John Doe's favor.

[052378](#) **Almy v. Grisham** 01/12/2007

The trial court erred in dismissing a claim for intentional infliction of emotional distress upon demurrer by several defendants, where the plaintiff had alleged facts sufficient to satisfy the elements of such claim with respect to these defendants. However, a plaintiff may not assert a cause of action in Virginia for civil conspiracy to intentionally inflict severe emotional distress; thus, the trial court did not err in dismissing this claim with respect to all of the defendants. The judgment is affirmed in part and reversed in part, and the case is remanded.

[060085](#) **Parker v. Warren** 01/12/2007

In this personal injury action, the trial court erred in concluding that Code § 8.01-229(B)(2)(b) contained a "scrivener's error" and could not be applied as written. There is no "scrivener's error" in this Code provision, and it does not apply to a motion for

judgment filed against a defendant who later dies. The judgment is reversed and the case is remanded for further proceedings.

[060469](#) **Crocker v. Riverside Brick & Supply Co.** 01/12/2007

A truck driver employed by a shipping company engaged by a supplier of masonry products to deliver stone to a customer is not barred by the Virginia Workers' Compensation Act from bringing a personal injury claim against the customer since this defendant is an "other party" within the meaning of the Act. The shipping company's driver was not the defendant's statutory employee because, even though she endeavored to assist in unloading the pallets of stone, the unloading of the freight was the sole responsibility of the defendant. The judgment is reversed, and the case is remanded for further proceedings.

[060682](#) **Holmes v. Levine** 01/12/2007

In a wrongful-death action based on alleged medical malpractice by a radiologist, the trial court erred in refusing to give the plaintiff's requested jury instruction on the issue of proximate causation. The trial court did not err either in overruling plaintiff's objection that certain testimony of a treating physician did not satisfy the requirements of Code § 8.01-399(B) or in sustaining an objection to testimony elicited on cross-examination of a medical expert witness concerning the cause of death listed in a death certificate. The judgment is reversed in part and affirmed in part, and the case is remanded for a new trial on all issues.

[060684](#) **Hughes v. Doe** 01/12/2007

In a suit alleging that an employer was liable for the negligence of its employee under a respondeat superior theory, dismissal of a claim against the employee with prejudice on procedural grounds terminates the plaintiff's ability to hold the employee liable for any alleged negligence, but does not amount to an affirmative finding of the employee's non-negligence. Absent such a finding, the employer is not exonerated under the derivative liability principle and such dismissal does not preclude further proceedings against the employer. The judgment of the trial court dismissing the case is reversed and the case is remanded for further proceedings.

[060704](#) **Harmon v. Sadjadi** 01/12/2007

A foreign personal representative not qualified in Virginia lacked standing to file a proceeding in Virginia arising from alleged personal injury suffered by the decedent here. Neither her initial suit filed in Virginia, nor her foreign qualification, triggered the one-year period for commencement of suits under Code § 8.01-229(B)(1). Instead, that period began to run upon her later qualification as personal representative in Virginia. The present case was filed within one year thereof; therefore the trial court erred in sustaining the defendants' plea of the statute of limitations. The judgment is reversed and the case is remanded for further proceedings.

[060755 McGuire v. Hodges](#) 01/12/2007

In a wrongful death action, the trial court erred in setting aside a jury verdict for the plaintiff where circumstantial evidence was sufficient to support the decision reached by the jury that defendant's negligence was probably, rather than merely possibly, a proximate cause of a child's death. The judgment of the trial court is reversed, the jury's verdict is reinstated, and final judgment is entered for the plaintiff.

DISCLAIMER

This newsletter is intended to provide information of general interest to industry professionals. It is not intended to offer legal advice about specific situations or problems. Sinnott, Nuckols & Logan, P.C. does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a Sinnott Nuckols & Logan, P.C. attorney if you have a legal matter requiring attention.

Nothing on or in this material creates an express or implied contract. If you have questions or comments regarding this newsletter, please contact: Mark C. Nanavati, (804) 378-7600 ext. 3316, [mnanavati@snllaw.com](mailto:mnanavati@snllaw.com).

DECISIONS BY THE SUPREME COURT OF VIRGINIA  
REGARDING INSURANCE INDUSTRY ISSUES  
NOVEMBER 3, 2006 SESSION

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[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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