

# IN BRIEF

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## An Insurance Industry Newsletter of Recent Issues and Opinions in Virginia Law By

**Sinnott Nuckols & Logan, PC**

ATTORNEYS AT LAW

### **BUT, WE MIGHT FIND.....**

The Virginia Supreme Court has taken a definite stance against the “but we might find”! Beware of sanctions if your defense strategy is to plead a plethora of affirmative defenses on the hopes that you might find evidence to support them through some future discovery. This is one lesson that can be garnered from the Virginia Supreme Court’s decision in Ford Motor Company, et al v. Berta Benitez, 639 S.E.2d 203; 2007 Va. LEXIS 18 (2007). The case began when Berta Benitez, a passenger, alleged injury to her eyes from the air bag that deployed when the vehicle she was riding in collided with another car. After the completion of discovery, the plaintiff voluntarily non-suited this case and subsequently re-filed on the same cause of action. In its Grounds of Defense to the second suit, the defendant Ford stated “Ford will rely on the following affirmative defenses, if applicable, and if proved at trial.” 2007 Va. LEXIS at 2. This statement was followed by the listing of thirteen separate, affirmative defenses. The plaintiff filed a motion to strike the defendant’s affirmative defenses on the grounds that the defendant had failed to provide any factual support for the defenses in its responses to the plaintiff’s discovery requests.

At the hearing on the motion, the plaintiff noted that discovery had been completed and all facts were disclosed prior to the nonsuit of the initial case. Consequently, defense counsel had all pertinent facts at his disposal. When asked by the Court individually for the facts relied upon for each of the affirmative defenses, the defendants responded to each, “Presently we don’t have sufficient information.” 2007 Va. LEXIS at 4.

Defendants argued that the deadline for discovery had not been reached, therefore, plaintiff's motion was untimely. And, finally, defense counsel stated the all affirmative defenses were asserted based on "information and belief" in order to preserve the right to assert them should future facts support a specific defense. *Id.* The trial court struck the defenses of contributory negligence, assumption of the risk, negligence of a third party, failure to mitigate damages, unconstitutionality of the claim for punitive damages, and the statute of limitations. The court reserved the right to rule on the defenses of release and accord and satisfaction in the future. The court allowed the three defenses relating to breach of warranty. It allowed the defendants' to reserve the right to assert additional defenses that might later become applicable. The defendants withdrew the two remaining affirmative defenses, failure to state a cause of action and unauthorized misuse or alteration of vehicle by plaintiff or others. At the end of the hearing, upon a motion by the plaintiff, the Court awarded sanctions based on the admission by defendants' counsel that no factual support existed for six of the affirmative defenses, in violation of Code § 8.01-271.1. The Court further granted the defense an appeal.

Virginia Code § 8.01-271.1 states in applicable part, "The signature of an attorney...constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact..." The issue before the Court became "a question of defense counsel's knowledge that the defenses lacked factual support when signing the pleading asserting them." 2007 Va. LEXIS at 5-6. Attorney 'knowledge' is not necessarily restricted to the facts in the present case. In this instance, because discovery had been completed in the nonsuited case by the same attorneys, all information upon which to base affirmative defenses was available to the signing attorney at the time he endorsed the Grounds of Defense. Therefore, he was violating Code § 8.01-271.1 by asserting the affirmative defenses with no evidence to support them. The defense argued further that the affirmative defenses listed in the Grounds of Defense were never actually asserted, they were listed merely to preserve the right to assert them if evidence should later become available. The Court rejected this argument by stating that the correct procedure for utilizing new evidence is to amend the pleadings after the evidence is at hand.

Since affirmative defenses must be predicated on facts not possibilities, the Benitez case elevates the importance of the accuracy and thoroughness of the initial investigation by claims professionals. Since the Grounds of Defense are filed at the beginning of a case when the defense attorney has not had the opportunity to gain information through discovery, any initial affirmative defenses will be predicated upon the information provided by the claims professional. Furthermore, the defense can no longer state all possible affirmative defenses then pare them down as the case unfolds. Rather, the defense must initially be conservative in the use of affirmative defenses and constantly evaluate the plaintiff's discovery responses and all deposition testimony in relation to available affirmative defenses. Therefore, defense counsel must be vigilant in amending pleadings to reflect specifically supported affirmative defenses throughout the discovery process instead of listing all affirmative defenses in the initial pleading.

**DECISIONS BY THE SUPREME COURT OF VIRGINIA  
REGARDING INSURANCE INDUSTRY & LITIGATION ISSUES  
FEBRUARY 26- MARCH 2, 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.

[051094](#) **Taboada v. Daly Seven (Order)** 03/02/2007

Upon considering a petition for rehearing regarding the prior decision of this appeal reported at *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 626 S.E.2d 428 (2006), the Court is of the opinion that its judgment should not be set aside. Accordingly, the judgment of the trial court sustaining the defendant innkeeper's demurrer to the plaintiff guest's claim under Code § 35.1-28 is affirmed, but its judgment sustaining the innkeeper's demurrer to the guest's common law negligence claim is reversed and the case is remanded for a trial on the merits thereof.

[060400](#) **Raytheon Technical Services Co. v. Hyland** 03/02/2007

In a defamation case, the judgment must be reversed because three of the five allegedly actionable statements are expressions of opinion, not fact, and therefore, should not have been submitted to the jury. Because the record does not reflect which statement or statements formed the basis of the jury verdict and the other grounds for reversal raised by the defendants are not dispositive in the posture of this case, the verdict is set aside and the case is remanded for further proceedings.

[060717](#) **W. R. Hall v. Hampton Roads Sanitation District** 03/02/2007

Contractual indemnification provisions are not void as against public policy insofar as they entitle an indemnitee to be reimbursed by an indemnitor for costs and expenses incurred in the defense of a personal injury claim by a third party. Accordingly, the trial court correctly ruled that the indemnity provisions in a construction contract were enforceable. The judgment of the trial court is affirmed.

[060935](#) **Lambert v. Javed** 03/02/2007

In a wrongful death and breach of warranty action arising from medical treatment of the decedent, the trial court correctly dismissed the plaintiff's case because of a prior final order dismissing the same cause of action with prejudice based on a plea of the statute of limitations. The dismissal with prejudice of a prior case on the basis of the statute of limitations was an adjudication on a substantive element of the cause of action, thereby directly supporting the doctrine of res judicata. The judgment is affirmed.

[060951](#) **Allstate Insurance Co. v. Gauthier** 03/02/2007

In an insurance coverage dispute concerning the insurer's denial of a loss claim for the sinking of a boat, the trial court's findings that the loss was caused by the negligence of the insured in failing to close the boat's seacock valve, and that such negligence did not fall within the exclusions to the policy, are neither plainly wrong nor without evidence to support them. Accordingly, pursuant to Code § 8.01-680, the trial court's judgment will not be disturbed, and it is therefore affirmed.

[060959](#) **Doherty v. Aleck** 03/02/2007

In a malpractice case against a podiatrist, the evidence was clearly sufficient to make a jury issue of whether the surgery performed upon the plaintiff was a proximate cause of the amputation of his toe. The jury's verdict was supported by credible evidence, and the trial court erred in setting the verdict aside. Issues concerning testimony to a reasonable degree of medical probability, waiver of objections, and proximate causation are discussed. The jury's verdict is reinstated, and final judgment is entered in favor of plaintiff.

[061302](#) **Estes Express Lines v. Chopper Express, Inc.** 03/02/2007

An indemnity provision in a vehicle lease agreement is not void as against public policy insofar as it would entitle a party to indemnification for liability incurred as the result of personal injuries caused by its own negligence. Thus, the trial court erred in ruling that such an indemnity provision is unenforceable, and in sustaining a demurrer for that reason. The judgment is reversed and the case is remanded for further proceedings.

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**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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