IN BRIEF

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ADMISSIBILITY OF EXTRA JUDICIAL STATEMENTS

An accident occurs involving an uninsured driver (Walker). A year and a half later, plaintiff filed suit against defendant driver for ordinary negligence. The UM carrier Answers and defends the suit but the named defendant never makes an appearance. Approximately six months later, plaintiff files a Motion to Amend requesting leave to seek punitive damages. One week after that, plaintiff's investigator calls the unrepresented defendant driver to interview him about the accident. The interview is recorded and, nowhere in the recording does the investigator advise the defendant of who he is or who he works for. After saying "hello", the investigator opens with "I know – um, we know the accident was not your fault". The questions asked are leading in nature and, when taken in context with over evidence, result in "admissions" such as operating an 80,000-pound logging truck for 50 miles with no brakes. The investigator closes the interview with "Take care. You be safe and I hope everything works out for you."

Should the recorded telephone conversation be admissible at trial? Should the full recording or parts thereof be allowed to be played for the jury? These were questions with confronted the Court in the case of Ernest R. Brown v. Seay Logging & Hauling, LLC and Kevin J. Walker, Circuit Court of Greensville, Case No: CL14-112.

Judge Nathan C. Lee's opinion letter in the Brown case notes that the Plaintiff cites Rule 2:803 of the Rules of the Supreme Court of Virginia which permits "admissions by a party opponent where the statement offered against a party is '(A) the party's own statement, in either an individual or representative capacity, or (B) a statement of which the party has manifested adoption or belief in its truth…'" Plaintiff also relies on Gray v. Rhoads, 268 Va. 81, 90, 597 S.E. 2d 93,98 (2004) where "the Court describes an extra-judicial admission as 'an admission deliberately made, precisely identified, and clearly proved'."

In exploring the Plaintiffs allegations, Judge Lee differentiates the facts in the Brown case from those in Gray. "Unlike Gray, where the defendants were aware that their statements were being recorded during the course of pending litigation, at the time of the telephonic interview in this case (Brown), Defendant Walker did not know of his status as an adverse party and witness in the pending lawsuit." The Court found that although process had

been posted, it had not been personally served on Walker and he was unaware at the time that he was a party to a lawsuit. It therefore concluded that the Walker admissions were not "deliberately made". The Court further took note that, a mere week before the interview, Plaintiff had moved to amend his complaint by including punitive damages and concluded that the interviewer and Walker were not operating at arm's length.

The conclusion of the Court's findings is that "Defendant Walker neither fully knew of his rights as a witness or a party at the time of the interview, nor that his statements could be used as substantive evidence against him in a lawsuit for punitive damages". The Court, also "in the interest of equity and fairness", excluded the use of any portion of the recorded statement at trial for any purpose.

DECISIONS BY THE SUPREME COURT OF VIRGINIA REGARDING INSURANCE INDUSTRY ISSUES APRIL 18-22, 2016 SESSION

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

150666 **Haynes v. Haggerty** 04/21/2016 In a civil action arising from alleged sexual abuse that occurred while plaintiff was a minor, the circuit court did not err in granting defendant's plea in bar of the statute of limitations. The causes of action raised in this suit concerning activities that took place from the alleged inception of the relationship between the defendant and the plaintiff in 1971 up through the date of plaintiff's 18th birthday in March 1975. A cause of action accrued when each unlawful contact occurred, and the limitations period governing these claims was tolled by the predecessor of Code § 8.01-229 until plaintiff reached the age of majority in March 1975. The limitations period on those claims began to run at that point and expired two years later on her birthday in March 1977. Plaintiff's causes of action all existed before the effective date of Title 8.01 on October 1, 1977, and – pursuant to the provisions of Code § 8.01-256 – the statute of limitations for those causes of action is the same as if Code § 8.01-249 had not been enacted. Therefore, Code § 8.01-249(6) does not apply to these claims, and the circuit court did not err in granting the plea in bar of the statute of limitations.