

# IN BRIEF

Vol. 65  
September 16, 2016

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

Sinnott Nuckols & Logan, PC  
ATTORNEYS AT LAW

**Sinnott Nuckols & Logan, P.C. is pleased to announce that  
Allen L. Kidd and R. Jamie Sinnott, IV have become partners at the firm**

### **GOOD FAITH/BAD FAITH**

In the recently decided case of Jeb Stuart Auction Services, LLC v. West American Insurance Company, a single member LLC applied for an insurance policy. The application asked whether “any applicant” had been indicted or convicted of the crimes of fraud, bribery, arson, etc. during the previous five years. The sole member of the LLC filled out and signed the application. He responded “no” to the fraud question. Of course, it turned out that this person had at least one such a conviction, which, according to the U.S. District Court, stemmed out of his “hiring individuals to wreck cars so that he could receive the proceeds from the applicable insurance policies.”

A little over a month after the application was completed and the policy was issued (and less than a month after the actual purchase), the subject property caught fire.<sup>1</sup> An EUO was taken, at which time the sole LLC member disclosed his convictions which would have been responsive to the application question, if the member, rather than the LLC itself, was the applicant.<sup>2</sup> At the EUO, the member claimed that he told his agent about his convictions and that the agent told him that he did not need to disclose them as the application questions applied only to the LLC itself.

<sup>1</sup> The Court noted that this sequence of events “casts doubt” on plaintiff’s claims.

<sup>2</sup> The Court previously ruled that the application question applied only to the LLC and not the sole member completing the application and that therefore there was no material misrepresentation.

The carrier never checked with the agent to determine whether this claim was accurate and instead moved forward with rescinding the policy for material misrepresentation. Following the Court's earlier determination that there was no material misrepresentation and that there was coverage, plaintiff sought bad faith damages for the insurer's failure to investigate the claim that the agent had been told of the prior convictions.

The Court held that the insurer failed to make a reasonable investigation as it failed to undertake any investigation to determine whether the member had informed the agent of his convictions, stating that "upon learning that the insured claimed that he told [the agent] about the very issue that justified rescission of the policy on the grounds of dishonesty, [the company] did not investigate it *at all*. Such willful ignorance of the facts cannot be said to be a 'reasonable investigation' of this claim."

But for the Court's holding plaintiff's claim regarding the agent's knowledge was not credible (in light of all of the evidence, including the agent's notes, the agent's denial of such a conversation and as well as the member's "history of lying with regard to insurance policies and proceeds") it appears that it would likely have held that the insurer acted in bad faith. Fortunately for the insurer, the Court concluded that an adequate investigation would have netted the same result and therefore did not give plaintiff a bad faith award. Nonetheless, this case exemplifies the necessity for a full and complete investigation.

**DECISIONS BY THE SUPREME COURT OF VIRGINIA  
REGARDING INSURANCE INDUSTRY ISSUES  
September 12-16, 2016 SESSION**

The following case summaries involve 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.

[151088](#) **Dorman v. State Industries, Inc.** 06/16/2016 In a products liability action alleging breach of warranty and negligence claims against the manufacturer of an atmospheric-vented gas fired water heater, proof of the sales volume of the product was not impermissible evidence of the absence of other injuries, but relevant to the merchantability of the product shown by its acceptance in the marketplace. Evidence as to other potential causes in products liability cases may be important in a products liability action, and here there was evidence from which the jury could have found that the defendant's negligence, if it existed, was superseded by other causes, and the trial court did not abuse its discretion in admitting defense evidence of superseding causation. A proper superseding cause jury instruction was given in this case, and the plaintiffs' objection to that instruction, premised on its failure to mention the burden of proof on a defendant asserting superseding causation, was waived because plaintiffs failed to tender a proposed instruction containing such language. The judgment in favor of the defendant is affirmed.

[150877](#) **VEPCO v. Hylton** 06/16/2016 In a condemnation proceeding, Code § 25.1-213(ii) makes it clear that a landowner objecting to a trial court's jurisdiction must raise the issue in an answer within 21 days of being served with the petition for condemnation. A general denial based on disagreement with the sufficiency of the amount of an offer to purchase cannot be considered an objection to the bona fides of the offer and, in this case, the landowner waived objection to the trial court's jurisdiction over this matter by failing to timely raise the issue. Thus, the decision of the trial court to grant a motion to dismiss on this ground is reversed. The trial court also erred in denying motions in limine with regard to the separate value of the coal reserves on the property, as well as a surface mine that was not contemplated at the time of the taking. However, considering the the unity of lands doctrine, the court did not err in denying a motion in limine with regard to evidence of the devaluation of the neighboring tracts owned by the landowner that were not part of the take because here, there is evidence from which a jury could find a unity of use. The judgment is affirmed in part, and reversed in part, and the matter is remanded.

[150930](#) **Commonwealth, DRM v. Va. Ass'n of Counties** 06/23/2016 In declaratory judgment actions involving insurance coverage afforded to a pretrial detainee who was injured while in jail custody and sued guards and nurses at a regional jail, for which there are two sources of insurance coverage, the circuit court erred in holding, as a matter of law, that one insurance source provided primary coverage and the other offered only excess coverage. Both provided concurrent primary liability coverage and, as a result, the judgment is reversed in part and affirmed in part. The case is remanded for the circuit court to determine the appropriate pro rata contributions from each insurance source to the costs of defense and indemnification associated with settlement of the underlying liability suit.

[160784](#) **Howell v. McAuliffe** 07/22/2016 On petition for writs of mandamus and prohibition brought by the Speaker of the House of Delegates, the Majority Leader of the Senate, and four other Virginia registered voters against the Governor, the Secretary of the Commonwealth, the Virginia Department of Elections, its Commissioner, and the State Board of Elections seeking to cancel voter registrations under the Governor's executive orders restoring voting rights and removing political disabilities of approximately 206,000 Virginians convicted of felonies, and to prevent further such orders categorically restoring voting rights, each petitioner has standing to challenge the executive orders and the registration of voters authorized in the orders. Code § 24.2-431 does not provide the exclusive remedy for petitioners' allegations, and the petition is not deficient for failure to join necessary parties; accordingly, the motion to dismiss the petition is denied. On the merits, the executive orders violate Article I, Section 7 and Article II, Section 1 of the Constitution of Virginia, and are unconstitutional. No election official in the Commonwealth may enforce them. The Secretary of the Commonwealth, the State Board of Elections, the Virginia Department of Elections, and their employees, agents, chairpersons, and commissioners, are ordered to take specified actions to satisfy their duties to ensure that only qualified voters are registered to vote. The requested writ of mandamus is issued to that effect; a writ of prohibition is denied.

[150391](#) **Holiday Motor Corp. v. Walters** 09/08/2016 A judgment for \$20 million on a jury verdict in favor of a plaintiff suing a major automobile manufacturer for alleged design defects in the convertible she was driving, which overturned while she was operating it with the soft top closed, is reversed. While plaintiff contended that she was injured after the windshield header disconnected from the top and pushed down on her head, allegedly due to the design of the soft top's latching system which was defective in not being designed to stay latched in a foreseeable rollover crash, the manufacturer had no duty to design or supply a soft top that provided occupant protection in a rollover crash. Further, the opinion offered by plaintiff's expert that the soft top's latching system was defectively designed lacked a sufficient foundation. The judgment for plaintiff is reversed and final judgment is entered for the defense.

#### **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: Kevin Logan (804) 893-3855, [klogan@snllaw.com](mailto:klogan@snllaw.com)