

IN BRIEF

Vol. 56
February 27, 2015

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

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ATTORNEYS AT LAW

DUTY OF LANDOWNERS AND CONTRIBUTORY NEGLIGENCE

The Supreme Court of Virginia recently reversed itself and restored to a plaintiff a multi-million dollar verdict in a wrongful death case. The case, RGR, LLC v. Settle, 764 S.E.2d 8 (2014), involved an accident in which a dump truck was struck at a railroad crossing on private property by an oncoming train. The truck driver, Charles Settle (Settle), was making his seventh delivery of gravel that day and had therefore crossed the tracks a number of times. RGR was a local business that unloaded lumber from rail cars for subsequent reloading onto tractor trailers. The road that Settle traveled was a private road that crossed railroad tracks owned by Norfolk Southern, which had a 30' easement. Because the crossing was private, it was controlled solely by "crossbuck" signs and there were no other traffic control devices or signs. RGR's lumber was stacked near the railroad tracks and seven feet inside Norfolk Southern's 30-foot right of way.

The plaintiff, Mrs. Settle, as personal representative of her deceased husband's estate, alleged in her wrongful death action against RGR, Norfolk Southern and two other commercial business entities, that the defendants had created a hazardous condition by stacking lumber near the railroad tracks, and breached their duty of care by blocking his view of the tracks, and failed to take reasonable steps to make the railroad crossing safe. Prior to trial Norfolk Southern settled with the plaintiff and claims against the two commercial businesses were dismissed.

A witness from Norfolk Southern testified that the right-of-way was to provide a clear area for sight lines and safety. Other witnesses generally agreed that Settle approached the crossing at around 5mph and that he never stopped prior to crossing the tracks. There was conflicting testimony as to whether the train blew its horn and how often and how long it did so. Testimony by the conductor and engineer established that prior to crossing the tracks Settle was looking straight ahead, though the Court noted that their accounts were inconsistent with regard to whether they first saw his face immediately after he came from behind the stacked lumber or as he began to cross the tracks. There was additionally testimony by two eyewitnesses on the other side of the tracks that they saw the train and began waving their arms to alert Settle and get him to stop.

The Court concluded that the Circuit Court's refusal to find Settle contributorily negligent as a matter of law was not plainly wrong or without evidence to support it under § 8.01-680. In so finding, it held that the evidence of Settle's conduct was sufficient to cause fair men to differ as to whether he was contributorily negligent. It noted that due to the stacked lumber and nearby buildings which blocked Settle's view that he was forced to rely on his hearing and that there was conflicting testimony as to whether the train sounded its horn. It additionally noted that the testimony was not conclusive as to whether or not Settle failed to look. Further, it took judicial notice of time and stopping distances and held that if Settle had been traveling at 5mph, if he looked, reacted and braked after passing the lumber pile, he nonetheless would have reached the tracks before coming to a stop. Finally, it noted that the defense expert conceded that Settle had no duty to stop and that a commercial driver should not stop closer than 15 feet from a rail crossing, apparently agreeing with the plaintiff's contention that the truck would not have sufficient distance and time to cross the tracks should a train approach from around the curve after the truck took off from its stop.

The Court additionally held, while carefully noting that this was not a premises liability case, that "the common law requires that every person must exercise ordinary care in the use and maintenance of his own property to prevent injury to others." *Id.* at 18. It went on to note that "we have never found a duty of owners or possessors of land to protect the sight lines of motorists traveling on adjacent roadways, and we make no such holding here. Rather, we affirm what has been consistently recognized: one has a duty to exercise ordinary care in the use and maintenance of one's property to prevent injury to others." *Id.* at 25-26. Nonetheless, it held that RGR's obstruction of the sight line at the crossing within Norfolk-Southern's right of way (which was designed to maintain clear sight lines) was negligent.

Justices McClanahan, Lemons and Goodwyn dissented, opining that "the Court imposes an abstract duty to mankind generally, based on general maxims.....this newly-created, ever-present duty overturns decades of entrenched and long-accepted Virginia law, requires owners of property and occupants of land to use their property with due care given the whole world in all instances, and effectively removes duty as an element of all property and land-use negligence actions." *Id.* at 34-35. They further opined that they would have held Settle as being contributorily negligent as a matter of law as, under the plaintiff's theory of the case, there was no safe way to cross the tracks and that he took no precautions for his own safety.

DECISIONS BY THE SUPREME COURT OF VIRGINIA REGARDING INSURANCE INDUSTRY ISSUES February 23-17, 2015 SESSION

The following case summaries 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 these cases, please make your request by return e-mail. If you would like to discuss the ramifications of these decisions, please call (804) 893-3854 for Ray; (804) 893-3855 for Kevin or (804) 893-3866 for Mark.

Brown v. Jacobs 02/26/2015 In a wrongful death case, the circuit court did not err in granting a demurrer because the complaint failed to allege a special relationship between an attorney and a private investigator hired by that attorney to serve process, sufficient to create a duty to warn of the danger of possible assault or criminal attack by a third party, and the circuit court did not abuse its discretion in refusing to grant reconsideration or leave to file a further amended complaint. The judgment is affirmed.

Shevlin Smith v. McLaughlin 02/26/2015 In a legal malpractice claim, the circuit court erred in denying a plea in bar addressing one of the alleged grounds for liability, failure to correctly anticipate a judicial ruling on an unsettled legal issue, and erred in holding that collectibility of a judgment is not probative of legal malpractice damages. Tort damages - including non-pecuniary damages for emotional distress and humiliation - are not recoverable for breach of contract, nor are wrongful incarceration and its attendant non-pecuniary damages. A plaintiff may not request from the jury, in either opening statement

or closing, an amount of damages that exceeds plaintiff's ad damnum. Denial of the partial plea in bar and the circuit court's order affirming the jury award are reversed, the award is vacated, and the case is remanded.

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