The Virginia Jury Verdict Reporter

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June 2014 **Statewide Jury Verdict Coverage** **1 VaJVR 1**

June 2014 Highlights

School Bus Negligence - A little boy (a kindergartner) was run over and killed by a school bus after being dropped off at his elementary school – the tragedy occurred because of a combination of errors between the driver of the bus that struck the boy, the driver that dropped him off and an administrator who signaled for the bus driver to pull away – fault was conceded and the case was tried on damages only, his parents and three siblings seeking damages for mental anguish and sorrow

Woodley v. School Board of Southampton, 11-7
Plaintiff: E.D. David and James J. Reid, *David Kamp & Frank*, Newport News
Defense: Melissa W. Robinson and Johneal M. White, *Glenn Robinson & Cathey*, Roanoke and Jim H. Guynn, Jr. and Jennifer D. Royer, *Guynn Memmer & Dillon*, Salem
Verdict: $4,357,431 for plaintiff
Court: **Southampton Circuit Court**
Judge: Robert W. Curran
Date: 4-1-14

Jameer Woodley, age 4, was a pre-kindergarten student on 1-9-09 at

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Riverside Elementary. The school, which had just opened in July of 2008, had a scheme whereby school buses pulled into assigned spots. The students then exited the buses and walked into the school – this required the students to walk through the loading area.

On this day Woodley's bus driver, Calvin Joyner, parked his bus in his assigned spot. Woodley was one of the last children off the bus, and he headed for school. At the same time, another bus driver, Barbara Ellis, received a signal from an administrator, Ann Lowers, that she should pull out from her assigned spot.

Ellis did so just as Woodley was walking through the loading area. She ran over the child, Woodley's skull being crushed. He was dead at the scene. Many children at the school witnessed the tragedy. Woodley was remembered as a fun-loving child who enjoyed video games and always wanted macaroni and cheese for dinner.

Woodley (nicknamed "Me-Me") was survived by his parents, Lakisa (a first grade teacher at the school) and his father, Timothy, as well as by his three brothers. In this lawsuit against the school board, Woodley's estate alleged negligence regarding the unloading procedure.

The plaintiff suggested that the children should have been dropped off at a location where they can walk directly into school without crossing any lanes of traffic. As the litigation progressed, the school board admitted its fault. In fact it has since changed its policy, and students are now dropped off directly at a curb and escorted into the school.

The boy's parents and siblings sought damages for their mental anguish and sorrow. The estate had been prepared to introduce proof from a grief expert, Mila Tecala, Washington, D.C. Upon motion by the school board, Judge Curran excluded Tecala's proof. The judge wrote in an order that the grief of the plaintiffs was well within the common knowledge and province of the jury.

This case was tried on damages only in Courtland. Each of Jameer's parents took $1.55 million for their grief and sorrow. His siblings too took an award, the amounts being different. Jaylon (age 6) was awarded $750,000, Jamal (age 13) taking $300,000, and Jaleel (who was just an infant at the time of Jameer's death) took an award of $200,000. The jury added $7,431 more for the funeral bill, the verdict totaling $4,357,431. Nearly six weeks after the trial when the record was reviewed, no judgment had yet been entered.

Auto Negligence - A child psychiatrist complained of a traumatic brain injury after a red light crash

Furey v. Gibbs, 09-615
Plaintiff: Cheryl S. Tuck, *Daniels Williams Tuck & Ritter*, Chester
Defense: John D. McGavin, *Bancroft Horvath & Judkins*, Fairfax
Verdict: $750,000 for plaintiff
Court: **Prince George Circuit Court**
Judge: Nathan C. Lee
Date: 1-29-14

Sheila Furey, then age 46 and working as a child psychiatrist, was involved in a serious crash on 9-12-07. The defendant, Nathan Gibb, ran a red light and broadsided Furey's Toyota Prius. Furey has since treated for a traumatic brain injury.

The injury has affected her memory and concentration. While before this wreck she was able to work in a hospital setting, Furey is now limited only to office work. Her husband (also a doctor) described her deficiencies.

Furey also relied on a team of medical experts that confirmed her permanent brain injury. They included Dr. Gregory O'Shanick, Neuropsychiatry, Dr. Michael Lipton, Neuroradiology and Wayne Gordon, Neuropsychology, New York, NY. [The estate of Gibbs (he died five years after this wreck) sought a mistrial regarding Gordon's testimony as he improperly discussed causation – the motion was denied.]

In this lawsuit Furey sought damages from the Gibbs estate. While her medical bills are not reflected in the record, her counsel suggested an award to the jury of $2,000,000.

The Gibbs estate conceded fault for the wreck and focused its defense on minimizing the claimed injury. It first noted (through the treating doctor at the ER) that Furey had not initially showed signs of a brain injury. Its IME experts, Dr. Edward Peck, Neuropsychology and Dr. Joseph David, Psychiatry, Charlottesville, concluded Furey was mostly normal. To the extent she did have a psychiatric impairment, the defense noted Furey had a longstanding history of depression that pre-dated this collision.

This case was tried for three days, the jury returning its verdict at 9:30 in the evening. Furey prevailed and took $750,000 in damages. There was no interest award.

The defense moved for JNOV relief and argued the award of

Coming in the July 2014 edition

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This is a snapshot look at what's coming in the July 2014 issue

Roanoke (Federal) - Medical Malpractice - Failure to stabilize a spinal fracture after a car accident
Charlottesville (Circuit)- Medical Malpractice - Cardiac Injury - $2,000,000
Stafford - Auto Negligence - Soft-tissue Injury - $100,000
Prince William - Nursing Home Malpractice - Claim of Global Neglect
Loudoun - Pharmacy Malpractice (Death) - Drug Interaction
Winchester - Medical Malpractice - Dermatological error alleged
Virginia Beach - Premises Liability - Trip and fall over an unpainted curb
Newport News - Medical Malpractice - $500,000 award in a plastic surgery case
Chesapeake - Medical Malpractice - Claim of a botched Lasik surgery
Petersburg - Auto Negligence - Significant soft-tissue verdict
Richmond - Legal Malpractice - $4,000,000 - A high-profile med mal lawyer botched a case
Roanoke (Circuit)- Auto Negligence - $50,000 soft-tissue award in a case with medicals of $14,043
Tazewell - Medical Malpractice - Plaintiff suffered ED after the mismanagement of priapism
Montgomery - Auto Negligence - Pedestrian post-grad co-ed injured crossing the street - $100,000

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damages was shocking and excessive especially as Furey never lost consciousness. Furey resisted the motion and argued her serious injury was confirmed by a battery of experts. The motion was denied on 3-10-14, and a consistent judgment was entered for the plaintiff.

Products Liability - The plaintiff linked mesothelioma to his time as a state trooper when he was exposed to asbestos in brakes at an inspection station – the plaintiff prevailed at a first trial ($282,865) but upon reversal at the Virginia Supreme Court, the defendants prevailed at this retrial

Lokey v. Ford Motor Company et al, 05-10647
Plaintiff: Gary W. Kendall and E. Kyle McNew, *Michie Hamlett Lowry Rasmussen & Tweel*, Charlottesville and Nathan D. Finch, *Motley Rice*, Washington, D.C.
Defense: Tracy J. Walker, IV, Samuel L. Terry, Jr. and Martha L. Steele, Richmond, Shepherd D. Wainger, Norfolk and J. Brian Jackson, Charlottesville, all of *McGuireWoods* for Ford
Lynn K. Brugh, IV, *Williams Mullen*, Richmond, Kevin Greene, *Willcox Savage*, Norfolk, Stuart A. Raphael, *Hunton & Williams*, McLean and Ricky A. Raven, *Thompson & Knight*, Houston, TX for Honeywell
Verdict: Defense verdict on liability
Court: **Albemarle Circuit Court**
Judge: Cheryl V. Higgins
Date: 11-18-13

James Lokey worked as a Virginia State Trooper from 1965 to 1974 and during that period, he was assigned to state vehicle inspection stations. There was proof that during the course of that work, Lokey was exposed to brake blow-out of asbestos materials – he was in the poorly ventilated stations ten days or so each month.

Moving forward thirty years, Lokey was diagnosed in 2005 with mesothelioma. He died two years later. In this lawsuit originally brought before his death (and continued after it), a products liability theory was presented against two defendants. They were Honeywell, the successor to Bendix, a company that made vehicle brakes with asbestos, and Ford Motor Company upon whose vehicles those brakes were installed.

Thus the estate asserted that Lokey's mesothelioma was caused by brake blow-out from the defendant's products. His key experts were Laura Welch, Occupational Medicine, Atlanta, GA and John Maddox, Pathology, Newport News. If the estate prevailed it sought the grief and sorrow of Lokey's two daughters as well as his medical bills and funeral expense.

The defendants (Ford and Honeywell) defended on two key fronts. The first was that there was no appreciable danger associated with working around asbestos-containing brakes. This evidence came from an expert, David Garabrant, Public Health, Ann Arbor, MI.

A second expert, Victor Roggli, Pathology, Durham, NC, analyzed Lokey's lung fibers and concluded his asbestos exposure was more consistent with a shipyard exposure than exposure to automobile brakes. Lokey had worked during WWII as a pipefitter at the Norfolk Naval Shipyard – there was proof he was regularly exposed to asbestos during his one-year working at the shipyard.

This case first came to trial in August of 2011. The estate prevailed against both defendants and took damages totaling $282,685. That figure represented $50,000 each for the grief interests of his two daughters and medicals totaling $180,545 more. The funeral bill was $2,140.

The defendants took an appeal and argued an instruction error. Namely the trial court's "substantial contributing factor" charge was erroneous, and a concurrent negligence "sufficient-to-have-caused" charge should have been given in the context of this mesothelioma case. The Supreme Court agreed and reversed in a January 2013 opinion.

The second trial occurred 11 months later. The verdict in the second trial was for the defendants, and the estate took nothing. Many months later, if a judgment was entered in the case, it is not a part of the court record.

Auto Negligence - A Ph.D. molecular biologist suffered a traumatic brain injury in a significant rear-end crash – the crash ended his dreams of working as a researcher at the National Institute of Health

Brandon v. Cummings, 75633
Plaintiff: Stephen M. Frei and Matthew C. Perushek, *Sickels Frei & Mims*, Fairfax
Defense: Alicia Lehnes Summers, *Michael Davis & Associates*, Richmond and John D. McGavin, *Bancroft McGavin Horvath & Judkins*, Fairfax
Verdict: $1,500,000 for plaintiff
Court: **Loudoun Circuit Court**
Judge: Burke F. McCahill
Date: 3-14-14

David Brandon, then age 58, had been a professor for many years in Oregon. He is a Ph.D. level molecular biologist and made a career as a researcher. In the fall fo 2010 he had relocated to the D.C. Metro area and was actively looking for his dream job at the National Institute of Health.

Brandon traveled this day on

Jefferson Pike. While stopped in traffic he was rear-ended by Michael Cummings. Cummings was driving a pick-up truck pulling a trailer. It was a hard hit – Cummings never saw Brandon, the crash resulting in significant vehicle damage. Fault was not contested.

Brandon was initially treated for a soft-tissue strain and an apparent concussion. The post-concussive symptoms did not improve, and they in fact got worse. Brandon has since been diagnosed with a mild traumatic brain injury.

The injury affects his concentration, attention, memory and speech. The injury was described as permanent (the baseline is established 24 months or so after the injury) and Brandon's professional career was derailed.

The brain injury was confirmed by Dr. Ruben Cintron, Neurology, Reston. Brandon also relied on a battery of experts including Deborah Gale, Speech Pathology, Vienna (with a speciality in treating brain injuries), Dr. Patrick Nisco, Psychology, Ashburn, and Dr. Peder Mehlberg, Vocational Expert, Richmond. Brandon's life care plan was quantified by Dr. Susan Grisham, Richmond.

In this lawsuit Brandon sought damages from Cummings. Cummings defended and tended to minimize the claimed injury. A key expert, Dr. Seth Tuwiner, Neuropsychiatry, Leesburg, noted Brandon's testing was inconsistent with his symptoms. The defense also relied on Dr. Gary Kay, Neuropsychology, Washington, D.C. and Dr. Auram Mack, Psychiatry, Washington, D.C. A defense vocational expert, Gray Broughton, Richmond, thought there were lots of jobs that Brandon could do and suggested that the plaintiff engage in more networking.

This case was tried to a jury in Leesburg over four days. The award was for Brandon, and he took $1.5 million. A consistent judgment was entered for him but it was later vacated, the order indicating the matter was dismissed as settled.

Medical Malpractice - The plaintiff suffered permanent paralysis after a lumbar nerve block injection (a CT-guided fluoroscopic procedure) penetrated a spinal artery and caused a spinal cord infarction

Lynch v. McLaughlin, 12-325
Plaintiff: S.D. Roberts Moore and Les S. Bowers, *Gentry Locke Rakes & Moore*, Roanoke
Defense: Robert F. Donnelly and Robin P. Ayres, *Goodman Allen & Filetti*, Glen Allen
Verdict: $6,400,000 for plaintiff
Court: **Fredericksburg Circuit Court**
Judge: Gordon F. Willis
Date: 3-7-14

Duane Lynch underwent a laminectomy surgery in 1992. His eggshell spine was reinjured in 2006 when he strained his back while lifting a trailer door. Thereafter Lynch underwent a course of steroid injections for pain relief. A Fredericksburg interventional radiologist, Dr. John McLaughlin, regularly administered those injections to Lynch.

This litigation concerned a CT-guided fluoroscopic steroid injection (a so-called nerve block) at the L-3 level on 11-26-10. It was performed on Lynch by McLaughlin at Mary Washington Hospital.

A minute or so after the injection, Lynch suffered lower extremity paralysis. The permanent injury was caused by the injection having penetrated a spinal artery which in turn caused a spinal cord infarction.

In this lawsuit Lynch alleged negligence by McLaughlin in several ways regarding the injection. He first focused on McLaughlin's use of a CT-guided fluoroscopy which limited the visualization of Lynch's anatomy. McLaughlin was blamed too for, (1) attempting an injection at all in light of Lynch's history of a failed back surgery, and (2) using the wrong steroid.

The plaintiff's liability experts were Dr. Marc Huntoon, Anesthesia, Nashville, TN and Dr. Stephen Abram, Anesthesia, Neosho, WI. Lynch's life care plan was valued at between $4.9 million and $7.8 million by Betty Overbey, Life Care Plan, Glen Allen. The plaintiff's incurred medical bills were $518,473.

McLaughlin defended that his use of a CT-guided fluoroscopy was well within the standard of care, and as importantly, the catastrophic result Lynch suffered represented a very small and accepted risk of the procedure. The defense was also critical of the plaintiff's experts, McLaughlin noting that neither had clinical experience with fluoroscopic procedures. Defense experts were Dr. Frank Berkowitz, Radiology, Washington, D.C. and Dr. Andrew Wagner, Radiology, Charlottesville.

This case was tried for four days, the jury then deliberating two hours. Lynch prevailed and was awarded damages of $6.4 million. [This is gleaned from the minutes as both the court's instructions and the verdict itself (inexplicably) are sealed court documents.] The jury also added pre-judgment interest to the date of

the injection. The court's judgment reduced the verdict to the statutory limit of $2,000,000 less a $246,422 lien held by a worker's compensation carrier.

Lynch moved to reinstate the verdict and argued Virginia's tort reform scheme was unconstitutional. McLaughlin replied that Lynch's argument was contrary to the plain language of the statute and existing case law. The court denied the motion, and Lynch has appealed. McLaughlin too has appealed.

Truck Negligence - The plaintiff suffered multiple fractures and a brain injury when a trucker lost control and crashed into a bridge overpass – the truck's trailer became detached and crossed into the oncoming lane of traffic and struck the plaintiff head-on – as the jury deliberated, the parties entered into a $7,000,000-$3,000,000 Hi-Lo agreement – the verdict was squarely within that agreement and was promptly satisfied by the defendant

Kargin v. Grace Food Distribution, 3:13-112
Plaintiff: Dabney J. Carr, IV, *Troutman Sanders*, Richmond, Nelson Tyrone, III, *Tyrone Law Firm*, Atlanta, GA and Lloyd N. Bell, *Bell Law Firm*, Atlanta, GA
Defense: E. Lewis Kincer, Jr., *KnicerSnyder*, Glen Allen
Verdict: $3,927,867 for plaintiff
Federal: **Richmond**
Judge: John A. Gibney, Jr.
Date: 2-7-14

Unal "Steve" Kargin, then age 40 and a Turkish immigrant (now naturalized) working as a trucker, traveled on I-85 near Petersburg. He was in a commercial box truck. At the same time Thomas Ore approached from the opposite direction in a tractor-trailer. He was hauling a load of Chinese food for Grace Food Distribution. It was the middle of the night, and Ore had been on the road for many hours.

As Ore neared the Sycamore Street Bridge, he apparently fell asleep. He crashed into the bridge overpass. This caused the truck's trailer to detach. It continued across into the oncoming lane of traffic, striking Kargin's truck head-on. The impact was serious, destroying Kargin's cab and sending Chinese food debris all over the highway.

Kargin was badly hurt in the crash. He sustained open fractures to both his arm and leg. Those injuries would later become infected by crash debris, including the Chinese food. Airlifted to the VCU Medical Center, Kargin was hospitalized for many weeks. While he made a remarkable recovery and now ambulates without assistance, his recovery was harrowing as he battled the infections.

Beyond the fractures Kargin has also treated for a traumatic brain injury that has affected his mood, memory, and concentration. There was expert proof confirming a post-traumatic stress disorder. The incurred medical bills were $856,426.

In this lawsuit Kargin sought damages from Grace Food, a Liberty-Mutual insured. His lost earning capacity (reduced to present value) was stipulated to be $621,673. Grace Food defended the case, and while conceding Kargin was badly hurt, it noted his recovery and suggested he could return to work.

This case was tried for five days, the jury then deliberating for four hours. As the jury deliberated the parties entered a Hi-Lo settlement agreement. Its parameters were $7,000,000-$3,000,000.

The jury asked a question as it deliberated: Do we include the past medicals in the total award? If Judge Gibney answered, that answer did not become part of the court record.

The jury returned with a general verdict, Kargin taking $3,927,867 in damages – it was squarely within the Hi-Lo settlement agreement. A consistent judgment was entered, and Grace Food promptly satisfied it.

Truck Negligence - As the plaintiff slowed in traffic on the interstate, he was rear-ended by a trucker – the crash left the plaintiff with a ruptured disc in his neck and a mild brain injury

Brady v. Aqua Gulf Express, 4:13-24
Plaintiff: Robert J. Haddad, *Shuttleworth Ruloff Swain Haddad & Morecock*, Virginia Beach
Defense: James A. Cales, III and Jonathan R. Hyslop, *Furniss Davis Rashkind & Saunders*, Norfolk
Verdict: $720,000 for plaintiff
Federal: **Newport News**
Judge: Lawrence R. Leonard
Date: 3-28-14

Gilbert Brady traveled on I-64 in Yorktown, VA on 2-10-10 near the Camp Perry exit. The conditions were snowy. There was a crash on the interstate ahead of Brady, and traffic was coming to a stop. Brady safely stopped. A moment later he was rear-ended by a tractor-trailer driven by Danny Pena for Aqua Gulf Express. It was a significant impact, Brady's vehicle being knocked into the next car.

Brady has since treated for two significant injuries, (1) a ruptured disc in his neck that was repaired in a fusion surgery, and (2) a mild traumatic brain injury. The effect of

these injuries has left Brady totally disabled. His medical bills were $166,800. In this lawsuit Brady sought damages from Pena regarding this crash.

Aqua Gulf defended on fault and blamed the snowy conditions for the crash. It also diminished damages, suggesting that Brady had sustained just a strain. Aqua Gulf linked his disc injury to degenerative conditions.

The jury's verdict was general and it was for Brady. He was awarded $720,000. The court entered a consistent judgment for him.

Auto Negligence - A pedestrian suffered multiple fractures when struck while crossing a city street – the verdict (while significant) was just $20,000 more than the plaintiff's incurred medical bills

Johnson v. Amisial, 13-6343
Plaintiff: Christopher I. Jacobs, *Kalfus & Nachman*, Norfolk
Defense: Michael D. Pace, *GEICO Staff Counsel*, Norfolk
Verdict: $361,000 for plaintiff
Court: **Norfolk Circuit Court**
Judge: Junius P. Fulton, III
Date: 4-21-14

Charles Johnson was a pedestrian on 9-9-11 as he walked on 26th Street in Norfolk. Johnson would recall that he attempted to cross the street at the intersection with Granby. Importantly, Granby was in the crosswalk and had a green light.

At the same time Rosemond Amisial proceeded on 26th Street. As Amisial passed the intersection (driving a minivan), he never saw Johnson. He struck Johnson hard.

The collision left Johnson with multiple fractures, including an orbital fracture as well as tib-fib and tibial plateau fractures. The knee fracture later led to the development of a compartment syndrome – Johnson also developed a MRSA infection which caused a septic knee. His recovery was grueling, the medical bills totaling $341,131.

In this lawsuit Johnson sought damages from Amisial and blamed him for the crash. Amisial defended and implicated the plaintiff's own contributory negligence.

Johnson prevailed at trial and took an award of $361,000 in damages. When the record was reviewed nearly a month later, no judgment had been entered.

Medical Malpractice - The plaintiff (a fireman at the Georgia Pacific paper mill) lost part of his foot after his doctor failed to diagnose an arterial compromise

Burnett v. Dodd, 11-6395
Plaintiff: James B. Feinman, *Feinman & Associates*, Lynchburg
Defense: C.J. Steuart Thomas, III, *Timberlake Smith Thomas & Moses*, Staunton
Verdict: $4,000,000 for plaintiff
Court: **Lynchburg Circuit Court**
Judge: J. Michael Gamble
Date: 2-24-14

Edward Burnett, then age 45, began suffering pain and discoloration in his lower leg on 2-24-07. He was treated and released that day at the Lynchburg General Hospital emergency room. Two days later he sought treatment with Dr. Jarrett Dodd, Family Practice. Burnett had no history of injury to explain the symptoms.

Dodd suspected a vascular problem or perhaps a pinched nerve, but he didn't consider the problem to be an emergency. He scheduled a vascular study for eight days later. That study was conducted on 3-6-07, and the results were abnormal. A vascular consult was scheduled by Dodd for eight days later. Burnett would never make it.

Two days later Burnett's complaints in his leg were much worse. He was seen by Dodd who brought in an immediate vascular consult. It was learned that Burnett was suffering from acute ischemic compromise in his foot – the clot had hardened in Burnett's arteries and could not be removed. Despite aggressive intervention his foot was partially amputated a month later – muscle in the tissue below Burnett's knee was also permanently damaged.

Burnett alleged error by Dodd in failing to appreciate the seriousness of his condition and seek an immediate vascular consult. There was proof that upon Burnett's first visit to Dodd on 2-26-07, he was still within the time frame that tPA clot-busting therapy could be administered. Burnett's liability experts were Dr. Irving Epperson, Family Practice, Powhatan, VA, Dr. Andrew Heiskell, Vascular Surgery, Morgantown, VA, and Dr. Charles Greenburg, Hematology, Charleston, SC.

Burnett has been left disabled from his vocation. At the time of his injury he worked as the head fireman for a Georgia Pacific paper mill in Big Island. His vocational loss was valued at $601,000. The plaintiff's medical bills were $342,000.

The procedure in this case was complex and lengthy. Burnett's original lawsuit resulted in a non-suit. He then refiled and sought a Medical Malpractice Panel to hear the case. That hearing was conducted before Judge Mosby Perrow in July of 2012. The panel

could not come to a conclusion.

Thereafter the case returned to the trial docket. Burnett accused Judge Perrow of bias, Perrow having referred to "lawyer trickery" by Burnett's counsel from the bench in the panel hearing. Perrow was removed from the case, and it was assigned to Judge Gamble who presided over the jury trial.

Dodd defended the case at trial on the merits that his treatment met the standard of care. He described Burnett's presentation as very unusual. There was also proof that not only would it have been virtually impossible for Dodd to have made the diagnosis on 2-26-07, there was no treatment in any event that would have provided relief. The plaintiff countered that with a prompt referral on the first 2-26-07 visit, Burnett's foot could have been saved. Defense experts were Dr. John Daniel, III, Internist, Richmond, VA and Dr. Jesse Davidson, Surgery, Roanoke, VA.

This case was tried in Lynchburg for a week. The jury's verdict was for Burnett in the sum of $4,500,000. No judgment was ever entered in the case, the record indicating it was dismissed by agreement a month later. The statutory limit in effect for malpractice at this time was $1.85 million.

Fire Truck Negligence - A volunteer firefighter was killed when his driver ran a red light on an emergency run and crashed into another vehicle – the jury awarded the funeral bill and nothing more

Altice v. Dillon et al, 12-7105
Plaintiff: Anthony M. Russell and Kathleen L. Weaver, *Gentry Locke Rakes & Moore*, Roanoke
Defense: James A.L. Daniel and Martha White Medley, *Daniel Medley & Kirby*, Martinsville for Dillon
Bryan J. Brydges, *Johnson Ayers & Matthews*, Roanoke for Valentine
Verdict: $9,984 for plaintiff against Valentine; Defense verdict on liability for Dillon
Court: **Franklin Circuit Court**
Judge: William N. Alexander, II
Date: 9-25-13

There was a tragic car versus fire truck accident in Rocky Mount on 7-26-10. A fire call was received by the city's fire department. Posey Dillon (the local chief) was operating a large fire truck and headed to the scene. He was joined by a fellow firefighter, William Altice. At the intersection of School Board Road and VA 40, Dillon blew through a red light with his lights flashing and his horn blaring.

At just this moment, Teri Valentine, who was driving a Ford Escape SUV, proceeded through the intersection with a green light. She broadsided the fire truck, and it turned on its side. Both Altice and Dillon were ejected and killed. Altice, age 67, was survived by his children (Christie and Carey) as well as by a teen granddaughter, Kayla.

In this lawsuit the Altice estate sued both Dillon and Valentine regarding the crash. A fire safety expert for the plaintiff, Wayne Hoover, explained that the large fire truck was not operator friendly and required Dillon to be especially careful. It was Hoover's opinion that in running the light Dillon had violated the fire truck operation standard of care. Valentine too was blamed for failing to keep a look-out for the fire truck – she never saw or heard the fire truck before the crash.

Dillon's estate defended that he acted reasonably in operating the fire truck. Valentine too denied fault and blamed Dillon for having run the red light. Valentine had presented her own personal injury claim against Dillon – it settled short of trial.

Dillon moved procedurally for summary judgment and cited that the case was barred by worker's compensation exclusivity because Altice was then employed as a firefighter. The plaintiff resisted that he was a volunteer. Judge Alexander denied the motion.

The plaintiff had also presented an UM claim against State Farm. The insurer was represented by Glenn W. Pulley, *Clement & Wheatley*, Danville. The record does not indicate where the UM coverage began.

This case was tried in Rocky Mount for three days, the jury then deliberating for three hours. The verdict was mixed. It exonerated Dillon but found against Valentine. Then to damages and against Valentine only, the jury assessed $9,984 for the funeral bill. It wrote "0" on the verdict form for the grief and sorrow of Altice's two children and his granddaughter. A consistent judgment was entered on the verdict.

Thereafter the plaintiff moved for both a new trial on liability and damages. The liability claim was predicated on Judge Alexander's limitation of proof from the estate's fire truck safety expert. The award

of damages was also criticized, there being uncontradicted proof Altice's children and granddaughter suffered grief.

Dillon's estate replied to the liability motion that the expert's proof was properly excluded as no expert was needed. Valentine answered on damages that the award was reasonable, the jury perhaps believing the plaintiffs had faked their grief and were not actually that close to Altice. Alternatively Valentine suggested that if there was a new trial on damages, there should be a new trial on all issues.

Judge Alexander granted the new trial (in December of 2013) on both counts finding, (1) he had erred in excluding the liability proof against Dillon, and (2) the award of damages was inadequate. He suggested to the parties that *additur* of $175,000 would be fair. The defendants balked.

The case has since been fully concluded, the defendants paying $186,000 to resolve the matter. The settlement was broken down as follows: $62,000 in attorney fees and $38,152 more in costs. The remaining $85,847 was divided $34,338 to the children and $17,169 to the granddaughter.

Premises Liability - The plaintiff suffered a puncture wound to her foot when she stepped (while wearing flip flops) on a protruding screw in a gas station parking lot

Jenkins v. E&C Enterprises, 12-410
Plaintiff: Von L. Piersall, III, Portsmouth
Defense: Michael L. AtLee, *Hall Fox & AtLee*, Hampton
Verdict: $30,000 for plaintiff
Court: **Portsmouth Circuit Court**
Judge: Kenneth R. Melvin
Date: 3-17-14

Kimberly Jenkins was a patron on 9-9-10 at a gas station in Portsmouth operated by E&C Enterprises. As she walked across a traffic island in the parking lot, she stepped on a screw that protruded from the ground.

Even though Jenkins was wearing flip flops, the screw penetrated those flip flops and caused a puncture wound to her foot. A small foreign body (as identified by a treating podiatrist, Dr. Peter Grinkewitz) was embedded in her foot. That foreign body created a cyst that pressed on a nerve – the pressure on the nerve was linked by Grinkewitz to the development of RSD symptoms.

Grinkewitz later removed the cyst in a 5-27-11 surgery. In this lawsuit Jenkins sought damages from E&C Enterprises regarding the hazard of the protruding screw. Her medical bills are not reflected in the record. E&C Enterprises defended the case and implicated the plaintiff's contributory negligence.

The jury's verdict in Portsmouth was for Jenkins, and she took a general award of $30,000. There was never a judgment, Judge Melvin entering a post-trial order indicating the case was dismissed by agreement.

Medical Malpractice - An internist discharged the plaintiff (he had slurred speech) believing he was drunk before a blood test was returned – he wasn't drunk and in fact was in the midst of a stroke

Duff v. Scott, 3:12-41
Plaintiff: Anthony M. Segura and S.D. Roberts Moore, *Gentry Locke Rakes & Moore*, Roanoke
Defense: Marc A. Pertiz, *Morin & Barkley*, Charlottesville and William H. Archambault, Charlottesville
Verdict: Defense verdict on liability
Federal: **Charlottesville**
Judge: Glen E. Conrad
Date: 11-22-13

Samuel Duff, then age 57 and of Danville, VA, was driven by his sister for a doctor's appointment at the UVA Medical Center on 8-31-10 in Charlottesville. He was to see his regular internist, Dr. Evelyn Scott. When Duff was dropped off, his wife remembered his condition was normal.

By the time Duff was seen by Scott, his speech was slurred. She suspected he was drunk and ordered a blood test. Before Scott had the test results, she called Duff's sister and told her to come get him. Duff was discharged and left with his sister despite their pleas that he had not been drinking.

Duff returned home. A few hours later Scott got the blood test results back. Duff wasn't drunk. Scott called Duff and told him to report to the hospital as his apparent drunkenness was more likely an impending stroke catastrophe. Duff did so and in fact he had suffered an ischemic stroke.

Duff has since suffered from significant limitations from the stroke. In this lawsuit Duff alleged Scott violated the standard of care in

discharging him without waiting for the blood test results. But for her hasty impression of intoxication, Duff missed an opportunity to institute tPA clot-busting stroke therapy. The plaintiff's experts were Dr. William Bethea, Internist, Port St. Lucie, FL and Dr. Guy Rordorf, Neurology, Boston, MA.

Scott defended the case and raised a fact dispute. She recalled that at the appointment, not only did Duff appear drunk (his speech was slurred), he had also reported to her that he had been drinking that morning. [Duff denied this.] Her liability experts were Dr. John Daniel, Internist, Richmond and Dr. David Ellington, Family Practice, Lexington, VA.

This case was tried in federal court for three days. The jury was queried: Do you find by a preponderance of the evidence that the defendant is liable to the plaintiff? The answer was no, and Duff took nothing. A defense judgment was entered, and the case is closed.

Premises Liability - A wine vendor dropped a bottle of wine at a grocery – while the vendor made efforts to clean up the spill, the floor remained slippery – a few minutes later the plaintiff walked through the area and slipped – she struck her head and suffered a serious retinal injury

Adams v. Kroger, 13:11-141
Plaintiff: Norman L. Saunders, Jr. and Thomas H. Gays, II, *Saunders Cary & Patterson*, Richmond
Defense: Victor S. Skaff, II, *Guynn Memmer & Dillon*, Salem, VA for Kroger
Alan R. Siciliano, *DeCaro Doran Siciliano Gallagher & DeBlasis*, Fairfax for Republic National Distributing
Verdict: Defense verdict on liability
Federal: **Richmond**
Judge: James R. Spencer
Date: 12-17-13

Deborah Adams shopped at a Kroger grocery in Richmond on 3-6-12. She perused the wine section. Unknown to her a hazard had been created in that area of the store just 19 minutes earlier. [This is the unusual premises liability case because the entire events of the fall (separated by 19 minutes) were recorded on video.]

Nineteen minutes earlier a wine vendor (Gary Judd) working for Republic National Distributing was restocking the wine shelves when he dropped a bottle. Judd went to work cleaning up the spill. That included getting a dustpan and a broom. He also picked up loose glass and mopped the area. Finally Judd placed a warning cone.

Six minutes passed between the time Judd concluded his clean-up and Adams's arrival. She slipped on the wet floor and struck her head. It was a hard hit, and it left Adams with retinal damage. Despite undergoing four repair surgeries and incurring medical bills of approximately $30,000, Adams is legally blind in that eye.

In this lawsuit (removed from Chesterfield Circuit Court), she alleged negligence by (1) Judd of Republic National Distributing in cleaning up the spill and still leaving a hazard, and (2) Kroger in failing to become involved in the cleanup. Particularly, she cited that while Judd tried to clean the floor, he mopped an area that was too wide and then didn't dry the floor. Making it worse, he used a slippery hand sanitizer on the floor. Finally he placed just a single warning cone. Kroger too was implicated for doing nothing, even though 19 minutes passed between the time of the spill and the plaintiff's fall.

Republic National Distributing defended Judd's actions in cleaning up the spill and described them as reasonable. Similarly, Kroger denied having notice (constructive or otherwise) of the spill hazard. Adams countered this notion citing that the key 19 minutes (in which Kroger did nothing) were more than long enough to put the store on notice.

This case first came to trial in March of 2012. Judge Spencer granted a directed verdict for the defendants at the close of the plaintiff's proof. He concluded the defendants had acted reasonably in cleaning up the spill.

Adams took an appeal to the Fourth Circuit. In a non-published *per curiam* opinion (issued in June of 2013), the intermediate court reversed Judge Spencer. It concluded there were fact disputes that precluded a directed verdict.

The case was tried again for two days in Richmond. This jury answered that both Kroger and Republic National Distributing were "not liable", and Adams took nothing. Having so found, the jury did not reach if Adams was contributorily negligent or her damages. A defense judgment closed the case.

Auto Negligence - The plaintiff alleged a minor rear-ender caused a previously installed spinal cord stimulator to fail, resulting in medicals of nearly $180,000 – a first jury in 2012 awarded the plaintiff $9,000 – a new trial was ordered, the plaintiff taking $1,766 at a second trial in 2013 – at the third trial (so far), the trial court granted summary judgment on the medicals, the jury valuing the plaintiff's non-economic damages at just $6,000

Clem v. Cosby, 10-1534
Plaintiff: Jeannie P. Dahnk, *Glover & Dahnk*, Fredericksburg
Defense: Jayne B. Randall, *GEICO Staff Counsel*, Glen Allen
Verdict: $6,000 for plaintiff (Court directed a verdict on $176,814 in medical bills)
Court: **Spotsylvania Circuit Court**
Judge: Joseph J. Ellis
Date: 3-25-14

This convoluted litigation (there would be three trials so far) started on 1-11-09 with a rather ordinary event. The plaintiff, Susan Clem, a former cop with a history of a back injury and the placement of a spinal cord stimulator, was rear-ended on Beaverdam Road in Spotsylvania Road. She was struck by Glen Cosby. The collision resulted in very minor vehicle damage.

Clem's primary injury from this collision was that it disrupted her spinal cord stimulator. It stopped working and had to be replaced. Her treating doctor, Michael Decker, Orthopedics, Richmond, opined that the stimulator malfunctioned because of trauma, a wire or other component being disrupted in this collision.

Clem incurred significant medical bills associated with the replacement of the stimulator. They were approximately $180,000. In this lawsuit she sought recovery from Cosby. Fault was not a jury issue. Cosby did not call any witnesses at trial. His defense focused that the collision was minor, and Clem had a history of other events that could have damaged the stimulator, including a motorcycle accident and a fall down a set of stairs.

This case first came to trial in June of 2012. That jury awarded Clem damages of $9,000. She moved for additur, the court granting $188,513 in additur. The defendant balked, and the case was set for trial again.

The second trial was conducted in February of 2013. This time Clem took an award of just $1,766. She again sought relief and Judge Ellis ordered $188,514 in additur for the second time. The defendant again objected.

The third trial was set for March of this year. As the case went to the jury, Judge Ellis took a different tack. He granted summary judgment to Clem on her medicals of $176,814, and thus the jury would only consider her non-medical bill damages.

The third jury (hearing the proof in a single day) awarded Clem $6,000. The court has since entered a judgment for Clem for $182,814, including the $6,000 and $176,814 more in medical bills. The same lawyers for the parties tried all three cases.

Medical Malpractice - The plaintiff suffered a bleeding complication and a bile leak following a laparoscopic cholecystectomy

Reed v. Dozier, 11-331
Plaintiff: Charles H. Smith, III and Leslie S. Bowers, *Gentry Locke Rakes & Moore*, Roanoke
Defense: Powell M. Leitch, III, *LeClair Ryan*, Roanoke
Verdict: Defense verdict on liability
Court: **Wise Circuit Court**
Judge: Tammy McElyea
Date: 11-21-13

Kermit Reed, then age 70, reported to Norton Community Hospital with complaints of left flank plain. Reed was diagnosed with a pulmonary emboli and placed on anti-coagulants. Because his doctors were concerned about a mass in his gallbladder, they consulted a surgeon, Dr. Lance Dozier. Reed's history was complex because he had three prior melanoma cancers.

Dozier was concerned about the possibility of metastatic cancer and thought it unwise to wait for the anticipated six months to end to deal with the gallbladder mass. He therefore stopped the patient's anti-coagulation therapy long enough to perform a laparoscopic cholecystectomy on 10-2-09. It was uneventful. There was proof that prior to Dozier's discharge from the hospital three days later he was suffering from a surgical bleed.

Dozier went back to the hospital on 10-7-09 with anemia and then on 10-17-09 to the ER with more serious complaints. At this time he was

treated for a bile leak. Reed's course of treatment related to the bile leak was complex, and he incurred medical bills of $243,951.

In this lawsuit Reed alleged error by Dozier in several regards. First in performing the surgery at all, Reed alleged it was error in light of his being on anti-coagulants – this increased his risk of a bleeding complication and served to obscure evidence of the bile leak. Similarly it was Reed's theory that Dozier had mismanaged a bleed complication that was evidenced *before* Reed was first discharged from the hospital on 10-5-09.

Finally the plaintiff alleged that at the time of the discharge (and in light of the risk of a bleed), Dozier should have ended the use of anti-coagulants. The plaintiff's liability expert was Dr. Paul Lin, Surgery, George Washington Hospital.

Dozier defended the case that the decision to perform surgery in the first place was reasonable especially in light of Reed's history of cancer – Dozier feared a recurrence. Then in managing the bleed, Dozier explained that while a radiology report the day before discharge indicated a problem, it was only dictated and not read by Dozier until after discharge. Thus, all Dozier had to review was a preliminary report that did not indicate an ongoing bleed.

Dozier also discussed the bile leak. He explained it developed post-operatively and would have been very difficult for him to diagnose. Dozier's experts were Dr. Paul Armstrong, Surgery, Abingdon and Dr. Robert Bass, Surgery, Lynchburg.

This case was heard by a Wise County jury for four days. The jury's verdict was for Dozier, and Reed took nothing. A defense judgment was entered.

The plaintiff has since moved for a new trial. Reed argued (1) there was overwhelming proof of negligence by Dozier in not stopping anti-coagulants in light of the post-surgical bleed, and (2) Dozier had purportedly changed his testimony regarding his knowledge of the bleed. The motion was heard in Lee County on 3-24-14 by Judge McElyea. She ruled from the bench and denied the motion. While not yet entered in the record, at the time this report was prepared a final order had been forwarded to the court for entry.

Breach of Circus Contract -

Two circus performers (who juggle while riding horses) alleged Ringling Brothers terminated their contract after refusing to move them in the show's order from following the tiger act – the tigers tended to spook the horses

Donnert v. Ringling Bros. and Barnum Entertainment, 1:13-40
Plaintiff: R. Wayne Pierce, *The Pierce Law Firm*, Annapolis, MD and Jason M. Setty, Niles *Barton & Wilmer*, Baltimore, MD
Defense: William B. Porter and Laurie L. Proctor, *Blankingship & Keith*, Fairfax
Verdict: $114,200 for plaintiffs
Federal: **Alexandria**
Judge: T.S. Ellis, III
Date: 11-15-13

Robert and David Donnert are circus performers who hail from the famous horse-training Donnert Family from Hungary. Their act features a juggling and comedy acrobatic performance with horses. The Donnerts struck an employment contract with the acclaimed Ringling Bros. and Barnum Circus to showcase their talents. The deal provided for both their employment and the lease of horses used in the show.

The trouble for the Donnerts started with the order of the circus acts. Preceding the horses in the show of the circus was a tiger act. Tigers and horses do not mix. One of the horses used in the act (Cornbread) was especially spooked by tigers.

During one show an uncomfortable Cornbread trampled David. The Donnerts knew there was a problem and went to circus bigwigs. They sought an accommodation -- namely, that their act not be placed in order after the tigers.

The circus took the position that it would direct the order of performances and this order was tigers followed by horses. The Donnerts balked. Thereafter Ringling Bros. canceled the contract.

The Donnerts sued and alleged a breach of contract by the circus. They sought unpaid sums for their efforts as well as for lease of the horses. Ringling Bros. defended and postured that it had the sole authority to determine the order of the show. When the plaintiffs would not perform as directed, they had no choice but to terminate the act. The plaintiffs countered their termination letter indicated specifically that it was not for cause.

The jury's verdict was for the plaintiffs on the breach of contract count. Each plaintiff took $57,200 in damages, representing $30,800 for the contract and $26,400 more for the lease. The combined verdict totaled $114,200. A consistent judgment was entered.

Ringling Bros. moved for a new trial and repeated its argument that it and it alone was to determine the show's order. The motion was denied, and the circus has since taken an appeal.

Disability Discrimination - A bakery manager at Golden Corral with a visual disability and who used taxis (sometimes unreliable ones) alleged her employer failed to accommodate her disability and excuse her tardiness

White v. Golden Corral, 4:13-27
Plaintiff: Todd M. Gaynor and Gregory W. Klein, *Taylor & Walker*, Norfolk
Defense: Scott W. Kezman and Mark E. Warmbieer, *Kaufman & Canoles*, Norfolk
Verdict: Defense verdict on liability
Federal: **Newport News**
Judge: Raymond A. Jackson
Date: 4-2-14

Glorienne White was hired as the assistant bakery manager in June of 2006 at the Golden Corral restaurant in Hampton. The restaurant serves buffet family-style food. White suffered from a visual disability and couldn't drive. That required her to rely on a bus or a taxi to get to work – she lived a few miles away.

Because of her visual disability, White sought several accommodations from Golden Corral: (1) permitting her to be tardy on occasion as taxis were unreliable, and (2) providing her a printed schedule in advance. [Because of her vision disability, it was not easy for her to read the schedule on the computer.]

For most of her tenure at Golden Corral (some 42 months), White was accommodated. She was let go in April of 2010. Golden Corral explained that White was let go for excessive tardiness.

In this lawsuit White alleged Golden Corral had engaged in disability discrimination in failing to accommodate her tardiness. She argued Golden Corral could reasonably (it did for 42 months) permit her to occasionally be late to work. She also alleged retaliation, Golden Corral firing her for having complained that several co-workers were illegal aliens – that claim was dismissed by summary judgment.

Golden Corral defended on the merits that tardiness was not a question of accommodation. It suggested that White had lots of ways to get to work, including using a carpool, a different taxi company, or even taking the bus. In fact in February of 2010 (two months before the firing), the company warned her about her tardiness. Then in the next two months before her firing, White was late to work some 25 times.

The court's instructions required White to prove all of the following: (1) she had a disability, (2) she was a qualified individual, (3) Golden Corral had notice of her condition, (4) a reasonable accommodation existed, and (5) Golden Corral refused to make it. The answer was for White on the first four questions, the jury (fatal to White's claim) answering "no" that Golden Corral had not refused the accommodation. That ended the deliberations, and White took nothing. A defense judgment was entered.

Auto Negligence - The plaintiff (a city bus passenger) complained of a cervical disc injury after a minor rear-ender

David v. Rogers, 13-2305
Plaintiff: Robert C. Slaughter, III, *Rutter Mills*, Norfolk
Defense: Lindsey M. Cole, *GEICO Staff Counsel*, Norfolk
Verdict: $847 for plaintiff
Court: **Virginia Beach Circuit Court**
Judge: William R. O'Brien
Date: 3-25-14

There was a minor chain reaction rear-ender on 10-28-11 in Virginia Beach. Kaya Rogers struck a vehicle which was then pushed forward into a municipal bus. Linda David, a passenger on the bus, was jostled in the collision. Fault was no issue.

David has since treated for the aggravation of a degenerative cervical disc condition. Dr. Grant Skidmore, Neurosurgery, Virginia Beach, later performed a diskectomy repair. David's medical bills are not reflected in the court record.

In this lawsuit David sought damages from Rogers and blamed her disc injury and surgery on the crash. Rogers defended that the collision with the bus was too minor to have caused a compensable injury. Her best proof was video from the bus itself, a passenger on the bus not even altering their gait at the moment of the impact. A defense expert, Dr. John Williamson, Orthopedics, Norfolk, disputed the link between the claimed disc injury and this collision.

The jury's verdict was for David, and he took a general award of $847. Nearly two months later no motions had been filed, nor had a judgment been entered in the record.

Medical Malpractice - The plaintiff's cystic duct was transected during a gallbladder surgery

Loupin v. Garwood, 12-147
Plaintiff: David M. Kopstein, *Kopstein & Associates*, Seabrook, MD
Defense: Walter H. Peake, III, *Frith Anderson & Peake*, Roanoke
Verdict: Defense verdict on liability
Court: **Rockingham Circuit Court**
Judge: Thomas J. Wilson, IV
Date: 10-31-13

Dana Loupin underwent a laparoscopic gallbladder surgery on 4-15-10. It was performed by a surgeon, Dr. Robert Garwood. During the procedure Garwood transected Loupin's cystic duct. Loupin endured a complex course thereafter, part of his intestine being harvested to restore his bile flow.

In this lawsuit Loupin alleged error by Garwood in failing to properly identify and protect his anatomy to avoid the injury. It was also suggested that an intra-operative cholangiogram would have prevented the injury. Loupin's liability expert was Dr. Gregory Schroeder, Surgery, Richmond.

Garwood defended that while he had misidentified the anatomy, this did not represent error because Loupin's anatomy was unusual. His expert, Dr. Robert Ripley, Surgery, Salem, explained this injury can and does occur in the best of hands.

This medical case was tried for three days. The jury's verdict was for Garwood, and Loupin took nothing. A defense judgment was entered.

Loupin moved for a new trial and argued it was error to exclude testimony from Garwood himself that the result would have been different had he performed an intra-surgery cholangiogram. Garwood answered that, (1) he couldn't be compelled to be an expert against himself, and (2) his opinion was speculative. Loupin replied that he wasn't compelled . . .it was a volitional party admission made in deposition. The motion was denied by Judge Wilson in a 1-15-14 order.

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