In The

Supreme Court of Virginia

RECORD NO. 080008

CENTRA HEALTH, INC.,
t/a Lynchburg General Hospital,

Appellant,

v.

LEONARD J. MULLINS and ELIZABETH SHERGILL,
Administrators of the Estate of
LEONARD MULLINS, Deceased,

Appellees.

BRIEF OF *AMICUS CURIAE* THE VIRGINIA TRIAL LAWYERS ASSOCIATION

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QUESTION PRESENTED

In a case where the cause of death is in dispute and the plaintiff has either a viable survivorship claim or a wrongful death claim, must the plaintiff abandon one claim or may the plaintiff submit the alternative facts and claims to the jury? (Assignment of error No. 1).

FACTS

The following are the pertinent facts construed most favorably to the plaintiffs who come before this Court with a favorable jury verdict approved by the trial court. *Oney v. Jamison*, 175 Va. 420, 9 S.E.2d 346 (1940):

Leonard Mullins was admitted to Lynchburg General Hospital[1] on November 3, 2004 for treatment of a hip fracture. He was briefly discharged on November 12, only to be readmitted the following day with a urinary tract infection. (App. 294). Mr. Mullins remained a patient of the Hospital until his death on November 21, 2004.

Mr. Mullins developed a urinary tract infection, sepsis, pain, fever and other serious injuries as a result of negligent nursing care. (App. 330-49). The Administrators introduced both expert and lay testimony of Mr. Mullins' pain and suffering. (*See*, *e.g.*, App. 330-49; 388-89; 392-99). The Administrators further introduced expert testimony that Mr. Mullins sustained injuries and those injuries were also a cause of his death. (App.

[1] Lynchburg General Hospital is owned and operated by the Appellant. Hereinafter it will be referred to as the "Hospital."

330-49). The Hospital introduced expert testimony that Mr. Mullins died of complications from his hip fracture and other pre-existing conditions. (App. 503-504).

The parties differ as to whether Mr. Mullins' serious injuries were a cause of his death. The jury found that Mr. Mullins' injuries were not a proximate cause of his death and awarded the Administrators damages for the decedent's personal injuries, but not his death.

ARGUMENT

I. The Trial Court Properly Denied The Hospital's Motion To Compel The Administrators To Elect A Remedy

The trial court properly denied the Hospital's motion to compel the Administrators to elect a remedy because Virginia law does not allow one party to compel his opponent to abandon a viable cause of action and risk that the jury will find that he wrongly chose which cause of action to pursue. Instead a litigant is permitted to plead alternative and inconsistent facts, theories, and demands for relief so long as the litigant does not recovery inconsistent remedies. *See* Rule 1:4(K); Va. Code § 8.01-281.

§ 8.01-281(A) provides, in pertinent part, "a party asserting a claim … may plead alternative facts and theories of recovery against alternate parties, provided that such claim, defenses, or demands for relief so joined arise out of the same transaction or occurrence." *See also* Rule 1:4(K)

which contains almost identical language. § 8.01-281 was enacted to permit a party to "present alternative statements of facts or alternative legal theories." *Powers v. Cherin*, 249 Va. 33, 37, 452 S.E.2d 666, 668 (1995), *citing Revision of Title 8 of the Code of Virginia*, *Report of the Virginia Code Commission to the Governor and The General Assembly of Virginia*, 1 *House & Senate Documents*, H. Doc. No. 14 at 185, 191 (1977).

The Administrators' right to plead in the alternative also permitted them to submit their alternative theories of recovery to the jury. A party is "entitled to plead alternative theories of recovery, based on claims arising out of the same occurrence, **and to have their case submitted to the jury on those alternative theories."** *Cooper v. Horn*, 248 Va. 417, 423, 448 S.E.2d 403, 406 (1994) (*citing* Rule 1:4(K) and § 8.01-281) (emphasis added). *See also Hoar v. Great Eastern Resort Management*, *Inc.*, 256 Va. 374, 382, 506 S.E.2d 777, 782 (1998); § 8.01-281(B) (stating that the trial court may bifurcate the trial of alternative claims).

This case epitomizes the danger of adopting the Hospital's position that the Administrators should have been compelled to elect a remedy. As the Administrators are supported by a jury verdict approved by the trial judge, the Court must accept that the Hospital was at fault for Mr. Mullins' injuries. If the trial court had ordered the Administrators to elect a remedy,

they may have elected incorrectly and chosen wrongful death. In that scenario, the Hospital would have avoided any legal responsibility for Mr. Mullins' injuries and the Administrators would have recovered nothing even though the Hospital was found to be at fault for Mr. Mullins' injuries.

II. *Hendrix v. Daugherty* Does Not Bar a Party From Pursuing Alternative Remedies

The Hospital's reliance upon *Hendrix v. Daugherty*, 249 Va. 540, 457 S.E.2d 71 (1995), is misplaced. *Hendrix* was a legal malpractice action arising out of the defendants' representation of plaintiffs in a medical malpractice action. There, plaintiffs' infant son Nicholas suffered hypoxia and cardiopulmonary arrest at the Children's Hospital of the King's Daughters (CHKD). He died seventeen months later.

Prior to his death, the plaintiffs retained attorneys who filed suit against the CHKD and later added the manufacturer of a medical device. After Nicholas died they amended their Motion for Judgment to add a claim for wrongful death. They subsequently suffered a voluntary non-suit. Plaintiffs refiled alleging wrongful death and survivorship. Unlike the case at bar, their attorneys consented to an Order requiring them to elect a remedy and they abandoned their survivorship claim. (See *Hendrix* Appendix p. 236, attached as Exhibit A). Subsequently, the defendants filed a plea of statute of limitations to the wrongful death claims which was granted

because under prior law a non-suit did not toll the statute of limitations in a wrongful death action.

Critical to the application of *Hendrix* to the case at bar, is that in *Hendrix* this Court implicitly rejected the defendants' assertion that they were required in the underlying proceeding "to elect between the legally inconsistent survival cause of action and wrongful death cause of action" and therefore as a matter of law they could not be found negligent for abandoning one cause of action. *Hendrix*, 249 Va. at 546-47, 457 S.E.2d at 75-76. Instead, the Court interpreted both the survivorship and the wrongful death statutes to permit only one **recovery**, but the Court not bar the attorneys from pursuing alternative claims for wrongful death and survivorship. *Id.*

The Court's statement that the plaintiff must elect a remedy at an appropriate time after discovery was not essential to the Court's decision and reflected the unique procedural posture of *Hendrix* as a legal malpractice action. As the Hospital correctly observes a legal malpractice action is "a case within the case" and the plaintiff in a legal malpractice action "must present virtually the same evidence" that would or should have been presented in the underlying tort action. *Whitley v. Chamouris*, 265 Va. 9, 11, 574 S.E.2d 251, 252-53 (2003).

In the *Hendrix* underlying medical malpractice case, the parties consented to an order that the plaintiffs must elect a remedy pre-trial. (Exhibit A). That became the law of the case. *See Kondaurov v. Kerdasha*, 271 Va. 646, 658, 629 S.E.2d 181, 186 (2006). In the subsequent legal malpractice action, the plaintiffs did not allege that their attorneys were negligent for consenting to the order. Therefore, just as in the underlying medical malpractice action, the plaintiffs in the subsequent legal malpractice action were required to make a pre-trial election of which remedy to pursue.

The Court's discussion that the plaintiff must elect a remedy after discovery was not essential to the outcome of *Hendrix*. Only the portion of an opinion necessary to determine the outcome of a case is controlling in future cases. *See*, *e.g.*, *Scott v. State Farm Mut. Auto. Ins. Co.*, 202 Va. 579, 582-83, 118 S.E.2d 519, 522 (1961). *Hendrix* was decided on demurrer. The only issue necessary for the Court to decide was whether the pleadings could survive a demurrer. *When* the plaintiffs must elect a remedy was not necessary to the decision of the case and therefore was not part of the Court's holding.

Even if the Court finds *Hendrix* to be factually analogous and controlling, the Court's statement that the plaintiff must elect a remedy at

an appropriate time "after discovery" does not require that an election be made pre-trial. In *Hendrix*, the Court stated that at some appropriate time after discovery the plaintiff must elect a remedy and the plaintiff may not receive a recovery under both the survivorship and the wrongful death statutes. The Court left open the question as to when the "appropriate time" is other than "after discovery." Importantly, the Court did not address the situation in the case at bar where after discovery there remained a genuine factual dispute regarding the decedent's injuries and whether those injuries were a cause of death. In the case at bar the appropriate time after discovery was once the jury made the factual determinations, but prior to entry of a judgment.

In many cases the "appropriate time" will be the completion of discovery. For example, responses to Requests for Admission, expert designations, and stipulations may show that the nature of the injury, whether it be wrongful death or personal injury, is not in dispute. In those cases it may be proper for the trial court to order the plaintiff to elect a remedy. However, where the injuries and cause of death remain in dispute, such as the case at bar, the appropriate time is after the jury has made its factual determinations yet before a judgment is entered.

III. Virginia Circuit Courts That Have Interpreted *Hendrix* Have Distinguished It in Medical Malpractice Actions Where the Cause of Death is in Dispute

Circuit courts throughout the Commonwealth have consistently distinguished *Hendrix* and held in medical malpractice actions that it is a jury issue when the plaintiff pleads both survivorship and wrongful death claims in the alternative, and the cause of death is in dispute. The rationale for permitting the plaintiff to plead in the alternative was well explained by Judge William R. O'Brien of the Circuit Court of the City of Virginia Beach:

> Whether the defendants' negligence caused injuries or death is a fact for the jury to determine. It would be unjust to force a plaintiff to choose one theory of recovery only to discover that the jury reached the opposite conclusion. Plaintiff would be left without a remedy even though the defendant was found to be at fault.

Williams v. Medical Facilities of America, 2005 WL 3533670 (Cir. Ct. Va. Beach, Feb. 16, 2005) (App. 78-80); *Thornburg v. Manor Healthcare Corp.*, LX-2509-3 (Va. Cir. 1995) (App. 81) (holding that that Va. Code § 8.01-281 permits the plaintiff to plead and prove alternative and conflicting facts, claims, and remedies); *McGuinn v. Mount Vernon Nursing Center Assoc., L.P.*, 44 Va. Cir. 453, 454-55 (Fairfax, 1988) (holding that should the cause of death remain in dispute both survivorship and wrongful death claims will be submitted to the jury); and *Tucker v. Ware*, 10 Va. Cir. 454, 456-57 (City of Richmond 1988).

Likewise, sister states have held that a plaintiff can submit to the jury alternative theories of survivorship and wrongful death. *See*, *Alston v. Britthaven*, 177 N.C. App. 330, 628 S.E.2d 824 (2006); *Cahoon v. Cummings*, 734 N.E.2d 535, 542-43 (Ind. 2000) (holding a plaintiff can plead alternative and inconsistent theories of recovery, and he need not elect between wrongful death and survival claims before trial); *King v. Cooper Green Hospital*, 591 So.2d 464, 465-67 (Ala. 1999) (holding plaintiff has a right to try her case on alternative theories of relief and is not required to make a pre-trial election between wrongful death and survival claims).

The circuit court decisions cited by the Hospital are readily distinguishable. For example, in *Twist v. Martin*, 71 Va. Cir. 315 (2007), the opinion suggests that the plaintiff's counsel voluntarily elected to pursue a survival claim and abandoned the wrongful death action. In *DeRoa v. Meloni*, 14 Va. Cir. 62 (1988)**,** the opinion does not indicate whether the cause of death was in dispute. Likewise, the court in *Atkins v. Chesler*, 50 Va. Cir. 365 (1999), held that the plaintiff could amend his wrongful death action to add a claim for survivorship. The trial court did not analyze *Hendrix* or comment on whether the case was distinguishable.

IV. The Hospital's Claim Of Prejudice Is Without Merit As It Failed To Seek A Cautionary Jury Instruction

The Hospital incorrectly claims that it was prejudiced because the jury heard evidence of the beneficiaries' grief, which was not an element of damages in a survivorship action. However, the jury was properly and carefully instructed that it could not award damages for both wrongful death and survivorship. (App. 815). It is rudimentary that the jury is presumed to follow the court's instruction. *Stump v. Doe*, 250 Va. 57, 62, 458 S.E.2d 279, 282 (1995), *Beavers v. Commonwealth*, 245 Va. 268, 280, 427 S.E.2d 411, 420 (1993). Here there is no evidence that the jury did not follow the court's instruction.

It is not unusual in a trial for the plaintiff to submit evidence of multiple injuries and the jury finds that not all of the claimed injuries were proximately caused by the defendant. For example, jurors often hear very compelling and sympathetic testimony of injuries that becomes irrelevant if the jury finds the defendant was not negligent. Likewise, juries may also hear enraging testimony about the defendant's misconduct, like drunk driving, that becomes irrelevant if the jury finds that the plaintiff was not injured.

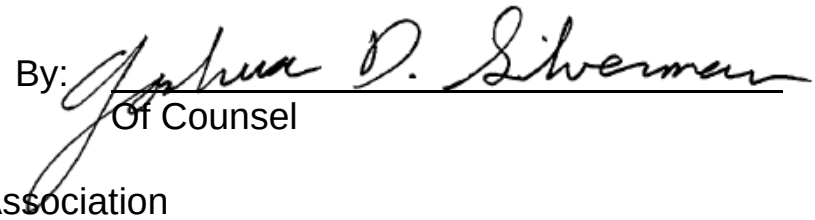
In each of those examples, the remedy is an instruction to the jury that it should not be motivated by bias or sympathy. *See*, *e.g.*, Va. Pract.

Jury Instructions, § 10:4 (2007 ed.). Likewise, if the Hospital believed that the jury would improperly consider evidence irrelevant to the appropriate remedy, the Hospital had the burden of requesting a cautionary instruction. *Cf. Cheng v. Comm.*, 240 Va. 26, 40, 393 S.E.2d 599, 607 (holding "[a] trial court is not required to give a cautionary instruction, *sua sponte*; rather, a defendant must request such an instruction where appropriate"). By failing to ask the court to instruct the jury to disregard certain evidence, the Hospital can not now complain that the jury considered evidence not relevant to its ultimate finding on the cause of death.

CONCLUSION

The Virginia Trial Lawyers Association respectfully asks this Court to affirm the verdict. The trial court properly submitted the disputed issues of fact to the jury. The jury heard the evidence, resolved the issues of fact and rendered a verdict based on proper instructions. The jury's verdict should be respected and affirmed.

VIRGINIA TRIAL LAWYERS ASSOCIATION

By: 
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CERTIFICATE PURSUANT TO RULE 5:26(d)

I hereby certify that, pursuant to Rule 5:26(d), twelve paper copies and one electronic copy of the foregoing Brief of the Virginia Trial Lawyers Association have been hand-filed with the Clerk of the Supreme Court of Virginia and three paper copies of the same have been sent via U.S. Mail, postage prepaid, this 8th day of August, 2008, to the following:

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V I R G I N I A:
IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART I

THOMAS E. HENDRIX AND MATTIE D. (HENDRIX) FORBES, Individually and as Administratrix of the Estate of NICHOLAS B. HENDRIX, Deceased,

Plaintiffs,

v. LAW NO. 29643

GUY E. DAUGHERTY, HOWELL, DAUGHERTY, BROWN & LAWRENCE AND THOMAS J. GALLO,

Defendants.

TRANSCRIPT OF PROCEEDINGS

DATE: February 9, 1994.

BEFORE: The Honorable Nelson T. Overton.

APPEARANCES: BRIAN D. LYTLE, ESQ. AND KENNETH HARDT, ESQ.,
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clearly set. Counts one and two say the wrongful death action was a valid cause of action. We have alleged that death was caused by the underlying negligence. This is counts one and two.

One is, I believe one is tort and two is contract. Counts one and two are the wrongful death action is a valid action, that these defendant attorneys were negligent for allowing that wrongful death action to be dismissed by the statute of limitations. So that is count one, two.

Count three and four we allege in the alternative, as permitted to do, we allege that survival action, the death was not caused by the underlying negligence and they were negligent in electing a dismissal with prejudice of not electing but allowing a dismissal with prejudice of the survival action. That is counts two, three and four.

Counts five and six is again pled in the alternative and it again goes back and says the wrongful -- there was a wrongful death cause of action. The death was caused by the underlying negligence and we allege that specifically in each of the separate counts as alternative and in counts five and six we said the statute of limitations hadn't expired, they should have argued the relation back doctrine because relation back

THE COURT: They didn't argue?

MR. HARDT: No. There is an order to the Court that they consented to the election and not only did they consent to the election, in the order it said whichever one you choose not to pursue, we are going to dismiss with prejudice and they consented to that so and then they chose wrongful death which basically under the order that they consented to amounted to a dismissal with prejudice of the survival action.

Well, a couple months later the defendants in that case filed a motion for summary judgment based on the statute of limitations ground saying that the wrongful death cause of action is barred by the statute of limitations and the only arguments that they made was well the reason the Virginia Supreme Court decision on the statute of limitations issue is wrong, we think they should revisit it, the General Assembly to provide the statute. That is the only thing they argued. They didn't argue relation back or anything else, and we will present evidence that in the form of expert testimony that what they did at these various stages was breach the standard of care of attorneys.

Now, that is the background of this case and so we filed and began, as Mr. Lytle has argued, we filed alternative and inconsistent counts. They are