V I R G I N I A :

IN THE CIRCUIT COURT OF THE CITY OF STAUNTON

WANDA D. MEEKS, ADMINISTRATOR OF THE ESTATE OF JODY HILTON SWISHER — **Plaintiff**

v. — **Case No.: CL03-03**

RICHARD G. BROSCHINKSI — **Defendant**

REPLY TO DEFENDANT'S MOTION TO EXCLUDE TESTIMONY OF DONALD JASON, M.D.

Introduction

This case is before Your Honor because Mr. Broschinski did not do what he was supposed to do. If Mr. Broschinski had done what he was supposed to do, the rescue team would have found either that Jody was dead, or that Jody was alive. If Jody was already dead when rescue arrived, there would be no case. If Jody was still alive, he would have been rescued and there would be no case. It is only because Mr. Broschinski did not do what he was supposed to do, that we are here on this case.

The defense incorrectly claims that it is the plaintiff's burden to prove exactly how long Jody Swisher lived following the accident. Their position is that since Dr. Jason cannot specify the exact time of death, his testimony should be excluded. This position is not supported by the law and policy applicable where the defendant has created the specific circumstance presented in this case.

I. **In a death case, if a dispatcher, by inaction, has destroyed any substantial possibility of the patient's survival, does such conduct become a proximate cause of the patient's death as a matter of law?**

Failure of Mr. Broschinski to act has created a unique causation issue and entitles the plaintiff to the presumption that Jody was alive until the defendant is able to prove Jody was dead. This is a right and just presumption. What the defendant has done by his grossly negligent act is, first, to have failed to send aid to the injured Jody Swisher when he knew, or should have known, that the probable result would be an untoward outcome; and next, as a result of his failure to act he made it more difficult to prove causation of the damaging results of his own act. He has violated not only the victim's substantive right to be rescued, but he has also culpably impaired Jody Swisher's ability to establish liability. By failing to act on the 911 call, he has, in effect, destroyed Jody Swisher's power of proof. The legal consequence of that under modern jurisprudence is a shifting of the burden, and puts the onus on Mr. Broschinski to exculpate himself.

Analogously, in all jurisdictions, there has long existed a rule of evidence that if a party intentionally or fraudulently destroys a written document with the intent to suppress evidence, its content is presumed to have been detrimental to him. Omnia prae sumuntur contra spoliatorem. (All things are presumed against a despoiler or wrong-doer.) Here Mr. Broschinski not only destroyed Jody Swisher's opportunity to survive, he destroyed the opportunity of the plaintiff to even prove exactly when he died.

Plaintiff will introduce evidence that Jody Swisher was struck by a car, that a 911 call was placed and that there was no response dispatched by Mr. Broschinski, even though that was his job and duty.

In multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the "but-for" cause

> of the plaintiff's injury. See *e.g., Summers v. Tice*, 33 Cal. 2d 80, 84-87, 199 P.2d 1, 3-4 (1948). The same rule has been applied where the effect of a defendant's tortious conduct combines with a force of unknown or innocent origin to produce the harm to the plaintiff. See *Kingston v. Chicago & N.W. R. Co.*, 191 Wis. 610, 616, 211 N.W. 913, 915 (1927) ("Granting that the union of that fire [caused by defendant's negligence] with another of natural origin, or with another of much greater proportions, is available as a defense, **the burden is on the defendant to show that . . . the fire set by him was not the proximate cause of the damage**"). See also 2 J. Wigmore, Select Cases on the Law of Torts § 153, p. 865 (1912) ("When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that one of the two persons, or one of the same person's two acts, is culpable, **then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm**"). *Price Waterhouse v. Hopkins,* 490 U.S. 228, 263-264 (1989). (Emphasis added.)

The United States Supreme Court and the Virginia Supreme Court are of one accord. Both courts recognize the rightness of requiring the defendant to prove someone else is the sole cause of harm. It is a recognition that it is just to require the defendant to exonerate himself in the special situation where it is the exactly the result of the defendant's bad act which prevents the plaintiff from carrying what would otherwise be the plaintiff's burden. This is akin to the policy considerations seen with instances of spoliation - one can't destroy the evidence and then defend by saying, "You don't have the evidence to prove your case."

In *Whitfield v. Whittaker Mem. Hospital*, 210 Va. 176, 184, 169 S.E.2d 563, 568-69 (1969), the Court said:

> When a physician's or surgeon's negligent action or inaction has effectively terminated a person's chance of survival, he will not be permitted to raise

> conjectures as to possible chances for survival that he has put beyond realization. **If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable.** Rarely is it possible to demonstrate to an absolute certainty what would have happened if certain actions had been taken. The law does not in all circumstances require a plaintiff to show a certainty that a patient would have lived had he been operated on promptly. *Hicks v. United States*, 368 F.2d 626, 632 (1966); *Harvey v. Silber*, 300 Mich. 510, 2 N.W.2d 483, 488 (1942). *Accord, Gardner v. National Bulk Carriers, Inc.*, 310 F.2d 284, 91 A.L.R.2d 1023 (4th Cir. 1962), *cert. denied*, 372 U.S. 913, 83 S. Ct. 728, 9 L. Ed. 2d 721 (1963). (Emphasis added.)

In *Brown v. Koulizakis*, 229 Va. 524, 532, 331 S.E.2d 440, 446 (1985), the Court reiterated this principle: "Thus, in a death case, if a defendant physician, by action or inaction, has destroyed any substantial possibility of the patient's survival, such conduct becomes a proximate cause of the patient's death." Dr. Jason will testify that Jody Swisher had a good chance of survival had help been sent.

In *Blondel v. Hays*, 241 Va. 467, 473, 403 S.E.2d 340, ___ (1991), the Court discussed a trilogy of cases where the trial courts incorrectly decided the issue of proving proximate cause:

> We adhere to the view expressed in those cases, but it is instructive to examine the context in which that view was expressed. *Whitfield*, *Brown*, and *Hadeed* were each medical malpractice-wrongful death cases in which the trial courts struck the plaintiffs' evidence against the defendant physicians. In all three cases, the physicians had argued in the trial court, in substance, that there was no evidence that the patients would have recovered, or that death could have been averted, regardless of any negligence on the physician's part and that there was, accordingly, no evidence of proximate cause. The trial courts agreed, but we did not. We

reversed and remanded each case for a new trial, adopting the rationale expressed above.

If the wrongdoer's acts make it impossible for the plaintiff to meet the burden of proof -- i.e., if the dispatcher's total neglect prevents the plaintiff from proving, or even from learning one way or the other, whether the plaintiff's decedent was alive, then the wrongdoer should not benefit from that wrongdoing. The dispatcher must prove Jody Swisher was already dead by the time help could have arrived had it been sent. This is required under the U.S. Supreme Court's reasoning in *Price Waterhouse,* cited above. If he cannot meet that burden of proof, then he is "answerable".

The defense's objection to Dr. Jason is not an objection to him or to his knowledge. The same things that he can't know for certain are the same things nobody can know for certain. There is no person who can know the certainties that the defendant says must be shown. The defense's real objection to Dr. Jason is the fear that if Dr. Jason testifies, the jury will understand the nature of Jody Swisher's injuries and that he did not need to die from them. Dr. Jason can help the jury assess the proximate cause argument the defendant asserts, and he can do that without doing the impossible, which is knowing the precise time of death.

There is no person that can say for certain what will happen tomorrow, whether it will rain, whether one will be alive, whether a medical malpractice victim would have survived. All of us, experts and non-experts, form opinions based on the information available and our training, experience and intelligence. The basic function of the jury is to assess the conflicting evidence and weigh the validity of the testimony, whether it is based on direct observations, opinions or likelihoods. It is Dr. Jason's opinion that this person may have survived hours from after the impact. This will refute the defense expert's opinion that this person would not have survived his injuries long enough for help to arrive, if it had been summoned.

It is hard to imagine an ultimate issue of proximate cause that is more appropriate for the jury to resolve. Reasonable minds most assuredly could reach different conclusions based on the expert testimony and the other circumstances in evidence in this case. The defense says Jody Swisher could have lived for only minutes. Dr. Jason's opinion, to a reasonable degree of medical certainty, is that Jody Swisher could have lived for hours. The defense cannot prove for certain that he died in 10 minutes, anymore than Dr. Jason can prove he lived for three hours! When as a dispatcher, Mr. Broschinski's negligent inaction effectively terminated Jody's chance of survival, he will not be permitted to raise conjectures as to possible chances for survival that he has put beyond realization. The reasoning of *Whitfield v. Whittaker Mem. Hospital*, *Brown v. Koulizakis* and *Blondel v. Hays* is controlling of the causation issue in this case. It is ultimately for the jury to decide after reconciling the evidence, including the expert opinions.

II. Is the plaintiff entitled to the presumption that Jody was still alive until the defendant proves that Jody is dead?

There is a presumption that Jody Swisher lived until he was found dead the next morning. There is a presumption of the continuation of life and the shifting of the burden of proving the death onto the person relying on the death. *United States v. Jones*, 508 F.2d 1271, 1276 (4th Cir. 1975) was a kidnaping case in which the Davenport was shot twice with a .38 caliber revolver — once in his back and again in the left front chest. The coroner thought that the marks on the right elbow and back could have been caused prior to death, and the ones on the knees and left elbow after death. There were also abrasions on his back which, on account of signs of hemorrhaging, led the doctor to believe that they were suffered while Davenport was living. "In other words, his body could still pump blood through these areas." He explained that the first shot involved an injury to the lung, resulting in massive bleeding. A critical question in the case was whether or not Davenport was still alive when he was transported from Virginia to West Virginia. In affirming a conviction of Jones, the Court said:

> The coroner's observation that there may have been some circulation of blood in Davenport's body just before it was put in the ditch, becomes of particular force with the holding of *Allen v. Mazurowski et al.*, 317 Mass. 218, 57 N.E.2d 544 (1944) that there is a presumption that a person is living until the contrary is shown. Applied here, the presumption of law is that Davenport was alive in the ditch until his death there appeared.

Like Davenport, Jody Swisher was alive on the side of the road. As Dr. Jason said, his physical condition "...did not stop him from being conscious enough to make bloody finger prints on that fence." Jason deposition p. 40 at 23-25.

Dr. Jason's testimony will support the plaintiff's contention that although Jody is severely injured, he does not die. He comes to. He struggles to get up. His bloody finger prints are on the top rail of the fence, showing that he tried to get up, again and again.

When Dr. Jason was asked if the fracture of Jody's T4 and T5 vertebrae and associated injuries could be life-threatening, he replied, "If left unattended." When asked what does "unattended" mean? Dr. Jason answered, **"If he's allowed to lie there dying overnight."** When Dr. Jason was asked, "Well, how long could someone go untreated with this type of injury?" His reply, **"Hours."**

Dr. Jason will explain to the jury the various injuries that Jody sustained and how those injuries affect one's odds of survival. It is Dr. Jason's opinion that Jody Swisher was partially paralyzed from the spinal cord injury he received. He did not have the use of his legs and many of his chest muscles needed for breathing were paralyzed. However, he was still able to use his diaphragm to breathe. Dr. Jason cannot say exactly how long he would have survived and does not believe anyone can. However, Dr. Jason can say that in spite of his partial paralysis, Jody Swisher could use his arms as shown by his ability to leave bloody fingerprints on the fence. His death was obviously not instantaneous. His eventual death was due to the paralysis of his chest muscles with a possible contribution of some degree of spinal shock. The microscopic sections of the spinal cord injury do not show transection of the cord. In fact, almost all the cord nerve cells appear still alive, but the cord is swollen and engorged with blood in the region of the injury. According to Dr. Jason, if Jody had received timely care, he not only would have survived but probably would have recovered function.

By not sending help, the dispatcher's total neglect not only prevented Jody Swisher from receiving the aid he so badly needed, he robbed him of his chance of survival and made it impossible for anyone to prove with certainty that Jody would or would not have been alive when help arrived – because help did not arrive. The law does not allow the tortfeasor to benefit from his neglect. To escape liability, the dispatcher must be required to prove that Jody Swisher was already dead when help would have arrived. Dr. Jason will testify that the medical uncertainties are such that defendant cannot meet this burden.

In *DuPont-Bie v. Vredenburgh*, 490 F.2d 1057, 1060 (4th Cir. 1974), the Fourth Circuit held:

> It is well settled in the great majority of jurisdictions ...that there is a presumption of the continuation of life. Under this presumption, a person shown to have been alive at a given time is presumed to remain alive until the contrary is shown by some sufficient proof or, in the absence of such proof, until a different presumption arises. **The existence of such presumption shifts the burden of proving a person's death to the party who relies on such death.** (Emphasis added.)

An earlier Virginia Supreme Court case reached the same conclusion. In *Ashby V. Red Jacket Coal Corp*., 185 Va. 202, 209, 38 S.E.2d 436 (1946), the Court stated:

> 'The law presumes that a person shown to be alive at a given time remains alive until the contrary is shown by some sufficient proof, or, in the absence of such proof, until a different presumption arises.' 16 Am. Jur., p. 16. This presumption of continued existence remains in full force and effect until the passage of the seven-year period, as stated in Michie's 1942 Code, sec. 6239, and, in the absence of credible evidence to the contrary, is conclusive.

Issues of negligence and proximate cause are ordinarily questions of fact for a jury. This is definitely a case for the jury. The dispatcher is asking Your Honor to decide this case without hearing any evidence. Only when reasonable minds could not differ about such issues do they become questions to be decided by a court. *Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 285, 377 S.E.2d 589, 593 (1989). Causation will be an important issue as will the burdens of proof. In oral argument before Your Honor, defense counsel suggested that *Blondel, Admin.,* required your plaintiff to prove the time of death. This is a misreading of a part of the case which deals with jury instructions to be given in a medical malpractice

death case. The quote defense counsel gave needs to be presented in its true context:

> The appellant's argument in the present case illustrates the danger of the indiscriminate use of language from appellate opinions in a jury instruction; a danger often referred to in our opinions. *(Citations omitted)* Here, the plaintiff contends that the granted instructions require him to prove that the patient would have recovered perfect health, or survived indefinitely in the absence of the negligence. For that reason, the plaintiff argues that his instructions were proper. The plaintiff's burden, however, was simply to prove that the particular time and manner of the patient's death resulted from the defendant's negligence. In that respect, his burden is no different from that attendant upon any other actions for personal injuries or wrongful death.
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> The "substantial possibility of survival" standard, while furnishing the criterion for deciding a motion to strike, was never designed for the guidance of a jury. The jury's function in a medical malpractice-wrongful death case remains the same as in any other tort action: to decide the issues of negligence, proximate cause, and damages. The well-settled law on the subject of proximate cause was correctly expressed by Instructions 8 and 13, which the court granted. Under those traditional instructions, the plaintiff's theory of the case could have been readily established by proof that the defendant physician's negligence was a proximate cause of the patient's death because, in the absence of that negligence, her death would not have occurred when it did. *Blondel v. Hays,* 241 Va. 467, 474, 403 S.E.2d 340, ___ (1991)

Blondel does not support the defendant's contention that the plaintiff has the burden of proving the time of death. The fact that Dr. Jason cannot specify the hour and minute of Jody's death is not dispositive, as defense counsel suggests.

Conclusion

In the instant case, the defendant "put beyond realization" Jody's chances of surviving the injuries he sustained. The defendant now attempts to use the uncertainty of survival to do exactly what *Whitfield* and *Brown* disallow. The defendant seeks to exclude plaintiff's expert, in effect, because plaintiff's expert cannot say exactly when Jody died. The law does not require that of the plaintiff. All the law requires is that the plaintiff be allowed to put on evidence to refute the defendant's evidence, since the defendant has the burden of proving that his negligence was not a cause of Jody's death. The only way the defendant can do that would be to prove that Jody would have died before receiving medical care. They cannot do that, but they have proffered experts to attempt to prove that. Plaintiff has a right to put on her expert whose opinion differs.

WANDA D. MEEKS,
ADMINISTRATOR OF THE ESTATE
OF JODY HILTON SWISHER

By:_____
Of Counsel

John P. Harris, III
HARRIS & HARRIS, P.C.
1619 Jefferson Davis Highway
Fredericksburg, Virginia 22401
(540) 371-4941 - (Telephone)
(540) 899-9477 - (Fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of July, 2005, a true and correct copy of the foregoing has been furnished by facsimile and U.S. first class mail delivery, to Amy J. Inge, Esquire, DurretteBradshaw, PLC, 600 East Main Street, 20th Floor, Richmond, Virginia 23219.

_____

John P. Harris, III