

VIRGINIA LAWYERS WEEKLY

Vol. 23, No. 36

February 9, 2009

www.valawyersweekly.com

New tactic successful *Seeking punitives from drunken drivers*

BY PETER VIETH

Plaintiffs' lawyers hope that a recent ruling will help turn the tide against a series of decisions that has hampered their efforts to win punitive damages from drunken drivers.

The Jan. 13 ruling by Chesterfield County Circuit Judge Frederick G. Rockwell III doubled the settlement value of a case by allowing scientific testimony about the defendant driver's blood alcohol level.

The ruling in *Dimmick v. Pike* (VLW 009-8-024) is the latest in a string of decisions by courts in the Richmond suburbs addressing whether testimony by toxicologists is proper to show that a driver's blood alcohol concentration was greater than 0.15 percent at the time of an accident. Under Virginia law, that level marks the threshold for automatic jury consideration of punitive damages.

In *Dimmick*, the defendant had a BAC of 0.18 percent about two hours after causing the accident. The wreck led to about \$8,000 in medical bills for the plaintiff. Plaintiff's counsel F. Neil Cowan Jr. had agreed with defense lawyers to settle the case for \$50,000 if the toxicologist were allowed to testify, and for \$25,000 if the toxicologist were excluded.

The toxicologist is the link to punitive damages in many cases. Virginia Code § 8.01-44.5 creates a presumption favoring punitive damages if a defendant had a BAC of 0.15 percent or greater when the incident occurred. Since blood alcohol tests generally are done hours later, plaintiffs' lawyers use toxicologists to show the probable alcohol concentration at the time of the accident.

Defense lawyers often fight against the expert's "look back" testimony, arguing toxicologists improperly based their opinions on averages of medical data, not on the metabolism of the specific defendant at issue. Judges agreed in at least eight cases, deciding that the toxicology testimony was too speculative to allow into evidence. Defense lawyers had been successful in cases in Chesterfield County and, reportedly, in

NEGLIGENCE

Auto Accident – BAC – Toxicology Report

A Chesterfield County Circuit Court allows an opinion from plaintiff's expert toxicologist and denies defendant's motion to dismiss plaintiff's punitive damages claim.

The court finds that Dr. Alphone Poklis's use of "outside windows" of absorption and elimination rates, that were most favorable to the defendant in his calculation, not averages, as well as other data unique to the defendant and the facts of the case render his expert opinion admissible. The court denies defendant's motion to exclude the toxicology expert and denies the motion to dismiss the punitive damages claim.

Dimmick v. Pike (Rockwell, J.) No. CL 08-289, Jan. 13, 2009; Chesterfield Cir. Ct.; David W. Drash, F. Neil Cowan Jr. for the parties. VLW 009-8-024, 2 pp.

Hanover and Goochland circuit courts.

Rockwell's ruling departed from decisions by fellow Chesterfield County Circuit Judges Michael C. Allen and Hebert C. Gill Jr., who had previously excluded toxicology evidence to support punitive damages.

"I think it is a very significant development," said Richmond plaintiffs' lawyer Elliott M. Buckner, who assisted Cowan with the case. Buckner previously persuaded a Louisa County judge to reverse his ruling on the issue. He defends the validity of the toxicology evidence. "They were using sound, well-reviewed science. It was scientific testimony that has the requisite foundation. It shouldn't have been excluded."

The difference for Rockwell was a change in how the toxicologist supported his opinion, according to the judge's brief opinion letter. In previous cases where the defense prevailed, toxicology testimony was excluded when it was based on average rates of absorption and elimination of alcohol in the blood. A 2000 Virginia Supreme Court opinion rejected testimony that relied on average characteristics without evidence to show that the person in question was within the average range.

In the *Dimmick* case, however, the toxicologist stayed away from averages and testified, instead, about "outside windows" of human absorption and elimination rates. Even using outside levels most favorable to the defen-

dant, the toxicologist's opinion was that the defendant had a BAC over 0.15 percent at the time of the accident.

Cowan and Buckner credit Salem lawyer P. Brent Brown with helping to develop strategies to beef up the credibility of toxicology testimony.

"With good preparation and a good understanding of the science, we're not talking about averages in any form. We're talking about ranges of the human body," Brown said. The main message, said Brown, is that "drunk drivers don't get a walk."

Stanley P. Wellman, president of the Virginia Association of Defense Attorneys, said he was unaware of any effort in the VADA to coordinate attacks on toxicology testimony, although he noted that the strategy has been used with success by various defense lawyers, including attorneys at his firm.

Richmond attorney David Drash, who represented the defendant in the *Dimmick* case, said that the issue needs to be tested in each case. "The statute provides for a remedy — if you can prove what the statute says you need to prove. If you cannot prove it, you are not entitled to punitives," he said.

Buckner said the battles over the toxicology evidence will likely continue. "My guess is that the defense is still going to raise the issue. My hope is that they're no longer successful at it."

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