



## Did the Supreme Court of Virginia Really Hold That The “Eggshell Skull Rule” Extends to an “Eggshell Psyche”, in Its Recent Decision in *Kondaurov v. Kerdasha*?

*Thomas C. Junker, Esq.*

Personal injury plaintiffs’ lawyers around the Commonwealth undoubtedly will cite the recent decision of the Virginia Supreme Court in *Kondaurov v. Kerdasha*, 629 S.E. 2d 181; 2006 Va. LEXIS 71, as holding that a negligent defendant “takes the plaintiff as he finds him” both with regard to pre-existing physical as well as emotional or mental conditions (i.e., the “eggshell skull” rule also includes an “eggshell psyche”). And there is certainly a sentence in that opinion that appears effectively to say that. But there are also good arguments that the Court’s statement on that issue was mere *dicta*. Moreover, there are good arguments that should the Court ever confront a case where the issue is properly before it, that it may well rule that a defendant in a negligence case (where there is a physical impact) does not take a plaintiff “as he

finds him” with regard pre-existing emotional or mental hypersensitivity (i.e., the eggshell “skull” rule does not include an eggshell “psyche”), which is already the rule in Virginia in negligent infliction of emotional distress cases where there has been no physical impact. To arrive at that conclusion requires an understanding not only of the precise holding of *Kondaurov v. Kerdasha* and relevant precedent, but the facts and procedural history of the case as well.

In that regard, for a case with such potentially broad implications for future Virginia personal injury cases, the facts and procedural history of *Kondaurov v. Kerdasha* were anything but typical, even though it could have been a fairly garden variety personal injury automobile accident case. Specifically, the Plaintiff, Eve Kerdasha, was driving her Jeep on Route 110 near the Pentagon on November 16, 1998 when she braked for an emergency vehicle and was then rear-ended by a bus owned by the Russian Embassy, and driven by one of its employees, Vladimir Kondaurov. Kerdasha’s Jeep flipped over as a result of the collision, and was then struck two more times by other vehicles. Remarkably, given the violence of the collision, Ms. Kerdasha suffered only minor physical injuries, for which she was treated and released after a few hours at the Emergency Room of The George Washington University Hospital. What made the case really unusual was the fact that at

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## Letter From The Chair

*Vicki Hansen Devine, Esq.*

### ***Greetings to all!***

Once again, it is time. Time to reflect on the accomplishments of the Litigation Section; time to renew our efforts to ongoing projects; and time to establish new goals. It is my hope that the Board of Governors will continue to provide a valuable service to the State Bar, to members of the section and to the citizens of Virginia.

### **Proposed Codification of the Rules of Evidence**

As you have probably heard, a movement is afoot to codify Virginia's evidence rules. The first issue is whether they should be codified at all. The second issue is whether the proposed draft rules correctly state the current state of the law of evidence.

This Board of Governors debated the advantages and disadvantages of such a codification: the accessibility and ease of use of all evidentiary rules in one place vs. the fear that once codified, the rules would be somehow cast in stone and not be easily adaptable and the fear that in so doing, we might be taking a step toward the Federal Rules of Evidence. The Board voted in favor of supporting the codification.

At the request of the Committee drafting the proposed Rules of Evidence, the Chair appointed Board members to review the draft rules and report to the Committee, which was done.

### **Litigation News**

We published three editions of Litigation News last year and hope to publish four editions this year. Our newsletters contain scholarly articles from attorneys, references to recent law review articles of interest to litigators and a column written by judges. Board members either write or solicit articles for the publication. If you have encountered and analyzed a novel legal issue or if you would like to share an approach to a legal question, you are invited to contact Kevin Holt, the Editor, or one of the Board members with your proposal. We are always searching for articles that appeal to trial attorneys.

### **Law In Society Essay Contest**

Each year, the Virginia State Bar sponsors an essay contest for high school students that deals with how the rule of law affects us as individuals or as a society. Recent topics

include Shield Laws to Protect Journalists and Sources; College Admission and Affirmative Action; Personal Expression & First Amendment Rights of Students and Online File Sharing. The Litigation Section is pleased to have been able to help with the grading of the essays, and also to have contributed funds to be used for awards. We will continue to provide support, both pecuniary and non-pecuniary, to this venture. Our goal is to increase participation among all high schools in the state. If you know of a high school near you that might be interested in learning more about the contest, contact Dawn Chase at the Virginia State Bar office or any member of this Board.

### **Summer Meeting Workshop**

Each year, this Section hosts a seminar at the VSB Summer Meeting in Virginia Beach. Often, we have co-hosted more than one. Working with other VSB sections is a good way to integrate continuing legal education "across the borders." This past meeting, we co-hosted with the Family Law Section and the Bench/Bar Conference. Last year we teamed up with the Bankruptcy Section. We have been approached by the Criminal Law Section for next summer's workshop. We will continue to provide Continuing Legal Education at the Summer Meeting.

### **Midyear Legal Seminar**

In keeping with our CLE theme, we often provide speakers for the Midyear Legal Seminar. This year we will make a proposal for the Seminar that will be held in November, 2007.

### **Judges' Practice Guide**

A new project for not just the Litigation Section, but which would be a joint project with other sections, has been proposed. It would entail gathering practice and procedure guidelines for the federal and state court judges and publishing it online. The project sounds huge and would be beneficial to all who practice in Virginia courts. We will need lots of assistance in putting together all the information and I welcome your participation – just call or email me at 757-461-7100; vdevine@furnissdavis.com.

We want to be responsive to your needs. Please feel free to contact me or the Virginia State Bar with your ideas.



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# References: An Affirmative Duty?

*Christopher L. Spinelli*

## Consider the following hypothetical:

Paul, a friend and prospective client, is in Carl Counselor's office for an initial free conference. Paul explains to his friend Carl that Paul left his position with his former employer on bad terms. Now Paul is currently seeking employment, and has had several productive interviews. Paul has recently discovered, however, that his former employer has not been accepting any phone calls from prospective employers when those prospective employers call to inquire about Paul's past performance. "He never returns those interviewers' phone messages, either!" Paul wails. "It's a kind of secret code in the industry that means 'Don't hire this guy!'"

Notwithstanding whether Paul's assumption is correct, Carl Counselor briefly considers if any liability would attach to the former employer. Virginia Code Section 8.01-46.1 states that when an employer furnishes information about a current or former employee's professional conduct, that employer is immune from civil liability so long as he is acting in good faith. Moreover, good faith is a rebuttable presumption with a 'clear and convincing' evidentiary threshold. *Id.* But the problem in Paul's case doesn't fit § 8.01-46. Paul's problem is that the employer is not providing any information at all, and isn't even returning screened calls.

Surely the Commonwealth does not impose an affirmative duty on the part of the former employer to answer and respond to phone calls and provide references?

Off the cuff, Carl advises his friend Paul that there isn't much that can be done about it, but that the injury probably isn't as serious as Paul thinks. "Don't be so sure that a negative inference attaches just because your former employer doesn't answer phone calls from interviewers," Carl says. Paul takes his leave after the free consultation, feeling somewhat better after talking

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with his friend.

After Paul departs, Carl Counselor thumbs through the Virginia Code. He comes across § 40.1-27 of the Code, which reads in part:

No person doing business in this Commonwealth ... after having discharged any employee from the service of such person ... shall willfully and maliciously prevent or attempt to prevent by word or writing, directly or indirectly, such discharged employee ... from obtaining employment with any other person. Section 40.1-27 of the Code of Virginia.

Carl doubtfully considers both whether Paul could actually show malice on the part of the former employer when the former employer refuses phone calls from Paul's prospective new employers, and whether the former employer's refusal to respond to phone calls would be communication "by word or writing" under § 40.1-27. *Id.* He concludes that the answer to both questions is probably no.

What's more, does § 40.1-27 even create a private cause of action? Carl reviews the federal case cited in the case notes section of the statute, *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332 (E.D. Va. 1987). In that case, a federal court refused to consider whether Section 40.1-27 creates a private right of action, instead stating that the Virginia Supreme Court has recognized a cause of action for interference with a prospective business or economic advantage. The federal court relied upon *Glass v. Glass*, 228 Va. 39, 51-52, 321 S.E.2d 69, 76-77 (1984). *See also* Comment, "Potential Employer Liability for Employee References," 21 U. Rich. L. Rev. 427, 443-445 (1987) (providing a summary of relevant cases from other states).

In *Glass*, the elements of tortious interference with a prospective business or economic advantage are explicitly identified as: 1) the existence of a business relationship or expectancy, with a future economic benefit to plaintiff; 2) defendant's knowledge of that relationship or expectancy; 3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and 4) damage to plaintiff. *Glass*, 228 Va. at 51-52, 321 S.E.2d at 76-77.

*References: An Affirmative Duty? — cont'd on page 10*

## Eggshell *cont'd from page 1*

the June 2004 trial in Arlington Circuit Court before retired Judge J. Howe Brown, sitting by designation, Ms. Kerdasha and her counsel (Jeffrey Rosenfeld and Karen Kennedy) devoted almost no attention to Ms. Kerdasha's physical injuries, or even her emotional distress over her own injuries. Instead, they focused, almost exclusively, on the emotional distress and anguish Ms. Kerdasha allegedly suffered over the injuries to her dog, Sushi, who had been a passenger in the Jeep, and who had also been injured in the accident. (Sushi had been ejected from the car by the force of the collision, lost for a short period of time, and later found with a part of her tail cut off.) Sushi was also alleged to have suffered her own emotional distress as a result of the accident, and indeed Ms. Kerdasha's personal psychiatrist testified that he had also treated Sushi for her (its?) anxiety and other emotional problems caused by the accident. (No, I am not making this up.) (Incidentally, Judge Brown allowed Sushi to be present in the courtroom, sitting at counsel's table, throughout the three day jury trial.) Ms. Kerdasha also claimed that her emotional distress over the accident itself, and over the injuries to her dog, aggravated her pre-existing multiple sclerosis, as well as her own pre-existing depression and other psychiatric conditions. The Embassy and Mr. Kondaurov ("the Embassy"), represented by Grady C. Frank, Jr., Esq. and Megan S. Ben'Ary, Esq. of the Alexandria office of LeClair Ryan, admitted liability and defended on damages only.

At the close of Plaintiff's case, the Embassy moved to strike the Plaintiff's evidence insofar as she sought recovery for her emotional distress over the injuries to her dog, on the grounds that a dog was just the personal property of its owner under Virginia law, and that damages for injury to such property were limited to its diminution of value, plus reasonable expenses.

Plaintiff's counsel opposed that motion and Judge Brown agreed with them. Judge Brown found unpersuasive the Embassy's reliance on Virginia cases holding that plaintiffs could not recover for emotional distress

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over injury to other types of personal property, or even over injuries to one's child, as opposed to one's dog. (Apparently Judge Brown wanted a case "on all fours".) Judge Brown also denied the Embassy's proffered jury instruction that Ms. Kerdasha could not recover for her alleged emotional distress over the injury to her dog, and overruled the Embassy's objections to Plaintiff's proposed non-standard Virginia jury instruction that the jury could award the plaintiff damages "for all injurious consequences," whether foreseeable or not. (The Embassy had argued that giving such an instruction would invite the jury to award damages that were not properly allowable under

Virginia law, including Plaintiff's alleged emotional distress over the injuries to her dog.) The jury then returned a verdict in favor of the Plaintiff for \$300,000.

The Embassy appealed, and in a unanimous 7-0 opinion authored by Senior Justice Charles S. Russell rendered on September 16, 2005 and reported at 270 Va. 356, 619 S.E. 2d 457 (2005) ("*Kondaurov I*"), the Supreme Court of Virginia reversed and remanded, holding that a dog was just personal property under Virginia law; that a plaintiff could not recover for emotional distress over injury to such property, but only damages for the property's diminution in value, plus reasonable and necessary expenses; and that Judge Brown should have given the Embassy's proposed instruction to that effect and should not have given the Plaintiff's "all injurious consequences" instruction, for the same reasons. That portion of the Court's decision, frankly, was not unexpected, even though the Court did note that the question of whether one's dog is just personal property was a matter of first impression in Virginia.

However, what was unexpected was that the Court went further, and relying on its opinion in Hughes v Moore, 214 Va. 27, 34-35, 197 S.E. 2d 214, 219-20 (1973), held that a plaintiff in a negligence case such as this (where there was a physical impact) could not recover for emotional distress beyond that “reasonably expected to be sustained by a person of normal sensitivity and normal reactions under the circumstances of the case.” 270 Va. at 370, 619 S.E. 2d at 464. In doing so, although it did not explicitly use that phrase, the Court essentially held that the “eggshell skull” doctrine (defendant takes a plaintiff as he finds him in a negligence case) applies only to a plaintiff’s pre-existing physical condition, and not to a plaintiff’s pre-existing mental or emotional conditions. And in so holding, the Court expressly noted that the policy reasons supporting that decision (difficulty in proving causation, and the fear of fraudulent and exaggerated claims easily asserted and difficult to refute, requiring a more objective standard) applied in negligence cases whether there was physical impact or not (in Hughes the defendant’s negligence did not cause a direct physical impact upon the plaintiff). The Court stated:

Many of our decisions involving the recovery of damages for emotional distress have arisen in the context of “non-impact” torts, where a plaintiff has claimed injury, emotional, physical or both, without having been physically touched as a result of a defendant’s negligence. The present case involves a direct physical impact, resulting in some bodily injury to the plaintiff. Nevertheless, the policy considerations that have guided our decisions on the recovery of damages for emotional distress apply equally to both “impact” and “non-impact” cases, and we shall consider both categories together in discussing those policy considerations. (Emphasis added.)

Shortly after that decision in Kondaurov I, the Plaintiff, with the support of the Virginia Trial Lawyers Association (VTLA) as *amicus*, petitioned for rehearing, and in an almost unprecedented Order, the Court granted that petition, vacated its unanimous

September 16, 2005 decision, and set the case for further argument in March, 2006.

Not surprisingly, the rehearing briefing by both parties focused on the “no eggshell psyche rule” aspect of the Court’s Kondaurov I opinion, with the Plaintiff and the VTLA taking the position that the Court erred in even addressing that issue, on the grounds that it had not been briefed or even raised as an express assignment of error, and because the Embassy had also waived that argument that failing properly to object at trial to the introduction of such “hypersensitive” emotional distress evidence, and by agreeing to the standard Virginia Model Jury Instruction on aggravation of injury (VMJI No. 9.030) The Plaintiff and the VTLA further argued that the Court’s “no eggshell psyche rule” was wrong in any event, because it allegedly violated the equal protection clause of the United States Constitution, various federal laws concerning persons with mental or other disabilities, and other foreign precedent concerning the “eggshell skull” rule.

In reply, The Embassy acknowledged that the “eggshell psyche” aspect of the case had not been briefed, argued, or made an express assignment of error, but argued that the Court had not erred in opining on that issue as it was implicit in its other rulings and necessary to guide the jury on remand with regard to what were properly awardable damages. The Embassy was supported in that regard by an *amicus* brief filed by the Virginia Association of Defense Attorneys (VADA) (authored by Mark Frye, Esq. of Penn, Stuart & Eskridge in Bristol, Virginia). The Embassy also argued that there had been no waiver, because the Embassy had timely moved to strike and had objected to the relevant instruction, and that the Plaintiff and the VTLA’s federal constitutional and other arguments were without merit. Among other things, the Embassy pointed out that except for two otherwise distinguishable out of state cases, every one of Plaintiff’s cited cases in support of an “eggshell psyche” rule concerned a case where the defendant had acted intentionally so as to injure the plaintiff or cause her to suffer emotional distress, instead of acting merely negligently, as in this case.

On April 21, 2006, in yet another unanimous  
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## Eggshell *cont'd from page 5*

7-0 opinion (“Kondaurov II”), again authored by Senior Justice Russell, the Virginia Supreme Court again reversed the verdict in favor of the Plaintiff; again held that a dog was personal property under Virginia law; again held that a plaintiff could not recover for emotional distress caused by injury to such property; again held that The Embassy had not waived its right to challenge that aspect of Plaintiff’s case or the related instruction; and again remanded the case for trial on proper instructions. Indeed, that portion of the opinion in Kondaurov II was virtually unchanged from the corresponding parts of the Court’s opinion in Kondaurov I.

However, the Court completely deleted that aspect of its Kondaurov I opinion limiting recovery for emotional distress in this kind of negligence case (where there was a direct physical impact on the plaintiff) to that expected to be suffered by a “normal person” under the circumstances. And in doing so, the Court let stand (*verbatim*) a paragraph that had been part of its original opinion in Kondaurov I, 270 Va. 356, 367, 619 S.E.2d 457, 463:

Here, the plaintiff was clearly entitled to be compensated in damages for any emotional distress she suffered as a consequence of the physical impact she sustained in the accident. Such distress might include shock and fright at being struck three times, turned over, left hanging upside down in her seat-belt and experiencing physical pain. It might also include anxiety as to the extent of her injuries, worry as to her future well-being, her ability to lead a normal life and to earn a living. It might include fear of disability, defor-

mity, or death. Such factors were proper subjects for the jury’s consideration because they might fairly be inferred from the physical impact of the collisions upon her person. They might also be taken into account as factors causing exacerbation of her pre-existing mental and physical conditions.

**So, when Kondaurov II is cited as establishing the “eggshell psyche” rule in a Virginia negligence case where there has been a physical impact, the proponent of that argument may be “barking up the wrong tree”, for all of the reasons just discussed.**

Remarkably, in retaining that cryptic statement from their Kondaurov I opinion concerning “pre-existing mental and physical conditions”, while deleting their decision concerning a “normal person” limitation on emotional distress damages, the Court failed even to mention Hughes v. Moore, or even any aspect of its lengthy discussion and holding in Kondaurov I that a plaintiff in a negligence case, even where there is a physical impact, cannot recover for emotional distress beyond that expected to be suffered by a “normal person” under the circumstances. Nor did the Court address any of the policy reasons

that had supported its decision on that issue. And the Court also failed even to mention any of Plaintiff’s or the VTLA’s equal protection or other arguments in favor of an “eggshell psyche” rule. (Nor did the Court mention any of the Embassy’s arguments against an “eggshell psyche” rule.) Indeed, the Court cited not one case in support of its one-sentence statement.

Nevertheless, Kondaurov II will surely be cited for the proposition that where there is a physical impact, the negligent defendant takes the plaintiff as he finds him with regard to pre-existing physical as well as mental or emotional conditions. There are valid arguments, however, that such reliance may be misplaced.

First, as the Plaintiff and the VTLA themselves strenuously argued in their own rehearing papers, whether there should or should not be a “eggshell psy-

che rule” in Virginia for such negligence cases was not properly before the Court because it was never briefed by the parties in the original appeal, and never made an express assignment of error by the Embassy. Accordingly, the Court’s discussion of the “eggshell psyche rule”, in both Kondaurov I and Kondaurov II, may be considered as mere *dicta*.

Second, as the Embassy argued in its rehearing papers, Hughes v. Moore is still good law in Virginia, and there appears to be no really valid or logical reason for a ruling that there is no “eggshell psyche rule” in a negligence case where there is no physical impact (but only emotional distress that later manifests itself in physical symptoms or injury), but that there is or should be such a rule in a negligence case where there has been a physical impact. Specifically, the very same practical and policy reasons (principally, an eggshell “psyche” can be faked, unlike an eggshell “skull”) that supported the Court’s decision in Hughes v. Moore, holding that there is no “eggshell psyche” rule in a negligence case where that has been no physical impact, would seem to apply with equal force to a negligently injured plaintiff where there has been a physical impact. Indeed, that was precisely the conclusion of the unanimous Court in Kondaurov I, whose thorough and thoughtful analysis and reasoning on that point was not even addressed, let alone explained away, in the Court’s opinion in Kondaurov II.

Finally, except for two factually and otherwise distinguishable cases out of Louisiana and New York, none of Plaintiff’s or the VTLA’s cited authority dealt with the “eggshell psyche” rule in the context of an ordinary negligence case. Instead, they were all intentional infliction of emotional distress cases or some other type of intentional tort case (battery), where there probably are valid policy reasons for expanding a defendant’s liability to unexpected “eggshell psyche” injuries suffered by the intentionally injured victim.

So, when Kondaurov II is cited as establishing the “eggshell psyche” rule in a Virginia negligence case where there has been a physical impact, the proponent of that argument may be “barking up the wrong tree”, for all of the reasons just discussed. A good argument can be made that a definitive ruling on whether the

“eggshell skull” rule includes an “eggshell psyche” in such a case must instead await some future personal injury negligence case (one hopes not involving a dog), where there has been physical impact and where an emotionally hypersensitive plaintiff is seeking recovery for his or her emotional distress beyond that expected to be suffered by a “normal person” under the circumstances, and where that issue has been properly preserved and properly made part of the appeal to the Virginia Supreme Court. (And it won’t be this case because it has now been settled.) If and when that happens, the compelling logic that informed the Court’s decision in Hughes v. Moore, and that was embraced by Justice Russell and six other Justices in their since vacated decision in Kondaurov I, will undoubtedly be invoked by defense counsel, and it will be interesting to see how the Court rules at that time. ☒

## References: An Affirmative Duty?

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Carl knows from past experience that a mere belief and hope that a business expectancy would be realized will not suffice for a cause of action. The proof must establish a *probability* of future economic benefit to the plaintiff. *Commercial Bus. Sys. v. Halifax Corp.*, 253 Va. 292, 484 S.E.2d892 (1997). So, Carl realizes, if Paul could somehow show that Paul's former employer knew that the new prospective employer would certainly hire Paul but for the refused reference, there might be some, albeit small, viability to the claim. But it's almost impossible to show all that, and the claim is probably a bit too 'creative,' Carl thinks.

However, a certified letter to the former employer (on attorney letterhead), advising the former employer of potential future liability for this cause of action might be helpful. Such a letter would at least put the former employer on notice that the former employer's refusal to take prospective employers' phone calls is hurting Paul. Such notice would strengthen any future case for tortious interference. Moreover, to prevent any future vindictiveness on the part of the former employer when the former employer begins providing references, that letter should also mention Virginia Code Section 8.01-46.1, which permits a waiver of immunity for bad-faith references.

If, after all that, the former employer then begins taking calls from Paul's prospective employers, but the reference he provides is bad and privileged under Virginia Code Section 8.01-46.1, Paul will just have to deal with it. At least he would be taking positive steps toward solving a problem. In any event, Paul needs to consider whether he wants to get an attorney involved, even though an attorney might be just what's needed.

Carl picks up the phone to call his friend.

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**Litigation News** welcomes the submission of litigation-oriented articles. If you have researched or argued an interesting point of Virginia law, or have practice tips to share, consider condensing them into an article for **Litigation News**. The contact for submission of these articles is:

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*R. Lee Livingston*

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Gely, Rafael and Leonard Bierman. *Workplace Blogs and Workers' Privacy*. 66 La L. Rev. 1079-1110 (2006).

Marcus, Richard L. *E-Discovery & Beyond: Toward Brave New World or 1984?* 25 Rev. Litig. 633-689 (2006).

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Kahlenberg, Michael. *Comment. Broken Record Lawmaking and Stare Decisis: The Unconstitutionality of Ohio's Latest Tort Reform Effort*. 37 U. Tol. L. Rev. 1087-1109 (2006).

Lotierzo, Amy. *Comment. The Unborn Child, a Forgotten Interest: Reexamining Roe in Light of Increased Recognition of Fetal Rights*. 79 Temp. L. Rev. 279-316 (2006).

Michael, Scott E. *Comment. "Lie or Lose Your Job!" Protecting a Public Employee's First Amendment Right to Testify Truthfully*. 29 Hamline L. Rev. 411-448 (2006).

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