Virginia Supreme Court Upholds Trial Court's Decision to Grant Missing Witness Instruction where Plaintiff Elected Not to Attend Trial

The Virginia Supreme Court recently denied a Petition for Appeal and a Petition for Rehearing in the case of Raighne C. Delaney v. Madison Pommer, Record No. 180903, Circuit Court No. CL-2016-16148. The issue on appeal was whether the "missing witness instruction" was properly granted when plaintiff did not appear for his own trial. Plaintiff is a prominent local attorney who never appeared at the trial or testified over the 4 days of the trial. The plaintiff claimed he suffered a traumatic brain injury following a minor rear end automobile accident. Plaintiff presented evidence of $189,000.00 in past medical specials and $1,150,000.00 in lost wages. The evidence demonstrated the roads were wet and the defendant was unable to stop her vehicle before colliding with the vehicle immediately in front of her. The vehicle immediately in front of the defendant was pushed into the plaintiff's vehicle. The jury returned a defense verdict.

The primary issue on appeal was whether the trial court erred in granting defendant's request for Model Jury Instruction No. 2.080 – Unexplained Failure to Produce Important Witness (commonly referred to as the "missing witness instruction") and permitting the defendant to argue the jury should presume the plaintiff's testimony would have been unfavorable. At trial, attorney John D. McGavin argued the instruction was supported by the evidence because the plaintiff's testimony was material because he had personal knowledge of the facts of the accident and the extent of his injuries, and he was "available" to the plaintiff as required by Neeley v. Johnson, 215 Va. 565 (1975). Mr. McGavin further argued there had been no evidence presented to excuse or otherwise justify the plaintiff's failure to appear. In summary, plaintiff is a prominent local attorney who claimed 3 years of disability and offered no excuse or justification for not appearing at his own 4 day jury trial. It was a plan that should not be condoned by the court, and as plaintiff is a prominent attorney shows gamesmanship.

At trial and on appeal, plaintiff argued the witness was "available" to both parties under modern subpoena authority and attempted to distinguish the case from Scott v. Watsontown Trucking Co., 920 F. Supp. 2d 644 (E.D. Va. 2013) by arguing the decision not to call the plaintiff was not gamesmanship. The Virginia Supreme Court denied the Petition for Appeal and denied the Petition for Rehearing. Attorneys John D. McGavin and Anna G. Zick appeared on brief for the defendant.