

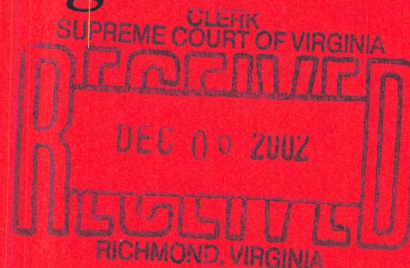
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IN THE  
**Supreme Court of Virginia**

RECORD NO. 021006



**TODD BERNER, M.D., et al.,**

*Appellants,*

**v.**

**SCOTT MILLS, et al.,**

*Appellees.*

JOINT APPENDIX

**Susan L. Mitchell  
MCCARTHY & MASSEY, P.C.  
9315 Center Street  
Suite 104  
Manassas, Virginia 20110  
(703) 330-2726**

*Counsel for Appellants*

**Robert T. Hall  
Donna Miller Rostant  
Holly Parkhurst Essing  
HALL, SICKELS, ROSTANT,  
FREI & KATTENBURG, P.C.  
12120 Sunset Hills Road, Suite 150  
Reston, Virginia 20192  
(703) 925-0500**

*Counsel for Appellees*



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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SCOTT AND TARA MILLS,  
Co-Administrators of the Estate of  
Nelson Mills and TARA MILLS,  
Individually,

Plaintiffs,

v

TODD BERNER, M.D., and  
PRIMARY CARE FOR WOMEN, P.C.,

Defendants.

At Law No. 181359

DEFENDANTS' MOTION TO REFER MATTER TO  
THE VIRGINIA WORKERS' COMPENSATION COMMISSION

COME NOW the Defendants, Todd Berner, M.D. and Primary Care for Woman, P.C., pursuant to VA. CODE ANN. §38.2-5000 et seq. and bring this their Motion to Refer the above-captioned matter to the Virginia Workers' Compensation Commission for determination of the applicability of the Virginia Neurological Birth-Related Injury Compensation Act. The bases for this Motion are set forth in the accompanying Memorandum in Support of Motion to Refer.

TODD BERNER, M.D. and  
PRIMARY CARE FOR WOMEN, P.C.  
By Counsel

MCCARTHY & MASSEY, P.C.  
9315 Center Street, Suite 104  
Manassas, Virginia 20110  
Phone (703) 330-2716  
Fax (703) 330-2429

By:

  
Susan L. Mitchell, Attorney-at-Law  
VSB No. 37789

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

JAN 11 '00

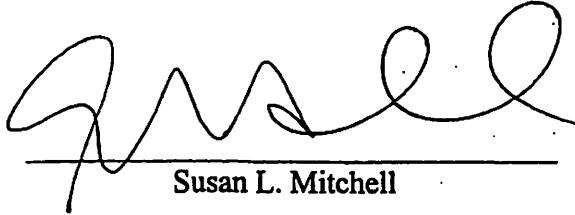
CHARGE # 15



**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 1st day of July, 1999, a true and accurate copy of the foregoing MOTION TO REFER was mailed first class, postage prepaid, to:

Robert T. Hall, Esquire  
Donna Miller Rostant, Attorney-at-Law  
Hall & Sickels, P.C.  
12120 Sunset Hills Road  
Suite 150  
Reston, Virginia 20190-3231



Susan L. Mitchell

VIRGINIA

99 JUN 24 PM 11:41  
IN THE CIRCUIT COURT OF ARLINGTON COUNTY

Scott and Tara Mills,  
Co-Administrators of the Estate of Nelson  
Mills, and Tara Mills individually

Plaintiffs,

v.

Todd Berner M.D., and Primary  
Care for Women, P.C.

Serve:

Todd Berner, M.D.  
5203 Leesburg Pike  
#609  
Falls Church, Virginia 22041

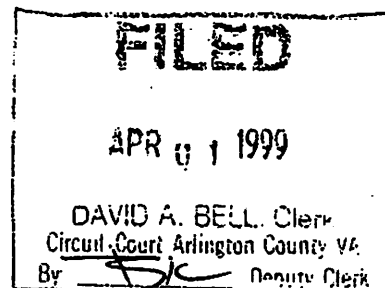
Serve

Primary Care for Women, P.C.  
Michael C. Normile, Registered Agent  
7600-B Leesburg Pike # 420  
Falls Church, Virginia 22043

Defendants.

CLERK-CIRCUIT COURT  
ARLINGTON, VA

AT LAW NO. 99-266



**MOTION FOR JUDGMENT**

COME NOW the Plaintiffs, by counsel, and in their Motion for Judgment seek judgment against the Defendants and in support thereof state as follows:

**I. PARTIES**

1. Scott and Tara Mills are the biological parents of the decedent, Baby Nelson

Page -1-

VIRGINIA WORKERS  
COMPENSATION COMMISSION

JAN 11 '00

CHARGE # 15



Mills and are residents of Fairfax County, Virginia.

2. Tara Mills and Scott A. Mills were duly appointed Co- Administrators for the Estate of Nelson Mills on February 23, 1999 in Fairfax County, Virginia. A copy of the Certificate of Qualification is attached hereto as Exhibit A.

3. Upon information and belief, at all times relevant, Defendant Todd Berner, (hereinafter "Berner") was a resident of the city of Alexandria, Virginia.

4. Upon information and belief, during all times relevant to this proceeding, Primary Care for Women, was a corporation organized and licensed under the laws of the Commonwealth of Virginia and at all times relevant, Berner was an agent or employee of Primary Care for Women, P.C.

5. At all times relevant to this action, Tara and Nelson Mills had a physician-patient relationship with Berner who was a physician practicing in the field of obstetrics and gynecology. Tara Mills remained a patient of Berner's and Primary Care for Women, P.C. until at least June 1, 1998. The events regarding this Motion for Judgment arose through and including the last day Tara Mills remained a patient of Berner and Primary Care for Women.

## **II. FACTS**

6. Tara Mills initially sought routine gynecology care from Defendant Berner commencing in 1994. In 1997, Tara and Scott Mills determined that they were ready and desired to have children. To that end, Tara Mills made a pre-conception visit to Defendant Berner on August 26, 1997. Shortly thereafter, Tara Mills discovered that she was pregnant with her first child.

7. Tara Mills reported religiously for her obstetrical appointments. Other than problems with elevated blood pressure, Tara Mills had no other difficulties with her pregnancy as all tests relating to her fetus were reassuring and she and Scott anxiously awaited the birth of their first child.

8. Towards the latter part of her pregnancy, Tara Mill's blood pressure began steadily increasing. As a result of her increasing blood pressure, Berner recommended and Tara agreed that her labor would be artificially induced so as to avoid any complication to her infant. On May 27, 1998, Tara was admitted to INOVA-Alexandria Hospital for induction of labor to occur the following morning.

9. On May 28, 1998, Tara was taken to the labor and delivery suite and the induction began at 8:50 a.m. Tara's labor began slowly and by 12:35 p.m. she was only 3 cms. dilated. In an attempt to facilitate the labor, Berner artificially ruptured Tara Mill's membranes at 12:35 p.m.

10. By 1:25 p.m., Tara began experiencing serious discomfort and an epidural anesthesia was ordered for her.

11. At 7:57 p.m., Tara's cervix was fully dilated. Because her baby was still high in the birth canal, she was instructed to push in an attempt to bring the baby down to a more favorable position for delivery.

12. At 8:37 p.m., another dose of epidural anesthesia was improperly administered to Tara Mills. The effect of the subsequent dose of epidural anesthesia prevented Tara from exerting effective pushing forces sufficient to assist baby Nelson down the birth canal and Tara was unable to push baby Nelson down the birth canal.



As a result, at 9:30 p.m., Berner elected to take Tara to the delivery room where he planned to attempt to deliver Nelson by using forceps. If the forceps delivery was not successful, Berner planned a cesarean delivery.

13. Twelve minutes before the delivery, Berner, upon information and belief, misapplied Tucker forceps to baby Nelson's head and strenuously pulled Nelson down Tara Mills' birth canal. At the time of the forceps delivery, although he performed a midline episiotomy, Berner caused a fourth degree laceration to Tara Mills. A fourth degree laceration is a tear that extends through the perineal skin, perineal body, anal sphincter and into the rectum.

14. Nelson Mills was born at 10:41 p.m. in severe distress without a heart rate or respirations. He was without tone and pale in color. He failed to respond to stimuli. He was immediately resuscitated but did not have a heart rate greater than 100 until three minutes after his birth.

15. Nelson Mills was intubated and taken to the Intensive Care Nursery (ICN) where he was attended to by Dr. Lisa Goldberg. His overall status was critical.

16. Upon his admission to the ICN, Dr. Goldberg noted that Nelson had "copious amount of bleeding from the nasopharyngeal region" as well as severe swelling on his head and a large cephalhematoma (or blood clot) on both sides of his skull. A severe forceps mark was noted on the right side of his face with an abrasion on his right ear. Dr. Goldberg emergently suctioned blood from Nelson's lungs indicating that he had breathed blood into his lungs. Although Dr. Goldberg initially thought the blood found in Nelson's lungs was from Tara she soon realized that Nelson himself was bleeding. Dr.

Goldberg believed Nelson was bleeding as a result of trauma from the forceps delivery.

17. A consult was obtained and Nelson was found to have a nasal hemorrhage as well as massively enlarged head circumference with diffuse scalp swelling across the suture lines. A CT of Nelson's brain was ordered.

18. The CT scan revealed that Nelson had multiple skull fractures including non-depressed fractures of the left parietal bone, right parietal bone, left temporal bone, right temporal bone, left sphenoid wing and floor of the right orbit. The CT scan also revealed extensive intracranial hemorrhage in the subarachnoid, intraventricular and intraparenchymal spaces. As a result of the trauma and bleeding from the skull fractures, Nelson developed cerebral edema or swelling of his brain which compresses normal brain tissues causing it to be starved for oxygen.

19. On May 28, 1998, baby Nelson was transferred to Children's National Medical Center (hereinafter "Children's"). Upon his admission to Children's, Nelson was noted to have seizure activity. In an attempt to control the seizures, he was placed on high doses of anticonvulsants without success. He remained on a ventilator.

20. After days of additional tests and numerous consultations with the pediatric neonatal specialists at Children's, Scott and Tara Mills understood that their previously healthy fetus had serious, irreversible damage. Acting on the recommendation of numerous medical experts, Scott and Tara Mills made the painful decision to discontinue life support to their son. On June 7, 1998, baby Nelson's breathing tube was removed. Unable to breathe on his own as a result of the trauma to his skull, Nelson died shortly thereafter, at 7:40 p.m.



21. An autopsy revealed that Nelson Mills had skull fractures and substantial head injury.

22. During the delivery of Nelson Mills, as a result of the improperly and unnecessarily applied forceps, Tara Mills suffered serious injury to her perineal, rectal and vaginal area. In spite of a reconstructive surgery, she continues to suffer as more particularly set forth in paragraphs 44 through 46.

**COUNT I. WRONGFUL DEATH ACTION PURSUANT TO §8.01-50 OF  
THE CODE OF VIRGINIA**

23. Plaintiffs incorporate paragraphs 1 through 22 as if fully set forth.

24. As a proximate result of the Defendants' deviations from the applicable standard of medical care as set forth in paragraph 27 and its subparts and paragraph 32 and its subparts and paragraph 33 and its subparts and incorporated herein by reference, Nelson Mills' beneficiaries have suffered greatly and are entitled to recover damages pursuant to Virginia Code 8.01-50 including: sorrow, mental anguish; loss of society, companionship, comfort, guidance, kindly offices and advice of the decedent; compensation for reasonably expected loss of income of the decedent and other services, protection, care and assistance provided by the decedent; expenses for the care, treatment and hospitalization of Baby Nelson Mills incident to the injury resulting in his death; and reasonable funeral expenses.

**COUNT II. NEGLIGENCE OF TODD BERNER**

25. Plaintiffs incorporate paragraphs 1 through 24 as if fully set forth herein.

26. At all times relevant, Todd Berner had a physician-patient relationship with

Tara and Nelson Mills and as such, was obligated to practice medicine within the applicable standard of care and to provide such medical care to Tara and Nelson Mills.

27. Todd Berner deviated from the applicable standard of care by:

- a. Failing to recognize that Tara Mills' labor was progressing normally;
- b. Authorizing the administration of a redosing of the epidural anesthesia which prevented Tara Mills from pushing Nelson Mills effectively down the birth canal;
- c. Failing to recognize that there was no indication for the application of forceps;
- d. Applying the forceps when Nelson was not in a proper position for application of forceps and there was no indication to do so;
- e. Failing to properly check the position of Nelson Mills relative to Tara Mill's pelvic cavity so that forceps could be properly and safely applied to avoid injury to Tara and Nelson Mills;
- f. Failing to properly apply the forceps and instead, applying them in such a manner as to cause numerous skull fractures to Baby Nelson Mills resulting in serious bleeding, coagulopathy, cerebral edema and permanent, irreversible damage;
- g. Failed to properly supervise non-physician care providers in the treatment and care of Tara Mills and Nelson Mills during Tara Mills' labor;
- h. Failed to perform or cause to be performed a timely cesarean section on Tara Mills; and
- i. Failed to exercise the degree of care and skill or possess the degree of knowledge ordinarily exercised of, and possessed by the average



physician or obstetrician, taking into account the existing state of knowledge and practice in the profession.

28. As a direct and proximate result of Todd Berner's deviations from the applicable standard of care, Nelson Mills incurred serious, permanent and irreversible damage and great pain and physical suffering and other damages more particularly set forth in paragraphs 43 through 44.

29. As a direct and proximate result of Todd Berner's deviations from the applicable standard of care, Nelson Mills died from massive head injuries from skull fractures as a result of the misapplied forceps

30. As a direct and proximate result of Todd Berner's deviations from the applicable standard of care, Tara Mills and Scott Mills suffered serious, permanent and disabling injuries as more particularly set forth in paragraphs 44 through 46.

### **COUNT III. NEGLIGENCE OF PRIMARY CARE FOR WOMEN, P.C.**

31. Plaintiffs incorporate by reference paragraphs 1 through 30 as if fully set forth.

32. Primary Care for Women, P.C. was negligent in that it:

- a. Failed to adequately and properly train and monitor care and treatment delivered by Todd Berner; and
- b. Failed to adequately supervise health care treatment and delivery by Todd Berner.

33. By virtue of the doctrine of respondeat superior and/or agency, Primary Care for Women, P.C. is responsible for the negligent acts and/or omissions of Todd Berner

and Todd Berner was negligent as set forth in paragraph 27 and its subparts.

34. As a direct and proximate result of the negligence of Primary Care for Women, P.C., directly, and by virtue of respondeat superior and/or agency, Nelson Mills suffered significant damages as more specifically described in paragraphs 44 through 45 incorporated herein.

35. As a direct and proximate result of the negligence of Primary Care for Women, P.C., directly, and by virtue of respondeat superior and/or agency, the Estate of Nelson Mills is entitled to recover monetary damages.

36. As a direct and proximate result of the negligence of Primary Care for Women, P.C., directly, and by virtue of respondeat superior and/or agency, Tara and Scott Mills have suffered and will suffer damages as more specifically described in paragraphs 45 through 47 incorporated herein.

37. As a direct and proximate result of the negligence of Primary Care for Women, P.C., directly, and by virtue of respondeat superior and/or agency, Tara and Scott Mills are entitled to recover monetary damages.

#### **COUNT IV. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

38. Plaintiffs incorporate paragraphs 1 through 37 as if fully set forth.

39. At all times relevant, Scott and Tara Mills observed the actions of Defendant Berner as he forcefully, inappropriately and improperly applied forceps to their son's head causing numerous skull fractures resulting in the critical condition of the infant at birth.

40. Following the delivery of son and the injuries inflicted upon him as a

proximate result of Berner's actions, Scott and Tara Mills suffered and continue to suffer from great emotional distress, anxiety, and physical ailments that naturally resulted from the trauma of seeing the devastating injuries caused to their newborn son.

41. As a proximate result of Berner's actions, Tara and Scott Mills are entitled to monetary recovery for the damages above as well as those set forth in paragraphs 44 through 46.

### **DAMAGES**

42. Plaintiffs incorporate paragraphs one through 41 as if fully set forth.

43. As a direct and proximate result of the negligence of the Defendants, baby Nelson Mills suffered serious multiple skull fractures and intracranial bleeding. The skull fractures and intracranial bleeding led to serious asphyxia and irreversible, permanent and substantial damage resulting in his death after ten days of pain and suffering.

44. As a direct and proximate result of the negligence of the Defendants, baby Nelson Mills incurred substantial medical and funeral expenses and his beneficiaries have suffered greatly and are entitled to recover damages pursuant to Virginia Code 8.01-50 including: sorrow, mental anguish, loss of society, companionship, comfort, guidance, kindly offices and advice of the decedent; compensation for reasonably expected loss of income of the decedent and other services, protection, care and assistance provided by the decedent; expenses for the care, treatment and hospitalization of the decedent.

45. As a direct and proximate result of the negligence of the Defendants Tara

Mills has incurred serious, permanent and disabling injury to her perineum, rectum and vagina. Such injury includes, but is not limited to the development of a recto-vaginal fistula from the trauma caused by the forceps applied by Berner. The injuries incurred by Tara Mills have interfered and interfere with her ability to carry on normal relations with her husband without substantial pain and have required one surgery with only limited success and will require a subsequent surgery to repair the resulting and remaining fistula.

46. As a direct and proximate result of the negligence of the Defendants, Tara and Scott Mills have incurred substantial medical expenses, past and future; lost wages, past and tremendous pain and suffering, personal anguish and emotional distress, past and future.

47. Your Plaintiffs specifically plead that the Virginia cap or ceiling in medical malpractice recoveries is unconstitutional on its face and to them under the constitutions of the United States of America and the Commonwealth of Virginia and will assert a good faith attempt to have any ruling to the contrary overturned. Moreover, the cap or ceiling on recovery is violative of and has been pre-empted by the Americans with Disabilities Act.



WHEREFORE, Plaintiffs pray for judgment against the Defendants for the following:

1. The sum of \$2,000,000
2. Prejudgment interest at the legal rate
3. Postjudgment interest at the legal rate
4. That the costs of this action be taxed against the defendants
5. For a trial by jury

Scott and Tara Mills as Co-Administrators of  
the Estate of Nelson Mills, and Tara Mills  
individually.  
By Counsel

**HALL & SICKELS, P.C.**



Robert T. Hall, Esquire

VSb NO. 4826

Donna Miller Rostant, Esquire

VSb NO. 41855

12120 Sunset Hills Road

Suite 150

Reston, VA 20190-3231

(703) 925-0500

Counsel for the Plaintiff

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

JAN 11 '00

CHARGE # 15



COMMONWEALTH OF VIRGINIA  
*Circuit Court of Fairfax County*  
**CERTIFICATE OF QUALIFICATION**



Commonwealth of Virginia  
County of Fairfax, to wit:

Fiduciary No: 62489

I, JOHN T. FREY, Clerk of the Circuit Court of the County of Fairfax, Virginia, the same being a Court of Probate and of Record and having a seal, do hereby certify that it appears of record in my office pursuant to law that:

**TARA MILLS & SCOTT A. MILLS**

has been duly appointed,:

**CO-ADMINISTRATORS, for the estate of: NELSON MILLS**

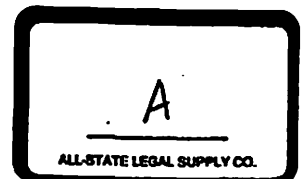
and that they has duly qualified as such by taking the oath prescribed by law and by entering into and acknowledging a bond in the penalty of : ONE HUNDRED Dollars, without surety.

I further certify that the said appointment and qualification is still in full force and effect and has not been revoked.

**IN TESTIMONY WHEREOF** I have hereunto set my hand, and affixed the seal of said Court hereto, at Fairfax, Virginia, this 23rd day of february , 1999.

**JOHN T. FREY, CLERK**

By: *Kathy Bishop*  
Deputy Clerk



✓  
VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SCOTT AND TARA MILLS,  
Co-Administrators of the Estate of  
Nelson Mills and TARA MILLS,

Plaintiffs,

v

TODD BERNER, M.D., and  
PRIMARY CARE FOR WOMEN, P.C.,

Defendants.

At Law No. 181359

AMENDED ORDER

THIS MATTER came before this Honorable Court upon the Defendants' Motion to Refer Plaintiffs' Motion for Judgment to the Virginia Workers' Compensation Commission pursuant to VA. CODE ANN. §8.012-273.1 and the Virginia Birth-Related Neurological Injury Compensation Act; and,

IT APPEARING TO THE COURT upon consideration of oral argument and the pleadings, briefs and other documents filed in this matter, that said motion ought to be granted in part and denied in part; it is hereby

ORDERED, ADJUDGED and DECREED for the reasons stated from the bench on November 8, 1999, and contained in the transcript thereof which is incorporated herein by reference, that

(1) The Defendants' motion to refer Plaintiffs' claim for the wrongful death of Nelson Mills be and hereby is GRANTED;

(2) Defendants' motion to refer Plaintiffs' claims of negligence as against Todd Berner, M.D. be and hereby is GRANTED;

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

JAN 11 '00

CHARGE # 15

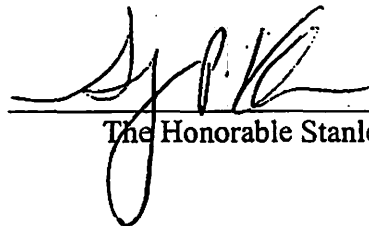
(3) Defendants' motion to refer Plaintiff's claim of negligence as against Primary Care for Women, P.C. be and hereby is GRANTED;

(4) Defendants' motion to refer Plaintiffs' claims for negligent infliction of emotional distress be and hereby is GRANTED; and,

(5) Defendants' motion to refer plaintiff Tara Mills' claims for personal bodily injury be and hereby is DENIED; and it is further

ORDERED, ADJUDGED and DECREED that the Clerk of this Court shall forward the Motion to Refer together with a copy of the Motion for Judgment to the Virginia Workers' Compensation Commission pursuant to VIRGINIA CODE ANNOTATED §8.01-273.1 (Michie 1950, as amended 1999).

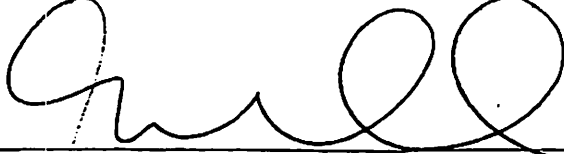
ENTERED this 4 day of January, 2000.



The Honorable Stanley P. Klein

Order to Refer  
Page 3

SEEN AND OBJECTED TO FOR REASONS STATED IN COURT AND ON BRIEF:



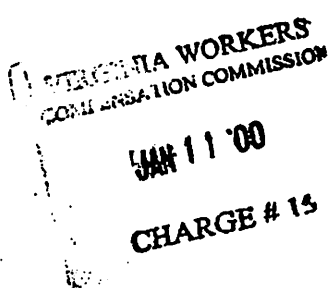
Tara M. McCarthy, Attorney-at-Law (VSB #22223)  
Susan L. Mitchell, Attorney-at-Law (VSB # 37789)  
MCCARTHY & MASSEY, P.C.  
9315 Center Street, Suite 104  
Manassas, Virginia 20110  
(703) 330-2726  
Counsel for Defendants

SEEN AND OBJECTED TO FOR REASONS STATED IN COURT AND ON BRIEF:



Robert T. Hall, Esquire  
Donna Miller Rostant, Attorney-at-Law  
Hall & Sickels, P.C.  
12120 Sunset Hills Road, Suite 150  
Reston, Virginia 20190-3231  
(703) 925-0500  
Counsel for Plaintiffs

M:\Open Cases\Berner\Mills\Refer Motion Amend Ord. wpd



A COPY TESTE:  
JOHN T. FREY, CLERK

BY:   
Deputy Clerk

Date: 1-5-2000  
Original retained in the office of  
the Clerk of the Circuit Court of  
Fairfax County, Virginia



LAW OFFICES  
**HALL & SICKELS, P.C.**

RESTON EXECUTIVE CENTER  
12120 SUNSET HILLS ROAD • SUITE 150  
RESTON, VIRGINIA 20190-3231

ROBERT T. HALL \*  
CHARLES W. SICKELS \*  
HOLLY PARKHURST LEAR \*\*\*  
DONNA MILLER ROSTANT \*\*  
STEVEN M. FREI \*\*\*

\*Admitted in VA & DC  
\*\*Admitted in N.C. & VA  
\*\*\*Admitted in VA

TELEPHONE  
(703) 925-0500

TELECOPIER  
(703) 925-0501

March 23, 2000

Deputy Commissioner Carolyn Colville  
Virginia Workers' Compensation Commission  
520 King Street  
Second Floor  
Alexandria, Virginia 22314

re: Case No. B- 00-06

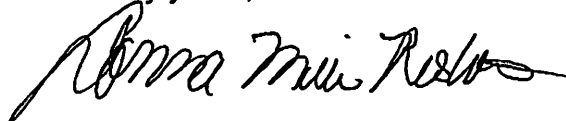
Dear Commissioner Colville:

Thank you for your letter dated March 10, 2000.

At this time, an original and one copy of Plaintiffs' Motion is enclosed.

Please let me know if you need additional information. Thank you for your assistance in this matter.

Sincerely yours,



Donna Miller Rostant

cc: Tara McCarthy Esq.



**ORIGINAL**

VIRGINIA

IN THE WORKERS' COMPENSATION COMMISSION

Scott and Tara Mills,  
Co-Administrators of the Estate of Nelson  
Mills, and Tara Mills individually

Plaintiffs,

v.

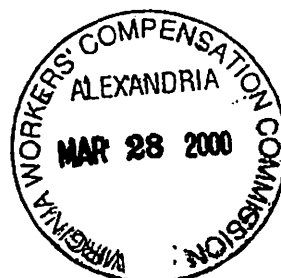
Todd Berner M.D., and Primary  
Care for Women, P.C.

VWC File No. B-00-06

**PLAINTIFFS' MOTION**

Come now Scott and Tara Mills, Co-Administrators of the Estate of Nelson Mills, and Tara Mills individually, by counsel and move this Honorable Commission as follows:

1. The Plaintiffs filed a Motion for Judgment against the defendants Todd Berner, M.D. and Primary Care for Women, P.C. in the Circuit Court for the City of Arlington on April 1, 1999. By agreement of the parties, venue was later transferred to the Circuit Court of Fairfax County.
2. Without determining whether the circuit court or the Commission had jurisdiction over this matter, the Fairfax County Circuit Court transferred this matter to the Commission pursuant to Virginia Code Section 273.1.
3. No action has been taken by the Commission to determine its jurisdiction in this matter.



4. The Plaintiffs now move that the claim asserted in the Motion for Judgment against Primary Care for Women, P.C. be remanded to the Circuit Court for Fairfax County in light of *Jan Paul Fruiterman, M.D. and Associates, P.C. v. Ahmad Waziri and Hassini Waziri, Individually and as Personal Representatives of the Estate of Syawach Waziri* Record No. 990376

5. With respect to the balance of the matters asserted in the Motion for Judgment against Todd Berner, M.D. individually, the Plaintiffs non-suit and withdraw such claims as to him individually, and waive any claim they might have arguably pursued under the Neurological Birth-Related Injury Compensation Act if the Commission was determined to have jurisdiction over these matters and this party.

6. That the file for this matter be closed, there being nothing further for the Commission to consider.

Scott and Tara Mills as Co-Administrators of the Estate of Nelson Mills and Tara Mills Individually

HALL and SICKELS, P.C.

  
Robert T. Hall, Esquire

VSb No.

Donna Miller Rostant

VSb No. 41855

12120 Sunset Hills Drive

Suite 150

Reston, VA 20190-3231

(703) 925-0500

Counsel for Plaintiffs

- 2 -



VIRGINIA

IN THE WORKERS' COMPENSATION COMMISSION

Scott and Tara Mills,  
Co-Administrators of the Estate of Nelson  
Mills, and Tara Mills individually

Plaintiffs,

v.

VWC File No. B-00-06

Todd Berner M.D., and Primary  
Care for Women, P.C.

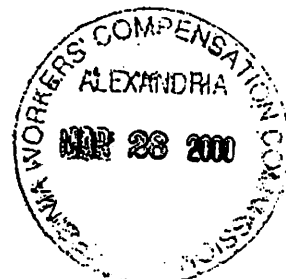
**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on this 23rd day of March, 2000 an original copy of the foregoing Plaintiffs' Motion was served on the following:

Tara M. McCarthy, Esq.  
McCARTHY & MASSEY, P.C.  
9315 Center Street, Suite 104  
Manassas, VA 20110  
Counsel for Defendants  
Todd Berner, M.D.  
Primary Care for Women, P.C.

( ) via facsimile  
( ) hand delivery  
(X) mailed, first class  
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April 4, 2000

Deputy Commissioner Carolyn Colville  
Virginia Workers' Compensation Commission  
520 King Street  
Second Floor  
Alexandria, Virginia 22314

Re: Mills v. Berner, M.D., et al.  
VWC File No.: B-00-06

Dear Commissioner Colville:

Enclosed please find Defendants' Opposition to Plaintiffs' Motion to Remand and for Nonsuit. We ask that you review and consider the same prior to ruling on Plaintiff's March 23, 2000 motions.

Thank you for your attention to this important matter.

Sincerely yours,

Susan L. Mitchell

SLM:ldh  
Enclosure

cc: Donna Miller Rostant, Attorney-at-Law (w/enc.)  
Gena Gustin, Claim No. SS001103QJ (w/enc.)  
Todd Berner, M.D. (w/enc.)

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**VIRGINIA:**

**IN THE WORKERS' COMPENSATION COMMISSION**

**SCOTT and TARA MILLS,  
Co-administrators of the Estate of  
Nelson Mills,  
and  
TARA MILLS, Individually,**

**Plaintiffs,**

**v.**

**TODD BERNER, M.D.,  
and  
PRIMARY CARE FOR WOMEN, P.C.,**

**Defendants.**

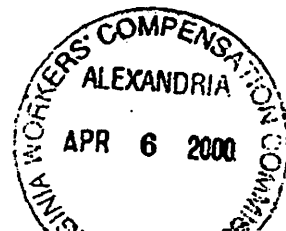
**VWC File No. B-00-06**

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION TO REMAND AND FOR NONSUIT**

COME NOW the Defendants, TODD BERNER, M.D., and PRIMARY CARE FOR WOMEN, P.C., by Counsel and file this their Opposition to Plaintiffs' Motion to Remand and for Nonsuit and state as follows:

**FACTUAL AND PROCEDURAL HISTORY**

The above-captioned matter was instituted by the Plaintiffs upon the filing of a motion for judgment in the Arlington County Circuit Court. Venue therein was improper and, by agreed order, the matter was transferred to the Circuit Court for the County of Fairfax. Thereafter, these Defendants, pursuant to VA. CODE ANN. §8.01-273.1 (Michie 1999), filed a motion to refer the entirety of the claims then pending to this Commission for adjudication under the Virginia Birth-Related Neurological Injury Compensation Act.





Following extensive briefing and oral argument, the honorable Stanley P. Klein granted, in part, the Defendants' motion to refer and referred all but Tara Mills' claims of personal injury to the Commission. The Order reflecting that decision was entered on January 4, 2000. The Order clearly reflects that all claims made on behalf of the estate of Nelson Mills against Dr. Berner and Primary Care for Women, P.C. had been referred to this Commission, as well as the Co-administrators' claims for emotional distress. The only claims which have not been so referred are Tara Mills' claims for personal injury in the form of a laceration and recto-vaginal fistula, and any alleged accompanying mental distress related thereto.<sup>1</sup>

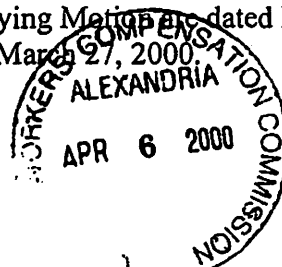
By correspondence dated March 10, 2000, this Commission notified the parties that the matter had been received and instructed the Plaintiffs to file all supporting documentation on or before April 10, 2000. Plaintiffs have not yet filed any such supporting documentation but, instead, have filed a Motion asking this Commission to remand the claims now pending against Primary Care for Women, P.C. to the Fairfax County Circuit Court in light of Fruiterman, M.D. v. Waziri, 2000 WL 237756 (Sup. Ct. of Va., Mar. 3, 2000) (hereinafter "Fruiterman") (attached hereto as Exhibit "A"), and have further asked this Commission to grant them a voluntary nonsuit with regard to the claims now pending against Dr. Todd Berner.<sup>2</sup> Both motions should be denied for the reasons which follow.

1

Contrary to the Plaintiffs' assertions in their Motion, the Circuit Court of Fairfax County did determine the issue of jurisdiction; it concluded that it did not have jurisdiction to hear those claims brought on behalf of the estate of Nelson Mills nor those claims made by the parents for emotional distress and that it did have jurisdiction over Tara Mills' personal claims of bodily injury. Its ruling regarding the Defendants' Motion to Refer implicitly decided such matters.

2

It should be noted that Plaintiffs' correspondence and accompanying Motion dated March 23, 2000. They were not received by the undersigned's office until March 27, 2000.



## ARGUMENT

### **I. FRUITERMAN CARRIES NO PRECEDENTIAL WEIGHT IN LIGHT OF THE AMENDMENT TO VA. CODE ANN. §38.2-5001 AND CANNOT SERVE AS THE BASIS FOR GRANTING PLAINTIFFS' MOTION TO REMAND.**

The Plaintiff's Motion to Remand the claims against Primary Care for Women, P.C. to the Circuit Court of Fairfax County should be denied as the Fruiterman decision carries no precedential weight.

More specifically, by emergency legislation passed by the General Assembly on March 13, 2000, and signed into law by Governor James Gilmore on April 1, 2000, VA. CODE ANN. §38.2-5001 was amended to include within the definition of "participating physician" partnerships, corporations, professional corporations, professional limited liability companies and other entities through which a participating physician practices. (The full text of the Bill and the Bill tracking are attached hereto as Exhibit "B"). It is important to note that this legislation did not follow the usual and customary path through the House and Senate. To the contrary, this legislation followed an accelerated track and was passed unanimously by both the House (February 2, 2000) and the Senate (March 3, 2000) (see Exhibit "B"). Thereafter, the Fruiterman decision was handed down on March 3, 2000, and on March 7, 2000, an emergency clause was added to the legislation declaring that the amendments to §38.2-5001 are "declaratory of existing law." Moreover, it was set forth in the body of the legislation that "an emergency exists and this act is in force from its passage" (See Exhibit "B").<sup>3</sup>

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3

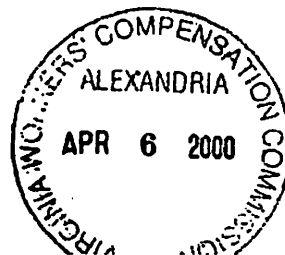
The usual and customary enactment date of legislation following regular session is the first day of July following the adjournment of the session. See VA. CONST. art. 4, §13.



Presumably, the emergency being recognized by the General Assembly was the fundamentally flawed Fruiterman decision. The legislative history of House Bill 398 clearly reflects that although legislation amending VA. CODE ANN. §38.2-5001 had been introduced prior to the Supreme Court's decision, it was not considered an emergent situation until after Fruiterman was handed down, because just four (4) days later the emergency clause was added to the Bill by the Senate and unanimously approved by the House two (2) days thereafter. Thus, it must be inferred that the General Assembly intended to override and effectively nullify the Fruiterman decision upon passage of the legislation at issue herein.

The swift action of the General Assembly in response to the Fruiterman decision is telling in several respects. First and foremost, the new legislation clearly indicates that the legislature did not intend to exclude professional corporations and other business entities through which physicians practice medicine from the coverage of the Act. As is clear from the Fruiterman decision, such an exception is absurd and would grant plaintiffs double recovery in instances where this Commission enters an award in favor of an injured infant with respect to the individual participating physician and a jury returns a verdict in favor of the injured infant and against that same physician's professional corporation, especially where the corporation is a corporation of just one member, i.e., the physician himself.

Second, the March 2000 legislation clearly indicates that the legislature, in enacting the Act, did not intend to splinter the claims of an infant who has suffered birth-related neurologic injury simply because that infant sought recovery from both an individual participating physician and that same physician's practice group, while the claims of another infant are not splintered because his guardian chose not to pursue a claim against a participating physician's practice



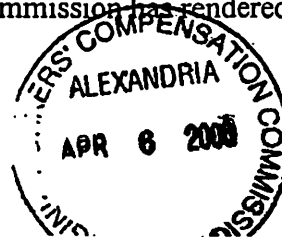
group or business entity. This dissimilar treatment of otherwise similarly situated infants is absurd and does not serve to promote the ends of justice but, rather, serves only to draw distinction where none should exist. If the individual physician is a participant in the Act, then his practice group should be likewise included, and the entirety of the claims made against him and his practice group should be adjudicated before one tribunal, under one set of procedures and rules, and at one time.

Finally, this most recent amendment to the definition of "participating physician" follows the history of the series of amendments to the definition of "health care provider" found in the Medical Malpractice Act (VA. CODE ANN. §8.01-581.1). These amendments enlarged the definition of "health care provider" to include professional corporations and other similar business entities through which the physician practices so as to avoid the illogical distinctions and exclusions which have once again occurred in the context of Fruiterman and the Birth-Related Neurological Injury Compensation Act.

**II. THIS COMMISSION DOES NOT HAVE THE POWER TO GRANT PLAINTIFFS A NONSUIT OF THE CLAIMS NOW PENDING AGAINST DR. TODD BERNER.**

In addition to asking this Commission to remand the claims against Primary Care for Women, P.C. to the Circuit Court of Fairfax County, the Plaintiffs also appear to make a motion for voluntary nonsuit of the remaining claims against Dr. Berner. To the extent that this Commission has not been empowered by the General Assembly to grant such motions, these Defendants object to the same and state that such a motion may only be made before the appropriate circuit court and only after the statutory stay has been lifted.

In the face of the mandatory stay imposed under VA. CODE ANN. §8.01-273.1, these Plaintiffs may not proceed at law until such time as this Commission has rendered a



determination on the merits of the case. Only then, and only in the face of a decision that this Commission does not have jurisdiction over the matter, may the Plaintiffs proceed with any appropriate actions at law with regard to their claims against Dr. Berner. Because this Commission has not yet made such a determination, this motion for nonsuit must fail.

**III. PLAINTIFFS MAY NOT WITHDRAW OR OTHERWISE WAIVE THEIR RIGHT TO PROCEED BEFORE THIS COMMISSION ON THE CLAIMS NOW PENDING AGAINST DR. BERNER.**

Finally, the Plaintiffs have indicated at paragraph five (5) of their Motion that in exchange for taking a voluntary nonsuit of their claims against Dr. Berner, they will

withdraw such claims as to him individually, and waive any claim they might have arguably pursued under the Neurological Birth-Related Injury Compensation Act if the Commission was determined to have jurisdiction over these matters and this party.

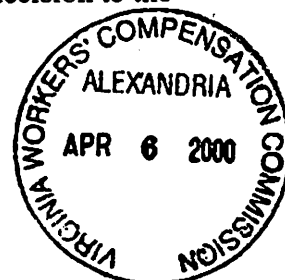
Plaintiffs, however, do not have the right to withdraw or otherwise waive their claims against Dr. Berner that now await determination by this Commission and any suggestion of the same is improper.

More particularly, VA. CODE ANN. §8.01-273.1 (Michie 1999), provides that

where a party moves to refer a cause of action to the Workers' Compensation Commission...the Court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition.

Additionally, VA. CODE ANN. §38.2-5003 (Michie 1987, as amended 1999), provides that

when a circuit court refers a civil action to the Commission pursuant to §8.01-273.1, for the purposes of determining whether the cause of action satisfies the requirements of this chapter the Commission shall set the matter for hearing pursuant to §38.2-5006. The Commission shall communicate its decision to the referring circuit court in due course.



Neither of these statutory provisions provides for any discretion by the circuit court or this Commission and, clearly, neither provides for the Plaintiff to short-circuit this process by nonsuiting, withdrawing or otherwise waiving the claims once the referral process has been set in motion.

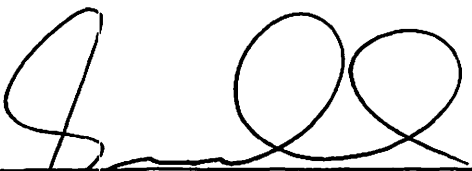
Absent clear statutory authority for permitting the same, this Commission should not permit the Plaintiffs to circumvent the adjudication process under the Act and withdraw or otherwise waive their claims against Dr. Berner so that they may attempt to secure some sort of favorable result in the Fairfax County Circuit Court against Primary Care for Women, P.C..

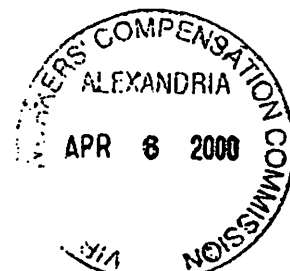
### CONCLUSION

WHEREFORE, for each of the foregoing reasons, the Defendants respectfully request that the Plaintiffs' Motion to Remand the claims against Primary care for Women, P.C. be denied and further state that this Commission may not consider Plaintiffs' Motion for Nonsuit, as the same is beyond the jurisdiction of this Commission.

TODD BERNER, M.D., and  
PRIMARY CARE FOR WOMEN, P.C.  
By Counsel

McCARTHY & MASSEY, P.C.  
9315 Center Street, Suite 104  
Manassas, Virginia 20110  
telephone (703) 330-2726  
facsimile (703) 330-2429

  
By: Susan L. Mitchell (VSB #37789)  
Tara M. McCarthy (VSB #22223)

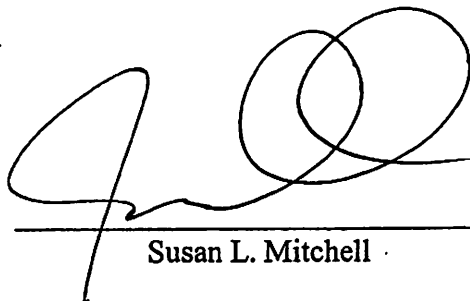




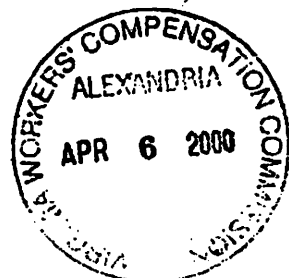
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Defendants' Opposition to Plaintiffs' Motion to Remand and for Nonsuit was mailed, first class postage prepaid this 4<sup>th</sup> day of April, 2000, to:

Robert T. Hall, Esquire  
Donna Miller Rostant, Attorney-at-Law  
*Hall & Sickels, P.C.*  
12120 Sunset Hills Drive  
Suite 150  
Reston, Virginia 20190-3231

  
\_\_\_\_\_  
Susan L. Mitchell

M:\Open Cases\Berner\Miller\Remand Opposition



Present: Carrico, C.J., Compton, Lacy, Hassell, Keenan, and Kinser, JJ., and Poff, Senior Justice.

JAN PAUL FRUITERMAN, M.D.  
AND ASSOCIATES, P.C.

Record No. 990376

v.

OPINION BY  
SENIOR JUSTICE RICHARD H. POFF  
March 3, 2000

AHMAD WAZIRI AND HASSINI WAZIRI,  
INDIVIDUALLY AND AS PERSONAL  
REPRESENTATIVES OF THE ESTATE OF  
SYAWACH WAZIRI

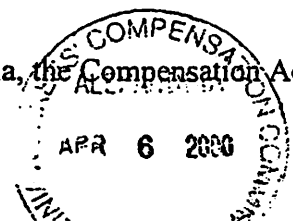
FROM THE CIRCUIT COURT OF FAIRFAX COUNTY  
M. Langhorne Keith, Judge

In this appeal from a judgment entered in a medical malpractice, wrongful death action, the appellant, Jan Paul Fruiterman, M.D. and Associates, P.C., a professional corporation (the P.C.), contends that the trial court erred in denying coverage of the Virginia Birth-Related Neurological Injury Compensation Act, Code § 38.2-5000 et seq. (the Compensation Act), to professional corporations.

Ahmad and Hassini Waziri, individually and as personal representatives of the estate of their son, Syawach, filed an amended motion for judgment entitled "Medical Malpractice-Wrongful Death" against Dr. Fruiterman, individually, and against the P.C. Applying the rights and remedies defined in the Compensation Act, the trial court sustained Dr. Fruiterman's demurrer. The court denied the co-defendant's demurrer on the ground that the rights and remedies of the Compensation Act do not apply to professional corporations. The jury returned a verdict against the P.C. for \$750,000 which the court reduced by remittitur to \$730,000.

The sufficiency of the evidence of medical malpractice and proximate cause are not in issue on appeal. Expert witnesses called by the plaintiffs testified that Dr. Fruiterman's performance of the fetal delivery by Caesarian section was conducted too late to avoid severe brain damage. In response to medical opinion, the parents agreed to suspend life support systems, and Syawach, their first-born child, died eight days after birth.

The General Assembly enacted Chapter 50 of the Code of Virginia, the Compensation Act,



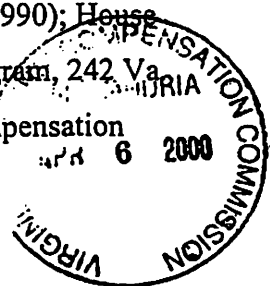
in 1987. That act "established the Virginia Birth-Related Neurological Injury Compensation Program." § 38.2-5002(A). The act provided that, subject to two exceptions, "the rights and remedies herein granted to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury." *Id.*

The Compensation Act established an "Injury Compensation Fund to finance the . . . Compensation Program." § 38.2-5015. To capitalize that fund, the Compensation Act provided that "[a] physician who otherwise qualifies . . . may become a participating physician in the Program . . . by paying an annual participating physician assessment to the Program in the amount of \$5,000", § 38.2-5020(A), and that "a participating hospital with a residency training program . . . may pay an annual participating physician assessment to the Program for residency positions," § 38.2-5020(B). To administer the Compensation Program, "[t]he Virginia Workers' Compensation Commission [was] authorized to hear and pass upon all claims filed pursuant to this chapter", § 38.2-5003, and to "make an award providing compensation for . . . items relative to . . . [a covered] injury," § 38.2-5009.

I The principal issue raised by the assignments of error is whether a professional corporation is entitled to the rights and benefits of the Compensation Act. The trial court ruled that it was not. The P.C. contends that the trial court misconstrued legislative intent. We disagree with the P.C.

On brief, the P.C. acknowledges that the Compensation Act was intended to serve several interrelated purposes: "Enacted in 1987 in direct response to the grossly lessening availability of medical malpractice insurance for obstetricians in the Commonwealth of Virginia, the Compensation Act was intended to assure affordable malpractice insurance and therefore a sufficient pool of obstetricians practicing throughout the Commonwealth."

The legislative intent is reflected in the legislative history recorded by legislators in the reports of subcommittees of the two Houses of the General Assembly. See Senate Document No. 11 (1987); House Joint Resolution No. 297 (1989); House Document No. 63 (1990); House Joint Resolution No. 641 (1997). See also *King v. Neurological Injury Comp. Program*, 242 Va. 404, 409-10, 410 S.E.2d 656, 660 (1991) (rejecting constitutional challenge to Compensation



Act).

As we have said, the Compensation Act provides that "the rights and remedies herein granted to an infant . . . shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law . . . ." § 38.2-5002(B).

"Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms." *Schwartz v. Brownlee*, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997) (citation omitted).

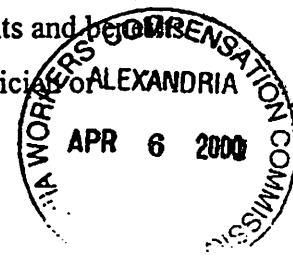
The Compensation Act begins with expressly restrictive definitions. A "[p]articipating physician" is "a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services", § 38.2-5001, and "a licensed nurse-midwife who performs obstetrical services", *id.*, and pays "an annual participating physician assessment to the Program", § 38.2-5020(A).

"'Participating Hospital' means a hospital . . . which . . . had in force an agreement with the Commissioner of Health . . . to participate in . . . a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and . . . had in force an agreement . . . whereby the hospital agreed to submit to review of its obstetrical service . . . and . . . had paid the participating assessment pursuant to § 38.2-5020 . . . ."

"Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed." *Barr v. Town and Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)(quoting *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934)).

Clearly, the General Assembly did not intend to immunize all health-care providers from tort liability for birth-related neurological injury caused by medical malpractice. The legislature expressly identified those entitled to that immunity as "participating physicians" and "participating hospitals"; then expressly defined "physicians" as obstetricians and nurse-midwives who perform obstetrical services; and then expressly specified that the term "participating" includes payment of an annual assessment by qualified physicians and hospitals to finance the costs of the benefits provided by the Compensation Program. No such assessment was imposed upon a professional corporation.

In summary, the Compensation Act expressly limits those entitled to its rights and benefits to selected health-care providers and expressly excludes "a nonparticipating physician or hospital."



hospital." § 38.2-5002(D). The legislative omission of other health-care providers serving during the course of child birth, such as pediatricians, radiologists, and medical partnerships, confirms our conclusion that participating physicians and hospitals were intended to be the only health-care providers afforded immunity from civil liability by the Compensation Act. A professional corporation, the employer of a participating physician, is conspicuous by its absence.

II In support of a second assignment of error, the P.C. contends that "[t]he award for non-economic loss bears no reasonable relation to the evidence and therefore is excessive." The P.C. is referring to the jury's award of \$655,973.46, a sum in addition to its award for expenses incurred in "the care, treatment and hospitalization of the decedent".

The wrongful death statute, § 8.01-52, provides that "[t]he jury or the court . . . may award such damages as to it may seem fair and just" and that "[t]he verdict or judgment . . . shall include, but may not be limited to, damages for . . . [s]orrow, mental anguish, and solace . . . ."

We find the evidence of sorrow, mental anguish, and solace contained in this record fully sufficient to support the jury's award, and finding no merit in the assignments of error, we will affirm the judgment entered by the trial court.

Affirmed.

Justice Compton participated in the hearing and decision of this case prior to the effective date of his retirement on February 2, 2000.

The Compensation Act expressly provides that "a civil action . . . shall not be foreclosed against a nonparticipating physician or hospital", § 38.2-5002(D), or "against a physician or hospital where there is clear and convincing evidence that such physician or hospital intentionally or willfully caused or intended to cause a birth-related neurological injury." § 38.2-5002(C).



[summary](#) | [pdf](#)

## VIRGINIA ACTS OF ASSEMBLY -- CHAPTER

*An Act to amend and reenact*

§

*8.01-273.1 and 38.2-5001 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act; referral to Workers' Compensation Commission.*

[H 398]

Approved

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-273.1 and 38.2-5001 of the Code of Virginia are amended and reenacted as follows:§ 8.01-273.1. Motion for judgment; motion to refer; Virginia Birth-Related Neurological Injury Compensation Act.A. In any civil action, where a party, *who is a participating hospital or physician as defined in*

§

*38.2-5001*, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; *provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than 120 days after the date of filing a grounds of defense by the party seeking the referral.*

B. Upon entry of the order of referral by the court, the clerk of the circuit court shall file with the Workers' Compensation Commission within thirty days a copy of the motion for judgment and the responsive pleadings of all the parties to the action. The clerk shall copy all counsel of record in the civil action on the transmittal letter accompanying the materials being filed with the Workers' Compensation Commission. All parties to the civil action shall be entitled to participate before the Commission upon filing a notice of appearance with the Clerk of the Commission within twenty-one days after receipt of the transmittal letter to the clerk of the circuit court. Notwithstanding the provisions of

§

*32.1-127.1:03*, the moving party shall provide the Commission with an original and five copies of the following: appropriate assessments, evaluations, and prognoses and such other records obtained during discovery and are reasonably necessary for the determination of whether the infant has suffered a birth-related neurological injury. The medical records and the pleadings referenced in this subsection shall constitute a petition as referenced in

§

*38.2-5004*. The moving party shall be reimbursed for all copying costs upon entry of an award of benefits as referenced in

§

*38.2-5009*.

§ 38.2-5001. Definitions.

As used in this chapter:



"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of this chapter, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse. The definition provided here shall apply retroactively to any child born on and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.

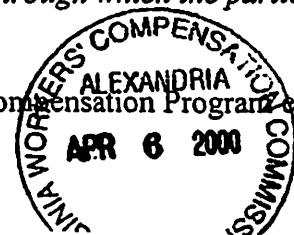
"Claimant" means any person who files a claim pursuant to § 38.2-5004 for compensation for a birth-related neurological injury to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, executor, or other legal representative.

"Commission" means the Virginia Workers' Compensation Commission.

"Participating hospital" means a hospital licensed in Virginia which at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the hospital agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Department of Health whereby the hospital agreed to submit to review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the participating hospital assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. The term also includes employees of such hospitals, excluding physicians or nurse-midwives who are eligible to qualify as participating physicians, acting in the course of and in the scope of their employment.

"Participating physician" means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time or, as authorized in the plan of operation, a licensed nurse-midwife who performs obstetrical services, either full or part time, within the scope of such licensure and who at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the physician agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. *The term "participating physician" includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices.*

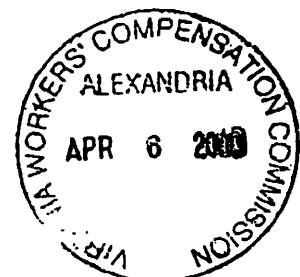
"Program" means the Virginia Birth-Related Neurological Injury Compensation Program established by this chapter.



2. That the provisions of this act amending § 38.2-5001 are declaratory of existing law.
  3. That an emergency exists and this act is in force from its passage.
- 



Go to (General Assembly Home)





# HB 398 Birth-Related Neurological Injury Compensation Act.

Patron-Clifton A. (Chip) Woodrum

*Summary as passed:*

**Virginia Birth-Related Neurological Injury Compensation Act.** Clarifies that only parties to litigation who are either participating hospitals or physicians under the Virginia Birth-Related Neurological Injury Compensation Act may move the court to refer the action to the Workers' Compensation Commission for the purpose of determining whether the requirements of the Act are satisfied. The bill also requires that a motion to refer the action to the Commission be filed no later than 120 days after the date the party seeking the referral filed its grounds of defense. The bill specifies what constitutes a petition and certain filing and administrative requirements. The bill provides that the definition of participating physician includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the physician practices. The bill has an emergency clause.

*Full text:*

01/13/00 House: Presented & ordered printed 003324996  
01/28/00 House: Committee substitute printed 001768996-H1  
03/07/00 Senate: Floor substitute printed 001925508-S1 (Norment)  
03/10/00 House: Enrolled bill text (HB398ER)

*Status:*

01/13/00 House: Presented & ordered printed 003324996  
01/13/00 House: Referred to Committee for Courts of Justice  
01/19/00 House: Assigned to C. J. sub-committee: 2  
01/27/00 House: Reported from C. J. with substitute (23-Y 0-N)  
01/28/00 House: Committee substitute printed 001768996-H1  
01/31/00 House: Read first time  
02/01/00 House: Read second time  
02/01/00 House: Committee substitute agreed to 001768996-H1  
02/01/00 House: Engrossed by House - com. sub. 001768996-H1  
02/02/00 House: Read third time and passed House (Block Vote) (98-Y 0-N)  
02/02/00 House: VOTE: BLOCK VOTE PASSAGE (98-Y 0-N)  
02/02/00 House: Communicated to Senate  
02/03/00 Senate: Constitutional reading dispensed  
02/03/00 Senate: Referred to Committee for Courts of Justice  
03/01/00 Senate: Reported from Courts of Justice (15-Y 0-N)  
03/02/00 Senate: Const. reading disp., passed by for the day (38-Y 0-N)  
03/02/00 Senate: VOTE: CONST. RDG. DISPENSED R (38-Y 0-N)  
03/03/00 Senate: Read third time  
03/03/00 Senate: Passed Senate (39-Y 0-N)  
03/03/00 Senate: VOTE: PASSAGE R (39-Y 0-N)  
03/06/00 Senate: Rec. of Sen. passage agreed to by Senate (39-Y 0-N)  
03/06/00 Senate: VOTE: RECONSIDER (39-Y 0-N)  
03/06/00 Senate: Passed by for the day  
03/07/00 Senate: Floor substitute printed 001925508-S1 (Norment)  
03/07/00 Senate: Read third time  
03/07/00 Senate: Reading of substitute waived

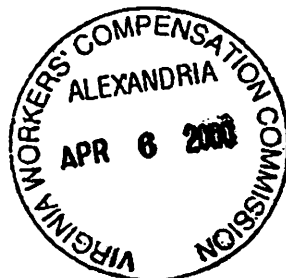


03/07/00 Senate: Substitute by Sen. Normant agreed to 001925508-S1  
 03/07/00 Senate: Emergency clause added  
 03/07/00 Senate: Engrossed by Senate - fl. sub. 001925508-S1  
 03/07/00 Senate: Passed Senate with substitute (36-Y 1-N 1-A)  
03/07/00 Senate: VOTE: PASSAGE (36-Y 1-N 1-A)  
 03/08/00 House: Placed on Calendar  
 03/09/00 House: Senate substitute agreed to by House (98-Y 0-N)  
03/09/00 House: VOTE: ADOPTION EMERGENCY (98-Y 0-N)  
 03/10/00 House: Enrolled bill text (HB398ER)  
 03/13/00 House: Enrolled  
 03/13/00 House: Signed by Speaker  
 03/15/00 Senate: Signed by President  
 04/01/00 Governor: Approved by Governor-Chapter 207 (effective 4/1/00)

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Go to (General Assembly Home) or (Bills and Resolutions)



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April 17, 2000

***Via AAA Courier***

Deputy Commissioner Carolyn Colville  
Virginia Workers' Compensation Commission  
520 King Street  
Second Floor  
Alexandria, Virginia 22314

re: Case No. B- 00-06

Dear Commissioner Colville:

Please find enclosed an original and file copy of Plaintiffs' Reply Memorandum in Support of Motions to Remand and to Withdraw Claim.

Please let me know if you need additional information. Thank you for your assistance in this matter.

Sincerely yours,

*Donna Miller Rostant*  
Donna Miller Rostant *by aek*

enclosures as stated  
cc: Tara McCarthy Esq.



ORIGINAL

**Scott and Tara Mills,  
Co-Administrators of the Estate of Nelson  
Mills, and Tara Mills individually**

[illegible]

the defendants

ALEXANDRIA  
APR 18 2000

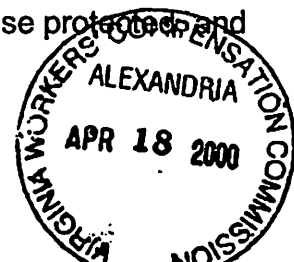
moved to refer the matter to the Commission pursuant to Code of Virginia § 8.01-273.1. Contrary to Defendants' assertions in their Opposition to Plaintiffs' Motion to Remand and for Nonsuit, at no time did the Court conclude that the Commission had jurisdiction to hear the claims referred to it. Instead, the Honorable Stanley Klein stated:

"In making the rulings that I have made in regard to the wrongful death claim, the claim against the corporation and the claim for negligent infliction of emotional distress, I am not ruling, nor am I implying that those claims, in fact, fall within the advent of the act. That is for the Workers' Compensation Commission to determine pursuant to 8.01-273.1 and I specifically decline to rule on those claims ...." (Transcript, p. 17, lines 10 - 20; attached as Exhibit 2)

Thus, the Court only concluded that the Commission had jurisdiction, pursuant to Code § 8.01-273.1 to determine if the causes of actions and claims **might be** within its jurisdiction.

On January 4, 2000, the court entered an order granting the motion to refer the claims for wrongful death against Dr. Berner and Primary Care for Women, P.C., but declining to refer Mrs. Mills' claim for the personal injury she sustained incident to the forceps delivery.

On March 3, 2000, the Supreme Court of Virginia handed down the *Fruiterman* decision, relying upon the plain language of the Neurological Birth-Related Injury Compensation Act (Birth Injury Act), which specifically defined those for whom the protections of the Act are available. Specifically, the Court held, those protected by the act include only "participating physicians" and "participating hospitals." Code § 38.2-5001. The Supreme Court in deciding *Fruiterman* recognized that the legislature did not include professional corporations within the limited class of those protected and



consequently affirmed the refusal of the trial court to grant the professional corporation's demurrer seeking dismissal on the grounds that the Birth Injury Act applied.

After the *Fruiterman* decision, on March 23, 2000, the Mills filed their motion to remand their claims against the professional corporation, which pursuant to *Fruiterman* does not enjoy protection under the Birth Injury Act as it is not one of the identified classes of protected health care providers. The Mills also moved this Commission to allow them to withdraw and non-suit their remaining claims against Dr. Berner.

On April 1, 2000, the Governor signed HB 398 which amended Code §§ 8.01-273.1 and 38.2-5001. The amendment to Code §38.2-5001 added, *inter alia*, professional corporations to the definition of "participating physician". The Act, as amended, went into effect from the date of its passage.

The defendants Berner and Primary Care for Women, P.C. oppose the Mills' motions on the grounds that this Commission is not bound by the Supreme Court's decision in *Fruiterman*, and that this Commission does not have the authority to allow the Mills' to withdraw or non-suit their claims against Dr. Berner.

### **ARGUMENT AND AUTHORITY**

1. ***Fruiterman* conclusively resolves the issue that Primary Care for Women, P.C. does not enjoy the rights and benefits of the Compensation Act**

To find for the Defendants, this Commission must agree with Defendants' assertion that a unanimous decision by the Supreme Court of this Commonwealth in *Fruiterman* was fundamentally flawed. (See Defendants' Opposition Brief, p. 4)



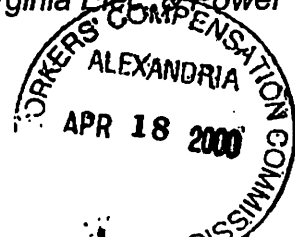
In effect, the defendants ask the Commission to give House Bill 398 retroactive effect. However, in passing House Bill 398 the legislature simply stated that the Act, with the amendments, was effective from the date of passage, which was earlier than the usual effective date of legislation, July 1.

The general rule is that legislation is prospective. Code § 1-16. provides:

No new law shall be construed to repeal a former law . . . or any right accrued, or claim arising under the former law, or in any way whatever to affect . . . any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. . . .

Here Dr. Berner's actions on May 28, 1998 gave rise to causes of action and rights of action against Primary Care for Women, P.C., and the Mills filed suit upon those accrued claims on April 4, 1999. Defendants are simply wrong in asserting that the action of the General Assembly in April 2000 can repeal the Mills' already accrued rights against the professional corporation.

It cannot be disputed that the Mills' causes of action and rights of action against the professional corporation are substantive rights that cannot be abridged by subsequent legislation. *Roller v. Basic Construction Co.*, 238 Va. 321, 328, 384 S.E.2d 323 (1989). "[T]he legislature possesses the power to enact retrospective legislation"; but, we added, only "if the statute . . . is not destructive of vested rights." *Starnes v. Cayouette*, 244 Va. 202, 211, 419 S.E.2d 669 (1992). In discussing the wrongful death statute the Supreme Court has noted that, "the rights of the plaintiff and defendant under the statutes became fixed at the time the cause of action accrued and subsequent amendments do not apply retroactively. *Riddett v. Virginia Elec. & Power*



Co., 255 Va. 23, 28-29 495 S.E.2d 819 (1998).

Moreover, even if the legislature could have made this amendment retroactive, which is refuted, the legislature did not do so. The legislature clearly knows how to make an amendment retroactive as seen in the fourth sentence of the definition of "Birth-related neurological injury" which was added by a 1999 Amendment to the act. Code § 38.2-5002<sup>1</sup>. The General Assembly did not indicate that it intended a retroactive effect for this new legislation.

Defendants' arguments in support of their position misstate the law. There would be no double recovery as argued on page 4 their memorandum. The Birth Injury Act provides that a suit against a nonparticipating physician or hospital constitutes an "election of remedies, to the exclusion of any claim under" the Birth Injury Act; "provided that if a claim is made, accepted and benefits are provided by the Fund . . . , " the Fund is subrogated to the rights of the claimants against the nonparticipating physician or

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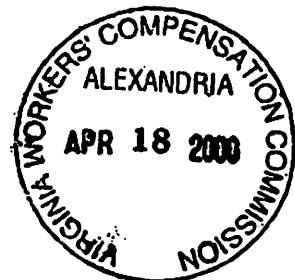
<sup>1</sup>"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of this chapter, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse. **The definition provided here shall apply retroactively to any child born on and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.**





hospital. Code § 38.2-5002.

Clearly, defendant, Primary Care for Women, P.C., is not entitled to the rights and protections afforded by the Birth Injury Act, as it existed at the time the corporation's liability to the Mills arose, at the time suit was filed against it, and at the time the matter was referred to this Commission. In May 1998, Dr. Berner's negligent actions gave rise to both common law and statutory(wrongful death) causes of action against the professional corporation. Defendants assert those causes of action have been abrogated by the April 2000 amendment to the Birth Injury Act, passed after the causes of action arose. Defendants are wrong, for rights and liabilities under statutes are fixed as of the time the injury occurs. *Roller v. Basic Construction Co.*, 238 Va. at 329 [applying the Workers' Compensation Statute in effect at the time the diagnosis was first communicated to employee, where the statute provided that the time for filing a claim did not begin to run until the diagnosis was communicated to the employee]; Similarly, the rights of Mills against Primary Care for Women, P.C., were fixed as of the time the injuries to Mrs. Mills and Nelson Mills occurred. Subsequent legislation cannot impair the substantive rights which arose at that time. The referral of the claim against the professional corporation is voidable to the extent the referral was of a claim to which the Birth Injury Act has no application, and consequently the matter against the professional corporation must be remanded to the Circuit Court for appropriate proceedings there.



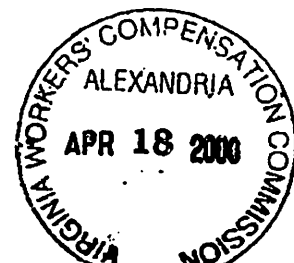
**2. This commission has the power to allow plaintiffs to withdraw and non-suit their claims against Dr. Berner**

The defendants' opposition to the Mills' Motions provides no authoritative guidance in support of their unfounded assertions as to what this Commission may and may not do. The power of the Workers' Compensation Commission to grant non-suits and to allow claimants to withdraw claims has been routinely utilized and recognized as appropriate in the Worker's compensation setting. "The Commission has traditionally followed the non-suit statute found in Va. Code Ann. § 8.01-380, . . ." *Zirkle v. Rocco Farms*, 99 WC UNP 1905166 (Copy attached as Exhibit 3 ) *J & F, Services, Inc. v. Hanover Insurance Company*, 1996 Va. App. LEXIS 876 (copy attached as Exhibit 4) [discussion of withdrawal]; *Keenan v. Westinghouse Elevator Co*, 10 Va. App. 232, 390 S.E.2d 342 (1990) (copy attached as Exhibit 5)[discussion of withdrawal]; *Britt v. Siemen's Automotive*, 96 WC UNP 1759589 (1996)[discussion of non-suit](Copy attached as Exhibit 6).

The same procedures utilized by the Workers' Compensation Commission in connection with Workers' Compensation Claims are also available for claims under the Birth Injury Act. Code § 38.2-5003 provides in pertinent part:

The Virginia Workers' Compensation Commission is authorized to hear and pass upon all claims filed pursuant to this chapter. The Commission may exercise the power and authority granted to it in Chapter 2 of Title 65.2 as necessary to carry out the purposes of this chapter.

This Commission clearly has the authority to allow the Mills to withdraw their claims and to waive any claim they may have under the Birth-Injury Compensation Act.



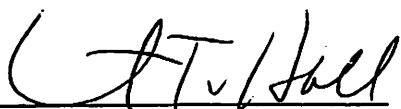
## CONCLUSION

The defendant Primary Care for Women, P.C. is a professional corporation that is not subject to the provisions of the Birth Injury Act, and consequently this matter should be remanded to the Circuit Court. The Mills, in their individual capacity and as Co-Administrators of Nelson Mills, have the right to withdraw or waive any claim they arguably might have under the Birth Injury Act as to Dr. Berner.

Respectfully submitted,

Scott and Tara Mills, as Co-Administrators of  
the Estate of Nelson Mills and Tara Mills  
Individually

HALL & SICKELS, P.C.



Robert T. Hall, Esquire VSB No. 4826  
Holly Parkhurst Essing, Esquire VSB No. 17538  
Donna Miller Rostant, Esquire VSB No. 41855  
12120 Sunset Hills Road, Suite 150  
Reston, VA 20190  
(703) 925-0500  
Counsel for Plaintiff

P-ReplytoDOpptoRemand.wpd



Present: Carrico, C.J., Compton , Lacy, Hassell, Keenan, and Kinser, JJ., and Poff, Senior Justice

JAN PAUL FRUITERMAN, M.D.  
AND ASSOCIATES, P.C.

Record No. 990376

v.

OPINION BY  
SENIOR JUSTICE RICHARD H. POFF  
March 3, 2000

AHMAD WAZIRI AND HASSINI WAZIRI,  
INDIVIDUALLY AND AS PERSONAL  
REPRESENTATIVES OF THE ESTATE OF  
SYAWACH WAZIRI

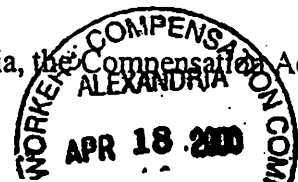
FROM THE CIRCUIT COURT OF FAIRFAX COUNTY  
M. Langhorne Keith, Judge

In this appeal from a judgment entered in a medical malpractice, wrongful death action, the appellant, Jan Paul Fruiterman, M.D. and Associates, P.C., a professional corporation (the P.C.), contends that the trial court erred in denying coverage of the Virginia Birth-Related Neurological Injury Compensation Act, Code § 38.2-5000 et seq. (the Compensation Act), to professional corporations.

Ahmad and Hassini Waziri, individually and as personal representatives of the estate of their son, Syawach, filed an amended motion for judgment entitled "Medical Malpractice-Wrongful Death" against Dr. Fruiterman, individually, and against the P.C. Applying the rights and remedies defined in the Compensation Act, the trial court sustained Dr. Fruiterman's demurrer. The court denied the co-defendant's demurrer on the ground that the rights and remedies of the Compensation Act do not apply to professional corporations. The jury returned a verdict against the P.C. for \$750,000 which the court reduced by remittitur to \$730,000.

The sufficiency of the evidence of medical malpractice and proximate cause are not in issue on appeal. Expert witnesses called by the plaintiffs testified that Dr. Fruiterman's performance of the fetal delivery by Caesarian section was conducted too late to avoid severe brain damage. In response to medical opinion, the parents agreed to suspend life support systems, and Syawach, their first-born child, died eight days after birth.

The General Assembly enacted Chapter 50 of the Code of Virginia, the Compensation Act,



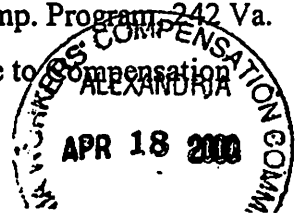
in 1987. That act "established the Virginia Birth-Related Neurological Injury Compensation Program." § 38.2-5002(A). The act provided that, subject to two exceptions, "the rights and remedies herein granted to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury." *Id.*

The Compensation Act established an "Injury Compensation Fund to finance the . . . Compensation Program." § 38.2-5015. To capitalize that fund, the Compensation Act provided that "[a] physician who otherwise qualifies . . . may become a participating physician in the Program . . . by paying an annual participating physician assessment to the Program in the amount of \$5,000", § 38.2-5020(A), and that "a participating hospital with a residency training program . . . may pay an annual participating physician assessment to the Program for residency positions," § 38.2-5020(B). To administer the Compensation Program, "[t]he Virginia Workers' Compensation Commission [was] authorized to hear and pass upon all claims filed pursuant to this chapter", § 38.2-5003, and to "make an award providing compensation for . . . items relative to . . . [a covered] injury," § 38.2-5009.

I The principal issue raised by the assignments of error is whether a professional corporation is entitled to the rights and benefits of the Compensation Act. The trial court ruled that it was not. The P.C. contends that the trial court misconstrued legislative intent. We disagree with the P.C.

On brief, the P.C. acknowledges that the Compensation Act was intended to serve several interrelated purposes: "Enacted in 1987 in direct response to the grossly lessening availability of medical malpractice insurance for obstetricians in the Commonwealth of Virginia, the Compensation Act was intended to assure affordable malpractice insurance and therefore a sufficient pool of obstetricians practicing throughout the Commonwealth."

The legislative intent is reflected in the legislative history recorded by legislators in the reports of subcommittees of the two Houses of the General Assembly. See Senate Document No. 11 (1987); House Joint Resolution No. 297 (1989); House Document No. 63 (1990); House Joint Resolution No. 641 (1997). See also *King v. Neurological Injury Comp. Program*, 242 Va. 404, 409-10, 410 S.E.2d 656, 660 (1991) (rejecting constitutional challenge to compensation



Act).

As we have said, the Compensation Act provides that "the rights and remedies herein granted to an infant . . . shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law . . . ." § 38.2-5002(B).

"Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms." *Schwartz v. Brownlee*, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997) (citation omitted).

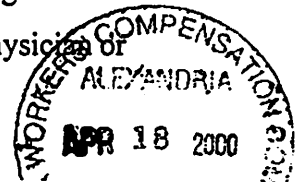
The Compensation Act begins with expressly restrictive definitions. A "[p]articipating physician" is "a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services", § 38.2-5001, and "a licensed nurse-midwife who performs obstetrical services", *id.*, and pays "an annual participating physician assessment to the Program", § 38.2-5020(A).

"'Participating Hospital' means a hospital . . . which . . . had in force an agreement with the Commissioner of Health . . . to participate in . . . a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and . . . had in force an agreement . . . whereby the hospital agreed to submit to review of its obstetrical service . . . and . . . had paid the participating assessment pursuant to § 38.2-5020 . . . ."

"Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed." *Barr v. Town and Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)(quoting *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934)).

Clearly, the General Assembly did not intend to immunize all health-care providers from tort liability for birth-related neurological injury caused by medical malpractice. The legislature expressly identified those entitled to that immunity as "participating physicians" and "participating hospitals"; then expressly defined "physicians" as obstetricians and nurse-midwives who perform obstetrical services; and then expressly specified that the term "participating" includes payment of an annual assessment by qualified physicians and hospitals to finance the costs of the benefits provided by the Compensation Program. No such assessment was imposed upon a professional corporation.

In summary, the Compensation Act expressly limits those entitled to its rights and benefits to selected health-care providers and expressly excludes "a nonparticipating physician or



hospital." § 38.2-5002(D). The legislative omission of other health-care providers serving during the course of child birth, such as pediatricians, radiologists, and medical partnerships, confirms our conclusion that participating physicians and hospitals were intended to be the only health-care providers afforded immunity from civil liability by the Compensation Act. A professional corporation, the employer of a participating physician, is conspicuous by its absence.

II In support of a second assignment of error, the P.C. contends that "[t]he award for non-economic loss bears no reasonable relation to the evidence and therefore is excessive." The P.C. is referring to the jury's award of \$655,973.46, a sum in addition to its award for expenses incurred in "the care, treatment and hospitalization of the decedent".

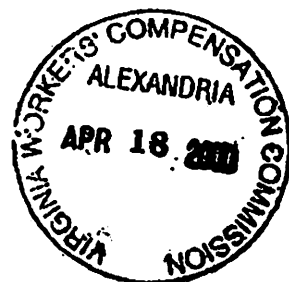
The wrongful death statute, § 8.01-52, provides that "[t]he jury or the court . . . may award such damages as to it may seem fair and just" and that "[t]he verdict or judgment . . . shall include, but may not be limited to, damages for . . . [s]orrow, mental anguish, and solace . . . ."

We find the evidence of sorrow, mental anguish, and solace contained in this record fully sufficient to support the jury's award, and finding no merit in the assignments of error, we will affirm the judgment entered by the trial court.

Affirmed.

Justice Compton participated in the hearing and decision of this case prior to the effective date of his retirement on February 2, 2000.

The Compensation Act expressly provides that "a civil action . . . shall not be foreclosed against a nonparticipating physician or hospital", § 38.2-5002(D), or "against a physician or hospital where there is clear and convincing evidence that such physician or hospital intentionally or willfully caused or intended to cause a birth-related neurological injury." § 38.2-5002(C).



ORIGINAL

1

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SCOTT AND TARA MILLS,  
CO-ADMINISTRATORS OF THE ESTATE OF  
NELSON MILLS AND TARA MILLS,

Plaintiffs,

vs.

At Law No. 181359

TODD BERNER, M.D., AND PRIMARY  
CARE FOR WOMEN, P.C.,

Defendants.

Fairfax, Virginia

Monday, November 8, 1999

The hearing commenced at 8:45 a.m.

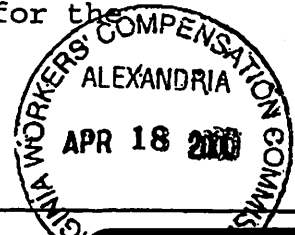
BEFORE:

THE HONORABLE STANLEY P. KLEIN

APPEARANCES:

DONNA MILLER ROSTANT, ESQ., Hall & Sickels,  
P.C., 12120 Sunset Hills Road, Suite 150,  
Reston, Virginia 20190-3231, counsel for  
the plaintiffs.

SUSAN L. MITCHELL, ESQ., McCarthy & Massey,  
9315 Center Street, Suite 104, Manassas,  
Virginia 20110, counsel for the  
defendants.



Platt & Dawson, Inc.  
(703) 591-0007

EXHIBIT

2



## P R O C E E D I N G S

(The court reporter was sworn.)

THE COURT: Let the record reflect we're here in the matter of Scott and Tara Mills, Co-Administrators of the Estate of Nelson Mills and Tara Mills, plaintiffs, versus Todd Berner, M.D., and Primary Care for Women P.C., defendants, Law No. 181359. And we're before the Court today for me to announce my decision on the Defendants' Motion to Refer.

And let me first state for the record an apology for the length of time that it's taken for me to be in a position to render the decision that I'm about to announce. There are a number of different reasons why, but suffice it to say that it's taken too long for me to be in a position to render my decision, and I apologize to counsel for the length of time.

This matter is before the Court on defendant's Todd Berner, M.D., and Primary Care for Women P.C.'s Motion to Refer this matter to the Virginia Workers' Compensation Commission pursuant to Virginia Code Section 8.01-273.1. And I need to decide the effect of that code section on the Virginia Birth-Related Neurological Injury



1 Compensation Act which was enacted in 1987 and is set  
2 forth in Virginia Code Section 38.2-5000 et seq.

3 I have before me a four-count Motion for  
4 Judgment filed by the plaintiffs, Scott and Tara Mills,  
5 alleging in Count I wrongful death; alleging in Count II  
6 negligence against the defendant, Dr. Berner; and  
7 alleging in Count III negligence against Primary Care for  
8 Women, P.C.; and Count IV, a negligent infliction of  
9 emotional distress.

10 The counts to some extent are a combination of  
11 the claims by the beneficiaries of the estate of the  
12 deceased child and Mrs. Mills's individual claims arising  
13 out of the alleged medical malpractice.

14 The defendants argue first the plain language  
15 of 8.01-273.1 mandates referral of this entire case, as  
16 the statute reads, that upon a party moving to refer a  
17 cause of action, the Court, quote, shall forward the  
18 motion to refer and stay all proceedings pending an award  
19 and notification by the commission of its disposition.

20 The defendants further contend that even if  
21 8.01-273.1 is not to be applied under the circumstances  
22 of this case; this court should nonetheless refer this



4

1 entire case to the commission because the act, in fact,  
2 covers the claims of the plaintiffs; and this court  
3 should so find.

4 The plaintiffs respond that 8.01-273.1 is, in  
5 fact, not applicable to this case because, one, it should  
6 be applied prospectively only under existing Virginia  
7 law; and as this case was pending prior to the effective  
8 date of the enactment -- excuse me -- the effective date  
9 of the statute, July 1st, 1999, and the statute according  
10 to plaintiffs affects substantive rights, I should not  
11 apply 8.01-273.1 to the circumstances of this case.

12 Secondly, plaintiffs respond that it would be  
13 constitutional to apply the statute retroactively, as to  
14 allow retroactive application of the statute would  
15 violate principles of separation of powers between the  
16 legislative and judicial branches of the government.

17 Thirdly, plaintiffs respond that the word  
18 "shall" in 8.01-273.1 should be interpreted by the Court  
19 as "directory" not "mandatory"; and that even if I were  
20 to determine that 8.01-273.1 is applicable, I should not  
21 refer this matter to the commission nonetheless.

22 I'm going to address each of the arguments that

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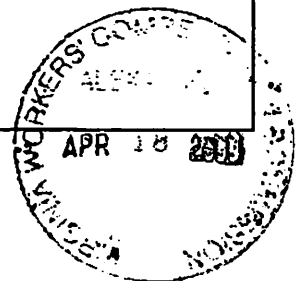


1 have been advanced.

2 The first issue is whether I'm going to apply  
3 8.01-273.1 to the circumstances of this case. And what  
4 that really boils down to is whether 8.01-273.1 is a  
5 substantive or a procedural/remedial statute. And in  
6 making that decision, there are certain statutes that I  
7 have to consider.

8 The first is Virginia Code Section 1-16, which  
9 basically says that if it's substantive, we're not going  
10 to apply it retroactively; but that if it's procedural or  
11 remedial, as the statute says, the proceedings thereafter  
12 shall conform so far practicable to the laws in effect at  
13 the time of such proceedings.

14 I also need to consider Virginia Code Section  
15 8.01-1, which counsel say is somewhat of an exception to  
16 1-16. I'm not sure that it is really an exception  
17 because I read 8.01-1 as basically saying the same thing  
18 as 1-16; that if it is a substantive modification, then  
19 1-16 will apply; if it's procedural or remedial in  
20 nature, then we're going forward based upon the amendment  
21 as of its effective date subject to the exceptions set  
22 forth in that statute.



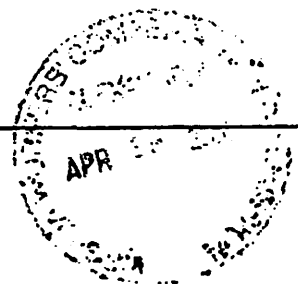
1           The substantive versus procedural distinction  
2       has been addressed on a number of different occasions by  
3       the Virginia Supreme Court. And perhaps the case most  
4       oft cited related to this issue is the Virginia Supreme  
5       Court's decision in Shifflet versus Eller (phonetic) at  
6       228 Virginia 115. And I am going to read part of the  
7       Court's decision in Shifflet.

8           At Page 120 of the opinion the Court stated:

9           "Preliminarily we observed that substantive  
10      rights as well as vested rights are included within those  
11      interests protected from retroactive application of  
12      statutes. The concept of protection of substantive  
13      rights was incorporated by the General Assembly into  
14      Virginia civil procedure with the enactment of Title 8.01  
15      effective October 1st, 1977.

16           "Specifically Section 8.01-1 provides for  
17      retroactive application of all provisions of the title  
18      unless a particular provision may materially change the  
19      substantive rights of a party (as distinguished from the  
20      procedural aspects of the remedy).

21           "Substantive rights which are not necessarily  
22      synonymous with vested rights are included with that part

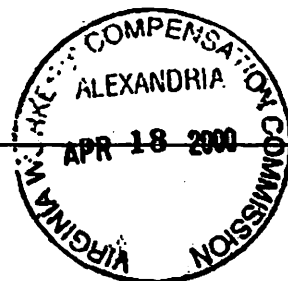


1 of law dealing with creation of duties, rights, and  
2 obligations as opposed to procedural or remedial law  
3 which proscribes methods of obtaining redress or  
4 enforcement.

5 "While all vested rights may be considered  
6 substantive, it does not necessarily follow that the only  
7 subject matter that is to be considered to be substantive  
8 that which relates to vested rights."

9 Shifflet is approvingly cited; and its  
10 principles are approvingly cited in a number of  
11 subsequent Virginia Supreme Court cases including Harris  
12 versus Demattina (phonetic) at 250 Virginia 306; Starns  
13 (phonetic) versus Cayotee, C-a-y-o-u-t-t-e, at 244  
14 Virginia 202.

15 And it also has a predecessor in Walke  
16 (phonetic) versus Dallas Incorporated where the Virginia  
17 Supreme Court goes into even further detail about the  
18 distinction between remedial and substantive changes or  
19 amendments and talks about statutes relating to remedies  
20 or modes of procedure which do not create new or take  
21 away vested rights but only operate in furtherance of the  
22 remedy or confirmation of rights already existing do not

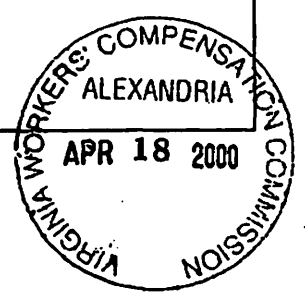


1 come within legal conception of a retrospective law or  
2 the general rule against the retrospective operation of  
3 statutes.

4 To the contrary statutes or amendments  
5 pertaining to procedure are generally held to operate  
6 retrospectively where the statute or amendment does not  
7 contain language clearly showing a contrary intention.  
8 Sometimes the rule is stated in a form that when a new  
9 statute deals with procedure only, prima facie it applies  
10 to all actions, those which have accrued or are pending  
11 in future actions.

12 And the Virginia Supreme Court also dealt with  
13 this issue in Riddick (phonetic) versus Virginia Electric  
14 & Power at 355 Virginia 23 and Mann versus Hinton  
15 (phonetic) at 249 Virginia 555.

16 The issue that's now before this Court is not  
17 whether a cause of action for you injuries which are  
18 encompassed in the Virginia Birth-Related Neurological  
19 Compensation Act can be maintained in common law. The  
20 act was passed well before the causes of action set forth  
21 in the motion for judgment herein accrued; and plaintiffs  
22 are not attacking the act in this case.

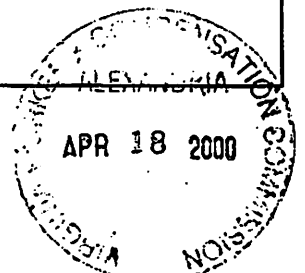


1           The sole issue before me is whether the  
2 commission or this Court will determine whether the act  
3 does or does not apply. And in my view that is clearly a  
4 procedural, remedial matter, not a substantive right as  
5 the Virginia cases have defined substantive rights. And  
6 the Court, therefore, rejects plaintiffs' initial  
7 position why 8.01-273.1 should not apply under the  
8 circumstances of this case.

... 9           Plaintiffs also argue on the substantive  
10 remedial/procedural distinction that they have a  
11 substantive or vested right to have this decision made by  
12 a judge rather than an administrative officer. Pursuant  
13 to Article I, Section 11 of the Virginia Constitution, a  
14 party does, in fact, have the right to a jury trial in  
15 cases properly before the courts.

16           However, after looking into this matter, I  
17 could not find in Virginia or elsewhere a corresponding  
18 substantive right to have a decision made by a judge  
19 rather an administrator officer. Issues about the  
20 appropriate forum for a decision are, in fact, remedial  
21 not substantive.

22           And the Virginia Supreme Court, in fact, dealt



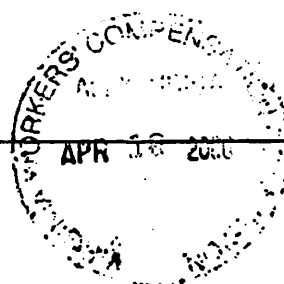


1 with that issue in Walke versus Dallas where the question  
2 was whether the enactment of the Virginia long-arm  
3 statute was going to be a remedial or a substantive  
4 change. And the Virginia Supreme Court held that that  
5 constituted a remedial/procedural change in the law  
6 because all it did was provide an additional forum,  
7 namely, the Virginia courts, for resolution of the  
8 dispute. It didn't create nor annul any rights that were  
9 substantive in nature of the parties.

10 Nor could I find any support for an argument  
11 that there's a vested or substantive right to have an  
12 appeal heard by the Virginia Supreme Court rather than  
13 the Virginia Court of Appeals. And in the Court's view,  
14 this is again a remedial not substantive issue because it  
15 doesn't go to the existence of a right; it goes to who is  
16 going to make a decision relating to that issue.

17 Therefore, after considering the arguments of  
18 counsel and all of the authorities that the Court could  
19 find, this Court finds that Virginia Code Section  
20 8.01-273.1 is a remedial or a procedural statute.

21 The next challenge by the plaintiffs to  
22 referring this matter is the constitutional challenge.

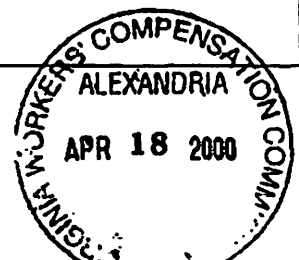


1 And as I trust was evident by some of my questions during  
2 oral argument, I'm, indeed, troubled by the concept of  
3 the legislative branch of government being able to enact  
4 laws that could affect who will decide cases that were  
5 then pending before a court. And in determining the  
6 constitutional issue, I am governed by certain  
7 established principles of law in the Commonwealth dealing  
8 with this issue.

9 All statutes enacted by the General Assembly  
10 are presumed to be constitutional, Cane (phonetic) versus  
11 Neurological Injury Comp Program, 242 Virginia 404 and  
12 Ethridge versus Medical Center Hospital, 237 Virginia 87  
13 at Page 94.

14 A party who assails the legislation has the  
15 burden of proving that the act is unconstitutional. Grill  
16 Burger versus Chesapeake Railway, 229 Virginia 213 at  
17 215, any reasonable doubt as to the statute's  
18 constitutionality must be resolved in favor of its  
19 validity, Blue Cross versus the Commonwealth, 221 Virginia  
20 349 at 358.

21 After reviewing all of the authorities and  
22 giving this issue substantial thought, I have eventually



1 concluded the that legislation of the General Assembly  
2 itself answers this troubling question.

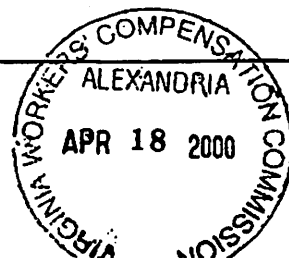
3           There is no evidence before me, nor is there  
4 any reason to believe that the General Assembly enacted  
5 8.01-273.1 to adversely affect the rights of the  
6 plaintiffs herein or for that matter any other specific  
7 litigants. The potential problems that were addressed the  
8 in oral argument were all conceivable, not present ones.

9           In the event that General Assembly, in fact,  
10 enacted legislation with the intent of affecting actual  
11 ongoing litigation, the plain language at 8.01-1 will  
12 allow a trial court to prevent a miscarriage of justice.

13           In 8.01-1, which says that all legislation  
14 which becomes law and which is included in Volume II of  
15 Virginia code is deemed to be procedural/remedial unless  
16 there's something stated to the contrary, two exceptions  
17 were carved out by the General Assembly.

18           One is if the legislation or the law would  
19 materially change the substantive rights of a party as  
20 distinguished from the procedural aspects of the remedy.  
21 And as I've previously ruled, I don't believe that that  
22 is applicable here; or, two, may cause the miscarriage of

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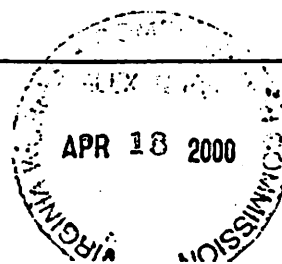


1 justice.

2 And if, in fact, the General Assembly enacted a  
3 law because a particular member or members of the General  
4 Assembly were interested in what was going on in specific  
5 litigation then pending before the courts and decided to  
6 take an affirmative act to affect the ongoing litigation  
7 in a matter to divest a court of jurisdiction, in 8.01-1  
8 there is, in fact, a way to prevent a miscarriage of  
9 justice from occurring.

10 In fact, in Harris versus Demattina or that  
11 portion of it which was really Cumberland versus Boone,  
12 the Supreme Court described a trial court's  
13 responsibility in interpreting 8.01-1 as a, quote, duty,  
14 closed quote, to prevent the miscarriage of justice and  
15 reversed a trial court for retroactively applying what  
16 would otherwise clearly have constituted a procedural or  
17 remedial change in the law.

18 As the General Assembly's law precludes the  
19 type of problems that were being discussed during oral  
20 argument and there is no reason to believe that the  
21 enactment of the statute in question has anything to do  
22 with this litigation, I am compelled to find the statute



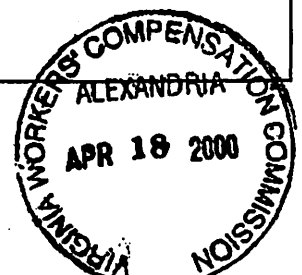
1 constitutional consistent with outstanding Virginia  
2 precedent.

3 Plaintiffs next assert that I should interpret  
4 the word "shall" in 8.01-273.1 to be "directory" not  
5 "mandatory", and decline to refer this the case. It  
6 cannot be questioned that in general the plain language  
7 of statute governs its meaning.

8 However, as plaintiffs point out on brief, the  
9 word "shall" has been found to mean "may" in a number of  
10 cases where a plain-meaning interpretation would have  
11 otherwise caused an absurd result. And among other cases  
12 see White versus Moreno, 249 Virginia 47; Fox versus  
13 Custis 246 Virginia 69; and Huffman versus Kyle, 198  
14 Virginia 196.

15 At oral argument I asked Ms. Mitchell whether a  
16 defendant may in a contract case who moves for referral  
17 would be entitled to referral and whether a judge's hands  
18 would be tied. Ms. Mitchell argued to the Court that in  
19 light of the wording of the statute, a judge would have  
20 to make that referral. I respectfully disagree.

21 This court holds that enacting 8.01-273.1 the  
22 General Assembly intended that a trial court refer all

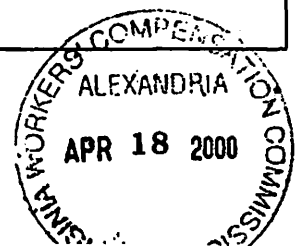


1 matters where a colorable claim could have been made or  
2 is, in fact, made that the act applies to the plain  
3 causes of action. That being the test, I now must  
4 examine the causes of actions set forth in the motion for  
5 judgment.

6 First, Count I is wrongful death. And a  
7 colleague of mine in this court, a colleague of mine in  
8 the Circuit Court for the City of Alexandria have ruled  
9 that wrongful death is controlled by the Virginia Birth  
10 Neurological Compensation Act; and I don't have to reach  
11 that question.

12 But suffice to it say in light of potentially  
13 contrary language in the act, reasonable minds can, in  
14 fact, differ; and I, therefore, refer that matter to the  
15 commission for its determination.

16 Next, in regard to the claim against the  
17 corporation, in defendants' supplemental brief an  
18 arguable compelling position is advanced for  
19 distinguishing the Supreme Court's decision  
20 in Schwartz versus Brownley and finding that this act  
21 applies to the corporate defendant under circumstances of  
22 this case.



1           The Virginia Supreme Court has granted an  
2 appeal on this specific issue in a case arising from this  
3 circuit. And upon reviewing the arguments advanced, I  
4 find that a colorable claim of the act's applicability to  
5 this claim also mandates referral of that issue to the  
6 commission.

7           Negligent infliction of emotional distress, my  
8 initial reaction was not to refer it. And then I  
9 reviewed the Virginia Supreme Court's decision in Bulala  
10 versus Boyd where the Supreme Court held that such claim  
11 for negligent infliction of emotional distress in a  
12 medical malpractice context is derivative of the  
13 malpractice claim at least in that case for purposes of a  
14 cap.

15           And I cannot distinguish sufficiently in my  
16 mind the Supreme Court's logic in Bulala versus Boyd from  
17 the situation that's presently before this Court. And,  
18 therefore, I find that, again, a colorable claim has been  
19 presented and advanced; and that issue is also referred  
20 to the commission.

21           However, as to Mrs. Mills's claim for personal  
22 injury, in the Court's view the claims set forth by

1 Mrs. Mills for her own individual injuries cannot fall  
2 within the act. Her injuries are totally unrelated to  
3 the types of injuries delineated in the act, and there is  
4 simply no possible remedy for her in the act.

5 I, therefore, deny the motion to refer  
6 Mrs. Mills's claims or individual claim for her personal  
7 injuries to the commission because I find that there is  
8 no colorable claim that the act would govern her claim  
9 for injuries.

10 In making the rulings that I have made in  
11 regard to the wrongful death claim, the claim against the  
12 corporation and the claim for negligent infliction of  
13 emotional distress, I am not ruling nor am I implying  
14 that I believe that those claims, in fact, fall within  
15 the advent of the act.

16 That is for the Workers' Compensation  
17 Commission to determine pursuant to 8.01-273.1, and I  
18 specifically decline to rule on the merits of those  
19 claims except to say that they present a good-faith  
20 colorable claim.

21 Therefore, for the reasons that I have  
22 articulated this morning, the defendant's motion to





1 refer is granted in part and denied in part.

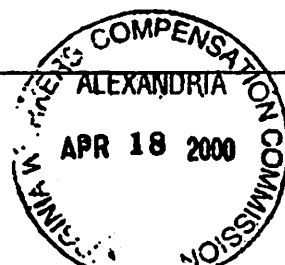
2 Ms. Mitchell's exception is noted for the reasons ably  
3 articulated both orally and on brief to the ruling that I  
4 have made against her clients; and Ms. Miller Rostant and  
5 Mr. Hall's exception to the other rulings are noted for  
6 the record for each of the reasons ably articulated by  
7 them both orally and on brief.

8 Ms. Mitchell, since you're the substantially  
9 prevailing party today, I'm going to ask that you draft  
10 an order consistent with the rulings that I've made. As  
11 far as I'm concerned, all you need to say, "For the  
12 reasons articulated by the Court on the record", and just  
13 set forth what the ruling is.

14 Now, is it possible to have that to me by  
15 Friday with your schedules, counsel?

16 MS. ROSTANT: That's possible, sure.

17 THE COURT: As far as I'm concerned, if you fax  
18 it to Ms. Miller Rostant, she can fax back to you  
19 authorization to enter the order and will attach her  
20 facsimile transmission, which for the record I will treat  
21 as containing any and all additional compensation that  
22 the plaintiffs wish to note for the record to the ruling



1 that I've made today so that those issues would be  
2 preserved in the event of a future appeal as far as this  
3 trial judge is concerned. That way it doesn't have to go  
4 back and forth.

5 MS. MITCHELL: That's fine, Your Honor.

6 I do have a question in terms of whether or not  
7 the ruling or the written order should include indication  
8 that Ms. Mills's claim will be stayed under the language.

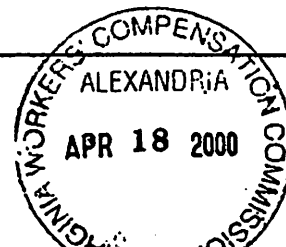
9 THE COURT: Absolutely. Well, her individual  
10 claim will be stayed?

11 MS. MITCHELL: The claim that you have denied  
12 the motion to refer on.

13 THE COURT: Why would that be stayed,  
14 Ms. Mitchell?

15 MS. MITCHELL: Under the language of the new  
16 statute of 273.1, "The Court shall forward the motion to  
17 refer together with a copy of the motion for judgment to  
18 the commission and stay all proceedings on the cause of  
19 action."

20 I'm wondering since it is contained in the same  
21 motion for judgment that is to be referred to the  
22 commission as Ms. Mills's claim as part of the cause of



1 action ought not be stayed.

2 THE COURT: Ms. Miller Rostant, do you want to  
3 be heard?

4 MS. ROSTANT: Yes, Your Honor.

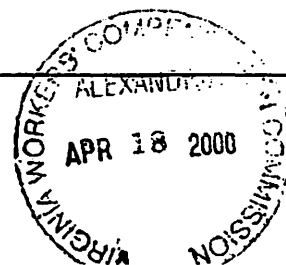
5 If it will prevent Ms. Mill's personal injury  
6 from being stayed, we'll make a motion to either separate  
7 the causes of action for her individual claim and allow  
8 the commission to decide those on those things that  
9 you've already referred to them.

10 There is no reason for her cause of action to  
11 be stayed because 273.1 would not apply to her cause of  
12 action. The Court already ruled that it wasn't included  
13 within the act, therefore, 273.1 has no applicability to  
14 her claim.

15 THE COURT: Give me one moment. I want to  
16 reread this before I definitively rule.

17 I deny that request. When the General Assembly  
18 includes "cause of action", what I believe that the  
19 General Assembly intends by "cause of action" is the  
20 cause of action that's being referred to the commission,  
21 because I'm not dismissing anything.

22 The commission may eventually decide that the



1 act does not apply to any of the matters that have been  
2 referred, and they may send all of them back to this  
3 court for trial. That's what I interpret "cause of  
4 action" to mean, not any cause of action that I'm not  
5 referring.

6 I don't believe that the plaintiffs have to  
7 file any type of an amended motion for judgment;  
8 although, as I mentioned before, her claim and the  
9 wrongful death claim are included within the same counts.  
10 And I make no comment on whether that does or does not  
11 constituted misjoinder. If there was any misjoinder,  
12 based upon my rulings today, there is no longer any  
13 misjoinder, at least for her going forward on her cause  
14 of action. So I'm to allow her case to move forward.

15 I think Mr. Hall addressed at oral argument the  
16 issue of whether you all should go to status conference.  
17 I told all of you that you should because at that point,  
18 consistent with how I eventually ruled, I felt I was  
19 probably not going refer to that. And as I looked  
20 through the authorities, I became more and more convinced  
21 that it would not be appropriate to refer her own  
22 individual personal injury claim.

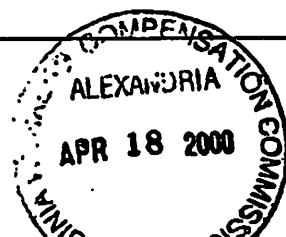
1           The other matters are clearly stayed until I  
2   hear back from the commission.

3           MS. ROSTANT: Your Honor, if I may, Mr. Hall is  
4   out of the country until this weekend. In light of the  
5   importance of this case to us, as the Court is no doubt  
6   aware and for which we thank the careful consideration of  
7   the Court has allowed us to give to the case, could we  
8   have an extension for the order until he has an  
9   opportunity to come back, if there any other exceptions  
10   that I have not identified to not to the order, he can  
11   add his exceptions as well?

12           THE COURT: When is he due back in town?

13           MS. ROSTANT: This weekend, I believe, Your  
14   Honor.

15           THE COURT: Let me tell you my only concern.  
16   I'll be glad to do that. But we have motions day this  
17   Friday. Then I have criminal on the 19th. There are no  
18   motions on the 26th. We're going over to December. And  
19   I would assume that the parties want to have the  
20   commission get this at the earliest possible opportunity  
21   so that the commission can determine these very important  
22   issues that I have decided today that I don't have the



1 authority to decide.

2 But if we're talking about getting to it me  
3 sometime next week, that's fine. Why don't you two of  
4 you take care of putting together a proposed order. Let  
5 Mr. Hall review it to see if there's anything he wants  
6 the plaintiffs to note as far as exceptions. Then you  
7 can simply send it directly to me in chambers.

8 In light of the time that I've taken to decide  
9 the issues, if there is any further discussion that needs  
10 to be had in reference to the wording of the order, you  
11 all can just call into my office. I'll arrange a time  
12 for us to have a conference call without Ms. Mitchell  
13 having to have come from Manassas and you having to come  
14 from Reston.

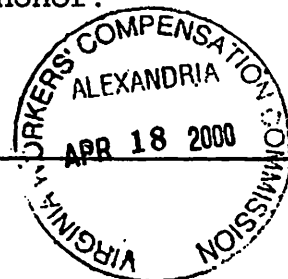
15 But I think everyone understands the import of  
16 my ruling, and I wouldn't expect there to be too much  
17 trouble putting together the order. So we can just do it  
18 that way if that's acceptable to you, Ms. Mitchell.

19 MS. MITCHELL: That's fine, Your Honor.

20 THE COURT: Is there anything further?

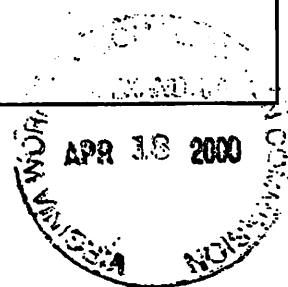
21 MS. ROSTANT: No, Your Honor. Thank you.

22 MS. MITCHELL: Thank you, Your Honor.



1 (At 9:10 a.m. the proceedings in the above-  
2 entitled matter were concluded.)  
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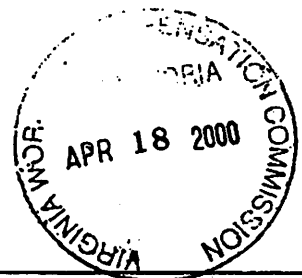


CERTIFICATE OF REPORTER

I, Malynda D. Whiteley, do hereby certify that the foregoing proceedings were taken by me in stenotype and thereafter reduced to typewriting under my supervision; that said proceedings are a true record of the testimony given by said witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and further, that I am not a relative or employee of any counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Given my hand this 10th day of November, 1999.

  
Malynda D. Whiteley  
Registered Professional Reporter





Zirkle v. Rocco Farms

99 WC UNP 1905166

VIRGINIA: IN THE WORKERS' COMPENSATION COMMISSION

CARROLL R. ZIRKLE, Claimant

v.

ROCCO FARMS, Employer

ROYAL INSURANCE COMPANY OF AMERICA, Insurer

VWC File No. 190-51-66

Decided: March 5, 1999

A. Thomas Lane, Jr., Esquire

35 South Gate Court

Suites 101 and 102

Harrisonburg, Virginia 22801

for the Claimant.

Cathleen P. Welsh, Esquire

P. O. Box 20028

Harrisonburg, Virginia 22801-7528

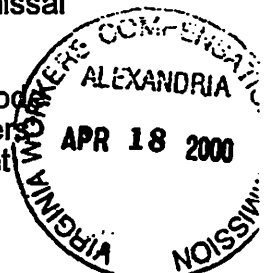
for the Defendants.

Opinion by LINK, Chief Deputy Commissioner

REVIEW on the record before Commissioner Tarr, Commissioner Dudley, and Chief Deputy Commissioner Link in Richmond, Virginia.

This case is before the Commission on the employer's January 20, 1999, petition for review of a deputy commissioner's January 12, 1999, Order dismissing the claimant's claim without prejudice. The employer asserts that because the claimant has withdrawn his claim two times, the second withdrawal must result in a dismissal with prejudice.

The Commission has traditionally followed the non-suit statute found in Va. Code Ann. § 8.01-380, even though there is no specific provision in either the Workers' Compensation Act or the Commission's Rules relating to a non-suit. In pertinent



EXHIBIT

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part, Va. Code Ann. § 8.01-380(B) states:

Only one non-suit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court *may* allow additional non-suits or counsel may stipulate to additional non-suits. The Court, in the event additional non-suits are allowed, may assess costs and reasonable attorney's fees against the non-suiting party.

Pursuant to the referenced Code section, a claimant may have one voluntary non-suit as a matter of right. When the claimant petitions for relief to withdraw his claim a second time, it is left to the discretion of the hearing officer to determine whether the dismissal will be with prejudice or without prejudice. In the present matter, the deputy commissioner exercised his discretion to dismiss the matter without prejudice. Since the deputy was acting within his discretion, we will not disturb his order.

For the foregoing reasons, the Commission's January 12, 1999, Order dismissing the claimant's claim without prejudice is **AFFIRMED**.

-- This matter is **ORDERED** removed from the review docket.

**APPEAL**

This Opinion shall be final unless appealed to the Virginia Court of Appeals within thirty days of receipt of this Opinion.

cc:

Carroll R. Zirkle

138 Kelford Street

Verona, Virginia 24482

Claimant.

Rocco Farms

P. O. Box 549

Harrisonburg, Virginia 22801

Employer.

Royal Insurance Company of America

Workers' Compensation Claims

P. O. Box 305055



Nashville, Tennessee 37230

Carrier.



**1996 Va. App. LEXIS 672 J&F SERVS. V. VILLATORO (Ct. App. 1996)**

**J&F SERVICES, INC. and HANOVER INSURANCE COMPANY**

**vs.**

**JOSE V. VILLATORO**

Record No. 1202-96-4

COURT OF APPEALS OF VIRGINIA

1996 Va. App. LEXIS 672

October 29, 1996, Decided

CASE STATUS: PURSUANT TO THE APPLICABLE VIRGINIA CODE SECTION THIS OPINION IS NOT DESIGNATED FOR PUBLICATION.

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION.

**COUNSEL**

William H. Schladt (Ward & Klein, on brief), for appellants.

Peter M. Sweeny (Wesley G. Marshall; Peter M. Sweeny & Associates, on brief), for appellee.

**JUDGES**

Present: Judges Willis, Fitzpatrick and Annunziata. MEMORANDUM OPINION BY JUDGE ROSEMARIE ANNUNZIATA.

**AUTHOR: ANNUNZIATA**

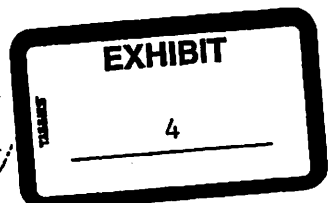
**OPINION**

**MEMORANDUM OPINION\* BY JUDGE ROSEMARIE ANNUNZIATA.**

Claimant, Jose V. Villatoro, filed a claim for benefits seeking compensation for an injury by accident arising out of and in the course of his employment with employer, J&F Services, Inc. The deputy commissioner applied the statute of limitations to bar compensation. The full commission reversed and remanded the case, directing the deputy commissioner to render a decision on the merits. The deputy commissioner entered an award in claimant's behalf, which, upon claimant's request for review, the full commission modified. Employer appeals, contending (1) the commission erred by not applying the statute of limitations as a bar to compensation; (2) the commission erred in finding claimant suffered a temporary total disability subsequent to May 25, 1992; and (3) the commission erred in awarding temporary total disability benefits after June 30, 1992. With the exception of the third issue raised, we affirm.

**I.**

Claimant suffered a compensable injury by accident while working for employer on April 16, 1992. On April 22, 1992, claimant, through his first attorney, filed a claim for benefits in the Virginia Workers' Compensation Commission. On May 5, 1992, claimant's counsel requested the matter be set for a hearing. By letter dated June 19, 1992, the commission stated that the case would not be placed on the hearing docket until the medical evidence supporting the claim was sent to the commission. On July 18, 1992, the Virginia commission wrote claimant's first lawyer



and advised him that the medical evidence supporting claimant's claim had to be sent immediately to the commission to avoid dismissal of the claim.

In the interim, on July 6, 1992, employer agreed to compensate claimant for total disability during the period April 17, 1992 to May 25, 1992. However, claimant refused to execute an Agreed Statement of Facts, and none was filed with the commission.

Meanwhile, by June 2, 1992, claimant had filed a claim for benefits in the Maryland Workers' Compensation Commission after having hired a new lawyer. The Virginia commission received notice of this action on July 7, 1992. On July 8, 1992, employer's carrier wrote claimant's new lawyer and stated it would compensate claimant for his Virginia claim through May 25, 1992. On July 15, 1992, claimant's counsel responded, stating that claimant had "opted for the State of Maryland Workers' Compensation benefits."

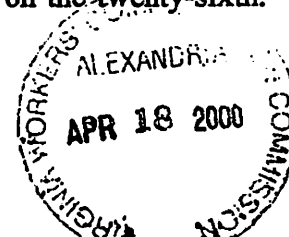
On August 28, 1992, the Virginia commission wrote claimant, requesting him to confirm that he was represented by new counsel and that he would be pursuing a claim in Maryland so the commission could dispose of the case. On September 10, 1992, claimant's counsel responded, advising the Virginia commission that he represented claimant in the Maryland case, which claimant was then pursuing.

The Virginia commission never entered an order dismissing claimant's Virginia claim. Following a hearing on April 11, 1994, the Maryland Workers' Compensation Commission denied claimant's claim for lack of jurisdiction.

Subsequently, claimant, through a third lawyer, filed a document entitled "Workers' Compensation Claim and Agreement to Retain Counsel" in the Virginia commission and requested the commission refer the claim to the hearing docket based on claimant's initial application for hearing. Following a hearing on February 24, 1995, the deputy commissioner invoked the statute of limitations to bar compensation, having found claimant made a conscious decision to withdraw his Virginia claim. The full commission reversed. It found claimant never intended to withdraw his Virginia claim and remanded the matter for a determination on the merits.

With respect to his claim for benefits, claimant responded to employer's interrogatories on the day before the February 24 hearing. In his response, claimant stated that he sought temporary total disability benefits from April 17, 1992 through June 30, 1993. At the February 24 hearing, the deputy commissioner stated that claimant sought temporary total disability benefits only for the periods April 17, 1992 to June 30, 1992, and November 1, 1993 to July 31, 1994, as "set out in a letter submitted today by claimant's counsel." The periods described comport with the periods claimant submitted to the deputy commissioner in a Statement of Benefits Claimed. The deputy commissioner's June 13, 1995 opinion also states that claimant sought benefits only until June 30, 1992. Upon remand from the commission's ruling that the statute of limitations did not bar the claim, another hearing was held before the deputy commissioner. At no point during that hearing was the termination of the initial time period for which claimant sought benefits modified from June 30, 1992; the deputy commissioner's ruling on the merits was likewise limited to that time period.

There is no dispute that claimant suffered a compensable accident which rendered him totally disabled from April 17, 1992 through May 25, 1992. Claimant's treating physician, Dr. Norman J. Cowan, approved a light duty job description for claimant provided by employer; the job was to commence May 26, 1992. Claimant testified that he received notice of the light duty opportunity, but he stated nobody was there when he appeared for work on the twenty-sixth.



Claimant acknowledged that he received further notice of light duty work within two weeks, but he stated when he responded, he was told he could not work.

Meanwhile, claimant was treated by Dr. Joseph Y. Lin, on May 29, 1992, at which time Dr. Lin directed claimant not to work for two weeks. Dr. Lin never released claimant to return to work at any level. Claimant was also referred to and treated by Dr. Michael April, who directed claimant not to work from July 20, 1992 to August 20, 1992. Although Dr. April noted as late as July 20, 1993 that claimant was not ready to return to work, on April 15, 1993, Dr. Cowan approved another light duty job description that employer provided for claimant.

The deputy commissioner found claimant's testimony concerning his reasons for not accepting light duty employment in May 1992 incredible and that claimant had unjustifiably refused selective employment. However, based on the medical records of Drs. Lin and April which demonstrated that claimant was totally disabled beginning May 29, 1992, the deputy commissioner awarded claimant temporary total disability benefits for the period April 17 to May 25 and again from May 29 to June 30, 1992. The deputy commissioner terminated the award on June 30 because claimant had not sought benefits beyond that date.

Claimant sought review, requesting, *inter alia* that the commission not terminate claimant's recovery as of June 30, 1992. The commission found that although Dr. Cowan had released claimant to return to light duty in May 1992, the records of both Drs. Lin and April established a continuing disability through the three-day period from May 26 to May 28. The commission further found that claimant was available for light duty employment in April 1993, which he unjustifiably refused. Without addressing the June 30, 1992 limitation imposed by the deputy commissioner, the full commission awarded claimant temporary total disability benefits for the period April 17, 1992 to April 13, 1993.

## II.

On appeal, employer contends (1) the commission erred by not applying the statute of limitations as a bar to compensation; (2) the commission erred in finding claimant suffered a temporary total disability subsequent to May 25, 1992; and (3) the commission erred in awarding temporary total disability benefits after June 30, 1992.

### A.

Assuming without deciding that employer's statute of limitations argument is not procedurally barred, we find that the argument fails. The right to compensation under the Virginia Workers' Compensation Act is forever barred "unless a claim be filed with the commission within two years after the accident." Code § 65.2-601. There is no dispute that claimant filed a claim for benefits in May 1992, well within the prescribed period. The issue then is whether claimant's actions subsequent to the filing of his claim amount to a withdrawal of the claim.

Initially, we find no rule or authority which requires a claimant to act within a certain time after the filing of a claim to avoid having the claim dismissed. Rule 1.3 of the Rules of the Workers' Compensation Commission states, "if supporting evidence is not filed within 90 days after an employee's claim is filed, it may be dismissed upon motion of the employer after notice by the Commission to the parties." Here, employer made no such motion. The record contains no indication that the commission ever dismissed the claim. Indeed, absent a motion by employer, the commission had no authority to do so. Thus, we conclude, claimant's inaction with respect to his Virginia claim is not tantamount to a withdrawal.



"The commission cannot hold that a claimant has withdrawn a 'claim' absent a clear showing that the claim has been withdrawn." *Keenan v. Westinghouse Elevator Co.*, 10 Va. App. 232, 235, 391 S.E.2d 342, 344 (1990). In *Keenan*, the claimant filed a claim for benefits in February 1987, alleging an injury by accident in May 1986. *Id.* at 233-34, 391 S.E.2d at 343. In December 1987, the claimant filed an Application for Hearing, which he subsequently withdrew in March 1988. *Id.* at 234, 391 S.E.2d at 343. In August 1988, claimant filed another Application for Hearing; however, the commission ruled that claimant's withdrawal of his initial Application for Hearing was effectively a withdrawal of his claim for benefits. *Id.* Noting the distinction between a claim for benefits and an Application for Hearing, this Court reversed the commission, ruling there had been no clear showing that the claimant had intended to withdraw his claim. *Id.* at 235-36, 391 S.E.2d at 344.

The commission ruled that claimant had not withdrawn his claim, and we find no basis to reverse that determination. The initial claim was never placed on the hearing docket because claimant failed to file his medical records. When pressed for his medical records, claimant responded that he was pursuing a claim in Maryland at that time. We agree with the commission that nothing in the correspondence suggests claimant intended to withdraw his Virginia claim to pursue his claim in Maryland. Although the commission stated its intention to "dispose" of the matter and advised claimant to forward his medical records to avoid "dismissal," we find no authority for the commission to dispose of the matter absent a motion by employer, and, in any event, the commission made no such disposition. Furthermore, the commission's November 1994 correspondence, which sought a response to its August 1992 letter inquiring about a disposition of the matter, demonstrates that the commission had not disposed of the claim. Also, contrary to employer's argument, we do not find claimant's refusal to sign the Agreed Statement of Facts evidence that he intended to not pursue a claim in Virginia. At most, such an act is evidence that claimant simply did not agree with the statement.

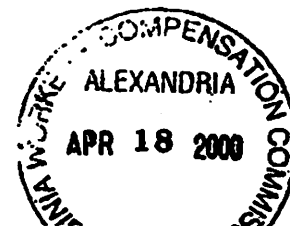
In short, we find no clear showing that claimant withdrew his claim within the meaning of *Keenan*. Accordingly, we find the claim is not time barred.

#### B.

Employer next contends the commission erred in finding claimant suffered temporary total disability subsequent to May 25, 1992. Dr. Cowan released claimant to return to a light duty job scheduled to begin May 26, 1992. By May 29, 1992, however, Dr. Lin directed claimant not to return to work. Claimant was not released to return to work again until April 1993. Based on the medical records, both the deputy commissioner and the full commission found claimant was totally disabled until May 26 and subsequent to May 28. Based on Dr. Cowan's release, the deputy commissioner found claimant was not totally disabled during the three-day period between May 26 and May 28. Based on Dr. Lin's records, the full commission found claimant's total disability continued through the three-day period. Employer argues Dr. Cowan's release is evidence that claimant was not totally disabled as of May 26 and contradicts the records of Drs. Lin and April which suggest he was. The commission's resolution of this apparent conflict in the medical evidence binds this Court on review if it is supported by credible evidence. See, e.g., *City of Norfolk v. Lillard*, 15 Va. App. 424, 429, 424 S.E.2d 243, 246 (1992). We do not find the records of Drs. Lin and April incredible and, accordingly, affirm the commission's finding.

#### C.

Finally, employer argues that the commission erred in awarding temporary total disability benefits after June 30, 1992. Although formal pleading is not required in matters before the



commission, see *Keenan*, 10 Va. App. at 233, 391 S.E.2d at 343, due process requires that the employer be fully apprised of the claim being presented, see *Sergio's Pizza v. Soncini*, 1 Va. App. 370, 375-76, 339 S.E.2d 204, 207 (1986).

Claimant responded to employer's interrogatories, stating that he sought temporary total disability benefits from April 17, 1992 through June 30, 1993. However, at the hearing on the following day, claimant made clear his intention to seek benefits for the periods from April 17, 1992 to June 30, 1992, and November 1, 1993 to July 31, 1994. Upon this statement, the deputy commissioner terminated the award as of June 30, 1992. On review to the full commission, claimant requested his benefits be extended beyond June 30, 1992. Without taking additional evidence, and without addressing the issue, the commission extended claimant's benefits beyond June 30, 1992. The commission terminated benefits in April 1993, finding claimant had been released to light duty.

We find that, in extending claimant's benefits beyond June 30, 1992, the commission deprived employer of the opportunity to defend against the claim for benefits during the period June 30, 1992 and April 13, 1993. Employer raised the defense of claimant's release to return to work in April 1993 before the deputy commissioner. However, contrary to claimant's argument, we do not find that this establishes employer suffered no prejudice. Employer presented evidence of the April 1993 release to defend against claimant's claim for benefits during the period November 1993 to July 1994, not as rebuttal to evidence of claimant's condition during the period June 1992 to April 1993. Accordingly, we reverse the commission's award of benefits during the period June 30, 1992 to April 13, 1993 and remand the case to allow both parties to present evidence on the issue whether claimant was totally disabled during that period. See *Soncini*, 1 Va. App. at 377, 339 S.E.2d at 208.

**Affirmed in part,**

**reversed in part,**

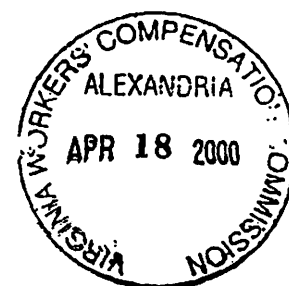
**and remanded.**

#### DISPOSITION

**Affirmed in part, reversed in part, and remanded.**

#### OPINION FOOTNOTES

\* Pursuant to Code § 17-116.010 this opinion is not designated for publication.





Keenan v. Westinghouse Elevator Co. 10 Va. App. 232

391 S.E.2d 342

In the Court of Appeals of Virginia

Argued at Alexandria, Virginia

WILLIAM D. KEENAN

v.

WESTINGHOUSE ELEVATOR COMPANY

Record No. 0690-89-4

Decided: April 24, 1990

#### SUMMARY

Employee appealed the decision of the Industrial Commission that held that her claim was barred by the two year limitation period of Code § 65.1-87. He argued that the commission erred in finding that his withdrawal of his application for a hearing also served to withdraw his claim.

The Court of Appeals reversed, holding that the evidence failed to show that he withdrew his claim or that the commission dismissed it.

*Reversed and remanded.*

#### HEADNOTES

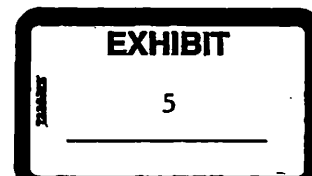
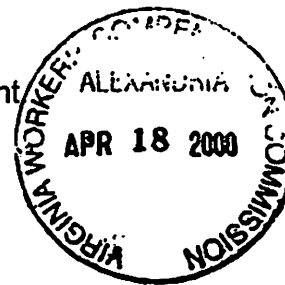
(1) Workers' Compensation - Statute of Limitations - Standard. - Code § 65.1-87 provides that the right to compensation is forever barred unless a claim is filed with the Industrial Commission within two years of the injury by accident.

(2) Workers' Compensation - Claims - Filing. - Neither the Act nor the commission's rules specify a particular method or form for filing a claim; in keeping with the policy that formal pleadings are not required, the filing of various documents with the commission has been held by the commission as sufficient to constitute the filing of a claim. [Page 233]

#### COUNSEL

Peter C. DePaolis (Koonz, McKenney & Johnson, P.C., on brief), for appellant

Michael P. Chervenak (Ford, Chervenak & Foote, on brief), for appellee.



## OPINION

COLEMAN, J. - The sole issue presented by this appeal from the Industrial Commission is whether a claimant's withdrawal of an "Application for Hearing" also serves to withdraw the claim. The commission held that it did, and as a consequence ruled that when the claimant filed a second "Application for Hearing," the claim was barred by the two year limitation of Code § 65.1-87. We reverse the commission's finding because the facts do not show that the claimant withdrew his claim or that the commission dismissed it. Accordingly, we reverse the commission's holding that it lacked jurisdiction and remand the claim for further hearings.

(1-2) Code § 65.1-87 provides that the right to compensation under the Workers' Compensation Act is forever barred "unless a *claim* be filed" with the Industrial Commission within two years after the injury by accident. Neither the Act nor the commission's rules specify a particular method or form for filing a claim. In keeping with the policy that formal pleadings are not required in matters before the commission, the filing of various documents with the commission has been held sufficient to constitute the filing of a "claim." The "Application for Hearing" form which the commission adopted in order to set in motion the adjudicatory process before the commission under Code § 65.1-94 is sufficient, and is frequently used, to file a claim, but the filing of less formal documents, such as letters sent to the commission from claimants or their attorneys, or informal notices styled as "claims," or even letters from the employer's attorney, have been held sufficient to meet the requirement for filing a claim. See, e.g., *Chalkley v. Nolde Bros.*, 106 Va. 900, 911, 45 S.E.2d 297, 301 (1947).

On February 27, 1987, the claimant, by counsel, filed his claim with the Industrial Commission, not on an "Application for Hearing" form provided by the commission, but by a letter from counsel [Page 234] and a form prepared by counsel styled, "Claim and Agreement to Retain Counsel." The claim form filed by counsel alleged that the claimant sustained an accidental injury on May 26, 1986, "for which workers' compensation may be due." The form identified the claimant, the employer and its address, and the date and nature of the injury, and this information sufficed to satisfy the filing requirements. See *id.* The employer previously had filed a first report of accident on September 15, 1986. On December 7, 1987, the claimant filed an "Application for Hearing" on the pre-printed form provided by the commission, requesting that the claim be scheduled for a hearing. The commission set the case on its hearing docket for March 16, 1988. The claimant thereafter withdrew the "Application for Hearing," presumably because he had no medical evidence which related the injury to an incident at work. The commission entered an order on March 28, 1988, which provided that the hearing would "not take place" because the applicant had "withdrawn the application." The order further stated, "The hearing is therefore cancelled and this case is ORDERED from the hearing docket." The order made no reference to the claim being withdrawn or dismissed.

On August 31, 1988, claimant's counsel filed a second "Application for Hearing," designating on the commission's printed form, "Change in Condition (To Reopen Case)." The commission ruled that, because no award previously had been



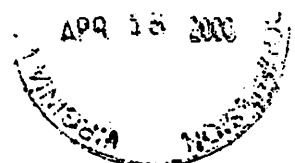
entered, the application could not be for a hearing to consider a change in condition; the commission treated the application as the filing of a claim. The commission thereupon ruled that the earlier request to withdraw the "Application for Hearing" constituted a withdrawal of the claim, and that the effort to refile the claim more than two years after the alleged accidental injury of May 26, 1986, was barred by the two year limitation of Code § 65.1-87.

The commission stated that it has "consistently held that the withdrawal of an application at the request of the claimant has the same effect as if though an application had not been filed," citing its opinions in *Brown v. Eastern Isles Manufacturing Corporation*, 52 O.I.C. 44 ( 1970), and *Kenney v. Pancake Kitchens, Inc.*, 48 O.I.C. 147 (1966). The commission further held that its order of March 28, 1988, "stated that *the claim* had been withdrawn and the case was ordered from the docket." ( emphasis added). [Page 235]

The commission's order entered following claimant's withdrawal of the "Application for Hearing" stated that "the scheduled hearing should not take place" because "[t]he applicant has *withdrawn the application*," The order also provided that "[t]he hearing is therefore cancelled and this case is ORDERED from the *hearing docket*." (emphasis added). Contrary to the finding of the commission, the order did not find that the applicant had withdrawn "the claim," but rather stated that the claimant had "withdrawn the application" for hearing. Likewise, the order did not order the case removed from the commission's docket, but rather "cancelled" the hearing and ordered the case from the "hearing docket." Nothing in the record establishes that the claimant withdrew or intended to withdraw his claim, or that the commission ordered that the claim be dismissed. Instead, the record establishes that the claimant merely withdrew his "Application for Hearing," which in this instance was not the vehicle by which his claim was filed. The commission did no more than cancel the hearing and remove the case from its hearing docket. If the commission is unwilling to grant claimants continuances of hearings upon request or only upon showing good cause, it is not required to allow the claimants to withdraw an "Application for Hearing." However, the commission cannot hold that a claimant has withdrawn a "claim" absent a clear showing that the claim has been withdrawn.

The commission misapplied its established principle "that the withdrawal of an application at the request of the claimant has the same effect as if though an application had not been filed." Keenan's "claim" was filed when counsel filed the "Claim and Agreement to Retain Counsel" form with the commission. When the "Application for Hearing" was withdrawn, it was as if the "Application for Hearing" had not been filed; the "claim," however, was still pending and had not been withdrawn or dismissed.

The Supreme Court's denial of a writ of error in *Kenney* and the commission's opinion in *Brown* provide no support for its holding. In both cases the "Application for Hearing" served as the vehicle for filing the claim. Withdrawal of the application in *Brown* and the dismissal of the application in *Kenney* for failure of the claimant to appear and prosecute his claim effectively withdrew or dismissed the claims in those cases. Therefore, before these "claims" could be considered, the "claims"

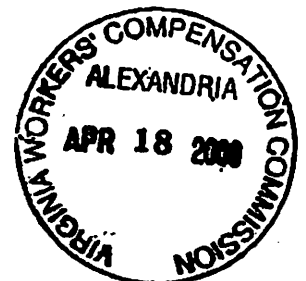


had to be refiled [Page 236] within the statutory time limitation; otherwise, the commission was barred from hearing the claim.

We hold that withdrawal of an "Application for Hearing," where the "Application" did not serve to file the "claim," does not constitute withdrawal of the claim. Thus, in the absence of an order from the commission dismissing the claim for failure to prosecute, the commission has jurisdiction to hear the pending claim. Accordingly, we hold that the commission has jurisdiction to hear the claim and remand the case for further proceedings.

*Reversed and remanded.*

Baker, J., and Duff, J., concurred.



Britt v. Siemen's Automotive

96 WC UNP 1759589

VIRGINIA: IN THE WORKERS' COMPENSATION COMMISSION

WILLIAM V. BRITT, Claimant

-v.

SIEMEN'S AUTOMOTIVE, Employer

TRAVELERS INDEMNITY COMPANY

OF ILLINOIS, Insurer

VWC File No. 175-95-89

Decided: May 29, 1996

Gregory E. Camden, Esquire

700 New Atlantic Bank Building

415 St. Paul's Boulevard

Norfolk, Virginia 23510

for the Claimant.

Timothy P. Murphy, Esquire

P. O. Box 3640

Norfolk, Virginia 23514

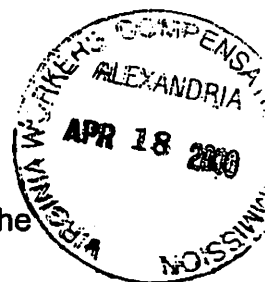
for the Defendants.

Opinion by TARR Chairman

REVIEW on the record before Chairman Tarr, Commissioner Joyner and Commissioner Diamond at Richmond, Virginia.

This case is before the Commission on the employer's request for Review of the Deputy Commissioner's December 27, 1995 decision awarding the claimant benefits for an occupational disease, bilateral carpal tunnel syndrome.

For six years, William Britt worked as a production machinist for this employer. His job involved repetitive hammering of steel bars into a machine. The claimant estimated that he hammered as many as 72 bars each day. He further testified that



EXHIBIT

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he experienced symptoms in his hands for the past five years but it was not until April 1995 that his treating physician, Dr. Martin Thiel, told him that his bilateral carpal tunnel syndrome was related to his work. The Deputy Commissioner found that the claimant suffered from a compensable occupational disease and awarded medical benefits.

After the Deputy Commissioner's Opinion, the Virginia Supreme Court issued the *Stenrich Group, et al. v. Jemmott*, 251 Va. 186, 467 S.E.2d 795, (1996) holding that "[j]ob-related impairments resulting from cumulative trauma caused by repetitive motion, however labeled or however defined, are, as a matter of law, not compensable under the present provisions of the Act."

After the case was submitted for Review, claimant's counsel asked to withdraw this claim. Although there is no specific provision in either the Workers' Compensation Act or the Commission Rules relating to a non-suit, the Commission has conformed to the civil non-suit Section, Va. Code § 8.01-308 and allowed a non-suit anytime before the hearing record closed and the claim was submitted to the Deputy Commissioner for a decision.

-- Civil courts do not allow a non-suit after a decision has been rendered. In *E.G. Khanna v. Dominion Bank*, 237 Va. 242, 377 S.E. 2d. 378 (1988), the Supreme Court stated: "It would be absurd to hold that a claimant could suffer a non-suit as a matter of right after a Court had decided the claim."

The Deputy Commissioner's decision is therefore REVERSED.

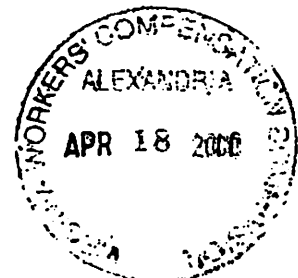
#### APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within thirty days.

cc:

William V. Britt 8176 Oak tree Farms Lane Gloucester, Virginia 23061

Travelers Indemnity Company of IL P. O. Box 85554 Richmond, Virginia 23285



VIRGINIA

IN THE WORKERS' COMPENSATION COMMISSION

Scott and Tara Mills,  
Co-Administrators of the Estate of Nelson  
Mills, and Tara Mills individually

Plaintiffs,

v.

Todd Berner M.D., and Primary  
Care for Women, P.C.

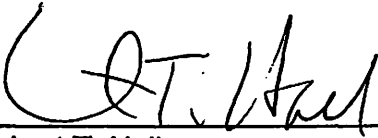
VWC File No. B-00-06

**CERTIFICATE OF SERVICE**

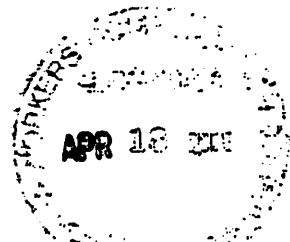
The undersigned does hereby certify that on this 17th day of April, 2000 an original copy of the foregoing Plaintiffs' Reply Memorandum in Support of Motions to Remand and to Withdraw Claim was served on the following:

Tara M. McCarthy, Esq.  
McCARNEY & MASSEY, P.C.  
9315 Center Street, Suite 104  
Manassas, VA 20110  
Counsel for Defendants  
Todd Berner, M.D.  
Primary Care for Women, P.C.

( ) via facsimile  
( ) hand delivery  
(X) mailed, first class  
postage prepaid

  
Robert T. Hall

P-ReplytoDOoptoRemand.wpd



**VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION**

**IN RE: SCOTT AND TARA MILLS, administrators  
of the Estate of NELSON MILLS, (deceased infant complainant)**

**Opinion by COLVILLE  
Deputy Commissioner**

**APR 28 2000**

**VWC FILE NO. B-00-06**

**Robert T. Hall, Esquire  
Donna Miller Rostant, Esquire  
12120 Sunset Hills Road  
Suite 150  
Reston, VA 20190-3231  
For Scott Mills, Tara Mills and  
Nelson Mills, (deceased infant complainant).**

**Tara M. McCarthy, Esquire  
Susan L. Mitchell, Esquire  
9315 Center Street  
Suite 104  
Manassas, VA 20110  
For Todd Berner, M.D. and  
Primary Care for Women, P.C.**

**John J. Beall, Jr., Esquire  
Senior Assistant Attorney General  
900 East Main Street  
Richmond, VA 23219  
For the Virginia Birth-Related Neurological  
Injury Compensation Program.**

**Hearing on the record before Deputy Commissioner Colville at Alexandria,  
Virginia.**



## PROCEDURAL HISTORY

A civil lawsuit was filed by Scott and Tara Mills, Co-Administrators of the Estate of Nelson Mills and Tara Mills individually against Todd Berner, M.D. and Primary Care for Women, P.C.

Pursuant to the provisions of Section 8.01-273.1, Code of Virginia, the Circuit Court of Fairfax County referred the claims made by the Co-Administrators of the Estate of Nelson Mills against both Todd Berner, M.D. and Primary Care for Women, P.C. in At Law No. 181359 to the Commission by Amended Order dated January 4, 2000.

The Commission's Clerk referred this matter to the docket by letter dated February 24, 2000. By letter dated March 10, 2000 the hearing Deputy Commissioner advised the parties that the basic information that would be contained in a petition as required by Section 38.2-5004, Code of Virginia was lacking and that the file contained no medical records. Thus, to adjudicate whether the deceased infant suffered a birth-related neurological injury as defined in Section 38.2-5001, Code of Virginia, medical records would be needed. The parents of Nelson Mills were directed to provide the Commission and the Birth-Related neurological Injury Compensation Program with information that would be contained in the petition and to provide the Commission with five copies of the prenatal records of the mother, the mother's hospital records including fetal monitoring strips, labor and delivery records and the child's medical records connected with the birth and death within thirty days.

## PRESENT PROCEEDINGS

The case is now before the Commission on the Co-Administrator's March 23, 2000 Motion filed March 28, 2000 to remand the claim against Primary Care for Women, P.C. to the Circuit Court for Fairfax County in light of the holding in Jan Friterman, MD. And Associates, P.C. v. Ahmad Waziri and Hassini Waziri, Individually and as personal Representatives of the Estate of Syawach Waziri, Record No. 990376. With reference to the balance of the case against Todd Berner, M.D. that was transferred, the Co-Administrators non-suited and withdrew "such claims" and waived "any claim they might have arguably pursued under the Neurological Birth-Related Injury Compensation Act if the Commission was determined to have jurisdiction over these matters and this party."

## DEFENSES

On April 6, 2000 counsel for the defendants filed a Opposition to Plaintiff's Motion to Remand and for Nonsuit which she sought to be reviewed and considered prior to ruling on the March 23, 2000 Motion.

## PRE-HEARING AND POST HEARING EVIDENCE

The March 23, 2000 Motion, the April 6, 2000 Opposition and the Co-Administrator's April 17, 2000 Reply Memorandum in Support of Motions to Remand and to Withdraw Claim are made a part of this record.

## SUMMARY OF THE EVIDENCE

The record reveals that subsequent to the Circuit Court's Order, the Supreme Court of Virginia issued the above cited March 3, 2000 Opinion wherein it held that professional corporations which employed a participating physician were not entitled to

the rights and benefits of the Virginia Birth-Related Neurological Injury Compensation Act as they were not included in the definition of a participating physician contained in Section 38.2-5001, Code of Virginia.

On April 1, 2000 Governor Gilmore signed a bill amending the definition of participating physician contained in Section 38.2-5001, Code of Virginia to include "a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices." This was reportedly to be "declaratory of existing law" and was to be "in force from its passage" as an emergency exists."

#### ISSUE NUMBER ONE

The first and only issue before the Commission has jurisdiction over Primary Care for Women, P.C. and Todd Berner, M.D.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

As set forth in Section 8.01-273.1, Code of Virginia:

In any civil action, where a party moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition.

As set forth in paragraph two of Section 38.2-5003, Code of Virginia:

When a circuit court refers a civil action to the Commission pursuant to §8.01-273.1 for the purposes of determining whether the cause of action satisfies the requirements of this chapter, the Commission shall set the matter for hearing pursuant to §38.2-5006. The Commission shall communicate its decision to the referring circuit court in due course.

After reviewing the record in its entirety this Commission finds that it lacks jurisdiction over the corporation as it fails to qualify as either a participating physician or participating hospital under the Virginia Birth-Related Neurological Injury Compensation Act on the date of the child's birth pursuant to the March 3, 2000 Opinion of the Virginia Supreme Court. In making this determination, this Commission is fully aware of the April 1, 2000 amendment to the definition of participating physician and the language that it was to be "declaratory of existing law." However, the Virginia Supreme Court specifically held to the contrary and this Commission finds no logical basis to conclude that the amendment could transform a corporation into a participating physician nearly two years after the May 28, 1998 cause of action, namely the birth of the child. Critical to this Commission's determination that this amendment is not to be retroactively applied is that with the July 1, 1990 amendment to the definition of birth-related neurological injury, the Commission previously determined that the change was substantive rather than procedural and was not to be construed as operating retrospectively to a birth that occurred prior to the effective date of the amendment. In re: Sarah Kelly Duncan, VWC File No. B-97-10 (February 24, 1998). Subsequent to this, the General Assembly enacted legislation which permitted a child born between January 1, 1988 and July 1, 1990 to file a claim via the review process to in effect seek entry of an award utilizing the July 1, 1990 more expansive definition given specific circumstances. This Commission concludes that implicit in this 1999 amendment is the admission that substantive changes such as occurred on July 1, 1990 are not to be retroactively applied and that should the General Assembly wish to cover children that would otherwise not qualify under the Birth-

Related Neurological Injury Compensation Act because of their date of birth then legislation can be passed to cover the circumstances which disqualified the child. Likewise this Commission concludes that the April 1, 2000 amendment shall not presently be retroactively applied to births that occurred prior to its enactment.

With reference to the individual physician, Todd Berner, M.D., Co-Administrators filed a non-suit. This Commission concludes that this action must be addressed by the Circuit Court and not with the Commission. Under such circumstances, the Commission remands that portion of the transfer back to the Circuit Court of Fairfax County for further processing. Should the non-suit not be granted then the Commission will further proceed with whether the cause of action against this individual physician satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act.

Pursuant to Section 38.2-5003, Code of Virginia, the Commission thus communicates its decision that it does not have jurisdiction over Primary Care for Women, P.C. and that it remands the cause of action against Todd Berner, M.D. to consider the non-suit dated March 23, 2000.

The case is removed from the docket.

#### REVIEW

You may appeal this decision by filing a request for review with the Commission within twenty days from receipt of this Opinion.

cc: Elinor J. Pyles, Executive Director  
Virginia Birth-Related Neurological  
Injury Compensation Program  
7400 Beaufont Springs Drive  
Suite 425  
Richmond, Virginia 23225

The Honorable Stanley P. Klein  
Circuit Court of Fairfax County  
4110 Chain Bridge Road  
5<sup>th</sup> Floor, Judge's Chambers  
Fairfax, Virginia 22030

**McCarthy & Massey, P.C.***Trial Attorneys and Counselors at Law*

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Facsimile (703) 330-2429

May 16, 2000

Ms. Lou Ann Joyner, Clerk  
Virginia Workers' Compensation Commission  
1000 DMV Drive  
Richmond, Virginia 23220

Re: Scott and Tara Mills, Administrators of the Estate of Nelson Mills  
(deceased infant complainant)  
VWC File No.: B-00-06

Dear Ms. Joyner:

Please allow this correspondence to serve as Dr. Todd Berner and Primary Care for Women, P.C.'s Request for Review of Deputy Commissioner Colville's April 28, 2000 Opinion relating to the above-referenced matter. The Request for Review is being made in accordance with VA. CODE ANN. §38.2-5010 (Michie 1950, as amended 1999) and also in accordance with Rule 3.1 of the Rules of the Workers' Compensation Commission.

Dr. Todd Berner and Primary Care for Women, P.C. assign the following errors in connection with their Request for Review:

1. The Deputy Commissioner erred in finding that the Commission lacks jurisdiction over Primary Care for Women, P.C..
2. The Deputy Commissioner erred in finding that Primary Care for Women, P.C. fails to qualify as either a participating physician or a participating hospital under the Virginia Birth-Related Neurological Injury Compensation Act.
3. The Deputy Commissioner erred in finding that the April 1, 2000 amendments to and re-enactment of VA. CODE ANN. §§8.01-372.1 and 38.2-5000 are not to be applied retroactively to births occurring prior to enactment.

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

MAY 17 '00

CHARGE # 15

4. The Deputy Commissioner erred in finding that the aforementioned legislative enactments are substantive and not procedural such that they may not be applied retroactively to births occurring prior to enactment.
5. The Deputy Commissioner erred in relying upon Fruiterman v. Waziri, \_\_\_ Va. \_\_\_, 525 S.E.2d 552 (2000).
6. The Deputy Commissioner erred in remanding the claims made against Primary Care for Women, P.C. to the Circuit Court for Fairfax County.
7. Any and all other grounds of error which, pursuant to Rule 3.1 of the Rules of the Workers' Compensation Commission, this Commission believes ought to be considered for just determination of the issues.

Finally, please do also allow this correspondence to serve as Dr. Todd Berner and Primary Care for Women, P.C.'s formal request that a schedule for submission of written statements be established pursuant to Rule 3.2 of the Rules of the Commission.

Thank you for your attention to these important matters.

Sincerely yours,

  
Susan L. Mitchell

SLM:ldh

cc: Donna Miller Rostant, Attorney-at-Law  
John J. Beall, Jr., Esquire  
Elinor J. Pyles  
Gena Gustin, Claim No. SS001103QQ  
Todd Berner, M.D.

DOCKET FOR	<u>Review</u>	<u>OTR</u>
DATE OF LAST PAYMENT	<u>5-17-00</u>	
APPLICATION FILED	<u>5-23-00</u>	
REFERRED TO DOCKET	<u>5-23-00</u>	
BY	<u>ldj</u>	

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**IN THE  
VIRGINIA WORKERS' COMPENSATION COMMISSION  
At Richmond**

**In Re: Scott and Tara Mills, Administrators )  
of the Estate of Nelson Mills (deceased infant )  
complainant) )**

**VWC File No.: B00-06**

**✓BRIEF AMICUS CURIAE OF  
DOCTORS INSURANCE RECIPROCAL (Risk Retention Group)  
IN SUPPORT OF REQUEST FOR REVIEW  
FILED BY TODD BERNER, M.D.  
AND PRIMARY CARE FOR WOMEN, P.C.**

Doctors Insurance Reciprocal (Risk Retention Group) ("DIR"), by counsel, hereby submits this brief amicus curiae in support of the request for review of the April 28, 2000 opinion of the Commission in this matter filed by Todd Berner, M.D. and Primary Care for Women, P.C.

On March 3, 2000, the Supreme Court of Virginia handed down a decision in Fruiterman v. Waziri, 259 Va. 540, 525 S.E.2d 552 (2000), holding that the professional corporation of a "participating physician" within the meaning of the Virginia Birth-Related Neurological Injury Act, Va. Code Ann. §§ 38.2-5000 et seq. ("the Act"), is not entitled to immunity from civil suit even though the Act is otherwise applicable.

Immediately thereafter, on March 7, 2000, House Bill No. 398 (Exhibit A) was amended on the Senate floor to add the following language:

"The term 'participating physician' includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices."

\* \* \*

CM  
6-9-00

“2. That the provisions of this act amending 38.2-5001 are declaratory of existing law.

3. That an emergency exists and this act is in force from its passage.”

The Bill, as so amended, passed the Senate in final form (by a vote of 36 yeas, one nay, and one abstention) and on March 9, 2000, it went back to the House for approval of the amendment and passed the House in final form (by a vote of 98 yeas and no nays) (Exhibit B). The Governor signed the Bill and it became law on April 1, 2000. (Exhibit C).

In March 2000, plaintiffs filed a motion with the Commission seeking a nonsuit of their claims against Dr. Berner and remand of their claims against Primary Care for Women, P.C. to the circuit court in light of Fruiterman v. Waziri. Defendants filed an opposition to the motion, and plaintiffs filed a reply memorandum. On April 28, 2000, an opinion denying plaintiffs’ motion for a nonsuit against Dr. Berner, but granting the motion to remand the claims against Primary Care for Women, P.C. was issued by Deputy Commissioner Colville. The defendants filed a timely request for review.

## ARGUMENT

Calling it “critical” to her decision, the deputy commissioner relies upon the Commission’s previous decision in In re: Sarah Kelly Duncan, VWC File No. B-97-10 (February 24, 1998), which construed a 1990 amendment to the definition of “birth-related neurological injury” and found that the amendment effected a substantive rather than a procedural change which should not be applied retroactively to a birth occurring prior to the effective date of the amendment. In addition, the deputy commissioner relied on the fact that with respect to this same 1990 definitional change, the

General Assembly, following the Commission's decision in In re: Sarah Kelly Duncan, amended the statute again in 1999 to allow a child born between January 1, 1998 and July 1, 1990 to file a claim utilizing the more expansive 1990 definition in certain specified circumstances. The deputy commissioner concluded that this 1999 action showed that the legislature knows what to say in order to apply a change retroactively when it wants to and that its failure to include similar language in its 2000 amendment to the definition of "participating physician" demonstrates that it did not intend for this amendment to be applied retroactively.

The fallacy in this reasoning is that, unlike the 2000 amendment at issue in this case, the General Assembly never suggested that its 1990 amendment to the definition of "birth-related neurological injury" was not a change. It certainly did not pronounce that its 1990 amendment was "declaratory of existing law." The 1990 amendment clearly was a change and, therefore, could not be applied retroactively unless the General Assembly so provided.

With respect to its 2000 amendment to the definition of "participating physician," however, the General Assembly, in reaction to the Supreme Court's decision in Fruiterman v. Waziri, specifically stated that the amendment was "declaratory of existing law." In other words, the enactment is a clarification of the law, not a change to the law. Because it does not change the law, there is not need to determine whether the amendment is substantive or procedural and can be applied retroactively. Because the enactment is merely declaratory of existing law, it clearly is intended to apply to all causes of action since the inception of the Virginia Birth-Related Neurological Injury Compensation Act.

"When amendments are enacted soon after controversies arise 'as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act –

a formal change – rebutting the presumption of substantial change.” Boyd v. Commonwealth, 216 Va. 16, 20-21, 215 S.E.2d 915, 918 (1975); accord, Dale v. City of Newport News, 243 Va. 48, 51, 412 S.E.2d 701, 702 (1992). Thus, common law principles of statutory interpretation support the position of the defendants. With respect to the 2000 amendment to the Act, one does not have to resort to principles of statutory construction to determine legislative intent, however, because the General Assembly has expressly stated that the amendment is “declaratory of existing law.”

While acknowledging its existence, the deputy commissioner gives no credence to the General Assembly’s statement that the amendment to the definition of “participating physician” is declaratory of existing law. Instead, she notes that the Supreme Court found that a participating physician’s professional corporation is not entitled to receive any benefit from the exclusive remedy provision contained in § 38.2-5002(B) of the Act.

It is the role of the Supreme Court in interpreting a statute to derive the meaning intended by the General Assembly. Barr v. Town & Country Properties, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990). It is not infallible in this regard. The General Assembly reacted immediately to the Supreme Court’s March 3, 2000 decision in Fruiterman, by clarifying the statute through its enactment in March 2000. It did not stop there, however. It further explained that this was the law all along. In effect, the General Assembly acknowledged that the Supreme Court made a mistake – it misinterpreted the language of the Act and the legislature’s intent.

The General Assembly’s statement in this regard is not equivocal. The statutory amendment, including the “declaratory of existing law” pronouncement, passed the Senate by a vote of 98 to 0, and the House of Delegates by a vote of 36 to 1. The deputy commissioner’s opinion does not explain why this overwhelming evidence of the legislature’s intent is not entitled to any weight.

While she relies instead on the Supreme Court's opinion in Fruiterman, unlike this Commission, when it handed down its decision on March 3, 2000, the Supreme Court did not have the benefit of this evidence of the legislature's intent. The General Assembly did not pass this legislation as an emergency enactment and the Governor did not sign it into law until after the Fruiterman decision.

Furthermore, the General Assembly's pronouncement that the amendment is declaratory of existing law is in no way incredible. It is completely consistent with the original language of the Act, the purposes of the Act, and with contemporaneous evidence of initial legislative intent. In its original enactment in 1987, the General Assembly provided in § 38.2-5002 that "the rights and remedies herein granted to an infant on account of a birth-related neurological shall exclude **all** other rights and remedies . . . at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury." 1987 Va. Acts, c. 540. The only exceptions to this exclusivity provision are those contained in § 38.2-5002(C) and (D), that is, suit against a physician or hospital that has intentionally or willfully caused a birth-related neurological injury and suit against a non-participating physician or hospital. Obviously, the legislature thought when it said "all" other rights and remedies were excluded, that "all" meant "all" without further explication or enumeration.

The Supreme Court found that the "legislative omission" in failing to actually name all other types of rights and remedies excluded and thus all others afforded civil liability by the Act "confirm[ed] [its] conclusion" that participating physicians and hospitals were "intended" to be the only ones afforded such immunity. 259 Va. at 545, 525 S.E.2d at 554. The Court went on to say that "[a] professional corporation, the employer of a participating physician, is conspicuous by its absence." Id. The legislature immediately and directly responded to the Court's opinion by

including professional corporations and other practice entities in the definition of “participating physician,” at the same time signaling that the Court had reached the wrong “conclusion,” because this amendment was merely “declaratory of existing law.”

The original intent of the legislature, in addition to providing a no-fault remedy, was to take birth-related neurologically injured infants “out of the tort system” in order to protect the availability and affordability of liability insurance for obstetricians. House Doc. No. 63, *Interim Report of the Joint Subcommittee Studying the Definition of Compensable Injury and the Funding Mechanism of the Virginia Birth-Related Neurological Injury Compensation Act to the Governor and the General Assembly of Virginia* (1990) at 2 (“the intention was to remove infants with catastrophic birth-related injuries from the tort system”). The Supreme Court’s opinion, misconstruing the statute, does not further this original intent, but has the opposite effect, as evidenced by the holding in this case which would send a case involving such an infant back into the tort system. The legislative enactment to be construed by the Commission not only accomplishes the original intent of the legislature, but, as the General Assembly itself has expressly stated, only serves to clarify what was enacted in the first place.

## CONCLUSION

For the reasons stated above, DIR respectfully requests that the Commission reverse the opinion of the deputy commissioner, deny the plaintiffs’ motion to remand the claim to circuit court, and retain jurisdiction over Dr. Berner and his professional corporation, Primary Care fore Women, P.C. regarding this matter.

Respectfully submitted,

DOCTORS INSURANCE RECIPROCAL  
(Risk Retention Group)

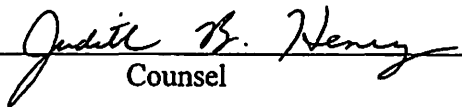
By Judith B. Henry  
Counsel

Judith B. Henry, VSB #18930  
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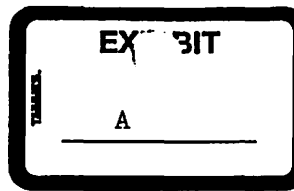
JUNE 9, 2000

## CERTIFICATE OF SERVICE

I hereby certify that one copy of this Brief Amicus Curiae of Doctors Insurance Reciprocal (Risk Retention Group) in support of the request for review filed by Todd Berner, M.D. and Primary Care for Women, P.C., was filed with the Clerk of the Workers' Compensation Commission, and one copy was mailed, first-class postage pre-paid, to Donna Miller Rostant, Esquire, 12120 Sunset Hills Road, Suite 150, Reston, Virginia 20190, to Susan L. Mitchell, Esquire, 9315 Center Street, Suite 104, Manassas, Virginia 20110, and to John J. Beall, Jr., Esquire, Senior Assistant Attorney General, 900 E. Main Street, Richmond, Virginia 23219, and to Elinor J. Pyles, Executive Director, Virginia Birth-Related Neurological Injury Compensation Program, 7400 Beaufont Springs Drive, Suite 425, Richmond, Virginia 23225, this 9<sup>th</sup> day of June, 2000.

  
Counsel



[summary](#) | [pdf](#)

**HOUSE BILL NO. 398**  
**FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE**  
 (Proposed by Senator Norment  
 on March 7, 2000)

(Patron Prior to Substitute--Delegate Woodrum)

*A BILL to amend and reenact §8.01-273.1 and 38.2-5001 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act; referral to Workers' Compensation Commission.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-273.1 and 38.2-5001 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-273.1. Motion for judgment; motion to refer; Virginia Birth-Related Neurological Injury Compensation Act.

*A. In any civil action, where a party, who is a participating hospital or physician as defined in §8.2-5001, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than 120 days after the date of filing a grounds of defense by the party seeking the referral.*

*B. Upon entry of the order of referral by the court, the clerk of the circuit court shall file with the Workers' Compensation Commission within thirty days a copy of the motion for judgment and the responsive pleadings of all the parties to the action. The clerk shall copy all counsel of record in the civil action on the transmittal letter accompanying the materials being filed with the Workers' Compensation Commission. All parties to the civil action shall be entitled to participate before the Commission upon filing a notice of appearance with the Clerk of the Commission within twenty-one days after receipt of the transmittal letter to the clerk of the circuit court. Notwithstanding the provisions of §2.1-127.1:03, the moving party shall provide the Commission with an original and five copies of the following: appropriate assessments, evaluations, and prognoses and such other records obtained during discovery and are reasonably necessary for the determination of whether the infant has suffered a birth-related neurological injury. The medical records and the pleadings referenced in this subsection shall constitute a petition as referenced in §8.2-5004. The moving party shall be reimbursed for all copying costs upon entry of an award of benefits as referenced in §8.2-5009.*

§ 38.2-5001. Definitions.

As used in this chapter:

"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of this chapter, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include

disability or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse. The definition provided here shall apply retroactively to any child born on and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.

"Claimant" means any person who files a claim pursuant to § 38.2-5004 for compensation for a birth-related neurological injury to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, executor, or other legal representative.

"Commission" means the Virginia Workers' Compensation Commission.

"Participating hospital" means a hospital licensed in Virginia which at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the hospital agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Department of Health whereby the hospital agreed to submit to review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the participating hospital assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. The term also includes employees of such hospitals, excluding physicians or nurse-midwives who are eligible to qualify as participating physicians, acting in the course of and in the scope of their employment.

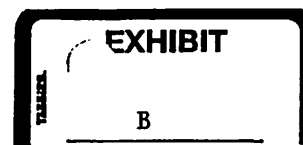
"Participating physician" means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time or, as authorized in the plan of operation, a licensed nurse-midwife who performs obstetrical services, either full or part time, within the scope of such licensure and who at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the physician agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. *The term "participating physician" includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices.*

"Program" means the Virginia Birth-Related Neurological Injury Compensation Program established by this chapter.

2. That the provisions of this act amending § 38.2-5001 are declaratory of existing law.
3. That an emergency exists and this act is in force from its passage.



[Go to \(General Assembly Home\)](#)



## HB 398 Birth-Related Neurological Injury Compensation Act.

Patron-Clifton A. (Chip) Woodrum

*Summary as passed:*

**Virginia Birth-Related Neurological Injury Compensation Act.** Clarifies that only parties to litigation who are either participating hospitals or physicians under the Virginia Birth-Related Neurological Injury Compensation Act may move the court to refer the action to the Workers' Compensation Commission for the purpose of determining whether the requirements of the Act are satisfied. The bill also requires that a motion to refer the action to the Commission be filed no later than 120 days after the date the party seeking the referral filed its grounds of defense. The bill specifies what constitutes a petition and certain filing and administrative requirements. The bill provides that the definition of participating physician includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the physician practices. The bill has an emergency clause.

*Full text:*

01/13/00 House: Presented & ordered printed 003324996  
 01/28/00 House: Committee substitute printed 001768996-H1  
 03/07/00 Senate: Floor substitute printed 001925508-S1 (Norment)  
 03/10/00 House: Enrolled bill text (HB398ER)  
 04/03/00 Governor: Acts of Assembly Chapter text (CHAP0207)

*Status:*

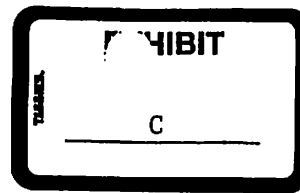
01/13/00 House: Presented & ordered printed 003324996  
 01/13/00 House: Referred to Committee for Courts of Justice  
 01/19/00 House: Assigned to C. J. sub-committee: 2  
 01/27/00 House: Reported from C. J. with substitute (23-Y 0-N)  
 01/28/00 House: Committee substitute printed 001768996-H1  
 01/31/00 House: Read first time  
 02/01/00 House: Read second time  
 02/01/00 House: Committee substitute agreed to 001768996-H1  
 02/01/00 House: Engrossed by House - com. sub. 001768996-H1  
 02/02/00 House: Read third time and passed House (Block Vote) (98-Y 0-N)  
 02/02/00 House: VOTE: BLOCK VOTE PASSAGE (98-Y 0-N)  
 02/02/00 House: Communicated to Senate  
 02/03/00 Senate: Constitutional reading dispensed  
 02/03/00 Senate: Referred to Committee for Courts of Justice  
 03/01/00 Senate: Reported from Courts of Justice (15-Y 0-N)  
 03/02/00 Senate: Const. reading disp., passed by for the day (38-Y 0-N)  
 03/02/00 Senate: VOTE: CONST. RDG. DISPENSED R (38-Y 0-N)  
 03/03/00 Senate: Read third time  
 03/03/00 Senate: Passed Senate (39-Y 0-N)  
 03/03/00 Senate: VOTE: PASSAGE R (39-Y 0-N)  
 03/06/00 Senate: Rec. of Sen. passage agreed to by Senate (39-Y 0-N)  
 03/06/00 Senate: VOTE: RECONSIDER (39-Y 0-N)  
 03/06/00 Senate: Passed by for the day  
 03/07/00 Senate: Floor substitute printed 001925508-S1 (Norment)  
 03/07/00 Senate: Read third time  
 03/07/00 Senate: Reading of substitute waived  
 03/07/00 Senate: Substitute by Sen. Norment agreed to 001925508-S1  
 03/07/00 Senate: Emergency clause added  
 03/07/00 Senate: Engrossed by Senate - fl. sub. 001925508-S1  
 03/07/00 Senate: Passed Senate with substitute (36-Y 1-N 1-A)

03/07/00 Senate: VOTE: PASSAGE (36-Y 1-N 1-A)  
03/08/00 House: Placed on Calendar  
03/09/00 House: Senate substitute agreed to by House (98-Y 0-N)  
03/09/00 House: VOTE: ADOPTION EMERGENCY (98-Y 0-N)  
03/10/00 House: Enrolled bill text (HB398ER)  
03/13/00 House: Enrolled  
03/13/00 House: Signed by Speaker  
03/15/00 Senate: Signed by President  
04/01/00 Governor: Approved by Governor-Chapter 207 (effective 4/1/00)  
04/03/00 Governor: Acts of Assembly Chapter text (CHAP0207)

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# CHAPTER 207

*An Act to amend and reenact § 8.01-273.1 and 38.2-5001 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act; referral to Workers' Compensation Commission.*

[H 398]

Approved April 1, 2000

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-273.1 and 38.2-5001 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-273.1. Motion for judgment; motion to refer; Virginia Birth-Related Neurological Injury Compensation Act.

*A. In any civil action, where a party, who is a participating hospital or physician as defined in § 8.2-5001, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than 120 days after the date of filing a grounds of defense by the party seeking the referral.*

*B. Upon entry of the order of referral by the court, the clerk of the circuit court shall file with the Workers' Compensation Commission within thirty days a copy of the motion for judgment and the responsive pleadings of all the parties to the action. The clerk shall copy all counsel of record in the civil action on the transmittal letter accompanying the materials being filed with the Workers' Compensation Commission. All parties to the civil action shall be entitled to participate before the Commission upon filing a notice of appearance with the Clerk of the Commission within twenty-one days after receipt of the transmittal letter to the clerk of the circuit court. Notwithstanding the provisions of § 2.1-127.1:03, the moving party shall provide the Commission with an original and five copies of the following: appropriate assessments, evaluations, and prognoses and such other records obtained during discovery and are reasonably necessary for the determination of whether the infant has suffered a birth-related neurological injury. The medical records and the pleadings referenced in this subsection shall constitute a petition as referenced in § 8.2-5004. The moving party shall be reimbursed for all copying costs upon entry of an award of benefits as referenced in § 8.2-5009.*

§ 38.2-5001. Definitions.

As used in this chapter:

"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of this chapter, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse. The definition provided here shall apply retroactively to any child born on

and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.

"Claimant" means any person who files a claim pursuant to § 38.2-5004 for compensation for a birth-related neurological injury to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, executor, or other legal representative.

"Commission" means the Virginia Workers' Compensation Commission.

"Participating hospital" means a hospital licensed in Virginia which at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the hospital agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Department of Health whereby the hospital agreed to submit to review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the participating hospital assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. The term also includes employees of such hospitals, excluding physicians or nurse-midwives who are eligible to qualify as participating physicians, acting in the course of and in the scope of their employment.

"Participating physician" means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time or, as authorized in the plan of operation, a licensed nurse-midwife who performs obstetrical services, either full or part time, within the scope of such licensure and who at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the physician agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. *The term "participating physician" includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices.*

"Program" means the Virginia Birth-Related Neurological Injury Compensation Program established by this chapter.

2. That the provisions of this act amending § 38.2-5001 are declaratory of existing law.

3. That an emergency exists and this act is in force from its passage.



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June 9, 2000

**Via Certified Mail  
Return Receipt Requested**

Ms. Lou Ann Joyner, Clerk  
Virginia Workers' Compensation Commission  
1000 DMV Drive  
Richmond, Virginia 23220

Re: Scott and Tara Mills, Administrators of the Estate of Nelson Mills  
(deceased infant complainant)  
WVC File No.: B-00-06

Dear Ms. Joyner:

✓ Enclosed please find Defendants Todd Berner, M.D. and Primary Care for Women, P.C.'s Written Statement in Support of their Request for Review of Deputy Commissioner Colville's April 28, 2000 Opinion.

Sincerely yours,

  
Susan L. Mitchell

SLM:dh

cc: Donna Miller Rostant, Attorney-at-Law  
John J. Beall, Jr., Esquire  
Elinor J. Pyles  
Gena Gustin, Claim No. SS001103QQ  
Todd Berner, M.D.

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**VIRGINIA:**

**IN THE WORKERS' COMPENSATION COMMISSION**

**SCOTT and TARA MILLS,**  
**Co-administrators of the Estate of**  
**NELSON MILLS, (deceased infant**  
**complainant)**

**v.**

**VWC File No. B-00-06**

**TODD BERNER, M.D.,**  
**and**  
**PRIMARY CARE FOR WOMEN, P.C.,**

**Defendants.**

**TODD BERNER, M.D. AND PRIMARY CARE FOR WOMEN, P.C.'S**  
**WRITTEN STATEMENT IN SUPPORT OF REQUEST FOR REVIEW**

COME NOW the Defendants, TODD BERNER, M.D., and PRIMARY CARE FOR WOMEN, P.C., by Counsel and file this their Written Statement in Support of their Request for Review of Deputy Commissioner Colville's April 28, 2000 Opinion and state as follows:

**FACTUAL AND PROCEDURAL HISTORY**

The above-captioned matter was instituted by the Plaintiffs upon the filing of a motion for judgment in the Arlington County Circuit Court. Venue therein was improper and, by agreed order, the matter was transferred to the Circuit Court for the County of Fairfax. Thereafter, these Defendants, pursuant to VA. CODE ANN. §8.01-273.1 (Michie 1999), filed a motion to refer the entirety of the claims then pending to this Commission for adjudication under the Virginia Birth-Related Neurological Injury Compensation Act (hereinafter "Act").

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Following extensive briefing and oral argument, the Honorable Stanley P. Klein granted, in part, the Defendants' motion to refer and referred all but Tara Mills' claims of personal injury to the Commission. The Order reflecting that decision was entered on January 4, 2000, and is attached hereto as Exhibit 1. The Order clearly reflects that all claims made on behalf of the estate of Nelson Mills against Dr. Berner and Primary Care for Women, P.C. had been referred to this Commission, as well as the Co-administrators' claims for emotional distress. The only claims which have not been so referred are Tara Mills' claims for personal injury in the form of a laceration and recto-vaginal fistula, and any alleged accompanying mental distress related thereto.

By correspondence dated March 10, 2000, this Commission notified the parties that the case file had been received from the circuit court and instructed the Plaintiffs to file all supporting documentation, including medical records, on or before April 10, 2000. Plaintiffs did not file any such supporting documentation but, instead, filed a Motion asking the Deputy Commissioner to remand the claims against Primary Care for Women, P.C. to the Fairfax County Circuit Court. Plaintiffs based their request upon the Supreme Court of Virginia's March 3, 2000 decision in Fruiterman, M.D. v. Waziri, \_\_\_ Va. \_\_\_, 525 S.E.2d 552 (2000) (hereinafter "Fruiterman") (attached hereto as Exhibit 2). The Plaintiffs also requested that their claims against Dr. Berner be dismissed by way of voluntary nonsuit. These defendants filed a Memorandum in Opposition to both of these motions. Thereafter, Plaintiffs filed a reply memorandum.

By Opinion dated April 28, 2000, Deputy Commissioner Colville determined that

this Commission...lacks jurisdiction over the corporation as it fails to qualify as either a participating physician or participating hospital under the Virginia Birth-Related Neurological Injury

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Compensation Act on the date of the child's birth pursuant to the March 3, 2000 Opinion of the Virginia Supreme Court.

(Op. at p. 5). The Deputy Commissioner further determined that the Commission could not consider the Plaintiffs' motion for voluntary non-suit and ordered that said motion be addressed by the Fairfax County Circuit Court. This aspect of the Deputy Commissioner's decision is not being challenged on review by any party hereto. What is being challenged by these Defendants is the Deputy Commissioner's finding that this Commission lacks jurisdiction over Primary Care for Women, P.C., and her further conclusion that the April 1, 2000 amendment to and re-enactment of VA. CODE ANN. §38.2-5001 (Michie 1987, as amended 2000) does not apply to the present case. For each of the reasons which follows, these Defendants assert that the Deputy Commissioner erred when she held that the Commission lacked jurisdiction over the professional corporation and request this Commission reverse that aspect of her April 28, 2000 Opinion and remand this case for determination on the merits of the infant's claims.

### ARGUMENT

#### **I. THE DEPUTY COMMISSIONER ERRED IN FINDING THAT THE COMMISSION LACKED JURISDICTION OVER PRIMARY CARE FOR WOMEN, P.C.**

In her April 28, 2000 Opinion, the Deputy Commissioner concluded that this Commission does not have jurisdiction over Primary Care for Women, P.C. because it does not qualify as a "participating physician" or a "participating hospital" as those terms are defined by the Act. In reaching this determination, the Deputy Commissioner erroneously failed to apply the April 1, 2000 amendments to VA. CODE ANN. §38.2-5001 (Michie 1987, as amended 2000), and, furthermore, improperly relied upon the decision of the Virginia Supreme Court in Fruiterman. Consequently, her Opinion is legally flawed and must be reversed.

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**A. THE DEPUTY COMMISSIONER ERRED BY NOT APPLYING THE APRIL 1, 2000 AMENDMENT TO AND RE-ENACTMENT OF VA. CODE. ANN. §38.2-5001 TO THE PRESENT CASE.**

The Deputy Commissioner erred by failing to apply the April 1, 2000 amendment to and re-enactment of VA. CODE. ANN. §38.2-5001 (Michie 1987, as amended 2000) to the present case. As a result of this error, she incorrectly determined that the Commission lacked jurisdiction over Primary Care for Women, P.C. because it did not meet the definition of "participating physician" or "participating hospital" as set forth in VA. CODE. ANN. §38.2-5001.

As this Commission is aware, the Virginia Birth-Related Neurological Injury Compensation Act (hereinafter "Act") was created by the General Assembly in 1987, in response to a perceived need to provide certain lifetime benefits to children who suffered injury from certain causes during the course of a woman's labor and delivery. Over the years, the General Assembly has seen fit to amend various provisions in the Act to address issues such as what injuries fall within the scope of the Act (1999 amendments to §38.2-5001), and what health care providers are considered to be included within the exclusive remedies provision of the Act (1989 amendment to §38.2-5001).

Most recently, the General Assembly, in direct response to the March 3, 2000 decision of the Supreme Court of Virginia in Fruiterman, again saw fit to amend and re-enact §28.2-5001 to bring within the scope of the Act those entities through which and within which participating physicians practice. More specifically, the Act was amended to include within the definition of "participating physician" "a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices." See VA. CODE ANN. §38.2-5001 (attached hereto as Exhibit 3). In so amending the Act, the General Assembly explicitly stated that "the provisions of this act amending §38.2-5001 are

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declaratory of existing law.” and further “[t]hat an emergency exists and this act is in force from its passage.” (See Exhibit 3). The Act was passed by the House and Senate in March 2000, and was signed by Governor Gilmore on April 1, 2000. (See Bill Tracking attached hereto as Exhibit 4).

The Deputy Commissioner, in her April 28, 2000 Opinion, refused to apply the newly amended version of the Act to the present case and, instead, held that Primary Care for Women, P.C. was not a “participating hospital” or a “participating physician” such that the Commission does not have jurisdiction to consider the claims against it. (See Op. at p. 5). In so deciding, the Deputy Commissioner “conclude[d] that the April 1, 2000 amendment shall not presently be retroactively applied to births that occurred prior to its enactment.” (Op. at p. 6). For the reasons set forth herein, the Deputy Commissioner erred by determining that application of the April 1, 2000 amendment to the present case would be a “retroactive” application and further erred by failing to recognize the clear intent of the General Assembly that the amendment shall apply to children born prior to the date of the amendment. Therefore, these Defendants respectfully request this Commission reverse the April 28, 2000 decision of the Deputy Commissioner and remand the matter for adjudication on the merits of the claim.

1. APPLICATION OF THE APRIL 1, 2000 AMENDMENT OF VA. CODE ANN. §38.2-5001 TO THE PRESENT CASE WOULD NOT CONSTITUTE RETROACTIVE APPLICATION OF LAW.

It is a well settled principle of American jurisprudence that courts will regularly apply statutes conferring or ousting jurisdiction, regardless of whether jurisdiction lay at the time when the underlying conduct occurred or at the time when the suit was filed. See e.g., Landgraf v. USI Film Products, 511 U.S. 244 (1994) (hereinafter “Landgraf”); Bruner v. United States, 343 U.S. 112 (1952) (hereinafter “Bruner”); Hallowell v. Commons, 239 U.S. 506 (1916) (hereinafter “Hallowell”).

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"Hallowell"); and Assessors v. Osbornes, 19 L.Ed. 748 (1870). This is true even when application of the statute requires dismissal of an action that was proper when filed but which has become improper for want of jurisdiction because the jurisdictional statute has been repealed. Bruner at 116-17. This maxim of statutory application is founded upon the concept that "application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" Landgraf at 274, *quoting* Hallowell, 239 U.S. at 508. "Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." Landgraf at 274 (citations omitted) (emphasis added).

As recently as January 1999, the Alexandria Division of the Eastern District of Virginia of the United States District Court was called upon to apply this rule of statutory application in Kight v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., 34 F. Supp.2d. 334 (1999) (hereinafter "Kight"). In Kight, the Plaintiff brought suit in the Circuit Court for the County of Prince William alleging various theories against multiple defendants in connection with her contracting breast cancer. The Defendants moved to remove the case to federal court, on the grounds that the Federal Employee Health Benefits Act (FEHBA) preempted the state claims. That motion was granted. Thereafter, the Plaintiff moved the district court to remand the matter to state court, and the defendants sought judgment on the pleadings. The legal issue facing the court in Kight was whether the 1998 amendment to FEHBA ought to be applied to a cause of action which accrued prior to the amendment and which was brought to suit prior to the amendment. The amendment at issue dealt with the degree to which FEHBA pre-empted state claims. The amendment at issue strengthened and broadened the preemption aspect of FEHBA.

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As described by the court, "[t]he change in [the statutory] language was substantial." Kight at 338. Notwithstanding what the court viewed as significant or "substantial" change in the preemption provision, which change came about after the plaintiff's cause of action accrued and after she had filed her motion for judgment in state court, the court, citing Landgraf, held that "where jurisdiction is concerned, a court should apply the law in effect at the time it renders the decision," Kight at 338 (emphasis added). The court found that FEHBA pre-empted Plaintiff's state law claims, denied Plaintiff's motion to remand the matter to circuit court, and granted judgment on the pleadings in favor of the defendants as to certain of the counts. Id. at 342.

The Supreme Court of Virginia also has been called upon to address similar issues with regard to amendments and re-enactments of various state statutory provisions. Most notably, in Walke v. Dallas, 209 Va. 32, 161 S.E.2d 722 (1968) (hereinafter "Walke"), the Court was called upon to determine if the [then new] Virginia Long Arm statutes ought to be applied to a cause of action that arose prior to the effective date of the statutes. The Court found that because the Long Arm Statutes dealt with the jurisdiction of the courts of the Commonwealth as to certain non-resident defendants, the statutes could be applied to causes of action that accrued prior to enactment. More particularly, the Court stated, "[The statutes] only provide a forum for asserting an existing right, with respect to which...the law in force at the time of the trial must prevail." Walke at 36, 161 S.E.2d at 725 (emphasis added).

In the present case, on April 1, 2000, the General Assembly of this Commonwealth enacted legislation which did not affect the rights or obligations of the parties hereto but, rather, which affected the jurisdiction of this Commission and the courts of this Commonwealth. More specifically, the April 1, 2000 amendment to VA. CODE ANN. §38.2-5001 broadens the jurisdiction of the Virginia Compensation Commission.

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persons or entities against whom the Act is the injured party's exclusive remedy. See VA. CODE ANN. §38.2-5002 (Michie 1987, as amended 1990). Just like the amendment at issue in Kight and the enactment of new law in Walke, the effect of the amendment to §38.2-5001 is to broaden the jurisdiction of the Commission to include partnerships, corporations, and other entities through which a participating physician practices. Because the amendment was jurisdictional in nature, the Deputy Commissioner erred in failing to apply the "present law" to the present case when the Plaintiffs moved to have the claims against Primary Care for Women, P.C. remanded to the Circuit Court of Fairfax County. Consequently, to correct the Deputy Commissioner's error, this Commission must apply the "present law" as expressed in VA. CODE ANN. §38.2-5001, reverse the Deputy Commissioner's decision and affirmatively find that the Commission has jurisdiction over Primary Care for Women, P.C..

**2. THE CLEAR INTENT OF THE GENERAL ASSEMBLY IN AMENDING VA. CODE ANN. §38.2-5001 WAS TO OVERRIDE FRUITERMAN AND CLARIFY THE EXISTING LAW.**

Not only did the Deputy Commissioner err by failing to recognize the jurisdictional nature of the statutory amendment at issue such that application to the case at bar was required, she also erred by ignoring the obvious and clearly expressed intent of the General Assembly in amending Va. CODE ANN. §38.2-5001. As a result, the Deputy Commissioner erroneously concluded that application of the amendment to the present claims would be an [improper] retroactive application, and held that this Commission lacks jurisdiction over Primary Care for Women, P.C. because it does not meet the statutory definition of "participating physician" or "participating hospital." The plain language of the amendment reveals that the legislature clearly intended for the statute to apply to all causes of action, regardless of the date of accrual or date of

filing and, therefore, this Commission should reverse the Deputy Commissioner's April 28, 2000 decision and remand this matter for adjudication on the merits of the claims.

As the General Assembly clearly stated in the body of the amendment to §38.2-5001, "an emergency exists and this act is in force from its passage." In light of the chronology of events leading up to the passage of the amendment, one must conclude that the emergency to which the General Assembly was referring was the illogical and unnecessary bifurcation of claims which would result in light of the Supreme Court's decision in Fruiterman. Although this Commission may not review the legislature's actions with regard to declaring a legislative emergency, Roanoke v. Elliott, 123 Va. 393, 96 S.E. 819 (1918) (stating that the legislature is the sole judge of what constitutes an emergency which will justify putting an act into immediate effect, and its action is not reviewable by the courts), this Commission may examine the conditions under which the amendment was passed to ascertain the legislative intent. Falls Church v. Board of Sup'rs, 151 Va. 672, 144 S.E. 870 (1928).

The conditions under which the April 1, 2000 amendments to §38.2-5001 were passed are thus: In November 1998, in the case of Waziri v. Fruiterman, the Fairfax County Circuit Court denied a plea in bar filed in response to a claim made by an infant allegedly injured during the course of labor and delivery. The plea in bar asserted that the action against both Dr. Fruiterman and his professional corporation was barred by the exclusive remedy provision of the Act. The court denied the plea as to the professional corporation and held that it did not fall within the scope of the Act because it did not meet the definition of a participating physician or hospital. Thereafter, the defendant physician and the professional corporation filed a petition for appeal. The Virginia Supreme Court granted the petition on July 30, 1999. (See Order attached hereto as

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Exhibit 5). Oral argument on the appeal took place on January 10, 2000, and on Friday, March 3, 2000, the Supreme Court rendered its decision affirming the trial court's ruling.

At the same time that the Fruiterman case was moving through the appellate process, the General Assembly was considering proposed amendments to §38.2-5001. House Bill 398 was first offered on January 13, 2000, and **did not** contain a provision modifying or changing the definition of "participating physician." (See Exhibit 6). Its original patron was Delegate Woodrum. Shortly thereafter, on January 27, 2000, the House Committee for the Courts of Justice proposed an Amendment in the Nature of a Substitute to House Bill 398. (See Exhibit 7). Again, although significant changes to §38.2-5001 were contained therein, there was no provision for modifying the definition of "participating physician." As noted above, on Friday, March 3, 2000, the Supreme Court handed down its decision in Fruiterman that a professional corporation does not fall within the scope of the Act. On Tuesday, March 7, 2000, **in direct response to the Fruiterman decision**, a Floor Amendment in the Nature of a Substitute to House Bill 398 was proposed by Senator Norment. That Floor Amendment included a change in the definition of the term "participating physician" such that professional corporations, partnerships, professional limited liability companies and any other entities through which a participating physician practices medicine would be included within the scope and coverage of the Act. (See Exhibit 8). The March 7, 2000 Floor Amendment did also contain the statement that the bill was "declaratory of existing law" and that an emergency existed such that the bill was to go into effect upon its passage, rather than on July 1, 2000. The Floor Amendment was passed by the Senate by a vote of 36-1. The House then voted on the Floor Amendment on Thursday, March 9, 2000, and agreed to the same by a vote of 98-0. On that same date, the

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emergency clause was also passed by a vote of 98-0. The bill was signed by the Governor on April 1, 2000, and went into effect that same date.

The above-described legislative history, when viewed in light of the timing of the Fruiterman decision, clearly reveals that the General Assembly was acting in direct response to Fruiterman when it broadened the definition of "participating physician" to include the business entities through which a physician practices. When legislative amendments are enacted soon after controversies arise as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act, i.e., as a formal change, rebutting the presumption of substantial change. Boyd v. Commonwealth, 216 Va. 16, 215 S.E.2d 915 (1975) (hereinafter "Boyd"). In the present case, it is patently clear that the General Assembly enacted its amendments to §38.2-5001 soon after the Supreme Court handed down its controversial decision in Fruiterman. Consequently, this Commission may properly conclude that the amendments are not "substantial amendments" but, rather, are mere formal changes to the language of the statute such that any interpretative controversy which was created by the Supreme Court has now been put to rest.

Moreover, the fact that the amendment as enacted contained the statement that the act is "declaratory of existing law," stands as further support that the General Assembly intended to override Fruiterman and eliminate any controversy with regard to the scope of coverage of the Act. Black's Law Dictionary defines "declaratory" as "explanatory; designed to fix or elucidate what before was uncertain or doubtful." BLACK'S LAW DICTIONARY 283 (Abridged 6<sup>th</sup> ed. 1991). This is in accord with the principle set forth in Boyd regarding mere formal change, rather than

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substantial change, in a statute made in response to controversy. Black's goes on to define a "declaratory statute" as follows:

**One enacted for the purpose of removing doubts or putting an end to conflicting decisions in regard to what the law is in relation to a particular matter. It may either be expressive of the common law, or may declare what shall be taken to be the true meaning and intention of a previous statute[.] .... A statute enacted to put an end to a doubt as to what is the common law, or the meaning of another statute and which declares what it is and ever has been.**

BLACK'S LAW DICTIONARY 284 (Abridged 6<sup>th</sup> ed. 1991) (emphasis added). Again, this definition is consistent with what the high court of this Commonwealth has expressed regarding "formal change" to statute through amendment made and enacted soon after controversy has arisen. See McQuinn v. Commonwealth, 19 Va. App. 418, 451 S.E.2d 704 (1994) *affirmed en banc* 20 Va. App. 753, 460 S.E.2d 624 (1995) (holding that the General Assembly, in amending VA. CODE ANN. §8.01-384 and denoting such amendment as "declaratory of existing law," was addressing and resolving a controversy which was created by a decision of the Court of Appeals and, as such, the amendment was applicable to a case brought prior to the enactment of the amendment). See also Ackerman v. Ackerman, 1997 WL 1070559 \*4 (Fairfax County Cir. Ct. 1997) (attached hereto as Exhibit 9) (stating that the 1997 amendment to and re-enactment of VA. CODE ANN. §8.01-249 contained a clause indicating that the amendments were declaratory of existing law and that, consequently, the legislative changes to that statute "clarif[ied] [what] the legislature intended when the statute was last amended in 1995).

In the case at bar, the Deputy Commissioner explicitly acknowledged the April 1, 2000 amendment to §38.2-5001, and further acknowledged that the amendment indicated that the act was "declaratory of existing law." Notwithstanding this acknowledgment, the Deputy

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Commissioner then went on to disregard the legislative amendment and found that the Commission lacked jurisdiction over Primary Care for Women, P.C. because it did not meet the definition of "participating physician" or "participating hospital." The Deputy Commissioner's decision in this regard flies in the face of the plain language of the act, and the decisions of the courts of this Commonwealth which have been called upon to interpret and then apply statutes deemed by the legislature to be "declaratory of existing law." Her decision that the Commission lacks jurisdiction over the professional corporation is without support and is contrary to the authority available on this subject. Therefore, this Commission should reverse the same and remand this case for determination on the merits.

**B. THE DEPUTY COMMISSIONER ERRED BY RELYING UPON FRUITERMAN V. WAZIRI INSTEAD OF APPLYING THE LAW AS IT EXISTED AT THE TIME OF HER DECISION.**

Not only did the Deputy Commissioner err by ignoring the mandate of the General Assembly regarding the application and effect of the April 1, 2000 amendment to VA. CODE ANN. §38.2-5001, she also erred by relying upon the March 3, 2000 Fruiterman decision. The Deputy Commissioner, in reaching her decision, stated:

After reviewing the record in its entirety this Commission finds that it lacks jurisdiction over the corporation as it fails to qualify as either a participating physician or participating hospital under the...Act on the date of the child's birth pursuant to the March 3, 2000 Opinion of the Virginia Supreme Court. In making this determination, this Commission is fully aware of the April 1, 2000 amendment to the definition of participating physician and the language that it was to be "declaratory of existing law." However, the Virginia Supreme Court specifically held to the contrary[.]

(Op. at p. 5) (emphasis added). The Deputy Commissioner's error is glaring: she acknowledges the actions of the General Assembly in amending VA. CODE ANN. §38.2-5001, and further acknowledges that the amendment is "declaratory of existing law" yet she persists in applying

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the Supreme Court's erroneous interpretation of what it believed to be the law as of March 3, 2000. In effect, the Deputy Commissioner has refused to accept that the General Assembly, and not the courts, holds the power to enact legislation and to amend or clarify previously enacted legislation. See e.g., Sykes v. Commonwealth, 27 Va. App. 77, 80-81, 497 S.E.2d 511, 512-13 (1998) (*quoting* Barr v. Town & Country Properties, Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (stating that courts cannot rewrite statutes; this is a purely legislative function); see also Coca-Cola Bottling Co. of Roanoke v. County of Botetourt, 259 Va. 559, 526 S.E.2d 746 (2000) (stating that courts cannot change or amend a statute under the guise of construing it).

As set forth in detail above, the Fruiterman decision was handed down on March 3, 2000. In direct response to that decision, the General Assembly moved swiftly to amend and re-enact VA. CODE ANN. §38.2-5001. That legislative action included declaration of an emergency and further included an explicit statement that the newly-amended statute was **declaratory of existing law**. The Deputy Commissioner, as set forth at page 5 of her Opinion, has chosen to ignore the General Assembly's actions and, instead clings to the Fruiterman decision as the basis for determining that the Commission lacks jurisdiction over Primary Care for Women, P.C.. Her determination in this regard is without affirmative support and, more importantly, is in direct conflict with all authority on the subject. Therefore, her decision must be reversed and this matter remanded for determination on the merits.

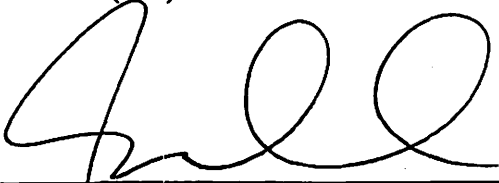
### CONCLUSION

WHEREFORE, for each of the foregoing reasons, the Defendants respectfully request this Commission reverse, in part, Deputy Commissioner Colville's April 28, 2000 Opinion and find that this Commission indeed has jurisdiction over Primary Care for Women, P.C. as a "participating physician" under the Virginia Birth-Related Neurological Injury Compensation

Act. These Defendants further request that this matter be remanded for further consideration and adjudication on the merits, pursuant to the Act.

TODD BERNER, M.D., and  
PRIMARY CARE FOR WOMEN, P.C.  
By Counsel

McCARTHY & MASSEY, P.C.  
9315 Center Street, Suite 104  
Manassas, Virginia 20110  
telephone (703) 330-2726  
facsimile (703) 330-2429



By: Tara M. McCarthy (VSB #22223)  
Susan L. Mitchell (VSB #37789)

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

JUN 15 2000

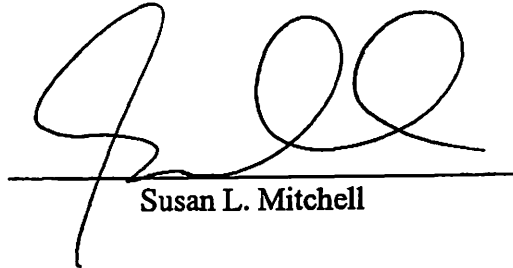
CHARGE #15

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the DEFENDANTS' WRITTEN STATEMENT IN SUPPORT OF REQUEST FOR REVIEW was faxed and mailed, first class postage pre-paid, this 9<sup>th</sup> day of June, 2000, to:

Robert T. Hall, Esquire  
Donna Miller Rostant, Attorney-at-Law  
*Hall & Sickels, P.C.*  
12120 Sunset Hills Drive  
Suite 150  
Reston, Virginia 20190-3231  
Counsel for Scott and Tara Mills, Administrators of the  
Estate of Nelson Mills, deceased

John J. Beall, Jr., Esquire  
Senior Assistant Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
Counsel for the Virginia Birth-Related Neurological Program



Susan L. Mitchell

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**VIRGINIA WORKERS  
COMPENSATION COMMISSION**

**JUN 15 2000**

**CHARGE #15**

✓  
VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SCOTT AND TARA MILLS,  
Co-Administrators of the Estate of  
Nelson Mills and TARA MILLS,

Plaintiffs,

v

TODD BERNER, M.D., and  
PRIMARY CARE FOR WOMEN, P.C.,

Defendants.

At Law No. 181359

AMENDED ORDER

THIS MATTER came before this Honorable Court upon the Defendants' Motion to Refer Plaintiffs' Motion for Judgment to the Virginia Workers' Compensation Commission pursuant to VA. CODE ANN. §8.012-273.1 and the Virginia Birth-Related Neurological Injury Compensation Act; and,

IT APPEARING TO THE COURT upon consideration of oral argument and the pleadings, briefs and other documents filed in this matter, that said motion ought to be granted in part and denied in part; it is hereby

ORDERED, ADJUDGED and DECREED for the reasons stated from the bench on November 8, 1999, and contained in the transcript thereof which is incorporated herein by reference, that

(1) The Defendants' motion to refer Plaintiffs' claim for the wrongful death of Nelson Mills be and hereby is GRANTED;

(2) Defendants' motion to refer Plaintiffs' claims of negligence as against Todd Berner, M.D. be and hereby is GRANTED;

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

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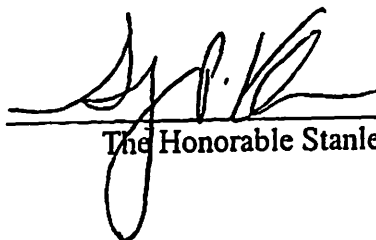
(3) Defendants' motion to refer Plaintiff's claim of negligence as against Primary Care for Women, P.C. be and hereby is GRANTED;

(4) Defendants' motion to refer Plaintiffs' claims for negligent infliction of emotional distress be and hereby is GRANTED; and,

(5) Defendants' motion to refer plaintiff Tara Mills' claims for personal bodily injury be and hereby is DENIED; and it is further

ORDERED, ADJUDGED and DECREED that the Clerk of this Court shall forward the Motion to Refer together with a copy of the Motion for Judgment to the Virginia Workers' Compensation Commission pursuant to VIRGINIA CODE ANNOTATED §8.01-273.1 (Michie 1950, as amended 1999).

OK  
5-2000  
ENTERED this 4 day of January, 2000.



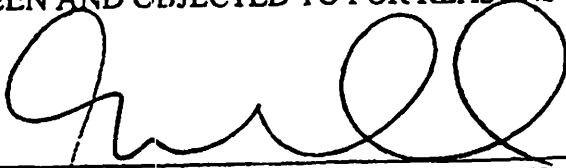
The Honorable Stanley P. Klein

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

JUN 15 2000

CHARGE #15

SEEN AND OBJECTED TO FOR REASONS STATED IN COURT AND ON BRIEF:



Tara M. McCarthy, Attorney-at-Law (VSB #21123)  
Susan L. Mitchell, Attorney-at-Law (VSB # 37789)  
MCCARTHY & MASSEY, P.C.  
9315 Center Street, Suite 104  
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(703) 330-2726  
Counsel for Defendants

SEEN AND OBJECTED TO FOR REASONS STATED IN COURT AND ON BRIEF:



Robert T. Hall, Esquire  
Donna Miller Rostant, Attorney-at-Law  
Hall & Sickels, P.C.  
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(703) 925-0500  
Counsel for Plaintiffs

M:\Open Cases\Benson Mills\Refir Motion Amend Ord. wpd

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

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Present: Carrico, C.J., Compton, Lacy, Hassell, Keenan, and Kinser, JJ., and Poff, Senior Justice

JAN PAUL FRUITERMAN, M.D.  
AND ASSOCIATES, P.C.

Record No. 990376

v.

OPINION BY  
SENIOR JUSTICE RICHARD H. POFF  
March 3, 2000

AHMAD WAZIRI AND HASSINI WAZIRI,  
INDIVIDUALLY AND AS PERSONAL  
REPRESENTATIVES OF THE ESTATE OF  
SYAWACH WAZIRI

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY  
M. Langhorne Keith, Judge

In this appeal from a judgment entered in a medical malpractice, wrongful death action, the appellant, Jan Paul Fruiterman, M.D. and Associates, P.C., a professional corporation (the P.C.), contends that the trial court erred in denying coverage of the Virginia Birth-Related Neurological Injury Compensation Act, Code § 38.2-5000 et seq. (the Compensation Act), to professional corporations.

Ahmad and Hassini Waziri, individually and as personal representatives of the estate of their son, Syawach, filed an amended motion for judgment entitled "Medical Malpractice-Wrongful Death" against Dr. Fruiterman, individually, and against the P.C. Applying the rights and remedies defined in the Compensation Act, the trial court sustained Dr. Fruiterman's demurrer. The court denied the co-defendant's demurrer on the ground that the rights and remedies of the Compensation Act do not apply to professional corporations. The jury returned a verdict against the P.C. for \$750,000 which the court reduced by remittitur to \$730,000.

The sufficiency of the evidence of medical malpractice and proximate cause are not in issue on appeal. Expert witnesses called by the plaintiffs testified that Dr. Fruiterman's performance of the fetal delivery by Caesarian section was conducted too late to avoid severe brain damage. In response to medical opinion, the parents agreed to suspend life support systems, and Syawach, their first-born child, died eight days after birth.

The General Assembly enacted Chapter 50 of the Code of Virginia, the Compensation Act,

**VIRGINIA WORKERS'  
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}

Act).

As we have said, the Compensation Act provides that "the rights and remedies herein granted to an infant . . . shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law . . . ." § 38.2-5002(B).

"Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms." *Schwartz v. Brownlee*, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997) (citation omitted).

The Compensation Act begins with expressly restrictive definitions. A "[p]articipating physician" is "a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services", § 38.2-5001, and "a licensed nurse-midwife who performs obstetrical services", *id.*, and pays "an annual participating physician assessment to the Program", § 38.2-5020(A).

"'Participating Hospital' means a hospital . . . which . . . had in force an agreement with the Commissioner of Health . . . to participate in . . . a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and . . . had in force an agreement . . . whereby the hospital agreed to submit to review of its obstetrical service . . . and . . . had paid the participating assessment pursuant to § 38.2-5020 . . . ."

"Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed." *Barr v. Town and Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)(quoting *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934)).

Clearly, the General Assembly did not intend to immunize all health-care providers from tort liability for birth-related neurological injury caused by medical malpractice. The legislature expressly identified those entitled to that immunity as "participating physicians" and "participating hospitals"; then expressly defined "physicians" as obstetricians and nurse-midwives who perform obstetrical services; and then expressly specified that the term "participating" includes payment of an annual assessment by qualified physicians and hospitals to finance the costs of the benefits provided by the Compensation Program. No such assessment was imposed upon a professional corporation.

In summary, the Compensation Act expressly limits those entitled to its rights and benefits to selected health-care providers and expressly excludes "a nonparticipating physician or hospital".

JUN 15 2000

hospital." § 38.2-5002(D). The legislative omission of other health-care providers serving during the course of child birth, such as pediatricians, radiologists, and medical partnerships, confirms our conclusion that participating physicians and hospitals were intended to be the only health-care providers afforded immunity from civil liability by the Compensation Act. A professional corporation, the employer of a participating physician, is conspicuous by its absence.

II In support of a second assignment of error, the P.C. contends that "[t]he award for non-economic loss bears no reasonable relation to the evidence and therefore is excessive." The P.C. is referring to the jury's award of \$655,973.46, a sum in addition to its award for expenses incurred in "the care, treatment and hospitalization of the decedent".

The wrongful death statute, § 8.01-52, provides that "[t]he jury or the court . . . may award such damages as to it may seem fair and just" and that "[t]he verdict or judgment . . . shall include, but may not be limited to, damages for . . . [s]orrow, mental anguish, and solace . . . ."

We find the evidence of sorrow, mental anguish, and solace contained in this record fully sufficient to support the jury's award, and finding no merit in the assignments of error, we will affirm the judgment entered by the trial court.

Affirmed.

Justice Compton participated in the hearing and decision of this case prior to the effective date of his retirement on February 2, 2000.

The Compensation Act expressly provides that "a civil action . . . shall not be foreclosed against a nonparticipating physician or hospital", § 38.2-5002(D), or "against a physician or hospital where there is clear and convincing evidence that such physician or hospital intentionally or willfully caused or intended to cause a birth-related neurological injury." § 38.2-5002(C).

**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

**JUN 15 2000**

**CHARGE #15**

Citation

Search Result

Rank 1 of 1

Database

LEGIS 207 (2000)

VA-LEG

2000 Virginia Laws Ch. 207 (H.B. 398)

## VIRGINIA 2000 SESSION LAW SERVICE

## REGULAR SESSION

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Additions are indicated by <<+ Text +>>; deletions by  
 <<- Text ->>. Changes in tables are made but not highlighted.

Ch. 207

H.B. No. 398

VIRGINIA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ACT; REFERRAL TO  
 WORKERS' COMPENSATION COMMISSION

Ch. 207

An Act to amend and reenact §§ 8.01-273.1 and 38.2-5001 of the Code of  
 Virginia, relating to the Virginia Birth-Related Neurological Injury  
 Compensation Act; referral to Workers' Compensation Commission.

Approved April 1, 2000

Be it enacted by the General Assembly of Virginia:

Ch. 207, § 1

1. That §§ 8.01-273.1 and 38.2-5001 of the Code of Virginia are amended and  
 reenacted as follows:

&lt;&lt; VA ST § 8.01-273.1 &gt;&gt;

§ 8.01-273.1. Motion for judgment; motion to refer; Virginia Birth-Related  
 Neurological Injury Compensation Act

<<+A. +>>In any civil action, where a party<<+, who is a participating  
 hospital or physician as defined in § 38.2-5001, +>>moves to refer a cause of  
 action to the Workers' Compensation Commission for the purposes of determining  
 whether the cause of action satisfies the requirements of the Virginia Birth-  
 Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court  
 shall forward the motion to refer together with a copy of the motion for  
 judgment to the Commission and stay all proceedings on the cause of action  
 pending an award and notification by the Commission of its disposition<<+;  
 provided, however, that the motion to refer the cause of action to the Workers'  
 Compensation Commission shall be filed no later than 120 days after the date of  
 filing a grounds of defense by the party seeking the referral+>>  
 <<+B. Upon entry of the order of referral by the court, the clerk of the  
 circuit court shall file with the Workers' Compensation Commission within

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CHARGE #15

## . 207, § 1

thirty days a copy of the motion for judgment and the responsive pleadings of all the parties to the action. The clerk shall copy all counsel of record in the civil action on the transmittal letter accompanying the materials being filed with the Workers' Compensation Commission. All parties to the civil action shall be entitled to participate before the Commission upon filing a notice of appearance with the Clerk of the Commission within twenty-one days after receipt of the transmittal letter to the clerk of the circuit court. Notwithstanding the provisions of § 32.1-127.1:03, the moving party shall provide the Commission with an original and five copies of the following: appropriate assessments, evaluations, and prognoses and such other records obtained during discovery and are reasonably necessary for the determination of whether the infant has suffered a birth-related neurological injury. The medical records and the pleadings referenced in this subsection shall constitute a petition as referenced in § 38.2-5004. The moving party shall be reimbursed for all copying costs upon entry of an award of benefits as referenced in § 38.2-5009.+>>

&lt;&lt; VA ST § 38.2-5001 &gt;&gt;

## § 38.2-5001. Definitions

As used in this chapter:

"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of this chapter, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse. The definition provided here shall apply retroactively to any child born on and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.

"Claimant" means any person who files a claim pursuant to § 38.2-5004 for compensation for a birth-related neurological injury to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, executor, or other legal representative.

"Commission" means the Virginia Workers' Compensation Commission.

"Participating hospital" means a hospital licensed in Virginia ~~at the time of the injury~~ (i) had in force an agreement with the ~~Commission~~ **VIRGINIA WORKERS' COMPENSATION COMMISSION**

VA LEGIS 207 (2000)

## 207, § 1

health or his designee, in a form prescribed by the Commissioner, whereby the hospital agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Department of Health whereby the hospital agreed to submit to review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the participating hospital assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. The term also includes employees of such hospitals, excluding physicians or nurse-midwives who are eligible to qualify as participating physicians, acting in the course of and in the scope of their employment.

"Participating physician" means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time or, as authorized in the plan of operation, a licensed nurse-midwife who performs obstetrical services, either full or part time, within the scope of such licensure and who at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the physician agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. <<+The term "participating physician" includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices.+>>

"Program" means the Virginia Birth-Related Neurological Injury Compensation Program established by this chapter.

Ch. 207, § 2

2. That the provisions of this act amending § 38.2-5001 are declaratory of existing law.

Ch. 207, § 3

3. That an emergency exists and this act is in force from its passage.

VA LEGIS 207 (2000)

END OF DOCUMENT

VIRGINIA WORKERS  
COMPENSATION COMMISSION

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# HB 398 Birth-Related Neurological Injury Compensation Act.

Patron-Clifton A. (Chip) Woodrum

*Summary as passed:*

**Virginia Birth-Related Neurological Injury Compensation Act.** Clarifies that only parties to litigation who are either participating hospitals or physicians under the Virginia Birth-Related Neurological Injury Compensation Act may move the court to refer the action to the Workers' Compensation Commission for the purpose of determining whether the requirements of the Act are satisfied. The bill also requires that a motion to refer the action to the Commission be filed no later than 120 days after the date the party seeking the referral filed its grounds of defense. The bill specifies what constitutes a petition and certain filing and administrative requirements. The bill provides that the definition of participating physician includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the physician practices. The bill has an emergency clause.

*Full text:*

01/13/00 House: Presented & ordered printed 003324996  
01/28/00 House: Committee substitute printed 001768996-H1  
03/07/00 Senate: Floor substitute printed 001925508-S1 (Norment)  
03/10/00 House: Enrolled bill text (HB398ER)  
04/03/00 Governor: Acts of Assembly Chapter text (CHAP0207)

*Status:*

01/13/00 House: Presented & ordered printed 003324996  
01/13/00 House: Referred to Committee for Courts of Justice  
01/19/00 House: Assigned to C. J. sub-committee: 2  
01/27/00 House: Reported from C. J. with substitute (23-Y 0-N)  
01/28/00 House: Committee substitute printed 001768996-H1  
01/31/00 House: Read first time  
02/01/00 House: Read second time  
02/01/00 House: Committee substitute agreed to 001768996-H1  
02/01/00 House: Engrossed by House - com. sub. 001768996-H1  
02/02/00 House: Read third time and passed House (Block Vote) (98-Y 0-N)  
02/02/00 House: VOTE: BLOCK VOTE PASSAGE (98-Y 0-N)  
02/02/00 House: Communicated to Senate  
02/03/00 Senate: Constitutional reading dispensed  
02/03/00 Senate: Referred to Committee for Courts of Justice  
03/01/00 Senate: Reported from Courts of Justice (15-Y 0-N)  
03/02/00 Senate: Const. reading disp., passed by for the day (38-Y 0-N)  
03/02/00 Senate: VOTE: CONST. RDG. DISPENSED R (38-Y 0-N)  
03/03/00 Senate: Read third time  
03/03/00 Senate: Passed Senate (39-Y 0-N)  
03/03/00 Senate: VOTE: PASSAGE R (39-Y 0-N)  
03/06/00 Senate: Rec. of Sen. passage agreed to by Senate (39-Y 0-N)  
03/06/00 Senate: VOTE: RECONSIDER (39-Y 0-N)  
03/06/00 Senate: Passed by for the day

**VIRGINIA WORKERS  
COMPENSATION COMMISSION**

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03/07/00 Senate: Floor substitute printed 001925508-S1 (Norment)  
03/07/00 Senate: Read third time  
03/07/00 Senate: Reading of substitute waived  
03/07/00 Senate: Substitute by Sen. Norment agreed to 001925508-S1  
03/07/00 Senate: Emergency clause added  
03/07/00 Senate: Engrossed by Senate - fl. sub. 001925508-S1  
03/07/00 Senate: Passed Senate with substitute (36-Y 1-N 1-A)  
03/07/00 Senate: VOTE: PASSAGE (36-Y 1-N 1-A)  
03/08/00 House: Placed on Calendar  
03/09/00 House: Senate substitute agreed to by House (98-Y 0-N)  
03/09/00 House: VOTE: ADOPTION EMERGENCY (98-Y 0-N)  
03/10/00 House: Enrolled bill text (HB398ER)  
03/13/00 House: Enrolled  
03/13/00 House: Signed by Speaker  
03/15/00 Senate: Signed by President  
04/01/00 Governor: Approved by Governor-Chapter 207 (effective 4/1/00)  
04/03/00 Governor: Acts of Assembly Chapter text (CHAP0207)

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Go to (General Assembly Home) or (Bills and Resolutions)

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

JUN 15 2000

CHARGE #15  
6/8/00

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on Friday the 30th day of July, 1999.*

Jan Paul Fruiterman,  
M.D. and Associates, P.C.,

Appellant,

against Record No. 990376  
Circuit Court No. L153578

Ahmad Waziri, et al.,

Appellees.

From the Circuit Court of Fairfax County

Upon the petition of Jan Paul Fruiterman, M.D. and Associates, P.C. an appeal is awarded it from judgment rendered by the Circuit Court of Fairfax County on October 19, 1998 and November 20, 1998; upon the appellant, or some one for it, filing an appeal bond with sufficient security or an irrevocable letter of credit in the clerk's office of the trial court in the penalty of \$500, within 15 days from the date of the Certificate of Appeal, with condition as the law directs.

On further consideration whereof, this appeal is refused as to the appellees' assignment of cross-error.

Reference is made to the said petition for the names of all the appellees involved in this appeal.

A Copy,

Teste

*H. B. Shank*

Clerk VIA WORKERS  
COMPENSATION COMMISSION

JUN 15 2000

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**CERTIFICATE OF APPEAL**

Pursuant to Rule 5:27, I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that on July 30, 1999 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the lower court indicated in the order and to all counsel of record.

Given under my hand this 30th day of July, 1999.

  
Clerk

**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

JUN 15 2000

**CHARGE #15**

HOUSE BILL NO. 398

Offered January 13, 2000

*A BILL to amend and reenact*

§  
8.01-273.1 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act; referral to Workers' Compensation Commission.

-----  
Patron-- Woodrum  
-----

Referred to Committee for Courts of Justice  
-----

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-273.1 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-273.1. Motion for judgment; motion to refer; Virginia Birth-Related Neurological Injury Compensation Act.

In any civil action, where a party, *who is a participating hospital or physician as defined in*  
§  
38.2-5001, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; *provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than ninety days after the date of filing a grounds of defense by the party seeking the referral.*

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 [Go to \(General Assembly Home\)](#)

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

JUN 15 2000

CHARGE #15

**HOUSE BILL NO. 398**  
**AMENDMENT IN THE NATURE OF A SUBSTITUTE**  
 (Proposed by the House Committee for Courts of Justice  
 on January 27, 2000)  
 (Patron Prior to Substitute--Delegate Woodrum)

*A BILL to amend and reenact*

*§*

*8.01-273.1 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act; referral to Workers' Compensation Commission.*

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-273.1 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-273.1. Motion for judgment; motion to refer; Virginia Birth-Related Neurological Injury Compensation Act.

*A. In any civil action, where a party, who is a participating hospital or physician as defined in*

*§*

*38.2-5001, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than 120 days after the date of filing a grounds of defense by the party seeking the referral.*

*B. Upon entry of the order of referral by the court, the clerk of the circuit court shall file with the Workers' Compensation Commission within thirty days a copy of the motion for judgment and the responsive pleadings of all the parties to the action. The clerk shall copy all counsel of record in the civil action on the transmittal letter accompanying the materials being filed with the Workers' Compensation Commission. All parties to the civil action shall be entitled to participate before the Commission upon filing a notice of appearance with the Clerk of the Commission within twenty-one days after receipt of the transmittal letter to the clerk of the circuit court. Notwithstanding the provisions of*

*§*

*32.1-127.1:03, the moving party shall provide the Commission with an original and five copies of the following: appropriate assessments, evaluations, and prognoses and such other records obtained during discovery and are reasonably necessary for the determination of whether the infant has suffered a birth-related neurological injury. The medical records and the pleadings referenced in this subsection shall constitute a petition as referenced in*

*§*

*38.2-5004. The moving party shall be reimbursed for all copying costs upon entry of an award of benefits as referenced in*

*§*

*38.2-5009.*

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COMPENSATION COMMISSION**

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[summary](#) | [pdf](#)**HOUSE BILL NO. 398**

Offered January 13, 2000

*A BILL to amend and reenact*

§

*8.01-273.1 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act; referral to Workers' Compensation Commission.*-----  
Patron-- Woodrum  
-----Referred to Committee for Courts of Justice  
-----

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-273.1 of the Code of Virginia is amended and reenacted as follows:§ 8.01-273.1. Motion for judgment; motion to refer; Virginia Birth-Related Neurological Injury Compensation Act.In any civil action, where a party, *who is a participating hospital or physician as defined in*

§

38.2-5001, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; *provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than ninety days after the date of filing a grounds of defense by the party seeking the referral.*[Go to \(General Assembly Home\)](#)**VIRGINIA WORKERS'  
COMPENSATION COMMISSION****JUN 15 2000****CHARGE #15**

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**HOUSE BILL NO. 398**  
**FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE**  
 (Proposed by Senator Norment  
 on March 7, 2000)  
 (Patron Prior to Substitute--Delegate Woodrum)

*A BILL to amend and reenact*

§

*8.01-273.1 and 38.2-5001 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act; referral to Workers' Compensation Commission.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-273.1 and 38.2-5001 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-273.1. Motion for judgment; motion to refer; Virginia Birth-Related Neurological Injury Compensation Act.

A. In any civil action, where a party, *who is a participating hospital or physician as defined in*

§

*38.2-5001*, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; *provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than 120 days after the date of filing a grounds of defense by the party seeking the referral.*

B. *Upon entry of the order of referral by the court, the clerk of the circuit court shall file with the Workers' Compensation Commission within thirty days a copy of the motion for judgment and the responsive pleadings of all the parties to the action. The clerk shall copy all counsel of record in the civil action on the transmittal letter accompanying the materials being filed with the Workers' Compensation Commission. All parties to the civil action shall be entitled to participate before the Commission upon filing a notice of appearance with the Clerk of the Commission within twenty-one days after receipt of the transmittal letter to the clerk of the circuit court. Notwithstanding the provisions of*

§

*32.1-127.1:03*, the moving party shall provide the Commission with an original and five copies of the following: appropriate assessments, evaluations, and prognoses and such other records obtained during discovery and are reasonably necessary for the determination of whether the infant has suffered a birth-related neurological injury. The medical records and the pleadings referenced in this subsection shall constitute a petition as referenced in

§

*38.2-5004*. The moving party shall be reimbursed for all copying costs upon entry of an award of benefits as referenced in

§

38.2-5009.

§ 38.2-5001. Definitions.

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As used in this chapter:

"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of this chapter, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse. The definition provided here shall apply retroactively to any child born on and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.

"Claimant" means any person who files a claim pursuant to § 38.2-5004 for compensation for a birth-related neurological injury to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, executor, or other legal representative.

"Commission" means the Virginia Workers' Compensation Commission.

"Participating hospital" means a hospital licensed in Virginia which at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the hospital agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Department of Health whereby the hospital agreed to submit to review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the participating hospital assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. The term also includes employees of such hospitals, excluding physicians or nurse-midwives who are eligible to qualify as participating physicians, acting in the course of and in the scope of their employment.

"Participating physician" means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time or, as authorized in the plan of operation, a licensed nurse-midwife who performs obstetrical services, either full or part time, within the scope of such licensure and who at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the physician agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. *The term "participating physician" includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices.*

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"Program" means the Virginia Birth-Related Neurological Injury Compensation Program established by this chapter.

2. That the provisions of this act amending § 38.2-5001 are declaratory of existing law.
3. That an emergency exists and this act is in force from its passage.



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**VIRGINIA WORKERS'  
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**JUN 15 2000**

**CHARGE #15**

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DONALD S. ACKERMAN  
V.  
DONALD C. ACKERMAN

AT LAW 154176.

Circuit Court of Virginia, Fairfax County.

April 3, 1997.

\*1 This matter came before the Court on March 20, 1997, upon defendant Donald C. Ackerman's Plea in Bar. The procedural history of this case is that on November 2, 1995, plaintiff Donald S. Ackerman ("son") filed a Motion for Judgment against his father, Donald C. Ackerman ("father") alleging causes of action arising from sexual abuse. A voluntary non-suit was taken in that case in May, 1996. The present Motion for Judgment was filed on July 26, 1996 again alleging causes of action arising from sexual abuse when the son was a minor. The Motion for Judgment contains three counts, namely: (1) battery; (2) sexual assault; and, (3) intentional infliction of emotional distress. The father filed a Plea in Bar on the grounds that the statute of limitations for all three causes of action has now run.

Dennis J. Smith, Judge.

Prior to 1991, all causes of action for personal injuries resulting from sexual abuse accrued on the date the last injury occurred pursuant to '8.01- 230. There is no dispute that under the law prior to 1991, the applicable statute of limitations for all three counts was provided by '8.01-243, which allows the injured party two years in which to bring the action. In this case, the son alleges that he was sexually abused by his father over a period of approximately ten years, with the last act of abuse occurring in 1980. Ordinarily the two year statute of limitations would begin to run in 1980 pursuant to '8.01-243, but as the son was a minor at that time, the statute of limitations was tolled by '8.01-229(2)(a), until he reached the age of majority in 1982. In 1984, the then-existing statute of limitations had expired as to any causes of action the son might have brought against the father for alleged abuse which occurred during his minority.

The son argues, however, that on November 2, 1995, the date he filed his first Motion for Judgment, '8.01-249(6) had revived his otherwise time-barred causes of action. On that date '8.01-249(6) directed that a cause of action shall be deemed to accrue

[i]n actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incompetency of the person, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist.

In order to determine the validity of Plaintiff's interpretation of ' 8.01- 249 (6), the history of that section must be reviewed. In 1991, the legislature reenacted '8.01-249 adding for the first time a subsection (6) dealing with accrual of causes of action for sexual abuse of minor. This provision included a statute of repose which barred the bringing of any action ten years after the later of the last act of abuse or the removal of the infancy or incompetency. The subsection in its 1991 form stated that a cause of action accrued

\*2 [i]n actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incompetency of the person, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. However, no such action may be brought more than ten years after the later of (i) the last act by the same perpetrator which was part of a common scheme or plan of abuse or (ii) removal of the disability of infancy or incompetency.

Section 8.01-249 was again amended in 1992 and 1993, but no changes were made to subsection (6). In 1992, however, the Virginia Supreme Court declared that the retroactive application of '8.01-249(6) to causes of action which had already accrued was constitutionally defective "as both clauses [(the accrual provision and the window of opportunity for filing stale claims)] offend the due process clauses [of Art. 1 ' 11 of the Virginia Constitution]." *Starnes v. Cayouette*, 244 Va. 202, 212 (1992).

In 1995, the General Assembly again amended '8.01-249(6) and deleted the second sentence of that subsection which had created the Statute of Repose. In 1993 and again in 1994, the General Assembly passed an amendment to the Constitution of Virginia which provided:

[t]he General Assembly's power to define the accrual date for a civil action based on an intentional tort committed by a natural person against a person who, at the time of the intentional tort, was a minor shall

include the power to provide for the retroactive application of a change in the accrual date. No person shall have a constitutionally protected property right to bar a cause of action based on intentional torts as described herein on the ground that a change in the accrual date for the action has been applied retroactively or that a statute of limitations or statute of repose has expired.

This Constitutional amendment was ratified by the people of the Commonwealth on November 8, 1994, and went into effect on January 1, 1995, as the fourth paragraph of Article IV, '14 of the Constitution of the Commonwealth of Virginia, dealing with the powers of the General Assembly.

As the Constitutional amendment was not a direct amendment of law but was instead an empowerment provision, the son's argument that his claims were revived must rely upon a subsequent legislative enactment which exercises the authority granted to the General Assembly by the amendment. In fact, the 1996 session of the General Assembly passed into law Chapter 377 of the 1996 Acts of Assembly, [FN1] which is entitled "[a]n Act to retroactively apply removal of the statute of repose in childhood sexual assault cases" and which states:

FN1. The Editor's Note to the 1995 version of '8.01-249 restates the language of Chapter 377 of the 1996 Acts of Assembly.

\*3 [b]e it enacted . . . [t]hat as authorized by Section 14 of Article IV of the Constitution of Virginia, Chapter 268 of the 1995 Acts of Assembly shall apply to all actions accruing on or after July 1, 1991, for injury to the person resulting from sexual abuse occurring during the infancy or incompetency of the person and which were or are filed on or after July 1, 1995.

The date on which the son's cause of action accrued is a mixed question of law and fact. Under the 1995 version of '8.01-249, the accrual date for sexual abuse causes of action is triggered "when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist." The son urges a narrow reading of the statute which would require a specific act of communication of the causal relationship between the abuse and the injury by a licensed person identified in the statute. This, the son argued, would be required by the express language of the statute even if the victim already had independent

knowledge that he had been so abused. When taken to the extreme, this reading of the statute would mean that if upon first entering the office of a licensed physician, psychologist or clinical psychologist, the son announced that he had been sexual abused as a child and as a result was suffering from various psychological injuries, the statute still would not have accrued until these statements were communicated to the son by the licensed physicians, psychologist or clinical psychologist. The Court finds this to be an unreasonable interpretation of the statute.

In the present case, the Court finds upon the pleadings and testimony at the hearing, that the son had knowledge of the fact and the cause of his injuries on or before 1988. There is no dispute that in 1988 the son knew of the abuse or that he sought help from Dr. Earl for psychological problems at that time. [FN2] While the son correctly points out that Dr. Earl was not licensed physician, psychologist or clinical psychologist at that time, this fact is irrelevant as whether or not Dr. Earl then established for the son a causal connection between his abuse and any injuries cannot reasonably be dispositive. This statute was not meant to revive time-barred actions in which victims had knowledge of the abuse and their injury but chose not to act. The legislature's 1991 amendment was directed toward providing a remedy to victims of child abuse who suffered from repressed memories relating to the abuse. Unfortunately, survivors of sexual abuse "often suppress memories of the assaults; thus, they may not recognize the source and cause of their injuries until many years after the abuse has ceased." 26 U. of Richmond L. Rev. 1 at 5 (1992). The legislature envisioned a remedy for victims who had suppressed memories revealed as a result of professional counseling. However, it is the victim's knowledge of the fact of the abuse and injury which is significant for purposes of accrual of rights, not the manner in which the he or she gains that knowledge.

FN2. Dr. Earl provided counseling to the son at college but was not a licensed person under '8.01-249. The son contends and the Court agrees that the term 'licensed' as used in the statute, applies to a physician, psychologist, or clinical psychologist. However, as explained below, whether or not Dr. Earl was licensed is not dispositive in this case.

\*4 The Court notes in support of its interpretation of the statute, that on the same day as this Plea in Bar hearing the Governor signed into law Chapter 565 of the Acts of 1997. This Act amended and reenacted 8.01-249 and added language to the first sentence of

subsection 6 so that as of July 1, 1997, it will read:

[i]n actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incompetency of the person, upon removal of the disability of infancy or incompetency as provided in 8.01-229 or, if the fact of the injury and its causal connection to the sexual abuse is not then known, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist.

(emphasis added)

The Act also added a new paragraph 2 which states "[t]hat the provisions of this act are declaratory of existing law." (emphasis added). These changes clarify that the legislature intended the knowledge of the fact of sexual abuse to trigger the accrual of the cause of action and that such was the case in 1995 when subsection 6 was last amended.

Ultimately, the 1995 statute may revive causes of action where the injured person was unaware of the injury, but it is not intended to revive actions where the injured party has knowledge of the abuse and injury resulting from the abuse. As the Court finds, based on the undisputed facts, that as a matter of law that under the 1995 statute the son's cause of action accrued in 1988, the son's claims were time barred as of 1990.

The Court also notes that the retroactive application of '8.01-249(6) violates the father's due process rights under the United States Constitution. The Virginia Supreme Court in *Starnes* recognized that the right to assert the bar of the statute of limitations as a defense after the statute has run is a vested right and that any legislation that destroys that vested right violates due process under the Virginia Constitution. *Starnes*, 244 Va. 202 (1992). As previously noted, the amendment

to Article IV, '14 of the Virginia Constitution granted power to the General Assembly to retroactively change the accrual date for any civil action based on an intentional tort committed against a person who, at the time, was a minor. This amendment may have removed the Virginia constitutional infirmities identified by the *Starnes* court, however the retroactive effect of the present statute remains an unconstitutional deprivation of property rights under the Constitution of the United States. The constitutional analysis in *Starnes* remains applicable in the federal context. The United States Supreme Court has clearly stated that the Due Process Clause of the Fourteenth Amendment forbids taking of property without due process of law and has acknowledged that statutes of limitations can create substantive property rights. The Supreme Court has stated that

\*5 "[t]he Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does is forbid is the taking of . . . property without due process of law . . . [and] statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution."

*Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-244 (1976) (citing, *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945)). In the present case, the father's substantive right in the statute of limitations vested at the latest in 1990 when the son's right to bring a cause of action lapsed. The father's federal due process rights would be violated if '8.01-249(6) is permitted to revive the son's long-expired claims.

Defendant shall prepare an Order in accordance with this decision, circulate it to opposing counsel, and forward it to my chambers for signature on or before April 9, 1997.

END OF DOCUMENT

LAW OFFICES  
**HALL & SICKELS, P.C.**

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June 19, 2000 ✓

✓  
***Via Certified Mail, Return Receipt Requested #Z191-093-937***

Ms. LouAnn Joyner, Clerk  
Virginia Workers' Compensation Commission  
1000 DMV Drive  
Richmond, VA 23220

***re: Case No. B- 00-06, Mills v. Primary Care for Women, P.C.***

Dear Sir/Madam:

Please find enclosed an original and file copy of Plaintiffs' Statement in Support of the Deputy Commissioner's Opinion and in Opposition to the Defendant's Written Statement as well as Plaintiff's Opposition to DIR's brief amicus curiae. ✓

Please date stamp the file copy and return the same to our office in the SASE enclosed. ✓

Please let me know if you need additional information. Thank you for your assistance in this matter.

Sincerely yours,

  
Holly Parkhurst Essing

enclosures as stated

cc: Tara McCarthy Esq., via US Mail  
Elinor J. Pyles, via US Mail  
John J. Beall, Esq., via US Mail

Judith Henry, Via US Mail, Opposition to DIR only enclosed

**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

JUN 26 2000

**CHARGE #15**

**COMMONWEALTH OF VIRGINIA  
VIRGINIA WORKERS' COMPENSATION COMMISSION**

STATEMENT of Scott and Tara Mills  
In Support of the Deputy  
Commissioner's Opinion

VIRGINIA BIRTH-RELATED  
NEUROLOGICAL INJURY  
COMPENSATION FUND

NO: B-00-06

Date of Birth: 05/28/98

RE: Claim of Scott and Tara Mills, Co-Administrators  
of the Estate of Nelson Mills (deceased infant complainant),

v.

Todd Berner M.D., and Primary Care for Women, P.C.

**STATEMENT IN SUPPORT OF THE DEPUTY COMMISSIONER'S OPINION  
AND IN OPPOSITION TO THE DEFENDANT'S WRITTEN STATEMENT**

Deputy Commissioner Colville correctly found that the Commission did not have jurisdiction under the Virginia Birth-Related Neurological Injury Compensation Act, Code of Virginia § 38.2-5000 *et seq.*, over Primary Care for Women, P.C., a professional corporation, as the professional corporation was neither a participating hospital nor a participating physician as defined in § 38.5001 of the Birth Injury Act. Deputy Commissioner Colville properly gave consideration to and was bound by the recent decision of the Virginia Supreme Court in *Fruiterman v. Waziri*, 259 Va. 540, \_\_\_ S.E.2d \_\_\_ (2000), where the Court specifically held that a professional corporation was not covered under the Birth Injury Act; and she appropriately followed the well established principle that legislation may not be applied retroactively when to do so affects substantive rights.

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## PROCEDURAL HISTORY

This matter arises out of the death of infant Nelson Mills, whose skull was crushed during a forceps delivery on May 28, 1998, by Dr. Berner, an agent and employee of Primary Care for Women, P.C. On April 4, 1999 suit was filed in Fairfax Circuit Court against Dr. Berner and Primary Care for Women, P.C. [Primary Care], seeking recovery for the wrongful death of Nelson Mills and for the personal injuries sustained by Tara Mills, individually. The defendants moved to refer the entire matter to the Commission pursuant to Code of Virginia § 8.01-273.1, relying on Dr. Berner's status as a participating physician who delivered the infant at a participating hospital.

On January 4, 2000, the circuit court entered an order granting the motion to refer the negligence and wrongful death claims against Dr. Berner and Primary Care to the Commission, but declining to refer Mrs. Mills' claim for the personal injury she sustained incident to the forceps delivery.

On March 3, 2000, the Virginia Supreme Court declared that the rights and remedies of the Virginia Birth-Related Neurological Injury Compensation Act, Virginia Code § 38.2-5000 *et seq.* (Birth Injury Act), **do not apply** to professional corporations. *Fruiterman M.D. v. Waziri*, 259 Va. 540, \_\_\_ S.E.2d \_\_\_ (2000) [Exhibit 1]. The Court relied upon the plain language of the Birth Injury Act, which precisely defined those for whom the protections of the Act were available. Specifically, the Court held that those protected by the Act included only "participating physicians" and "participating hospitals." Code § 38.2-5001. *Fruiterman*, 259 Va. at 544. The Supreme Court

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applied the age-old principle that where the legislature has used clear and unambiguous words, courts must afford them their plain and definite meaning. *Fruiterman*, 259 Va. at 544. The statute provided:

"Participating physician" means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time. . . and . . . (iii) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred.

Virginia Code § 38.2-5001.

The legislature did not include professional corporations within the limited class of those protected, and consequently the Court affirmed the refusal of the trial court to grant the professional corporation's demurrer seeking dismissal on the grounds that the Birth Injury Act applied.

Twenty days after the *Fruiterman* decision, the Mills filed their March 23, 2000 motion to remand to the circuit court the claims against the professional corporation, which, as *Fruiterman* held, did not enjoy protection under the Birth Injury Act because it was not one of the identified classes of protected entities. The Mills also moved the Commission to allow them to withdraw and non-suit their remaining claims against Dr. Berner.

On April 1, 2000, the Governor signed HB 398 which amended Code of Virginia §§ 8.01-273.1 and 38.2-5001. The amendment to 8.01-273.1 added to subsection A the phrase, "who is a participating hospital or physician as defined in § 38.2-5001," added a 120 day time limit after the filing of the grounds of defense within which the motion to

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refer must be filed, and added an entire new subsection B. [Exhibit 2]. The amendment to Code §38.2-5001 added, *inter alia*, professional corporations to the definition of "participating physician". The Act, as amended, went into effect from the date of its passage. [Exhibit 3].

Defendants Berner and Primary Care opposed the Mills' motions on the grounds that the Commission was not bound by the Supreme Court's decision in *Fruiterman*, and that the Commission did not have the authority to allow the Mills' to withdraw or non-suit their claims against Dr. Berner.

Virginia Code § 38.2-5003 authorizes the Commission to decide the claims filed pursuant to the Birth Injury Act. In accordance with the statute, on April 28, 2000, Deputy Commissioner Colville issued her Opinion, correctly holding that the Commission did not have jurisdiction over Primary Care, as it was a professional corporation which was not covered under the Act at the time of the birth of the infant, and remanding the cause of action against Dr. Berner for consideration of the non-suit issue. The Deputy Commissioner recognized that the legislature had amended the definition of "participating physician" to include the participating physician's professional corporation, but she properly refused to apply the amendment retroactively as it was substantive rather than procedural. [Exhibit 4 pp. 5-6].

Primary Care and Dr. Berner filed a Request for Review of the Deputy Commissioner's Opinion assigning error to her findings that the Commission did not

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have jurisdiction of the professional corporation. They did not request review of the remand of the cause of action against Dr. Berner to the circuit court on the non-suit issue.

Defendants demand that this Commission overturn the Deputy Commissioner's Opinion for her failure to ignore the pronouncement of the Supreme Court in *Fruiterman*, her failure to disregard the plain language of the Birth Injury Act as it existed at the time the incident occurred, and her failure to give retrospective application to the amendment redefining "participating physician", even though the rights of the parties were fixed at the time the causes of action accrued and retroactive application would adversely affect a right accrued and/or a claim arising before the effective date of the amendment to the Birth Injury Act. Clearly the Deputy Commissioner's Opinion is without error and should be sustained.

### PRELIMINARY STATEMENT

Commencing in 1871, a statutory cause of action for wrongful death was created and included the right of the personal representative of a deceased child to bring an action on behalf of the bereaved parents. A common law cause of action had existed for such a child's injuries since the inception of the Commonwealth.

More than 100 years later, in 1987 the legislature passed the Birth Injury Act, diverting to the Workers' Compensation Commission claims against certain identified physicians and hospitals arising out of certain types of neurological injury from certain types of birth related events. Because the Birth Injury Act was in derogation of the common law, its provisions were and are to be strictly construed. *Fruiterman*, 1991 WL 1000.

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*Waziri*, 259 Va. at 544, citing *Schwartz v. Brownlee*, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997) (citation omitted).

Patterned in part after the approach of the Virginia Workers' Compensation Act, the Birth Injury Act was thought to be constitutional because although it deprived those identified claimants of their common law causes of action against identified physicians and hospitals, it provided administrative benefits as a *quid pro quo* for the lost common law rights. In return for being relieved of the obligations to prove a participating physician's negligence, the injured infant was to be provided certain statutory benefits if all of the conditions of the statute were met. If the conditions of the statute were not met, however, the claimant's common law causes of action were preserved.

The designated participating physicians and hospitals, in similar fashion, received the protections of the Birth Injury Act, if they met the requirements of the Act. They would, in essence, be immune from suit if they met a three prong test. First, the physician and hospital had to be a participating physician or hospital. Second, the resultant injuries to the newborn had to meet the statutory level of injuries, and third, the injuries had to be caused in the manner specified in the statute. If any prong was missing, each remained liable under the common law.

When the Birth Injury Act was first enacted, its protections and immunities for health care providers were only afforded to "participating physicians" and "participating hospitals". Relevant here, "participating physicians" were defined as those Virginia licensed physicians who practiced or performed obstetrical services and who had paid an

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annual assessment into the Compensation Program. Professional corporations were given no immunity or protection from common law liability. The Virginia Supreme Court so held on March 3, 2000 in *Fruiterman v. Waziri*, 259 Va. at 544-545.

Young Nelson Mills was born alive on the 28<sup>th</sup> day of May 1998, but died 10 days later from injuries attributable to Dr. Berner's conduct during the course of labor and delivery. At the time of baby Mill's birth and death and at the time the Motion for Judgment was filed, the personal representatives of his estate, acting on behalf of his statutory beneficiaries, possessed all of the rights afforded them by Virginia's Wrongful Death Act, Section 8.01-50, *et seq.*, against Dr. Berner's professional corporation because it was not a "participating physician", and against Dr. Berner personally because the Birth Injury Act neither granted immunity to Dr. Berner for actions based on wrongful death of a child, nor repealed the Virginia Wrongful Death Act as it related to such a death.

Plaintiffs specifically reserve the right to brief and argue the inapplicability of the The Birth Injury Act to actions for wrongful death. The same rules of strict construction which governed the *Fruiterman* decision make it clear that the Birth Injury Act does not apply to actions for wrongful death. Clearly intended to provide medical care, therapy, housing and related benefits to a living child, it did not repeal the Wrongful Death Act as it applied to the death of a child, did not bar the claims of the beneficiaries for injuries they, not the child sustained, and it provided no death benefits under the Act.

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Even in a cursory comparison of the Birth Injury Act to the Workers' Compensation Act, it is obvious that while the latter barred common law wrongful death claims and provided scheduled death benefits in their place, the former, the Birth Injury Act, fails, in all instances but one, to address the issue of death. The one, the application of the "exclusive remedy" provisions to personal representatives is obviously limited to those instances where there would be a remedy, - i.e. benefits payable under the Act. A personal representative, bringing a survival action under Section 8.01-25 for injuries the child incurred during its lifetime, would find the remedies provided under the Birth Injury Act exclusive. For a personal representative bringing an action for wrongful death under Section 8.01-50, the "exclusive remedy" provisions would be meaningless. There are no remedies under the Birth Injury Act for wrongful death. Besides the constitutional implications of such an interpretation, it would border on nonsense to claim that "the absence of a remedy" was one's "exclusive remedy".

Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.

*De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953).

The jurisdiction of the circuit court over Primary Care at the time the Motion for Judgment was filed was clear and the issue of its exclusion from the Act's coverage was conclusively decided by *Fruiterman*. The contention that, as to the Mills, the legislature retroactively repealed *Fruiterman* is fraught with legal, logical and constitutional hurdles impossible to traverse and will be addressed at length hereafter. The

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jurisdiction of that court over Dr. Berner personally has been mooted by Plaintiff's decision to non-suit that portion of the claim. Such a non-suit makes no concession that there is a jurisdictional question with respect to the doctor individually, but non-suits him from the case on the grounds that his presence in the case is not essential to its resolution.

### **ARGUMENT AND AUTHORITY**

**1. THE DEPUTY COMMISSIONER CORRECTLY FOUND THAT THE COMMISSION LACKED JURISDICTION OVER THE PROFESSIONAL CORPORATION, PRIMARY CARE FOR WOMEN, P.C.**

To find for the Defendants, this Commission must agree with Defendants' assertion that the unanimous decision by the Supreme Court of this Commonwealth in *Fruiterman* was fundamentally flawed and that House Bill 398 must be given retroactive effect. Defendants seek support for their position by labeling the amendment to the Birth Injury Act as nothing more than a statute affecting jurisdiction. Their attempt to do so must fail as their underlying premise totally ignores the fact that the amendment effects substantive rights as it takes away an existing cause of action against Primary Care In addition, even if the legislature could have mandated retroactive application it did not do so as there is no clear expressed intention that the amendment be retrospectively applied.

**A. THE APRIL 1, 2000 AMENDMENT TO 38.2-5001 CANNOT BE APPLIED RETROACTIVELY**

The legislature may pass retroactive legislation but only if it is not destructive of substantive or vested rights and the legislature clearly manifests its intent **HERNANDEZ WORKERS' COMPENSATION COMMISSION**

legislation have retrospective effect. *Eaton v. Davis*, 176 Va. 330, 336 10 S.E.3d 893 (1940).

**1. Because the April 1, 2000 amendment affects substantive rights it cannot be applied retroactively**

Here Dr. Berner's actions on May 28, 1998 gave rise to causes of action against Primary Care, and the Mills filed suit upon those causes of action on April 4, 1999. Defendants are simply wrong in asserting that the enactment of HB 398 which became effective on April 1, 2000 repealed the Mills' already accrued rights against the professional corporation.

It cannot be disputed that the Mills' causes of action against the professional corporation involve substantive rights that cannot be abridged by subsequent legislation. *Shiflet v. Eller*, 228 Va. 115, 120, 319 S.E.2d 750 (1984). The Supreme Court has consistently held that there is a constitutional constraint on the legislature's power to pass retroactive legislation.

"[T]he legislature possesses the power to enact retrospective legislation"; but, we added, only "if the statute . . . is not destructive of vested rights."

*Starnes v. Cayouette*, 244 Va. 202, 209, 419 S.E.2d 669 (1992), citing *Eaton v. Davis*, 176 Va. 330, 336, 10 S.E.2d 893 (1940).

Virginia has both statutory and judicial protections in place to preserve the substantive rights of her citizens. Code of Virginia §1-16 protects from retrospective legislation substantive and vested rights which have accrued under a former law and which cannot be affected by the enactment of new legislation. *City of Norfolk v. Pension Commission*

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234 Va. 341, 345, 362 S.E.2d 894 (1987). [The rights of an assistant department head guaranteed by her status in classified service, could not be affected by a new law which did not include assistant department heads in the classified service].

Code of Virginia § 1-16 provides in pertinent part:

No new law shall be construed to repeal a former law . . . or any right accrued, or claim arising under the former law, or in any way whatever to affect . . . any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. . . .

The Virginia Supreme Court will safe guard Constitutional rights which would be impinged by the legislature's specific directive for retrospective application of a statute.

In *Potomac Hospital Corp. v. Dillon*, 229 Va. 355, 362, 329 S.E.2d 41 (1985), the Court refused on constitutional grounds to give effect to the expressed intention of the legislature for retrospective application to § 8.01-35.1. *See also, Riddett v. Virginia Electric & Power Co.*, 255 Va. 23, 495 S.E.2d 819 (1998).

Here the cause of action for the wrongful death of baby Mills accrued prior to the April 1, 2000 passage of the amendment to § 38.2-5001. This wrongful death cause of action against Primary Care for Women is a substantive right which must be afforded the same constitutional protection against retroactive statutory abridgment as a cause of action for contribution. *See, Potomac Hospital Corp. v. Dillon*, 229 Va. at 359-360, holding that retroactive application of Code § 8.01-35.1, abolishing the right of a non-settling tortfeasor to contribution from a joint tortfeasor who has executed a release or covenant not to sue, would violate the non-settling tortfeasor's due process right.

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Supreme Court refused to give effect to the legislature's express provision for retroactive application of the statute, "regardless of the date the causes of action affected thereby accrued," Code § 8.01-35.1(D). *Potomac Hospital Corp. v. Dillon*, 229 Va. at 362.

Where a statutory amendment affects the cause of action, retrospective operation of the statute is impermissible.

Because the cause of action for contribution accruing to Eller, a joint tort-feasor, arose at the time of the jointly negligent acts in October of 1977, it necessarily follows that the 1979 statute in question, which adversely affects that substantive right, cannot be applied retroactively to impair that right. . . . Such a retroactive application of the enactment would violate Eller's due process rights and would be invalid.

*Shiflet v. Eller*, 228 Va. at 121. [Citations omitted].

In connection with the wrongful death statute the Supreme Court has noted that, "the rights of the plaintiff and defendant under the statutes became fixed at the time the cause of action accrued and subsequent amendments do not apply retroactively." *Riddett v. Virginia Elec. & Power Co.*, 255 Va. 23, 28-29 495 S.E.2d 819 (1998). Because the cause of action for wrongful death as well as the right to enforce it were created by statute, *Horn v. Abernathy*, 231 Va. 228, 237, 343 S.E.2d 318, 323 (1986), the statutes in existence when these causes of action arose control the outcome of this matter. *Dodson v. Potomac Mack Sales & Services, Inc.*, 241 Va. 89, 92, 400 S.E.2d 178 (1991).

This principal was also applied to the Worker's Compensation statute in *Roller v. Basic Construction Co.*, 238 Va. 321, 328, 384 S.E.2d 323 (1989) where the Supreme

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Court held that "the rights of both employer and employee become 'fixed' at the time an 'injury by accident' occurs." *Roller v. Basic Construction Co.*, 238 Va. at 328.

It is equally true that, here, the Mills' cause of action for wrongful death arose and their rights were fixed at the time of the death of their baby on June 7, 1998, almost two years before the enactment of the amendment redefining "participating physician" to include a professional corporation. Moreover any rights of the parties under the Birth Injury Act were also fixed as of the date of birth of the baby Mills. The Deputy Commissioner correctly recognized that there is "no logical basis to conclude that the amendment could transform a corporation into a participating physician nearly two years after the May 28, 1998 cause of action, namely the birth of the child." [Exhibit 4 p. 5].

The Deputy Commissioner found instructive an earlier decision of the Commission which held that a July 1, 1990 amendment, expanding the definition of "Birth-related neurological injury" could not be applied retroactively, because the amendment reduced the requirements to be met by the infant for coverage under the statute and consequently the amendment affected substantive rights. [Exhibit 4 p. 5], relying on *In re: Sarah Kelly Duncan*, VWC File No. B. 97-10 (February 24, 1998), page 10-11 [Exhibit 5].

In an attempt to gloss over the prohibition against retroactive legislation that affects substantive rights, defendants argue at length that application of the April 1, 2000 Amendment to the facts of this case would not constitute an impermissible retroactive exercise because statutes which modify jurisdiction may be applied retrospectively.

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Defendants overlook the fact that the cases approving retroactive application of jurisdictional statutes do not involve statutes affecting substantive rights.

Defendants' reliance on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) is misplaced, as there the Court applied the law in effect at the time the cause of action accrued. *Landgraf* noted there is a deeply rooted presumption against retroactivity. *Hughes Aircraft v. U.S. ex rel Schumer*, 520 U.S. 939, 946, 951 (1997), citing *Landgraf*, at 265. While acknowledging that statutes modifying jurisdiction may be applied retroactively, the *Landgraf* Court made the observation, which is pertinent to the consideration of the matter before this Commission, that applying new jurisdictional rules usually "takes away no substantive right, but simply changes the tribunal that is to hear the case." *Landgraf* at 276. Here substantive rights would be taken away by the retroactive application of the April 1, 2000 amendment. The Mills' cause of action against Primary Care would be extinguished.

The two other U.S. Supreme Court cases cited by defendants are equally inapplicable. *Bruner v. U. S.*, 343 U.S. 112 (1952) simply held that where Congress enacted a statute divesting District Courts of the concurrent jurisdiction they shared with the Court of Claims over actions under the Tucker Act, the statute would be applied retroactively to a case pending on appeal at the time the statute became effective. The amendment did not affect any substantive rights of the parties involved. The other case, *Hollowell v. Commons*, 239 U.S. 506, 508 (1916) recognized that jurisdictional statutes usually do not involve substantive rights.

The only Virginia case the defendants cite in support of their argument that amendments to jurisdictional statutes can be applied retroactively is *Walke v. Dallas*, 209 Va. 32, 161 S.E.2d 722 (1968). Our Supreme Court held that the long arm statute could be applied to obtain jurisdiction over a non-resident defendant for a cause of action accruing prior to the enactment of the statute. The statute obviously neither created nor took away a cause of action, it did not affect substantive rights, it merely provided a means to obtain service of process on a person whose conduct had given rise to a cause of action prior to the enactment of the statute.

Finally Defendants rely on *Kight v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.*, 34 F. Supp.2d 334 (E.D.Va.1999), a case involving federal preemption under FEHBA. Federal preemption involves considerations not applicable here. There the issue was whether an amendment to FEHBA which provided a stronger basis for preemption could be applied to a claim which accrued prior to the enactment of the statute. Since the statute provided for complete preemption, the district court found it had removal jurisdiction. *Kight*, 34 F. Supp.2d at 338.

Here the issue involved is whether the statute has retrospective effect which would preclude its application to the Mills' claims. Whether a statute involves retrospective effect depends upon a determination of "whether the new provision attaches new legal consequences to events completed before its enactment." *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), quoting *Langraf*, at 269-270, 114 S. Ct. 1483, 1499. There can be no doubt that including the professional corporation within the definition of

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"participating physician" would attach new legal consequences to Dr. Berner's negligent acts and the resulting death of baby Mills, as the causes of action against the professional corporation which is legally accountable for Dr. Berner's malpractice would be extinguished.

**2. The legislature did not plainly manifest an intent that the amendment be retroactive**

The general rule is that legislation is prospective. *Riddett v. Virginia Electric & Power Co.*, 255 Va. 23, 29, 495 S.E.2d 819 (1998); *Ferguson v. Ferguson*, 169 Va. 77, 87, 85, 192 S.E. 774, 776 (1937). Legislation may be made retroactive if, as noted above, doing so does not affect substantive rights and, "if the legislative intent is plainly manifest that the statute is to have a retroactive effect .. ." *Eaton v. Davis*, 176 Va. at 336. Even if the legislature could have provided for retroactive application of the statute, which is refuted, it did not "plainly manifest" its intent to do so.

The legislature clearly knows how to make an amendment retroactive as seen in the fourth sentence of the definition of "Birth-related neurological injury" which was added by a 1999 Amendment to the Act. Code § 38.2-5002:

The definition provided here shall apply retroactively to any child born on and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.

Here the General Assembly did not indicate that it intended a retroactive effect for this new legislation. Simply saying that an emergency exists and that the statute is to be

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take effect upon its passage, does not even arguably indicate an intent to make it retroactive.

*Landgraf*, relied upon by defendants, involved a suit under the Civil Rights Act for sexual harassment in the workplace and an amendment to the Act which was passed while plaintiff's suit was pending on appeal. The statute provided that "except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." *Landgraf*, at 257. The Court gave short shrift to the argument urged by *Landgraf*, and advanced by the defendants here, that the above quoted language means the Act is to be applied retroactively.

A statement that a statute will become effective on a certain date **does not even arguably suggest** that it has any application to conduct that occurred at an earlier date.

*Langraf*, at 258 [Emphasis added].

The Virginia Supreme Court has similarly observed that the phrase in a bill, "an emergency exists and this act is in force from its passage," language which is identical to that in H.B. 398, is not a direction for retroactive application.

**But this sentence is merely the legislative device contemplated by Art. IV, § 13, Constitution of Virginia, and Code § 1-12 to advance the date the emergency measure is to become operative. Whether the statute was intended to have retrospective effect is a question governed by the rules of statutory construction.**

*Fletcher v. Tarasidis*, 219 Va. 658, 661, 250 S.E.2d 739 (1979)[Emphasis added].

The defendants suggest that the legislature used an allowable substitute or equivalent language when it employed the expression, "declaratory of existing law," **VIRGINIA WORKERS' COMPENSATION COMMISSION**

Taken literally, it states that the amendment is declaratory of existing law on the effective date of the amendment because it has no power before its effective date. A reasonable construction of this language is that as of its effective date it is declaratory of existing law. In other words, that language does *not ipso facto* designate the amendment as retroactive.

A legislative statement that an amendment is declaratory of existing law does not make it subject to retroactive application where to do so affects substantive rights. At the time baby Mills was born and the cause of action accrued, the plain language of the statute clearly indicated that a professional corporation was not a participating entity.

The Supreme Court's discussion of its refusal to give the urged retroactive application to an amendment adding professional corporation to the definition of "health care provider" is instructive. In *Turner v. Wexler*, 244 Va. 124, 418 S.E.2d 886 (1992), the Court stated:

We have repeatedly stated the principles of statutory construction that we apply when a statute, such as former Code §8.01-581.1, is clear and unambiguous.

While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed. *Barr v. Town & Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)[Citations omitted].

*Turner v. Wexler*, 244 Va. at 127.

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Even though the then existing definition of "health care provider" included a professional corporation<sup>1</sup>, the Court refused to retroactively apply a new definition of "health care provider".

This former Code section specifically enumerated those individuals and entities which fell within the scope of the term "health care provider" and the General Assembly chose not to include professional corporations. Thus, the maxim *Expressio unius est exclusio alterius* is applicable here. This maxim provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute. *Tate v. Ogg*, 170 Va. 95, 103, 195 S.E. 496, 499 (1938).

*Turner v. Wexler*, 224 Va. at 126.

The Supreme Court noted that the question was "not what the legislature intended to enact, but what is the meaning of that which it did enact. We must determine the legislative intent by what the statute says and not by what we think it should have said." *Turner v. Wexler*, 224 Va. at 127.

In *Riddett v. Virginia Electric & Power Co.*, 255 Va. 23, 495 S.E.2d 819 (1998), the Supreme Court was faced with a factual chronology similar to that preceding the enactment of the legislation involved here. *Riddett* involved the issue of the applicability of the tolling provisions of the general nonsuit statute to a wrongful death action. When the death occurred in 1987 the statute of limitations for wrongful death was two years under § 8.01-244 which also provided for tolling of the statute only during the period of time a nonsuited action was pending. The general tolling statute § 8.01-229(E)(3)

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<sup>1</sup> Code § 8.01-581.1

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contained a provision tolling the statute for six months after an action was nonsuited. In 1989, four days before the statute of limitations ran, the Ridditt wrongful death action was filed. In January 1991 the Supreme Court decided *Dodson v. Potomac Mack Sales & Services, Inc.*, 241 Va. 89, 400 S.E.2d 178 (1991), holding that the general nonsuit statute was not applicable to wrongful death actions. Thereafter, in 1991 the legislature passed a bill, effective July 1, 1991, amending §§ 8.01-229 and 8.01-244 to make the six month tolling provision apply in wrongful death actions. In January 1995, Ridditt nonsuited her action, and refiled it five months later. The refiling was not timely unless the amendment could be applied retrospectively.

The bill amending the statutes contained the following language. "That the provisions of this act are declaratory of the original intent of the General Assembly in enacting Chapter 617 of the 1977 Acts of Assembly" (Title 8.01). Plaintiff argued that the language manifested the intention of the legislature for making the amendments retroactive. The Court held that because the changes were substantive § 8.01-1 was not applicable. *Riddett v. Virginia Electric & Power Co.*, 255 Va. 29. Obviously even if an amendment is the legislature's reaction to a Supreme Court decision, that circumstance does not overcome the basic principle that legislation affecting substantive rights cannot be given retroactive effect.

It must be remembered that the legislature only makes the law, it cannot declare what existing law is; it is the judiciary that declares what the existing law is. "In sum, pure statutory interpretation is the prerogative of the judiciary." *Sims Wholesale Co. v.*

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*Brown-Forman Corp.*, 251 Va. 398, 404, 468 S.E.2d 905 (1996), citing *Hampton Roads Sanitation Dist. Comm'n v. City of Chesapeake*, 218 Va. 696, 702, 240 S.E.2d 819, 823 (1978). In *Sims* the Court confined its analysis to “the provisions that were in place” when the cause of action arose, and did not rule on the effect of an amendment passed during the pendency of the appeal, which containing the language, “the provisions of this act are declaratory of existing law.” *Sims*, 251 Va. at 407.

Defendants argue that the language, “declaratory of existing law,” means that the statute in its pre-amendment state necessarily included professional corporations within the definition of “participating physicians” and that no change was wrought by the amendment. Defendant’s argument must fail because it ignores the basic concept that the plain meaning of unambiguous clear language of a statute is controlling. The *Fruiterman* Court did not, as defendants suggest, create an interpretative controversy. In deciding *Fruiterman* the Supreme Court looked to the plain language of the statute.

Rules of statutory construction require the application of the plain meaning of the words used in a statute. *Coca-Cola Bottling Co. v. County of Botetourt*, 259 Va. 559, 565, \_\_\_ S.E.2d \_\_\_ (2000). Courts cannot add words that do not appear in legislation or expand the scope of legislation. *Id.*, at 565. The plain meaning of the statute in existence at the accrual of the Mill’s cause of action for wrongful death was that a professional corporation was not included under the Birth Injury Act.

It is relevant that many cases following the doctrine that a statute must be afforded its plain meaning, are concerned with liability in a medical setting and the

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legislature's omissions of the very words, "professional corporation," omitted here.

Some of the cases involve the definition of "health care provider" which did not include professional corporation in the definition under the Medical Malpractice Act (§ 8.01-581.1); and others involve the definition of "participating physician" or "participating hospital" under the Birth Injury Act.

In *Schwartz v. Brownlee*, 253 Va. 159, 482 S.E.2d 827 (1997), the Supreme Court noted that the liability of a doctor and his professional corporation were not coterminous and refused to apply the medical malpractice cap (\$1,000,000) to a professional corporation, which was not included within the definition of health care provider at the time the cause of action arose. While there was no assertion by the defendant that a 1994 amendment adding professional corporations to the definition should be applied retroactively, the Court footnoted the 1994 amendment acknowledging the law had been changed. The jury returned a verdict in the amount of \$1,850,000 against the doctor and his professional corporation jointly and severally. The Supreme Court affirmed the refusal of the trial court to order any remittitur as to the professional corporation. *Schwartz v. Brownlee*, 253 Va. 159, 482 S.E.2d 827 (1997).

Succinctly stated the Supreme Court takes "the statute as it is written." *Joanne Richman v. National Health Labs.*, 235 Va. 353, 357, 367 S.E.2d 508(1988) [National Health Labs was not licensed by the state and consequently was not a "health care provider" under the definitional provisions of the Act].

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*Taylor v. Mobil Corporation*, 248 Va. 101, 444 S.E.2d 705 (1994)[Doctor was not entitled to the protection of the Medical Malpractice cap on damages because he was not licensed by the state of Virginia at the time the malpractice occurred, even though the laspe was inadvertent]. The Court again applied the plain meaning of the statute, noting that malpractice was specifically defined as a tort based on the act of a health care provider, and to be a health care provider a doctor had to be licensed by the state, therefore there was no statutory malpractice. *Taylor v. Mobil Corporation*, 248 Va. at 109.

This Commission has had occasion to determine whether an obstetrician who was associated with a group of obstetrician (all of whom were “participating physicians”) could qualify as a “participating physician when he had not met the requirements of the act as he had not applied for coverage. *Wine v. Va. Birth-Related Neurological*, 69 Va. WC 221 (1990) [Exhibit 6]. The Commission recognized that the definition of “participating physician” was clear and unambiguous and that each physician needed to meet the specific requirements. “Status as a ‘participating physician’ is conferred and controlled by the statutory requirements.” *Wine*, 69 Va. WC at 223. The Commission’s decision in *Wine* is consistent with those decisions of the Supreme Court giving effect to statutes in accordance with the plain language employed by the legislature as of time the cause of action accrued, and which refused to give retrospective application to an amendment, even where the legislature had so directed, if the statute affected substantive rights.

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*Falls Church v. Board of Sup'rs*, 151 Va. 672, 144 S.E. 870 (1928), relied upon by the defendants, does not compel the result they advocate. In *Falls Church*, the Court was concerned with two acts declared to be emergency acts passed within a day of each other. The Court's language, that legislative intent may be ascertained from the conditions under which the Bills were passed, was directed at determining whether the second act to be passed could amend the provisions of a 3 year old act which had been repealed the day before by the first act.

Defendants reliance on *Boyd v. Commonwealth*, 216 Va. 16, 215 S.E.2d 915 (1975), is misplaced. The Court noted that the changes were not "changes of substance which add rights to, or withdraw existing rights from, an original act." *Boyd*, 216 Va. at 20. Here we are not dealing with mere formal changes interpreting the Act. The April 1, 2000 Amendment added a new entity to the scope of the Act's protection. The statute remains very detailed and precise in its definition of who is entitled to the protection of the Act. Here, as the Supreme Court in *Fruiterman* held, the statute as written only included those specifically identified in the definitions of participating hospitals and participating physicians. Professional corporations were not so included, and could not be held to have been entitled to the provisions of the Act.

Defendants also rely on *McQuinn v. Commonwealth*, 19 Va. App. 418, 451 S.E.2d 704 (1994), which addresses an amendment which was "declaratory of existing law." Defendants' construction of *McQuinn* is simply wrong. As readily apparent, the additional language made no change to the original meaning of the statute. The Court of

Appeals noted that the legislature simply redeclared the law as it existed in the original statute. *McQuinn v. Commonwealth*, 19 Va. App. at 421. The court was not applying the new statute retroactively, what was in the new statute was what the law had always been. *McQuinn* is not a case where the original statute clearly omitted what was later added by the amendment.

**B. THE DEPUTY COMMISSIONER CORRECTLY RELIED ON FRUITERMAN**

Basically the defendant's position is that the *Fruiterman* decision has been overturned by the April 1, 2000 amendment to the Birth Injury Act. What *Fruiterman* tells us is that the April 1, 2000 amendment is not applicable to the defendant Primary Care. The Court's reasoning was sound. The plain language used by the legislature extended coverage only to specified participating physicians and hospitals, and professional corporations was not one. As noted above, courts must give unambiguous words their plain meaning. *Turner v. Wexler*, 244 Va. at 127. The question "is not what the legislature meant to enact, but what is the meaning of what it did enact. *Turner v. Wexler*, 244 Va. at 127. It is axiomatic that statutes in derogation of common law must be strictly construed, and they may not be construed to enlarged their operation beyond their express terms. *Fruiterman, M.D. v. Waziri*, 259 Va. at 544, citing *Schwartz v. Brownlee*, 253 Va. at 166.

If, as the defendants contend, the addition of professional corporation to the definition of "participating physician" retroactively overruled the *Fruiterman* decision, we are faced with a dilemma. The Supreme Court ruled in *Fruiterman* that professional

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corporations were not included within the definition of participating physician. The legislature acknowledged this decision and amended the statute to make professional corporations protected by the Birth Injury Act.

Professional corporations have always had a separate legal identity from their officers and shareholders. The April 1, 2000 amendment to the Birth Injury Act extended the protections of the Act to a class which had not been under its protection before. If, as the defendants contend, the legislature by this amendment made professional corporations protected by the Act retroactively to 1987, and, as the defendants argued to the Deputy Commissioner, the Supreme Court erred in deciding *Fruiterman*, who is the final arbiter of the law on this subject? Where would citizens, such as the Mills, turn to find the law? More importantly, how would they determine what laws affected their legal rights and remedies? According to the Virginia Supreme Court, when their baby died as the result of medical malpractice, they had a full claim under the Wrongful Death Act for the negligence attributable to Primary Care (and, for the reasons articulated above, Dr. Berner personally, but those rights were not affected by the April 1, 2000 amendment, and won't be further argued here.). According to the defendants, the legislature by the use of the phrase "declaratory of existing law" in its year 2000 amendment to the Birth Injury Act overruled the Virginia Supreme Court, retroactively took away the Mills legal rights and remedies in the circuit court, and substituted for them a forum in which the parties had no rights or remedies.

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The defendants proposed reading of this ambiguous phrase highlights the problems of retroactive application of laws. On the date the Mills filed their Motion for Judgment against Primary Care they had settled rights and remedies as to it. If the defendants are correct, as of April 1, 2000, the Mills had no further legal rights except to have the Commission deny them any remedies for the wrongful death of their son. "Declaratory of existing law" as used in this amendment should be given no effect other than its mere terms. On the date of its enactment it was declaratory of existing law on that date. Absent express language of retroactivity, it was not retroactive..

The Deputy Commissioner appropriately applied the *Fruiterman* determination that a professional corporation was not covered by the Birth Injury Act. Clearly at the time Baby Mills was born a professional corporation was neither a participating physician nor a participating hospital. The Deputy Commissioner's refusal to give retrospective application of the April 1, 2000 amendment was equally appropriate. The rights of the parties were fixed as of the date of the birth of baby Mills. *Roller v. Basic Construction Co.*, 238 Va. at 328. Once the cause of action accrued the substantive rights of the parties could not be impinged by retroactive legislation. *Riddett v. Virginia Elec. & Power Co.*, 255 Va. at 28-28; *Potomac Hospital Corp. V. Dillon*, 229 Va. at 359-360; *Shiflet v. Eller*, 228 Va. at 120.

VIRGINIA WORKERS  
COMPENSATION COMMISSION

## CONCLUSION

The defendant Primary Care for Women, P.C. is a professional corporation that is not subject to the provisions of the Birth Injury Act.<sup>2</sup> The Mills respectfully request that this Commission uphold the Deputy Commissioner's findings and remand this matter to Circuit Court.

Respectfully submitted,

Scott and Tara Mills, as Co-Administrators of  
the Estate of Nelson Mills and Tara Mills  
Individually

HALL & SICKELS, P.C.

Holly Parkhurst Essing  
Robert T. Hall, Esquire VSB No. 4826  
Holly Parkhurst Essing, Esquire VSB No. 17538  
Donna Miller Rostant, Esquire VSB No. 41855  
12120 Sunset Hills Road, Suite 150  
Reston, VA 20190  
(703) 925-0500  
Counsel for Plaintiff

---

<sup>2</sup> Moreover, while not the subject of this Statement, wrongful death actions are likewise not subject to the provisions of the Birth Injury Act.

VIRGINIA WORKERS  
COMPENSATION COMMISSION

JUN 26 2000

CHARGE #15

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on this 19 th day of June 2000, the CLAIMANTS' STATEMENT IN SUPPORT OF THE DEPUTY COMMISSIONER'S OPINION AND IN OPPOSITION TO THE DEFENDANTS' WRITTEN STATEMENT was sent by Certified Mail Return Receipt Requested to the Virginia Workers' Compensation Commission, 1000 DMV Drive, Richmond VA 23220 and that copies were sent first class mail, postage prepaid to:

Tara M. McCarthy, Esq.  
McCARTHY & MASSEY, P.C.  
9315 Center Street, Suite 104  
Manassas, VA 20110  
Counsel for Defendants  
Todd Berner, M.D.  
Primary Care for Women, P.C.

John J. Beall, Jr., Esquire  
Sr. Assistant Attorney General  
900 E. Main Street  
Richmond, VA 23219  
Counsel for VA Birth Related Neurological Program

Elinor J. Pyles, Executive Director  
Virginia Birth-Related Neurological Injury  
Compensation Program  
7400 Beaufont Springs Drive, Suite 425  
Richmond, VA 23225

  
Holly Parkhurst Essing

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In the Supreme Court of Virginia

**JAN PAUL FRUTTERMAN, M.D.AND ASSOCIATES, P.C.**

**v.**

**AHMAD WAZIRI AND HASSINI WAZIRI, INDIVIDUALLY AND AS  
PERSONAL REPRESENTATIVES OF THE ESTATE OF SYAWACH WAZIRI**

Decided: March 3, 2000

Present: Carrico, C.J., Compton, <sup>1</sup> Lacy, Hassell, Keenan, and  
Kinser, JJ., and Poff, Senior Justice

In a medical malpractice, wrongful death action, the trial court correctly applied the Virginia Birth-Related Neurological Injury Compensation Act, which expressly limits those entitled to its rights and benefits to selected health-care providers. The jury's award in the wrongful death claim was fully supported by the record, and the judgment is affirmed.

**Medical Malpractice - Wrongful Death - Virginia Birth-Related Neurological Injury  
Compensation Act - Health Care Providers - Statutory Construction - Professional Corporations -  
Non-Economic Loss - Damages - Medical Malpractice Cap**

Parents, individually and as personal representatives of the estate of their son, filed a motion for judgment for medical malpractice and wrongful death against a doctor and his professional corporation ("P.C."). Applying the Virginia Birth-Related Neurological Injury Compensation Act ("Compensation Act"), the trial court sustained the doctor's demurrer. The court overruled the demurrer of the co-defendant P.C. on the ground that the rights and remedies of the Compensation Act do not apply to professional corporations. The jury returned a verdict against the P.C. for \$750,000 which the court reduced by remittitur to \$730,000. The P.C. appeals.

1. The General Assembly enacted the Compensation Act to establish the Virginia Birth-Related Neurological Injury Compensation Program. It provided that rights and remedies therein granted to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury. The Act established a compensation fund to finance the compensation program. [Page 541]
2. The Compensation Act was intended to assure affordable malpractice insurance and therefore a sufficient pool of obstetricians practicing throughout the Commonwealth.
3. The Compensation Act provides that the rights and remedies granted shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law. Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms.
4. A "participating physician" under the Compensation Act is a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services and pays an annual participating physician assessment to the Program.

**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

JUN 26 2000

Printed from CaseFinds - - - - - opment Corporation

IMAGE #15

**EXHIBIT**

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5. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.
6. In the Compensation Act, the legislature expressly identified those entitled to that immunity as "participating physicians" and "participating hospitals"; then expressly specified that the term "participating" includes payment of an annual assessment by qualified physicians and hospitals to finance the costs of the benefits provided by the Compensation Program. No such assessment was imposed upon a professional corporation.
7. The Compensation Act expressly limits those entitled to its rights and benefits to selected health-care providers. The legislative omission of other health-care providers serving during the course of child birth, such as pediatricians, radiologists and medical partnerships, confirms the conclusion that participating physicians and hospitals were intended to be the only health-care providers afforded immunity from civil liability by the Compensation Act. A professional corporation, the employer of a participating physician, is conspicuous by its absence.
8. The wrongful death statute provides that the jury or the court may award such damages as to it may seem fair and just and that the verdict or judgment shall include, but may not be limited to, damages for sorrow, mental anguish and solace.
9. The evidence of sorrow, mental anguish, and solace contained in this record was fully sufficient to support the jury's award.

Appeal from a judgment of the Circuit Court of Fairfax County. Hon. M. Langhorne Keith, judge presiding.

*Affirmed.*

Alfred F. Belcuore (Stephen L. Altman; Montedonico, Hamilton & Altman, on briefs), for appellant.

Timothy D. Junkin (William B. Moffitt; Oscar I. Dodek; Ashbill, Junkin & Moffitt, on brief), for appellees. [Page 542]

*Amicus Curiae:* Medical Society of Virginia and Virginia Obstetrical and Gynecological Society (Allen C. Goolsby; Virginia H. Hackney; Marie Elena Graham; Hunton & Williams, on brief), in support of appellant.

*Amicus Curiae:* Virginia Birth-Related Neurological Injury Compensation Program (Mark L. Earley, Attorney General; Frank S. Ferguson, Deputy Attorney General; John J. Beall, Jr., Senior Assistant Attorney General, on brief), in support of appellant.

*Amicus Curiae:* Doctors Insurance Reciprocal (Risk Retention Group) (Judith B. Henry; Crews & Hancock, on brief), in support of appellant.

*Amicus Curiae:* Virginia Trial Lawyers Association (Cheryl G. Rice; Steven M. Garver, on brief), in support of appellees.

SENIOR JUSTICE POFF delivered the opinion of the Court.

**VIRGINIA WORKERS  
COMPENSATION COMMISSION**

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**CHARGE #115**

In this appeal from a judgment entered in a medical malpractice, wrongful death action, the appellant, Jan Paul Fruiterman, M.D. and Associates, P.C., a professional corporation (the P.C.), contends that the trial court erred in denying coverage of the Virginia Birth-Related Neurological Injury Compensation Act, Code § 38.2-5000 *et seq.* (the Compensation Act), to professional corporations.

Ahmad and Hassini Waziri, individually and as personal representatives of the estate of their son, Syawach, filed an amended motion for judgment entitled "Medical Malpractice-Wrongful Death" against Dr. Fruiterman, individually, and against the P.C. Applying the rights and remedies defined in the Compensation Act, the trial court sustained Dr. Fruiterman's demurrer. The court denied the co-defendant's demurrer on the ground that the rights and remedies of the Compensation Act do not apply to professional corporations. The jury returned a verdict against the P.C. for \$750,000 which the court reduced by remittitur to \$730,000.

The sufficiency of the evidence of medical malpractice and proximate cause are not in issue on appeal. Expert witnesses called by the plaintiffs testified that Dr. Fruiterman's performance of the fetal delivery by Caesarian section was conducted too late to avoid severe brain damage. In response to medical opinion, the parents agreed to suspend life support systems, and Syawach, their first-born child, died eight days after birth.

[1] The General Assembly enacted Chapter 50 of the Code of Virginia, the Compensation Act, in 1987. That act "established the [Page 543] Virginia Birth-Related Neurological Injury Compensation Program." § 38.2-5002(A). The act provided that, subject to two exceptions, <sup>2</sup> "the rights and remedies herein granted to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury." *Id.*

The Compensation Act established an "Injury Compensation Fund to finance the . . . Compensation Program." § 38.2-5015. To capitalize that fund, the Compensation Act provided that "[a] physician who otherwise qualifies . . . may become a participating physician in the Program . . . by paying an annual participating physician assessment to the Program in the amount of \$5,000", § 38.2-5020(A), and that "a participating hospital with a residency training program . . . may pay an annual participating physician assessment to the Program for residency positions," § 38.2-5020(B). To administer the Compensation Program, "[t]he Virginia Workers' Compensation Commission [was] authorized to hear and pass upon all claims filed pursuant to this chapter", § 38.2-5003, and to "make an award providing compensation for . . . items relative to . . . [a covered] injury," § 38.2-5009.

## I

The principal issue raised by the assignments of error is whether a professional corporation is entitled to the rights and benefits of the Compensation Act. The trial court ruled that it was not. The P.C. contends that the trial court misconstrued legislative intent. We disagree with the P.C.

[2] On brief, the P.C. acknowledges that the Compensation Act was intended to serve several interrelated purposes:

"Enacted in 1987 in direct response to the grossly lessening availability of medical malpractice insurance for obstetricians in the Commonwealth of Virginia, the Compensation Act was intended to assure affordable malpractice insurance and [Page 544] therefore a sufficient pool of **VIRGINIA WORKERS' COMPENSATION COMMISSION** practicing throughout the Commonwealth."

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[3] The legislative intent is reflected in the legislative history recorded by legislators in the reports of subcommittees of the two Houses of the General Assembly. See Senate Document No. 11 (1987); House Joint Resolution No. 297 (1989); House Document No. 63 (1990); House Joint Resolution No. 641 (1997). See also *King v. Neurological Injury Comp. Program*, 242 Va. 404, 409-10, 410 S.E.2d 656, 660 (1991) (rejecting constitutional challenge to Compensation Act).

As we have said, the Compensation Act provides that "the rights and remedies herein granted to an infant . . . shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law . . ." § 38.2-5002(B). "Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms." *Schwartz v. Brownlee*, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997) (citation omitted).

[4] The Compensation Act begins with expressly restrictive definitions. A "[p]articipating physician" is "a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services", § 38.2-5001, and "a licensed nurse-midwife who performs obstetrical services", *id.*, and pays "an annual participating physician assessment to the Program", § 38.2-5020(A).

"Participating Hospital" means a hospital . . . which . . . had in force an agreement with the Commissioner of Health . . . to participate in . . . a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and . . . had in force an agreement . . . whereby the hospital agreed to submit to review of its obstetrical service . . . and . . . had paid the participating assessment pursuant to § 38.2-5020 . . ."

[5] "Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed." *Barr v. Town and Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)(quoting *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934)).

[6] Clearly, the General Assembly did not intend to immunize all health-care providers from tort liability for birth-related neurological injury caused by medical malpractice. The legislature expressly identified [Page 545] those entitled to that immunity as "participating physicians" and "participating hospitals"; then expressly defined "physicians" as obstetricians and nurse-midwives who perform obstetrical services; and then expressly specified that the term "participating" includes payment of an annual assessment by qualified physicians and hospitals to finance the costs of the benefits provided by the Compensation Program. No such assessment was imposed upon a professional corporation.

[7] In summary, the Compensation Act expressly limits those entitled to its rights and benefits to selected health-care providers and expressly excludes "a nonparticipating physician or hospital." § 38.2-5002(D). The legislative omission of other health-care providers serving during the course of child birth, such as pediatricians, radiologists, and medical partnerships, confirms our conclusion that participating physicians and hospitals were intended to be the only health-care providers afforded immunity from civil liability by the Compensation Act. A professional corporation, the employer of a participating physician, is conspicuous by its absence.

## II

In support of a second assignment of error, the P.C. contends that "[t]he award for non-economic loss bears no reasonable relation to the evidence and therefore is excessive." The P.C. is referring to the **VIRGINIA WORKERS' COMPENSATION COMMISSION**

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jury's award of \$655,973.46, a sum in addition to its award for expenses incurred in "the care, treatment and hospitalization of the decedent".

[8] The wrongful death statute, § 8.01-52, provides that "[t]he jury or the court . . . may award such damages as to it may seem fair and just" and that "[t]he verdict or judgment . . . shall include, but may not be limited to, damages for . . . [s]orrow, mental anguish, and solace . . . ."

[9] We find the evidence of sorrow, mental anguish, and solace contained in this record fully sufficient to support the jury's award, and finding no merit in the assignments of error, we will affirm the judgment entered by the trial court.

*Affirmed.*

#### FOOTNOTES

<sup>1</sup> Justice Compton participated in the hearing and decision of this case prior to the effective date of his retirement on February 2, 2000.

<sup>2</sup> The Compensation Act expressly provides that "a civil action . . . shall not be foreclosed against a nonparticipating physician or hospital", § 38.2-5002(D), or "against a physician or hospital where there is clear and convincing evidence that such physician or hospital intentionally or willfully caused or intended to cause a birth-related neurological injury." § 38.2-5002(C).

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**CHARGE #15**



Title 8.01 Civil Remedies and Procedure

Chap. 7 Civil Actions; Commencement, Pleadings, and Motions, §§ 270 - 284

Art. 2 Pleadings Generally, §§ 271 - 281

**§ 8.01-273.1. Motion for judgment; motion to refer; Virginia Birth-Related Neurological Injury Compensation Act. —**

A. In any civil action, where a party, who is a participating hospital or physician as defined in § 38.2-5001, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than 120 days after the date of filing a grounds of defense by the party seeking the referral.

B. Upon entry of the order of referral by the court, the clerk of the circuit court shall file with the Workers' Compensation Commission within thirty days a copy of the motion for judgment and the responsive pleadings of all the parties to the action. The clerk shall copy all counsel of record in the civil action on the transmittal letter accompanying the materials being filed with the Workers' Compensation Commission. All parties to the civil action shall be entitled to participate before the Commission upon filing a notice of appearance with the Clerk of the Commission within twenty-one days after receipt of the transmittal letter to the clerk of the circuit court. Notwithstanding the provisions of § 32.1-127.1:03, the moving party shall provide the Commission with an original and five copies of the following: appropriate assessments, evaluations, and prognoses and such other records obtained during discovery and are reasonably necessary for the determination of whether the infant has suffered a birth-related neurological injury. The medical records and the pleadings referenced in this subsection shall constitute a petition as referenced in § 38.2-5004. The moving party shall be reimbursed for all copying costs upon entry of an award of benefits as referenced in § 38.2-5009. (1999, c. 822; 2000, c. 207.)

The 2000 amendments, effective April 1, 2000, added subsection B and *added* language in subsection A as follows:

*A. In any civil action, where a party, who is a participating hospital or physician as defined in § 38.2-5001, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than 120 days after the date of filing a grounds of defense by the party seeking the referral.*

**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

**JUN 26 2000**

**CHARGE #15**

**EXHIBIT**

**2**

**§ 38.2-5001. Definitions.** — As used in this chapter:

"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of this chapter, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse. The definition provided here shall apply retroactively to any child born on and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.

"Claimant" means any person who files a claim pursuant to § 38.2-5004 for compensation for a birth-related neurological injury to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, executor, or other legal representative.

"Commission" means the Virginia Workers' Compensation Commission.

"Participating hospital" means a hospital licensed in Virginia which at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the hospital agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Department of Health whereby the hospital agreed to submit to review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the participating hospital assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. The term also includes employees of such hospitals, excluding physicians or nurse-midwives who are eligible to qualify as participating physicians, acting in the course of and in the scope of their employment.

"Participating physician" means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time or, as authorized in the plan of operation, a licensed nurse-midwife who performs obstetrical services, either full or part time, within the scope of such licensure and who at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the physician agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. The term "participating physician" includes a partnership, corporation, professional

**EXHIBIT**

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corporation, professional limited liability company or other entity through which the participating physician practices.

"Program" means the Virginia Birth-Related Neurological Injury Compensation Program established by this chapter. (1987, c. 540; 1989, c. 523; 1990, cc. 234, 534; 1994, c. 872; 1995, c. 302; 1999, c. 806; 2000, c. 207.)

The 2000 amendments, effective April 1, 2000, added the last sentence to the definition of "Participating physician."

Note: The 2000 Acts, chapter 207, clause 2 provides: "That the provisions of this act amending § 38.2-5001 are declaratory of existing law."

The 1999 amendments added the last sentence to the definition of "Birth-related neurological injury."

The 1995 amendments added the last sentence to the definition of "Participating hospital".

**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

**JUN 2 6 2000**

**CHARGE #15**



**COPY**

## COMMONWEALTH of VIRGINIA

VIRGINIA R. DIAMOND, CHAIRMAN  
LAWRENCE D. TARR, COMMISSIONER  
WILLIAM L. DUDLEY, JR., COMMISSIONER

### WORKERS' COMPENSATION COMMISSION

NORTHERN VIRGINIA REGIONAL OFFICE

P. O. BOX 20246

ALEXANDRIA, VIRGINIA 22320-1246

DEPUTY COMMISSIONER  
CAROLYN J. COLVILLE  
(703) 518-8037

MARY ANN LINK  
CHIEF DEPUTY COMMISSIONER

LOU-ANN D. JOYNER, CLERK

*April 28, 2000*

*The Honorable Stanley P. Klein  
Circuit Court of Fairfax County  
4110 Chain Bridge Road  
5<sup>th</sup> Floor, Judge's Chambers  
Fairfax, VA 22030*

*Re: Scott and Tara Mills v. Todd Berner, M.D., et al.  
Law Number: 181359*

*Re: Scott and Tara Mills, administrators  
Of the Estate of Nelson Mills, (deceased infant complainant)  
VWC File No. B-00-06*

*Dear Judge Klein:*

*Attached please find a copy of the Commission's Opinion in the above styled case that was transferred to the Virginia Worker's Compensation Commission pursuant to Section 8.01-273.1, Code of Virginia.*

*Very respectfully yours,*

*Carolyn J. Colville*  
Carolyn J. Colville  
Deputy Commissioner

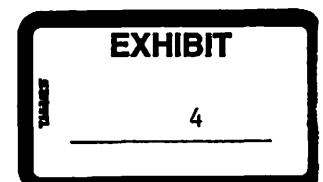
**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

*CJC/sab*

*cc: Robert T. Hall, Esquire  
Donna Miller Ronstant, Esquire  
Tara M. McCarthy, Esquire  
Susan L. Mitchell, Esquire  
John J. Beall, Jr., Esquire*

**JUN 26 2000**

**CHARGE #15**



VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

IN RE: SCOTT AND TARA MILLS, administrators  
of the Estate of NELSON MILLS, (deceased infant complainant)

Opinion by COLVILLE  
Deputy Commissioner

APR 28 2000

VWC FILE NO. B-00-06

Robert T. Hall, Esquire  
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Nelson Mills, (deceased infant complainant).

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Primary Care for Women, P.C.

John J. Beall, Jr., Esquire  
Senior Assistant Attorney General  
900 East Main Street  
Richmond, VA 23219  
For the Virginia Birth-Related Neurological  
Injury Compensation Program.

Hearing on the record before Deputy Commissioner Colville at Alexandria,  
Virginia.

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

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CHARGE #15

## PROCEDURAL HISTORY

A civil lawsuit was filed by Scott and Tara Mills, Co-Administrators of the Estate of Nelson Mills and Tara Mills individually against Todd Berner, M.D. and Primary Care for Women, P.C.

Pursuant to the provisions of Section 8.01-273.1, Code of Virginia, the Circuit Court of Fairfax County referred the claims made by the Co-Administrators of the Estate of Nelson Mills against both Todd Berner, M.D. and Primary Care for Women, P.C. in At Law No. 181359 to the Commission by Amended Order dated January 4, 2000.

The Commission's Clerk referred this matter to the docket by letter dated February 24, 2000. By letter dated March 10, 2000 the hearing Deputy Commissioner advised the parties that the basic information that would be contained in a petition as required by Section 38.2-5004, Code of Virginia was lacking and that the file contained no medical records. Thus, to adjudicate whether the deceased infant suffered a birth-related neurological injury as defined in Section 38.2-5001, Code of Virginia, medical records would be needed. The parents of Nelson Mills were directed to provide the Commission and the Birth-Related neurological Injury Compensation Program with information that would be contained in the petition and to provide the Commission with five copies of the prenatal records of the mother, the mother's hospital records including fetal monitoring strips, labor and delivery records and the child's medical records connected with the birth and death within thirty days.

VIRGINIA WORKERS'  
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## PRESENT PROCEEDINGS

The case is now before the Commission on the Co-Administrator's March 23, 2000 Motion filed March 28, 2000 to remand the claim against Primary Care for Women, P.C. to the Circuit Court for Fairfax County in light of the holding in Jan Friterman, MD. And Associates, P.C. v. Ahmad Waziri and Hassini Waziri, Individually and as personal Representatives of the Estate of Syawach Waziri, Record No. 990376. With reference to the balance of the case against Todd Berner, M.D. that was transferred, the Co-Administrators non-suited and withdrew "such claims" and waived "any claim they might have arguably pursued under the Neurological Birth-Related Injury Compensation Act if the Commission was determined to have jurisdiction over these matters and this party."

## DEFENSES

On April 6, 2000 counsel for the defendants filed a Opposition to Plaintiff's Motion to Remand and for Nonsuit which she sought to be reviewed and considered prior to ruling on the March 23, 2000 Motion.

## PRE-HEARING AND POST HEARING EVIDENCE

The March 23, 2000 Motion, the April 6, 2000 Opposition and the Co-Administrator's April 17, 2000 Reply Memorandum in Support of Motions to Remand and to Withdraw Claim are made a part of this record.

## SUMMARY OF THE EVIDENCE

The record reveals that subsequent to the Circuit Court's Order, the Supreme Court of Virginia issued the above cited March 3, 2000 Opinion wherein it held that professional corporations which employed a participating physician were not entitled to ~~ORDER'S~~ ~~COMPENSATION COMMISSION~~

the rights and benefits of the Virginia Birth-Related Neurological Injury Compensation Act as they were not included in the definition of a participating physician contained in Section 38.2-5001, Code of Virginia.

On April 1, 2000 Governor Gilmore signed a bill amending the definition of participating physician contained in Section 38.2-5001, Code of Virginia to include "a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices." This was reportedly to be "declaratory of existing law" and was to be "in force from its passage" as an emergency exists."

#### ISSUE NUMBER ONE

The first and only issue before the Commission has jurisdiction over Primary Care for Women, P.C. and Todd Berner, M.D.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

As set forth in Section 8.01-273.1, Code of Virginia:

In any civil action, where a party moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition.

As set forth in paragraph two of Section 38.2-5003, Code of Virginia:

When a circuit court refers a civil action to the Commission pursuant to §8.01-273.1 for the purposes of determining whether the cause of action satisfies the requirements of this chapter, the Commission shall set the matter for hearing pursuant to §38.2-5006. The Commission shall communicate its decision to the referring circuit court in due course.

**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

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After reviewing the record in its entirety this Commission finds that it lacks jurisdiction over the corporation as it fails to qualify as either a participating physician or participating hospital under the Virginia Birth-Related Neurological Injury Compensation Act on the date of the child's birth pursuant to the March 3, 2000 Opinion of the Virginia Supreme Court. In making this determination, this Commission is fully aware of the April 1, 2000 amendment to the definition of participating physician and the language that it was to be "declaratory of existing law." However, the Virginia Supreme Court specifically held to the contrary and this Commission finds no logical basis to conclude that the amendment could transform a corporation into a participating physician nearly two years after the May 28, 1998 cause of action, namely the birth of the child. Critical to this Commission's determination that this amendment is not to be retroactively applied is that with the July 1, 1990 amendment to the definition of birth-related neurological injury, the Commission previously determined that the change was substantive rather than procedural and was not to be construed as operating retrospectively to a birth that occurred prior to the effective date of the amendment. In re: Sarah Kelly Duncan, VWC File No. B-97-10 (February 24, 1998). Subsequent to this, the General Assembly enacted legislation which permitted a child born between January 1, 1988 and July 1, 1990 to file a claim via the review process to in effect seek entry of an award utilizing the July 1, 1990 more expansive definition given specific circumstances. This Commission concludes that implicit in this 1999 amendment is the admission that substantive changes such as occurred on July 1, 1990 are not to be retroactively applied and that should the General Assembly wish to cover children that would otherwise not qualify under the **VIRGINIA WORKERS' COMPENSATION COMMISSION**

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Related Neurological Injury Compensation Act because of their date of birth then legislation can be passed to cover the circumstances which disqualified the child. Likewise this Commission concludes that the April 1, 2000 amendment shall not presently be retroactively applied to births that occurred prior to its enactment.

With reference to the individual physician, Todd Berner, M.D., Co-Administrators filed a non-suit. This Commission concludes that this action must be addressed by the Circuit Court and not with the Commission. Under such circumstances, the Commission remands that portion of the transfer back to the Circuit Court of Fairfax County for further processing. Should the non-suit not be granted then the Commission will further proceed with whether the cause of action against this individual physician satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act.

Pursuant to Section 38.2-5003, Code of Virginia, the Commission thus communicates its decision that it does not have jurisdiction over Primary Care for Women, P.C. and that it remands the cause of action against Todd Berner, M.D. to consider the non-suit dated March 23, 2000.

The case is removed from the docket.

#### REVIEW

You may appeal this decision by filing a request for review with the Commission within twenty days from receipt of this Opinion.

cc: Elinor J. Pyles, Executive Director  
Virginia Birth-Related Neurological  
Injury Compensation Program  
7400 Beaufont Springs Drive  
Suite 425  
Richmond, Virginia 23225

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

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CHARGE #15

The Honorable Stanley P. Klein  
Circuit Court of Fairfax County  
4110 Chain Bridge Road  
5<sup>th</sup> Floor, Judge's Chambers  
Fairfax, Virginia 22030

**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

**JUN 26 2000**

**CHARGE #15**

**VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION**

**IN RE:        SARAH KELLY DUNCAN  
              infant Complainant**

**Opinion by COLVILLE  
Deputy Commissioner  
FEB 24 1998**

**Petitioner:    WILLIAM A. DUNCAN and  
                 ROSA V. DUNCAN  
                 Father and Mother of Sarah Kelly Duncan**

**Claim No.    B 97-10**

**T. Daniel Firth, III, Esquire  
P.O. Box 2240  
Roanoke, VA 24009  
for the Petitioner.**

**Robert A. Lowman, Esquire  
P.O. Box 929  
Radford, VA 24241  
co-counsel for the Petitioner.**

**John J. Beall, Jr., Esquire  
900 East Main Street  
Richmond, VA 23219  
for the Virginia Birth-Related Neurological Injury  
Compensation Program.**

**Hearing before Deputy Commissioner Colville in Roanoke,  
Virginia on January 16, 1998.**

**PRESENT PROCEEDINGS**

**This case is before the Commission on the petition of William  
A. Duncan and Rosa V. Duncan as parents of Sarah Kelly Duncan, the  
infant complainant, filed September 22, 1997 seeking relief under  
the Virginia Birth-Related Neurological Injury Compensation Act.**

**STIPULATIONS**

**CHARGE #15**

**The Virginia Birth-Related Neurological Injury Compensation  
Program [Program] admits that Allen Duncan and Rosa V. Duncan are  
the parents of Sarah Kelly Duncan born on March 12, 1989 at Roanoke  
Memorial Hospital, a participating hospital as defined by Section**

**EXHIBIT**

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38.2-5001, Code of Virginia, that Dr. Gary O'Hagan and Dr. Elizabeth LeBrun performed the delivery while a Dr. Robert W. Allen was present and that Dr. LeBrun was a participating physician as defined by Section 38.2-5001, Code of Virginia in 1989.

#### DEFENSES

The Program maintains that the infant complainant does not meet the definition of suffering a birth related neurological injury set out in Section 38,2-5001, Code of Virginia as of the date of birth or as set out in the amended definition enacted in, 1990.

#### PRE-HEARING AND POST HEARING EVIDENCE

Medical records submitted up to the time of the hearing are made a part of this record.

Leave was granted counsel for the infant complainant and her parents to submit a written statement by February 2, 1997. Accordingly, counsel's January 29, 1998 letter filed February 2, 1998 is made a part of this record.

#### SUMMARY OF THE EVIDENCE

Both parents testified at the hearing concerning the constant attention that their child requires when at home where they feed her, give her medication, dress her and put her on a bus. She cannot be left alone and acts in an inappropriate manner. She is toilet trained and in general is hyper-active. She can talk but is not responsive.

VIRGINIA WORKERS'  
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The child at the time of the hearing was seen as hyperactive and able to move around on her own between her mother and father.

As reflected in the August 2, 1996 report of Doctors Lisa Sampson-Fant and Richard D. Stevenson of the Kluge Children's Rehabilitation Center of the University of Virginia Hospitals the child has the following diagnoses: 1) extrapyramidal CP with hypotonia and ataxia with a possible superimposed right hemiplegia and right brachial plexus injury; 2) a stable seizure disorder; 3) an oral-motor dysfunction; 4) strabismus; 5) mild mental retardation; and 6) attention deficit hyperactivity disorder. In considering these conditions and their cause the Commission has received numerous expert opinions.

In his March 27, 1997 letter Dr. Richard T. Jackson, a neurologist who both treated the infant complainant and who reviewed the earliest medical records, indicated that the child needed to be watched almost continuously as while she could go to the bathroom on her own she would wander off forgetting where she was going, that she was unable to dress herself and that she was able to eat by herself but was very sloppy which led him to conclude that she would be permanently in need of assistance in all the activities of daily living. He went on to summarize the records from the delivery as follows along with his conclusion:

Review of Dr. Sisk's records and in particular his dictation of 3-11-92, indicates that Sarah had a very difficult delivery with APGAR scores of 0 at 1 minute, 4 at 5 minutes and 4 at 10 minutes and 20 minutes. She required intubation and 100% pressurized oxygen.

VIRGINIA WORKERS' COMPENSATION COMMISSION

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oxygen and transfusion for hypotension. On the 4th day of life she was noted to have a flaccid right arm which was thought to be due to shoulder dystocia and a brachial plexus injury. She was diagnosed as having Cerebral Palsy and a chronic brachial plexus injury. Subsequent numerous records from both Dr. Sisk and the Kluge Rehab Center have documented that she has a static encephalopathy consisting of mental retardation, attentional deficit and seizures for a number of years. On my examination of 9-14-95, I found that she had mental deficiency, clumsiness, unclear speech and residual right brachial plexopathy.

It is therefore my opinion that Sarah's permanent, handicaps qualify her as having a "birth related neurological injury", according to the Code of Virginia statute 38.2-5001.

The Program requested that Duncan C. MacIvor, an obstetrician/gynecologist, to evaluate the records and in his October 3, 1997 report he reviewed the delivery records at some length and wrote:

The only evidence for antenatal fetal compromise in these records are the placental deterioration seen on ultrasound and the possible meconium staining. The scantiness of this evidence does not entirely exclude antenatal causes of cerebral palsy and mental retardation. There is no evidence of asphyxia during the labor itself, nor of any mismanagement of labor. The variable decelerations present did not indicate fetal distress. The labor was not prolonged, and in spite of the sonogram warnings of developing macrosomia (which did not actually exist), the shoulder dystocia was not reasonably foreseeable or preventable (i.e. there was no prospective reason for a C-section).

There is insufficient information to evaluate the management of the shoulder dystocia once it occurred. Fundal pressure in such cases is usually inappropriate. The McRoberts maneuver is quite appropriate. We are not told how the delivery was actually accomplished. Even

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there were complete occlusion of the umbilical cord in a previously uncompromised infant, four or five minutes of shoulder dystocia would not be expected to produce such profound, prolonged depression or subsequent brain damage. This raises the question of other factors at work. More details about the delivery itself might help.

He went on to recommend an evaluation by a neurologist and a neonatologist specialist. With reference to the former he went on to write:

Brachial plexus injuries do not usually meet the requirements of the birth injury statute. Her mental retardation and cerebral palsy may combine to meet the requirements. If so, some combination of intrapartum and neonatal events may have caused them.

Shoulder dystocia is a sufficient and likely cause of brachial plexus injury, but five minutes or less of shoulder dystocia does not seem a sufficient cause of central nervous system injury without other contributing factors. That is my only reservation about calling this a statutorily compensable birth injury.

The Program arranged for Dr. S.I. Tarant, a neonatologist, summarized the delivery findings and in an October 20, 1997 letter expressed the following:

I share Dr. Macivor's views on this case. The shoulder dystocia was the likely cause of Sarah's brachial plexus injury. Five minutes of shoulder dystocia, however, should have led to a depressed baby but not one that was, for all intents and purposes, born dead at birth. It suggests that the fetus or placenta was already compromised in some way, which not only rendered this baby less equipped to handle the stress of an ordinary delivery, but rendered her especially vulnerable to the particularly difficult delivery she experienced. Nevertheless, her cerebral palsy

VIRGINIA WORKERS' COMPENSATION COMMISSION

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is consistent with the precise pattern seen in hypoxic ischemic encephalopathy (i.e. asphyxia) in a full term infant. Thus, although there might have been contributing facts, it appears to me that her injuries are, indeed, birth related. From a neonatologist's point of view, the only neonatal events that might have contributed to her problems were the aforementioned delay in cardiac compressions in the delivery room and the aggressive alkalosis in the NICU. Either of these events could have added to Sarah's sad outcome but probably not substantially. Hence, from my perspective, this case appears to fit the statutory criteria of a birth related injury.

Dr. W. Davis Parker of the Department of Health, Division of Children's Specialty Services, Neurologist Program at the University of Virginia Health Sciences Center met with infant complainant and her parents to evaluate the child's recurrent neurologist status and in a November 13, 1997 letter he outlined her history and her then present physical status. He expressed the following opinions:

Sarah certainly has severe neurologic dysfunction. This appears to be secondary to severe asphyxia sustained at the time of delivery as a result of compromise of fetal circulation because of a prolapsed and nuchal umbilical cord. The early neonatal course is certainly compatible with this diagnosis. Her present neurologic difficulties appear to be secondary to events surrounding delivery. She also appears to have a right brachial plexopathy noted at the time of delivery which is probably secondary to neurologic injury secondary to shoulder dystocia and a difficult delivery occurring in a crisis situation. This has left her with major disability. She appears to require constant supervision and assistance with most activities of daily living including bathing, toileting and eating. She also appears to require constant supervision

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in order to protect her from possible injury from wander(sic) in two (sic) dangerous situations. Based on the parents description I doubt that this child can be left alone for any significant period of time without significant risk. I expect that this condition will persist indefinitely.

Thereupon both Dr. Tarant and Dr. MacIvor were asked by the Program to express an opinion about whether the infant complainant's status met the 1989 definition of "birth-related neurological injury".

In his December 8, 1997 response Dr. Tarant wrote:

I have read through Dr. Parker's note, the pediatric neurologist who assessed Sarah in November of this year. At that time his evaluation makes it clear that Sarah is ambulatory and in his report there is nothing that states that she is incontinent, although Dr. Parker does say that she requires assistance in toileting. "Birth-related neurological injury" as it is defined in the legislation at the time requires that the child be non-ambulatory and incontinent, in addition to being aphasic and in need of assistance in all phases of daily living. Therefore, based on the definition present at the time of Sarah's birth, which has since been modified, Sarah does not meet the criteria of a "birth-related neurological injury."

In his December 23, 1997 response Dr. MacIvor indicated that he did not personally examine the infant complainant but that the materials he reviewed were the obstetric records of the mother and the child's newborn and early childhood care. He expressed that:

In this particular case and in general, it seems to me that three elements must all be present to qualify a child for compensation: 1) evidence of potential for birth related injury, and 2) current evidence of neurologic

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injury meeting the statutory criteria, and 3) likelihood of a cause and effect relationship between the first two elements.

In Sarah's case I could vouch for the first element from the record and would say the third was likely but have no direct current information on the second and must defer to a neurologist who has seen her recently.

The panel of three qualified and impartial physicians mandated by Section 38.2-5008 (B), Code of Virginia which in this case amounted to Professor John W. Seeds, chairman of Obstetrics & Gynecology of the Medical College of Virginia along with three associate professors, Dr. Mara J. Dinsmoor, Dr. Tom Peng and Dr. Steven Cohen authored the following January 13, 1998 report:

The panel has reviewed the records provided regarding the perinatal events surrounding the birth of the above named infant and concludes that in our opinion this infant has not suffered a "birth related neurological injury" as defined at the time of her birth in 1989 since she is not nonambulatory and aphasic as required by the then applicable statute. She suffers cerebral palsy but is not nonambulatory. She suffers developmental disability but is not aphasic. She suffers a right brachial palsy likely the result of a shoulder of a shoulder dystocia, not intrapartum asphyxia.

The panel does conclude that on the basis of low Apgar scores, the almost immediate need for bicarbonate therapy to correct acidosis, the early seizure activity, and the multisystem dysfunction as evidenced by persistent fetal circulation and hypotension during the neonatal period, that this infant almost certainly did suffer oxygen deprivation during labor and/or the delivery process.

The panel also concludes that if statutory changes adopted in 1990 were applied requiring VIRGINIA WORKERS' only that the infant be "motorically disabled" COMPENSATION COMMISSION

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and developmentally disabled", that this infant would, in our opinion, meet the criteria for a "birth related neurologic injury."

ISSUE NUMBER ONE

The initial issue before the Commission is which definition of "birth-related neurological injury" should apply.

FINDING OF FACT AND CONCLUSIONS OF LAW

After reviewing the record we find that any injury took place at the time of birth, March 12, 1989 at which time the definition reads as follows:

"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently nonambulatory, aphasic, incontinent, and in need of assistance in all phases of daily living. This definition shall apply to live births only.

This definition was modified in 1990 to read as follows:

"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of this chapter, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include disability

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or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse.

This issue has not been adjudicated under the Virginia Birth-Related Neurological Injury Compensation Act but as discussed in the context of the Workers' Compensation Act in the case of Brushy Ridge Coal Co. v. Blevins, 6 Va. App. 73, 367 S.E.2d 204 (1988) quoting from Duffy v. Hartsock, 187 Va. 406, 46 S.E.2d 570 (1948):

Retrospective laws are not favored, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest; but the legislature may, in its discretion, pass retrospective and curative laws provided they do not partake of the nature of what are technically called ex post facto laws, and do not impair the obligation of contracts, or disturb vested rights; and provided, further, they are of such nature as the legislature might have passed in the first instance to act prospectively.

The determining factor has been whether an amendment of a statutory provision merely affected the procedure or manner in which an entitlement to benefits is to be determined versus establishing a new substantive right. As noted by the Program's memorandum, this rationale has applied in the cases of wrongful death actions and non-suits. See Riddett, Administratrix v. VEPCO, Record No. 970297 (January 9, 1998); Dodson v. Potomac Mack Sales & Service, 2241 Va. 89, 400 S.E.2d 178 (1991).

In this particular case we find that the 1990 amendments are not be construed as operating retrospectively, namely to births that occurred before its implementation. The record fails to reveal any such legislative intent and the provision in fact

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COMPENSATION COMMISSION

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established new substantive rights by significantly decreasing the requirements to be met. We agree with the Program that if caselaw establishes that the statute of limitations or non-suit provisions at the time of injury have to be applied then the definition of a "birth-related neurological injury" has to apply as of the date of the child's birth.

#### ISSUE NUMBER TWO

The second and final issue before the Commission is whether the parents have met the provisions of the statute in existence at the time of the birth of the infant complainant.

#### FINDING OF FACT AND CONCLUSIONS OF LAW

After reviewing the record carefully in its entirety this Commission, it is apparent that the infant complainant is not permanently nonambulatory as was apparent at the hearing wherein she was fully able to move about. Likewise as was pointed out by the statutory panel of physicians, she is not aphasic, rather, suffers a developmental disability.

While the infant complainant has obviously suffered an injury that will continue to require constant attention, the remedy is not under the 1989 Virginia Birth-Related Neurological Injury Compensation Act. Accordingly, the petition filed September 22, 1997 must be dismissed and the case ordered removed from the hearing docket.

#### REVIEW

You may appeal this decision by filing a request for review with the Commission within twenty days from the date of this opinion.

VIRGINIA WORKERS'  
COMPENSATION COMMISSION

JUN 26 2000

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VWC File No. B-97-10

cc: William A. and Rosa V. Duncan  
P.O. Box 311  
Radford, VA 24141

Elinor J. Pyles, Executive Director  
Virginia Birth-Related Neurological Injury  
Compensation Program  
7400 Beaufont Springs Drive  
Suite 425  
Richmond, VA 23225

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Wine v. Va. Birth-Related Neurological, 69 Va. WC 221 (1990) (1990)

**VIRGINIA: IN THE WORKERS' COMPENSATION COMMISSION**

**IN RE: BRADLEY ALAN WINE, Deceased Infant**  
**Petitioners: Mark A. Wine and Nancy Lynn Wine,**  
**Parents of Bradley Alan Wine**  
**Claim No. B 90-1**

Decided: November 29, 1990

[Pending before Court of Appeals]

**VIRGINIA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ACT/§ 38.2-5001-**  
Coverage as a participating physician is not transferable between various members of a physician's group. Each physician must qualify as a "participating physician" before the provisions of the Act are applicable.

Nancy E. Haas, Esquire  
Thomas D. Logie, Esquire  
118 East Main Street, Suite 201  
Front Royal, Virginia 22630  
for the Petitioners.

Janice M. Sigler, Esquire  
Assistant Attorney General  
101 North 8th Street  
Richmond, Virginia 23219  
for the Virginia Birth-Related Neurological  
Injury Compensation Program.

Opinion by O'NEILL, Chairman

REVIEW before the full Commission at Richmond.

The narrow question before the Commission in this request for Review is whether a physician who is an associate in a group of gynecologists and obstetricians may qualify as a "participating physician" under Code § 38.2-5001 of the Virginia Birth-Related Neurological Injury Compensation Act without personally having met the statutory requirements. The petitioners contend that a physician who is a group associate may obtain coverage under the Act by application of the law of agency and the doctrine of vicarious presence through agency. We hold that the Act requires each physician to apply for **VIRGINIA WORKERS' COMPENSATION COMMISSION** obtain coverage before the provisions of the Act apply.

The Deputy Commissioner in her well-reasoned opinion sets forth the uncontested facts. Briefly **UN 2 6 2080** stated, the mother, Nancy Lynn Wine, [Page 222] was attended in her pregnancy and given prenatal care by a physician group known as Winchester Women's Specialists, P.C. Two physicians in this group, John Henry Lowder, Jr., M.D. and James H. Stafford, Jr., M.D., provided prenatal care. When the **CHARGE #15** mother was taken to Winchester Medical Center for delivery, she was attended by Mark W. Doering, M.D., another physician in the group, who delivered the infant by emergency caesarian section on



August 16, 1989. Complications followed the delivery and treatment continued at the University of Virginia Medical Center, where the infant expired on August 27, 1989.

The evidence establishes that all of the physician members in the medical group known as Winchester Women's Specialists, P.C. had applied for coverage and each was covered by the Act, except for Mark W. Doering, M.D., an obstetrician who had not yet qualified.

The surgical delivery on August 16, 1989 was performed by Dr. Doering and he was assisted by Roy W. Lutz, M.D., a pediatrician, and John J. Maurino, M.D., anesthesiologist. None of the physicians present at delivery were, as of that date, covered by the provisions of § 38.2-5000, et seq. as "participating physicians."

The sole issue before us is whether the obstetrical services performed by Dr. Doering at the time of the delivery of the infant were performed by a "participating physician" under Code § 38.2-5001. Under that section, a "participating physician" is one who is

a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services . . . within the scope of such licensure and who at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the physician agreed to participate . . . (ii) had in force an agreement with the Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred.

Upon review of the evidence in this record and the briefs of counsel, we hold that the language of the statute is clear and unambiguous in [Page 223] its requirement that each physician desiring to be covered under the provisions of the Birth-Related Neurological Injury Compensation Act must have complied with the specific provisions of Code § 38.2-5001 to become an individual participating physician.

We also hold specifically that there is no statutory basis for recognition of an agency relationship between one or more participating physicians, individually or as a group, and a physician associate of the group for the purpose of conferring status as a participating physician. The Act is a creature of statute and each physician who seeks to have its benefit must enter into the agreements specified and meet the requirements for coverage. Simply stated, coverage as a participating physician is not transferrable. Finally, we hold that principles of agency, although they may regulate personal and commercial obligations of the various members of a physician group, do not have application to the statutory definition of "participating physician." Status as a "participating physician" is conferred and controlled by the statutory requirements.

We therefore adopt the opinion of the Deputy Commissioner in its entirety and we hold that the petition filed February 16, 1990 must be and is dismissed by operation of law. **AFFIRMED.**

This case is ordered removed from the Review Docket.

**ORIGINAL**

**COMMONWEALTH OF VIRGINIA  
VIRGINIA WORKERS' COMPENSATION COMMISSION**

STATEMENT of Scott and Tara Mills  
In Opposition to Doctor's Insurance  
Reciprocal's Request for Leave to  
File an Amicus Curiae Brief

VIRGINIA BIRTH-RELATED  
NEUROLOGICAL INJURY  
COMPENSATION FUND

**NO: B-00-06**

Date of Birth: 05/28/98

RE: Claim of Scott and Tara Mills, Co-Administrators  
of the Estate of Nelson Mills (deceased infant complainant),  
v.  
Todd Berner M.D., and Primary Care for Women, P.C.

**STATEMENT IN OPPOSITION TO DOCTOR'S INSURANCE RECIPROCAL'S  
REQUEST FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

The Mills oppose the Request of Doctor's Insurance Reciprocal for leave to file an *amicus curiae* brief. The Request for leave to file and the brief were filed on the same day. The Commission had not ruled on the motion at the time the brief was filed and did not set out a briefing schedule in connection with Doctor's Insurance Reciprocal's brief. If the Commission allows the filing of the amicus brief, the Mills request that they be given time to respond. If the Commissions denies the Mills request for time to respond, then for the reasons set forth in the Mills' Statement in Opposition to the Statement of Todd Berner M.D. and Primary Care for Women, P.C., the relief requested in the Doctor's Insurance Reciprocal's brief should be denied.

Respectfully submitted,

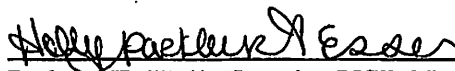
Scott and Tara Mills, as Co-Administrators of  
the Estate of Nelson Mills and Tara Mills  
Individually

**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

JUN 26 2000

**CHARGE #15**

HALL & SICKELS, P.C.

  
Robert T. Hall, Esquire VSB No. 4826  
Holly Parkhurst Essing, Esquire VSB No. 17538  
Donna Miller Rostant, Esquire VSB No. 41855  
12120 Sunset Hills Road, Suite 150  
Reston, VA 20190  
(703) 925-0500  
Counsel for Plaintiff

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on this 19 th day of June 2000, the CLAIMANTS' STATEMENT IN OPPOSITION TO THE REQUEST OF DOCTORS' RECIPROCAL INSURANCE FOR LEAVE TO FILE AN AMICUS BRIEF was sent by Certified Mail Return Receipt Requested to the Virginia Workers' Compensation Commission, 1000 DMV Drive, Richmond VA 23220 and that copies were sent first class mail, postage prepaid to:

Tara M. McCarthy, Esq.  
McCARTHY & MASSEY, P.C.  
9315 Center Street, Suite 104  
Manassas, VA 20110  
Counsel for Defendants  
Todd Berner, M.D.  
Primary Care for Women, P.C.

John J. Beall, Jr., Esquire  
Sr. Assistant Attorney General  
900 E. Main Street  
Richmond, VA 23219  
Counsel for VA Birth Related Neurological Program

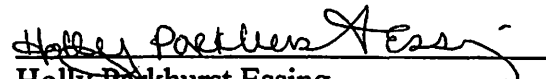
VIRGINIA WORKERS'  
COMPENSATION COMMISSION

JUN 26 2000

CHARGE #15

Elinor J. Pyles, Executive Director  
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June 28, 2000

**Via Certified Mail**  
**Return Receipt Requested**

Ms. Lou Ann Joyner, Clerk  
Virginia Workers' Compensation Commission  
1000 DMV Drive  
Richmond, Virginia 23220

Re: Scott and Tara Mills, Administrators of the Estate of Nelson Mills  
(deceased infant complainant)  
VWC File No.: B-00-06

Dear Ms. Joyner:

→ Enclosed please find Defendants Todd Berner, M.D. and Primary Care for Women, P.C.'s Reply Brief and Statement in Response to Plaintiffs' Statement in Support of the Deputy Commissioner Colville's April 28, 2000 Opinion and in Opposition to Defendants' Written Statement.

Very truly yours,



Tara M. McCarthy

TMM:ls  
Enclosure

cc: Donna Miller Rostant, Attorney-at-Law  
John J. Beall, Jr., Esquire  
Elinor J. Pyles  
Gena Gustin, Claim No. SS001103QJ  
Todd Berner, M.D.

**VIRGINIA WORKERS'**  
**COMPENSATION COMMISSION**

**JUL 10 '00**

**CHARGE # 15**

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**COMMONWEALTH OF VIRGINIA  
VIRGINIA WORKERS' COMPENSATION COMMISSION**

**SCOTT and TARA MILLS,  
Co-administrators of the Estate of  
NELSON MILLS, (deceased infant  
complainant)**

**v.**

**TODD BERNER, M.D.,  
and  
PRIMARY CARE FOR WOMEN, P.C.**

**Defendants.**

**VWC File No. B-00-06**

**DEFENDANTS TODD BERNER, M.D. AND PRIMARY CARE FOR WOMEN, P.C.'S  
REPLY BRIEF AND STATEMENT IN RESPONSE TO PLAINTIFFS' STATEMENT IN  
SUPPORT OF THE DEPUTY COMMISSIONER'S OPINION AND IN OPPOSITION TO  
THE DEFENDANTS' WRITTEN STATEMENT**

COME NOW the defendants Todd Berner, M.D. and Primary Care for Women, P.C., by counsel, and file this their reply brief and statement in response to Plaintiffs' Statement in Support of the Deputy Commissioner's Opinion and in Opposition to the Defendants' Written Statement.

**INTRODUCTION**

As a preliminary matter, these defendants filed their written statement in support of a request for a review on or about June 9, 2000, to which the plaintiffs filed the aforementioned response. On or about June 9, 2000, the Doctors Insurance Reciprocal (Risk Retention Group) filed a Brief Amicus Curiae in support of the request for review filed by Todd Berner, M.D. and Primary Care for Women, P.C. These defendants hereby adopt and incorporate, as if fully set forth herein, the entirety of the Brief Amicus Curiae of

**VIRGINIA WORKERS'  
COMPENSATION COMMISSION**

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Doctors Insurance Reciprocal (Risk Retention Group) filed in support of the Request for Review filed by Todd Berner, M.D. and Primary Care for Women, P.C.

Upon careful reading of the Statement in Support of the Deputy Commissioner's Opinion and in Opposition to the Defendants' Written Statement filed by the plaintiffs, it is difficult to ascertain exactly what the plaintiffs' position is. For example, the plaintiffs talked at length in their brief about the Wrongful Death Act, and their position that the Wrongful Death Act precludes application of the Birth Injury Act. However, the plaintiffs then go on to say (at page 7 of their Brief) that . . . [they] specifically reserve the right to brief and argue the inapplicability of the Birth Injury Act to actions for wrongful death. In the very next sentence the plaintiffs state "the same rules of strict construction which govern the Fruiterman decision make it clear that the Birth Injury Act does not apply to actions for wrongful death. The Fruiterman case, which the plaintiffs so heavily rely upon, was, in fact, a wrongful death action. The issue in Fruiterman was whether the trial court erred in sending the individual physician to the Commission for determination on the merits and retaining jurisdiction over the corporation. However, the cause of action in Fruiterman was the death of an infant.

The plain language of the Birth Injury Act clearly indicates that infants who die as a result of their neurological injuries are entitled to the benefits of the Act. VA. CODE ANN. §38.2-5001 (Michie, 1987, as amended 1995), within the definition of a "claimant", states that:

"in the case of a deceased infant, the claim may be filed by an administrator, executor or other legal representative."

Plaintiffs argue at page 8 of their Brief that "the application of the 'exclusive remedy' provisions to personal representatives is obviously limited to those instances where there would be a remedy . . .". It is interesting to note that the plaintiffs' major complaint in this case, regarding the defendants' position, is that the defendant (under the plaintiffs' theory) is asking this Commission to read something into the Birth Injury Act that is not in the Statute. As will be addressed herein, it is the defendants' position that they are certainly not asking this Commission to do any such thing. However, it seems that the plaintiffs are doing exactly that; they are asking this Commission to conclude that the Birth Injury Act does not apply to wrongful death cases and cite as authority for this proposition that it is "obvious". The contrary is true: There is no statement in the Birth Injury Act which sets out a survival action versus a wrongful death action on behalf of an infant. In fact, the language is clear and unambiguous. The Birth Injury Act provides the exclusive remedy with reference to a birth related neurological injury including a birth-related neurological injury that results in the death of an infant.

Certainly, this unambiguous language indicates that the legislature intended for the Act to apply to children who suffer birth-related neurological injuries and die thereafter prior to claim being made. Likewise, that language would apply to the case at bar. Nelson Mills was born on May 28, 1998 and died allegedly as a result of his neurological injuries on June 7, 1998. A civil action was brought by his co-administrators on April 1, 1999. If the co-administrators had elected to file a claim before the Birth Injury Fund, rather than file a lawsuit in Circuit Court, Nelson Mills would have met the definition of a "claimant" and would have been subject to all of the provisions of the Act.



VA CODE ANN. §38.2-5002 (Michie 1987, as amended 1990) also requires that the plaintiffs' position that deceased infants are not contemplated by the Act be rejected. This statutory provision provides that the act is the exclusive remedy when an infant has suffered a birth-related neurological injury where services during birth have been provided by a participating hospital and/or physician. This exclusivity applies not just to the injured infant but to "all of the rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise, arising out of or related to a medical malpractice claim with respect to such injury." There is nothing vague or ambiguous about this statutory provision. An examination of the provision indicates clearly the legislative intent to apply the Act to the death of an infant. It is for that reason that the legislature used the following words:

- Next of kin
- At common law or otherwise
- In the case of a deceased infant the claim may be filed by an administrator, executor, or other legal representative

The Birth Injury Act speaks of all rights and remedies at common law or otherwise, and contemplates statutory causes of action such as wrongful death actions in addition to those causes of action traditionally existing at common law. As plaintiffs will no doubt concede, the legislature is presumed to know the law at the time that it acts. At the time that the Birth Injury Act was passed, the Wrongful Death Act (VA CODE §8.02-50 et. seq.) had already been in existence for quite a period of time. Despite that knowledge, the legislature made the Birth Injury Act the exclusive remedy of the infant and his personal representative, parents, dependents or next of kin.

VA. CODE §38.2-5002 states in pertinent part as follows:

B. Except as provided in Subsection D, the right and remedies herein granted to an infant on account of a birth-related neurological injury, shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise, arising out of or related to a medical malpractice claim with respect to such injury.

Furthermore, the Act speaks to and is made exclusive for all rights and remedies of an injured infant's personal representative, his parents, his dependents and his next of kin. It is telling that the legislature included these persons within the exclusivity provision, for this enumeration encompasses the entirety of that class of persons who are entitled to recover under the Wrongful Death Statute (VA CODE §8.01-53). The intent of the legislature cannot be misunderstood; deceased infants, even those who would otherwise have a claim for wrongful death, are contemplated by the Act, and their recovery, as well as the recovery of their dependents and next of kin, is exclusively found within the Act. Thus, the plaintiffs' argument, (or lack thereof) that there is no remedy for the Mills family under the Act, must fail.

**I. THE DEPUTY COMMISSIONER ERRED BY NOT APPLYING THE APRIL 1, 2000 AMENDMENT TO AND RE-INACTMENT OF VA CODE ANN. §38.2-5001 TO THE PRESENT CASE.**

Deputy Commissioner Colville erred by failing to apply the April 1, 2000 amendment to and re-enactment of VA. CODE ANN. §38.2-5001 to the case at bar. The Deputy Commissioner should have applied the April 1, 2000 amendment to and re-enactment of VA CODE ANN. §38.2-5001 and, therefore, should have concluded that Primary Care for Women, P.C. was entitled to the protection of the Act. A fact, which the plaintiffs tend to gloss over, regarding the creation of the Virginia Birth-Related Neurological Injury

Compensation Act (Birth Injury Act), is that it was created by the General Assembly in 1987 in response to a perceived need to provide benefits to children who suffered a birth-related injury. From time to time, the General Assembly has seen fit to amend various provisions in the Act to address issues, such as what injuries fall within the scope of the Act, and what health care providers are considered to be included within the exclusive remedies provision of the Act.

The Deputy Commissioner, in her April 28, 2000 Opinion, refused to apply the newly amended version of the Act to the present case and, instead, held that Primary Care for Women, P.C. was not a "participating hospital" or a "participating physician", such that the Commission did not have jurisdiction to consider the claims against the corporation. In so deciding, the Deputy Commissioner concluded that the amendment shall not presently be retroactively applied to births that occurred before its enactment. For the reasons set forth herein, and in the opening brief, these defendants assert the Deputy Commissioner erred by determining that application of the April 1, 2000 amendment to the present case would be a "retroactive" application and, further erred by failing to recognize the clear intent of the General Assembly that the amendment shall apply to children born prior to the date of the amendment.

**A. APPLICATION OF THE APRIL 1, 2000 AMENDMENT OF VA CODE ANN. §38.2-5001 TO THE PRESENT CASE WOULD NOT CONSTITUTE RETROACTIVE APPLICATION OF LAW**

This issue was previously argued and set forth in the opening brief of these defendants, and a considerable attempt will be made not to repeat and reiterate those same arguments. It is of interest to note that the plaintiffs, in asserting their position that the April 1, 2000 amendment cannot be applied retroactively, continually state that the

application (alleged retroactive application) takes away an existing cause of action against Primary Care for Women, P.C. However, plaintiffs cite no authority for that position, nor is that position legally sound.

Plaintiffs make a quantum leap in their argument against "retroactive application of VA CODE ANN. §38.2-5001 when they cite as foundation for the leap that the cause of action against the professional corporation would be extinguished. Plaintiffs' brief contains no facts upon which such a conclusion could be based. The plaintiffs' alleged claim against the professional corporation would certainly not, under any scenario, be extinguished. If VA CODE ANN. §38.2-5001 as amended, is applied to the case at bar, the deceased infant pursues his claim against Dr. Berner and the professional corporation before the Birth Injury Fund. Plaintiffs have never made any allegations that the corporation was independently or separately liable for distinct or different acts of negligence than that for which they sued Dr. Berner. The whole premise of liability against the professional corporation, based upon the plaintiffs' motion for judgment, has always been that Dr. Berner was an agent and employee of the corporation and, therefore, the corporation's liability would be vicarious in nature. If the infant plaintiff has a claim against Dr. Berner and Primary Care for Women, P.C. that can be filed under the Birth Injury Act, how can the cause of action against the professional corporation be extinguished? The plaintiffs' real complaint is that the forum for the airing of the infant's claim is different than the forum the plaintiffs would like; plaintiffs would prefer the forum to be Fairfax Circuit Court rather than the Industrial Commission. However, the exclusivity provision and the clear language of the Birth Injury Act, mandates that both defendants, and this infant's claims are properly before the Birth Injury Fund.

Plaintiffs are critical of the defendants' reliance upon Landgraf v. USI Film Products, 511 U.S. 244 (1994). However, the principles espoused in Landgraf are sound and ought to be adhered to. In Landgraf the Court stated:

Where the Statute in question unambiguously applies to preenactment conduct, there is no conflict between the anti-retroactivity presumption and the principle that a Court should apply the law in effect at the time of decision. Even absent specific legislative authorization, application of a new Statute to cases arising before its enactment is unquestionably proper in many situations. However, where the new Statute would have a genuinely retroactive effect - - i.e., where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed - - the traditional presumption teaches that the Statute does not govern absent clear congressional intent favoring such a result. (Landgraf at 245).

**II. THE CLEAR INTENT OF THE GENERAL ASSEMBLY IN AMENDING VA CODE ANN. §38.2-5001 WAS TO OVERRIDE FRUITERMAN AND CLARIFY THE EXISTING LAW.**

The plain language of the 2000 General Assembly amendment reveals that the legislature clearly intended for the Statute to apply to all causes of action, regardless of the date of accrual or date of filing and, therefore, this Commission should reverse the Deputy Commissioner's April 28, 2000 decision and remand this matter for adjudication on the merits. Plaintiffs repeatedly refer to "clear and unambiguous" in their brief. The plaintiffs suggest that "where the legislature has used clear and unambiguous words, courts must afford them their plain and definite meaning" (plaintiffs' Written Statement page 3). What then, under that theory, can the statement "declaratory of existing law" possibly mean? "Declaratory of existing law" is plain and unambiguous. The 2000 enactment is a

clarification of the law. Because the enactment is a clarification and merely declaratory of existing law, it clearly is intended to apply to all causes of action since the inception of the Virginia Birth-Related Neurological Injury Compensation Act.

"When amendments are enacted soon after controversies arise 'as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act - a formal change - rebutting the presumption of substantial change". Boyd v. Commonwealth 216 Va. 16, 20 - 21, 215 S.E.2d 915, 918 (1975).

Thus, common law principles of statutory interpretation support the position of these defendants. With respect to the 2000 amendment to the Act, one does not have to resort to principles of statutory construction to determine legislative intent, however, because the General Assembly has expressly stated that the amendment is "declaratory of existing law."

Plaintiffs obviously have some trouble explaining away the language "declaratory of existing law." In their brief on pages 17 - 18, plaintiffs attempt to persuade this Commission that "declaratory of existing law" simply means that the legislature, upon passing a law, is confirming that it passed a law. If any construction of the term "declaratory of existing law" would involve a 'manifest absurdity', it is the plaintiffs' suggestion on page 18 of its brief. Seemingly, plaintiffs concede this point when they state "in other words, that language does '*not ipso facto*' designate the amendment as retroactive." Black's Law Dictionary defines *ipso facto* as "by the fact itself". It is apparent, from the use of that sentence in their brief, that the plaintiffs, at a minimum, concede that "declaratory of existing law" can be interpreted to require retroactive application.

Likewise, plaintiffs' reliance on Turner v. Wexler, 244 Va.124, (1992) is misplaced. In that case, the Supreme Court was called upon to rule on an issue related to Va. Code §8.01-581.1 and the definition of health care provider. However, the language at issue in the Turner case did not contain the language "the amendment is declaratory of existing law". In fact, the Court in Turner stated that the question was "not what the legislature intended to enact, but what is the meaning of that which it did enact. We must determine the legislative intent by what the Statute says and not by what we think it should have said." (Turner at 127).

In the 2000 amendment, we know what the legislative intent was because the legislature has told us. The General Assembly has clearly indicated that the 2000 amendment is a clarification of what the law has been with regard to the definition of participating physician under the Birth Injury Act. Further, the General Assembly reacted immediately after the Supreme Court's March 3, 2000 decision in Fruiterman by clarifying the Statute through its enactment of March of 2000. The General Assembly explained, through the language "declaratory of existing law", that this was the law all along. The General Assembly in this regard was not at all ambiguous or equivocal. The statutory amendment, including the "declaratory of existing law" statement passed the Senate by a vote of 98 to 0 and the House of Delegates by a vote of 36 to 1. Furthermore, the General Assembly's statement that the amendment is declaratory of existing law, is completely consistent with the purposes of the Act and the intent of the Act. What conceivable argument could there be to have the individual health care provider in the Birth Injury Fund forum, while the professional corporation that employs the individual health care provider is apparently excluded from the Birth Injury Fund and sent to the Circuit Court? This would

defeat the very spirit and intent of the Birth Injury Act; i.e., to take cases of neurologically injured infants out of the Circuit Court system and place them in the Birth Injury Fund. Likewise, in its original enactment in 1987, the General Assembly provided in VA. CODE ANN. §38.2-5002 that "the rights and remedies herein granted to an infant on account of a birth-related neurological injury shall exclude all of the rights and remedies . . . at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury." Obviously, the General Assembly believed when it said "all" that the plain and fair meaning of that word would be accorded to it. Quite simply, "all" means "all" without further explication or enumeration.

### **CONCLUSION**

As set forth in detail above and in the opening brief of these defendants, the Fruiterman decision was handed down on March 3, 2000. In direct response to that decision, the General Assembly moved rapidly to amend and reinact VA CODE ANN. §38.2-5001. That legislative amendment included an explicit statement that the newly amended Statute was "declaratory of existing law". In enacting the amendment, the General Assembly was stating clearly, plainly and unambiguously that the amendment and reenactment was simply a clarification and an explanation of the law as it has existed since the inception of the Act insofar as the definition of participating physician is concerned. Based upon that clear and direct pronouncement and clarification, Primary Care for Women, P.C. is properly before the Birth Injury Fund.




WHEREFORE, for each of the foregoing reasons cited herein, and in the opening brief, the defendants respectfully request this Commission reverse, in part, Deputy Commissioner Colville's April 28, 2000 opinion and find that this Commission, indeed, has jurisdiction over Primary Care for Women, P.C. as a "participating physician" under the Birth-Related Neurological Injury Compensation Act. These defendants further request this matter be remanded for further consideration and adjudication on the merits, pursuant to the act.

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By: \_\_\_\_\_

  
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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on this 29<sup>th</sup> day of June, 2000, DEFENDANTS TODD BERNER, M.D. AND PRIMARY CARE FOR WOMEN, P.C.'S REPLY BRIEF AND STATEMENT IN RESPONSE TO PLAINTIFFS' STATEMENT IN SUPPORT OF THE DEPUTY COMMISSIONER'S OPINION AND IN OPPOSITION TO THE DEFENDANTS' WRITTEN STATEMENT was sent by Certified Mail, Return Receipt Requested to the Virginia Workers' Compensation Commission, 1000 DMV Drive, Richmond, Virginia 23220 and that copies were sent first class mail, postage prepaid to:

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VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

IN RE: Claim of SCOTT AND TARA MILLS, Administrators of the  
Estate of NELSON MILLS, Deceased Infant Complainant,  
for benefits under the Virginia Birth-Related Neurological  
Injury Compensation Act

VWC File No. B-00-06

Opinion by DUDLEY  
Commissioner

APR 20 2001

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REVIEW before Commissioner Tarr, Commissioner Diamond, and  
Commissioner Dudley at Richmond, Virginia, on September 27, 2000.

This case is before the Commission on the request by Dr. Todd Berner (hereinafter "Dr. Berner") and Primary Care for Women, P.C. (hereinafter "Primary Care"), for Review of the Deputy Commissioner's April 28, 2000, Opinion finding that the Commission lacks jurisdiction over Primary Care; that Primary Care fails to qualify as either a participating physician or a participating hospital under the Virginia Birth-Related Neurological Injury Compensation Act (hereinafter "the Act"); and that the April 1, 2000, amendments to, and reenactment of, Va. Code §§ 8.01-373.1 and 38.2-5000 are not to be applied retroactively to births occurring prior to enactment. For the reasons set forth, we affirm the Opinion of the Deputy Commissioner.

On May 28, 1998, Tara Mills gave birth to a son, Nelson Mills (hereinafter "the decedent"). The decedent was maintained on life support through June 7, 1998, at which time life support was discontinued and he died.

On April 1, 1999, the claimants, Scott and Tara Mills, filed a Motion for Judgment in Arlington County Circuit Court<sup>1</sup> against Dr. Berner and Primary Care seeking damages for (1) the wrongful death of the decedent; (2) the negligence of Dr. Berner; (3) the negligence of Primary Care; and (4) negligent infliction of emotional distress.

On July 1, 1999, Dr. Berner and Primary Care made a motion to refer the matter to the Virginia Workers' Compensation Commission pursuant to Va. Code § 38.2-5000, *et seq.* A January 4, 2000, Amended Order of Fairfax County Circuit Court referred the

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<sup>1</sup> By agreement of the parties, venue was later transferred to Fairfax County Circuit Court.

case to the Commission pursuant to Va. Code § 8.01-273.1 for the purpose of determining whether the cause of action satisfied the requirements of the Act.

On March 3, 2000, the Virginia Supreme Court issued an opinion in Fruiterman v. Waziri, 259 Va. 540, 525 S.E.2d 552 (2000), which held that professional corporations were not included in the expressly restrictive definition of those persons and entities which were immunized from tort liability by the Act for birth-related neurological injury caused by medical malpractice.

On March 23, 2000, the claimants filed a Motion to Remand the claim asserted against Primary Care to Fairfax County Circuit Court, relying on Fruiterman. The claimants also stated that they non-suited and withdrew all remaining claims against Dr. Berner and waived any claim they might have had under the Act. On April 6, 2000, Dr. Berner and Primary Care filed an Opposition to Plaintiff's Motion to Remand and for Nonsuit. On April 28, 2000, the Deputy Commissioner issued an Opinion in which she determined that the Commission did not have jurisdiction over Primary Care. The Deputy Commissioner remanded the cause of action against Dr. Berner to the Circuit Court to consider the claimants' March 23, 2000, nonsuit.<sup>2</sup>

On April 1, 2000, Virginia's Governor signed House Bill 398, which amended Va. Code §§ 8.01-273.1 and 38.2-5001. The amendment to § 8.01-273.1(A) is reflected by italics:

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<sup>2</sup> Neither party appealed the Deputy Commissioner's decision to remand the cause of action against Dr. Berner to consider the non-suit dated March 23, 2000. Therefore, this issue is not before the Commission.

- A. In any civil action, where a party, *who is a participating hospital or physician as defined in § 38.2-5001*, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; *provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than 120 days after the date of filing a grounds of defense by the party seeking the referral.*<sup>3</sup>

The amendment to Va. Code § 38.2-5001 broadened the definition of "participating physician" to include "a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices." In 2000 Va. Acts, chapter 207, clause 1, it is noted "that the provisions of this act amending § 38.2-5001 are declaratory of existing law." Clause 2 states "that an emergency exists and this act is in force from its passage."

On May 16, 2000, Dr. Berner and Primary Care requested Review of the April 29, 2000, Opinion. A Schedule for Written Statements was issued on May 25, 2000. On June 9, 2000, Judith B. Henry, Esquire, of Crews and Hancock, P.L.C., submitted an *amicus curiae* brief on behalf of her client, Doctors Insurance Reciprocal (Risk Retention Group) (hereinafter "DIR"). A motion for leave to file the brief was also submitted. In its written statement, the claimants objected to DIR's submission of an *amicus* brief. The

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<sup>3</sup> The legislature also created a new subsection B, which is not germane to the case at bar.

Rules of the Commission do not address the issue of *amicus* briefs. Rule 5:30(a)(3) of the Rules of the Virginia Supreme Court provides that an *amicus curiae* brief may be filed on motion, which may be accompanied by the proposed brief and the consent of the Court. The *amicus* brief was filed on the date on which the brief of the party it supports, the defendants, was required to be filed. Since the *amicus* brief comports with the Rules of the Supreme Court, the Commission will consider it on Review. The claimants were provided with a copy of the *amicus* brief in accordance with the defendant's briefing schedule. Therefore, the claimants' request for additional time to respond to the *amicus* brief is denied.

The sole issue before the Commission is whether it has jurisdiction over Primary Care. The claimants argue that before April 1, 2000, professional corporations were not included in the definition of participating physicians under Va. Code § 38.2-5001. They further contend that since their cause of action accrued and their motion for judgment was filed before April 1, 2000, the Commission does not have jurisdiction over Primary Care. The defendants argue that the changes enacted by the legislature in Chapter 207 on April 1, 2000, are merely declaratory of the law that has been in existence since 1987 when the General Assembly created the Act. The claimants counter that the April 2000 legislative action affects substantive rights; i.e., it takes away an existing cause of action against Primary Care. It is their position that the amendments are not declaratory, but an attempt to apply new law retroactively. The claimants contend that an amendment cannot be applied retroactively if, as in this case, it affects the substantive

rights of the parties. Furthermore, the claimants argue that even if the legislature could have mandated retroactive application of the amendment, it failed to do so.

The facts of the Fruiterman case are directly on point with the case at bar. The plaintiffs in Fruiterman filed a medical malpractice/wrongful death claim against the defendant physician and the defendant professional corporation. The trial court, applying the Act, sustained Dr. Fruiterman's demurrer, but denied the professional corporation's demurrer on the ground that the Act did not apply to professional corporations. The Virginia Supreme Court noted that the expressly restrictive definitions set forth in the Act limit those who are entitled to apply for the rights and remedies contained therein. Applying the proposition that "where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed," Fruiterman, 259 Va. 540, 544, 525 S.E.2d 552, 554; *quoting* Watkins v. Hall, 161 Va. 924, 930, 172 S.E.2d 445 447 (1934); the Court concluded that "clearly, the General Assembly did not intend to immunize all health-care providers from tort liability" under the Act. Id. The Court then held that a professional corporation, which was conspicuous by its absence in the text of the Act, was purposefully omitted from seeking immunity under the Act, and the plaintiff in Fruiterman was able to pursue the medical malpractice wrongful death action against the professional corporation.

In direct response to Fruiterman, the General Assembly enacted the legislation at issue. In 2000 Va. Acts, chapter 207, clause 3, it states that an emergency exists and that



this Act is in force from its passage, which clearly reflects that the legislature intended that the amendments take effect immediately, as opposed to 90 days after the adjournment of the session of the General Assembly at which it was passed.

Chapter 207, clause 2, which contains the statement that the amendments are “declaratory of existing law”, reflects the General Assembly’s intent that the legislation be effective retroactively. However, whether the statute was intended to have retrospective effect is a question governed by the rules of statutory construction. Fletcher v. Tarasidis, 219 Va. 658, 661, 250 S.E.2d 739 (1979).

The change enacted by the legislature on April 1, 2000, is procedural in nature. It changed the forum in which a cause of action of a person who incurred a birth-related neurological injury and died as a result thereof, against a participating professional corporation, is heard from the Circuit Court to the Workers’ Compensation Commission. The question is whether the procedural action by the legislature also affects the substantive rights of the parties. We find that it does.

The change effectuated by the legislature on April 1, 2000, did more than change the forum in which the cause of action may be heard. In this regard, this case is distinguishable from Walke v. Dallas, 209 Va. 32, 161 S.E.2d 722 (1968), cited by the defendants in support of their argument that amendments to jurisdictional statutes can be applied retroactively. In Walke, the Virginia Supreme Court found that the newly-enacted Virginia “long arm” statutes merely supplied a remedy to enforce an existing right. Id. at 35, 161 S.E.2d at 724. The Supreme Court specifically noted that the statutes created no

new cause of action, nor did they take away an existing right. In the case at bar, the new legislation does not merely change the remedy or means by which a right is enforced; it changes the right itself.

The new legislation substitutes a wrongful death action in tort for a no-fault cause of action under the Act. Va. Code § 8.01-50 provides a cause of action for the death of a person caused by "the wrongful act, neglect, or default of any person or corporation, . . . [when] the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action . . . ." The purpose of the Death by Wrongful Act statute is to compensate a decedent's statutory beneficiaries for their loss resulting from the decedent's death. In contrast, the Act provides an exclusive no-fault cause of action against participating entities under the statute, as long as the decedent sustained a birth-related neurological injury as defined in Va. Code § 38.2-5001 and a participating physician provided obstetrical services at the birth or the birth occurred in a participating hospital. The purpose of the Act was to make medical malpractice insurance coverage available to licensed physicians. See King v. Virginia Birth-Related Neurological Injury Compensation Program, 242 Va. 404, 410 S.E.2d 656 (1991).

The claimants had a substantive right to sue Primary Care in a wrongful death action in tort as of June 8, 1998, the date of the decedent's death. The Virginia Supreme Court has noted that "the rights of the plaintiff and defendant under the [wrongful death] statutes became fixed at the time the cause of action accrued and subsequent amendments do not apply retroactively." Riddett v. Virginia Electric and Power Company,

255 Va. 23, 28-29. 495 S.E.2d 819, 822 (1998), *citing* Barksdale v. H. O. Engen, Inc., 218 Va. 496, 498-99, 237 S.E.2d 794, 796-97 (1977). Because the cause of action for wrongful death and the right to enforce it were created by statute, Horn v. Abernathy, 231 Va. 228, 237, 343 S.E.2d 318, 323 (1986), the statute in existence when these causes of action arose control the outcome of this case. Dodson v. Potomac Mack Sales and Services, Inc., 241 Va. 89, 92, 400 S.E.2d 178, 180 (1991).

Therefore, we find that the April 1, 2000, legislative amendments, while procedural in nature, affect the substantive rights of the parties who had the right to file a cause of action and did file a cause of action in tort against Primary Care before April 1, 2000. Thus, we hold that the amendments do not apply retroactively to the claimants' suit.

Accordingly, the Deputy Commissioner's Opinion is AFFIRMED.

#### APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within 30 days of receipt.

cc: Elinor J. Pyles, Executive Director  
Virginia Birth-Related Neurological Injury Compensation Program  
7400 Beaufont Springs Drive  
Suite 425  
Richmond, VA 23225

The Honorable Stanley P. Klein  
Judge's Chambers  
Circuit Court of Fairfax County  
4110 Chain Bridge Road  
Fifth Floor  
Fairfax, VA 22030

VIRGINIA:

IN THE WORKERS' COMPENSATION COMMISSION, VIRGINIA

SCOTT and TARA MILLS,  
Co-administrators of the Estate of  
NELSON MILLS, (deceased infant  
complainant),

v.

VWC File No. B-00-06

TODD BERNER, M.D.,  
and  
PRIMARY CARE FOR WOMEN, P.C.,

Defendants.

NOTICE OF APPEAL

COME NOW the Defendants, Todd Berner, M.D. and Primary Care for Women, P.C., by counsel, pursuant to VA. CODE ANN. §38.2-5011 (Michie 1987, as amended 1989) and Rule 5A:11 of the RULES OF THE SUPREME COURT OF VIRGINIA, and hereby appeal to the Court of Appeals of Virginia from the April 20, 2001 Opinion of the Full Commission of the Virginia Workers' Compensation Commission.

TODD BERNER, M.D., and  
PRIMARY CARE FOR WOMEN, P.C.  
By Counsel

McCARTHY & MASSEY, P.C.  
9315 Center Street, Suite 104  
Manassas, Virginia 20110  
Telephone (703) 330-2726  
Facsimile (703) 330-2429

By: Tara M. McCarthy (VSB #22223)  
Susan L. Mitchell (VSB #37789)

## CERTIFICATE

1. The names and address of the appellants are: Todd Berner, M.D. and Primary Care for Women, P.C., 5203 Leesburg Pike, Suite 609, Falls Church, Virginia 22041.


2. The names, address and telephone number of counsel for the appellants are: Tara M. McCarthy, Attorney-at-Law and Susan L. Mitchell, Attorney-at-Law, MCCARTHY & MASSEY, P.C., 9315 Center Street, Suite 104, Manassas, Virginia 20110, (703) 330-2726.

3. The names and address of appellees are: Scott and Tara Mills, Co-Administrators of the Estate of Nelson Mills, deceased infant complainant, 11016 Del Mar Court, Fairfax, Virginia 22030.

4. The names, address and telephone number of counsel for the appellees are: Robert T. Hall, Esquire and Donna Miller Rostant, Attorney-at-Law, HALL & SICKELS, P.C., 12120 Sunset Hills Drive, Suite 150, Reston, Virginia 20190-3231, (703) 925-0500.

5. The name, address and telephone number of counsel for the Virginia Birth-Related Neurological Injury Program are: John J. Beall, Jr., Esquire, Senior Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219, (804) 786-2071.

6. A copy of this Notice of Appeal has been mailed or delivered to all opposing counsel and to the Clerk of the Court of Appeals pursuant to Rule 5A:11(b) of the RULES OF THE SUPREME COURT OF VIRGINIA, this 16<sup>th</sup> day of May, 2001.



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Susan L. Mitchell

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## COURT OF APPEALS OF VIRGINIA

COPY

Present: Judges Willis, Agee and Senior Judge Overton  
Argued at Alexandria, Virginia

TODD BERNER, M.D. AND  
PRIMARY CARE FOR WOMEN, P.C.

v. Record No. 1298-01-4

OPINION BY  
JUDGE NELSON T. OVERTON  
MARCH 26, 2002

SCOTT AND TARA MILLS,  
CO-ADMINISTRATORS OF THE ESTATE  
OF NELSON MILLS, AND  
TARA MILLS, INDIVIDUALLY

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION

Susan L. Mitchell (Tara M. McCarthy;  
McCarthy & Massey, P.C., on briefs), for  
appellants.

Robert T. Hall (Holly Parkhurst Essing; Donna  
Miller Rostant; Hall & Sickels, P.C., on  
brief), for appellees.

Todd Berner, M.D. (Berner) and Primary Care for Women, P.C. (Primary Care) appeal a decision of the Workers' Compensation Commission ruling that it did not have jurisdiction over Primary Care under the Virginia Birth-Related Neurological Injury Compensation Act ("the Act"). Berner and Primary Care contend the commission erred in (1) refusing to apply the April 1, 2000 amendments to Code §§ 8.01-273.1 and 38.2-5001 retroactively to the present case; and (2) granting appellees a double recovery under the Act and the Death by Wrongful Act statutes where the

only viable theory of liability against Primary Care was respondeat superior. Finding no error, we affirm.

#### Background

On May 28, 1998, Tara Mills gave birth to a son, Nelson Mills ("the decedent"). The decedent remained on life support after his birth through June 7, 1998, at which time life support was discontinued and he died.

On April 1, 1999, Scott and Tara Mills filed a Motion for Judgment in the Arlington County Circuit Court ("the circuit court") against Berner and Primary Care seeking damages for the wrongful death of the decedent, the negligence of Berner, the negligence of Primary Care, and negligent infliction of emotional distress.

In a January 4, 2000 amended order, the circuit court referred the case to the commission pursuant to Code § 8.01-273.1 for the purpose of determining whether the cause of action satisfied the requirements of the Act.

On March 2, 2000, the Supreme Court issued an opinion in Jan Paul Fruiterman, M.D. and Assocs. v. Waziri, 259 Va. 540, 525 S.E.2d 552 (2000). In Fruiterman, the Supreme Court held that professional corporations were not included in the definition of those persons and entities that were immunized from tort liability by the Act for birth-related neurological injury caused by medical malpractice. Id. at 545, 525 S.E.2d 554. Therefore, the plaintiff in Fruiterman was able to pursue



the medical malpractice wrongful death action against the professional corporation. Id.

On March 23, 2000, relying upon Fruiterman, Scott and Tara Mills filed a Motion to Remand their claim against Primary Care to the circuit court. The Millses also represented that they moved to non-suit and withdraw all remaining claims against Berner and waive any claim they might have had under the Act. Berner and Primary Care opposed the motion to remand.

On April 28, 2000, the deputy commissioner issued an opinion finding that the commission did not have jurisdiction over Primary Care under the Act. As a result, the deputy commissioner remanded the Millses' cause of action against Berner to the circuit court for it to consider their March 23, 2000 motion to nonsuit as to Berner.

On April 1, 2000, the Governor of Virginia signed House Bill 398, which amended Code §§ 8.01-273.1 and 38.2-5001. As a result of those amendments, the definition of a "participating physician" subject to the Act was broadened to include "a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices." In 2000 Va. Acts, chapter 207, clause 1, the General Assembly noted "that the provisions of this act amending § 38.2-5001 are declaratory of existing law." Clause 2 stated "that an emergency exists and this act is in force from its passage."

On May 16, 2000, Berner and Primary Care requested review of the deputy commissioner's April 28, 2000 decision. On review, the commission held as follows:

[T]he April 1, 2000, legislative amendments, while procedural in nature, affect the substantive rights of the parties who had the right to file a cause of action and did file a cause of action in tort against Primary Care before April 1, 2000. Thus we hold that the amendments do not apply retroactively to the claimants' suit.

In so ruling, the commission recognized the following:

The change effectuated by the legislature on April 1, 2000, did more than change the forum in which the cause of action may be heard. . . . In the case at bar, the new legislation does not merely change the remedy or means by which a right is enforced; it changes the right itself.

The new legislation substitutes a wrongful death action in tort for a no-fault cause of action under the Act. Va. Code § 8.01-50 provides a cause of action for the death of a person caused by "the wrongful act, neglect, or default of any person or corporation, . . . [when] the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action . . . [.]". The purpose of the Death by Wrongful Act statute is to compensate a decedent's statutory beneficiaries for their loss resulting from the decedent's death. In contrast, the Act provides an exclusive no-fault cause of action against participating entities under the statute, as long as the decedent sustained a birth-related neurological injury as defined in Va. Code § 38.2-5001 and a participating physician provided obstetrical services at birth or the birth occurred in a participating hospital. The purpose of the Act was to make medical

malpractice insurance coverage available to licensed physicians.

The claimants had a substantive right to sue Primary Care in a wrongful death action in tort as of June 8, 1998, the date of the decedent's death. The Virginia Supreme Court has noted that "the rights of the plaintiff and defendant under the [wrongful death] statutes became fixed at the time the cause of action accrued and subsequent amendments do not apply retroactively." Because the cause of action for wrongful death and the right to enforce it were created by statute, the statute in existence when these causes of action arose control the outcome of this case.

(Citations omitted.)

I.

The commission did not err in refusing to apply the April 1, 2000 amendments retroactively. In reaching this decision, we are guided by certain well-accepted principles governing the retroactivity of statutes. The presumption in Virginia is against the retroactive application of statutes. Code § 1-16; Booth v. Booth, 7 Va. App. 22, 26, 371 S.E.2d 569, 572 (1988). "The intent of the General Assembly determines whether a statute will be applied [retroactively], but the general rule of statutory construction is that legislation only speaks prospectively." Id. at 26, 371 S.E.2d at 571-72. Moreover, "retroactive effect will be given to a statute only when legislative intent that a statute be so applied is stated in clear, explicit, and unequivocal terms; otherwise, a statute will be applied prospectively only and applied only to cases

that arise thereafter." Foster v. Smithfield Packing Co., 10 Va. App. 144, 147, 390 S.E.2d 511, 513 (1990).

These principles have been harmonized with the distinctions between substantive provisions of laws, which cannot be applied retroactively, and procedural or remedial statutes, which may be applied retroactively where a retroactive legislative intent is demonstrated.

In [Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984)], the Supreme Court stated that substantive rights are addressed in statutes which create duties, rights, or obligations. In contrast, the Court explained that procedural or remedial statutes merely set forth the methods of obtaining redress or enforcement of rights.

In order for [the statute] . . . to apply retroactively, therefore, it must be procedural in nature and affect remedy only, disturbing no substantive or vested rights. The statute must also contain an expression of [retroactive] legislative intent.

Cohen v. Fairfax Hosp. Ass'n, 12 Va. App. 702, 705, 407 S.E.2d 329, 331 (1991) (citations omitted).

Here, the General Assembly did not clearly, explicitly and unequivocally state that the April 1, 2000 amendments were to be applied retroactively to causes of action that accrued before April 1, 2000. Its statement that the amendments were declaratory of existing law and that they were in force from their passage, did not clearly, explicitly and unequivocally provide that the amendments were to be applied retroactively to causes of action that accrued prior to April 1, 2000. In the

absence of such a statement, the amendments apply only to cases that arose after their enactment.

Furthermore, retroactive application of the amendments would impermissibly disturb substantive or vested rights. Prior to April 1, 2000, the Millses' cause of action against Primary Care had accrued and they had a substantive right to file suit against Primary Care in the circuit court under the Wrongful Death statute, and had, in fact, done so. If the amendments were applied retroactively, that substantive and vested right would be taken away and substituted with the right to proceed against Primary Care under the Act. As the commission found, the amendments are more than a mere change in forums; they change the right itself.

Accordingly, we find that the commission did not err in refusing to apply the April 1, 2000 amendments retroactively, and in following Fruiterman to hold that it did not have jurisdiction under the Act over Primary Care, a professional corporation.

## II.

On appeal, Berner and Primary Care argue that the commission erred in granting the Millses a "double recovery" where the only viable theory of liability against Primary Care is respondeat superior. Berner and Primary Care did not make this specific "double recovery" argument before the full commission on review in its written statement or its reply to

the Millses' written statement. Thus, this issue was not considered by the full commission. Accordingly, we will not consider this argument on appeal. See Green v. Warwick Plumbing & Heating Corp., 5 Va. App. 409, 413, 364 S.E.2d 4, 6 (1988); Rule 5A:18.

For these reasons, we affirm the commission's decision.

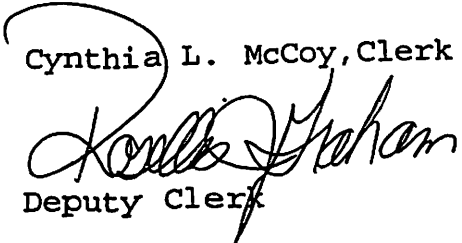
Affirmed.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:

  
Deputy Clerk

COPY

**VIRGINIA:**

*In the Court of Appeals of Virginia on Tuesday the 26th*  
*day of March, 2002.*

Todd Berner, M.D. and  
Primary Care for Women P.C.,

Appellants,

against Record No. 1298-01-4  
Claim No. B-00-06

Scott and Tara Mills,  
Co-Administrators of the Estate  
of Nelson Mills, and Tara Mills,  
Individually,

Appellees.

From the Virginia Workers' Compensation Commission

Before Judges Willis, Agee and Senior Judge Overton

For reasons stated in writing and filed with the record,  
the award appealed from is affirmed. The appellants shall pay to the  
appellees thirty dollars damages.

This order shall be certified to the Virginia Workers'  
Compensation Commission.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: This mandate of the Court of Appeals of  
Virginia has not yet been certified to  
the VWCC, pursuant to Rule 5A:31.

Deputy Clerk

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on* Monday the 28th day of October, 2002.

Todd Berner, M.D., et al.,

Appellants,

against

Record No. 021006

Court of Appeals No. 1298-01-4

Scott Mills, Co-Administrator of the  
Estate of Nelson Mills, et al.,

Appellees.

From the Court of Appeals of Virginia

Upon the petition of Todd Berner, M.D. and another an appeal is awarded them from a judgment rendered by the Court of Appeals of Virginia on the 26th day of March, 2002; upon the appellants, or some one for them, filing an appeal bond with sufficient security or an irrevocable letter of credit in the clerk's office of the Virginia Workers' Compensation Commission in the penalty of \$500, within 15 days from the date of the Certificate of Appeal, with condition as the law directs.

Reference is made to the said petition for the names of all the appellants and all the appellees involved in this appeal.

A Copy,

Teste:

  
Clerk



CERTIFICATE OF APPEAL

Pursuant to Rule 5:23, I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that on October 28, 2002 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the Court of Appeals of Virginia, the Virginia Workers' Compensation Commission, and to all counsel of record.

Given under my hand this 28th day of October, 2002.

  
Clerk

### **ASSIGNMENTS OF ERROR**

1. The Court of Appeals erred by affirming the Commission's refusal to apply the April 1, 2000 amendments to and re-enactment of VA. CODE ANN. §8.01-273.1 and VA. CODE ANN. §38.2-5001 to the present case. (J.A. at 103-04; Berner v. Mills, 2002 Va. App. Lexis 175, \*6).
2. The Court of Appeals erred in finding that the General Assembly did not clearly, explicitly and unequivocally state that the April 1, 2000 amendments to re-enactment of VA. CODE ANN. §8.01-273.1 and VA. CODE ANN. §38.2-5001 were to be applied retroactively to causes of action that accrued before April 1, 2000, a finding which is contrary to that made by the Commission. (J.A. at 256; Berner v. Mills, 2002 Va. App. Lexis 175, \*8).
3. The Court of Appeals erred in finding that retroactive application of the April 1, 2000 amendments to and re-enactment of VA. CODE ANN. §8.01-273.1 and VA. CODE ANN. §38.2-5001 would disturb some substantive or vested right of Mills. (J.A. at 103-04; Berner v. Mills, 2002 Va. App. Lexis 175, \*8-9).