2015

Virginia Practice Series: Tort and Personal Injury Law

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INTRODUCTION TO 2015 EDITION

This edition of Virginia Practice: Tort and Personal Injury Law continues with the same general organization as preceding editions, while also continuing to provide updated caselaw and statutory citations and analysis on the many facets of tort and personal injury law in Virginia.

Although Virginia tort and personal injury law has evolved over the course of centuries, each year brings new cases and statutes which clarify, supplement, modify, and in some cases even abrogate, long-standing legal authority. This past year was no exception. One of the more important cases decided during 2015 was the Supreme Court of Virginia’s decision in Shevlin Smith v. McLaughlin, 769 S.E.2d 7 (Va. 2015), addressing several previously unanswered questions of Virginia law in legal malpractice actions. (Although legal malpractice cases in Virginia are considered to be claims for “breach of contract,” we discuss legal malpractice in our work on tort and personal injury law because they nevertheless involve a number of tort concepts and defenses).

In Shevlin Smith v. McLaughlin, the Court held that an attorney cannot be held liable for failing to correctly predict the outcome of an unsettled legal issue. The Court further held that “collectability” of a judgment against the underlying defendant is relevant in a legal malpractice action, because a legal malpractice plaintiff’s damages for a lost claim can only be measured by the amount that could have actually been collected from the underlying defendant in the absence of the attorney’s negligence. On this issue, the Court held that the plaintiff does not have the burden of proving collectability; rather, the attorney defendant has the burden to plead and prove as an affirmative defense that the claim was not collectible. The Court in Shevlin Smith also held that recovery for legal malpractice in Virginia is limited to pecuniary loss, and does not include non-pecuniary loss such as mental anguish, emotional distress or humiliation. For the same reason, the Court held that a plaintiff suing his former criminal defense counsel for legal malpractice cannot recover non-pecuniary damages for his wrongful incarceration.
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