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# ELECTION OF REMEDIES IN THE TWENTY-FIRST CENTURY: *CENTRA HEALTH, INC. V. MULLINS*

*L. Steven Emmert* \*

## I. INTRODUCTION

For generations, Virginia plaintiff's attorneys pleading wrongful death cases have faced an unpleasant truth: Virginia law permits a recovery for either a wrongful death claim or a survival claim, but not both.<sup>1</sup> The rules of court permit *pleading* in the alternative, even if the claims are inconsistent with each other,<sup>2</sup> but it is clear that a plaintiff is entitled to only one *recovery*. In order to prevent redundant recoveries, trial courts require plaintiffs to elect between these two alternative claims.

The requirement of an election is by no means unique to personal injury cases. For example, a plaintiff suing for breach of a contract for the sale of land must elect between specific performance and a claim for damages.<sup>3</sup> A widow is entitled to sue to claim rights under her late husband's will, or she can elect to renounce the will and claim a statutory share of his augmented estate.<sup>4</sup> In these and similar situations, the plaintiff is not entitled to both ends of the bargain; she cannot, for example, compel the sale *and* receive damages because it did not occur. Otherwise, the plaintiff could find herself "in a better position than [she] would

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1. See *Lucas v. HCMF Corp.*, 238 Va. 446, 449, 384 S.E.2d 92, 94 (1989).

2. VA. SUP. CT. R. 1:4(k) (Repl. Vol. 2009) ("A party may also state as many separate claims or defenses as he has regardless of consistency . . ."); see also VA. CODE ANN. § 8.01-281 (Repl. Vol. 2007) (permitting the pleading of "alternative facts and theories of recovery.").

3. See *Jennings v. Realty Developers, Inc.*, 210 Va. 476, 482, 171 S.E.2d 829, 834 (1970).

4. VA. CODE ANN. § 64.1-13 (Repl. Vol. 2007).

have enjoyed had the contract been performed as expected," a result the law will not countenance even for a wronged plaintiff.<sup>5</sup>

In the realm of torts, the election doctrine allows a single recovery under two mutually exclusive rights of action. But sometimes these alternate theories call for different evidence of damages. In a wrongful death suit, the claim is made on behalf of the beneficiaries of the estate, to compensate them for the loss of the decedent.<sup>6</sup> Evidence of damages generally focuses on solace, funeral expenses, and loss of financial support.<sup>7</sup> In a survival action, the claim is that of the decedent, brought to recover for his injuries before he died; evidence of damages usually comprises expert testimony on things such as the likely pain the decedent suffered before he died.<sup>8</sup>

The statutory framework provides that these rights of action are alternates, not complements. The survival statute entitles a decedent's survivors to continue to press his suit if he dies while the case is pending.<sup>9</sup> The Wrongful Death Act provides a remedy for the death.<sup>10</sup> If the decedent dies from causes unrelated to the wrongful act, then the survival claim is the only one that can be maintained. If he dies as a result of the wrongful act, then the action must be amended to state a claim for wrongful death.<sup>11</sup> Thus, as long as the plaintiff knows whether the injury caused the death or not, the decision is easy.

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5. *Nichols Constr. Corp. v. Va. Machine Tool Co.*, 276 Va. 81, 90, 661 S.E.2d 467, 472 (2008).

6. *See* VA. CODE ANN. § 8.01-50 (Repl. Vol. 2007).

7. *Id.* § 8.01-52 (Repl. Vol. 2007). Section 8.01-52 specifies five categories of damages that may be recovered in wrongful death cases. The list is not exclusive, but the decedent's pre-death pain and suffering has never been regarded as a compensable item in such a claim. *See* *Breeding v. Johnson*, 208 Va. 652, 659-60, 159 S.E.2d 836, 842 (1968).

8. The former survival statute provided that "[n]o cause of action for injuries to person or property shall be lost because of the death of the person in whose favor the cause of action existed, provided, however, in such action no recovery can be had for mental anguish, pain or suffering." VA. CODE ANN. § 8-628.1 (Repl. Vol. 1957) (superseded). This final clause does not appear in the current survival statute, and modern practice virtually always includes the decedent's pain and suffering as the principal component of damages in survival claims. *See id.* § 8.01-25 (Repl. Vol. 2007).

9. *Id.* § 8.01-25 (Repl. Vol. 2007).

10. *Id.* § 8.01-50 (Repl. Vol. 2007).

11. *Id.* § 8.01-56 (Repl. Vol. 2007).

## II. THE *CENTRA HEALTH* CASE

So what does a plaintiff do if the cause of death is in dispute in the case? The Supreme Court of Virginia confronted that issue in *Centra Health, Inc. v. Mullins*.<sup>12</sup> There, an eighty-four-year-old patient was admitted to a Lynchburg hospital and received negligent care during and after surgery to repair a broken hip.<sup>13</sup> The patient stayed in the hospital for nine days before being released to a nursing home to continue his recovery.<sup>14</sup> But he was brought back to the hospital the next day, eventually slipped into a coma, and died eighteen days after the operation.<sup>15</sup> His personal representatives sued for medical malpractice, asserting wrongful death and survival claims in the same complaint.<sup>16</sup>

The hospital denied negligence, and it also denied that the patient's death was proximately caused by its care for the elderly, infirm man.<sup>17</sup> It contended that his broken hip, in combination with his "very debilitated, chronically ill" condition, was the ultimate cause of death.<sup>18</sup> Citing *Hendrix v. Daugherty*, the hospital called for the administrators to elect which action to pursue at trial, since they could not recover for both survival claims and wrongful death.<sup>19</sup>

### A. *Hendrix v. Daugherty*

*Hendrix* was a legal malpractice suit brought against attorneys who missed a statute of limitations in similar circumstances.<sup>20</sup> The attorneys had asserted wrongful death and survival claims, both alleging medical negligence by a hospital and a products liability claim against a manufacturer, arising out of the death of a

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12. 277 Va. 59, 63, 670 S.E.2d 708, 709 (2009).

13. *Id.* at 64, 670 S.E.2d at 709.

14. *Id.*

15. *Id.* at 64, 81, 670 S.E.2d at 709–10, 719.

16. *Id.* at 64, 670 S.E.2d at 710.

17. *Id.*

18. Trial Transcript at 79, 81, *Centra Health, Inc. v. Mullins*, 277 Va. 59, 670 S.E.2d 708 (2009) (No. 080008).

19. *Centra Health*, 277 Va. at 64–65, 670 S.E.2d at 710 (citing *Hendrix v. Daugherty*, 249 Va. 540, 547, 457 S.E.2d 71, 75 (1995)).

20. *Hendrix*, 249 Va. at 542–43, 457 S.E.2d at 72–73.

child.<sup>21</sup> The parents later sued the attorneys, claiming that but for his missing the statute of limitations, they would have recovered for the injuries to, or the death of, their son.<sup>22</sup>

One major issue in the appeal was whether the parents would have to elect between presenting a legal malpractice claim based on the wrongful death claim or one based on the survival claim.<sup>23</sup> The supreme court resolved the issue in this manner:

The plain language contained in Code §§ 8.01-25 and -56 unequivocally mandates that a person may not recover for the same injury under the survival statute and the wrongful death statute. There can be but one recovery. Hence, the plaintiffs in this action, as a matter of law, could not have recovered in the underlying tort action against defendants on both theories of wrongful death and survival. Therefore, it necessarily follows that in the present action, at an appropriate time after discovery has been completed, the plaintiffs must be required to elect whether they will proceed against the defendant attorneys on the theory that the attorneys breached a duty owed to the plaintiffs in the prosecution of the wrongful death action or breached a duty owed to the plaintiffs in the prosecution of the survival action.<sup>24</sup>

### B. *Centra Health Trial Proceedings*

Ever since *Hendrix*, tort lawyers have abided by the premise that an election had to be made in a medical malpractice case at some point after the completion of discovery. But the administrators of Mullins's estate refused to agree that they could not present both claims at trial; they wanted to ask the jury to resolve the factual dispute over cause of death.<sup>25</sup> After all, they reasoned, if the jury is to decide whether the hospital's negligence caused the death, why should we have to run the risk of guessing incorrectly?<sup>26</sup>

The administrators found a sympathetic ear in the trial court. The judge, buoyed by a number of circuit court decisions that had permitted claimants to proceed to trial on both theories in this

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21. *Id.* at 542, 457 S.E.2d at 73.

22. *Id.* at 543, 457 S.E.2d at 73.

23. *Id.* at 546, 457 S.E.2d at 75.

24. *Id.* at 547, 457 S.E.2d at 75-76.

25. *Centra Health, Inc. v. Mullins*, 277 Va. 59, 64-65, 670 S.E.2d 708, 710 (2009).

26. *Id.* at 65, 670 S.E.2d at 710.

situation,<sup>27</sup> refused to require a pretrial election because “the jury can determine causation.”<sup>28</sup> Instead, the trial court permitted both sides to adduce expert testimony at trial on the question of whether the hospital’s acts caused the patient’s death.<sup>29</sup>

At first glance, this ruling seemed to indicate a departure from the *Hendrix* doctrine. Here, the court evidently was not requiring a post-discovery election at all, and was permitting the administrators to present both claims to the jury. This, the hospital pointed out, would lead to the introduction of otherwise inadmissible evidence.<sup>30</sup> For example, in a survival claim, evidence of the survivors’ mental anguish is immaterial and therefore inadmissible; in a wrongful death claim, evidence of the decedent’s suffering is similarly inadmissible.<sup>31</sup> In addition to their expert testimony on causation, the administrators presented both types of damage evidence in their case-in-chief.<sup>32</sup>

The trial judge addressed this problem by carefully instructing the jury on the difference between the two causes of action, and then telling it how to evaluate the two claims:

I will go over it again, but instruction sixteen we call the wrongful death damages. Instruction seventeen is the survival damage instruction. They are effectively going to be mutually exclusive. If you decide to award damages, you can do it under one.

If you find negligence caused the death, you can do it under that. If you find it just caused the injury, you can do it under seventeen, but you can’t do both. You’ve got to choose. That’s a jury issue for y’all to resolve, and you have to determine one or the other.<sup>33</sup>

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27. *Id.*, 670 S.E.2d at 710; *see, e.g.*, *Williams v. Med. Facilities of Am.*, 75 Va. Cir. 416, 417 (Cir. Ct. 2005) (Virginia Beach City) (“Whether the defendants’ negligence caused injuries or death is a fact for the jury to determine. It would be unjust to force a plaintiff to choose one theory of recovery only to discover that the jury reached the opposite conclusion. Plaintiff would be left without a remedy even though the defendant was found to be at fault. While Plaintiff is permitted to proceed both on a survivorship and wrongful death claim, Plaintiff will recover on only one theory.”). Circuit court cases on both sides of this issue are collected in a footnote to the *Centra Health* opinion. *See* 277 Va. at 77 n.6, 670 S.E.2d at 717 n.6.

28. Transcript of Motions Hearing at 14–15, *Centra Health*, 277 Va. 59, 670 S.E.2d 708 (No. 080008).

29. *Centra Health*, 277 Va. at 65, 68, 670 S.E.2d at 710, 712.

30. Transcript of Pretrial Hearing at 3–6, *Centra Health*, 277 Va. 59, 670 S.E.2d 708 (No. 080008).

31. *See, e.g.*, *Breeding v. Johnson*, 208 Va. 652, 659–60, 159 S.E.2d 836, 842 (1968).

32. *Centra Health*, 277 Va. at 68, 670 S.E.2d at 712.

33. Trial Transcript, *supra* note 18, at 111.

Having considered conflicting testimony from the parties' medical expert witnesses on the cause of death, the jury found that the hospital was negligent, and that its negligence caused injuries to the patient, but not his death.<sup>34</sup> The jury returned a verdict in favor of the administrators, on the survival claim only, for \$325,000.<sup>35</sup> The trial court denied the hospital's post-verdict motions and entered judgment in accordance with the verdict.<sup>36</sup>

On appeal, the question of when, exactly, an election would be required was squarely before the supreme court:

Since deciding *Hendrix*, we have not been afforded the opportunity to address further the circumstances that would constitute the "appropriate time after discovery has been completed" at which a circuit court must require an election between a survival personal injury claim and a wrongful death claim. Nor have we specifically addressed whether there can be circumstances in which that "appropriate time" might be after the trier of fact has resolved disputed issues of liability. However, as the parties noted in the circuit court and on brief in this appeal, a number of circuit court cases tried since *Lucas* have dealt with these and related issues, but without any consistent agreement as to when and under what circumstances an election of remedy would be required. The facts and the procedural posture of the present case, therefore, provide this Court with the opportunity to address directly the issues left unresolved by *Lucas*,<sup>37</sup> *Bulala*,<sup>38</sup> and *Hendrix*.<sup>39</sup>

### C. *Centra Health in the Supreme Court of Virginia*

On brief and in oral argument, the hospital contended that a plain reading of *Hendrix* mandated an election at some point after discovery.<sup>40</sup> It noted that if a plaintiff could indeed present both claims to the jury, then the result in *Hendrix* would have been different, since the legal malpractice plaintiffs in that case simply could have presented both theories at trial, and invited

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34. *Centra Health*, 277 Va. at 71, 670 S.E.2d at 713.

35. *Id.*

36. *Id.* at 71-72, 670 S.E.2d at 713-14.

37. *Lucas v. HCMF Corp.*, 238 Va. 446, 384 S.E.2d 92 (1989).

38. *Bulala v. Boyd*, 239 Va. 218, 389 S.E.2d 670 (1990).

39. *Centra Health*, 277 Va. at 76-77, 670 S.E.2d at 717.

40. *Id.* at 76-78, 670 S.E.2d at 717-18.

the jury to select the better one.<sup>41</sup> It argued that an election after verdict was in effect no election at all.<sup>42</sup>

The administrators responded by noting that, in *Hendrix*, when the defense had moved for an election in the medical malpractice action, the plaintiff's attorneys had agreed to do so without disputing whether a pretrial election was required.<sup>43</sup> That meant that any objection to the election would be regarded as invited error,<sup>44</sup> and the supreme court was not free to revisit the need for such an election when the *legal* malpractice claim came up for consideration.<sup>45</sup>

The administrators also argued that the hospital had, in this instance, created the dispute by denying that its actions led to the death.<sup>46</sup> Hospitals, they reasoned, should not be empowered to "require a plaintiff to jettison one potentially meritorious theory of recovery in order to get to trial."<sup>47</sup> They contended that the Constitution of Virginia consigns factual determinations to juries,<sup>48</sup> so the jury should be permitted to resolve the ultimate issue in this dispute.<sup>49</sup>

In deciding the issue, the court noted that its directive in *Hendrix*—that an election should take place "at an appropriate time after discovery has been completed"—does not require that that "appropriate time" must be *before* the jury resolves the facts:

Contrary to Centra Health's contention, we did not hold in *Hendrix* that a plaintiff would always be required to elect between remedies prior to trial. Rather, the election is required only at a time when the record sufficiently establishes that the personal injuries and the death arose from the same cause. In this particular case, the circuit court correctly determined that compelling an election would put the administrators in the untenable, and manifestly unjust, position of

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41. Brief of Appellant at 18–19, *Centra Health*, 277 Va. 59, 670 S.E.2d 708 (No. 080008).

42. *Id.*

43. Brief of Appellees at 8, *Centra Health*, 277 Va. 59, 670 S.E.2d 708 (No. 080008).

44. *Wright v. Norfolk & W. Ry. Co.*, 245 Va. 160, 170, 427 S.E.2d 724, 729 (1993) ("[A] litigant will not be permitted to invite a trial court to commit error, either through agreeing or failing to object, and then be permitted to successfully complain of such error on appeal.")

45. Brief of Appellees, *supra* note 43, at 8.

46. *Centra Health*, 277 Va. at 65, 670 S.E.2d at 710.

47. Brief of Appellees, *supra* note 43, at 9.

48. VA. CONST. art. I, § 11.

49. Brief of Appellees, *supra* note 43, at 9.



having to elect between two potentially viable claims, which Centra Health was contesting on separate and independent grounds. Under those circumstances, there was no "appropriate time" prior to trial at which compelling an election would not have prejudiced the administrators and, consequently, unfairly benefited Centra Health.<sup>50</sup>

#### D. *The "Centra Health Doctrine"*

To the extent there will be a lasting "*Centra Health* doctrine," this is it. This calculus was precisely what the administrators had sought, and it is the heart of the court's holding in the case; from here, the remainder of the court's rulings flow inevitably. This ruling sweeps aside the previous notions of most tort lawyers, who had come to regard *Hendrix's* mandate of an election "after discovery" as meaning "before trial." Legal literature before *Centra Health* had presumed that the two claims could not be tried together.<sup>51</sup>

This does not mean, however, that plaintiffs will always be permitted to intermingle their survival and wrongful death claims before juries. First and foremost, if there is no dispute as to the cause of death, this situation will not arise. If the parties agree that the decedent died from the condition asserted in the complaint, then only a wrongful death claim will be viable.<sup>52</sup> The reverse is also true—if the parties agree that death ensued from extrinsic conditions, then only a survival action can be presented.<sup>53</sup>

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50. 277 Va. at 79, 670 S.E.2d at 718.

51. See, e.g., K. Sinclair & L. B. Middleditch, *Virginia Civil Procedure* § 4.9 (4th ed. 2003) ("[I]t is doubtful that a wrongful death action and an action pursuant to § 8.01-25 may be joined.") (cited in Brief of Appellant, *supra* note 41, at 16).

52. This issue was addressed in an amicus curiae brief filed in the case by the Virginia Trial Lawyers Association:

In many cases the 'appropriate time' will be the completion of discovery. For example, responses to Requests for Admission, expert designations, and stipulations may show that the nature of the injury, whether it be wrongful death or personal injury, is not in dispute. In those cases it may be proper for the trial court to order the plaintiff to elect a remedy.

Brief for Virginia Trial Lawyers Ass'n as Amicus Curiae Supporting Appellees at 7, *Centra Health*, 277 Va. 59, 670 S.E.2d 708 (No. 080008). The administrators also conceded before trial that if the cause of death were uncontroverted, they would be required to elect. Transcript of Motions Hearing, *supra* note 28, at 8 ("The cause of death is contested. If they stipulated to the cause of death, it would be uncontested and then there would be a wrongful death action for those injuries that caused death.")

53. See *Centra Health*, 277 Va. at 79, 670 S.E.2d at 718.

Second, the supreme court suggests bifurcation as an appropriate vehicle to deal with situations where the cause of death is contested.<sup>54</sup> Bifurcation removes the possibility of any danger from the introduction of improper damage evidence.<sup>55</sup> This suggestion is likely to be more happily received by the defense bar than by plaintiff's lawyers, as both groups know that, regardless of cautionary instructions, it is virtually impossible for jurors to completely divorce their evaluation of liability from their view of the plaintiff's injuries.<sup>56</sup> Bifurcation was not an issue in the *Centra Health* case because the hospital did not request it at trial, but this opinion puts every defense attorney on notice.

Not all judges will be eager to bifurcate trials, as they may perceive that bifurcation lengthens the trial process. In circumstances where the judge does not bifurcate, careful instruction to the jury may suffice to eliminate the possible influence of evidence of the "other" type of claim.<sup>57</sup> Defense attorneys would probably be well-advised to object to simple jury instruction since bifurcation will work better in almost all instances from the defense perspective. But the argument in favor of relying on detailed instructions is persuasive; trial courts commonly instruct juries to disregard certain elements of testimony, or even classes of evidence—such as when one claim in a civil suit, or one count in a criminal indictment, has been dismissed on a motion to strike.<sup>58</sup>

Third, some defendants may be able to persuade the trial judge that the admission of both kinds of evidence in a particular case would be so prejudicial as to justify an election. In that event, the argument would be based on an underlying evidentiary ruling

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54. *Id.* at 78, 670 S.E.2d at 718 ("Indeed, in a case where there is any doubt as to when compelling an election would be proper, bifurcation is the most practical means to assure that each party receives a fair opportunity to present their case to the jury without prejudice to the other.").

55. *Id.*

56. See, e.g., J. Alexander Tanford, *Thinking About Elephants: Admonitions, Empirical Research and Legal Policy*, 60 UMKC L. REV. 645, 645–46 (1992).

57. The jury is presumed to heed admonitions to disregard stricken evidence. *Stump v. Doe*, 250 Va. 57, 62, 458 S.E.2d 279, 282 (1995).

58. See, e.g., *Kroger Grocery & Baking Co. v. Dunn*, 181 Va. 390, 392–93, 25 S.E.2d 254, 255–56 (1943) (citing *Bourne v. Richardson*, 133 Va. 441, 455, 113 S.E. 893, 898 (1922)) ("A judgment ought not to be reversed for the admission of evidence or for a statement of counsel which the court afterwards directs the jury to disregard unless there is a manifest probability that the evidence or statement has been prejudicial to the adverse party.").

that the evidence is more prejudicial than probative,<sup>59</sup> thus placing the onus on the plaintiff to decide which claim to present to the jury. But it would require truly remarkable circumstances to convince a trial judge to bypass the option of bifurcation—which the supreme court has specifically recommended—and order an election in the wake of *Centra Health*.<sup>60</sup>

### III. ANALYSIS OF THE DECISION

Most lawyers reading *Hendrix* would have assumed that requiring an election “at an appropriate time after discovery has been completed” means requiring an election before the case is tendered to the jury for decision.<sup>61</sup> Otherwise, it is not much of an election; it is more like a horse race in which you get to place your bets after all the riders cross the finish line. At that point, a defendant might grumble, and the whole concept of an “election” has been gutted. So what changed?

#### A. *First Thoughts*

First, and most obviously, the court changed. Of the seven justices who decided *Hendrix*, only two were still on the court fourteen years later when *Centra Health* arrived on the argument docket.<sup>62</sup> There is a very real possibility that the current makeup of the court is more equitable than were the current justices’ relatively recent forebears, but broad philosophical speculation like that is beyond the scope of this essay.

This explanation is probably too simplistic; two members of the *Hendrix* court stuck around long enough to decide *Centra Health*, and both decisions were unanimous.<sup>63</sup> Indeed, the *Hendrix* opinion was written by then-Justice, now-Chief Justice, Leroy Hassell.<sup>64</sup> Chief Justice Hassell is by no means a butterfly in terms of

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59. *Coe v. Commonwealth*, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986).

60. *See Centra Health, Inc. v. Mullins*, 277 Va. 59, 78, 670 S.E.2d 708, 718 (2009).

61. *Hendrix v. Daugherty*, 249 Va. 540, 547, 457 S.E.2d 71, 76 (1995).

62. Chief Justice Leroy R. Hassell and Justice Barbara M. Keenan were the two justices deciding both *Hendrix* and *Centra Health*. *Compare* *Justices of the Supreme Court During the Time of These Reports*, 249 Va. (1995), *with* *Justices of the Supreme Court During the Time of These Reports*, 277 Va. (2009).

63. *See generally Centra Health*, 277 Va. 59, 670 S.E.2d 708; *Hendrix*, 249 Va. 540, 457 S.E.2d 71.

64. *See Hendrix*, 249 Va. at 542, 457 S.E.2d at 72.

legal scholarship; changing his mind from a firmly expressed view like that in *Hendrix* is a significant undertaking. That leads to the conclusion that there is a qualitative difference between the two cases to distinguish the holdings.

In all likelihood, that difference does not arise from the different procedural postures (one appeal directly implicated medical malpractice, while the other did so only indirectly).<sup>65</sup> In a legal malpractice case such as *Hendrix*, a plaintiff must prove two elements—negligence and causation.<sup>66</sup> Often, as in *Hendrix*, proving negligence is child's play; the defendant's attorneys missed the statute of limitations, patently violating the standard of care.<sup>67</sup> Proof of causation (sometimes called the "case within the case"<sup>68</sup>) is more complex; the plaintiff must show that but for the lawyer's error, the plaintiff would have obtained a recovery.<sup>69</sup> This requires an examination of the merits of the underlying case in which the lawyer's alleged negligence occurred.<sup>70</sup> If the suit was a dead loser to begin with, then the lawyer's error did not cause the plaintiff any damages.<sup>71</sup>

In this context, the point at which election is ultimately required will probably be the same, or at least parallel, in both types of cases. That is, legal malpractice plaintiffs will be required to elect at the same point of the case in which a tort plaintiff would have been required to do so. In this respect, *Centra Health* probably gives legal malpractice plaintiffs a bit of serendipitous breathing space, at least in cases like this one where a key element of causation is disputed. The ruling unquestionably libe-

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65. Compare *Centra Health*, 277 Va. at 63, 670 S.E.2d at 709 (involving an appeal from a decision in a medical malpractice action), with *Hendrix*, 249 Va. at 542, 457 S.E.2d at 72–73 (involving an appeal from a judgment in a legal malpractice action based on an underlying medical malpractice action).

66. See, e.g., *Goldstein v. Kaestner*, 243 Va. 169, 172, 413 S.E.2d 347, 349 (1992).

67. See *id.* at 170–72, 413 S.E.2d at 348–49.

68. *Whitley v. Chamouris*, 265 Va. 9, 11, 574 S.E.2d 251, 252–53 (2003) ("The plaintiff must present virtually the same evidence that would have been presented in the underlying action. Similarly, the defendant is entitled to present evidence and assert defenses that would have been presented in the underlying action.")

69. *Duvall, Blackburn, Hale & Downey v. Siddiqui*, 243 Va. 494, 497, 416 S.E.2d 448, 450 (1992) ("An attorney is liable only for actual injury to his client and damages will be calculated on the basis of the value of what is lost by the client.")

70. See *Whitley*, 265 Va. at 11, 574 S.E.2d at 252–53.

71. *Id.*, 574 S.E.2d at 253 ("In order to show proximate cause and resulting damages, a plaintiff must present sufficient evidence to convince the fact finder in the malpractice case that he would have prevailed in the underlying case absent the attorney's alleged negligence.")

realizes the strict demands of the *Hendrix* opinion in legal malpractice cases.

### B. *Alternative Pleading*

In the supreme court, the parties addressed the question of whether the plaintiff should be required to risk a wrong guess on how the jury will view the evidence.<sup>72</sup> The administrators asserted that if an early election were required, a defendant could force a plaintiff to gamble.<sup>73</sup> Since, in this case, the need for an election was produced by the hospital's decision to contest the cause of death, the administrators argued that it was unfair to force that risk on them.<sup>74</sup> The hospital responded that the only way it could eliminate this risk was to assume risk of its own—for example, by admitting causation of death.<sup>75</sup> That would eliminate one primary problem from the defendant's perspective—the admissibility of damage evidence from the “other” type of claim—but it would make the defendant forgo its opportunity to win the case on the causation question.

The supreme court's opinion did not squarely address this question of economic theory, but its resolution of the case leaves no doubt of the court's sentiment on the matter. Explaining the earlier *Lucas* decision, it held that a plaintiff cannot be deprived of the opportunity to present and prove the claims she wishes to present.<sup>76</sup> In *Lucas*, the plaintiff brought a survival claim, but on cross-examination, the plaintiff's expert testified that the defendant's negligence “hastened” the death.<sup>77</sup> Technically, that made it a wrongful death claim, and the defendant accordingly moved immediately to dismiss.<sup>78</sup> The trial court granted that motion, but the supreme court reversed, holding that “[d]ismissal of the action prior to completion of her evidence deprived Lucas of [the op-

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72. Brief of Appellees, *supra* note 43, at 3, 9.

73. *Id.* at 9–10.

74. *Id.* at 9.

75. See Brief of Appellant, *supra* note 41, at 21.

76. *Centra Health, Inc. v. Mullins*, 277 Va. 59, 78, 79, 670 S.E.2d 708, 717, 718 (2009) (“[T]he plaintiff ought not be compelled to make the election without a full opportunity to develop its case . . . . [The early election requirement places the plaintiff in the] untenable, and manifestly unjust, position of having to elect between two potentially viable claims . . . .”).

77. *Lucas v. HCFM Corp.*, 238 Va. 446, 449, 384 S.E.2d 92, 93 (1989).

78. *Id.*

portunity to prove her survival claim] and, therefore, constituted error.”<sup>79</sup>

Interestingly, the issue of alternative pleading may have arisen in the *Lucas* trial court. But the matter was determined to have been procedurally defaulted, as it was not properly preserved for appeal;<sup>80</sup> it thus fell victim to the supreme court’s contemporaneous objection rule,<sup>81</sup> leaving the question of alternative claims for the *Centra Health* court.

### C. *Judicial Estoppel and Supreme Court Rule 1:6*

In the *Centra Health* briefs, both parties assumed that the requirement of an election would foreclose the possibility that the plaintiff could later pursue the “other” claim, perhaps in subsequent litigation, by nonsuiting the claim not chosen.<sup>82</sup> The hospital described wrongful death and survival claims as “mutually exclusive,” implying that a choice to proceed on one claim would work a judicial estoppel to present the other separately.<sup>83</sup> The administrators described the effect of a required election in even starker terms: “As the trial court recognized, where the defendant contests the cause of death, it is fundamentally unfair to require a plaintiff to jettison one potentially meritorious theory of recovery in order to get to trial.”<sup>84</sup>

Judicial estoppel is unlikely to bar subsequent litigation of the alternate claim after an election. That doctrine prohibits a party from assuming contradictory positions in litigation (even successive litigation) between the same parties.<sup>85</sup> But in order to act as a bar, the party must have prevailed on that issue in the first litigation.<sup>86</sup> Thus, if a plaintiff unsuccessfully asks a jury to find that a defendant’s negligence caused a wrongful death, he would not be barred from trying again, with another jury, to prove a surviv-

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79. *Id.*, 384 S.E.2d at 93–94.

80. *Id.* at 449 n.\*, 384 S.E.2d at 94 n.\*.

81. VA. SUP. CT. R. 5:25 (Repl. Vol. 2009).

82. See VA. CODE ANN. § 8.01-380 (Repl. Vol. 2007).

83. Brief of Appellant, *supra* note 41, at 16.

84. Brief of Appellees, *supra* note 43, at 9.

85. *Lofton Ridge, LLC v. Norfolk S. Ry. Co.*, 268 Va. 377, 380–81, 601 S.E.2d 648, 650 (2004).

86. *Bentley Funding Group v. SK&R Group*, 269 Va. 315, 327, 609 S.E.2d 49, 54–55 (2005).

al claim. Nevertheless, this approach is fraught with expense, practical difficulties, and the specter of inconsistent verdicts.

For example, assume that in a first trial the plaintiff, required to elect, chooses to present a wrongful death claim. The jury determines that the defendant is negligent, and also finds that the negligence caused injuries, but not death. It accordingly returns a verdict in favor of the defendant, since the plaintiff did not prove that the defendant's negligence was the proximate cause of the death. The plaintiff then presents a survival claim to a separate jury in subsequent litigation. This jury also finds the defendant to be negligent, but determines that the negligence *did* cause the death. Judgment in this case is quite properly for the defendant, since such a claim is necessarily brought under the wrongful death statutes.

In this instance, both juries have found the defendant negligent, but the plaintiff is left wholly without a remedy, solely as a result of the obligation to elect. This unpalatable scenario may have been the foundation for the court's refusal to order an election.

A separate doctrine could, however, pose a great danger to litigants. During oral argument, Justice Cynthia Kinser posed to counsel the question of whether a judgment on one claim would bar later litigation of the other claim.<sup>87</sup> The doctrine of *res judicata* claim preclusion, as now reflected in Rule 1:6, may well bar such re-litigation.<sup>88</sup> The rule bars

any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit . . . .<sup>89</sup>

Thus, while the rule did not govern this case,<sup>90</sup> the court likely considered that its application would render any election conclusive in future litigation. While the opinion does not mention the

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87. While there are no publicly available transcripts of supreme court oral arguments, suffice it to say that the author has direct personal knowledge of Justice Kinser's query.

88. VA. SUP. CT. R. 1:16 (Repl. Vol. 2009).

89. *Id.*

90. Rule 1:6 was promulgated in 2006, and applies to all suits filed on or after July 1 of that year. *Id.* The administrators filed suit against Centra Health on December 1, 2005, so the new rule did not apply to this action. *Centra Health, Inc. v. Mullins*, 277 Va. 59, 64, 670 S.E.2d 708, 710 (2009).

new rule,<sup>91</sup> this, too, may have played a key role in the justices' shift of views between *Hendrix* and *Centra Health*.

#### D. Other Significant Holdings

While the election of remedies ruling is the most visible one in *Centra Health*, the supreme court also addressed two additional assignments of error presented by the hospital. First, it turned aside a challenge to the administrators' evidence on the survival claim, because the plaintiff's expert physician had opined that the hospital's negligence had caused the patient's death.<sup>92</sup> The hospital argued that since no plaintiff's witness testified that the injuries did *not* cause the death, there was no support in the plaintiff's case for the survival claim.<sup>93</sup>

The administrators argued in response that the hospital had supplied exactly such testimony in its own case-in-chief, and since the sufficiency of the evidence must be evaluated with regard to the evidence adduced by both parties, the result was supported by the overall trial record.<sup>94</sup> They reasoned that juries "can and often do determine that the truth is a synthesis of the plaintiff's and defendant's theories and evidence."<sup>95</sup>

The supreme court adopted a simpler view, holding that juries are entitled not only to select which witness is more credible, but also which portions of a single party's evidence are worthy of acceptance.<sup>96</sup> Here, the court noted that the administrators' expert opined that the hospital injured the patient, and he also opined

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91. As of the date of publication of this note in late 2009, the supreme court has not addressed Rule 1:6 in any of its decisions.

92. See *Centra Health*, 277 Va. at 79, 670 S.E.2d at 718–19.

93. Brief of Appellant, *supra* note 41, at 33 ("[The administrators] failed to present expert testimony on causation in support of [the survival] claim; there was no evidence [in the administrators' case-in-chief] that the negligence caused injury but not death.").

94. Brief of Appellees, *supra* note 43, at 10–13. Under Virginia practice, if a defendant unsuccessfully moves to strike the plaintiff's evidence, and then elects to present evidence of its own, an appellate court reviewing the evidence will consider the entire record, not merely that part of it that was adduced in the plaintiff's case-in-chief. *Norfolk S. Ry. v. Rogers*, 270 Va. 468, 481, 621 S.E.2d 59, 66–67 (2005). If a defendant wishes to preserve its original motion to strike for appellate review, so that the appellate court considers only the plaintiff's evidence, it faces the unpalatable prospect of resting without presenting any evidence at all.

95. Brief of Appellees, *supra* note 43, at 12.

96. *Centra Health*, 277 Va. at 80, 670 S.E.2d at 719.



that those injuries led to death.<sup>97</sup> The court concluded that the jury was at liberty to accept the former evidence but not the latter:

In light of the fact that Centra Health continued to dispute the issue of causation with respect to the wrongful death claim, the jury would have been free to discount Dr. Pambianco's conclusion that the hospital staff's negligence . . . contributed to Mullins' death, while still accepting that portion of the testimony establishing that the negligence . . . caused Mullins' personal injuries.<sup>98</sup>

Accordingly, even viewed in isolation, the administrators' evidence supported the survival claim.

The other ancillary issue in this opinion relates to the hospital's contention that the \$325,000 verdict was excessive.<sup>99</sup> The hospital pointed out that the survival claim wholly arose during the last eighteen days of the patients' life, "most of which he spent in a comatose state."<sup>100</sup> It contended that the blended evidence received by the jury, including testimony by the survivors about their own emotional distress at the patient's death, must have influenced the jury to award an amount that was much higher than the evidence had justified for the survival claim alone.<sup>101</sup>

The supreme court rejected this assignment of error as well.<sup>102</sup> It concluded that the jury had been carefully instructed on how to evaluate the separate claims and noted that the hospital had not requested a cautionary instruction (to disregard damage evidence relating to the "other" claim when fixing damages) at trial.<sup>103</sup> The opinion concludes with the court's ruling that the amount of the verdict was supported by the evidence.<sup>104</sup>

The standard of review of damage awards almost compels such a result. Appellate courts reviewing jury verdicts are not free to substitute their own views as to what amount of damages would be appropriate; such a determination is left to the jury, which has the opportunity to see the witnesses firsthand and evaluate what

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97. *Id.*

98. *Id.*

99. *Id.* at 80–81, 670 S.E.2d at 719.

100. Brief of Appellant, *supra* note 41, at 35.

101. *Id.* at 34–36.

102. *Centra Health*, 277 Va. at 82, 670 S.E.2d at 720.

103. *Id.* at 81, 670 S.E.2d at 719–20.

104. *Id.* at 82, 670 S.E.2d at 720.

damages would be appropriate.<sup>105</sup> Even a trial judge who has similarly seen the evidence is not free to become an “additional juror” and substitute his view of damages for that of the jury’s; he can only set aside or reduce such an award if the amount of the award is so large as to shock his conscience.<sup>106</sup>

#### IV. CONCLUSION

As observed in the beginning of this essay, other areas of law also require elections.<sup>107</sup> The *Centra Health* doctrine may affect some of those cases, depending on whether the election turns on a disputed fact, as here. Some elections emphatically will not be affected; for example, a plaintiff seeking both rescission and specific performance of the same contract in the same pleading has an election problem that is entirely divorced from the *Centra Health* holding.<sup>108</sup> He has to decide what to ask the court for, not simply what his theory of the case will be. But where a factual issue arises—especially where it is created by the defendant’s pleading—litigants can expect the supreme court to side with a plaintiff who wants that issue decided *before* he elects.

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105. *Hamilton Dev. Co. v. Broad Rock Club, Inc.*, 248 Va. 40, 45, 445 S.E.2d 140, 144 (1994) (“Ordinarily, a damage award fixed by a jury after a properly conducted trial and approved by the trial judge is held to be inviolate against disturbance by the appellate court.”).

106. *Allstate Ins. Co. v. Wade*, 265 Va. 383, 394–95, 579 S.E.2d 180, 186 (2003).

107. *See supra* notes 3–5 and accompanying text.

108. The supreme court’s none-too-subtle aside in *Wilkins v. Peninsula Motor Cars*, 266 Va. 558, 560–61, 587 S.E.2d 581, 583 (2004) (“This case is not about claims that are irreconcilable, such as a claim for rescission of the contract accompanied by a claim for specific performance.”) and its even stronger language in *McLeskey v. Ocean Park Investors, Ltd.*, 242 Va. 51, 52, 405 S.E.2d 846, 846 (1991) (holding that a party is barred from seeking rescission after a long course of insisting on specific performance) should dissuade any such hybrid pleadings for the foreseeable future.

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