

SUPREME COURT OF VIRGINIA

Budd v. Punyanitya

643 S.E.2d 180 (Va. 2007) · No. Record No. 061138 · Decided April 20, 2007

SUMMARY

The Supreme Court of Virginia held that Code § 8.01-401.1 requires a party to provide opposing counsel with copies of statements from published medical literature at least thirty days before trial when the party intends to establish the literature as reliable authority through its own expert on direct examination for later use in cross-examination. The court rejected an attempt to circumvent the notice requirement by characterizing the expert's testimony as merely laying a foundation. The judgment in favor of the defendant physician was affirmed.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                         |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Virginia                                                                                                                                                                                                                                                                                               |
| WRITING FOR THE COURT | Lawrence L. Koontz, Jr.; All the Justices                                                                                                                                                                                                                                                                               |
| JURISDICTION          | Virginia                                                                                                                                                                                                                                                                                                                |
| DECIDED               | April 20, 2007                                                                                                                                                                                                                                                                                                          |
| DOCKET                | Record No. 061138                                                                                                                                                                                                                                                                                                       |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                |
| PROCEDURAL POSTURE    | Budd appealed a judgment entered after a jury verdict for Punyanitya in a medical malpractice action. The appeal challenged the trial court's exclusion of a proposed foundation for using medical literature during cross-examination because copies of the statements had not been provided thirty days before trial. |
| STANDARD OF REVIEW    | Statutory interpretation is a pure question of law reviewed de novo. The Court also considered the trial court's evidentiary ruling under the governing statutory framework.                                                                                                                                            |
| PRECEDENTIAL VALUE    | Published opinion; precedential decision of the Supreme Court of Virginia.                                                                                                                                                                                                                                              |
| PARTIES               | William T. Budd v. Vissepong Punyanitya, M.D.                                                                                                                                                                                                                                                                           |

TOPICS

- hearsay
- evidence
- expert testimony
- statutory interpretation
- medical malpractice

## PRACTICE AREAS

evidence

medical malpractice

appellate procedure

statutory interpretation

## QUESTIONS PRESENTED

1. Whether Budd waived appellate review by failing to make a contemporaneous proffer of the medical literature when the trial court sustained the objection.
2. Whether Budd waived the issue by failing to cross-examine Punyanitya's experts about the designated publications.
3. Whether Code § 8.01-401.1 requires a party to provide opposing counsel with copies of statements from published medical literature thirty days before trial when the party intends to have its own expert establish the literature as reliable authority on direct examination for later use as substantive evidence during cross-examination of the opposing party's expert.

## HOLDINGS

1. Budd did not waive appellate review by making the proffer in his motion for reconsideration rather than at the time of the trial court's ruling because the court's ruling was based on a legal interpretation of the statute, and a contemporaneous proffer would not have changed the fact that the literature had not been timely provided.
2. Budd did not waive the issue by failing to cross-examine Punyanitya's experts about the publications because the appeal concerned the legal propriety of establishing the publications as reliable authority through Budd's own expert, not the admissibility of a particular publication.
3. When a party intends to introduce statements from published literature during cross-examination of an opposing expert but plans to have its own expert establish the literature as reliable authority on direct examination, the party must provide opposing counsel with copies of the statements thirty days before trial under Code § 8.01-401.1.

## KEY QUOTATIONS

*“So long as the statements from authoritative literature are used solely for the purpose of testing an expert's knowledge, reading and accuracy in a field of expertise, and are not read directly or indirectly to the jury as substantive evidence regarding the contents of the literature or the opinions of its author, neither the hearsay rule nor the exception thereto found in Code § 8.01-401.1 is implicated.” (at 186)*

*“Accordingly, we hold that when a party intends to introduce into evidence statements from published literature during the cross-examination of an opposing expert, but wishes to avoid the possibility that the opposing expert will not acknowledge that literature as a reliable authority on a particular matter at issue by having the party's own expert establish the literature as a reliable authority on direct examination, the party must provide opposing counsel with copies of the statements in the literature thirty days before trial pursuant to Code § 8.01-401.1.” (at 187)*

## FACTUAL BACKGROUND

Budd alleged that Punyanitya negligently provided medical care during multiple spinal surgeries and failed to assess and timely diagnose compartment syndrome. Before trial, Budd designated medical publications concerning compartment syndrome but did not provide Punyanitya's counsel with copies of the articles or identify the statements on which he intended to rely at least thirty days before trial. Budd sought to have his own expert establish the publications as reliable authorities solely to use statements from them as substantive evidence during cross-examination of Punyanitya's experts. The trial court prohibited that procedure, and the jury returned a verdict for Punyanitya.

## PROCEDURAL HISTORY

Budd filed an amended motion for judgment in the Circuit Court of Albemarle County alleging negligent medical treatment following spinal surgeries. Before trial, Budd designated medical literature but did not provide opposing counsel with copies of the articles or the specific statements at least thirty days before trial. The trial court barred Budd from having his expert establish the literature as reliable authority, the jury returned a verdict for Punyanitya, and the court denied Budd's motion for reconsideration. The Supreme Court of Virginia affirmed.

## DISPOSITION

affirmed

## CASES CITED

- *Molchon v. Tyler*, 262 Va. 175, 180, 546 S.E.2d 691, 695 (2001)
- *Rose v. Jaques*, 268 Va. 137, 154, 597 S.E.2d 64, 74 (2004)
- *Whittaker v. Commonwealth*, 217 Va. 966, 968-69, 234 S.E.2d 79, 81 (1977)
- *Crawford v. Haddock*, 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005)
- *Ainslie v. Inman*, 265 Va. 347, 352, 577 S.E.2d 246, 248 (2003)
- *Campbell v. Harmon*, 271 Va. 590, 597-98, 628 S.E.2d 308, 311-12 (2006)
- *Virginia Polytechnic Inst. & State Univ. v. Interactive Return Serv.*, 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006)
- *Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 925-26 (2006)
- *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003)
- *Woods v. Mendez*, 265 Va. 68, 74-75, 574 S.E.2d 263, 266 (2003)
- *Weinberg v. Given*, 252 Va. 221, 226, 476 S.E.2d 502, 504 (1996)
- *Todd v. Williams*, 242 Va. 178, 182-83, 409 S.E.2d 450, 452-53 (1991)
- *May v. Caruso*, 264 Va. 358, 362-63, 568 S.E.2d 690, 692 (2002)
- *Hopkins v. Gromovsky*, 198 Va. 389, 395, 94 S.E.2d 190, 194 (1956)
- *Griffett v. Ryan*, 247 Va. 465, 473, 443 S.E.2d 149, 154 (1994)