

IN THE SUPREME COURT OF VIRGINIA

ABE SHEPARD, )  
Administrator of the Estate of )  
Ernestine Shepard, )  
 )  
Appellant, )  
 )  
v. )  
 )  
CAPITOL FOUNDRY OF VIRGINIA, INCORPORATED, )  
a Virginia corporation, )  
and )  
JACK P. GUTHRIE, JR., )  
 )  
Appellees. )

Record No.: 002776

APPELLANT'S BRIEF

Charles H. Cuthbert, Jr.  
Margaret Cuthbert Broaddus  
Cuthbert Law Offices  
A Professional Corporation  
220 North Sycamore Street  
Petersburg, VA 23803-3228

## SUBJECT INDEX

	Page
Table of citations .....	iii
Assignments of error .....	1
Statement of the questions presented .....	2
Statement of the nature of the case and of the material proceedings in the trial court or commission in which the case originated .....	3
Statement of the facts .....	4
Summary of argument .....	5
Principles of law, argument, and authorities.....	7
1.    As a matter of law the trial judge was wrong to remit the jury’s verdict because of two comments made by plaintiff’s counsel in closing argument, where the trial judge ruled before the verdict that the defense had waived one such objection by failing to object before the jury had withdrawn to deliberate, and where the defense did not make the other objection until four weeks after the jury returned its verdict.	
a.    Facts relevant to the waiver issue .....	7
b.    Argument as to the waiver issue .....	9
2.    The trial judge was wrong to conclude that the closing argument of plaintiff’s counsel was improper .....	11

3.	In this wrongful death action based on sorrow and other intangible losses, the trial judge was wrong to remit a portion of the jury’s verdict of \$1.7 million plus prejudgment interest under the circumstances of this case, including the failure of the trial judge to explain why the jury, reasonably evaluating the evidence in the light most favorable to the plaintiff, could not have reached this verdict, such evidence including the concession by defense counsel that the decedent “was a great wife and mother” and that the seven statutory beneficiaries (her husband of 44 years plus her six adult children) “miss her terribly.”	
a.	Principles of law applicable to remittitur.....	15
b.	Argument as to the remittitur.....	18
1).	The reduction of the jury’s award to Mr. Shepard, Sr.....	19
2).	The reduction of the jury’s award to Merritt Shepard.....	25
3).	The elimination of the jury’s award of prejudgment interest .....	27
4).	The jurors’ behavior.....	29
	Conclusion.....	30
	Certificate .....	31

## TABLE OF CITATIONS

### Cases

<i>Aime v. Seaboard Systems R.R.</i> , 648 So.2d 20 (La. Ct. App. 1994)	25
<i>Aronovitch v. Ayres</i> , 169 Va. 308, 193 S.E. 524 (1937)	16
<i>Betz v. Timken Mercy Med. Ctr.</i> , 644 N.E.2d 1058 (Ohio Ct. App. 1994)	25
<i>Brann v. F. W. Woolworth Co.</i> , 181 Va. 213, 24 S.E.2d 424 (1943)	13
<i>Burks v. Webb</i> , 199 Va. 296, 99 S.E.2d 629 (1957)	5, 9
<i>Cheng v. Commonwealth</i> , 240 Va. 26, 393 S.E.2d 599 (1990)	9
<i>City of Lynchburg v. Amherst County</i> , 115 Va. 600, 80 S.E. 117 (1913)	5, 14, 27
<i>DeYoung v. Alpha Constr. Co.</i> , 542 N.E.2d 859 (Ill. App. Ct. 1989)	24
<i>Edmiston v. Kupsenel</i> , 205 Va. 198, 135 S.E.2d 777 (1964)	15, 16, 20, 26, 28
<i>Gaddis v. United States</i> , 7 F. Supp.2d 709 (D.S.C. 1997)	24
<i>Gill v. Rollins Protective Servs. Co.</i> , 836 F.2d 194 (4 <sup>th</sup> Cir. 1987)	14, 27
<i>Jan Paul Fruiterman, M.D. and Assocs., P.C. v. Waziri</i> , 259 Va. 540, 525 S.E.2d 552 (2000)	23
<i>Klinke v. Mitsubishi Motors Corp.</i> , 556 N.W.2d 528 (Mich. Ct. App. 1996)	25
<i>Knoke v. South Carolina Dep't of Parks, Recreation, and Tourism</i> , 478 S.E.2d 256 (S.C. 1996)	25
<i>Lindsey v. Navistar Int'l Transp. Corp.</i> , 150 F.3d 1307 (11th Cir. 1998)	24
<i>Lomax v. Couthran</i> , Circuit Court for the City of Buena Vista, 15 VLW 1169 (March 19, 2001)	23
<i>Majestic Steam Laundry v. Puckett</i> , 161 Va. 524, 171 S.E. 491 (1933)	13
<i>Modaber v. Kelley</i> , 232 Va. 60, 348 S.E.2d 233 (1986)	18, 22
<i>Murphy v. Virginia Carolina Freight Lines, Inc.</i> , 215 Va. 770, 213 S.E.2d 769 (1975)	16
<i>P. Lorillard Co. v. Clay</i> , 127 Va. 734, 104 S.E. 384 (1920)	10
<i>Pace v. Aboulhosen</i> , Record No. 971807 (April 17, 1998)	5, 17, 18, 20, 27, 28, 30
<i>Pescatore v. Pan Am. World Airways, Inc.</i> , 97 F. 3d 1 (2nd Cir. 1996)	24
<i>Poulston v. Rock</i> , 251 Va. 254, 467 S.E.2d 479 (1996)	15, 16, 17, 20, 26, 28
<i>Pullen v. Nickens</i> , 226 Va. 342, 310 S.E.2d 452 (1983)	9
<i>Robinson v. Old Dominion Freight Line, Inc.</i> , 236 Va. 125, 372 S.E.2d 142 (1988)	16
<i>Simmons v. Boyd</i> , 199 Va. 806, 102 S.E.2d 292 (1958)	16
<i>Stump v. Doe</i> , 250 Va. 57, 458 S.E.2d 279 (1995)	9
<i>Taylor v. Mobil Corp.</i> , 1993 WL 945991 (Fairfax County Circuit Court)	23
<i>Thornhill v. State Dep't of Transp. and Dev.</i> , 676 So.2d 799 (La. Ct. App. 1996)	24
<i>Virginia Electric and Power Co. v. Dungee</i> , 258 Va. 235, 520 S.E.2d 164 (1999)	9, 16, 20, 22, 26, 28
<i>Wagner v. Shird</i> , 257 Va. 584, 514 S.E.2d 613 (1999)	17
<i>Williams Paving Co. v. Kreidl</i> , 200 Va. 196, 104 S.E.2d 758 (1958)	22

### Statutes

<i>Virginia Code</i> section 8.01-382	27
---------------------------------------	----

### Other

Article I, Section 11, <i>Constitution of Virginia</i>	17, 30
--	--------

## ASSIGNMENTS OF ERROR:

1. As a matter of law the trial judge was wrong to remit the jury's verdict because of two comments made by plaintiff's counsel in closing argument, where the trial judge ruled before the verdict that the defense had waived one such objection by failing to object before the jury had withdrawn to deliberate, and where the defense did not make the other objection until four weeks after the jury returned its verdict.

2. The trial judge was wrong to conclude that the closing argument of plaintiff's counsel was improper.

3. In this wrongful death action based on sorrow and other intangible losses, the trial judge was wrong to remit a portion of the jury's verdict of \$1.7 million plus prejudgment interest under the circumstances of this case, including the failure of the trial judge to explain why the jury, reasonably evaluating the evidence in the light most favorable to the plaintiff, could not have reached this verdict, such evidence including the concession by defense counsel that the decedent "was a great wife and mother" and that the seven statutory beneficiaries (her husband of 44 years plus her six adult children) "miss her terribly."

STATEMENT OF THE QUESTIONS PRESENTED:

1. As a matter of law, was the trial judge wrong to remit the jury's verdict because of two comments made by plaintiff's counsel in closing argument, where the trial judge ruled before the verdict that the defense had waived one such objection by failing to object before the jury had withdrawn to deliberate, and where the defense did not make the other objection until four weeks after the jury returned its verdict?

(Assignment of error No. 1.)

2. Was the trial judge wrong to conclude that the closing argument of plaintiff's counsel was improper? (Assignment of error No. 2.)

3. In this wrongful death action based on sorrow and other intangible losses, was the trial judge wrong to remit a portion of the jury's verdict of \$1.7 million plus prejudgment interest under the circumstances of this case, including the failure of the trial judge to explain why the jury, reasonably evaluating the evidence in the light most favorable to the plaintiff, could not have reached this verdict, such evidence including the concession by defense counsel that the decedent "was a great wife and mother" and that the seven statutory beneficiaries (her husband of 44 years plus her six adult children) "miss her terribly"? (Assignment of error No. 3.)

STATEMENT OF THE NATURE OF THE CASE AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT OR COMMISSION IN WHICH THE CASE ORIGINATED:

This is a wrongful death action. The plaintiff Abe Shepard (“Mr. Shepard”) alleges that his wife Ernestine Shepard (“Mrs. Shepard”) died as the proximate result of the negligence of the driver of a tractor trailer, the defendant Jack P. Guthrie, Jr. (“Mr. Guthrie”), an employee of the defendant Capitol Foundry of Virginia, Incorporated (“Capitol”).

This is the second time that this matter has come before this Court. On the first occasion, the trial judge denied Mr. Shepard a jury trial when he granted the defendants’ motion for summary judgment after concluding that, as a matter of law, there was no causal link between Mr. Guthrie’s alleged negligence and Mrs. Shepard’s torn aorta. On appeal, this Court reversed and remanded. On remand, the same trial judge has again interfered with the normal functioning of the jury, this time remitting the jury’s verdict. In this second appeal, Mr. Shepard challenges the trial judge’s decision to remit.

STATEMENT OF THE FACTS:

On April 24, 1996, less than sixteen hours after her aorta tore as a result of a motor vehicle accident the day before, Mrs. Shepard died, leaving seven statutory beneficiaries: her husband and six adult children.

Through the testimony of numerous witnesses, including all seven of the statutory beneficiaries except the adult child Merritt Shepard (a resident of Germany), the plaintiff presented compelling evidence as to deep emotional loss. The jury returned its verdict in favor of the plaintiff, and awarded a total of \$1.7 million, plus interest from the date of Mrs. Shepard's fatal accident, and distributed this award as follows: \$1.1 million to the husband; and \$100,000 to each of the six adult children. Thereafter, the trial judge remitted the jury's award of \$1.1 million to the husband by \$350,000, reducing it to \$750,000; remitted the jury's award of \$100,000 to Merritt Shepard (the resident of Germany) by \$50,000, reducing it to \$50,000; and remitted the jury's award of more than four years of prejudgment interest in its entirety, to zero. Because prejudgment interest exceeded \$660,000, remittitur reduced the total verdict by more than \$1 million. The plaintiff accepted the remitted amount under protest, and this appeal followed.

Additional facts appear below.

## SUMMARY OF ARGUMENT:

The trial judge was wrong to rely on two untimely objections as his basis for remittitur. Objections must be made when they can make a difference. Otherwise, they come too late, and are waived. *Burks v. Webb*, 199 Va 296, 311, 99 S.E.2d 629, 641 (1957) (“Except under unusual circumstances, objection to improper argument must be timely made and if not made until after the case has been submitted to the jury, it comes too late”).

Furthermore, the two comments at issue were not improper. As to the first comment, it pointed out that, if the defendant tractor trailer driver Mr. Guthrie was not negligent for doing what he did, then neither would any other driver be negligent if he did the same thing. Furthermore, this comment fairly responded to defense counsel’s argument, whereby defense counsel indirectly but clearly asked the jurors to put themselves in the shoes of the defendant Mr. Guthrie. As to the second comment, it dealt with the award of interest and, consistent with *City of Lynchburg v. Amherst County*, 115 Va. 600, 80 S.E. 117 (1913), with the time value of money. Furthermore, if the defendants had timely objected to the interest argument, and if the trial judge had sustained their objection, Mr. Shepard’s lawyer could have avoided the problem by rephrasing.

Finally, by granting the defense motion to remit, the trial judge committed the ultimate invasion of the jury’s province. In doing so, the trial judge repeated the same mistake that he had made in remitting the jury’s verdict in *Pace v. Aboulhosen*, Record No. 971807 (April 17, 1998), reversed by this Court. That mistake was to remit the jury’s verdict without articulating an explanation as to why the jury, reasonably

evaluating the evidence in the light most favorable to the plaintiff, could not have reached the verdict it reached.

It is of course true that the jury awarded Mr. Shepard \$100,000 more than the one million dollars requested by plaintiff's counsel in closing argument. But contrary to the reasoning of the trial judge, this does not fairly indicate that passion or prejudice produced the jury's verdict. After all, the jury gave the six children a total of only \$600,000 -- \$2.4 million *less* than requested by plaintiff's counsel in closing argument. If passion or prejudice had produced the jury's verdict, would it have done so selectively -- for Mr. Shepard only, and not for his six children as well?

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES:

1. **As a matter of law the trial judge was wrong to remit the jury's verdict because of two comments made by plaintiff's counsel in closing argument, where the trial judge ruled before the verdict that the defense had waived one such objection by failing to object before the jury had withdrawn to deliberate, and where the defense did not make the other objection until four weeks after the jury returned its verdict.**

a. Facts relevant to the waiver issue.

After the jury had withdrawn to its room to deliberate, defense counsel moved for a mistrial, based on the rebuttal argument made by Mr. Shepard's lawyer that, if the defendant Mr. Guthrie was not negligent, then neither would any other truck driver be negligent if he did the same thing. In response, the trial judge ruled that, by waiting until the jury had withdrawn to deliberate, defense counsel had waived his objection. Thus, the record at App. 555 - 56 reflects the following:

(The jury left the courtroom at 2:49 p.m.)

MR. GALLALEE: Your Honor, I would like to make a motion.

In his closing argument, Mr. Cuthbert, I believe, improperly asked this jury to send a message to these defendants, to protect the people of Petersburg. That is clearly not argument -- not proper argument. It is inflammatory. It has tainted this jury so they cannot give a fair verdict, and I ask the Court to enter a mistrial at this time.

THE COURT: I am afraid it is untimely made. And if I had addressed it at the time, I could have. But I think once it is said and not objected to, I cannot undo it.

MR. GALLALEE: Once it was out, Judge, I mean --

THE COURT: I understand that. But I think it is your obligation to object to it at the time. And if the Court finds it to be inflammatory, it would so advise the jury. But if it is untimely, then the Court cannot undo it. So I cannot sustain the motion for mistrial at this particular time.

The Court will be in recess until the jury reaches a verdict.

MR. GALLALEE: Note my exception.

(Recess taken)

Furthermore, at no point did defense counsel ask the trial judge to give the jury a cautionary instruction addressing this rebuttal argument of Mr. Shepard's lawyer.

Instead, defense counsel merely moved for a mistrial.

Then four weeks later to the day, in his brief in support of post-trial relief filed September 13, 2000, defense counsel objected for the first time to a second, totally different argument that plaintiff's counsel had made. This second argument dealt with interest, and was as follows:

The family also asks you to award interest. So much time has passed, and the company has had this money and the Shepards haven't. And that's not right.

I know when I miss my credit card payment for one month, my next bill has an interest charge in it. And the defendants have had the Shepard's family money for over four years.

App. 536. In his brief filed September 13, 2000, defense counsel contended at App. 18 - 19 that this interest argument was improper because:

(3) He inflamed the jury on the issue of interest. He argued that Capitol Foundry "has had this money and the Shepards haven't. And that's not right." The statement is inflammatory and incorrect. It implies wrongdoing by Capitol Foundry. It was also wrong to suggest Capitol Foundry had \$4 million lying around collecting interest. The Court may recall that Mr. Cuthbert objected to any evidence as to the size of Capitol Foundry, but yet he told the jury that Capitol Foundry had this type of money. It is improper to argue the financial condition of a party.

(4) He improperly placed the argument for an award of interest on a personal level when he talked about his credit card payments. He then said that the "defendants have had the Shepards' money for over four years," and this is both incorrect and inflammatory.

Based on the objections at App. 555 - 56 and App. 18 - 19 set forth above, the trial judge remitted the jury's verdict. App. 631 - 637. In doing so, he did not explain how he could rely on these objections as a basis for remittitur when, after the jury had withdrawn to deliberate and the defense had only then objected to the argument concerning other truck

drivers, this same judge had ruled that the objection was “untimely made,” coming as it did when it was too late for the judge to “advise the jury” and thereby “undo it.” App. 555 - 56.

b. Argument as to the waiver issue.

Virginia law mirrors the trial judge’s initial ruling that an objection to closing argument comes too late when the objection is first raised only after the jury has withdrawn to deliberate. *Burks v. Webb, supra*, 199 Va. at 311, 99 S.E.2d at 641, stating:

If objection is made during the argument, the judge has an opportunity to stop improper argument, and make a timely and effective ruling thereon. Except under unusual circumstances, objection to improper argument must be timely made and if not made until after the case has been submitted to the jury, it comes too late.

*Accord Cheng v. Commonwealth*, 240 Va. 26, 38, 393 S.E.2d 599, 605 (1990), stating, “A motion for a mistrial is untimely and properly refused when it is made after the jury has retired.” *Cf. Virginia Electric and Power Co. v. Dungee*, 258 Va. 235, 261 n.6, 520 S.E.2d 164, 179 n.6 (1999), stating, “We note that Virginia Power did not object to this statement during plaintiff’s closing argument.” Furthermore, there is a presumption that a jury has followed curative instructions. *Stump v. Doe*, 250 Va. 57, 62, 458 S.E.2d 279, 282 (1995) (“we presume that the jury heeded the court’s instruction”); *Pullen v. Nickens*, 226 Va. 342, 347, 310 S.E.2d 452, 455 (1983) (“an admonition is generally deemed to be sufficient”).

There are no “unusual circumstances” sufficient to justify an exception to the *Burks v. Webb* general rule regarding waiver. Opposing counsel had ample opportunity to object -- rebuttal argument continued for more than a full page after the rebuttal argument

in question. App. 553 - 54. There was no illness, court order, or other impediment to timely objection.

In support of their position to the contrary, Capitol and Mr. Guthrie cite *P. Lorillard Co. v. Clay*, 127 Va. 734, 753, 104 S.E. 384, 390 (1920), and its statement that “the objection . . . should have been made at the time the argument was made and certainly before the verdict was rendered.” This statement is dicta in suggesting that objection is timely as long as made before verdict: for in *P. Lorillard*, this Court held that the verdict should be set aside due to improper argument to which a contemporaneous objection had been made, followed by a contemporaneous curative instruction. Mr. Shepard’s lawyer has been unable to find any decision in which any court has ever invoked this dicta to save an untimely objection.

In sum, as a matter of law, the trial judge was wrong to remit the jury’s verdict because of two comments made by plaintiff’s counsel in closing argument. After all, before the verdict the trial court ruled that the defense had waived one such objection by failing to object before the jury had withdrawn to deliberate, and the defense did not make the second objection until four weeks after the verdict.

**2. The trial judge was wrong to conclude that the closing argument of plaintiff's counsel was improper.**

We reach this second question only if this Court decides the first question (waiver) against Mr. Shepard and his children.

During his closing argument, in an indirect but indisputably clear fashion, defense counsel asked the jurors to put themselves in the shoes of the defendant tractor trailer driver Mr. Guthrie, as follows:

You also have to decide if, when he was in that left lane, did he impede it and render it dangerous? And I submit to you that it wasn't Mr. Guthrie that rendered that highway dangerous. It was Mr. Walker. Mr. Walker rendered it dangerous. Under the plaintiff's argument, if **you're** stopped in the road, for however long a time and someone comes behind **you** and is stopped, for whatever reason, and then that person is rear-ended, is it the person up front's fault. I submit to you that's not what the law should be. People stop on roads.

Under that theory, if **you** are stopped on a road and maybe a person is stopped on the road to drop their children off, maybe **you're** stopped on the road to deliver a package, maybe **you're** stopped on the road to wait for a parking place, but **you** are stopped in that lane of travel, for whatever reasons, maybe traffic is backed up, again, maybe **you** are just trying to drop something off, maybe **you're** waiting to get into a parking space, but **you're** blocking that lane of travel, and if **you're** stopped and someone comes up behind **you** because of that and stops behind **you** and then that person is rear-ended, you know whose fault it is? It is the person that rear-ends **you**.

App. 546 - 47. Please note that defense counsel used the word "you" (referring to the jurors themselves) thirteen times in these two paragraphs! In this fashion, defense counsel repeatedly invited the jurors to consider the consequences *to themselves* of concluding that Mr. Guthrie was negligent.

In reply to this repeated suggestion that the jurors consider the implications of a plaintiff's verdict to themselves, coupled with a not-so-subtle invitation for jury nullification

of the law itself (“that’s not what the law should be”), plaintiff’s counsel responded in his rebuttal argument, App. 552 - 53, as follows:

Let me ask you to look at it this way: Do you want tractor-trailer drivers to come into Petersburg and stop in heavily traveled areas in the middle of the road, get out of their cab for 20 minutes? Is that what you want? What does that do to the lives of the people in the City of Petersburg?

That is negligence, and that’s what happened here. And you are the only people in a position to protect the people of Petersburg from that kind of thing happening again.

The central point of this argument by plaintiff’s counsel was that, if Mr. Guthrie was not negligent for doing what he did, then neither would any other truck driver be negligent if he did the same thing. This would be permissible argument even if not spoken in response to defense counsel’s improper invitation to the jurors to put themselves in Mr. Guthrie’s shoes and to nullify the law. Plaintiff’s counsel never asked the jury to “send a message” or otherwise to punish the defendants or anyone else.

In addition, the argument of plaintiff’s counsel was fair reply to defense counsel’s improper invitation to the jurors to put themselves in Mr. Guthrie’s shoes and to nullify the law. For by his rebuttal argument plaintiff’s counsel hoped to drive home the point that what Mr. Guthrie did was quite different from the various examples defense counsel gave when he repeatedly asked the jurors to put themselves in Mr. Guthrie’s shoes -- “maybe **you’re** stopped on the road to deliver a package, maybe **you’re** stopped on the road to wait for a parking space, . . . again maybe **you** are just trying to drop something off, maybe **you’re** waiting to get into a parking space, but **you’re** blocking that lane of travel, and if **you’re** stopped and someone comes up behind **you** and then that person is rear-ended, you know whose fault it is? It is the person that rear-ends **you**.” (Emphasis added.)

This Court has held that, where defense counsel opens an area of argument, he cannot then complain when plaintiff's counsel responds. For example, in *Brann v. F. W. Woolworth Co.*, 181 Va. 213, 24 S.E.2d 424 (1943), both counsel engaged in somewhat personal and hyperbolic attacks during closing. Eventually, the defendant objected and moved for a mistrial. Supporting the trial court's decision to deny the motion, this Court explained:

Defendant's counsel committed the first offense. He invited the improper argument of plaintiff's counsel and therefore is not in a position to complain. If either or both had timely objected, the court, no doubt, would have corrected the errors of counsel.

181 Va. at 221, 24 S.E.2d at 427. See also *Majestic Steam Laundry v. Puckett*, 161 Va. 524, 171 S.E. 491 (1933), holding that defense counsel had provoked plaintiff's rebuttal argument that, " 'If you give me a verdict of \$11,000.00, I won't go into [defendant's] pocket for one cent of it.' " 116 Va. at 527, 171 S.E. at 492.

In Shepard, the trial judge also remitted because of closing argument made by plaintiff's counsel at App. 536, as follows:

The family also asks you to award interest. So much time has passed, and the company has had this money and the Shepards haven't. And that's not right.

I know when I miss my credit card payment for one month, my next bill has an interest charge in it. And the defendants have had the Shepard's family money for over four years.

This is fair argument. It combined an appeal to the jurors' sense of right and wrong - - clearly a legitimate concern in a court of law -- with common sense, common experience observations as to the time value of money -- the concept underlying an award of prejudgment interest. *City of Lynchburg v. Amherst County*, 115 Va. 600, 608, 80 S.E. 117, 120 (1913), explaining that the law allows an award of prejudgment interest

because “it is but natural justice that he who has the use of another’s money should pay interest on it ;” *Gill v. Rollins Protective Services Co.*, 836 F2d 194, 199 (4<sup>th</sup> Cir. 1987), stating, “Such interest is permitted by statute, and is designed to compensate the plaintiff who has been without relief for an extended period of time.” Please note the similarity between the words used by this Court in the *City of Lynchburg* decision (“he who has the use of another’s money”) and the words attacked by the defense because they allegedly comment on financial condition (“the defendants have had the Shepard’s money”).

It is true that the argument at issue *did* contain a brief reference to counsel’s own experience with a missed credit card payment and a resulting interest charge. But this statement was merely an attempt to tap into the jurors’ common experience, rather than an attempt by plaintiff’s counsel to testify. And if an objection had been made and sustained, the same point could have been made by asking rhetorically:

What happens when a person fails to make a credit card payment one month? Doesn’t the next month’s bill contain an interest charge? And the defendants have had the use of the Shepard family’s money for over four years.

In short, the argument of plaintiff’s counsel was not improper.

3. **In this wrongful death action based on sorrow and other intangible losses, the trial judge was wrong to remit a portion of the jury’s verdict of \$1.7 million plus prejudgment interest under the circumstances of this case, including the failure of the trial judge to explain why the jury, reasonably evaluating the evidence in the light most favorable to the plaintiff, could not have reached this verdict, such evidence including the concession by defense counsel that the decedent “was a great wife and mother” and that the seven statutory beneficiaries (her husband of 44 years plus her six adult children) “miss her terribly.”**

a. Principles of law applicable to remittitur.

Several principles of law bear directly upon the remittitur issue.

To begin with, in deciding whether a jury’s verdict is excessive and hence must be remitted, the focus of the trial judge, and of this Court as well, must be on the evidence that was present and whether it justifies the verdict, and not on evidence that was absent. Thus:

The crucial question to be determined, therefore, in the case before us, is whether there was evidence to sustain the verdict of the jury, for if there was, then the trial court was in error in ordering the remittitur.

*Edmiston v. Kupsenel*, 205 Va. 198, 203, 135 S.E.2d 777, 780 (1964). *Accord the dissent of Justice Compton in Poulston v. Rock*, 251 Va. 254, 265 and 267-68,

467 S.E. 2d 479, 485 and 487 (1996),<sup>1</sup> protesting that the majority decision in *Poulston* “effectively has overruled” prior Virginia law that “[f]rom 1976 until today [March 1, 1996] . . . the important number has been the trial judge’s number, not the jury’s number.” See *Poulston v. Rock, supra*, 251 Va. at 261, 467 S.E.2d at 483, stating that, in considering a motion to remit, both the trial court and the appellate court must “consider the evidence in the light most favorable to [the plaintiff], the party who received the jury verdict.” See also *Virginia Electric and Power Co. v. Dungee, supra*, 258 Va. at 261 and 263, 520 S.E.2d at 180, stating:

A jury verdict fairly rendered on competent evidence should not be disturbed by the trial court. . . .

. . . .

As this Court has stated before, there is no exact method by which to measure and value in monetary terms the degree of pain and anguish of a suffering human being, and, unless the jury’s verdict is so great as to indicate its judgment was actuated by partiality or prejudice, the court should not disturb the verdict.

---

<sup>1</sup> In *Poulston v. Rock*, this Court held that the trial court abused its discretion in remitting a jury verdict in a defamation action when it reduced the compensatory award from \$10,000 to \$1,000, and the punitive award from \$25,000 to \$2,500. In the following decisions, this Court likewise reversed a trial court’s decision to remit: *Robinson v. Old Dominion Freight Line, Inc.*, 236 Va. 125, 372 S.E.2d 142 (1988) (remitting a jury verdict for personal injuries received in a motor vehicle accident by reducing the jury’s verdict from \$30,000 to \$15,000); *Murphy v. Virginia Carolina Freight Lines, Inc.*, 215 Va. 770, 213 S.E.2d 769 (1975) (remitting a jury verdict for \$25,000 and ordering a new trial, which resulted in a jury verdict for \$10,000); *Edmiston v. Kupsenel, supra* (remitting half of a \$28,500 jury verdict for personal injuries received in a motor vehicle accident); *Simmons v. Boyd*, 199 Va. 806, 102 S.E.2d 292 (1958) (remitting a jury verdict for personal injuries received in a motor vehicle accident by reducing the jury’s award from \$20,000 to \$6,500); *Aronovitch v. Ayres*, 169 Va. 308, 193 S.E. 524 (1937) (remitting a jury verdict for personal injuries received in a motor vehicle accident by reducing the jury’s award from \$20,607 to \$8,000).

Thus, the trial judge who remitted the jury's verdict in the Shepard trial committed once again<sup>2</sup> the error he committed in *Pace v. Aboulhosen*, Record No. 971807 (April 17, 1998), where this Court reversed another order of remittitur by this same trial judge and stated:

the circuit court abused its discretion in setting the jury verdict aside as excessive as a matter of law and ordering remittitur. In making its determination, the court recited facts favorable to the appellee. However, the circuit court "was required, as are we, to consider the evidence in the light most favorable to [the appellant], the party who received the verdict." *Poulston v. Rock*, 251 Va. 254, 261, 467 S.E.2d 479, 483 (1996) (citing *Caldwell v. Seaboard System Railroad, Inc.*, 238 Va. 148, 155, 380 S.E.2d 910, 914 (1989)). The circuit court's reasons for setting aside the jury's verdict do not demonstrate that it "considered factors in evidence relevant to a reasoned evaluation of the damages incurred . . ." *Caldwell*, 238 Va. at 157, 380 S.E.2d at 915 (quoting *Bassett Furniture Indus., Inc. v. McReynolds*, 216 Va. 897, 912, 224 S.E.2d 323, 332 (1976)). Thus, we conclude that the circuit court "simply disagreed with the jury's damage evaluation" and arbitrarily substituted its opinion for that of the jury. *Bassett*, 216 Va. at 912, 224 S.E.2d at 332. Accordingly, we reverse the order of remittitur, reinstate the jury verdict, and enter judgment for the appellant on the verdict.

Article I section 11 of the *Constitution of Virginia* underlies these precepts by mandating "That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."

*Poulston v. Rock*, *supra*, 251 Va. at 258, 467 S.E.2d at 481, states:

Circumstances which compel setting aside a jury verdict include a damage award that is so excessive that it shocks the conscience of the court, creating the impression that the jury was influenced by passion, corruption, or prejudice; that the jury has misconceived or misunderstood the facts or the

---

<sup>2</sup> In *Wagner v. Shird*, 257 Va. 584, 514 S.E.2d 613 (1999), an action for personal injuries arising out of a motor vehicle accident, this Court reversed another remittitur order of this same trial judge. There, the trial judge remitted the jury's verdict from \$106,000 to \$60,000. On appeal, this Court held that the trial judge's attempt to remit was ineffective because he had not entered the remittitur order before the trial court's jurisdiction had expired.

law; or, the award is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision.

Furthermore, a trial court may not remit a jury's verdict "without a clear showing that it has been formed by improper factors." *Modaber v. Kelley*, 232 Va. 60, 69, 348 S.E.2d 233, 238 (1986), holding that a trial court did not abuse its discretion in entering judgment on a jury's award of \$750,000 for pain and emotional suffering by a mother relating to an injury to a fetus that resulted in stillbirth.

b. Argument as to the remittitur issue.

In the context of these legal principles and as the following argument proves, the trial record supplies no basis for making the "clear showing that [the verdict of the jury] has been formed by improper factors," as *Modaber, supra*, requires before the trial judge may remit the jury's verdict.

Furthermore, because the trial judge made the same error in the Shepard litigation that he made in *Pace v. Aboulhosen, supra*, the same result on appeal is warranted -- to reinstate the jury's verdict. After all, in explaining why he was remitting the jury's verdict in the Shepard litigation, once again the trial judge never articulated an explanation as to why the jury, reasonably evaluating the evidence in the light most favorable to the Shepard family, could not have reached the verdict it reached.

Because of this deficient analysis, the trial judge remitted the award to Mr. Shepard, Sr. from \$1.1 million to \$750,000, remitted the award to Merritt Shepard (the resident of Germany) from \$100,000 to \$50,000, and remitted the award of prejudgment interest from approximately \$660,000 to zero. These three reductions are discussed separately below.

1). The reduction of the jury's award to Mr. Shepard, Sr.

In remitting the jury's award to Mr. Shepard, Sr. from \$1.1 million to \$750,000, the trial judge cited only the following facts:

- # “[T]he jury gave over 100,000 [dollars to Mr. Shepard, Sr.] not requested by the plaintiff....” App. 633.
- # Mr. Shepard “was age 83 at the time of trial....” App. 181.
- # “[T]here was no evidence of loss of income....” App. 181.

Admittedly, the \$1,100,000 awarded to the widower Mr. Shepard is a substantial sum. But there was evidence to support it -- none of which the trial judge even mentioned. The senior Mr. Shepard and his wife had been married for 44 years. App. 394. She was eleven years his junior. App. 391. The decedent conceived<sup>3</sup> and raised his six children, App. 399, washed his clothes, App. 404, maintained his house, App. 378, cooked his food, App. 398 - 99, paid his bills, App. 356, and got his last Army promotion for him, App.400 - 401. The U. S. Army awarded Mrs. Shepard a Certificate of Appreciation, App. 193, documenting that:

On the occasion of the retirement of her husband from active duty with the United States Army [Ernestine Shepard] has earned the Army's grateful appreciation for her own unselfish, faithful and devoted service. Her unflinching support and understanding helped to make possible her husband's lasting contribution to the nation.

And his wife even helped relieve the discomforts of Mr. Shepard's advancing years:

Rubbing me down when my arthritis was bothering me. So now I have to reach back there and rub my own shoulders, and I can't hardly do it. I just let it hurt.

---

<sup>3</sup> The birth certificates of the six children are in evidence as Plaintiff's Exhibits 16 through 21, App. 186 - 192.

App. 402. In addition, the adult child Randy Shepard described his mother as “a crutch to my dad. . . [who] hasn’t been right since without that crutch,” App. 356, and Bishop Wright testified that Mrs. Shepard “ate, slept, and lived in and survived in caring for her husband, as well as for her family,” App. 379.

But more important than all of these functions, Mrs. Shepard supplied loving companionship and genuine devotion, leaving behind a man who has lost about 15 pounds, App. 399, burns his food “about half the time”, App. 399, eats alone, App. 399, and spends “this lonely life that I am experiencing now,” App. 404, “[j]ust fumbling around, trying to find something to do to keep busy,” App. 394. This is the same man who, on the day when his wife was fatally hurt, followed the helicopter by car to MCV, to be with her. App. 395 - 96. His emotional loss is such that, even more than four years after his wife’s death, he visits her grave once or twice a month, when he:

talk[s] with her as if she was going to talk back, knowing that she can’t. I tell her about the children. I tell her about my life and what I’m going through since she’s been gone, how much I miss her, and all of that. You would think that somebody was talking to me the way I be talking out there sometimes. And I say a prayer or two, and then I leave.

App. 404 - 05. That testimony was spellbinding.

In the context of these facts, for two independent reasons the trial judge was wrong to remit the jury’s verdict for Mr. Shepard, Sr. from \$1.1 million to \$750,000. First, the trial judge did not inquire whether a jury could have awarded \$1.1 million to Mr. Shepard, based on a reasonable evaluation of the evidence in the light most favorable to him. *Edmiston v. Kupsenel, supra*; *Poulston v. Rock, supra*; *Virginia Electric and Power Co. v. Dungee, supra*; and *Pace v. Aboulhosen, supra*. Second, if the trial judge had thus inquired (which he did not), it would have been an abuse of discretion to conclude that a

jury, after making such a reasonable evaluation, could not have awarded \$1.1 million to Mr. Shepard.

It is of course true that the jury awarded Mr. Shepard \$100,000 more than the one million dollars requested by plaintiff's counsel in closing argument. App. 536. But contrary to the reasoning of the trial judge, this does not fairly indicate that passion or prejudice produced the jury's verdict. After all, the jury gave the six children a total of only \$600,000 -- \$2.4 million *less* than requested by plaintiff's counsel in closing argument. App. 536. If passion or prejudice had produced the jury's verdict, would it have done so selectively -- for Mr. Shepard only, and not for his six children as well? What evidence is there in the record, anywhere in the record, that *because of* passion or prejudice or other improper motive the jury awarded Mr. Shepard, Sr. \$100,000 more than requested by plaintiff's counsel, at the same time that the jury awarded the six children \$2,400,000 less than requested by plaintiff's counsel?

Contrary to the trial judge's explanation, there is a perfectly logical explanation for the jury's verdict that does not implicate mankind's darker side -- namely, that the jury took to heart and followed Instruction #16, that "The amount sued for is not evidence in this case. You should not consider it in arriving at the amount of your verdict, if any." App. 6 and 519.

Recoveries in other Virginia litigation confirm<sup>4</sup> that a conscientious and fair-minded jury could reasonably have valued the loss suffered by Mr. Shepard at \$1,100,000. *Virginia Electric and Power Co. v. Dungee, supra*, is particularly important. There, this Court held that the trial court did not abuse its discretion in denying remittitur of a verdict for \$20,000,000 for the pain and suffering of a child who was badly burned while trespassing on a power company's substation. The Dungee child presented no evidence of special damages. Thus the \$20,000,000 verdict was solely for intangible losses, just as the jury's \$1,100,000 award to Mr. Shepard was solely for intangible losses.

In 1986, in *Modaber v. Kelley, supra*, this Court upheld an award of \$750,000 for pain and emotional suffering by a mother relating to an injury to a fetus that resulted in stillbirth. This was the maximum recovery that, at that time, Virginia's medical malpractice cap allowed. There, this Court wrote that, although the amount of the verdict was larger than some members of the Court would have awarded if they had been sitting as jurors, the Court could not say that the verdict was excessive as a matter of law.

---

<sup>4</sup> Mr. Shepard recognizes that, in *Williams Paving Co. v. Kreidl*, 200 Va. 196, 204, 104 S.E.2d 758, 764 (1958), this Court discounted the relevance of verdicts in other litigation, holding that the trial judge did not abuse his discretion in concluding that a verdict for \$33,000 was not excessive, and writing:

Defendants cite several cases in which verdicts for personal injuries were set aside or the plaintiffs put on terms to accept lesser sums, and plaintiff relies upon several decisions where comparable sums for personal injuries were not disturbed. Yet the inadequacy or excessiveness of each verdict must be determined on the facts of the case, the character of the injuries sustained, and their resultant effect upon the injured party, which are never identical, and but seldom similar. Hence the amounts of respective verdicts for somewhat like physical injuries are by no means controlling or determinative of whether a verdict under consideration is excessive or not, or inadequate or not.

In *Jan Paul Fruiterman, M.D. and Associates, P.C. v. Waziri*, 259 Va. 540, 525 S.E.2d 552 (2000), a defendant contended that the jury's award of roughly \$650,000 for non-economic damages in a wrongful death case was excessive. The decedent was an 8 day old child, and the statutory beneficiaries were his parents. In response this Court held, "We find the evidence of sorrow, mental anguish, and solace contained in this record fully sufficient to support the jury's award...." 259 Va. at 545, 525 S.E.2d at 555.

In *Lomax v. Couthran*, Circuit Court of the City of Buena Vista, 15 VLW 1169 (March 19, 2001), a jury returned a verdict for \$3.7 million on account of the death of a 66 year old retired woman. The statutory beneficiaries were her husband and two adopted, adult children. The economic losses (medical and funeral expenses) totaled only about \$218,000. Because the parties had entered into a high low agreement, with a floor of \$1.5 million and a ceiling of \$3.5 million, there will be no appeal. For intangible losses such as sorrow and the like the jury awarded \$2 million to the husband, and \$750,000 to each adopted, adult child. As the newspaper article reporting this verdict noted at 15 VLW 1169:

The reason for the jury's returning a large verdict: The family's lawyers said they were able to demonstrate the closeness of the family relationship and the continuing impact of her death on the surviving husband and their two adult children.

*Taylor v. Mobil Corp.*, 1993 WL 945991 (Fairfax County Circuit Court), *aff'd in part and rev'd in part, all on other grounds*, 248 Va. 101, 444 S.E.2d 705 (1994), likewise powerfully supports the reasonableness of the jury's award to Mr. Shepard. There, the jury in a wrongful death action awarded a widow "almost \$1.8 million" for sorrow,

mental anguish, and loss of companionship. The trial judge denied the defendant's motion to remit. In doing so, the trial judge explained:

From the evidence, the jury could believe that Mr. and Mrs. Taylor shared a close and affectionate relationship. Upon consideration of the impact of the loss of a spouse, the quality of the Taylor's marriage, and the relatively young ages of the couple as well as other evidence about the relationship, the jury could find that an award of almost \$1.8 million for such loss to be fair and just.

[1993 WL 945991](#), at \*7.

Published decisions from other jurisdictions likewise make clear that the size of the Shepard jury's award to Mr. Shepard does not justify remittitur: [Lindsey v. Navistar International Transportation Corp.](#), 150 F.3d 1307 (11th Cir. 1998) (under Georgia law, bench verdict for \$5,000,000 for the " 'intangible value' of [a 30 year old woman's] life" was not excessive, where the decedent was survived by a husband and two sons ages four months and two-and-a-half years); [Pescatore v. Pan American World Airways, Inc.](#), 97 F. 3d 1 (2nd Cir. 1996) (jury verdict of \$5,000,000 for wife's loss of society, companionship, love, and affection not excessive, where her husband died at the age of 33); [Gaddis v. United States](#), 7 F. Supp.2d 709 (D.S.C. 1997) (bench verdict of \$800,000 for loss of society and companionship suffered by the adult daughter of the deceased, a 69 year old man); [DeYoung v. Alpha Construction Co.](#), 542 N.E.2d 859 (Ill. App. Ct. 1989), appeal denied, 548 N.E.2d 1067 (Ill. 1989) (jury's verdict of \$3,600,000 for loss of society was not excessive, where the deceased was a 75 year old woman who was survived by her husband of 57 years and their ten children); [Thornhill v. State Department of Transportation and Development](#), 676 So.2d 799 (La. Ct. App. 1996) (bench verdict of \$150,000 to each of ten adult children for

intangible losses was not excessive, where the decedent was their 69 year old mother); *Aime v. Seaboard System Railroad*, 648 So.2d 20 (La. Ct. App. 1994), cert. denied, 649 So.2d 417 (1995), reconsideration denied, 651 So.2d 262 (1995) (bench verdict of \$900,000 for a widow's general damages was not excessive, and neither was a bench verdict of \$700,000 for a minor child's general damages); *Klinke v. Mitsubishi Motors Corp.*, 556 N.W.2d 528 (Mich. Ct. App. 1996), aff'd, 581 N.W. 2d 272 (Mich. 1998) (jury verdict of \$5,000,000 for intangible losses not excessive, where the 22 year old decedent was survived by a sister and one parent); *Betz v. Timken Mercy Medical Center*, 644 N.E.2d 1058 (Ohio Ct. App. 1994) (jury verdict of \$2,500,000 for intangible losses not excessive and the trial court was wrong to reduce this award to \$1,165,000, where the statutory beneficiary in question was the husband who had been married to the 23 year old decedent for less than three months); *Knoke v. South Carolina Department of Parks, Recreation, and Tourism*, 478 S.E.2d 256 (S.C. 1996) (jury verdict of \$3,000,000 for non-pecuniary losses not excessive, where the decedent was a 12 year old child survived by his parents).

2). The reduction of the jury's award to Merritt Shepard.

In remitting the jury's award to Merritt Shepard (the resident of Germany) from \$100,000 to \$50,000, the trial judge committed similar error. He cited only the following: Merritt was absent from trial, App. 632; there was "minimal evidence," App. 632, as to his intangible losses; and the jury awarded him "the same amount as the other [five children] who testified at great length to the relationship with their mother," App. 632.

Thus, in remitting the jury's award to Merritt, the trial judge ignored the following evidence:

- # The decedent “was a great wife and mother. They miss her terribly.” App. 540. These are the words of defense counsel himself, spoken in closing argument.
- # Plaintiff's Exhibit 14 (the large family photograph) shows Merritt Shepard with his mother and other family members. App. 184. This photograph was taken at a 4<sup>th</sup> of July cookout at which the Shepard family gathered. App. 357.
- # All six of the children, even Merritt, attended their mother's funeral. App. 368.
- # Mrs. Shepard “held us all together” while Mr. Shepard, Sr. was in Vietnam. App. 371.
- # Mrs. Shepard “didn't have any favorites” among her children. App. 350.
- # Mrs. Shepard “loved every one of us. She took time with us.” App. 384.
- # Mrs. Shepard “was very close to each one of us....” App. 385.
- # Mrs. Shepard did the disciplining of the children and saw to their moral upbringing. App. 347.

In the context of these facts, for the same two independent reasons, the trial judge was wrong to remit the jury's verdict for Merritt from \$100,000 to \$50,000. First, the trial judge failed to inquire whether a jury could have reached a verdict of \$100,000, based on a reasonable evaluation of the evidence in the light most favorable to Merritt.

*Edmiston v. Kupsenel, supra; Poulston v. Rock, supra; Virginia Electric and*

*Power Co. v. Dungee, supra*; and *Pace v. Aboulhosen, supra*. Second, if he had thus inquired and then remitted the verdict, he would have abused his discretion.

It is true, of course, that Merritt did not attend trial. But he had responsibilities in Germany -- a wife, two children, and was “the operational chief receiver for the United States Army. He handles all of the equipment for the United States Army.” App. 349.

It is also true, of course, that the jury awarded the same amount to Merritt as to his five siblings. But when the evidence is that Mrs. Shepard “didn’t have any favorites” among her children and “loved every one of us,” can it be said that it was unreasonable for the jury to award the same amount to each child?

3). The elimination of the jury’s award of prejudgment interest.

At the root of the trial judge’s decision to remit all prejudgment interest was the trial judge’s personal belief, erroneous as a matter of law, that interest should run “from the date of trial since this delay is something that is not attributable to either side . . . .” App. 637. To the contrary, the purpose of prejudgment interest is not to punish anyone, and is not dependent on evidence as to responsibility for delay in bringing litigation to a close. *Gill v. Rollins Protective Services Co.*, 836 F.2d 194, 199 (4<sup>th</sup> Cir. 1987), stating, “We are persuaded that Rollins’ urged ‘bona fide legal dispute’ exception to the Virginia prejudgment interest statute is without support.” Instead, Virginia law allows a jury to award prejudgment interest because “it is but natural justice that he who has the use of another’s money should pay interest on it. . . .” *City of Lynchburg v. Amherst County, supra*, 115 Va. at 608, 80 S.E. at 120. See *Gill v. Rollins Protective Services Co., supra*, 836 F.2d at 199, stating that an award of prejudgment interest “is designed to compensate the plaintiff who has been without relief for an extended period of time.” This is why

*Virginia Code* section 8.01-382 gives the finder of fact (in the Shepard trial, the jury) the discretion to “provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence.” The trial judge’s instruction as to interest at App. 520 mirrors this statute, as follows:

As to interest, you have a choice. You may award interest. You may not award interest. It is up to you. If you do award interest, you have a choice from the date of the accident up until the date of the trial. Or you have a choice of not to award interest. . . .

Handicapped by his erroneous personal belief that the purpose of prejudgment interest was to punish a party for delay, the trial judge did not articulate a satisfactory explanation as to why the jury, reasonably evaluating the evidence in the light most favorable to the plaintiff, could not have awarded prejudgment interest. As a result, this Court must reverse the trial judge’s decision to remit all prejudgment interest.

*Edmiston v. Kupsenel, supra; Poulston v. Rock, supra; Virginia Electric and Power Co. v. Dungee, supra; and Pace v. Aboulhosen, supra.*

In sum, there are multiple defects, each fatal, underlying the trial judge’s decision to remit all interest: first, this decision was based on an objection that defense counsel waived by not raising it until four weeks after the jury returned its verdict, discussed above in detail in connection with the first assignment of error; second, this decision stems from the trial judge’s mistaken personal belief that the purpose of prejudgment interest is to punish rather than to compensate for the time value of money; third, it conflicts with the instructions that, without objection, the trial judge gave the jury as to interest, since the jury’s award of interest is totally consistent with those instructions; and finally, the trial judge failed to articulate why the jury, reasonably evaluating the facts in

the light most favorable to the Shepard family, could not have made the award of interest that the jury actually made.

4). The jurors' behavior.

The jurors' behavior supplies no basis to remit. They were appropriately attentive throughout the trial. They listened carefully and seriously. They deliberated for more than two hours. Once the verdict was returned, the foreman responded seriously, intelligently, and forthrightly to the trial judge's questions as to who was the foreman, whether the jury had reached a verdict, and what was the foreman's preference as to who read the verdict. App. 556. When the jurors were polled at the request of the defense, each agreed with the verdict. App. 557 - 58. In short, there is no evidence whatsoever that passion or prejudice produced the verdict, or that the jury misconstrued the facts or the law.

## CONCLUSION

This jury's assessment of damages reflects tempered, mature deliberation and an impartial discharge of the jury's collective civic duty. It is not easy to determine the full and fair money equivalent of the sorrow, mental anguish, solace, and other human losses suffered by the seven Shepard statutory beneficiaries, for which Virginia law allows recovery. Even so, it is *because of* this difficulty, not *in spite of* this difficulty, that Article I section 11 of the *Constitution of Virginia* leaves this task to the collective wisdom of the common man. Jurors, through their life experiences, know the value of these human losses in their many dimensions, and the trial judge was wrong to substitute his verdict for the jury's verdict.

For all of the reasons set forth above, the appellant Abe Shepard, Administrator of the Estate of Ernestine Shepard, asks this Court to reverse the trial court's order of remittitur, reinstate the jury's verdict, and enter judgment for the appellant on the jury's verdict -- just as this Court did in *Pace v. Aboulhosen, supra*.

ABE SHEPARD, Administrator  
of the Estate of Ernestine Shepard

---

Counsel  
Charles H. Cuthbert, Jr.  
Margaret Cuthbert Broaddus  
Cuthbert Law Offices  
A Professional Corporation  
220 North Sycamore Street  
Petersburg, Virginia 23803

**CERTIFICATE**

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that, on July 6, 2001, I caused twenty copies of this brief to be filed in the office of the Clerk of this Court, and three copies thereof to be mailed to opposing counsel, as follows:

Charles F. Midkiff, Esquire  
Midkiff, Muncie & Ross, P.C.  
9030 Stony Point Parkway, Suite 160  
Richmond, VA 23235

---

Charles H. Cuthbert, Jr.