AUTO INJURY LITIGATION FROM START TO FINISH

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PART III

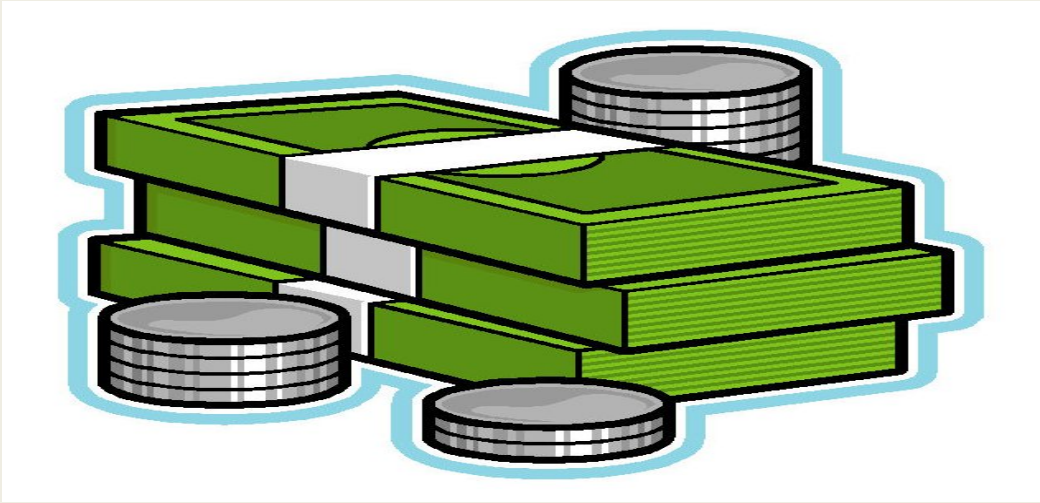
INITIAL FILING, DISCOVERY, EXPERTS AND EVIDENCE

FILING A COMPLAINT IN CIRCUIT COURT: RULE 1:4

- Claims greater than $25,000.00
- State facts in numbered paragraphs
- Informs opposite party of the nature of the claim
- Date stamp required for proof of beating SOL
- Electronic filings only available in Arlington

PRACTICE POINTER: RULE 3:2(c)(ii)

- If asking for money damages, include the amount requested in the ad damnum clause of the complaint
- Unlike federal court, you cannot amend the complaint to increase the amount sued for after the judgment or verdict



SCHEDULING TRIALS IN CIRCUIT COURT: RULE 1:20

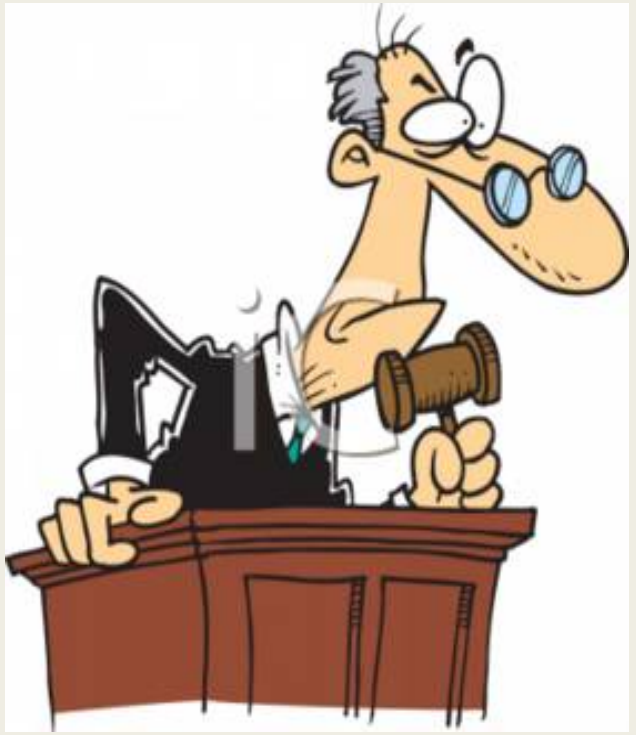
- Counsel may agree to trial date on their own
- Court may set civil cases for trial on a term day
- Usually at least four term days per year

PRACTICE POINTER

- Uniform Pretrial Scheduling Order requires written discovery be completed no later than 30 days before trial
- Interrogatories, RFPDs, and RFAs must all be served no later than 51 days prior to trial

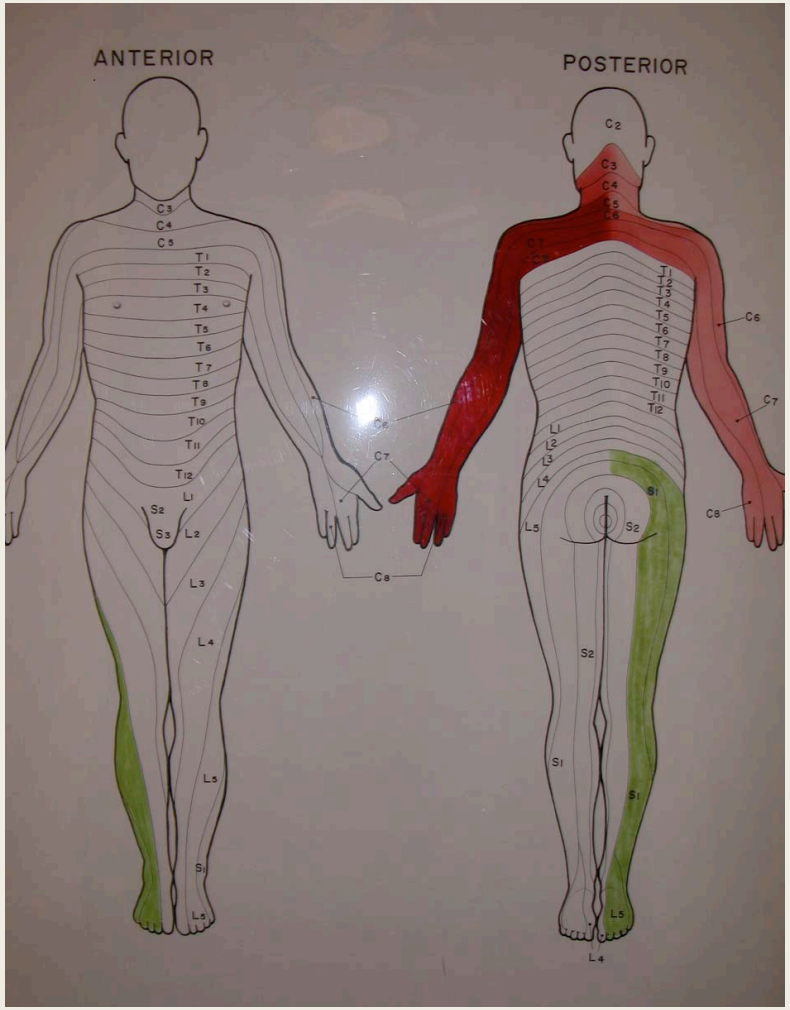
GENERAL DISTRICT COURT: RULE 7B

- If claim less than $25,000, file in GDC
- Exclusive jurisdiction over claims of $4,500 or less
- Claim will be heard by a judge, not a jury
- Either party can appeal “de novo” to circuit court within 10 days of judgment
- If defendant appeals, he/she must post bond
  - Exception exists for defendant with indemnity coverage through liability policy that is sufficient to satisfy judgment

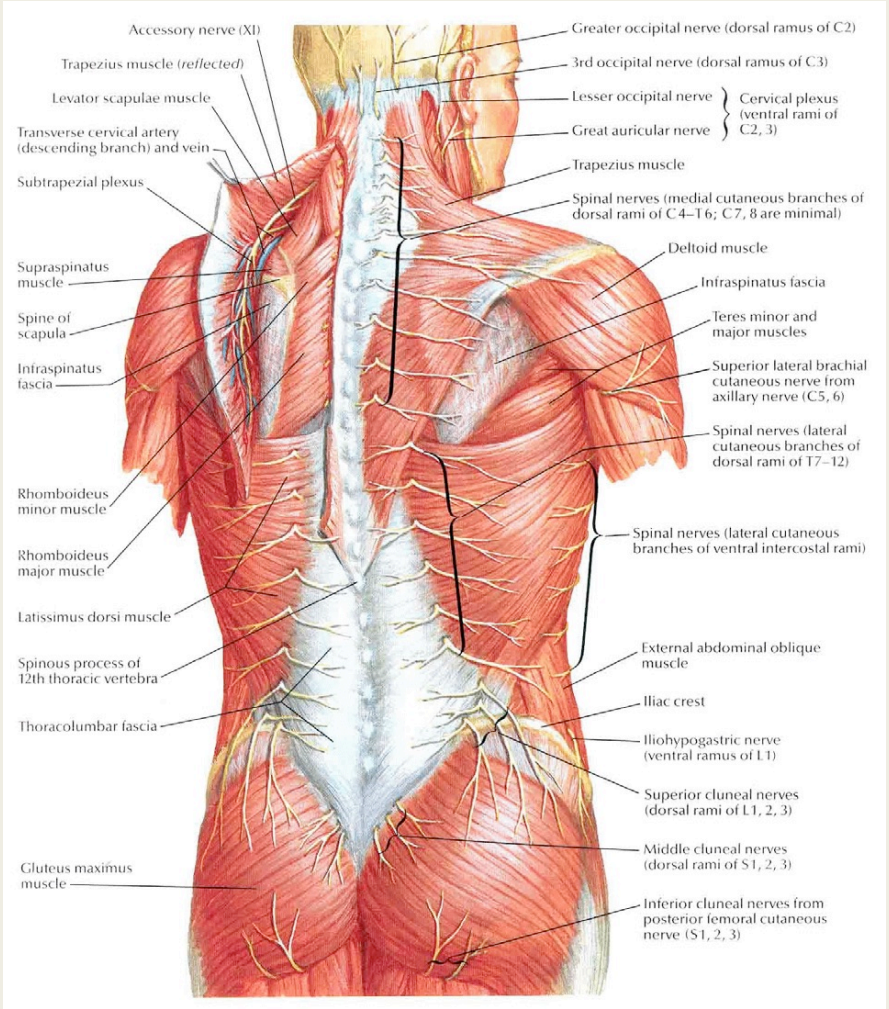


ANATOMY OF COMMON INJURIES

Nerve roots and their pathways – radiculopathy



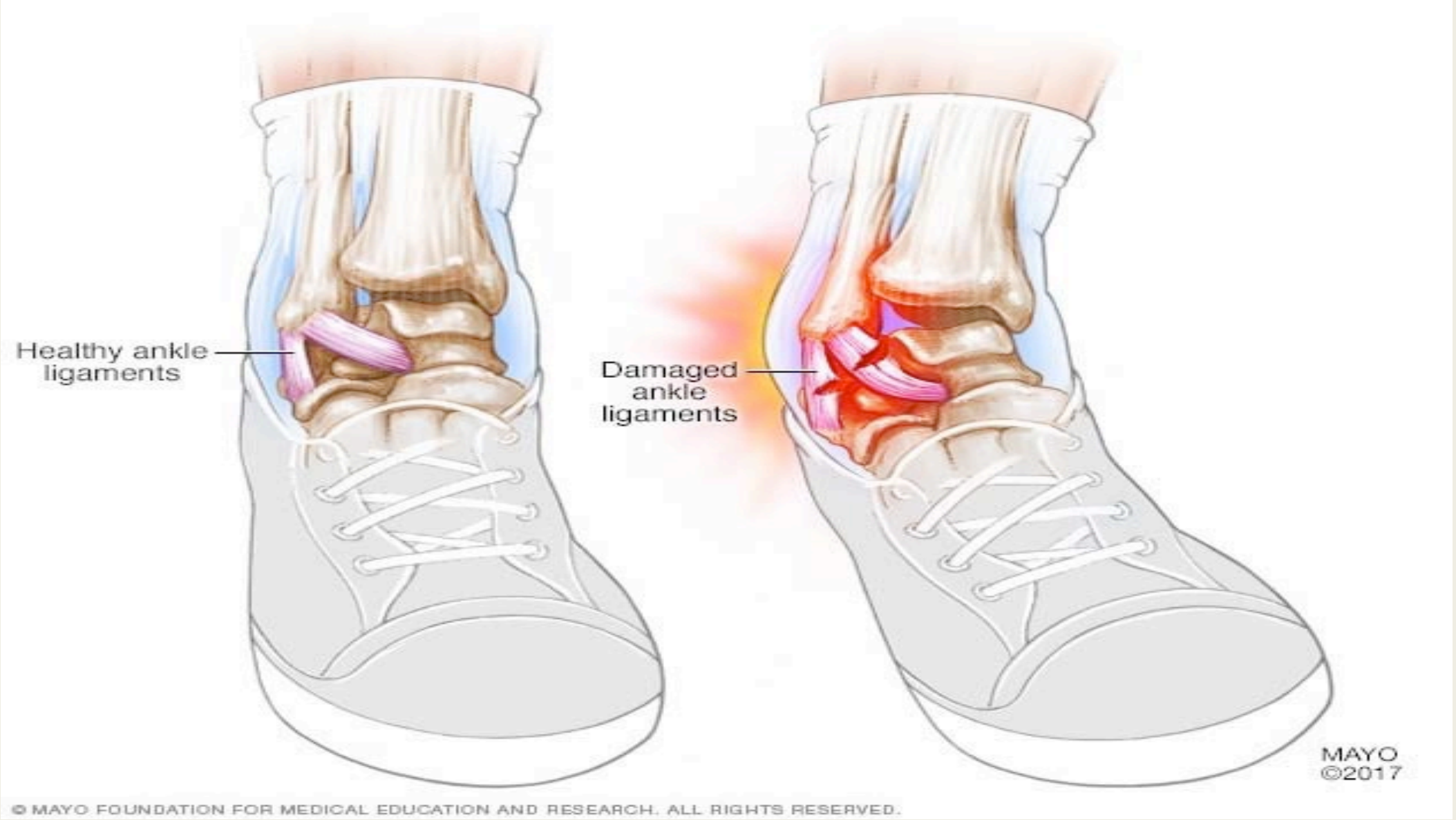
Nerves in the back



STRAINS & SPRAINS

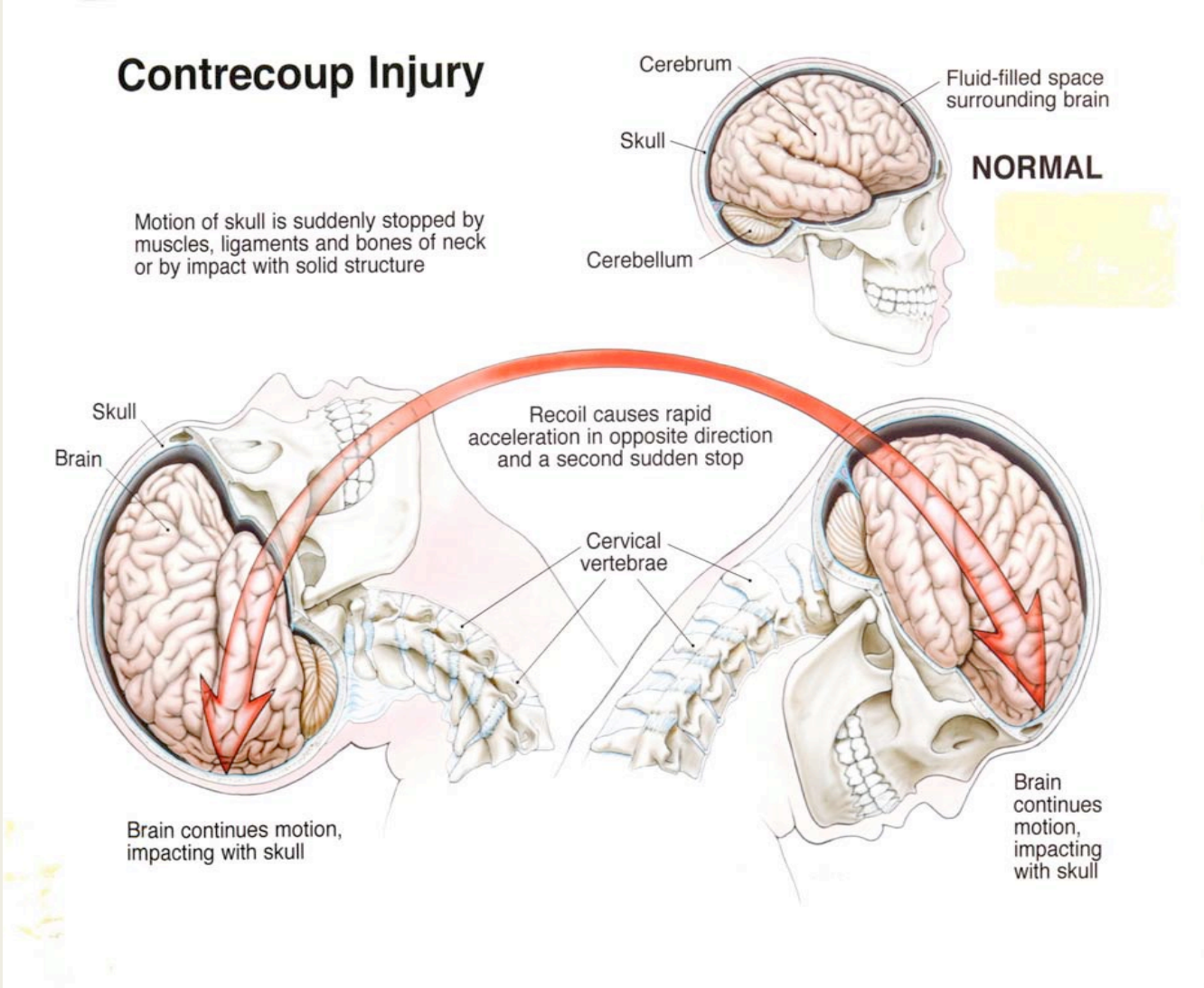
- Strains and sprains probably most common injury after a motor vehicle accident
- A strain is a stretching or tearing of muscle or tendon
- Tendon is the fibrous cord of tissue that connects muscles to bones
- A sprain is a stretching or tearing of ligaments
- Ligament is tough bands of fibrous tissue that connect bones to form joints

ANKLE SPRAIN



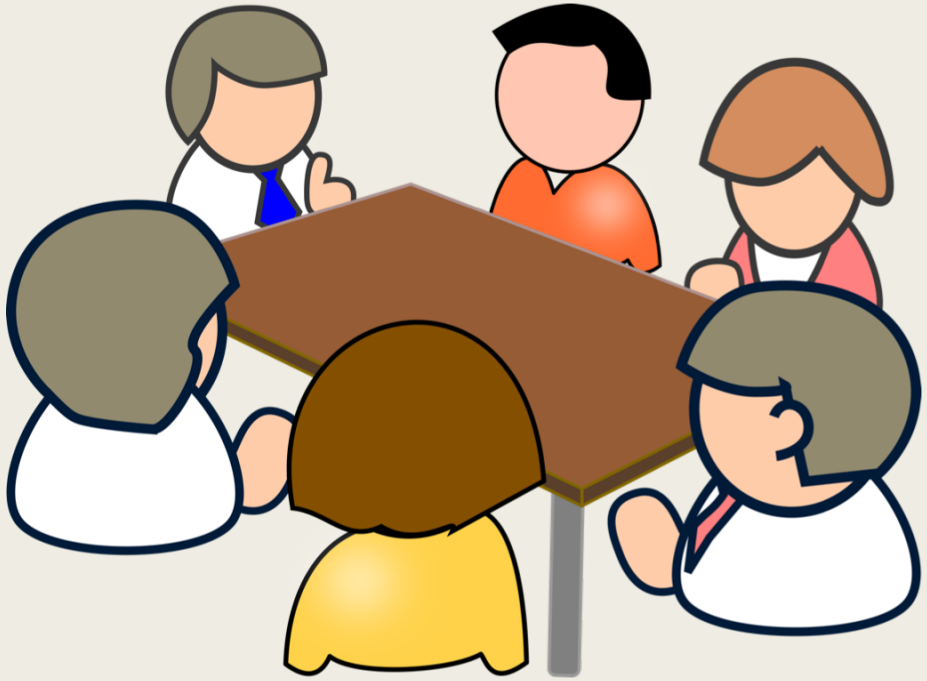
COUP CONTRECOUP INJURY (“WHIPLASH”)

- Motion of the skull is suddenly stopped by muscles, ligaments, and bones of the neck or by impact with solid structure
- Severe whiplash, with or without the head striking an object, can cause a concussion and a mild traumatic brain injury (MTBI)



WITNESS DEPOSITIONS – RULE 4:5

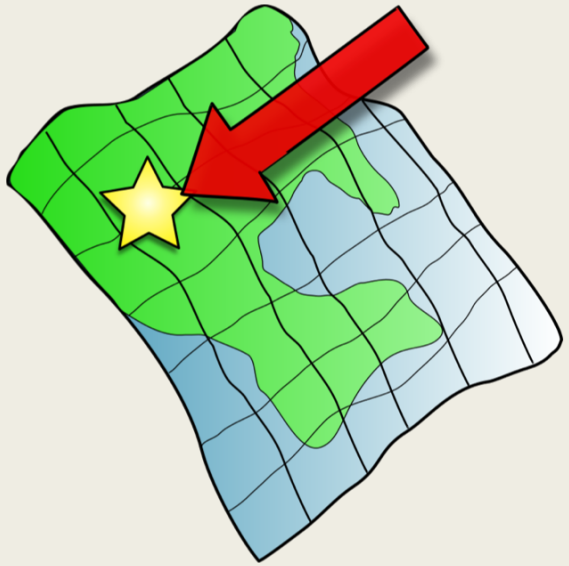
- Depositions are necessary to fully explore claims and defenses
- Depositions may provide ammunition for cross examination and impeachment



LOCATION OF DEPOSITIONS OF A PARTY

- Party depositions may be taken;
  - In the city or county where the suit is pending; or
  - In an adjacent city or county; or
  - Where the parties agree; or
  - Taken where a court may designate

LOCATION OF DEPOSITIONS OF A NON-PARTY: RULE 4:5(a)(a1)(ii)



- Non-party depositions must be taken;
  - In the city or county where the non-party resides; or
  - Where the non-party is employed of has a principal place of business
  - Typically, a non-party has to be subpoenaed to appear for a deposition

OBJECTIONS DURING WITNESS DEPOSITIONS: RULE 4:5(c)(2)

- Objections stated in non-argumentative manner
- May instruct a deponent not to answer only:
  - To preserve a privilege; or
  - To protect attorney work-product; or
  - To enforce a limitation ordered by the court; or
  - To present a motion to terminate or limit deposition

SHOULD YOU DEPOSE THE OPPOSING EXPERT WITNESS?

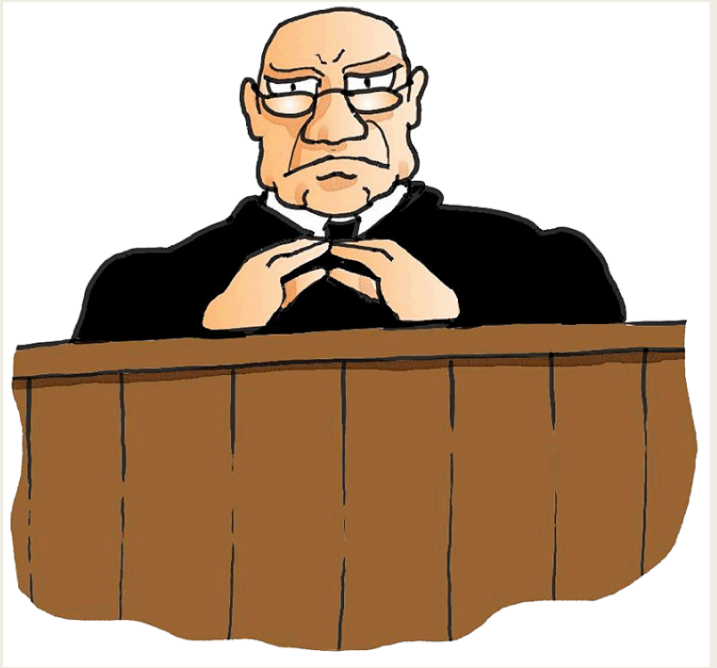
- Skilled trial lawyers disagree on this issue
- Pluses: the more information you have pretrial, the more effective cross will be
- Minuses: deposition prep may strengthen opposing expert at trial and unintentionally enlarge parameters of the expert's opinion

PRACTICE POINTER

In 2017, the Court in *Emerald Point, LLC v. Hawkins* held that opinions disclosed for the first time after 90-day filing deadline were inadmissible, despite the fact the opinions were offered in a pretrial deposition.

USE OF DEPOSITIONS AT TRIAL: RULE 4:7(a)

Depositions of witnesses, whether or not a party, may be used to contradict testimony or impeach during cross.



RULE 4:7(a)(3)

Deposition of party or corporate designee may be used

by an adverse party for any purpose

DEPOSITION OF UNAVAILABLE WITNESS: RULE 4:7(a)(4)

- May be used at trial to introduce testimony in the party's case if:
  - A) Witness is deceased; or
  - B) Witness > 100 miles from courthouse; or
  - C) Witness unable to attend due to illness, age or imprisonment; or
  - D) Witness cannot be produced by subpoena; or
  - E) Witness is a physician, surgeon, dentist, chiropractor or registered nurse who treated or examined any party

PRACTICE POINTER

If either party uses a physician to conduct only a record review, the rule does not allow the expert to appear by deposition.

DEPOSITIONS OF BUSINESS ENTITIES: RULE 4:5(b)(6)

- Allows a party to depose a corporation, partnership or governmental agency
- Notice of Deposition sets forth topics at deposition
- Subpoena Duces Tecum used for a non-party
- Attached list of requested documents used for a party

OUT-OF-STATE AND PRE-LAWSUIT DEPOSITIONS

- Out-of-state depositions: Rule 4:5(a)(a1)(iii)
  - Use a person authorized to administer oath where the deposition will be held
  - May use letter rogatory, which includes list of questions to answer under oath
- Depositions before filing lawsuit: Rule 4:2
  - Most commonly used where party or witness may become unavailable
  - Unavailability must be due to illness, death or other exigent circumstance
  - If providing notice not feasible, secure court order

ERRATA SHEET: RULE 4:5(e)

- Witness may change testimony, but must provide reason
- Thoroughly prepare witness to minimize errata sheet entries
- Witness has 21 days to provide reasons for changes
- Unless both parties so stipulate, a deponent can be required to read his/her deposition

OBTAINING MEDICAL BILLS & RECORDS

- First step is identifying relevant healthcare providers
- Interview client, starting with day of crash and move chronologically
- Common for healthcare providers to subcontract billing
- Single visit to the ER will generate multiple requests for bills and records
- ER has subcontractors, including ER physician and the radiologist

FEDERAL HIPPA REQUIREMENTS: 42 U.S.C. § 1320d et seq.

- Health Insurance Portability and Accountability Act of 1996
- Requires confidential handling of protected health information
- Mandates individual's right to access own medical records

VIRGINIA HIPPA REQUIREMENTS: § 32.1-127.1:03

- Health records are property of entity maintaining them
- Requires SDT for medical records be served on opposing counsel or the patient when he is not represented

MOTION TO QUASH IN VIRGINIA: § 32.1-127.1:03 (H)(6)

- Patient or attorney has 15 days to file motion to quash
- Factors to consider for motion to quash:
  - The particular purpose for which the information was collected;
  - The degree to which the disclosure of the records would embarrass, injure, or invade the privacy of the individual;
  - The effect of the disclosure on the individual's future healthcare;
  - The importance of the information to the lawsuit or proceeding; and
  - Any other relevant factor

REQUESTING/PRODUCING MEDICAL RECORDS & ADMISSIBILITY: VA CODE 8.01-413

- Copies of records are admissible as if they were originals
- Copies shall be produced within 30 days of date of the request
- Records can be produced either as hard copies or electronically
- Itemized bills must be provided without charge
- Willful refusal to comply with request for bills or records is sanctionable
- Sanctions include refund of fees, plus court costs and attorney fees

PRACTICE POINTER

Request that medical records be provided in electronic format, it's cheaper! Consider requesting ABSTRACT of multi-day inpatient hospital stay, which should produce most important records.

READ CLIENT'S MEDICAL BILLS & RECORDS CAREFULLY

- Days of quickly negotiating settlement of 2½ x the bills are gone
- Must be able to discuss injuries and treatment in detail
- Today, many adjusters offering settlement barely exceeding medical bills
- Carriers hope most claimants will not take the time and expense to litigate

ARGUE PAIN & SUFFERING DIRECTLY FROM MEDICAL RECORDS

- Review medical records for objective findings consistent with painful injury
- Look for terms such as “spasm,” “trigger points” and “restricted range of motion”
- Also look for the type and amount of prescription strength medication purchased
- It is common to find references to pain on a scale of 1-10 in the medical records

EVALUATE FOR PRE-EXISTING CONDITIONS AND PRIOR CLAIMS

- Adjuster will likely demand at least 3 years of prior medical records
- Always ask client about prior injuries, prior claims and pre-existing conditions
- You need to know at least as much about client's history as the adjuster
- Most prior claims are entered into a master data bank accessible by insurer

PRACTICE POINTER

Many obtain care known as “maintenance.” This can reduce the value of a claim if the maintenance was close in time to the collision and involved the same body part that was injured.

MEDICAL EXPERTS

- Can be retained experts or treating providers, or both
- Gain credibility with jury by using treating physician
- Request opinions on causation and past and future medical expenses
- Organizations such as VTLA, VADA and AAJ can be useful for finding experts

"I know nothing about the subject,
but I'm happy to give you my expert opinion."

NON-MEDICAL EXPERTS

- Auto Appraiser
  - Hire an appraiser to look for hidden damage
- Accident reconstruction/trucking expert
- Vocational rehabilitation
- Economist
- Medical billing coder

SECURING DRAFT REPORT FROM EXPERT

- Make sure you know opinions of expert or treating physician before report is final
- Many experts do not understand how to phrase their conclusions to satisfy the court
- Best to avoid a paper trail with drafts going back and forth
- In state court, claim your comments to an expert are protected work product
  - See *Turner v. Thiel*, 262 Va. 597 (2001), where VSC held that counsel's communications with expert were confidential
- Your consultations and work product are explicitly protected under the federal rules

EXPERT & LAY TESTIMONY

- Expert testimony is proper when the subject matter is of such character that only persons of certain skill or experience are capable of forming a correct judgment
- Opinion testimony by lay witness is allowed if:
  - It's reasonably based upon personal experience or observations of witness; and
  - It will aid the trier of fact in understanding the witness' perceptions
- Examples of admissible lay opinion:
  - Speed of a vehicle
  - Handwriting

EVIDENTIARY ASPECTS OF EXPERT TESTIMONY

- Rule 2:701: Opinion testimony by lay witnesses
- Rule 2:702: Testimony by experts
- Rule 2:703: Basis of expert testimony
- Rule 2:704: Opinion on ultimate issue
- Rule 2:705: Facts or data used in testimony
- Rule 2:706: Use of learned treatises with experts

DISCOVERY OF EXPERT OPINIONS: RULE 4:1(b)(4)(A)

- Can use interrogatories to identify the opponent's experts
- Opposing party must divulge:
  - Subject matter about which expert is to testify,
  - Substance of facts and opinions to which expert is expected to testify, and
  - Summary of the grounds for each opinion

DISCOVERY OF EXPERT OPINIONS: RULE 4:1(b)(4)(A)

- Subject to paying a reasonable fee, counsel may depose opposing testifying expert
- Can't discover opinions of non-testifying expert, absent exceptional circumstances
- May also seek *Lombard* information, which allows for discovery of an expert's income earned from opposing counsel. *Lombard v. Rohrbaugh*, 262 Va. 484 (2001)

MEDICAL EXAMINATIONS OF PLAINTIFF: RULE 4:10

- Authorizes defendant to require plaintiff to attend exam
- Defendant can select authorized healthcare provider
- Defendants request exam if plaintiff claiming permanent/ongoing injury
- If physical/mental condition of party is in issue, upon motion, court may order exam

- Rule 4:10 has been the subject of much litigation:
  - What constitutes "good cause" to seek the examination?
  - Can Defendant tell the jury the examination is "independent?"

PHYSICAL AND MENTAL EXAMINATION OF PERSONS

- Rule 4:10 requires an Order
  - Order to be made only on motion for good cause shown
  - Specifies time, place, manner, CONDITIONS AND SCOPE OF EXAMINATION
  - Names examiner & fixes time for filing report
- Do not agree to the examination if your client is not claiming a permanent injury

DEFENSE MEDICAL EXAM: ADVICE TO PLAINTIFF

- Plaintiff should be advised to be polite, but not overly friendly
- Plaintiff should:
  - Be familiar with his/her medical history
  - Be able to explain where he has pain and how it affects him/her
  - Understand the doctor is not neutral
  - Understand the examination is not for treatment
  - Understand the examination does not create doctor-patient relationship

PRACTICE POINTER: RULE 4:10(c)(2)

If the results of the defense exam are favorable, the plaintiff can read the report to the jury.

SECURING EVIDENCE

- Take photographs of the accident scene
- Accident scene may be only opportunity before litigation to secure photos of the other person's vehicle
- Secure photos of client's vehicle, even if injuries aren't life-threatening
- If you wait too long, vehicle may be disposed of or repaired
- Good photos of vehicle damage enhance client's bodily injury claim

PRACTICE POINTER

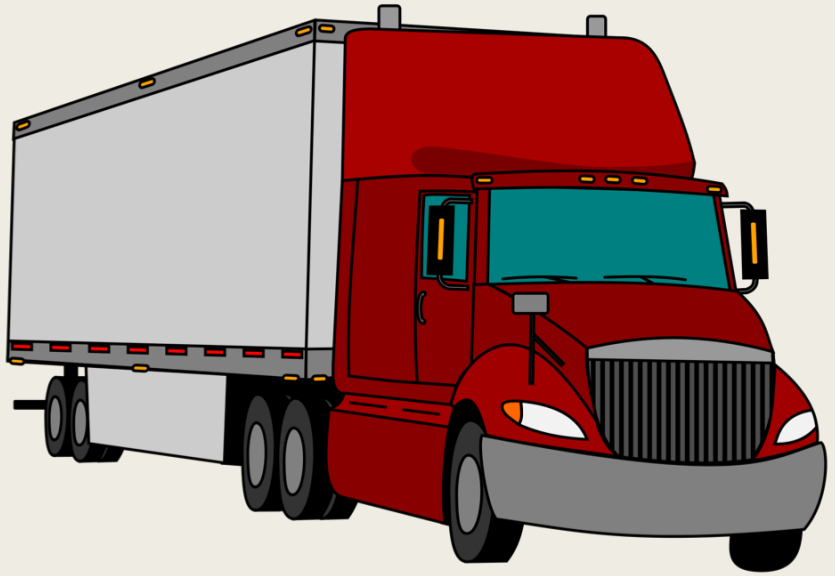
Never accept client's representation that the other party's insurer took photographs to dissuade you from taking your own. You typically have no better then a 50-50 chance of securing valuable photographs from the defendant's insurer.

EVENT DATA RECORDER (EDR) AND MANIFEST

- If accident involves serious injury, hire an expert to download data from EDR
- EDRs record data such as speed and braking events
- Secure truck driver's manifest to determine hours of driver
- Tractor-trailer drivers traveling interstate required to maintain manifests
- Manifests must record hours driving, hours off-duty but awake, and hours sleeping
- Employers are required to maintain manifests for at least 6 months

PRACTICE POINTER

Hiring an expert may be critical because crash data can be lost by simply turning on the ignition after a crash. Counsel should consider filing suit immediately if cooperation regarding preservation of evidence is not forthcoming.



SPOLIATION

- If evidence lost by one of the parties, opposing party may claim spoliation
- Allows jury to infer that lost evidence would have supported opponent's case
- See *Emerald Point*, 294 Va. 544 (loss or destruction of evidence must be intentional)

DOCUMENTATION OF LOST EARNINGS

Can be simplified if the client keeps

track of the time lost from work

CRASHWORTHINESS CLAIMS

- Sometimes seatbelt failure or structural defects are alleged
- Thorough evaluation, appraisal and inspection of vehicles involved required

PART IV

DAMAGES, LIENS AND SUBROGATION IN SETTLEMENT NEGOTIATION

VEHICLE DAMAGE AND DIMINISHED VALUE

- Owner can claim vehicle lost value even after repair
- Compensation measured by cost of reasonable repairs necessary to restore vehicle to original condition, combined with diminution in value of property after repairs
- Vehicle is considered a total loss if cost of repair > ~75% of vehicle's value
- If a total loss, compensation is vehicle's fair market value immediately before crash

COLLATERAL SOURCE RULE APPLIES TO PAYMENT OF MEDICAL BILLS

- Collateral sources of payment are inadmissible at trial
- Established by case law
  - *Acuar v. Letourneau*, 260 Va. 180 (2000)
  - See page 66 in course materials

COLLATERAL SOURCE RULE APPLIES TO LOSS OF EARNINGS: VA CODE § 8.01-35

- Includes sources of payment other than defendant or defendant's insurer, such as:
  - Health insurance
  - Medicare
  - Medicaid
  - Worker's compensation
  - Disability insurance
  - Sick leave and vacation pay

PRACTICE POINTER: VA CODE 8.01-413.01(B)

For HMO's that don't generate a bill, hire a certified medical billing specialist to create a bill. The bill is admissible if submitted in the form of an affidavit from the preparer and submitted to the opposing party within 30 days of trial.

MEDICAL BILLS: *MCMUNN V. TATUM*, 237 VA. 558 (1989)

- *McMunn* held that proof of medical expenses by the introduction of bills solely through the plaintiff's testimony requires consideration of:
  - (1) authenticity,
  - (2) reasonableness in amount,
  - (3) medical necessity, and
  - (4) causal relationship

MEDICAL BILLS

- Whether treatment is medically necessary and causally related can usually only be determined by a qualified medical expert who has studied plaintiff's case
- Injured plaintiff can offer testimony about need for future care, unless the defendant objects and will question the necessity or causal relationship of the treatment

LOSS OF EARNING CAPACITY

- Earning capacity is to be distinguished from loss of earnings
- One can experience increase in income after injury and still claim lost earning capacity
  - Example: someone whose education or experience would likely have lead to significant promotions or even a new career resulting in a higher pay scale
- Calculate loss of earning capacity by figuring out work-life expectancy and loss of earnings over work-life due to injury
- Work-life expectancy considers contingencies, including probabilities of dying, becoming disabled, or leaving the labor market

FACTORS FOR LOSS OF EARNING CAPACITY

- Age and life expectancy of plaintiff
  - Table below (§ 8.01-419) admissible for permanent injury and loss of future earnings/capacity

AGE	BOTH SEXES	MALE	FEMALE
20	58.4	55.8	60.8
25	53.6	51.2	56.0
75	11.7	10.5	12.5
90	4.8	4.3	5.0

  - The death of a young child, without a history of earnings, and whose future earnings are speculative, is usually worth less than death of a working parent
  - But due to life expectancy and healthcare expenses, a serious injury with lifetime medical needs usually valued higher for a younger person

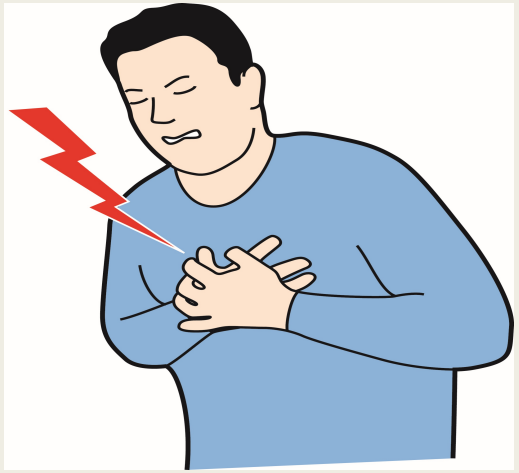
FACTORS FOR LOSS OF EARNING CAPACITY

- Evaluation of education and work history
- Potential vocational re-training costs
  - If injured worker is a candidate for a retraining program, the costs to complete the program, along with lost wages during program, can be assessed as damages

DAMAGE CALCULATION EXAMPLE

Due to injury, a construction supervisor was physically limited from performing his prior work. But with completion of a 9-month computer assisted drafting (CAD) program, he was employable as a CAD technician. Because his earnings as a construction supervisor had been variable, but his employment as a CAD technician was full-time, he was able to return to employment as a CAD technician earning as much as he had as a construction supervisor. Damages would include the cost of tuition and supplies, as well as 9 months of lost wages.

PAIN AND SUFFERING:
KONDAUROV V. KERDASHA, 271 VA. 646 (2006)



- Plaintiff and her dog were in a vehicle that overturned
- Court's opinion:
  - Mental anguish may be inferred from bodily injury
  - Such distress might include shock and fright at being struck three times, turned over, left hanging upside down in her seatbelt and experiencing physical pain
  - It might also include anxiety as to the extent of her injuries, worry as to her future well-being, her ability to lead a normal life and to earn a living

COMPENSATORY DAMAGES: JURY INSTRUCTION 9.000

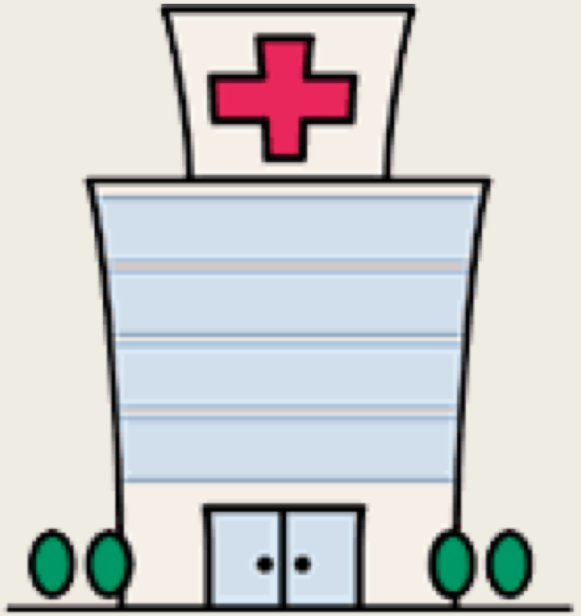
- *If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant*
  - *(1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;*
  - *(2) any physical pain [and mental anguish] he suffered in the past [and any that he may be reasonably expected to suffer in the future]*
  - *(3) any disfigurement or deformity and any associated humiliation or embarrassment;*

COMPENSATORY DAMAGES: JURY INSTRUCTION 9.000 (CONTINUED)

- *(4) any inconvenience caused in the past [and any that probably will be caused in the future];*
- *(5) any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future;*
- *(6) any earnings he lost because he was unable to work at his calling;*
- *(7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;*
- *(8) any property damage he sustained.*

STATUTORY LIENS FOR MEDICAL PROVIDERS VA CODE § 8.01-66.2

- Hospitals & nursing homes- $2500.00
- Physicians, chiropractors, nurses, physical therapists, pharmacies - $750.00
- Ambulance services - $200.00
- Can a hospital claim that each physician or nurse is entitled to $750 on top of the hospital's $2500?
- If one has two separate trips to the same emergency room for the same accident, does the hospital get to claim $5,000?



ERISA (SUBROGATION) LIENS

- ERISA stands for Employee Retirement Income Security Act
- Ascertain if client's health insurance is a qualified, self-funded healthcare plan
- Self-funded means that medical bills are paid from funds contributed by the company and its workers, not by insurance purchased by either the company or the employee
- Bills paid by qualifying self-funded plans are required to be reimbursed from personal injury settlement
- Large employers like hospital corporations and banks use self funded plans

US AIRWAYS, INC. V. McCUTCHEN, 569 U.S. 88 (2013)

- *McCutchen* confirmed ERISA compliant plan's right to reimbursement from Plaintiff's recovery
- If plan so states, reimbursement not reduced for plaintiff's attorney fee
- ERISA plans must notify insured of subrogation claim

SUBROGATION

- The right of insurer to claim reimbursement from third-party settlement or verdict for payments made to insured
- Seen in auto litigation with uninsured (UM) and underinsured motorist (UIM) claims
- At-fault party is either unknown, uninsured, or has less insurance than injured party

Subrogation – Uninsured Motorist

- Where the uninsured defendant is known, UM insurer will make payment to its insured conditioned on right to "subrogate".
- Subrogation allows plaintiff's insurer to sue the uninsured defendant for any payments made to plaintiff.
- Subrogation will not be viable where the uninsured motorist is a "John Doe" and therefore unknown.

SUBROGATION
UNDERINSURED MOTORIST

- The traditional rule is never take a payment from the liability insurer without consent of UIM carrier if you intend to make a UIM claim.
- For auto policies effective 1/1/16, never settle a claim with the liability insurer of an underinsured defendant without following the procedures in § 38.2-2206(K) and (L), which require communication and paperwork between plaintiff, defendant, and liability insurer.
- If you comply with Va. Code, you can accept liability limits and then litigate against UIM insurer AND the UIM insurer's right to subrogation is extinguished.

PENDING LIENS IN SETTLEMENT NEGOTIATIONS

- Determine all of your client's outstanding bills and liens prior to Mediation
- Don't forget you may have to deal with Medicare, Medicaid, ERISA, FEHBA, etc., who are not subject to Virginia's anti-subrogation statute
- Calculate your costs
- Review realistic range of settlement with client prior to Mediation
- Calculate client's "net" based on range of numbers representing possible settlements
- Once the claim settles, attempt to negotiate reductions of unpaid amounts and liens

MANDATORY MEDICARE REPORTING

Federal law requires all insurance companies to determine if claimant is eligible for Medicare, and if so to report it.

TIPS FOR SUCCESSFUL MEDIATION

- Mediator is a neutral person who attempts to convince parties to reach settlement
- Prepare client for a potentially frustrating “back and forth” over many hours
- Insist that the adjuster with the money attends the mediation
- Best to have pre-mediation settlement offer to gauge position of insurance company
- Make sure you and your client are on the same page with the value of the case
- Do not reveal everything up front to the mediator

TIPS FOR RESTARTING STALLED NEGOTIATIONS

- If defendant pleaded guilty and you didn't include information in demand, do so now
  - Subpoena other party's criminal record or search records in local courts
- Provide evidence of structural damage to client's vehicle when visible damage is minor
- If your client has incurred at least $12,500 in combined loss of earnings and medical bills, send them to adjuster: Va. Code § 8.01-417(C)
  - Forces them to give you policy limits
- If policy limits are low relative to damages, send demand letter noting you will settle within the policy limits

STRUCTURING SETTLEMENTS

- Invests some or all of the settlement proceeds
- There can be substantial tax benefits
- Earnings on the amount invested accumulate tax free
- Structured settlement is good for clients who cannot manage money
- The financial entity that takes the investment money will usually sell the structure to a related entity, which then holds it and must pay out as agreed
- Once client agrees to structured settlement and money is invested, it is nearly impossible to reverse

PART V

AUTO INSURANCE BAD FAITH CLAIMS IN VIRGINIA

BAD FAITH AUTO INSURANCE

- John Careless runs a red light and collides with Jane Perfect.
- Jane Perfect suffers two broken legs
  - John Careless is insured with NeverPay Insurance Company
  - NeverPay refuses to make any offer to settle with Jane
- Jane Perfect files suit against John Careless
  - NeverPay still refuses to make any offer and hires Dr. Quack

BAD FAITH CLAMS HANDLING

- Dr. Quack testifies that Jane really didn't break any legs and if they were broken she did not suffer any pain
- Jane's lawyer writes to John's lawyer explaining that Jane's injuries were severe and her damages far exceed NeverPay's 50k liability policy
  - Jane offers to settle for 49k, within the policy limits
  - NeverPay still refuses to make any offer
- Jane receives a jury verdict for 150K
  - Can Jane sue anyone for bad faith?

AETNA V. PRICE, 206 VA. 749 (1966)

- Doctor sued his malpractice insurer for failing to settle his claim within policy limits
- Court held that Dr. Price did not have a bad faith claim

AETNA V. PRICE

- *Aetna v. Price* held "the insurer may, under proper circumstances, be held liable to the insured for the whole amount of a judgment exceeding the policy limits"
- See course materials pages 83-87 (commentary by VSC)
  - Aetna refused to accept recommendation of its counsel to settle within policy limits
  - Nevertheless, VSC announced that the failure of an insurer to follow settlement recommendation of its counsel, alone, is insufficient to sustain claim of bad faith
- Damages equal amount of verdict which exceeds liability limits

REASON FOR RULE ALLOWING BAD FAITH

- Control of the defense is vested in the insurer
- The insurer is permitted to make “such investigation, negotiation and settlement as it deems expedient”
- A relationship of confidence and trust is created between the insurer and insured, which imposes upon the insurer the duty to deal fairly with the insured
- Query: Is confidence and trust the equivalent of a FIDUCIARY relationship?

HOW TO EVALUATE LIABILITY COMMON LAW BAD FAITH

- A reasonably diligent effort must be made to ascertain facts upon which a good faith judgment as to settlement can be made
- A decision not to settle must be an honest one; it must result from a weighing of probabilities in a fair manner
  - A good faith decision must be honest and intelligent in light of the insurer's expertise in the field
  - Where reasonable and probable cause exists for rejecting a settlement offer, the insurer will be vindicated

STATE FARM V. FLOYD, 235 VA. 136 (1988)

- Auto crash resulting in head-on collision injuring Plaintiff
- Defendant (Floyd) told his attorney he was not at fault
- Floyd consulted private counsel, who stated that verdict would be within policy limits
- Defense firm conducted full and complete investigation
  - Concluded no offer due to no liability, and any verdict will be within policy limits
- Plaintiff offered to settle within policy limits
- Although State Farm's counsel didn't convey settlement offer to Floyd, Floyd later testified that he would have rejected State Farm's offer of 10-15k

STATE FARM V. FLOYD

- Trial resulted in verdict of 100k, but only 50k in coverage
  - Defendant paid plaintiff 50k and then sued State Farm

- Jury awarded Floyd 50k against State Farm
  - VSC reversed

STATE FARM V. FLOYD

- Relationship of confidence and trust does exist between insurer and insured
  - The interests of the parties are parallel and to some extent overlapping
  - But it is <u>not a fiduciary relationship</u>
  - Interests of parties may diverge when likely that policy limits may be exceeded
- The insurer has the right to protect its own interest along with that of the insured
  - This means there is never a true fiduciary relationship

STATE FARM V. FLOYD

- Bad faith requires showing that the "insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured"
  - Attorneys have duty to convey offers that may significantly affect settlement
  - But Floyd testified he would have rejected settlement offer

- Ruling: attorney's failure to pass on settlement offer, by itself, is not bad faith

STANDARD OF PROOF FOR COMMON LAW BAD FAITH

- Clear and convincing evidence of bad faith. (*State Farm v. Floyd*, 235 Va. 136, 144)
  - Jury Instruction 3.110 (Definition of "Clear and Convincing")
    - Must produce evidence that creates in your minds a firm belief or conviction that he has proved the issue
  - Contrast with "Greater Weight of Evidence" Jury Instruction 3.100
    - The greater weight (preponderance) is evidence you find more persuasive

WHO OWNS COMMON LAW BAD FAITH CLAIM: JANE OR JOHN OR SOMEONE ELSE?

- NeverPay Insurance Co. has a contractual duty/confidence & trust
  - NeverPay must attempt to settle Jane's claim within policy limits
  - But NeverPay is not a "fiduciary" to John Careless
- John Careless "owns" any bad faith claim against NeverPay
  - Can John Careless "sell" the bad faith claim he "owns"?

HOW DOES THE PLAINTIFF COLLECT?

- Jane provides defense attorney and John Careless with pre-trial letter documenting clear liability & damages
- If verdict exceeds coverage, Jane Perfect contacts John Careless and requests assignment of his “bad faith” claim
- In exchange for not pursing John Careless personally, Jane Perfect receives an assignment of John Careless’ claim against NeverPay Insurance

COMMON LAW VS. STATUTORY LIABILITY (3RD PARTY) BAD FAITH CLAIM

- Common law: *Aetna v. Price* and *State Farm v. Floyd*
- Statutory VA Code 8.01-66.1(B)
  - Limited to liability claims of $3,500 or less
- Statute does not award the excess verdict
  - Damages: double the amount of the judgment as well as reasonable attorney's fees and expenses

INCIDENTS OF TRIAL FOR STATUTORY CLAIM UNDER 8.01-66.1

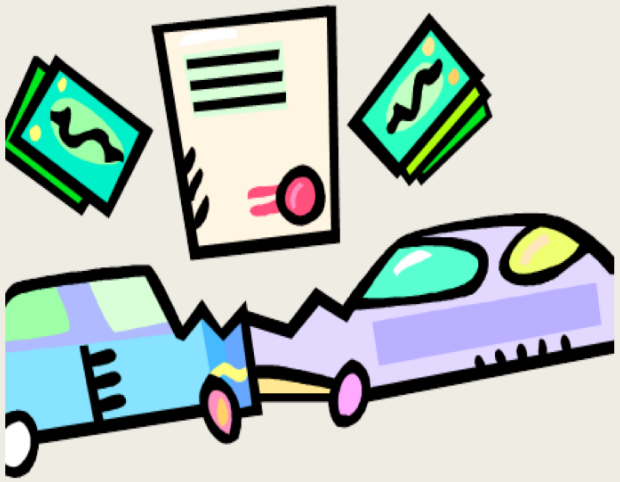
- *Nationwide Mut. Ins. Co. v. St. John,* 259 Va. 71 (2000)
- The higher evidentiary standard of clear and convincing evidence applied in *Floyd* is inconsistent with the remedial purpose of § 8.01-66.1(A)
- Evidentiary burden under this remedial statute is the preponderance of the evidence standard
- Fact finder is the judge - no jury trial
- Standard of proof is preponderance of the evidence
  - No need to prove clear and convincing

REMEMBER JOHN CARELESS AND JANE PERFECT?

- Assume that John Careless runs a red light, causing a crash that breaks Jane's legs
- But also assume that John Careless was UNINSURED
  - Jane is insured with SometimesPay insurance company
  - Jane presents her claim for damages to SometimesPay through her UM coverage
- Assume Jane has 50k of UM coverage
  - SometimesPay refuses to offer more than 5K – hires Quack
  - Quack testifies that Jane didn't break her legs, and even if she did, she had no pain
- Jane gets a verdict of 150K : Can she sue anyone for bad faith?

DOES VA RECOGNIZE A BAD FAITH UM/UIM CLAIM? *MANU V. GEICO*, 293 VA. 371 (2017)

- Crash involving four vehicles, Manu was a passenger in car #4
- Crash caused by a John Doe vehicle cutting off the lead car
- Manu's driver also negligent for rear-ending car #3, and his insurer, Allstate, paid its liability policy limits prior to trial
- Geico was Manu's insurer and Manu demanded payment from Geico, under UM coverage, for the negligence of John Doe
- Despite serious injury to Manu, Geico only offered $5,000



MANU V. GEICO

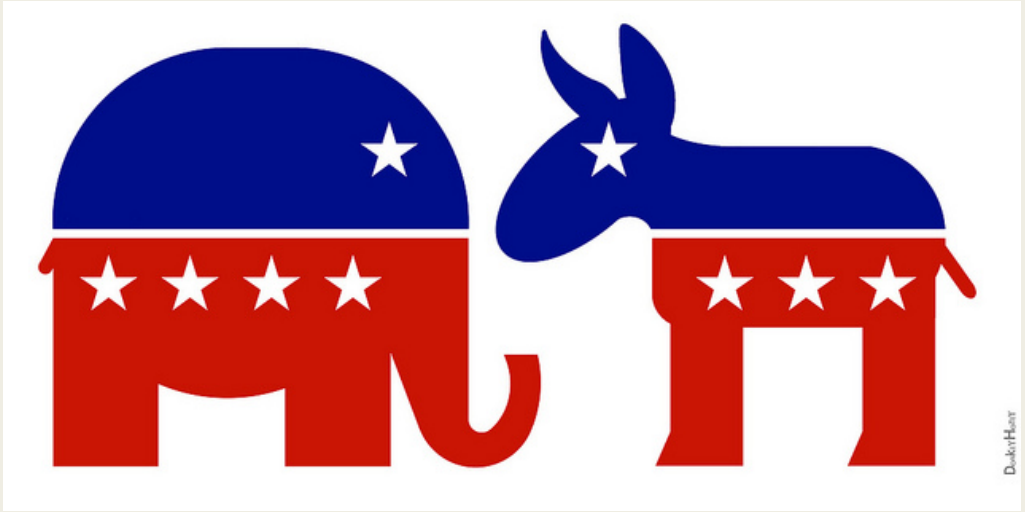
- Geico defended on the grounds that:
  - (1) the injury was not serious;
  - (2) the negligence of Manu's driver was an intervening/superseding cause; and
  - (3) the evidence of a John Doe was not clearly established
- The jury returned an excess verdict for Manu against John Doe
- Geico paid its policy limits and Manu filed a "bad faith" action against Geico
- Geico appealed to the Virginia Supreme Court
- Manu argued Virginia Code 8.01-66.1(D)(1) unambiguously references first party claims, which include UM and UIM

MANU v. GEICO

- VSC ruling:
  - All liability insurance policies issued in Virginia shall include an endorsement undertaking to pay insured all sums insured "legally entitled to recover" from UM
  - UM carrier is under no duty to pay until a judgment
  - Geico cannot be sued for bad faith for pre-judgment UM claims handling
- *Connor v. Glasgow* (2017)
  - VSC ruled on *Connor* the same day as *Manu*, holding that there is no pre-judgment bad faith for UIM claims either

IS THERE A SOLUTION TO *MANU* DECISION?

Because VSC held that the existing law will not support pre-judgment bad faith UM/UIM claims, the legislature must go back to the drawing board.



VIRGINIA CODE § 8.01-66.1(D)

"Whenever a court of proper jurisdiction finds that an insurance company . . . denies, refuses or fails to **pay to its insured** a claim of more than $3,500 in excess of the deductible, if any, under the provisions of a policy of motor vehicle insurance issued by such company to the insured and it is subsequently found by the judge of a court of proper jurisdiction that such denial, refusal or failure to pay was not made in good faith, the company shall be liable to the insured in the amount otherwise due and payable [plus interest, attorney's fees and expenses.]"

8.01-66.1(A)&(D)
MEDICAL EXPENSE COVERAGE

- *Nationwide Mut. Ins. Co. v. St. John,* 259 Va. 71, 524 S.E. 2d 649 (2000)
- Subsection (A) references claims of $3,500 Or Less
- Subsection (D) references claims of more than $3,500
- Both subsections specifically include medical expense coverage

BURDEN OF PROOF FOR STATUTORY BAD FAITH CLAIMS

Preponderance of the evidence standard:

The evidence you find more persuasive

DAMAGES AVAILABLE UNDER 8.01-66.1 (A & D) (CLAIMS MADE BY THE INSURED)

- This pertains to first-party claims
  - Medical expense claims
  - Collision/comprehensive coverage claims
  - Only post-judgment UM and UIM claims
- Judge may award an amount DOUBLE the amount otherwise due & payable, plus reasonable attorney's fees and expenses

HOW TO PROVE COMMON LAW BAD FAITH

- Must have judgment in excess of defendant's policy limits
- Must have evidence of more than insurer's refusal to follow counsel's advice to settle within limits
- Evidence must be "clear and convincing" that insurer acted in furtherance of its own interest with intentional disregard of the financial interest of the insured
- Pages 92-93 in course materials: evidentiary foundation of common law bad faith claims
- Unfair Claim Settlement Practices Act contains list of prohibited practices

HOW TO PRESERVE A POTENTIAL BAD FAITH CLAIM

- Provide claims adjuster ample reason to settle within policy limits
  - Provide medical bills and records early and often
  - If liability not conceded, take depositions of all witnesses
  - File detailed expert witness designations using qualified experts
- Write to claims adjuster
  - Lay out liability and damages
  - Explain why the value of the case exceeds liability limits

JEREMY FLACHS SAYS GOODBYE!