(4)

JAN 27 1979
CLERK

IN THE

Supreme Court of Virginia

AT RICHMOND

No. 771005

Norton C. Fines, *Appellant*

v.

John F. Kendrick
and
Richmond Memorial Hospital, *Appellees*

APPENDIX

Andrew J. Ellis, Jr.
Russell V. Palmore, Jr.
Barbara T. Jones
MAYS, VALENTINE, DAVENPORT & MOORE
P. O. Box 1122
Richmond, Virginia 23208

Counsel for Appellant

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

NORTON C. FINES, an incompetent
person, who sues by and through
Marjorie Ellen Fines, his next
friend, Plaintiff,

v.

JOHN F. KENDRICK
8 Willway Avenue
Richmond, Virginia 23226

and

RICHMOND MEMORIAL HOSPITAL,
a Virginia corporation,

Serve on Mr. Harold Prather
Registered Agent
1300 Westwood Avenue
Richmond, Virginia 23227, Defendants.

MOTION FOR JUDGMENT

Comes now the plaintiff, Norton C. Fines, an incompetent person, who sues by and through Marjorie Ellen Fines, his next friend, by counsel, and moves the Court for judgment against the defendants, jointly and severally in the amount of Two Million Five Hundred Thousand and No/100 Dollars ($2,500,000.00), together with her costs, all by reason of the following:

1. That at all times hereinafter mentioned defendant, John F. Kendrick (defendant Kendrick) was a physician duly licensed to practice medicine in the Commonwealth of Virginia and a specialist in neurosurgery.

2. That at all times hereinafter mentioned Norton C. Fines (Fines) was a patient of defendant Kendrick.

3. That at all times hereinafter mentioned defendant, Richmond Memorial Hospital (defendant hospital), operated a hospital at 1300 Westwood Avenue, Richmond, Virginia, which accepted plaintiff as a paying patient.

4. That on or about March 20, 1971, Fines was hospitalized at defendant hospital where Fines remained until on or about June 22, 1971. That on or about March 24, 1971, defendant Kendrick performed a surgical procedure on Fines known as a right temporal-frontal craniotomy at which time a large subdural hematoma was removed from Fines by defendant Kendrick.

5. That during the period of Fines' hospitalization but prior to March 24, 1971, Fines possessed certain symptoms and developed certain conditions which were made known to defendant Kendrick, and the seriousness of which in the exercise of reasonable care, he ought to have recognized and which conditions and symptoms demanded an immediate operation, and for which symptoms and conditions defendant hospital, its agents and employees, in

the exercise of reasonable care ought to have sought and obtained proper and immediate medical aid and attention for Fines. Nevertheless, on account of the negligence of said defendants as aforesaid, the operation was not performed in timely fashion.

6. As a direct and proximate result of the negligence aforesaid of defendant Kendrick and defendant hospital, the aforesaid operation was not performed until on or about March 24, 1971; that the failure in performing the aforesaid operation in a timely fashion and in the accepted and proper medical manner and in failing to exercise due medical care and skill was due to the carelessness and negligence of defendant Kendrick, and the carelessness and negligence of defendant hospital, its agents and employees, in failing to obtain proper and immediate medical aid for Fines.

7. That defendant hospital was further negligent in that it negligently breached its duty to Fines in not exercising due care in the selection and retention of its servants, agents and employees and that it was negligent in the selection and retention of the unfit personnel that were assigned to care for and administer to Fines from March 20, 1971 through March 24, 1971.

8. As the direct, sole, and proximate result of the foregoing negligent acts and omissions, Fines was caused to sustain serious and permanent injuries resulting in his condition of incompetency in which he has remained since the aforesaid operation,

severe shock to his nervous system, excruciating pain, permanent disability, and extensive mental anguish; that he will continue to suffer great pain of body and mind; that he has incurred extensive expenses for hospitalization, medical and related expenses in an unsuccessful effort to be cured; that he has been and continues to be unable to perform his usual occupation and activities; and, that he has and will continue to sustain a loss of earnings.

9. That on or about March 23, 1971, Fines became an insane person within the meaning of § 8-30 of the Code of Virginia, as amended, and has continued in that capacity, without interruption, up to and including the date of the filing of this Motion for Judgment.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, in the amount of Two Million Five Hundred Thousand and No/100 Dollars ($2,500,000.00), together with interest thereon from March 24, 1971 and his costs expended herein.

MARJORIE ELLEN FINES, on behalf
of Norton C. Fines

By _____
Of Counsel

Andrew J. Ellis, Jr.
Russell V. Palmore, Jr.
Mays, Valentine, Davenport & Moore
P. O. Box 1122
Richmond, Virginia 23208

V I R G I N I A :

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND,
DIVISION I

NORTON C. FINES, an incompetent person, who sues by and through Marjorie Ellen Fines, his next friend,	)	
Plaintiff,	)	
v.	)	PLEA OF THE STATUTE OF LIMITATIONS
JOHN F. KENDRICK	)	
and	)	
RICHMOND MEMORIAL HOSPITAL,	)	
Defendants.	)	

The defendant John F. Kendrick, by counsel, moves the Court to dismiss this action on the grounds that same is barred by the applicable statute of limitations in that the Motion for Judgment was not filed within two years of the date the alleged cause of action arose.

C E R T I F I C A T E

This is to certify that a true copy of the foregoing Plea of the Statute of Limitations was mailed this 19th day of

May, 1976, to Andrew J. Ellis, Jr., Esquire, P. O. Box 1122, Richmond, Virginia 23208, counsel for the plaintiff, and to Mr. Harold Prather, 1300 Westwood Avenue, Richmond, Virginia 23227, Registered Agent for Richmond Memorial Hospital.

JOHN F. KENDRICK

By _____
Counsel

R. Carter Scott, III
BROWDER, RUSSELL, LITTLE,
MORRIS & BUTCHER
1200 Ross Building
Richmond, Virginia 23219

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

CASE NO. ____

NORTON C. FINES, an incompetent person, who sues by and through Marjorie Ellen Fines, his next friend, Plaintiff

v.

JOHN F. KENDRICK

and

RICHMOND MEMORIAL HOSPITAL Defendants

PLEA OF THE STATUTE OF LIMITATIONS

Comes now the defendant Richmond Memorial Hospital, by counsel, and states that the cause of action alleged against this defendant occurred on or before March 24, 1971 and move than two years prior to the filing of the action against it and that it is therefore barred by the applicable Statute of Limitations.

RICHMOND MEMORIAL HOSPITAL

By Counsel

McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

ORIGINAL SIGNED BY
HENRY H. McVEY, III

By _____
Henry H. McVey, III

CERTIFICATE

I hereby certify that a true copy of the foregoing pleading was mailed, postage prepaid, to Andrew J. Ellis, Jr., and Russell V. Palmore, Jr., Mays, Valentine, Davenport & Moore, P. O. Box 1122, Richmond, VA 23208, counsel for the plaintiff; and to John F. Kendrick, 8 Willway Avenue, Richmond, VA 23226, defendant, this 27th day of May, 1976.

ORIGINAL SIGNED BY
HENRY H. McVEY, III

Henry H. McVey, III

CS139051

Virginia:

In the Circuit Court of the City of Richmond, Division 1,

THE 28th DAY OF September 19 76

NORTON C. FINES, etc. PLAINTIFF

v.

JOHN F. KENDRICK

and

RICHMOND MEMORIAL HOSPITAL, DEFENDANTS.

ORDER

THIS CAUSE came on today's date on defendants' Plea of Statute of Limitations and upon due consideration of the evidence heard ore tenus, oral argument of counsel of the respective parties, memoranda of law submitted by counsel for respective parties,

It Is ORDERED and DECREED that the defendants' Plea of Statute of Limitations is hereby sustained.

Plaintiff's exception to the Court's ruling is hereby duly noted.

copy
B., R.
M. W
9-30-76

NI ek

Circuit Court
OF THE
City of Richmond

April 21, 1977

JAMES EDWARD SHEFFIELD
JUDGE

COURTS BUILDING
RICHMOND, VIRGINIA 23219

Russell V. Palmore, Jr., Esq.
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Eighth and Main Streets
Richmond, VA 23219

R. Carter Scott, III, Esq.
Browder, Russell, Little, Morris and Butcher
1200 Ross Building
Eighth and Main Streets
Richmond, VA 23219

Re: Case No. 9446
Norton C. Fines, etc. v. John F. Kendrick, et al

Gentlemen:

This cause came again on today's date upon the issue as to whether this Court's Order entered on September 28, 1976, sustaining defendant's Plea of Statute of Limitations, is a final and appealable order as is envisioned in Section 8-462(3)(c) of the Code of Virginia (1950), as amended, and Rule 1:1 of the Rules of the Supreme Court of Virginia.

It is established from the record in this case that the plaintiff's counsel never received a copy of the order of September 28, 1976, granting the defendant's plea of Statute of Limitations until well after the period for perfecting an appeal of the Order of September 28, 1976, had run because none had been sent to him by the Clerk's Office of this Court, and apparently he had not checked the Court file subsequent to the entry of the Order. It does appear, however, that copies of the Order were sent to the defendants' counsel of record.

The Order of September 28, 1976 reads as follows:

* * * *

> THIS CAUSE came on today's date on defendants' Plea of Statute of Limitations and upon due consideration of the evidence heard ore tenus, oral argument of counsel of the respective parties, memoranda of law submitted by counsel for respective parties,
>
> It Is ORDERED and DECREED that the defendants' Plea of Statute of Limitations is hereby sustained.
>
> Plaintiff's exception to the Court's ruling is hereby duly noted.

* * * *

Whether or not an order is a final order in contemplation of Section 8-462, supra, depends upon whether the order disposes of the whole subject, gives all of the relief contemplated and leaves nothing to be done in the case except to execute and give effect to the order.

The only issue is whether the Order of September 28, 1976, still left something to be done in the cause which negated its being a final order.

It is the opinion of this Court that the Order of September 28, 1976, is not a final and appeable order because the Order does not dismiss the plaintiffs' cause of action. More importantly, since plaintiff received no notice that his suit had been dismissed, something still remained to be done in the matter and therefore the Order was not a final order as is contemplated in Section 8-462, supra. That something to be done was notice by the Court to plaintiff, that its suit was barred by the Statute of Limitations.

To hold otherwise, that one is not entitled to notice from the Court that a plea of Statute of Limitations had been sustained as to one's claim, would virtually negative and emasculate one's right of appeal as provided for in Section 8-462, supra. While there is no direct statutory or Rule of Court requirement that copies of orders terminating a cause be forwarded to counsel or to parties to litigation, the concept of due process of law provided for in both the Federal and State Constitutions and basic fairness dictate this position and requirement.

Accordingly, the enclosed Order has been entered this date in accordance with the above state opinion.

Very truly yours,

James Edward Sheffield

js
Enclosure

CS13905A

Virginia:

In the Circuit Court of the City of Richmond, Division 1,

THE 21st DAY OF April 19 77

NORTON C. FINES, ETC. PLAINTIFF

v.

JOHN F. KENDRICK, ET AL DEFENDANTS

ORDER

It is ORDERED and DECREED that this Court's Order entered on September 28, 1976, is not a final and appealable order.

It Is Further ORDERED and DECREED that the defendant's Plea of Statute of Limitations is hereby sustained as of the date of entry of this Order and the plaintiff's Motion For Judgment is ORDERED dismissed. It is considered by the Court that the plaintiff recover nothing of the defendants, but that the defendants recover of the plaintiff their costs expended by them in defense of this case.

The exception of all parties to this cause is noted as to those rulings and actions of the Court that are adverse to their respective positions and interests.

And nothing further remaining to be done herein, it is ORDERED that this cause be stricken from the docket and the papers placed among the ended causes of this Court.

Copy

EDWARD G. KIDD, CLERK

By _____
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

```
* * * * * * * * * * * * * * * * * * * *
                                      *
NORTON C. FINES,                      *
an incompetent person,                *
who sues by and through               *
MARJORIE ELLEN FINES, his             *
next friend,                          *
                        Plaintiff     *
                                      *
-vs                                   *
                                      *
JOHN F. KENDRICK                      *
and                                   *
RICHMOND MEMORIAL HOSPITAL,           *
                        Defendants    *
                                      *
* * * * * * * * * * * * * * * * * * * *
```

TRANSCRIPT of MOTIONS in the above-styled case when heard on July 19, 1976, before Honorable James E. Sheffield, Judge.

APPEARANCES:

Andrew J. Ellis, Jr. and Russell V. Palmore, Jr., Attorneys at Law of MAYS, VALENTINE, DAVENPORT & MOORE, F & M Center, Richmond, Virginia 23219, Counsel for the Plaintiffs;

R. Carter Scott, III, Attorney at Law of BROWDER, RUSSELL, LITTLE, MORRIS & BUTCHER, 1200 Ross Building, Richmond, Virginia 23219, Counsel for Defendant John F. Kendrick;

Henry H. McVey, III, Attorney at Law of McGUIRE, WOODS & BATTLE, 1400 Ross Building, Richmond, Virginia 23219, Counsel for Defendant Richmond Memorial Hospital.

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Reported and dictated by Robert A. Tierney/rwm

NOTE: At the calling of the matter at 11:00 a.m., the hearing begins as follows, viz:

THE COURT: Good morning, gentlemen. Are all parties ready in the case of Fines versus Kendrick and Richmond Memorial Hospital?

MR. PALMORE: Yes, your Honor.

THE COURT: Is the defense ready?

MR. SCOTT: Yes, sir.

MR. McVEY: Yes, sir.

THE COURT: We are here on motions?

MR. PALMORE: That's correct. I might add that the notice states that we are here this morning on two pleas, and the respective pleas is one, the statute of limitations which has been filed by both defendants, and in addition the special plea filed by Mr. McVey on behalf of the Hospital in which he has alleged the Hospital is immune in the suit.

Mr. McVey and I spoke the first of last week and due to a problem with a witness of Mr. McVey's we agreed to postpone argument on the special plea and so we are here this morning entirely on the plea of statute of limitations.

THE COURT: Thank you very much.

Are the defendants ready to proceed?

MR. SCOTT: Yes, sir. I don't know whether there are any witnesses in the Courtroom but if there are I ask for their exclusion.

THE COURT: Are there any persons here who are going to testify on the statute of limitations, other than the parties in the case, and if so we will ask you to step out of the Courtroom and the Sheriff will escort you to the Witness Room.

NOTE: At this time all witnesses left the Courtroom.

THE COURT: You may proceed, Mr. Scott.

MR. SCOTT: On behalf of Dr. Kendrick we filed a plea of statute of limitations on the basis that the motion for judgment alleges a cause of action resulting in personal injury to the plaintiff occurring on or about March 24, 1971, and the motion for judgment being filed on or about May 6, 1976, and pursuant to Section 8-24 of the Virginia Code, we would move the Court to rule that the two year statute of

1 limitations has run on this action and enter a
2 summary judgment for the defendant, Kendrick.
3 MR. McVEY: We join in that motion.
4 I take it that the defense will be
5 that because of 8-30 the suit hasn't been
6 brought by an incompetent, but I think the
7 burden shifts to the plaintiff in this case to
8 show that at the time Mr. Fines cause of action
9 arose that he was incompetent, or insane, or
10 some sort of disability.
11 MR. PALMORE: This is putting the cart
12 before the horse and I did have a brief opening
13 which I will narrow down, but Mr. McVey's posi-
14 tion is correct with respect to our defense of
15 the statute.
16 Norton C. Fines is a resident of
17 Fredericksburg and was admitted to Richmond
18 Memorial Hospital under the care of Dr. John F.
19 Kendrick on March 20, 1971. On March 24, 1971,
20 Dr. Kendrick performed a neurological operation
21 upon Mr. Fines.
22 Now, as you are aware of, our motion
23 for judgment alleges that the operation on the
24 24th, we believe, should have been performed
25 prior to that date, and we specifically allege

that on March 23rd, 1971 that Mr. Fines became an insane person under the provisions, and within the meaning of the Section of 8-30. It is the plaintiff's position through his next friend, Mrs. Fines, that the defendants negligence occurred on the same date that he became insane within the provisions of Section 8-30, and our evidence this morning, we believe, will show that as of that date, and without interruption, that Mr. Fines has remained an insane person within the meaning of 8-30, and, therefore, the plea to the statute of limitations would be inept.

THE COURT: Okay, call your first witness.

MR. PALMORE: Mrs. Fines.

1
2
3
4
5 MARJORIE ELLEN FINES, a plaintiff
6 herein, called as a witness on her own behalf, first being
7 duly sworn, testified as follows:
8
9 DIRECT EXAMINATION
10 BY MR. PALMORE:
11 Q Please state your full name, your age,
12 and your address?
13 A I am Marjorie Ellen Fines, and I am
14 54. I live at 108 Buckner Road, Fredericksburg.
15 Q I am going to be directing questions
16 to you, and please address your answers to his Honor.
17 A All right.
18 Q Are you the wife of Norton C. Fines?
19 A I am.
20 Q Now, Mrs. Fines, is it or is it not a
21 fact that on March 20, 1971 that Mr. Fines was hospitalized
22 at Richmond Memorial Hospital?
23 A That's correct.
24 Q Under whose care was he so admitted?
25 A Dr. John Kendrick.

Q How long did Mr. Fines remain at Richmond Memorial Hospital?

A Two months--until the 22nd of June.

Q Would you briefly state what occurred thereafter in terms of where he was transferred, or did he return home?

A No, he was transferred to Sheltering Arms.

Q Was an operation performed, during Mr. Fines stay at Richmond Memorial Hospital?

A Yes, sir.

Q What was the date of that operation?

A The 24th of March.

Q Of 1971?

A Yes, that's right.

Q Did you have an occasion to be with your husband at all from the time he was admitted to the Hospital on the 20th of March until the date of the operation?

A Yes, I was with him most of the time, or all of the time except Saturday night and Sunday night I went home, but up through the 24th.

Q When you referred to Saturday, was that the 20th?

A That was the 20th.

Q Now, would you please briefly describe

your husband's condition as you observed it from March 20th, when he was first admitted, until March 23rd, the day before the operation?

A Well, on Saturday, March 20th, when we brought him in--Dr. Moss had given him medicine, and he didn't know where he was or anything. That was on Saturday, and on Sunday, March 21st, he was more alert and he was, you know, almost perfectly normal and knew everything, and on Monday he was aware of everything that was going on and was sitting up on the side of his bed and I thought he was doing fine, then on March 23rd, or somewhere right after 8:00 o' clock he began to go into--I thought it was a sleep but he couldn't blow his cigarette smoke out and he couldn't eat. I tried to give him some soup but he couldn't swallow that.

Q You mentioned 8:00 o'clock; was that 8:00 o'clock a.m. or p.m. on the 23rd?

A In the morning.

Q Eight a.m.?

A A.M. in the morning of the 23rd.

Q All right. Would you continue with respect to his condition on the 23rd and the 24th.

A Well, he continued to, I thought go into a deeper sleep and I thought they had given him something to make him sleep, but, you know, then on the 23rd, or then on the 24th he was completely out of it. He was real sick all

that night and on the 24th Dr. Kendrick performed whatever it was, an arteriogram and the operation.

Q All right. Did you have an occasion to see Dr. Kendrick on the 23rd, the day before the operation?

A Yes, he came in the room three times that morning, around I would say 1:00 o'clock and again at 6:00 o'clock, and that's when I asked him just what his condition was and just what he was going to do and he told me he didn't know and that his condition was critical and that it had been ever since he had been there and that even if he found the trouble he wouldn't be able to operate for two weeks until he built him up physically.

Q Now, would you describe, please, Mr. Fines condition as you observed it on Dr. Kendrick's last visit on March 23rd?

A He had gone deeper to sleep and he didn't know anybody at that time.

Q Did Dr. Kendrick advise you of what he concluded Mr. Fines condition to be as of the last visit on the 23rd?

A He said his condition was critical and had been since he had been in there.

Q Now you stated that the operation was performed on March 24th, is that correct?

A That's correct.

Q At what time, approximately, was the operation performed?

A I think it was around 7:00 o'clock that morning.

Q In the morning?

A Yes.

Q Were you with your husband the evening of the 23rd and the early morning of the 24th?

A Yes, I stayed with him all night. I didn't leave him at all.

Q Did you observe any contrast in his condition from the visit that Dr. Kendrick paid around 6:00 o'clock early in the evening?

A Well, he continued to get worse and he sort of was fighting for his breath and his temperature went up to 103, and then began to gurgle in his throat and they had to bring the suction machine in and suction him out and he was just sort of fighting to live all that night.

Q Now you stated and testified, Mrs. Fines, that Dr. Kendrick advised you that it would be two weeks before an operation would be performed when he last saw him on the 23rd, is that correct?

A That's correct.

Q Now you testified that the operation was performed on March 24th, the next day--in fact, the next

1 morning, is that correct?
2 A That's right.
3 Q Did you have an occasion to ask Dr.
4 Kendrick about his earlier statement?
5 A Well, on March 24th when he asked me
6 to sign the paper I told him--I said: Well, you told me yes-
7 terday that even if you found out the trouble you couldn't
8 operate for two weeks, and he told me, he said: Well, he's
9 dying anyway.
10 So, I just signed the paper.
11 Q Did you have occasion after March 24th
12 to speak with Dr. Kendrick about your husband's condition?
13 A Yes, I talked to him many times about
14 it and he told me that if he had operated sooner that it would
15 have made a difference, and that even three hours would have
16 made a difference.
17 Q Since March 24, 1971, and certainly
18 since Mr. Fines discharge from Sheltering Arms, whose care
19 has Mr. Fines been under?
20 A Dr. Moss from Fredericksburg.
21 Q Where has your husband been living
22 since that date?
23 A In our home, except for the times that
24 he has had to be admitted to the hospital. I have taken care
25 of him ever since.

1 Q Since March, 1971?
2 A June, is when he went home.
3 Q When he was finally discharged, you
4 mean?
5 A Yes.
6 Q Would you please describe for Judge
7 Sheffield Mr. Fines condition as you have observed it since
8 his discharge, or since March 23rd, 1971 until the present?
9 A Well, he still doesn't know me from
10 anybody else and his physical condition, to me, is a little
11 better because he moves his hands and arms and feet and legs,
12 but he can't walk. He can walk with help but he doesn't know
13 day from night, and he can't see. He is just like a helpless
14 baby.
15 Q Can he eat by himself?
16 A No, I have to feed him and I have to
17 bathe him and shave him, and clean his teeth.
18 Q Can he write?
19 A No.
20 Q Can he speak?
21 A Yes, he talks but he is living in the
22 past and doesn't realize there is any present at all. He
23 thinks he is working back at work, and when he talks, he is
24 talking to people back like he did when he was well.
25 Q Now this condition that you describe,

has it continued since the 23rd of March until the present?

A No, at first he couldn't talk at all and couldn't move himself at all and I just kept working with him and talking to him and he made a noise at first before he started to talk, and then he began to talk a little and now he talks, and sometimes he speaks real clear, you know, like his natural voice, but it is still in the past and nothing of the present. He will call me to him, and when I get there he doesn't know who I am and I will say: I am Marjorie, but he doesn't know me. (Witness upset)

Q When did you last see him?

A This morning.

MR. PALMORE: Answer Mr. Scott's questions, please.

CROSS EXAMINATION

BY MR. SCOTT:

Q Mrs. Fines, you have been taking care of your husband since March of '71?

A Yes, sir.

Q In the times that he hasn't been in the hospital, you mean?

A That's right.

Q Were there any members of your family that live with you, or lived up there in Fredericksburg with

1 you?
2 A They live in the surrounding County
3 but nobody lives with me. It is just my husband and I.
4 Q Do you have any children?
5 A I have one son.
6 Q Where does he live?
7 A He lives--well, I guess you would call
8 it a mile from us.
9 Q A mile from where you live?
10 A Yes.
11 Q Has he been involved in helping you
12 out with your husband?
13 A Well, he helps me with some things but
14 he just can't stand it and when he comes around it upsets him
15 and so he doesn't help me but very little.
16 Q Has there been any Court proceedings
17 to classify your husband in any way incompetent, or to appoint
18 a representative for him of any kind?
19 A No.
20 Q Who handles his business affairs?
21 A Well, really I haven't had too much
22 done, but Mr. Boydon, a lawyer, has helped me.
23 Q Is he your family attorney?
24 A Yes, he was and like I said, I haven't
25 had too much to do.

1 Q Do you have a power of attorney for
2 your husband?
3 A No, I am the power of attorney.
4 Q Do you have any kind of paper, or
5 document that is filed with any Court that gives you the right
6 to handle your husband's affairs?
7 A No, it hasn't been through the Court.
8 Q Now, Mrs. Fines, you indicated earlier
9 that your husband has been under the care of Dr. Moss since
10 March of '71, is that correct?
11 A That's right.
12 Q Are there any other physicians up in
13 the Fredericksburg area that have seen him, or evaluated him?
14 A No, other than just like Dr. Moss
15 wasn't there they would fill in.
16 Q Has he seen any other physician out-
17 side of the Fredericksburg area for his condition?
18 A Yes, he has. I have carried him to
19 Charlottesville to Dr. Martines and Dr. James and in Richmond
20 at the Medical College, to Dr. Young.
21 Q How recently has that been?
22 A Well, it was a year ago, since Dr.
23 Young saw him.
24 Q Has anybody, or any of these physi-
25 cians given you any indication that his condition will change?

A They have given me very little hope. Dr. Young has told me that he could come out of it but it was doubtful.

Q Before that time, did anybody give you any indication at all that there was hope of him coming out of it?

A Well, Dr. Kendrick told me he could snap out of it, but he hasn't.

Q And that was back in '71?

A That's right.

Q Since that time you haven't had any indication that he would come out of this condition?

A No.

Q Now, Mrs. Fines, this suit was filed in your name on behalf of your husband in May of 1976.

Could you tell us the reason why you waited so long to file--

MR. PALMORE: I object to that. I don't see the relevancy of it at all. That is the purpose of this hearing.

THE COURT: What is the relevance, Mr. Scott?

MR. SCOTT: Judge, I think there may be an equitable factor that the Court is going to consider here, and I think perhaps the Court

1 has a legal aid to consider equitable facts,
2 and if there was a delay unnecessarily, even
3 though the Court may find that the patient was,
4 in fact, insane under the statute, I think it
5 would be relevant.
6 THE COURT: How do we get into equity
7 when we are talking about the statute of limit-
8 ations?
9 MR. SCOTT: I think there might be
10 some authority for establishing equity principles
11 and in the event that the Court feels that, we
12 should have this on the record. We don't have
13 a jury and it is certainly not prejudicial to
14 the plaintiff's case. I think if there is some
15 reason other than the particular physical status
16 of the patient, I think we ought to know that.
17 THE COURT: I will admit it subject
18 to it being relevant at some later date that you
19 might want to use it but I don't feel that it is
20 relevant, but we do not have a jury and I will
21 let her answer.
22 MR. PALMORE: Note my exception.
23 Q Do I answer the question?
24
25 BY MR. SCOTT: (Continuing)

Q Yes, ma'am.

A Like Dr. Kendrick had said that he could snap out of it any minute and I thought that he would, and truthfully I wasn't physically able, from taking care of my husband, to even go and attend to it.

Q Now, Mrs. Fines, you indicated that on the 20th of March, when your husband came into the hospital, that he appeared to be all right, I think you said, or okay, is that correct?

A Well, he was all right until--he was all right at home but we carried him to the hospital and Dr. Moss saw him that morning, and he was in violent pain and I'm sure he gave him something to ease his pain.

Q And during the 21st and 22nd of March, 1971, he appeared to be--was he all right during those two days?

A Yes, he seemed to be perfectly normal to me.

Q Was he sleeping?

A No, like I said he sat on the side of his bed and it started to snow, and I told him to look at the snow, and he talked to us and laughed and seemed to be in real good spirits.

Q How about during the day of the 23rd in the morning, what was his situation?

A Well, when they asked me to leave the room for him to take his bath, up to that point I hadn't seen any change in him, and then they came up and told me that Norton wanted a cigarette, and so I went back in the room and that minute I didn't see any difference until he complained--well, he started to hold his cigarette up like that (Indicating), and I said: Norton, what are you doing that for, and he said: I'm trying to see what kind it is, and then he couldn't blow the smoke out.

So, I went up and asked the nurse: What is the matter with Norton, he can't blow the smoke out and she just said: Don't give him anymore.

Q Did you continue to correspond, or talk to him during the remainder of that day?

A No, I didn't talk to him because I really thought they had given him something to relax and put him to sleep and rest because he had been in such terrible pain, and I thought he was going to sleep--I mean, a normal sleep because I couldn't tell any different.

Q Were you staying with him during the time that he was in the hospital?

A Yes, I did.

Q Were you in the room most of the time?

A I was right in the room.

Q You would have seen whether they had

given him any medication, right?

A Other than when they asked me to leave the room to do what they had to do, yes.

Q And did they ask you to leave when they gave him medication?

A I didn't see them, but they wouldn't let me stay when they gave him a bath.

Q But he was complaining of pain on the 23rd also?

A Not that morning that I remember but he had been in such severe pain for two weeks in his head, and even on the 23rd, or Sunday, when he was his best that he had been for over a week, at times he would go like that (Indicating), like he had a pain, but he didn't say anything.

Q What day was that again?

A Sunday, the 21st, I mean.

Q Now, on the remainder of the day of the 23rd, did you converse with him during that period, say up until 6:00 o'clock in the afternoon?

A Yes, they brought him soup, I think it was around 11:00 o'clock and I tried to give him the soup and I called him and rolled him up a little bit and asked him: Could he eat his soup, and of course he didn't answer me, but I thought he was awake enough and I said: Norton, I am going to give you some soup, and I gave him three spoons full and

he sort of strangled, and then the nurse said not to give him anymore.

Q You didn't talk to him anymore after lunch time then on the 23rd?

A No, like I said, I thought he was resting and it was along in the afternoon when I began to realize that he wouldn't be asleep that sound on his own and it looked like, especially when Dr. Kendrick came in around 1:00 o'clock and pressed on him, he drew up like he hurt him, and that was the only movement that he made from that time on.

Q Did Dr. Kendrick see him later on on that same day?

A He came in about 6:00 o'clock that same day.

Q And did your husband have dinner that night?

A No, he didn't have any lunch or dinner, either one, because he couldn't swallow. They brought his lunch but I ate it because the nurse told me to.

Q Were you present when Dr. Kendrick performed any type of examination on him on the late afternoon visit of the 23rd?

A Yes, I was there in the room when he came in but I don't remember him doing anything but pressing on his eyes, I think.

1 Q And that's all you remember about his
2 examination?
3 A Yes.
4 Q Was that the time that you talked to
5 Dr. Kendrick about the operation, or was it before that, or
6 later?
7 A You mean on March 23rd?
8 Q Yes, ma'am.
9 A Well, I asked him what was wrong with
10 Norton and what was he going to do, and that's when he told
11 me that if he found the trouble he couldn't operate then, and
12 he told me his condition was critical and had been since he
13 had been there, and I asked him: What was he going to do and
14 he said: I don't know.
15 Q He told you at some point on the 23rd
16 that he was going to run a test on your husband the following
17 day, didn't he?
18 A Well, if he did, I don't remember.
19 Q Have you ever heard of a test called
20 an arteriogram?
21 A I have now, but I hadn't then.
22 Q Do you remember him talking to you
23 about performing an arteriogram?
24 A No.
25 Q Do you recall signing an authorization

on March 23rd for an arteriogram on your husband?

A No, I signed it on March 24th, that morning, and I remember that I put the wrong date on it and I asked the nurse if that was all right, and she said it didn't make any difference, because I remember I signed them both at the same place because I signed one, and he had the test run, and then when they brought him back they told me they were going to operate, and that's when I signed the other one.

Q Let me ask you to look at this, Mrs. Fines. Is that your signature? (Indicating)

A Yes, it is.

Q Is that the authorization for the arteriogram; is it not?

A That's right.

Q And it is dated March 23rd 1971?

A That's right.

Q And you are saying that you put the date on there?

A Well, I thought I put the date on there because I remember asking her but now I'm not positive, but that's the way I remember it--I mean--

Q You can't say for certain you put the date on it rather than somebody at the hospital?

A No, I thought I put the date on it.

Q Do you deny that you signed that on

March 23rd?

A No, I don't deny it because I am not positive. In my mind I am sure I signed both papers on the 24th but now it is possible that I did because I was pretty upset.

MR. SCOTT: We would like to offer that.

THE COURT: Is there any objection?

MR. PALMORE: No objection.

THE COURT: It will be Defendant's Exhibit A.

NOTE: The above referred to authorization was marked by the Court as: Defendant's Exhibit A.

BY MR. SCOTT: (Continuing)

Q Now, after Dr. Kendrick left around 6:00 o'clock on the 23rd, did you continue to stay with your husband?

A Yes, I did.

Q Was there any change in his condition from that time until the next morning?

A Yes, he continued to get worse.

Q In what way; was he sleeping?

A No, he had been laying there just perfectly still and then he began to move about--I don't mean turning over or anything like that, but just moving about and kind of pushing himself up and he was breathing harder and his temperature went up and then, like I said, he began to gurgle and they had to go suction him out.

Q During the day of the 23rd, he was more or less just lying there still; is that what you are saying?

A Yes, like he was asleep.

Q During the whole day?

A Since a little after 8:00 o'clock. From 11:00 o'clock on it was the last that he moved at all, and that's when I tried to feed him the soup.

Q And after Dr. Kendrick left on the 23rd did his condition change, because he was moving, and like he wasn't moving before earlier?

A That's right.

Q Did this go on for the remainder of the evening of the 23rd, and the early morning hours of the 24th?

A Yes, it did.

Q Were you in contact with Dr. Kendrick at any time during that period?

A You mean from when he left around 6:00

1 o'clock until the next morning?
2 Q Yes, ma'am.
3 A No.
4 Q Did you attempt to get in touch with
5 him in any way?
6 A Yes, I asked the nurse and she said
7 she thought I should call him.
8 Q Did you attempt to reach him?
9 A No.
10 Q Other than that one conversation with
11 the nurse, did you make any further attempts to get Dr.
12 Kendrick, or some other physician to examine your husband?
13 A No.
14 Q What time was that that you had this
15 conversation?
16 A You mean with the nurse?
17 Q Yes.
18 A I think it was somewhere around 3:00
19 o'clock.
20 Q In the morning?
21 A It was in the early morning hours, I
22 know that.
23 Q So, between 6:00 o'clock in the evening
24 of the 23rd, and 3:00 o'clock a.m. on the morning of the 24th,
25 you had no discussions with any personnel at the hospital

concerning your husband's condition, or concerning contacting Dr. Kendrick?

A Nothing but the nurse that was in the room with us.

Q Was she there most of the time?

A No, she was a nurse on the floor.

Q She would come in and out periodically?

A Yes.

Q What was his condition on the 24th prior to the operation; was it about the same as it had been on the 23rd?

A I can't remember, but it seems to me that he had sort of given up and just wasn't moving anymore. That's the best I can remember, but I know when they brought him out after the test, he didn't--he wasn't moving at all. He was just lying there like a dead person because they didn't want me to see him and I wanted to see him and so they let me see him.

Q Was he still in his room at that time?

A They had brought him back to his room and then they carried him out again to operate on him.

Q How long did he remain at Richmond Memorial, and then Sheltering Arms?

A Two months at Richmond Memorial and a month at Sheltering Arms.

Q And then you took him back to Fredericksburg after that?

A Yes, home.

Q Since that time Dr. Moss has been his physician?

A That's right.

MR. SCOTT: I have nothing further.

BY MR. McVEY:

Q Mrs. Fines, my understanding is that Dr. Kendrick saw your husband on the evening of the 22nd, is that correct?

A The first time?

Q Well, he had seen him all along but on the evening of the 22nd?

A On Monday?

Q On the 22nd.

A Yes, I'm sure he did.

Q And then on the morning he went in and saw him before he had his bath, and that was quite early, and had Dr. Kendrick seen him at that time?

A Yes, Dr. Kendrick came in then.

Q And then at that time, as far as you were concerned, your husband seemed to be reasonably normal and he was given his bath and Dr. Kendrick saw him, and then

at that time you left the room, and when you went back was the time that he had trouble exhaling smoke?

A Not right away--I mean, it wasn't right that minute. He smoked two or three cigarettes, and that was unusual because he didn't smoke one right after another, but that morning he just kept requesting them and I didn't know why he was asking, and then he began like he couldn't blow the smoke out, but I don't know how many cigarettes he smoked, but he smoked normally before that.

Q So, if I understand you correctly then, you saw him about 8:00 o'clock in the morning and he seemed to be pretty well, and what time was it when Dr. Kendrick saw him?

A Well, he saw him, as well as I can remember, he was in there around the time that they were giving him his bath, or right after, or right before that.

Q But you left the room actually during the time that he was given his bath?

A Yes, they asked me to wait in the lobby.

Q And then you came back in and Mr. Fines seemed fine at that time, except that he continued to want to smoke, is that correct?

A That's right.

Q Then after a period of time, he app-

arently couldn't blow the smoke out?

A That's right.

Q And then at 11:00 o'clock, I believe you said, he had trouble with his soup?

A Yes.

Q Did Dr. Kendrick see him again about 1:00 o'clock on that day?

A Yes.

Q And that was after the soup and after the cigarettes?

A Yes.

Q Did you discuss with Dr. Kendrick the problem with the cigarettes, and the problem with the soup?

A If I did, I don't remember.

Q You just don't recall?

A No.

Q And then Dr. Kendrick saw him again at 6:00 o'clock in the evening, approximately?

A That's right.

Q And then your husband was operated on, or to the best of your knowledge and recollection an arteriogram was performed subsequently an operation was performed but it was not done until the 24th, is that correct?

A That's correct.

Q And that's the best of your recollec-

1 tion ?

2 A I remember that distinctly.

3 Q But up until sometime during the middle

4 of the morning on the 23rd of March, 1971, your husband seemed

5 to be reasonably alert and understand who he was, and who you

6 were, and what was going on, is that correct?

7 A That's correct.

8 Q But thereafter he had trouble with

9 smoking--well, even after he had trouble with his smoking and

10 the soup, were you able to converse with him?

11 A No, he never spoke anymore at all. I

12 don't think that he ever spoke when I was trying to give him

13 the soup. I don't remember him saying anything. He just

14 gagged and began to struggle.

15 Q Up until the middle of the morning of

16 the 23rd your husband seemed to be reasonably normal, and

17 reasonably alert?

18 A I don't think it was that late in the

19 middle of the morning because when they finished with his bath

20 it was right after 8:00 o'clock and that's when he began to

21 smoke the cigarettes, and I don't know how many, but I would

22 say about three or four.

23 Q But he asked you for the cigarettes?

24 A Yes, sir.

25 Q And I take it you all carried on some

1 conversation while he was smoking?
2 A Yes.
3 Q But it wasn't until he really began to
4 be unable to exhale that you really noticed any real change?
5 A That's the first thing that I noticed.
6 Q Was that sometime during the middle of
7 the morning?
8 A No, it wasn't during the middle. It
9 was a little earlier.
10 Q Can you give me an estimate then?
11 A I would say approximately 9:00 o'clock
12 because I am sure it wasn't over an hour from the time that I
13 went back in the room after his bath that he began to go to
14 sleep.
15 Q Was he asleep when Dr. Kendrick saw
16 him at 1:00 o'clock?
17 A Yes, he was.
18 MR. McVEY: Thank you, ma'am.
19 THE COURT: Do you have anything on
20 redirect?
21 MR. PALMORE: One question.
22
23 REDIRECT EXAMINATION
24 BY MR. PALMORE:
25 Q Mrs. Fines, were you told by anyone on

the 23rd whether or not your husband was asleep, or in a coma?

A Yes.

Q Who told you that?

A Dr. Kendrick when I asked him about his condition and he told me--that was around 6:00 o'clock, and I asked him: Is Norton asleep or is he going in a coma, or what is wrong with him, and he said: Well, he's already in a semi coma.

MR. PALMORE: I have no further questions.

MR. SCOTT: I have one further question.

RECROSS EXAMINATION

BY MR. SCOTT:

Q You also told us that Dr. Kendrick had told you that your husband had been critical since he came in?

A That's correct.

Q Since he came in the hospital, is that right?

A That's right.

Q And are you referring to March 20th?

A That's right.

Q 1971?

A Yes.

Q And you indicated that Dr. Kendrick told you that?

A He told me that, yes, air.

Q That he was critical since March 20th?

A Yes, and that his condition was critical since he came in.

Q And he told you that on the 23rd or 24th?

A On the 23rd around 6:00 o'clock.

Q That was the same time that he told you he was in a semi coma?

A That's right.

Q And you did indicate in at least one particular that he examined your husband; right?

A Well, he pressed on his eyes and I didn't know why he did that, and I don't remember asking him, but if I did, I don't remember it.

Q And was that the time, or was that the visit by Dr. Kendrick that you first heard about this procedure called an arteriogram?

A I don't remember that. I can't remember it at all.

MR. SCOTT: Thank you.

THE COURT: Is there anything further of this witness?

MR. PALMORE: No, your Honor.

THE COURT: Let me make sure I am clear on the time sequence.

Did I understand that your testimony to be that on March 23rd that Dr. Kendrick saw your husband on two occasions, one at 1:00 o'clock and one at 6:00 o'clock?

THE WITNESS: On three occasions.

THE COURT: When is the other time?

THE WITNESS: Around 8:00 o'clock.

THE COURT: In the morning?

THE WITNESS: Yes, sir.

THE COURT: All right, thank you very much. You may step down.

* *

WITNESS STOOD ASIDE

THE COURT: Who is your next witness?

MR. PALMORE: Dr. Lloyd Moss, your Honor.

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4
5 DR. LLOYD F. MOSS, called as a witness
6 by counsel for the plaintiff, first being duly sworn, testified
7 as follows:
8
9 DIRECT EXAMINATION
10 BY MR. PALMORE:
11 Q Dr. Moss, please state your full name
12 and address and occupation?
13 A Lloyd F. Moss, 215 Eagleside Drive,
14 Fredericksburg, Virginia. My occupation is physician.
15 Q Would you describe abd relate to his
16 Honor your educational background, please?
17 A Well, four years at Hampden-Sydney;
18 four years at the Medical College of Virginia; residency in
19 Internal Medicine at MCV, and I finished it at McGuire Hospi-
20 tal after the war.
21 Q Are you a member of any Medical
22 Societies and organizations, Dr. Moss?
23 A The Medical Society of Virginia, AMA,
24 the Medical College of Physicians, and the American Society
25 of Internal Medicine.

1 MR. PALMORE: Your Honor, I move that
2 Dr. Moss be permitted to be qualified as an
3 expert in the medical field.
4 MR. SCOTT: Of internal medicine.
5 MR. PALMORE: Right.
6 THE COURT: Is there any objection?
7 MR. McVEY: No, sir.
8 MR. SCOTT: No, sir.
9 THE COURT: Your motion is granted.
10
11 BY MR. PALMORE: (Continuing)
12 Q Has Norton C. Fines ever been a
13 patient of yours?
14 A He has.
15 Q For how long has he been a patient of
16 yours?
17 A Well, approximately twenty years.
18 Q Does he still continue to be a patient
19 of yours?
20 A He is.
21 Q When was the last time that you saw
22 Mr. Fines?
23 A This morning.
24 Q Did you have occasion, Dr. Moss, in
25 March of 1971, to have Mr. Fines transferred from Fredericks-

1 burg to Richmond Memorial Hospital?
2 A I did.
3 Q Would you briefly describe the reasons
4 for that transfer?
5 A Well, Mr. Fines had been admitted to
6 Mary Washington Hospital the day before with extreme headaches
7 and nausea, vomiting, and some confusion and I performed a
8 spinal tap on him and found really increases in intercranial
9 pressure with some red cells in his spinal fluid and thought
10 that he needed a neurosurgical consultation and that's why I
11 referred him to Richmond.
12 Q And that was on the 20th of March,
13 1971?
14 A The 20th he was admitted and the 21st
15 he was transferred.
16 Q Do you recall the next time that you
17 saw Mr. Fines subsequent to that date?
18 A I don't have an accurate record of
19 how many times, but I visited his home after he came back to
20 Fredericksburg, but several times, approximately, or maybe
21 half a dozen, but the next record I have is of him being in
22 the hospital here in Fredericksburg, and that was in August of
23 1971.
24 Q Has he been admitted to the hospital
25 in Fredericksburg subsequent, or in addition to that other

1 admission?
2 A Quite a few times.
3 Q Now, for what reasons?
4 A Well, usually he had a urinary tract
5 infection or aspiration pneumonia usually precipitated by
6 chills and high fever.
7 Q Throughout your care of Mr. Fines
8 since March, 1971, do you have an opinion as to his mental
9 capacity?
10 A Yes, Mr. Fines has been just a total
11 incapacitated person and has been bedridden and incompetent
12 with naso-gastric tube feeding and a catheter. Without the
13 catheter he becomes incontinent. He is hand fed and needs
14 just about one hundred percent nursing care twenty four hours
15 a day.
16 Q Woud you say he is one hundred percent
17 dependent for care?
18 A I would. Mr. Fines, at times, you
19 know, is just not only oblivious of everything but he doesn't
20 respond to his name and he is spastic and has to be turned in
21 bed at times. At times there are some voluntary movements but
22 I am sure he is completely unaware of his surroundings, time
23 and place. He just would be almost a vegetable but maybe not
24 quite that bad.
25 Q Is your opinion applicable from the

1 time subsequent to his transfer to Richmond Memorial until
2 the morning you saw him again?
3 A What is your question?
4 Q His mental capacity from the time that
5 you saw him, the first time you saw him subsequent to his
6 transfer from Fredericksburg to Richmond Memorial to the pre-
7 sent?
8 A Well, his condition has been pretty
9 much the same except at times worse when he has a fever and
10 chills and prostration from his infection. He, at times, has
11 been very critical--you mean his mental situation?
12 Q Yes.
13 A The mental situation is that he is
14 completely incompetent to do anything.
15 THE COURT: Excuse me. I am not sure
16 I understand your question.
17 Are you asking him about the times
18 prior to the time that he was transferred from
19 Mary Washington to Richmond Memorial or subse-
20 quent to that?
21 MR. PALMORE: I'm asking him from the
22 time that he has seen Mr. Fines, the first time
23 that he saw Mr. Fines subsequent to his transfer
24 from Fredericksburg to Richmond Memorial and
25 then from that point to the present date.

THE COURT: Well, he was admitted on what, the 20th and you are asking him prior to the 20th, or subsequent?

MR. PALMORE: Subsequent to that date.

THE COURT: All right. Did you understand that, Doctor?

THE WITNESS: Yes, and my answer was not prior to his illness in which I saw him and transferred him to Richmond but it was from the time I saw him after his arrival back from Richmond until the present time.

MR. PALMORE: Thank you, Dr. Moss. Please answer Mr. Scott's questions.

CROSS EXAMINATION

BY MR. SCOTT:

Q To your knowledge, has there been any formal medical classification of Mr. Fines been made as an incompetent, or insane, or anything like that?

A A formal classification?

Q Made by any committee of the estate, to your knowledge?

A No.

Q Have there been any legal proceedings, to your knowledge, in which you testified concerning his

1 mental capacity, or to classify him in any form of incompe-
2 tency?
3 A No.
4 MR. SCOTT: That's all.
5 THE COURT: Mr. McVey, do you have any
6 questions?
7 MR. McVEY: Yes, sir.
8
9 BY MR. McVEY:
10 Q Dr. Moss, as far as you are concerned,
11 his mental capacities were all right when you sent him to
12 Richmond Memorial Hospital on March 20th, 1971?
13 A That's right. He was a little leth-
14 argic at the time from his present illness, from the time he
15 came into the hospital, but up until the day before--in fact,
16 he had been pretty clear. What precipitated his hospitaliza-
17 tion was headaches and a little confusion and an unsteadiness
18 on his feet and his vomiting is why he was put in the hospi-
19 tal and why the spinal tap was done.
20 Q In your judgment as to his lack of
21 competence is based on what you have seen since his return to
22 Fredericksburg, is that right?
23 A That's right.
24 MR. McVEY: Thank you, sir.
25 THE COURT: Is there anything further

from the Doctor?

MR. SCOTT: I have nothing further.

MR. PALMORE: I have nothing further.

THE COURT: May this witness be excused?

MR. PALMORE: Yes, sir.

THE COURT: You may be excused, if you like. Please do not discuss your testimony with the other witnesses.

* *

WITNESS STOOD ASIDE

THE COURT: Who is your next witness?

MR. PALMORE: Dr. Young.

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4
5 DR. HAROLD F. YOUNG, called as a wit-
6 ness by counsel for the plaintiff, first being duly sworn,
7 testified as follows:
8
9 DIRECT EXAMINATION
10 BY MR. PALMORE:
11 Q Dr. Young, please state your full name,
12 your address and your occupation?
13 A Harold Francis Young, 1200 East Broad
14 Street, Richmond, Virginia, physician and neurosurgeon.
15 Q Would you briefly describe your educ-
16 ational background?
17 MR. McVEY: I will stipulate that he
18 is a well-qualified neurosurgeon.
19 MR. SCOTT: And I will so stipulate.
20 THE COURT: All right.
21
22 BY MR. PALMORE:
23 Q Dr. Young, have you had occasion to
24 care for Norton C. Fines?
25 A Yes, sir.

1 Q When did Mr. Fines, or when was Mr.
2 Fines first brought under your care?
3 A I first saw him in the office for out-
4 patient care, I believe in October of 1973, and then admitted
5 him to the Medical College of Virginia Hospital in January,
6 1974, and I think it was approximately January 10th, I believe
7 in 1974.
8 Q Subsequent to that date, have you had
9 occasion to see Mr. Fines?
10 A Yes, he was in the hospital about one
11 month and I saw him two or three times since then, once I
12 believe about March or April of '74 and once in November--
13 October or November of '74, and again in April of '75.
14 Q For what purpose was he admitted to
15 the Medical College?
16 A For further evaluation and any poss-
17 ible therapy for his medical condition.
18 Q What were the results of that ad-
19 mission?
20 A We performed some tests and we per-
21 formed a surgical procedure where we inserted a tube to drain
22 spinal fluid, or fluid from the cavity of the brain into a
23 peritoneal cavity.
24 Q Do you have an opinion, Doctor, with
25 respect to each time that you have seen Mr. Fines as to his

1 mental capacity?

2 A Do I have an opinion?

3 Q Yes.

4 A Yes.

5 Q Would you please state it?

6 A Well, Mr. Fines at each single visit,
7 or every visit, he could not communicate to me and I could not
8 communicate to him in any way that would give a purposeful
9 response. He could not carry out commands and he could not
10 use his arms or legs effectively and needed really full ass-
11 istance in his care, and in fact, when he was hospitalized he
12 had most of the time private duty nurses and he was unable to,
13 or it was impossible to communicate with him.

14 MR. PALMORE: Thank you, Doctor.

15 MR. SCOTT: No questions.

16 MR. McVEY: No questions.

17 THE COURT: May he be excused?

18 MR. PALMORE: Yes, sir.

19 THE COURT: You are free to leave or
20 remain in the Courtroom, if you like. Please
21 do not discuss your testimony with the other
22 witnesses

23

24 *

25 WITNESS STOOD ASIDE

THE COURT: Your next witness, Mr. Palmore.

MR. PALMORE: I call Dr. Kendrick as an adverse party.

DR. JOHN F. KENDRICK, a defendant herein, called as a witness by counsel for the plaintiff, as an adverse witness, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PALMORE:

Q Doctor, please state your full name, address and occupation?

A My name is John F. Kendrick and I am a neurological surgeon and I live here in Richmond.

Q What is your educational background?

A I graduated from Washington University in St. Louis in 1946 and did a surgical residency at Grady Memorial Hospital in Atlanta, and then the Medical College of Virginia for two years, first in general surgery and then neurological surgery, and then I went to the Lahey Clinic in

1 Boston, and from there I went to the University of California
2 in San Francisco and then spent two years in the Army doing
3 neurological surgery, and three years in the University of
4 Chicago doing neurological surgery, and following that I came
5 back here.
6 Q Did you have occasion to have as a
7 patient, Norton C. Fines?
8 A I did.
9 Q And was this at the Richmond Memorial
10 Hospital?
11 A Yes.
12 Q Was it in the time frame that we have
13 heard testified to this morning; do you concur with this
14 particular time frame?
15 A Yes.
16 Q Would you please describe Mr. Fines's
17 condition when he was first admitted to the Richmond Memorial
18 Hospital?
19 A Well, he was admitted on the 20th of
20 March and at that time--are you talking about his history or
21 the physical?
22 Q Just his condition as of the 20th.
23 A At that time he was drowsy and he was
24 not complaining of severe headaches and his neurological
25 examination was pretty much within normal limits. There was

1 no evidence of localized symptomology and he was speaking all
2 right and could make coherent remarks and follow commands.
3 Q Did you have occasion to follow Mr.
4 Fines progress and to see him in fact, subsequent to the 20th,
5 and I'm speaking up until the day of his operation on the
6 24th?
7 A Yes, I saw him daily, or sometimes
8 more than daily.
9 The next day he was alert and had no
10 headaches and seemed to be settling down very well.
11 On the 22nd he was complaining of
12 more headaches and his neck was somewhat stiffer and a lumbar
13 puncture was carried out at that time to follow up on the
14 lumbar puncture that had been done by Dr. Moss in Fredericks-
15 burg.
16 Q Did you have an occasion to see him
17 on March 23rd?
18 A Yes, I saw him that day too.
19 Q How many times did you see him that
20 day, Doctor?
21 A I am not absolutely certain whether
22 I saw him twice or three times but I know I saw him at least
23 twice.
24 Q Would you describe his condition as
25 of March 23rd, please?

A He had become over that day somewhat more, what you call stuporous. He was not unconscious. He would respond to some extent by moving all of his extremities but he was particularly drowsy because of sedation to keep him relaxed so he wouldn't be too restless and having too much problems with headaches. He showed no localized symptomology.

Later that afternoon his right pupil was minimally larger than the left one.

NOTE: Paper shown to all counsel.

BY MR. PALMORE: (Continuing)

Q I show you a sheet, or a photostat which is titled: Progress Notes, and ask you if you can identify that, Doctor?

A Yes, that is my handwriting.

Q And I ask you, is that your handwriting with respect to the entries that appear on 3/23/71?

A That is my handwriting.

Q You have entered as of that date: Patient is stuporous, which you have previously so testified to?

A Right.

Q Would you describe what stuporous is?

1 A This is a type of patient who was
2 drowsy and sometimes it is difficult to arouse him, but they
3 will arouse and respond to some extent as opposed to being
4 totally unconscious.
5 Q You also testified, or did you, that
6 you prescribed medication for Mr. Fines?
7 A Yes, I did.
8 Q Was that medication primarily Decadron
9 Doctor?
10 A No, Decadron and Thorazine.
11 Q Is that medication in the nature that
12 would render a patient stuporous?
13 A If it was given in too high of a
14 dosage, the thorazine would, yes.
15 Q Do you have any reason to believe
16 that the dosage was too high?
17 A No.
18 MR. PALMORE: Your Honor, I ask that
19 this sheet from the progress report be admitted
20 to evidence.
21 THE COURT: Do you have any objection?
22 MR. SCOTT: We have no objection.
23 MR. McVEY: No, sir.
24 THE COURT: All right. The Doctor
25 identified it and it will be Plaintiff's Exhibit

1.

NOTE: The above referred to progress note was marked by the Court as: Plaintiff's Exhibit 1.

BY MR. PALMORE: (Continuing)

Q Doctor, on March 24, 1971, when did you first see Mr. Fines?

A I don't remember the exact time but it was somewhere between 6:30 and 7:30.

Q Can you describe his condition as of that time?

A Yes, he had a definite change from stuporous to unconsciousness.

Q Would you please describe his condition from March 24th 1971 until his release from the hospital?

A Well, due to his obvious progressive deterioration he was taken for an arteriogram and surgery, and following surgery, although the brain expanded where the clot was removed it apparently did not relieve enough pressure, or the pressure had already done the damage to the mid-brain, and the mid-brain area controls the conscious state, and he did not really come out of it. He has remained as has been testified to prior to this.

I have not examined him myself, I think, since 1972 and I think that was the last time that I saw him. I haven't seen him in the last two years--no, I believe I saw him in July of '73.

Q Would your opinion with respect to his mental capacity, concur with that which you have heard testified to this morning?

A I am sure it is accurate but I haven't examined him since '73.

Q Is it not true that had the operation been performed earlier that there was a likelihood of recovery and that it would have been greater?

A I think this is a fair statement, yes, but there is no way to predict that. In the first place, I wasn't sure what he had and I was in progress of working him up. He apparently went bad that night.

MR. PALMORE: Thank you, Doctor. I have no further questions.

CROSS EXAMINATION

BY MR. SCOTT:

Q Dr. Kendrick, on the 23rd of March Mrs. Fines has indicated that you were in there around 6:00 o'clock in the evening.

Would that conform with your recoll-

1 ection, in what she said you said?
2 A Of course I can't obviously remember
3 what I told her that night but I am sure I saw that patient
4 that night because I wrote a pre-operative on the 23rd and not
5 the 24th. I was planning on doing it the next morning and it
6 is noted by the nurse that he was taken off by 7:15 and so I
7 had to see him sometime before that.
8 Q So 6:00 o'clock would be within the
9 time frame then?
10 A Surely.
11 Q And you examined him at that time?
12 A I did.
13 Q And he was not unconscious?
14 A Not totally. He was definitely
15 stuporous but he would arouse.
16 Q Was he, or during the 23rd had he
17 been on the usual orders for the sedation that you indicated?
18 A I have forgotten exactly whether this
19 was interrupted or not. I'm sure it was. (Witness looking at
20 paper).
21 Well, it was written that--that's
22 right, I remember on the 22nd I had written Thorazine, 25
23 milligrams and so he only got it when he was awake. If he was
24 sleeping, he didn't get it.
25 Q And that order was in effect on the

1 23rd?
2 A Yes.
3 Q Now when you, or did Mr. Fines re-
4 spond to stimuli?
5 A Yes, he was moving all extremities
6 and would arouse and say a few words.
7 THE COURT: What date are you now
8 referring to?
9 MR. SCOTT: Still on the 23rd.
10 A (Continuing) He was still definitely
11 confused, as I said, and stuporous but he would arouse and
12 speak and I let him go on back to sleep. He could not perform
13 coordinated acts and get out of bed.
14
15 BY MR. SCOTT: (Continuing)
16 Q Basically what type of neurological
17 examination did you perform at that time?
18 A Well, in this type of patient the main
19 thing you check is the pupils, the response to pain, and what
20 movements that they had and whether or not they would say any-
21 thing, and to what extent they were aware.
22 Q And that is the examination basically
23 reported in your notes that you referred to earlier, the notes
24 on the 23rd?
25 A Yes.

1 Q Do you recall whether or not Mrs.
2 Fines was in the room on that occasion?
3 A I do not recall.
4 Q You did not see the patient again until
5 the early morning hours around 6:30 or 7:00 on the 24th?
6 A That's correct.
7 Q You did write some orders on the eve-
8 ning, or afternoon of the 23rd after your visit?
9 A Yes, those are the ones for the
10 arteriogram.
11 Q Now, basically, what type of procedure
12 is an arteriogram? Is it a diagnostic procedure or an opera-
13 tion, or what?
14 A It is a diagnostic procedure.
15 Q And the order was that that was to be
16 performed the following day?
17 A Yes, I had not felt that he had pro-
18 gressed to a state where I really thought he was going from a
19 state where he was reasonably good to a state that he was so
20 bad that something had to be done about it at that moment,
21 and I didn't know really what the mad had. Among the tests
22 we had done was an EEG and nothing was localized about any of
23 them, and he had absolutely no history of a head injury and
24 he had no fall, or anything else that would indicate that
25 this man might have a subdural and, of course, this is one of

1 the various diagnoses that you would consider in a patient of
2 this type, but I had no indication at all that this man had
3 a massive subdural.
4 Q Had you felt that his condition had
5 deteriorated earlier in the course of his treatment, would you
6 have done these tests?
7 A Right away. Of course, the point is
8 if I had really had a deep suspicion that he had a subdural
9 I might have done it that night but I was worrying about
10 encephalitis and I thought his condition was fluctuating as it
11 had prior to him coming in.
12 Q As of the last time that you saw him
13 on March 23rd, in your judgment, was his condition stable
14 enough to have performed the operation the following day?
15 A Yes, definitely. I wouldn't have
16 waited if I thought his condition necessitated at at that
17 time.
18 Q Do you recall telling Mrs. Fines that
19 you wouldn't be able to operate on Mr. Fines for two weeks, or
20 words to that effect?
21 A I do not.
22 Q Was there any reason why you would
23 have said that?
24 A No, because I never consider a person
25 inoperable. If they are getting worse you have to consider it,

1 regardless of their condition, but if I have any choice in the
2 matter I may wait.
3 Q Was there anything about his general
4 medical condition that would have required the delay in the
5 procedure?
6 A No, nothing that I knew of.
7 Q I believe that Mrs. Fines mentioned
8 something about him having to be built up?
9 A I don't think he had been eating well
10 for the last few days and he certainly did eat the first two
11 days he was there, and as she said, on the 23rd he began not
12 to eat, and so, well, we gave him intravenous fluids.
13 Q Would you say, Dr. Kendrick, on March
14 20th, 21st or 22nd that Mr. Fines was in critical condition?
15 A No.
16 Q Did you ever tell Mrs. Fines that her
17 husband had been critical since he arrived at Richmond Memor-
18 ial Hospital on March 20th?
19 A Again, I can't remember my exact words
20 that I told her, but it certainly was not critical until the
21 morning of the 24th.
22 Q Did you ever tell Mrs. Fines that her
23 husband was dying, or words to that effect?
24 A I don't remember saying that, no.
25 Q Would there have been any reason for

you to say that, let's say, prior to the early morning of the 23rd?

A I may have on the 24th told her his condition was so serious that if we didn't do something he may die, but I certainly wouldn't have said it before then.

Q Was that the situation on the 24th when you performed the operation?

A He definitely progressed to a state of unconsciousness and his condition was so serious that if we didn't do something there wouldn't be anything left to do.

Q And subsequently you did the arteriogram and then the operation?

A That's correct.

MR. SCOTT: All right, that's all we have, your Honor.

THE COURT: Mr. McVey.

MR. McVEY: I don't think I have any questions.

THE COURT: All right. Is there anything else?

MR. PALMORE: I have nothing else.

THE COURT: You may step down, sir.

* *

WITNESS STOOD ASIDE

1 MR. PALMORE: That concludes the
2 plaintiff's evidence, your Honor.
3 THE COURT: All right.
4 MR. SCOTT: Could we take about a two
5 minute recess? I don't think we are going to
6 have any further evidence.
7 THE COURT: We will take a five minute
8 recess.
9
10 NOTE: A recess was had from 12:15 o'
11 clock p.m. until 12:20 o'clock p.m. whereas the
12 hearing continues as follows, viz:
13
14 THE COURT: Do you have any evidence?
15 MR. SCOTT: We have no further evi-
16 dence.
17 THE COURT: Mr. McVey.
18 MR. McVEY: We have none, your Honor.
19 THE COURT: All right, sir. Is there
20 anything further?
21 MR. PALMORE: I have no further evi-
22 dence.
23 THE COURT: Is there any argument for
24 the plaintiff?
25 MR. PALMORE: Just briefly, sir.

1 As your Honor is aware, the plaintiff
2 has endeavored this morning solely to address
3 itself to the defense to the plea of the statute
4 of limitations.
5 THE COURT: Right.
6 MR. PALMORE: We submit that the evi-
7 dence so tendered has, in fact, established Mr.
8 Fines, as of March 23rd, 1971, as being an in-
9 sane person within the meaning of the statute,
10 and that that condition has continued without
11 interruption until this very day.
12 THE COURT: Mr. Palmore, excuse me.
13 What evidence do you rely on as
14 establishing the insanity of Mr. Fines? Through
15 what evidence do you rely on?
16 MR. PALMORE: In order to answer that
17 question I think it is important to understand
18 what insanity is. My research has not brought
19 to my attention any Virginia case defining
20 insanity with respect to the provisions of 8-30,
21 however, the General Assembly did provide cer-
22 tain rules of construction and definitions with
23 respect to certain words and phrases that appear
24 in the Code.
25 Under Section 1-13 it simply is

entitled: Rules of Construction, and it suggests that in the construction of the Code and all the statute and rules should be observed and set forth in the following section unless the construction would be inconsistent to manifest the intentions of the General Assembly, and at one point in 13.11 is insane. It is defined as a person who is deranged or non compos mentis, and the definition of an insane person under 1-13.11 with respect to non compos mentis is what the plaintiff relies on with respect to Mr. Fines condition.

I believe, and submit that that definition applies to the statute of 8-30 for if the General Assembly intended otherwise it would have so provided for as it did in title 37.1 dealing with mental institutions in which insane persons were defined as a person who has been adjudicated legally incompetent by certain Courts.

There is no evidence that the construction of the word: Insane, as provided in 1-13.1 is inconsistent with the intentions of the General Assembly, and it has been defined, although not in Virginia, but not of sound mind,

1 and that is literally what it means, and insane,
2 it has been defined as not being of sound mind,
3 and the terms are inclusive.
4 I suggest that Black's Law Dictionary,
5 and limitations of actions, which appears in
6 American Jurisprudence at Volume 35, Section 187,
7 and also Volume 354 in Corpus, that it is im-
8 portant, I believe, your Honor, to keep in mind
9 as case law has demonstrated, and I have cases--
10 several cases from other jurisdictions which I
11 have copied and would be willing to give to the
12 Court, certainly, that suggests that to narrow
13 the definition of insanity, or of non compos
14 mentis would be an injustice, both to the liti-
15 gants as well as to the Court and that non
16 compos mentis insanity are generic terms which,
17 if you accumulate what the holdings have been
18 in the various cases that this very question has
19 presented that it seems to suggest that a person
20 is non compos mentis, or insane with respect to
21 the statute if he is unable to manage his aff-
22 airs, and if he is not aware, or does not know
23 of his legal rights and liabilities.
24 Now, addressing your specific question,
25 sir, I suggest that every witness that testified

this morning, from Mrs. Fines through Dr. Moss, through Dr. Young, and through Dr. Kendrick himself, has established the fact that Mr. Fines has continued to be insane within the definition as described in the Virginia Code, and I suggest that particular definition is included within the generic term of non compos mentis. He is certainly not able to care for himself, and he cannot walk, and he cannot eat, and he has trouble swallowing, and he makes unresponsive comments, and this has been borne out by every witness that has been called and our position, sir, is simply that this condition began on March 23rd, 1971 and has continued without interruption until the present day, and therefore with respect to the statute that he is insane.

This is in Section 8-30.

THE COURT: What are the particularities in the wife's testimony that allows for showing that this gentleman was insane at the time, or on March 23rd?

MR. PALMORE: Mrs. Fines testified, sir, that she first began noticing an inability to exhale smoke and then noticed her husband,

what she surmised at the time, to be in a deep sleep and it wasn't until Dr. Kendrick's third visit around 6:00 p.m. that evening when he advised Mrs. Fines that her husband was in a semi comatose condition, and that particular statement has not been contradicted by testimony offered by the defendants.

Furthermore, in a question that I directed to Dr. Kendrick with respect to his own notation that Mr. Fines was in a stuporous condition as of March 23rd, 1971, I asked him if that condition could be attributed to the medication that he was receiving, and his response was it could if the dosage was unusually high and that to his knowledge no such dosage was given, except for that which was prescribed, which I assume was the proper amount under the circumstances. He made no sounds in terms of intelligible comments from the early morning to mid-morning of March 23rd, Mrs. Fines testified to, and it manifested itself at the 6:00 o'clock visit by the doctor when he visited him at which time he said: Your husband is in a semi-unconscious state and that he was in a coma and that he is in critical condition, and that applies

1 that, sir, to the definition of non compos
2 mentis, and not of sound mind and not being able
3 to care for his own affairs, and not one being
4 able to manage his own estate and not being
5 aware of his legal rights and liabilities, and
6 I have the cases and the authorities here. I
7 have a capsulation of them, if you want me to
8 go into them as well, and I have the very cases
9 themselves for which I would be more than will-
10 ing to do, but I simply mention that for the
11 Court's benefit.
12 THE COURT: Following the same line
13 of inquiry, what evidence is there in Dr. Moss's
14 testimony that you rely upon as showing either
15 insanity, or non compos mentis on March 23rd?
16 How does his testimony help you, as far as your
17 theory is concerned?
18 MR. PALMORE: He did not contradict
19 the fact that he advised Mrs. Fines that her
20 husband was in a semi comatose state. I asked
21 him what stuporous meant and he said, perhaps--
22 well, perhaps we have to go back to the record,
23 but as I recall what he said was he was not com-
24 pletely unconscious but it was a condition that
25 would suggest that a person was confused, baff-

1 led, or perplexed, and that sort of testimony
2 from Dr. Kendrick himself applies to the defini-
3 tion which suggests that even as far as Dr.
4 Kendrick was concerned that he was not a person
5 that was capable of understanding his legal
6 rights.
7 THE COURT: What did Dr. Moss's testi-
8 mony--how does that help you?
9 MR. PALMORE: Dr. Moss's testimony
10 does not help me with respect to the condition
11 as of the 23rd, but his testimony, and Dr.
12 Young's testimony helped, I suggest, the plain-
13 tiff with respect to the condition manifesting
14 itself and continuing up and through without
15 interruption to the present day.
16 THE COURT: What testimony do you
17 rely upon from Dr. Young as establishing his
18 condition on the 23rd?
19 MR. PALMORE: That is what I said. I
20 do not rely on the testimony from either Dr.
21 Young or Dr. Moss with respect to the condition
22 on the 23rd. I simply relied on the testimony
23 of Dr. Kendrick and Mrs. Fines, and the doctor's
24 notation in the progress report of the stuporous
25 condition.

1 THE COURT: All right. Mr. Scott.
2 MR. SCOTT: Thank you, your Honor.
3 Your Honor, on behalf of Dr. Kendrick,
4 we submit that the burden in this situation is
5 on the plaintiff to prove that the exception to
6 the long recognized two year statute of limita-
7 tions in this instance requires that they prove
8 to the Court satisfactorily that this particular
9 competence, or disability exists in this partic-
10 ular situation, and we submit, sir, that the
11 appropriate use of the word: Insane, is, as
12 used in title 37.1 of the Virginia Code, re-
13 quires adjudication by a Court of competent
14 jurisdiction of insanity. We submit that had
15 the legislature intended there to be some lesser
16 degree of mental competency, or incompetency
17 which would allow this section to apply that
18 they could have well said, or other incompetency,
19 or other condition which would not require the
20 adjudication of insanity, and yet they use the
21 word: Insanity, and I think this section would
22 have to be strictly construed since it is an
23 exception to the established statute of limita-
24 tions.
25 THE COURT: Mr. Scott, do I understand

1 your argument to be that the person is actually
2 insane at the time this cause of action accrues,
3 that unless he has been adjudicated insane he
4 could not use that as to the exception of the
5 statute of limitations?
6 MR. SCOTT: I don't think the Court
7 can determine the insanity of any particular
8 person without adjudication to that effect, or
9 at least having evidence that such adjudication
10 could have been made.
11 THE COURT: Couldn't the Court hear
12 the same kind of evidence that the people who
13 normally hear that evidence make the adjudica-
14 tion, and then the Court could go on and make
15 the same kind of adjudication after the fact?
16 MR. SCOTT: I submit that either that,
17 or adjudication of another Court of competent
18 jurisdiction would be required, otherwise the
19 legislature could have said: Some lesser degree
20 of a burden of proving incompetency is ordered,
21 or would be necessary. There wouldn't have been
22 any reason why the legislature couldn't have
23 laid that out in this particular statute had
24 they desired any other construction, other than
25 the strict construction of the word: Insane.

1 Your Honor, if the Court feels that a
2 lesser degree of proof is required we do not
3 feel that the evidence supports such a finding
4 if the Court feels that the term: Non compos
5 mentis, is appropriate itself. We submit the
6 only competent evidence in this case was from
7 Dr. Kendrick who testified although the patient
8 was stuporous, he responded to stimuli when he
9 conducted an examination, except for a small
10 distinct difference in the light reaction of
11 the eyes that he was essentially within the
12 normal condition and that he felt he was not in
13 a condition that was appropriate under the cir-
14 cumstances, or he would have performed the diag-
15 nostic procedures and perhaps, even the operation
16 on that very evening.
17 So, he made a medical conclusion and
18 came to a medical diagnosis that the patient was
19 not in a serious condition of any type of in-
20 competency or he would have done something about
21 it. There is no evidence from Dr. Young or Dr.
22 Moss, or any other independent expert witness
23 who could have testified in this case from the
24 records, and by the use of hypothetical ques-
25 tions that this patient was, in fact, incompet-

1 ent in any stretch of the definition that the
2 Court wants to use on March 23, 1971. They have
3 not presented any evidence to that effect and
4 it is their burden to convince the Court and
5 carry the burden of proof that that condition
6 did, in fact, exist.
7 Now, Dr. Kendrick's testimony, as the
8 Court can remember as well as I do, but the
9 combination of sedation, and the combination of
10 his physical examination, and his judgment, and
11 he is the only medical witness we have to deter-
12 mine the patient's condition, was that he was
13 not in a condition that would require any immed-
14 iate type of action. Now the remainder of the
15 section on the statute of limitations says that
16 the disability has to be present at the time of
17 the cause of action accrues. Now as I read the
18 motion for judgment, they are alleging in gen-
19 eral, and perhaps in certain particulars, and
20 specific terms that the delay, or failure of Dr.
21 Kendrick and the hospital to diagnose the condi-
22 tion ultimately led to the condition in which
23 Mr. Fines is presently in and was negligent, and
24 they are saying on the one hand that he was in-
25 competent before the negligence occurred, and

incompetent as a result of negligence and we don't have a situation here where you have an infant who has been injured. We have a situation here where the allegations are that negligence on the defendant caused the disability that they are claiming he was in at the time that the negligence occurred.

Now the statute expressly sets out that it must exist at the time the cause of action accrues and not as a result of the cause of action, but at the time of the accrual of the cause of action and we submit that the incompetency in this situation resulted not from alleged negligence.

THE COURT: The only evidence we have that the cause of action accrued in the first place comes from Dr. Kendrick, and on his testimony everything that he did was right under the circumstances.

MR. SCOTT: Right, and there was no requirement, and that ties in with his mental status that there was no requirement that anything be done prior to March 24th, 1971, which is the day that they also allege the negligence occurred, and so I submit to the Court that in

1 this situation would be a case where an auto-
2 mobile accident occurred, and as a result of the
3 automobile accident the plaintiff in the situa-
4 tion went into a comatose condition and never
5 recovered, and I submit to the Court that it
6 would be a far stretch of this statute to rule
7 that this particular plaintiff was injured as a
8 result of an automobile accident and it would
9 have been twenty years before he brought his
10 cause of action, which is what this section
11 said, and to carry this out to its logical con-
12 clusion that Mr. Fines could wait until March
13 23 of 1991 before feeling that Dr. Kendrick
14 should be called into Court to answer for these
15 allegations. I think that would be an unreason-
16 able stretch of the statute under the strict
17 construction, which we think it should carry.
18 We also, your Honor, would be happy to
19 provide the Court with any authorities in supp-
20 ort of our position within a reasonable time
21 limitation.
22 THE COURT: All right, sir, thank you.
23 Mr. McVey.
24 MR. McVEY: If your Honor please, I
25 couldn't agree with Mr. Scott more. I think

1 Section 8-30 was intended to apply to an infant
2 who clearly is an infant at the terminal time
3 when this cause of action arises, or a person
4 who is legally incompetent at the time the cause
5 of action arises and was never intended to apply
6 to a situation where the act, giving rise to the
7 alleged incompetent with, and parcel to the
8 cause of action but more like, your Honor, there
9 has been no testimony from the witness chair
10 today by any physician that this man was legally
11 incompetent, or insane on March 23, 1971, or
12 for that matter, on March 24, 1971. The only
13 testimony that has been offered from this chair
14 by Dr. Young, and Dr. Moss and Dr. Kendrick was
15 in connection with this man's condition as of
16 sometime subsequent to the operation.
17 Now, one of the allegations is that
18 one of the reasons Mr. Fines is the way he is
19 today is that Dr. Kendrick didn't perform the
20 right sort of operation, and if that is true,
21 then it is incumbent on the plaintiff to show
22 at the time his cause of action arose that he
23 was, in fact, incompetent, or insane as that
24 term is defined in the law, and there has not
25 been one piece of evidence here today that he

1 was not, and, in fact, the question was not
2 asked of Dr. Young: Dr. Young, based on your
3 review of the records, and assuming for the
4 facts, was Mr. Fines incompetent, or insane as
5 of March 23, 1971, but the question wasn't asked
6 nor was it asked of Dr. Kendrick, and absent
7 such testimony there is no proof that this man
8 was, in fact, incompetent, or insane at the time
9 this cause of action arose, and absent such
10 proof the statute begins to run, and once it
11 begins to run it continues to run, and even
12 though the man momentarily thereafter becomes
13 incompetent--
14 MR. PALMORE: I want to correct Mr.
15 McVey. Dr. Kendrick, I believe, testified as
16 to the early morning of March 24th that Mr.
17 Fines was completely unconscious, which he
18 stated, and which, of course, is contrary to
19 that which Mr. McVey stated, but more important-
20 ly, I think, sir, and if the Court will simply
21 indulge me in referring to Volume 35 of American
22 Jurisprudence, with substantiating cases which
23 I do have, it states: As a general rule, it is
24 not necessary that a person be adjudged insane
25 to bring him within the exception on the grounds

1 of mental incanpacity with respect to the runn-
2 ing of the statute of limitations dealing with
3 similar cases that we have before that.
4 THE COURT: I don't have a case with
5 adjudication but I am having problems with the
6 testimony.
7 MR. PALMORE: Judge, assume that the
8 definition of insane, as it appears in 8-30 is
9 the same as it appears in 1-13.11, which includes
10 non compos mentis, and with respect to that in
11 a New Jersey case involving exactly the same
12 statute, the Court said the defendant asked us
13 to require something more than insane. The
14 defendant requires that we use insane as it
15 relates to voluntary commitment proceedings--
16 THE COURT: What was the evidence in
17 that case as to the particular party's status?
18 MR. PALMORE: In this particular case,
19 Judge, there was a tree climber whose rope broke
20 and when he fell to the ground he was unconscious
21 and remained so for a hundred days, I believe,
22 Now I think in that case is a case that we can
23 use to our advantage for two purposes; one, he
24 was not insane when the rope broke, if you want
25 to apply the rationale forwarded by Mr. McVey

1 and Mr. Scott that a person has to be insane at
2 the very moment that the cause of action acc-
3 rued.
4 THE COURT: What does the annotation
5 to that section say?
6 MR. PALMORE: Case Law also suggests
7 that to avoid such harsh results, if the cause
8 of action accrues on the same day as the in-
9 capacity, or insanity, the Court and the law
10 will not require a simultaneous faction of date,
11 sort of splitting.
12 In this case, if you wanted to view
13 this situation as the defendants would, that
14 means that the plaintiff would have had to show
15 that he was insane at the time the rope broke.
16 He wasn't insane until he hit the ground and was
17 knocked unconscious and there was no testimony
18 that he was insane just prior to the breaking
19 of the rope, or in terms of when the rope
20 actually broke, but that between the time the
21 rope broke and the time he hit the ground it was
22 considered to be a simultaneous act.
23 THE COURT: Well, this cause of action
24 would have arisen at the time that the rope
25 broke and not when he hit the ground?

1 MR. PALMORE: That's correct, and if
2 you apply the strict interpretation to it then
3 it would not have fallen within the meaning of
4 the provisions because his cause of action
5 accrued at the time the rope broke, and you are
6 presumed to be sane, but he really didn't become
7 insane, or unconscious until he actually hit
8 the ground, but the Court said in order to avoid
9 a harsh result in situations where the cause of
10 action accrues, and the disability accrues on
11 the same day.
12 THE COURT: Let me ask you about this
13 because this is an area where I have problems.
14 The only evidence we have in the
15 record thus far is that the cause of action
16 arises and comes from Dr. Kendrick, and he says
17 that there is no cause of action did arise be-
18 cause he did everything right, and how do we
19 have a cause of action?
20 MR. PALMORE: He testified, and Mrs.
21 Fines testified that she was told on several
22 occasions subsequent to the operation that had
23 the operation been performed two to three hours
24 before it was performed, the chances of recovery,
25 and his condition would have been different.

1 THE COURT: That's what she said but
2 he said there was nothing to indicate to him
3 that the man was in this situation, and had he
4 known he would have performed it sooner, or the
5 night before.
6 MR. PALMORE: For the purposes of this
7 hearing, I can vouch to the Court that as far
8 as the negligence involved, and as far as when
9 the cause of action accrued that we will be in
10 a position to submit expert testimony as to the
11 fact that the operation and the test, the
12 arteriogram, should have been performed on the
13 23rd, but for the purposes of this hearing we
14 have only addressed ourselves to the fact that
15 Mr. Fines was insane as of March 23rd and I defy
16 anyone to contradict that.
17 THE COURT: Why March 23rd; because
18 that's when you say the cause of action is?
19 MR. PALMORE: I am saying that the
20 arteriogram and operation should have been per-
21 formed at the very latest on March 23rd and it
22 wasn't until March 23rd, even looking at our
23 testimony in our best light, that Mrs. Fines
24 said that she noticed something different and
25 that he couldn't smoke, and Dr. Kendrick stated

that he was semi conscious which is basically the situation in the North Carolina case. Mr. Fines condition on March 23rd tolls the statute, your Honor. He was not able to understand and he couldn't comprehend and he was not even aware of things, and he couldn't eat or swallow.

THE COURT: How do we know that he didn't have a physical disability rather than a mental disability to keep him from doing all these things? The statute doesn't talk about physical disabilities but insane.

MR. PALMORE: It speaks of insane as we are trying to defend that word and it embraces all sorts of definitions, and in order to hold Mr. Fines to the degree that the defendants are trying to, they are suggesting that on that particular date he was of sound enough mind, and in effect, that is what they are saying, on March 23rd to be able to understand his legal rights, and in effect, that he, at that point, he could file an appropriate action that he was sound enough of mind to do that, and I submit that the testimony hasn't proven that.

THE COURT: Who has the burden though?

MR. PALMORE: The burden of proof is

the preponderance of the evidence.

THE COURT: But that burden is on you.

MR. PALMORE: Obviously, and it came out.

THE COURT: You say you have got some cases and in fairness I ought to read those cases.

I guess counsel on the other side ought to have an opportunity to respond and I will give you that opportunity also, if you want it.

MR. PALMORE: Thank you.

THE COURT: How much time will you need?

MR. PALMORE: Within ten days, your Honor.

THE COURT: Is the trial date set in this case?

MR. PALMORE: Yes, in January, your Honor.

THE COURT: Why don't we give you say a period of two weeks to file, and then the defendants can respond within two weeks thereafter.

MR. McVEY: I don't know where that puts us on the calendar but I am going to be

1 out of town starting this Saturday for three
2 weeks.
3 THE COURT: Well, with the trial date
4 being off that far, how much time would you need
5 to reply?
6 MR. McVEY: If I could have until the
7 1st of September.
8 THE COURT: Certainly. Then take
9 twenty one days. I think the case is of suffi-
10 cient magnitude to brief it but I am not requir-
11 ing briefs with the backlog I have, but this is
12 a highly important case to all of the parties
13 and I think it ought to be briefed.
14 The plaintiff will file a brief within
15 twenty one days from today, and the defendants
16 will send one in in rebuttal ten days thereafter.
17 MR. PALMORE: Thank you, sir.
18 THE COURT: Is there anything further,
19 gentlemen?
20 MR. SCOTT: No, sir, your Honor.
21 MR. McVEY: No, sir.
22 THE COURT: Thank you very much.
23
24 THE HEARING IS ADJOURNED AT 12:55 o'clock p.m.
25

CERTIFICATE OF COURT REPORTER

I, Robert A. Tierney, certify that I was the Court Reporter in the Circuit Court of the City of Richmond, Division I, Richmond, Virginia, on the 19th day of July, 1976, at the time of the hearing herein.

I further certify that the foregoing transcript is a true and accurate record of the testimony and other incidents of the hearing herein.

Given under my hand this the 8th day of March 1977.

(Original signed:)
ROBERT A. TIERNEY

Court Reporter, RPR

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION 1

- - - - - - - - - - - - - - - - - -

NORTON C. FINES, an incompetent person, who sues by and through Marjorie Ellen Fines, his next friend)

v.)

JOHN F. KENDRICK)

and)

RICHMOND MEMORIAL HOSPITAL)

- - - - - - - - - - - - - - - - - -

Transcript of the above proceedings heard on Wednesday, February 17, 1977, before Honorable James E. Sheffield, Judge.

APPEARANCES:

Messrs. Andrew J. Ellis, Jr. and Russell V. Palmore, Jr., of MAYS, VALENTINE, DAVENPORT & MOORE, F&M Center, Richmond, Virginia, counsel for the plaintiff

Mr. R. Carter Scott, III, of BROWDER, RUSSELL, LITTLE, MORRIS & BUTCHER, Ross Building, Richmond, Virginia, counsel for defendant John F. Kendrick

Mr. Lawrence H. Framme, III, of McGUIRE, WOODS & BATTLE, Ross Building, Richmond, Virginia, counsel for defendant Richmond Memorial Hospital

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WITNESSES

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1 NOTE: The hearing began at 10:00 a. m.

2 THE COURT: Good morning, gentlemen. You may
3 proceed.

4 MR. ELLIS: May it please the Court, we
5 represent the plaintiff in this case, Norton C.
6 Fines.

7 On July 19, 1976, a hearing was held in this
8 court on a plea of the statute of limitations, at
9 which time evidence was produced for the Court. On
10 September 28, 1976, the Court entered an order
11 sustaining the plea of the statute of limitations
12 filed by the defendants.

13 On or about September 30, 1976, copies of
14 this order were mailed to counsel for the defendants,
15 but copies of the order were never mailed to counsel
16 for the plaintiff. It was not until the first week
17 in January when we were preparing for trial that we
18 learned that the order was entered.

19 At that time we did also ascertain that the
20 case was still on the pending docket of this Court.
21 We prepared a final order to be entered based on the
22 order entered September 28, and it gave counsel notice
23 that we would appear this morning and present this
24 order although, of course, we object to the order

1 sustaining the plea of the statute of limitations.

2 At this point, at the conclusion of any

3 statement counsel for the defendants would make, I

4 would like to call Mr. Kidd, who is the clerk of this

5 court, for some very brief testimony.

6 THE COURT: All right, sir. Are there any

7 statements for the defendants?

8 MR. SCOTT: We will waive opening statement,

9 Your Honor.

10

11 EDWARD G. KIDD, being first duly sworn,

12 testified as follows:

13 DIRECT EXAMINATION

14 BY MR. ELLIS:

15 Q Would you state your name, please?

16 A Edward G. Kidd.

17 Q Your occupation, Mr. Kidd?

18 A Clerk of the Circuit Court of the City of

19 Richmond, Division 1.

20 Q Mr. Kidd, have you had occasion to examine

21 the court file in the pending case of Norton C. Fines versus

22 John F. Kendrick and others?

23 A In part.

24 Q Now, did you look at the order that was

1 entered on September 28, 1976 sustaining the plea of the
2 statute of limitations filed by the defendants?
3 A I did.
4 Q Was a copy of that order mailed to counsel
5 for the plaintiff or delivered to counsel for the plaintiff as
6 far as you could ascertain?
7 A As far as we could ascertain, a copy was not
8 sent to counsel for the plaintiff.
9 Q Do you know why?
10 A Yes, sir, I think I do. I think that there
11 is a note on the sketch of that order that our office sent a
12 copy of the order to defense counsel, but the purpose for it
13 was merely to collect our $5.00 fee from each of the defendants.
14 It did not have anything to do with actually giving parties to
15 the case notice of the entry of the order.
16 Q Now, is the case still on the pending docket
17 of this court?
18 A Yes, sir.
19 MR. ELLIS: I have no further questions.
20
21 CROSS EXAMINATION
22 BY MR. SCOTT:
23 Q Mr. Kidd, where is that original order now?
24 A It's in the court file. I believe the Judge

1 has it.

2 MR. SCOTT: I wonder, if Your Honor please,

3 if I might look at that for a moment.

4 THE COURT: Sure.

5 NOTE: The order was handed to Mr. Scott.

6

7 BY MR. SCOTT: (Continued)

8 Q Mr. Kidd, I wonder if you might look at this

9 original order, and I ask you if you can decipher the hand-

10 written comments on the left lower corner of that order? I

11 believe the first two are "BR," then "MW."

12 A Yes. The "BR" means Browder, Russell. "MW"

13 means McGuire, Woods. Dated 9/30/76.

14 Q What are the next words there, notations?

15 A I'm not sure. The file number is on there:

16 9464. I really can't make out the other. It looks like "no

17 check," abbreviation for "no check," but I really can't say.

18 Q Could you determine who made those entries?

19 A Miss Maxey.

20 Q Would a cover letter have gone out from the

21 clerk's office with the order?

22 A No letter. Just the Xerox copy of the order

23 certified, and the bill to each defendant for $5.00.

24 Q Let me ask you this, sir: Is there any

1 indication on the records or in the clerk's office which would
2 reveal that the bills were paid?
3 A I really don't follow it up. But there would
4 be something. There would either be a copy of the bill unpaid
5 or a receipt somewhere indicating that it had been paid.
6 Q Where would they be lodged?
7 A Room 102.
8 Q Would it take any abnormal degree of time or
9 effort to find those this morning? To find the receipts or the
10 copies of the bills?
11 A I don't think it would take too long.
12 MR. SCOTT: If Your Honor please --
13 A (Continued) I'm not sure about the receipt.
14 We would have to go through the receipts. That might be a
15 little difficult. But if it was unpaid the copy would be among
16 our unpaid bills.
17 THE COURT: What is the relevancy of that?
18 MR. SCOTT: Well, I want the record to be as
19 complete as possible concerning the transactions that
20 took place in and from the clerk's office.
21
22 BY MR. SCOTT: (Continued)
23 Q Now, how would you ascertain from the files
24 or the records that you have reviewed that a copy was not sent

1 to the plaintiff's attorney?

2 A Well, it's hearsay at this point. I don't

3 know. But I have investigated the matter with all the deputies

4 involved in the thing and have determined that a copy had not

5 been mailed to Mays, Valentine.

6 Q Is that from memory?

7 A From Miss Maxey.

8 Q From her personal recollection of this case

9 or because of something written somewhere or not written

10 somewhere?

11 A Well, both. If she had sent it she would have

12 made the notation, and her recollection was specifically in this

13 case that she had not.

14 Q So it is based on her personal recollection

15 of this particular case in addition to the absence of a written

16 entry in the file?

17 A That's right. Because the purpose of sending

18 it was not to give anybody notice. It was just to justify our

19 bill for $5.00.

20 Q Were there at that time any additional costs

21 which would be due from the plaintiff?

22 A No.

23 Q Is it not the routine procedure of the Clerk's

24 Office to send -- well, let me ask you this, Mr. Kidd: The

1 defendants' costs would not be assessed if this was not a final
2 order, is that correct?
3 MR. ELLIS: Your Honor, I object to that
4 question on the ground that it calls for a legal
5 conclusion.
6 THE COURT: Well, he can certainly ask Mr.
7 Kidd what the procedure is in the clerk's office as
8 to that kind of matter.
9
10 BY MR. SCOTT: (Continued)
11 Q In other words, the defendants would not be
12 billed?
13 A There is one other bit of information that
14 you should know to complete this whole story which relates to
15 it. Apparently, there was some conclusion in the clerk's office
16 as to whether or not this order that Judge Sheffield had entered
17 was indeed final, because Mrs. Faglie's handwriting was on the
18 note. I thought it was still in the file there. But this was
19 a final order. And based on that, Miss Maxey sent out the
20 bills to you with the copy. At one point somebody down there
21 thought it was final. When I went down to review it, I think
22 my opinion was not the same.
23 Q My question is that the procedure in the
24 clerk's office is not to send a bill to defense counsel or to

1 the defendants without a final order being entered?

2 A Yes, sir. That is the problem here. This

3 order does not become final, if I were doing the paper work

4 here, because there was no judgement in favor of the defendants

5 awarding them their costs. If there had been such a finding,

6 Mr. Ellis would have gotten the bill for your costs. So the

7 principle that you have just stated, as far as it applies to

8 our office, is exactly correct.

9 Q Is the procedure in the clerk's office not to

10 assign costs to the defendants if they prevail on a plea of the

11 statute of limitations, for instance?

12 A Had I been doing it and considered it to be

13 a final order, I would have sent the bill to the plaintiff.

14 Q To the plaintiff?

15 A Yes.

16 Q If this order were presented to you, you

17 would send the bill for the costs to the plaintiff? The order

18 as it appears on the records?

19 A You are asking me if I thought it to be a

20 final order what would I have done. If I had thought it was a

21 final order I would have billed the plaintiff, because, --

22 Q Even though --

23 A -- obviously, the defendants were let out of

24 the case. But this particular order did not have a finding

about costs in it. So I really can't testify so positively that the people that worked for me would do exactly what I would do. I don't see all of these things personally.

Q Well, someone concluded, is this not correct, that the case was disposed of or else they wouldn't have billed the costs?

A That's correct.

Q Is that a reasonable assumption?

A Yes, that is a reasonable assumption. There is one other thing that Miss Maxey told me, that when she read the order she really thought that everybody was present when the decision was made and, therefore, concluded that everybody knew about the thing, and sent the copies just to get the money. She is very diligent about getting our money for us.

Q Well, there was no indication in the court file, and is no indication in the court file, that an order was sent to the plaintiff at any time when Miss Maxey was reviewing it, or any other time.

A No, no.

Q Is it, or is it not, routine procedure in the clerk's office to forward copies of orders to all counsel of record?

A No.

MR. SCOTT: It is not. I don't have any

1 further questions.

2 THE COURT: Anything on redirect?

3 MR. ELLIS: No, Your Honor.

4 WITNESS STOOD ASIDE

5

6 THE COURT: Anything further?

7 MR. ELLIS: We have no further evidence,

8 Your Honor.

9 We prepared an order, a final order, dismiss-

10 ing the case based on the plea of the statute of

11 limitations, noting our objection to it. We

12 presented it to counsel for the defendants who did

13 not endorse it. And I will at this time tender it to

14 the Court.

15 THE COURT: Any argument for the defense?

16 MR. SCOTT: Yes, sir. Your Honor, the

17 defendant, Dr. Kendrick, in this case takes the

18 position that the order entered by the Court on

19 September 28, 1976 was a final order, according to the

20 applicable rules of court, and, specifically Rule 1:1,

21 which was in effect as of that date, which states

22 that all final judgements, orders and decrees remain

23 under the control of the trial court for 21 days and

24 no longer.

1 Now, there is no saving provision in that
2 particular rule that I have become aware of, and
3 although I certainly sympathize with the position of
4 the plaintiff, and I am sure they well know it and I
5 am sure the Court well knows it, I don't see that the
6 Court has any discretion in this matter regardless of
7 what appears to be a mixup in the clerk's office, and
8 perhaps an unavoidable mixup. But, still that order
9 was entered. It was a final order. It is appealable.
10 There is nothing more that could be done by the
11 plaintiff following the sustaining of the plea of the
12 statute of limitations except to appeal.
13 So there appears to be no question about it.
14 Rule 1:1 states that the Court has discretion over
15 that order only from within 21 days after its entry,
16 and the only alternative or the only provision upon
17 which the plaintiff could rely after that 21-day
18 period is to appeal to the Supreme Court. And we
19 would respectfully suggest to the Court that under
20 this rule and under our interpretation of this order
21 that is being filed that the Court has no discretion
22 as to the entry of the order submitted by the plaintiff
23 THE COURT: Thank you, Mr. Scott. Mr.
24 Framme.

1 MR. FRAMME: If I may respond on the part of
2 Richmond Memorial Hospital, we concur in the position
3 taken by Mr. Scott on the part of Dr. Kendrick, and
4 just add to the Court that, really, under the
5 procedure that Mr. Kidd just outlined, normally there
6 is no statute that requires the clerk of any circuit
7 court to send orders to counsel. I believe Mr. Kidd
8 testified that there was no absolute procedure in his
9 court by which copies are automatically sent. For
10 that reason, really, the testimony of Mr. Kidd
11 concerning any mixup that may have occurred is really
12 irrelevant to the matter.
13 The statute of limitations plea was denied,
14 and it was embodied in an order, and as Mr. Scott
15 says that is all the Court can do.
16 THE COURT: All right.
17 MR. ELLIS: If it please the Court, the order
18 as entered simply sustained the plea of the statute
19 of limitations. We take the position that that is not
20 a final order as such. There is a great deal of case
21 law on the subject. I think this is probably a matter
22 that will have to be determined by the Supreme Court
23 of Virginia. The case is still on the pending docket.
24 No judgement has been entered. It has not been

1 dismissed.

2 We submit to the Court that when the case is
3 dismissed and judgement is entered in favor of the
4 defendants based on the Court's ruling, that that at
5 that time is a final order and is appealable. For
6 that reason, we requested this hearing and presented
7 this order here today.

8 THE COURT: It appears to me that there is
9 nothing that the Court can do about the order that it
10 entered on September 28, 1976. But it was intended
11 to be a final order.

12 And I think the Court certainly must bear part
13 of the responsibility for the confusion by not
14 having entered judgement for the defendants in the
15 order itself. But I do not see how at this time this
16 Court can do anything about this particular order and
17 the only recourse that the plaintiff has is to appeal
18 from the order of September 28, 1976.

19 The Court does note that the Court inserted
20 the phrase "Plaintiff's exception to the Court's
21 ruling is hereby duly noted."

22 MR. ELLIS: Your Honor, I agree with the
23 Court's view that there is nothing this Court can do
24 about the order entered September 28, 1976. However,

1 that order is not a final order. There is no order
2 dismissing this case. There is no judgement in favor
3 of the defendants based on that ruling. If the Court
4 were to enter the order that we have presented this
5 morning, then there would be a judgement based on the
6 Court's ruling and it would be appealable. The time
7 has run for any appeal to be taken from the order
8 entered September 28, 1976. The time had run before
9 counsel for the plaintiff ever ascertained that the
10 order was entered.
11 We submit to the Court that it would be
12 appropriate at this time simply to enter an order
13 dismissing the case from the docket and entering
14 judgement for the defendants.
15 THE COURT: But the effect of that would give
16 each of you an opportunity to then appeal the case to
17 the Supreme Court based on the new order.
18 MR. ELLIS: That's correct, Your Honor. And
19 we submit that it would be proper to enter that order
20 then we would not be denied our right of appeal.
21 THE COURT: Do you have any case law that
22 indicates that this is not a final order?
23 MR. ELLIS: Yes, Your Honor.
24 THE COURT: All right.

1 MR. ELLIS: I will ask Mr. Palmore to
2 address that if he will.
3 MR. PALMORE: If Your Honor please, we
4 anticipated this particular argument to be raised
5 by the defendants on appeal. That is the
6 appealability of the order which we trust the Court
7 will enter today and which Mr. Ellis just tendered
8 to the Court.
9 However, with respect to case law on this
10 point, I refer the Court to Bibber v. McCreary, 194
11 Va. 394, decided in 1952. An order was entered in
12 that case sustaining the defendant's demurrer to the
13 motion for judgement filed by plaintiff. However,
14 the order that was entered did not dismiss the suit,
15 and the Court held in Bibber that it was not a final
16 order because the order sustaining the demurrer
17 did not contain the language that the suit was
18 dismissed.
19 Bibber was followed by Southern Railway v.
20 Anderson, which is found in 203 Va. at page 991. It
21 quotes from Bibber, and the Court held at page 994 of
22 Southern Railway that an order sustaining or over-
23 ruling a demurrer is not final. It must go further
24 and dismiss the case.

1 Now, I understand that we do not have a
2 demurrer before the Court at this time, however, I
3 do believe that the applicable law is germane to the
4 discussion at hand. An order sustaining a demurrer
5 could have the same effect as an order sustaining
6 the plea of the statute of limitations. And I
7 believe that what the Court is trying to say is that
8 to be final the order has to be final on its face.
9 It has to dismiss the case. It cannot leave anything
10 open.
11 I also would cite to the Court the case of
12 Wade v. Peebles, 162 Va. 479. And also Rodgers v.
13 Danko, 204 Va. 140.
14 Burks Pleading & Practice, 417, page 810,
15 states that no writ of error lies in any case at law
16 until after final judgement has been rendered in the
17 trial court.
18 We submit that the order of September 28 was
19 not a final judgement regardless of what the intention
20 of the Court may have been or regardless of what the
21 intention of certain employees of the clerk's office
22 might have been. And, therefore, we believe that in
23 order for the plaintiff to be able to appeal any
24 order sustaining the statute of limitations it must,

1 in fact, dismiss the case and that language must be
2 explicitly stated in the order.
3 THE COURT: Thank you, Mr. Palmore. Mr.
4 Scott, do you want to respond to that?
5 MR. SCOTT: Just very briefly. The
6 distinction between a demurrer and the sustaining of
7 a plea of the statute of limitations appears obvious
8 to me. The obvious distinction is that after the
9 sustaining of the demurrer there are other things
10 the plaintiff can do which, obviously, does not apply
11 in this case, with the exception of appeal.
12 I think it is important for the Court to note
13 that the use of the words "judgements and orders" in
14 Rule 1:1 is mutually exclusive. It is not the same
15 thing. You can have a final judgement and you can
16 have a final order. And the plaintiff appears to be
17 taking the position that any final order such as the
18 sustaining of the plea of the statute of limitations
19 must contain on its face judgement for the defendants.
20 If that were the case, the Supreme Court would not use
21 these terms in a mutually exclusive manner. Whether
22 judgement is given for the defendants in the order
23 does not indicate whether the order is final, and I
24 find no problem at all in construing an order

1 sustaining the plea of the statute of limitations as
2 final and appealable. It is inconceivable to me that
3 the Supreme Court would not conclude and interpret
4 this order as being final and appealable. So I think
5 the terms are used in a mutually exclusive manner.
6 And certainly the intent of the rule is to cover both
7 judgements and orders, and this Court, in my opinion,
8 must interpret this as a final order. And, in fact,
9 the Court has indicated it did so when it was entered.
10 THE COURT: All right. Thank you.
11 MR. FRAMME: Your Honor, I just concur in
12 Mr. Scott's argument.
13 MR. PALMORE: I might add, Your Honor, that
14 there is no dispute that the case is still on the
15 pending docket of the court.
16 THE COURT: Mr. Kidd so testified.
17 MR. PALMORE: Mr. Kidd so testified to that.
18 And I think that is an important consideration that
19 the Court should take into account. The case must be
20 dismissed from the pending docket of the court. That
21 is not a self-executing process. There must be a
22 final order for that to be accomplished, and I submit
23 that the order that has been tendered this morning
24 will do that.

THE COURT: You are contending then, Mr. Palmore, that the order, in addition to saying that the final judgement is for one of the parties, must also state that the case is stricken from the docket. Is that your contention?

MR. PALMORE: Yes, sir.

THE COURT: I want to look at these authorities that the plaintiff has cited here, gentlemen, and I won't be able to do it at this exact moment, but I will let you know by letter opinion exactly what the Court's holding is.

I think in view of the fact that this whole matter may be appealed I should place the court reporter under oath.

(Speaking to reporter) And I am going to ask you to stand and let me swear you in as if you had been sworn.

NOTE: The reporter was sworn by the Court.

THE COURT: Will there be anything further?

MR. ELLIS: No, Your Honor.

MR. PALMORE: Judge Sheffield, I am not asking for another bite at the apple, but in order to help you in your research I would ask you to look at Salem Loan Company v. Kelsey, which is found at 115 Va. 383,

1 and also Rule 5:6 of the Rules of Supreme Court of
2 Virginia, which specifically states that before an
3 appeal shall be allowed, final judgement must be
4 entered.
5 I am sure you are familiar with that rule
6 but I didn't know if you were familiar with the case.
7 THE COURT: All right. Mr. Scott and Mr.
8 Framme, do you desire the opportunity to forward
9 authorities to the Court or will you stand simply on
10 your arguments? I don't want to foreclose you from
11 doing it.
12 MR. SCOTT: I would like the opportunity to
13 review the authorities cited by the plaintiff, and I
14 would certainly think that a week would be plenty of
15 time for me.
16 THE COURT: Then the Court will grant a week
17 to both defendants to file such authorities as you
18 wish to file.
19 MR. FRAMME: I think we can probably do it on
20 a combined basis, to save the Court some trouble.
21 THE COURT: Anything further, gentlemen?
22 MR. SCOTT: No, sir.
23
24 CONCLUDED

1 CERTIFICATE OF COURT REPORTER

2

3

4

5 I, Mary Elizabeth Taylor, having been
6 duly sworn to report the case herein in the Circuit Court of
7 the City of Richmond, Division 1, Richmond, Virginia, certify
8 that I was the court reporter on February 17, 1977, at the time
9 of the hearing herein; and I further certify that the fore-
10 going transcript is a true and correct record of the proceedings.
11 Given under my hand this _____day of
12 _____, 1977.

13

14

15

16

17 _____
18 Mary Elizabeth Taylor
Court Reporter

19

20

21

22

23

24

1 CERTIFICATE OF COUNSEL

2

3 Final judgement in the foregoing matter
4 having been rendered on the _____day of _____, 1977,
5 counsel for the plaintiff and counsel for the defendants hereby
6 affix their signatures to the foregoing transcript of testimony
7 and other incidents of trial to the end that the same may
8 become part of the record on appeal.

9

10 Given under my hand this _____day of
11 _____, 1977.

12

13 By: _____
Counsel for the plaintiff

14

15 Given under my hand this _____day of
16 _____, 1977.

17 By: _____
Counsel for the defendants

18

19

20

21

22

23

24

1 CERTIFICATE OF TRIAL JUDGE

2

3 Date tendered _____

4

5 Date signed _____

6

7

8 _____

9 James E. Sheffield, Judge

10

11

12

13

14

15 CERTIFICATE OF CLERK

16 Date received _____

17

18

19 _____

20 Clerk

21

22

23

24

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

NORTON C. FINES, an incompetent person, who sues by and through Marjorie Ellen Fines, his next friend,	)	
Plaintiff,	)	
v.	)	Case No. 9446
JOHN F. KENDRICK	)	
and	)	
RICHMOND MEMORIAL HOSPITAL,	)	
Defendants.	)	

NOTICE OF APPEAL

TO: Edward G. Kidd, Clerk
Circuit Court of the City of
Richmond, Division I
John Marshall Courts Building
800 East Marshall Street
Richmond, Virginia 23219

NOTICE IS HEREBY GIVEN that Norton C. Fines, an incompetent person, who sues by and through Marjorie Ellen Fines, his next friend, announces his intention of applying for an appeal to the Supreme Court of Virginia from the final Order rendered by this Court on April 21, 1977.

Transcripts of the case will be filed hereafter.

NORTON C. FINES, an incompetent person, who sues by and through Marjorie Ellen Fines, his next friend

By
Of Counsel

Andrew J. Ellis, Jr.
Russell V. Palmore, Jr.
Mays, Valentine, Davenport & Moore
Post Office Box 1122
Richmond, Virginia 23208

Counsel for Plaintiff

ASSIGNMENT OF ERROR

It was error for the Court to sustain respondents' pleas of the statute of limitations inasmuch as the applicable statute was tolled by Section 8-30.

ASSIGNMENT OF CROSS-ERROR

The trial court erred in ruling that the Order of September 28, 1976 sustaining the defendant's Plea of the Statute of Limitations was not a "final" Order pursuant to Rule 1:1, and in entering the Order of April 21, 1977, from which this appeal was taken.