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Missing an Appeal is Not Enough for Malpractice

By: Jeff Geiger. ***This was posted Friday, September 24th, 2010***

In a rebuke to the "blame game," the Virginia Supreme Court affirmed a trial court's decision to kick out a legal malpractice case on summary judgment. In Wintergreen Partners, Inc. v. McGuireWoods, LLP, Wintergreen contended that its former lawyers at McGuireWoods screwed up an appeal. As noted by the Supreme Court, McGuireWoods "failed to ensure that the trial transcripts were timely filed." As a result, the Supreme Court dismissed the appeal. (As an aside, this an especially harsh result but one that speaks to the need to follow the rules).

Looking backwards, the underlying case concerned severe injuries sustained by Jessica Grigg when she crashed into a snow groomer as she was skiing at night at Wintergreen Ski Resort. She ended up suing the employees who were transporting the snow groomer and Wintergreen, alleging that they were all negligent. At trial, the jury was allowed to consider the fate of each defendant and concluded that only Wintergreen was negligent to the tune of $8.3 million. Wintergreen argued that the verdict was inconsistent because if its employees were not negligent, how could it be deemed to be negligent? The trial court didn't buy it and the verdict stood. The appeal was made and then dismissed.

Moving forward, Wintergreen sued its attorneys. You lost the appeal because you did not file the necessary papers. Seems like an open and shut case, right? Not so fast. While not articulated based upon prior case law, the Supreme Court recognized that "even if the appeal of the judgment against Wintergreen has not been dismissed, this Court would not have been required to reverse the [] judgment as a mater of law," because the instructions to the jury would have allowed the jury to conclude that Wintergreen was negligent independent of any actions taken by its employees.

The import of the decision is as follows: missing an appeal due to attorney error is not enough—you must be able to establish that, had the appeal gone forward, you would have won. This may sound like it is too strident of a position (and I recognize that the facts and circumstances were critical to the decision) but the Supreme Court made clear that if a jury could have decided the case in favor of the victim on other grounds, that was sufficient to say, "no malpractice."

This opinion makes sense and recognizes the underlying tension of post-trial 20/20 hindsight. Should they have blown the appeal, no. But the underlying case is what drives the appeal and in the heat of trial, good attorneys

make decisions based upon their judgment influenced experience. It is easy to "Monday morning quarterback" a case after the jury has returned with a verdict and flyspeck the transcript in an effort to find an undotted "i" or uncrossed "t." And an appeal is the offspring of such efforts. Yet, at the end of the day, a meritorious appeal rises and falls on the facts and the law in the case and, here, the jury was given several grounds on which to conclude that Wintergreen was negligent.