

The Intersection involved is a major intersection on **The Highway**. (C # 10). While the speed limit is 45 miles per hour vehicles routinely exceed the speed limit at the intersection. (C # 12). **The Funeral Home** has operated at that intersection since 2001. (C # 5).

The Funeral Home planned the route to the burial ground and knew that mourners would be travelling through the intersection before turning left to head north on the highway. (C # 9-12, 18). As the funeral ended and the procession was about to begin, there were no law enforcement personnel present at the intersection. (C # 19). **The Funeral Home** deliberately and consciously planned to use no law enforcement personnel for traffic control and instead planned to use a single employee, who wore no safety or reflective gear over his dark suit and raincoat to get **The Highway** traffic to stop so that the funeral procession could move through **The Intersection**. (C # 19, 22- 28).

Before the funeral procession began, **The Funeral Home** operator, John Mullins, walked into the middle of the intersection to attempt to “control” **the Intersection**. (C #22). Mullins then abruptly abandoned his post and left **the Intersection** to enter one of the cars heading towards the funeral, directing another employee to stand in the middle of **The Highway**. (C # 22- 24). This second employee, James Bryant, had only been employed at **The Funeral Home** for a few months, had no training or experience in traffic control and protested to the employee who was now leaving the intersection that he (Bryant) did not know what he was doing. (C # 24 – 27). He was told “it’s no big deal, just go out there and wing it.” (C # 25). Despite “taking over” **The Intersection**, **The Funeral Home**, knowing that it was directing mourners out in the middle of **The Intersection** no matter what color the traffic lights were, placed no other warnings along **The Highway** to warn drivers like Defendant Deats that a funeral procession was underway.(C # 30-32).

Despite the fact that **The Intersection** was now being controlled by one untrained employee who protested that he was not qualified to control traffic, and despite the fact that **The Funeral Home** employees knew that it was highly dangerous to direct traffic through **The Intersection**, a third **Funeral Home** employee (“John Doe”) began to wave mourners, including Eustice, into the intersection. (C # 35-38).³

Jean Eustice followed all of the directions of **The Funeral Home** employees. (C # 41 – 43). She was one of the first cars directed into the intersection by **The Funeral Home** employees. (C # 41-42). Tragically, she was directed into the intersection just in time to be struck by Defendant Deats in a violent T-bone accident. (C # 44-46). She sustained substantial, permanent injuries. (C # 46).

I. Ms. Eustice alleged sufficient allegations of willful and wanton conduct to support her Punitive Damages Claim.

A demurrer shortcuts litigation and the Supreme Court of Virginia has noted that “with increasing frequency, we are confronted with appeals of cases in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits. *Renner v. Stafford*, 245 Va. 351, 351, 429 S.E.2d 218, 219 (1993). *See, Sawyer v. C.L. Pincus, Jr. & Co.*, 83 Va. Cir. 251 (2011) [Due to the preliminary nature of the demurrer, the Supreme Court of Virginia has expressed a desire that trial courts refrain from incorrectly “short-circuit[ing] litigation pretrial.”]

³ Remarkably, **The Funeral Home** now blames Eustice for following the directions of its employees and “violating established traffic laws and driving through a red light while leaving the funeral home.”

Circuit Courts should be slow to dismiss claims at the beginning of a case because:

The Supreme Court of Virginia has admonished trial judges against “short circuiting the litigation upon demurrer”; to be careful lest “the parties on brief argue the issues as if all the facts outside the pleadings are properly before this Court; they are not.” Even if “the pleadings leave many factual questions unanswered,” and there are “matters that need to be addressed if the plaintiffs are to recover,” a plaintiff should not be precluded from going forward with its case. The Supreme Court, as Justice Kinser recently wrote, has “often warned of the dangers of ‘short circuiting’ litigation because in doing so, a trial court ‘deprives a litigant of his day in court and deprives this Court of an opportunity to review a [more] thoroughly developed record on appeal.

NRC Mgmt. Servs. Corp. v. First Virginia Bank-Sw., 63 Va. Cir. 68, 2 (2003).

After all, a Circuit Court has several opportunities to rule that as a matter of law the plaintiff’s claim for punitive damages has no merit:

1. Demurrer
2. Motion for Summary Judgment
3. Motion to Strike the Evidence after the Plaintiff has rested at Trial.
4. Motion to strike the Evidence after all of the evidence is presented at trial.
5. Post-trial motions in the event of a jury verdict.

Of course, the Supreme Court of Virginia always has the last word on this issue.

In seeking to strike a claim for punitive damages on the pleadings alone, “[I]f reasonable persons...could differ regarding whether [certain] conduct was so willful or wanton as to show conscious disregard of the rights of others,” then the case should be resolved by a jury. *Huffman v. Love*, 245 Va. 311, 314 (1993).⁴

Willful and wanton negligence is action taken in conscious disregard of another's rights, or with reckless indifference to consequences that the defendant is aware, from his knowledge of existing circumstances and conditions, would probably result from his conduct and cause injury to another. *Harris v. Harman*, 253 Va. 336, 340-41 (1997); *Clohessy v. Weiler*, 250 Va. 249, 252 (1995); *Griffin v. Shively*, 227 Va. 317, 321-22,(1984). Each case raising an issue of willful and wanton negligence must be evaluated on its own facts, and a defendant's entire conduct must be considered in determining whether his actions or omissions present such a question for a jury's determination. *Clohessy*, 250 Va. at 253, 462 S.E.2d at 97; *Huffman v. Love*, 245 Va. 311, 315-16 (1993). Willful and wanton negligence, unlike gross or ordinary negligence, requires an actual

⁴ The Funeral Home's demurrer can be misleading if not read carefully. For example it puts into quotes this statement: "The Virginia Supreme Court has recognized a very high factual standard to *plead* willful and wanton conduct. To find willful and wanton conduct, a person's actions must be some type of egregious conduct - conduct going beyond that which shocks fair-minded people." (Demurrer, page 2, emphasis added.) It then appears to cite *Harris v. Harman*, 253 Va. 336, 486 S.E.2d 99, 101 (1997) as the source of the quote, but *Harris* was not a case about the pleadings at all. The issue in *Harris* was whether or not, based on the facts proven *at trial*, the jury should have been instructed on willful and wanton negligence. **The Funeral Home** then cites *Huffman v. Love*, 245 Va. 311, 427 S.E.2d 357, 360 (1993) but doesn't tell the court that in that case the Supreme Court held that the trial court had ***erroneously struck the punitive damages claim*** by not letting the jury decide it. *Friedman v. Jordan*, 166 Va. 65, 69, 184 S.E. 186, 187 (1936), another case the defendant cites, affirmed a punitive damage award for intentional or reckless conduct that will probably result in an injury. *Puent v. Dickens*, 245 Va. 217, 220, 427 S.E.2d 340, 342 (1993), is not a demurrer case, either. The trial court struck the punitive damage claim on a pre-trial proffer of facts in garden-variety drunk driving case involving an allegedly high level of blood alcohol content and the Supreme Court upheld the decision. In *Giant of Va., Inc. v. Pigg*, 207 Va. 679, 687, 152 S.E.2d 271, 277 (1967), another case cited by the defendant, the trial court's decision to strike the punitive damage claim in a malicious prosecution case was also made ***after the jury returned its verdict***.

or constructive consciousness that injury will result from the act done or omitted. *Wolfe v. Baube*, 241 Va. 462, 465 (1991); *Boward v. Leftwich*, 197 Va. 227, 231 (1955). However, ill will is not a necessary element of willful and wanton negligence. *Baker v. Marcus*, 201 Va. 905, 909 (1960).

In *Alfonse v. Robinson*, 257 Va. 540 (1999), the Supreme Court found willful and wanton conduct when a commercial trucker failed to take adequate steps to warn oncoming motorists that his truck was broken down in the roadway, which clearly presented a huge risk of danger:

...Alfonso was a professional driver who had received specialized safety training warning against the very omissions he made prior to the accident. As stated above, Alfonso admitted at trial that he was instructed that the deployment of safety flares and reflective triangles was the first act that should be taken after securing a disabled truck. **He knew that the purpose of such safety devices was to warn motorists that they were approaching a stopped vehicle. Despite this training and knowledge, Alfonso consciously elected to leave the disabled truck in a travel lane of an interstate highway without placing any warning devices behind it.**

Alfonso v. Robinson, 257 Va. 540, 546, 514 S.E.2d 615, 619 (1999) (Emphasis added).

In the case at bar the pleadings allege that **The Funeral Home** consciously directed the plaintiff to cross a busy highway no matter what the color the light knowing that it had sent one person into the middle of the intersection to stop busy highway traffic. Instead of employing law enforcement to legally conduct the procession, Covenant placed Mr. Mullins and then Mr. Bryant (albeit reluctantly) into the busy intersection with little more than small signs. To warn high speed drivers. Remarkably, shortly thereafter, Mr. Mullins abandoned the intersection, leaving Mr. Bryant a young, unexperienced, untrained employee to “fend for himself.”

No individual or business in Virginia has the legal right to take over traffic control at a busy intersection and in disregard of the traffic lights in order to convenience its patrons and

customers. As any long time funeral home operators would know, only a police escorted funeral procession can “take over” existing traffic regulations.⁵

To have put the Ms. Eustice in such danger by first violating the law, and then, using its “apparent” authority try to cause busy highway traffic to obey an unauthorized individual standing the middle of the highway in a dark raincoat, carrying a little sign, Covenant’s actions was “conduct going beyond that which shocks fair-minded people”. Harris v. Harman, 253 Va. 336, 341 (1997).

II. Ms. Eustice alleged sufficient allegations to support her Simple Negligence Claim.

General Negligence Duty Pleaded

At trial the jury will be instructed that:

Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.⁶

The Funeral Home confuses the concepts of “do the facts of The Complaint set out a legal duty of care that **The Funeral Home** allegedly breached” with “does the word ‘duty’ appear in the Complaint?” A demurrer says “even if all these facts are true, the facts don’t state a

⁵ § 46.2-828. **Right-of-way for funeral processions under police or sheriff’s escort; improper joining of, passing through, or interfering with processions prohibited; use of high beam headlights and hazard lights by vehicles traveling in funeral processions.**

Funeral processions traveling under police or sheriff’s escort shall have the right-of-way in any highway through which they may pass. Localities may, by ordinance, provide for such escort service and provide for the imposition of reasonable fees to defray the cost of such service. The sheriff or police department in any locality may provide traffic control for funeral processions when equipment and personnel are not otherwise engaged in law-enforcement activities. Vehicles traveling as part of any funeral procession, whether escorted or unescorted, may display high beam headlights and flash all four turn signals or hazard lights to identify themselves as part of the procession. No vehicle that is not properly part of a funeral procession shall join, pass through, or interfere with the passage of any funeral procession under escort as provided in this section.

⁶ *VMJI 4.000.*

duty.” **The Funeral Home**, in its demurrer, *doesn’t contend* that it owed *no duty of care* to Ms. Eustice.

Virginia employs a “notice” standard of pleading. *Virginia Supreme Court Rule 3:18*. The only question on **The Funeral Home’s** demurrer to the negligence claim is whether the Plaintiff has stated a claim for simple negligence. Here, in addition to a detailed recitation of the facts of the day, the Complaint specifically alleges *a duty to first know of the danger its actions would create*:

29. Defendant Covenant, through its employees, including Mullins and Bryant, knew or should have known that:
 - a. While it would be “controlling” the intersection the automatic traffic lights overhead would still be rotating through their usual sequence of “green, amber and red” while high speed traffic on Route 1 was travelling toward the intersection;
 - b. Drivers driving on Route 1 and approaching the intersection at a high rate of speed would have no advanced warning that a funeral procession was proceeding through the intersection no matter what color the lights on the automatic traffic lights were displaying;
 - c. Mourners leaving the funeral would be relying on directions and instructions from Covenant and its employees as to when and how they could safely proceed through the intersection;
 - d. Covenant should have notified law enforcement of the fact that a funeral procession would be attempting to cross Route 1 just before 1:00 p.m. on a Saturday afternoon;
 - e. Covenant’s attempt to take it upon itself (through untrained employees in dark suits and raincoats holding small STOP/SLOW hand signs) to stop highway traffic and to direct a funeral procession through a busy intersection had a high probability of causing death or injury.

Further the Complaint alleges the following *duties* to act safely in paragraph 47 of the Complaint:⁷

(1) Alert law enforcement that a funeral was going to happen and **The Funeral Home** would be directing traffic through the lights not matter what color the lights;

(2) To have law enforcement on site;

⁷ Specifically, paragraph 47 of the Complaint says:

Defendant Covenant was negligent in at least the following ways:

- a. Failing to alert, local law enforcement that a funeral would be ending and that a procession of traffic would be trying to cross southbound Route 1 before turning left to head north to the burial ground, in order that law enforcement personnel could make the intersection safe for the public by:
 - i. Taking control of the automatic traffic lights so that they did not show “green” to traffic heading on Route 1 while mourners were proceeding across the intersection;
 - ii. Providing additional visual and audible warning devices so that high speed Route 1 traffic would be alerted to the fact that a funeral home procession was crossing the intersection.
- b. Failing to have trained law enforcement personnel on site to control the intersection and provide additional safety measures to visibly and audibly warn motorists travelling on Route 1 that a funeral procession was travelling through the intersection.
- c. Directing first, one of its owners, and then an employee with absolutely no training or experience in traffic control to head out the middle of a very busy highway intersection in plain clothes and carrying a confusing hand-held sign and expecting that this heavily travelled intersection would be made safe for a funeral procession to travel through.
- d. Failing to otherwise make the intersection safe for passage of the funeral procession by signage, lighting, and barricades.
- e. Directing those in the funeral procession, including Plaintiff Eustice, through the intersection even though it was not safe to do so.

- (3) To not send unqualified and inexperienced personal out to attempt to direct traffic;
- (4) To make the intersection safe and to;
- (5) Not send Jean Eustice (and others) through the intersection when it was not safe to do so when, in paragraph 47 of the Complaint, it alleged.

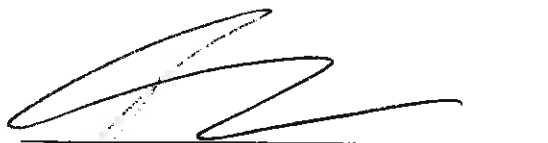
If **The Funeral Home** had any argument that somehow, despite the facts alleged, it owed no duty to mourners like Ms. Eustice, whatsoever, then that's what it should have argued in its demurrer. It, quite correctly, didn't file *that* pleading. Barring that argument, **The Funeral Home** has no viable argument that it is no notice of the claims against it. The demurrer to simple negligence should be overruled. Of course, should this Court agree with the Defendant, it should permit Ms. Eustice to amend her Complaint under *Virginia Supreme Court Rule 1:8* as that Rule requires that amendments be granted liberally.

Conclusion

Wherefore, the Plaintiff, I. Jean Eustice, respectfully requests this Court to deny Defendant Covenant's Demurrer as to Ms. Eustice's claims of willful and wanton conduct and simple negligence and provide any additional relief this Court deems proper.

Respectfully submitted,

I. Jean Eustice
By Counsel



Benjamin W. Glass, III (VSB 23152)

James S. Abrenio (VSB 76442)

Benjamin W. Glass, III & Associates, P.C.

3915 Old Lee Highway, Suite 22B

Fairfax, VA 22030

Tel. 703-591-9829

Fax 703-783-0686

CERTIFICATE

I **HEREBY CERTIFY** that on this 18th day of May, 2017, a true copy of the foregoing was sent by first class mail to:

Medford J. Brown, IV (76543)
Parris Snead
910 Princess Anne Street, 2nd Floor
PO Box 7166
Fredericksburg, VA 22404-7166
Ph. 540-373-3500
Fax 540-899-6394
brown@parrishsnead.com
Counsel for Covenant Funeral Service, Inc.

William Tunner, Esq.(38358)
100 Shockoe Slip
Richmond, VA 23219-4140
Ph. 804-049-7545
Fax 804-78-1813
wtunner@t-mlaw.com
Counsel for Yevetta Deats



James S. Abrenio, Esq. (VSB #76443)
Benjamin W. Glass, III & Associates, P.C.
3915 Old Lee Highway, Suite 22-B
Fairfax, VA 22030
Tel.: 703-591-9829
Fax: 703-783-0686
Counsel for Plaintiff