

N E W S	<h1 style="margin: 0;">Recent Developments in the Law.®</h1>
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In order to keep our clients abreast of pertinent recent developments in the law, Saunders & Schmieler, P.C. creates Recent Developments in the Law® to inform regarding the substance of several decisions of importance recently rendered in and on the jurisdictions of Maryland, Virginia, and the District of Columbia.

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HEALTH LAW:

CLARIFYING THE PURVIEW OF MEDICARE REIMBURSEMENT

Hadden v. United States, 2011 U.S. App. LEXIS 23289 (November 21, 2011).

In August 2004, Vernon Hadden (“Hadden”) was struck by a vehicle owned by Pennyrile Rural Electric Cooperative Corporation (“Pennyrile”) while standing next to a traffic circle in Kentucky. Hadden’s medical bills totaled to \$82,035.17, all of which Medicare paid for because Hadden is a Medicare beneficiary. Subsequently, Hadden filed an action against Pennyrile. Pennyrile eventually paid Hadden \$125,000 for a full release.

While Medicare paid Hadden’s medical expenses pursuant to a provision that allows it to do so if the responsible party does not pay promptly, it also has the right to seek reimbursement

from the responsible party or beneficiary if the beneficiary receives a payment from the responsible party. *Hadden v. United States*, 2011 U.S. App. LEXIS 23289, at *3 (November 21, 2011). Federal law makes Medicare a “secondary payer” only. After subtracting the attorneys’ fees Hadden had spent to obtain the settlement from Pennyrile, Medicare argued that Hadden owed it \$62,338.07. Hadden argued that he should only be required to reimburse Medicare for 10% – approximately \$8,000 – because the accident he was injured in was primarily the fault of an unidentified motorist who had caused the Pennyrile truck to hit Hadden. As such, that motorist was responsible for 90% of his damages and Pennyrile was responsible for only 10%; therefore, Pennyrile’s payment of \$125,000 represented only 10% of his total damages. Hadden argued that this meant that Pennyrile only

compensated him for 10% of his medical expenses; the remaining \$117,000 of the settlement compensated him for damages other than medical expenses (i.e., pain and suffering) and was unavailable to Medicare. An administrative law judge found that the plain language of the Medicare statute required Hadden to pay Medicare the full amount that it had demanded. The Medicare Appeals Council agreed with the administrative law judge. After Hadden appealed the decision to the district court, and the Appeals Council again agreed with the administrative law judge's findings and the district court agreed with the Appeals Council, Hadden appealed to the Sixth Circuit.

Since the Sixth Circuit's review of the district court's decision involves interpretation of a federal statute, the *Chevron* standard is used. Under the *Chevron* standard, if "'Congress has directly spoken to the precise question at issue,' in the text of the statute, a court will give effect to Congress's answer without regard to any divergent answers offered by the agency or anyone else." *Hadden v. United States*, 2011 U.S. App. LEXIS 23289, at *4 (November 21, 2011). The Court found that Congress had already directly spoken on the issue in a "highly unfavorable" way to Hadden in

2003 when it amended the Medicare statute:

A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means.

42 U.S.C. § 1395y(b)(2)(B)(ii).

The Court stated that pursuant to the amended language, the scope of the plan's "responsibility" for the beneficiary's medical expenses, and thus of his own obligation to reimburse Medicare, is "ultimately defined by the scope of *his own claim against the third party.*" *Hadden*, 2011 U.S. App. LEXIS 23289, at *6. In other words, a beneficiary cannot tell a third party that it is responsible for all of his medical expenses, and then later tell Medicare that the same third party was responsible for only 10% of his medical expenses. As such, the Sixth Circuit affirmed the district court's judgment.

LABOR AND EMPLOYMENT LAW:

SEX DISCRIMINATION

Taylor v. Giant of Maryland LLC, Nos. 9 & 10, 2011Md. LEXIS 685 (December 6, 2011).

Maryland's highest court unanimously reversed a decision holding that the plaintiff, Julia M. Taylor ("Taylor"), who has a debilitating menstrual condition, had failed as a matter of law to show that her employer had acted out of bias. The Court then reordered a \$644,000 award in damages and an additional \$545,000 in attorneys' fees and costs to Taylor. The Court explained that Taylor's employer, Giant Food, LLC, ("Giant") had waived their opposition to the fees and costs because it had failed to appeal within 30 days of the decision in Prince George's County Circuit Court.

During the underlying action, Taylor had provided evidence demonstrating that four male colleagues with various debilitating diseases, such as diabetes or Parkinson's disease, were not required to take any medical examinations outside of those required by the U.S. Department of Transportation. Giant had demanded that Taylor receive an examination from an independent physician even after her own physician had diagnosed her with excessive

menstrual bleeding and fibroid cysts. The condition can occur without warning, which often caused Taylor to be unable to comply with the company's requirement that drivers call no later than 90 minutes before the start of their shift if they will be late or absent. Despite receiving personal leave to compensate for her inability to meet the 90 minute notice requirement because of her condition, she began to receive disciplinary notices in 2002 whenever she failed to comply with the 90 minute requirement. After receiving a number of disciplinary notices, Taylor then sent a report from her gynecologist, Dr. Jill Ladd, who explained that the suddenness of the condition made it "impossible" for Taylor to follow the 90 minute rule. However, Giant then demanded that Taylor submit to an independent medical examination, otherwise she would risk being denied future leave requests. Taylor subsequently filed a discrimination complaint with the Prince George's County Human Relations Commission. A few weeks later, Taylor was informed by a Giant human resources manager that she would be taken off the road and would not be given further assignments until she had the independent medical examination and went under any recommended procedure. Taylor

then added a retaliation claim to her discrimination complaint. After a trial, the jury found Giant liable for sex discrimination and retaliation. After the jury awarded Taylor \$644,751 in compensatory and nominal damages, the Court of Special Appeals reversed. The Court of Special Appeals held that Taylor's male colleagues' medical conditions were not comparable to Taylor's medical condition because their conditions were being satisfactorily monitored by medical tests.

The Maryland Court of Appeals, however, found that Taylor's male colleagues' medical conditions were similar enough to Taylor's gender specific medical condition to act as "comparators." The Court explained that "the single most relevant fact [is] that each of the male drivers used as comparators had significant health conditions but were not required to submit to an independent medical examination." *Taylor v. Giant of Maryland LLC*, Nos. 9 & 10, 2011 Md. LEXIS 685, at *48 (December 6, 2011). As such, the Court reinstated the original award in damages, attorneys' fees, and costs.

TORT LAW:

THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT

*Washington Metropolitan Area
Transit Authority v. Tinsley*, No.

1089, 2011 Md. App. LEXIS 156 (November 30, 2011).

On December 19, 2001, when Veronica Tinsley ("Tinsley") arrived at a Metrorail station in Cheverly, Maryland, the entire floor of the train platform was wet. Despite the absence of any warning cones, Tinsley walked carefully to the elevator. By the elevator, a "wet floor" sign was posted. However, after finding the elevator to be out of service, Tinsley walked towards the escalator. As she was walking, she slipped and fell, fracturing her right ankle.

Subsequently, Tinsley brought a negligence action in Circuit Court against Washington Metropolitan Area Transit Authority ("WMATA") for her injuries from the fall. At the close of Tinsley's case and at the conclusion of its own expert witnesses, WMATA moved for judgment, arguing that it was immune from suit because of how it cleaned its platforms. The Circuit Court denied both of the motions and the jury found for Tinsley, awarding \$64,213 in damages. The Court of Special Appeals held that WMATA was entitled to sovereign immunity from Tinsley's claim and reversed the judgment.

As the signatories to the WMATA Compact (Maryland, Virginia, and the District of Columbia) conferred their respective sovereign immunities onto WMATA, it has sovereign

immunity. See *Proctor v. WMATA*, 412 Md. 691, 708 (2010). Section 80 of the WMATA Compact provides for the contours of that immunity, and controls to the extent in which WMATA waives its immunity. It creates a distinction between “governmental” functions and “proprietary” functions. Those actions that are taken in the service of governmental functions are covered by sovereign immunity while those actions taken in the service of proprietary functions are not. The Court determined that because Congress consented to the creation of WMATA, the interpretation of the whether a function is “governmental” or “proprietary” under §80 is a question of federal law. See *Saunders v. WMATA*, 819 F.2d 1151, 1154 (D.C. Cir. 1987).

In order to determine whether a particular act is a governmental or proprietary function, federal courts have created a two-part test. See *Smith v. WMATA*, 290 F.3d 201, 206 (4th Cir. 2002). First, a court determines whether the challenged act occurred in the performance of a “quintessential governmental function,” or in other words, functions that are “obviously public activities.” *Beebe v. WMATA*, 129 F.3d 1283, 1287 (D.C. Cir. 1997). If it did, then the governmental immunity applies. If it did not, then the court must decide whether the governmental activity in question is discretionary. If it is not discretionary, then it is

“ministerial” and, as such, is not protected by governmental immunity. However, if the activity is discretionary, then the Court must determine whether it within the “exception for discretionary governmental functions.” *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). If such exception applies to the activity in question, then that activity is considered a “governmental activity” in the meaning of the “governmental/proprietary” test of §80, and, therefore, insulated from tort liability. *Smith*, 290 F.3d at 207. A governmental act is considered to be within the discretionary function exception if it typically necessitates judgment as to which of a number of permissible courses is the wisest. *United States v. Gaubert*, 499 U.S. 315, 325 (1991). WMATA is immune from claims regarding such acts, irrespective of how negligently caused, that affects the governmental functions. *Smith*, 290 F.3d at 207.

In the case at issue, because it was undisputed that WMATA’s platform cleaning and maintenance was not a “quintessential governmental function,” the Court went directly to the second part of the analysis, which was determining whether the act in question fell within the discretionary function exception and, thus, was immune from suit. The Court

found that the nature of the decisions in question, such as whether to clean the entire platform or spot clean it and whether to clean late at night or during rush hour, were those which regularly requires judgment as to which of a range of permissible courses is the wisest. *Gaubert*, 499 U.S. at 325. Therefore, Tinsley’s challenge went to the discretionary acts of WMATA personnel, and those discretionary acts were precisely of the kind that the discretionary function exception was meant to protect. Consequently, the Court of Special Appeals reversed the Circuit Court’s judgment and held that the discretionary function barred Tinsley’s claim.

TORT LAW:

NEGLIGENT/INTENTIONAL MISPRESENTATION

Lavine v. Am. Airlines, Inc., No. 2917, 2011 Md. App. LEXIS 158 (December 1, 2011).

The Lavines purchased two round-trip airline tickets from American Airline Inc.’s (“American”) website for December 21, 2008. Each ticket included two connecting flights. After paying for the tickets, the Lavines received an email confirmation, which referenced the “Conditions of Carriage,” stating that the tickets and Conditions of Carriage “constitute the contract.” When

the Lavines arrived at the airport for their flight, they were told that the flight to Miami was delayed. The Lavines requested a refund or seats on another flight so that they would not miss their connecting flight to Key West. In response, American represented that, even with the delay, it would be able to provide the Lavines to their connecting flight. Based on those representations, the Lavines agreed to board the delayed flight. However, when the flight landed in Miami, American informed the Lavines that they only fifteen minutes to go through the airport to go to their connecting flight. When the Lavines arrived at their connecting flight, they were turned away because they did not arrive thirty minutes before the scheduled flight time. Ultimately, American paid for a hotel room in Miami for the Lavines and provided them with a stipend for dinner and breakfast. Subsequently, the Lavines filed a lawsuit against American for negligent misrepresentation and intentional misrepresentation. The Circuit Court granted summary judgment for American, and the Court of Special Appeals affirmed.

The Airline Deregulation Act, 49 U.S.C. §41707 et seq., states that “[t]o the extent the Secretary of Transportation prescribes by regulation, an air

carrier may incorporate by reference in a ticket or written instrument any term of the contract for providing interstate air transportation.” 49 U.S.C. §41707. Furthermore, “[a] ticket or other written instrument that embodies the contract of carriage may incorporate contract terms by reference (i.e., without stating their full text), and if it does so shall contain or be accompanied by notice to the passenger.” 14 CFR 253.4(a). However, the ticket or written instrument must include a “conspicuous notice” that “[a]ny terms incorporated by reference are part of the contract.” *Id.* at 253.5(a). The permissible incorporated terms may have information on the “[r]ights of the carrier and limitations concerning delay or failure to perform service, including schedule changes, substitution of alternate air carrier or aircraft, and rerouting.” *Id.* at 253.5(b)(5). Therefore, because American was permitted to incorporate by reference the Conditions of Carriage to the “E-Ticket Confirmation” email and such conditions were a part of the contract between the Lavines and American, the Lavines could not argue that they did not see or receive the Conditions of Carriage.

The Lavines argued that American had contractually promised them that it could transport them from

Washington, D.C. to Key West within a certain time, and represented to them that, even though there was a delay, it would provide them to their connecting flight from Miami to Key West. However, the Court stated that even if such representations were made to the Lavines, they could not justifiably rely on such statements or the times written on their tickets since the Conditions of Carriage had stated that the times displayed were not guaranteed and did not form a part of the contract. The Court further explained that in a case of misrepresentation, “the plaintiff must show not only that he would not have performed the act from which the injury resulted but for the misrepresentation, but also that the fact misrepresented was the proximate cause of the injury.” *Lustine Chevrolet v. Cadeaux*, 19 Md. App. 30, 35 (1973). The Court disagreed with the Lavines’ argument that they were physically injured from American’s alleged misrepresentations because they suffered breathing difficulties from inhaling construction debris while running through the airport. It was not foreseeable that the Lavines would inhale construction debris as a result of the scheduling delay. Therefore, the Lavines did not establish a sufficient causal connection as to physical damages. As to the Lavines’ economic damages, it

was foreseeable that the Lavines, while relying on American's statements that they would be able to provide the Lavines with the connecting flight, would need lodging when they missed their connecting flight. However, American did reimburse their lodging expenses. In addition, while it was foreseeable that the Lavines would be unable to use their Key West hotel room, such a claim was precluded by the Conditions of Carriage.

Therefore, the Court of Special Appeals held that the trial court properly granted summary judgment for American.