

N E W S	<h1 style="margin: 0;">Recent Developments in the Law.®</h1>
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L E T T E R	
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**PREMISE LIABILITY:**

**MARKING THE OVERLAP  
 BETWEEN DRAM SHOP  
 LIABILITY AND PREMISE  
 LIABILITY CLAIMS**

*Troxel v. Iguana Cantina, LLC*,  
 No. 820, 2011 Md. App. LEXIS  
 137 (Md. Ct. Spec. App. Oct. 3,  
 2011).

The Maryland Court of Special Appeals vacated the Baltimore Circuit Court’s grant of summary judgment based on a finding that Plaintiff Troxel’s claim was based on a theory of “dram shop” liability and that Plaintiff Troxel’s negligence claim did not have supporting evidence. Here, the Maryland Court of Special Appeals determined that that the trial court failed to identify that Plaintiff and Appellant Troxel’s claim was not one based on “dram shop liability,” but on the independent cause of action,

premises liability. Additionally, the Court determined that there was sufficient evidence of negligence to survive a summary judgment.

In the matter at hand, Troxel was severely beaten by three unknown assailants at Iguana Cantina, LLC’s (“Iguana Cantina”) “College Night,” an event for students, presumably, permitting entry for patrons ages 18 to 20 and patrons who had identification showing them to be 21 or over. Troxel brought suit against Iguana Cantina and its managing entities seeking damages for the injuries sustained, submitting affidavit and deposition testimony from security guards regarding the prevalence of violence at these “College Nights.”

The Circuit Court for Baltimore City granted Iguana Cantina’s motion for summary judgment, in part because it believed that

Troxel's claim was based on "dram shop liability," a liability concept not recognized as a valid form of action in Maryland. The Maryland Court of Special Appeals reverses on this point, finding that Troxel's claim is really one based on premises liability and not "dram shop" liability. The Court does acknowledge that the conditions giving rise to both premises liability and "dram shop" liability can intermingle. More specifically, dram shop statutes permit recovery of damages from a seller of alcohol if the sale of alcohol and the resulting intoxication of a customer caused a plaintiff's injuries while premises liability provides for damages where a plaintiff's injuries were proximately caused by an establishment's dangerous conditions "whether alcohol is involved or not." *Troxel*, No. 820, 2011 Md. App. LEXIS 137 at \*16-17 (citing for comparison JAMES F. MOSHER, 1 LIQUOR LAW LIABILITY § 2.02 at 2-2, 2-3 (2010); Joan Teshima, *Tavernkeeper's Liability to Patron for Third Person's Assault*, 43 A.L.R. 4TH 281, \*2a (2011)). Based on this nuanced but important distinction, the Court found that the Circuit Court for Baltimore City incorrectly categorized Troxel's claim as one for "dram shop" liability.

Next, the Maryland Court of Special Appeals found that

Troxel presented sufficient evidence of the elements of a premise liability claim to survive a motion for summary judgment, namely evidence of duty, breach, proximate cause, and injury. Evidence sufficiency is evaluated to give Troxel the benefit of inferences reasonably drawn from the facts presented. First, the Court found sufficient evidence that Iguana Cantina had a duty to Troxel based on the previous and acknowledged prevalence of violence at the "College Night" events based on deposition testimony and affidavits of Iguana Cantina security employees. *Id.* at \*26-27 (citing by way of comparison Moore v. Jimel, Inc., 809 A.2d 10 (Md. Ct. Spec. App. 2002)). Second, the Court found sufficient evidence of a breach to overcome a motion for summary judgment, pointing to the affidavit of an expert witness for Troxel indicating that the stationing of security on raised platforms in a premise like Iguana Cantina would have minimized the risk of such violence. Third, the Court found sufficient evidence on which "a jury could reasonably conclude that Iguana Cantina's failure to provide adequate security was a substantial factor in bringing about Troxel's injuries, *Id.* at \*47, and that a jury could similarly conclude that the "College Night" events created an environment of "disorder and violence" such that Troxel's

injuries were foreseeable. *Id.* at \*47-49. The Court agreed that the role of third-party attackers would not destroy causation for premise liability claims where, as here, such an attack was "foreseeable." *Id.* (citing Hemmings v. Pelham Wood, LLC, 826 A.2d 443 (Md. 2003); Scott v. Watson, 359 A.2d 548 (Md. 1976)). The final element, actual injury, was not contended and, thus, needed no discussion.

The Maryland Court of Special Appeals vacated the judgment of the Circuit Court for Baltimore City and remanded the case for further proceedings in consideration of its opinion

#### **CIVIL PROCEDURE:**

#### **SPECIFIC AND GENERAL JURISDICTION NOT ESTABLISHED FOR PASSIVE WEB HOSTING COMPANY**

*Allcarrier Worldwide Serv., Inc. v. United Network Equip. Dealer Ass'n.*, No. AW-11-cv-01714, 2011 U.S. Dist. LEXIS 108010 (D. Md. Sept. 22, 2011).

In *Allcarrier Worldwide Services, Inc. v. United Network Equipment Dealer Ass'n.*, the United States District Court for the District of Maryland granted Defendant's motion to dismiss for want of personal jurisdiction. The United Network Equipment Dealer Association ("UNEDA") is a non-profit corporation which is incorporated in the State of Nebraska and which has its

principal place of business in Omaha, Nebraska. While UNEDA had no dealings, contracts, employees, or offices in Maryland, UNEDA operated a website “in which its members from around the world post information to buy and sell used computer equipment.” *Id.* at \*2. Plaintiff, a Maryland corporation in Montgomery County, was a member of UNEDA until April of 2011 when plaintiff allegedly disseminated a UNEDA posting to a non-member, in violation of the Code of Ethics, as determined by the UNEDA’s Board of Directors. Plaintiff brought suit in the U.S. District Court for the District of Maryland seeking a permanent injunction, specific performance for breach of contract, declaratory judgment and bringing claims of tortious interference with a prospective advantage, breach of fiduciary duty, and civil conspiracy. Defendant, UNEDA, moved to dismiss on the ground that the Court lacks personal jurisdiction. *Id.* at \*4.

A plaintiff must prove grounds for jurisdiction by a preponderance of the evidence when a defendant files a motion to dismiss for lack of personal jurisdiction. *Id.* (citing *Mylan Lab., Inc. v. Alzo*, 2 F.3d 56, 59-60 (4th Cir. 1993)). Plaintiff is required to produce “competent evidence” to prove jurisdiction, a requirement which can be

satisfied by sworn affidavits, and the like. *Id.* (citing *Nichols v. G.D. Searle & Co.*, 783 F. Supp. 233, 235 (D. Md. 1992)). Importantly, while the court will draw all “reasonable inferences” in favor of the plaintiff, the court is not limited to only looking at the plaintiff’s evidence to draw inferences. *Id.* (citing *Mylan Lab. Inc.*, *supra*, 2 F.3d at 62).

Personal jurisdiction requires satisfaction of both: (1) Maryland’s long-arm statute, MD. CODE ANN., CTS & JUD. PROC. § 6-103, and (2) constitutional due process requirements. *Id.* at 5. Although technically two separate requirements, in Maryland, case law provides that Maryland’s long arm statute inquiry merges with constitutional inquiry because the Maryland statute is coextensive with “personal jurisdiction[] as set by the due process clause of the Constitution.” *Id.* at \*6 (quoting *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 -97(4th Cir. 2003) (emphasis omitted)). Thus, both the Maryland long arm and constitutional due process utilize the due process “minimum contacts” analysis, looking for both specific and general jurisdiction. Specific jurisdiction, a lower threshold, is appropriate when:

- (1) the defendant purposely directed its

activities toward residents of Maryland or purposely availed itself of the privilege of conducting activities in the state; (2) the plaintiff’s cause of action arises out of or results from the defendant’s forum-related contacts; and (3) the forum’s exercise of personal jurisdiction in the case is reasonable[, i.e.] consistent with traditional notions of fair play and substantial justice.

*Id.* at \*7 (quoting *Cole-Tuve, Inc. v. Am. Mach. Tools Corp.*, 342 F. Supp. 2d 362, 366 (D. Md. 2004) (internal quotations omitted)).

In *Allcarrier*, the Court first considered specific jurisdiction. The Court declined to accept Plaintiff’s argument that UNEDA contracted to supply services in Maryland by having a membership agreement with Plaintiff, a Maryland corporation, granting access to the website. The Court, looking the Fourth Circuit’s opinion in *ALS Scan, Inc. v. Digital Services Consultants, Inc.*, found that UNEDA only had a “passive role” in the website, “establishing and regulating membership in the organization and granting access to members internationally, including in Maryland.” *Id.* at \*10 (citing *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707

(4th Cir. 2002). From this, the Court found that mere maintenance of a public website is insufficient to establish minimum contacts in any state where the website might be accessed. Passive hosting of a public website actions, absent more, was insufficient to show direct or targeted activities. *Id.* Similarly, the payment of membership dues by Maryland corporations to UNEDA was also not “purposeful availment” and similarly would not provide for specific jurisdiction.

The Court then considered the propriety of general jurisdiction. The *Allcarrier* Court found that UNEDA’s activities in Maryland were not “continuous and systematic” as required for general jurisdiction. *Id.* at \*15-16. The U.S. District Court cited a case from the Western District of Pennsylvania adopted by the Fourth Circuit in *ALS Scan*. *Id.* at \*16 (utilizing *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* as had the Fourth Circuit in *ALS Scan*, *supra*, 293 F.3d at 713; *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)). From this, the *Allcarrier* Court found that the “knowing and repeated transmissions of computer files over the internet,” buying and selling of used network equipment, was not an action of UNEDA as a passive website hosting company. *Allcarrier*

*Worldwide Serv., Inc.*, *supra*, 2011 U.S. Dist. LEXIS 108010 at \*17-18. Because these actions were not attributable to UNEDA, general jurisdiction was also improper because UNEDA played no active part in the interactive features nature of the website. *Id.* at \*18.

Thus, the Court granted Defendant UNEDA’s motion to dismiss for want of personal jurisdiction.

#### **LABOR AND EMPLOYMENT LAW:**

##### **SCOPE OF THE MINISTERIAL EXCEPTION AND THE “CONTINUING VIOLATION” DOCTRINE**

*Prince of Peace Lutheran Church v. Linklater*, No. 66, 2011 Md. LEXIS 574 (Md. Sept. 21, 2011).

In *Prince of Peace Lutheran Church v. Linklater*, the Maryland Court of Appeals affirmed a portion of the holding of the Court of Special Appeals that the case be remanded to the Circuit Court for Montgomery County for further proceedings on Counts I and III of the plaintiff respondent’s claim. The Court of Appeals reversed the portion of the Court of Special Appeals’ holding that ordered the Circuit Court to conduct further proceedings on Counts IV, XIV, and XV of the claim.

The plaintiff in this case, Mary Linklater, is the former Music Director at the Prince of Peace Lutheran Church. In a sixteen count complaint she filed on October 16, 2002, Linklater alleged that she had been sexually harassed by one of the defendants, Pastor Rufus Lusk. Her complaint further alleged that after she complained about the harassment, she found a defaced picture of herself on a bulletin board outside her office that caused her great emotional distress and created a work environment so hostile and intimidating that she could no longer work at the church. In addition to Lusk, Linklater also named as defendants in her complaint the Prince of Peace Lutheran Church, the Metropolitan Washington D.C. Synod of the Evangelical Lutheran church in America (The Synod), and Bishop Theodore Schneider (Schneider).

From the complaint on, the *Prince of Peace Lutheran Church* matter became very procedurally complicated namely because of arguments under the “ministerial exception” of the First Amendment and the “continuing violation” doctrine. Eventually, on September 21, 2011, the Maryland Court of Appeals considered this matter, bringing some clarity despite the case’s complicated procedural history and complex complaint. In

*Prince of Peace Lutheran Church*, the Court of Appeals discusses the import of both the “ministerial exception” of the First Amendment’s Free Exercise and Establishment clause and the “continuing violation doctrine” in the context of the sexual harassment/employment discrimination case.

First, the Maryland Court of Appeals considered the impact of the “ministerial exception” on the counts alleged. Generally, the ministerial exception prohibits the operation of a law against a religious entity if it allows the government to prohibit or advance a particular religion institution or otherwise become too entangled with religion. In *Prince of Peace Lutheran Church*, the Court favorably cites the Ninth Circuit opinion in *Bollard v. California Province of the Soc’y of Jesus*, stating that the religious organization exceptions from non-discrimination mandate of Title VII of the Civil Rights Act of 1964 (“Title VII”) still render “race, sex, or national origin as an impermissible basis of discrimination against employees of religious institutions.” *Id.* at \*29 (citing *Bollard v. California Province of the Soc’y of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999)). The Court found that the ministerial exception does not bar every

claim of sexual harassment asserted against church officials by a former ministerial employee, especially absent a “doctrinal reason” for the harassment alleged by Respondent and in light of the Appellant’s sexual harassment policy. While the Court did find that the ministerial exception barred Count II’s quid pro quo sexual harassment claim because it would necessitate an evaluation of claimant’s work performance, other harassment claims of sexual harassment/hostile work environment and gender discrimination, Counts I and III, respectively, were outside the scope of church governance. *Id.* at 37-38.

Second, the Court evaluated the impact of the “continuing violation doctrine” on its findings. Importantly, the Court found that claimants may not benefit via the continuing violation doctrine, *see infra*, on the basis of acts or conduct which is inadmissible under the ministerial exception. However, finding no valid “religious justification for stabbing a photograph of Respondent with multiple holes through the head, eyes, and chest, and then posting that photograph in the hallway across from her office,” the Court found retaliation and the resulting “course of conduct evaluation.” *Id.* at 42-43. From this, Counts I and III were not

barred by the applicable statute of limitations.

Third, the Court found that Counts IV, V, X, XIV, and XV could not proceed because such inquiry would “necessarily involve judicial inquiry into church governance,” an inquiry prohibited by the First Amendment. *Id.* at 44.

Based on this analysis, the Court of Appeals remanded Counts I and III for further proceedings against Lusk and the Church and reversed a remand order for Counts IV, XIV, and XV.

#### **CONTRACT LAW:**

#### **PREVAILING PARTY MAY ONLY BE AWARDED ATTORNEY’S FEES ACTUALLY INCURRED**

*SunTrust Bank v. Goldman*, No. 803, 2011 Md. App. LEXIS 135 (Md. Ct. Spec. App. September 30, 2011).

The Maryland Court of Special Appeals affirmed the Circuit Court’s decision to award to the prevailing party only the amount of attorneys’ fees actually incurred rather than fifteen percent of the principal plus accrued interest/reasonable attorneys’ fees as provided for in a line of credit agreement.

On February 20, 2007, Appellees, the Goldmans,

entered into a line of credit agreement with the Appellant, SunTrust Bank. The agreement contained a provision which provided that if the appellees should default, the appellants would collect as attorneys' fees "fifteen percent (15%) of the principal plus accrued interest . . . or reasonable attorneys' fees as allowed by law." *SunTrust Bank v. Frank J. Goldman*, No. 803, 2011 Md. App. LEXIS 135, at \*2 (Md. Ct. Spec. App. September 30, 2011). When the appellees defaulted, the appellants sought to obtain \$60,206.00 (15% of the principal) instead of the \$3,258.30 actual attorneys' fees plus costs incurred, arguing that they would credit the appellees the portion of the \$60,206.00 that the appellants do not pay its attorneys for future expenses.

The Court of Special Appeals disagreed with the appellants, explaining that Maryland law "limits the amount of contractual attorney's fees incurred, regardless of whether the contract provides for a greater amount." *Id.* at \*9. Even if a contract states that the amount of fees will be determined by a percentage, in order to adhere to the indemnification requirement, the fees paid according to an agreement between the claimant and its attorneys must be equal to or more than the amount written in the contract. In

addition, the amount must be reasonable. (In contract cases, the reasonableness of attorneys' fees is determined by the factors set forth in Rule 1.5(a) of the Maryland Lawyers' Rules of Professional Conduct). The Court looked to the case of *Mortgage Investors of Washington v. Citizens Bank & Trust Co. of Maryland*, where the court did not allow the creditor to obtain the full 15% fee with the plan to credit back the debtor the unused portion. 278 Md. 505 (1976). The *Mortgage Investors* court only permitted collection of those fees that had actually been incurred and that the creditor was required to pay to its attorney.

The Court then explained that in Maryland, under the rule of merger, "a simple contract is merged in a judgment or decree rendered upon it, and that all its powers to sustain rights and enforce liabilities terminated in the judgment or decree." *SunTrust Bank*, supra, No. 803, 2011 Md. App. LEXIS 135, at \*16 (quoting *AccuBid Excavation, Inc. v. Kennedy Contractors, Inc.*, 188 Md. App. 214, 233 (Md. Ct. Spec. App. 2009)). In addition, in Maryland, the entry of final judgment on a contract case will end any "contract-based right to further attorneys' fees because 'attorney's fees recoverable pursuant to a

contract are part of the damages claim.'" *Id.* at \*16-17 (quoting *AccuBid Excavation, Inc.*, supra, 188 Md. App. at 231). The Court then discussed various exceptions for avoiding the rule of merger, but ultimately determined that the language in the agreement in the present case is not "sufficiently clear to exempt it from operation of the merger doctrine." *Id.* at 23.

In sum, the Court explained that if a contract includes a provision on fees and costs incurred in pursuing a breach, there will be no issue with post judgment fees and costs. However, if a contract includes a provision on shifting of fees and costs incurred in pursuing a post-judgment collection, and in the instance it does not avoid the merger rule, then a trial court should allow the party requesting payment to produce evidence to demonstrate the fees that, with certainty, be accumulated as well as those fees that are already accumulated at the time. Therefore, with the case at issue, the Court affirmed the trial court's decision because there was no evidence that there was an agreement to pay for attorneys' fees other than on an hourly rate basis and no evidence demonstrating that addition fees are certain to be incurred in the future.

## **CIVIL PROCEDURE:**

### **THE DISTRICT COURT OF MARYLAND DEVIATES FROM THE “FIRST TO FILE” RULE**

*LWRC Int’l, LLC, v. Mindlab Media, LLC, et al.*, No. L-11-1028, 2011 U.S. Dist. LEXIS. 109964 (D. Md. September 26, 2011).

The United States District Court for the District of Maryland held that it was appropriate, in this case, to deviate from the “first to file” rule and, as a result, refused to exercise jurisdiction over the case.

The Plaintiff is a Maryland corporation that specializes in the design, manufacture, and sale of military, law enforcement, and civilian rifles, carbines, and pistols. The Defendant is a former Navy Seal, weapons expert, and host of the Discovery Channel and Military Channel show “Future Weapons.” In 2007, the Plaintiff and Defendant had business discussions in New Mexico; the Plaintiff would send the Defendant one of its rifles free for charge, and in exchange, the Defendant would send the Plaintiff photographs of himself with the rifle so that the Plaintiff could use them as advertising material. However, the business transaction did not occur. Three years later, the Defendant called

the Plaintiff at the Plaintiff’s office in Maryland to resume their business discussions. Soon after, the Plaintiff sent the Defendant a rifle and, in return, the Defendant mailed the photographs to the Plaintiff. After the Plaintiff used one of the photographs in its magazine, it received a cease-and-desist letter from the Defendant’s attorneys stating that a copyright infringement lawsuit was being prepared, but that the Plaintiff could settle by April 18th. On April 18th, the attorneys for the Plaintiff wrote to the attorneys for the Defendant asking that they refrain from filing suit while the Plaintiffs examine the facts on which the Defendants would base a claim and to determine whether the insurance carrier would be involved. However, the next day, April 19th, the Plaintiff filed a lawsuit in the United States District Court for the District of Maryland, seeking a declaratory judgment that its use of the Defendant’s photographs did not violate the Lanham Act, the Copyright Act, or Maryland common law. A few days later, the Defendant filed his own suit against the Plaintiff in the Central District of California. Two months later, that court granted the Plaintiff’s motion to stay proceedings pending a decision by the United States District Court for the District of Maryland as to where the case should be tried.

The Court declined to resolve the question regarding personal jurisdiction. Instead, the Court decided on the propriety of the declaratory judgment. While the Court stated that a declaratory judgment action would normally be appropriate in a case such as this, it would decline to do so in the instant matter. A federal court has the discretion to refuse to entertain a declaratory judgment action for good reason. When deciding which of two identical or essentially similar lawsuits should proceed, courts typically follow the “first-to-file” rule which gives “priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction.”” *LWRC Int’l, LLC v. Mindlab Media, LLC, et al.*, No. L-11-1028, 2011 U.S. Dist. LEXIS 109964, at \*15 (D. Md. September 26, 2011) (quoting *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993)). However, the rule will not be applicable if a court decides that there are compelling circumstances supporting its nullification. The Court explained that in some instances, there may “come a point after which the potential lawsuit that may otherwise have given rise to a proper declaratory judgment action has become so certain or imminent, that the declaratory judgment action is

merely an improper act of forum shopping, or a race to the courthouse.” *LWRC Int’l, LLC v. Mindlab Media, LLC, et al.*, No. L-11-1028, 2011 U.S. Dist. LEXIS 109964, at \*15 (D. Md. September 26, 2011) (quoting *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993)).

In the present case, the Plaintiff’s request to the attorneys for the Defendant to delay filing suit until it could examine the facts on which the Plaintiffs would base a claim and to determine whether the insurance carrier would be involved was “little more than a disingenuous feint to allow it to file first and litigate close to home.” *Id.* at \*17. As a result, the Court refused to allow the “race . . . to go to the litigant who sprinted for the Courthouse after tying his adversary’s shoelaces together” and declined to exercise jurisdiction. *Id.* at \*19.

## **TORT LAW:**

### **THE MARYLAND UNIFORM COMMERCIAL CODE § 3-420 DISPLACES COMMON LAW NEGLIGENCE**

*Advance Dental Care, Inc. v. SunTrust Bank*, No. AW-10-01286, 2011 U.S. Dist. LEXIS 116460 (D. Md. October 7, 2011).

The United States District Court for the District of Maryland, Southern Division, held that § 3-420 of the Maryland Uniform Commercial Code displaces common law negligence when a payee attempts to recover from a depository bank that accepted unauthorized fraudulent checks.

In the matter at hand, the Plaintiff, a dental office, brought an action against the Defendant, SunTrust Bank, for depositing checks that were falsely endorsed and deposited by the Plaintiff’s employee. The Court initially declined to dismiss Count III (common law negligence), but permitted the defendant to address the Court’s concerns in a Renewed Motion to Dismiss. After the Defendant renewed its motion to dismiss Count III arguing that Maryland U.C.C. § 3-420 displaces common law negligence, the Court ultimately agreed and granted the renewed motion to dismiss.

In deciding to grant the motion to dismiss, the Court first examined a number of case law regarding a drawer’s claims against a depository bank. It observed that in each of these cases, the drawer’s insufficient remedy under the U.C.C. was essential to each court’s ruling. The Court then stated that in the present case, the Plaintiff unquestionably had an adequate U.C.C. remedy: conversion. The

Court then explained that statutory authority also suggests the need to displace common law negligence in this case because there is a substantial overlap between § 3-420 and common law negligence. The Court noted that the “duplicative nature of these two theories suggests the U.C.C.’s intention to create a comprehensive regulation of payment over unauthorized or fraudulent endorsements.” *Advance Dental Care, Inc. v. SunTrust Bank*, No. AW-10-01286, 2011 U.S. Dist. LEXIS 116460, at \*10 (D. Md. October 7, 2011). Indeed, the Court pointed out that the plaintiff’s common law negligence action is not any different from its § 3-420 action as the plaintiff refers to the same conduct alleged in its § 3-420 claim as its common law negligence claim. Lastly, the Court found that there are conflicting defenses for each cause of action. The U.C.C. utilizes the principle of comparative negligence while common law negligence continues to employ contributory negligence as a defense. As a result, it is clear that displacement is required because “Maryland courts hesitate to adopt or perpetuate a common law rule that would be plainly inconsistent with the legislature’s intent in passing Titles 3 and 4 of that Article.” *Id.* at \*11.

**EMPLOYMENT AND  
LABOR LAW:**

**QUALIFYING DISABILITIES  
UNDER THE AMERICANS WITH  
DISABILITIES ACT**

*Anderson v. Discovery Communs., LLC*, No. 08-CV-02424-aw, 2011 U.S. Dist. LEXIS 111261 (D. Md. Sept. 29, 2011).

In *Anderson v. Discovery Communs., LLC*, the U.S. District Court for the District of Maryland granted a defendant employer's motion for summary judgment on the grounds that the employee who had filed a claim under the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., (ADA) had not sufficiently demonstrated that she was an individual with a disability as defined under the statute. The Plaintiff in this case, Anderson, had worked as an attorney in Discovery's legal department for approximately three years. In January of 2007, Discovery terminated her employment because of Anderson's insubordination to superiors, combative attitude, and generally unpleasant demeanor with co-workers and clients. Anderson's performance related deficiencies were noted in several evaluations throughout her tenure at Discovery.

In October 2006, Anderson became ill, and took leave from work under the Family and Medical Leave Act (FMLA) 29 U.S.C. § 2601 et seq. from the period October 20, 2006 through November 15, 2006. During this leave, Anderson visited her doctor, who informed Anderson that her laboratory results were normal, and that her illness was related to "fatigue" or "sleep deprivation." Anderson's doctor provided her with a note, recommending that she return to full duty, but work no more than 8 hours per day. In December of 2006, Discovery decided to terminate Anderson's employment, citing Anderson's negative demeanor in general, as well as specific instances of Anderson's unsatisfactory behavior at the work place.

In order to establish a claim under the ADA, a complaining employee must first demonstrate that she is "qualified individual with a disability" which the ADA defines as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). In order to survive a motion for summary judgment, the employee must establish a *prima facie* case of discrimination by demonstrating, *inter alia*, that

she fits within the ADA definition of a "qualified individual with a disability." *Anderson v. Discovery Communs., LLC*, No. 08-cv-02424-AW, 2011 U.S. Dist. LEXIS 111261, at \*18 (D. Md. Sept. 29, 2011) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)). If the employee does so, the defendant has the opportunity to rebut the presumption of discrimination by offering a non-discriminatory reason for the defendant's actions. *Id* (citing *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420 (4th Cir. 2000)). If the defendant succeeds in this regard, the burden shifts back to the plaintiff, who then must prove by a preponderance of the evidence that defendant's proffered reasons were merely a pretext for discriminatory conduct. *Id* (citing *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981)).

In *Anderson*, the court held that the plaintiff had not established a *prima facie* case because she failed to demonstrate that her sleep disorder qualified her as having a disability under the ADA's statute. While sleep apnea may qualify as a "physical impairment" under the ADA, a sleep apnea-based ADA claim cannot succeed unless the plaintiff demonstrates that the disorder affected a "major life

activity.” *Id.* at \*21. After noting that Anderson’s doctor had not even diagnosed her with sleep apnea, but merely a “sleeping disorder,” the court pointed to the fact that none of Anderson’s “major life activit[ies]” had been affected. *Id.* As a result, she failed to establish a *prima facie* case of disability discrimination under the ADA, and summary judgment was proper. The court also noted that even if Anderson had established a *prima facie* case, her claim would still not survive a summary judgment motion, because Discovery had offered non-discriminatory reasons for firing her, which Anderson had not shown to be pre-textual.

## **EMPLOYMENT AND LABOR LAW:**

### **INJURIES COVERED UNDER MARYLAND’S WORKER’S COMPENSATION ACT**

*Doe v. Buccini Pollin Group, Inc.*, No. 812, 2011 Md. App. LEXIS 140 (Md. Ct. Spec. App. Oct. 3, 2011).

In *Doe v. Buccini Pollin Group Inc.*, the Maryland Court of Special Appeals upheld a decision of the Circuit Court of Baltimore City by ruling that an employee could not recover compensation benefits under the Maryland Worker’s Compensation Act (Act) for

injuries he sustained as a result of a third-party’s actions that occurred outside “the course of the employment. . . .” *Id.* (quoting The Maryland Workers Compensation Act, Md. Code (1991, 1999 Repl. Vol., 2007 Supp.), § 9-101(b)(2) of the Labor and Employment Article). The appellant Doe, while engaged in his employment as a banquet houseman at the BWI Hilton Hotel, became involved in a disagreement with a co-worker, Keya Gardner. As a result of this disagreement, Gardner phoned a friend, Daryl Newsome, and asked him to come to the hotel to inflict injury on Doe. As Doe was finishing his shift and leaving the hotel parking lot, he was followed by Newsome, and a high speed chase began. Eventually, Doe stopped his vehicle in an alley in Baltimore City, at which time Newsome arrived, got out of his car, approached Doe, and shot him. Doe was rendered a paraplegic as a result of his injuries. Doe then filed a workers compensation claim with the Workers’ Compensation Commission (Commission) who awarded Doe total disability benefits. After Buccini filed a timely appeal, the circuit court reversed, holding that Doe’s injuries were not covered under the Act.

In this case, the outcome turned on the court’s interpretation of § 9-101(b)(2) of

the Act, which states that an employee’s injury is compensable under the Act if it was “an injury caused by a willful or negligent act of a third person directed against a covered employee in the course of the employment of the covered employee[.] . . .” Md. Code (1991, 1999 Repl. Vol., 2007 Supp.), § 9-101(b)(2) of the Labor and Employment Article. In determining the scope of the “course of employment” language, the court cited two cases decided by the Court of Appeals, *Giant Food, Inc. v. Gooch*, 245 Md. 160 (1967) and *Edgewood Nursing Home v. Maxwell*, 282 Md. 422 (1978). In each of these cases, the Court of Appeals held that an employee’s injury that resulted from the actions of a third-party and that occurred on the employer’s premises was in “the course of employment” and thus, was compensable under the Act. *Giant Food, Inc.*, 245 Md. at 165; *Edgewood Nursing Home*, 282 Md. at 430. In the present case, the Court of Special Appeals also noted the “coming and going rule,” which precludes an employee from recovering under the Act if the injury occurred while the employee was commuting to or from work. *Doe v. Buccini Pollin Group, Inc.*, No. 812, 2011 Md. App. LEXIS 140, at 24-5 (Md. Ct. Spec. App. Oct. 3, 2011). The court also identified the

“proximity exemption” to the “coming and going rule” which holds that an employee is still in the course of employment if he is exposed to some peculiar danger related to his employment, even though he is not geographically located at the employer’s premises. *Id.* at 27.

Applying this law to the facts of the case, the Court of Special Appeals held that Doe’s injuries did not fall within “the course of employment” as defined by Maryland case law. *Id.* at 28 (citing *Bd. of County Comm’rs for rederick County v. Vache*, 349 Md. 526 (1998)). The court distinguished the present case from *Giant Food and Edgewood Nursing Home* by noting that in both of those cases, the injury occurred while the employee was on the employer’s premises. In contrast, Doe was 13 miles away from the Hotel when he suffered his injuries. Furthermore, the court held that the circumstances of the present case fell squarely into the “coming and going rule,” and could not be saved by the “proximity exemption” because Doe’s injuries occurred outside the “range of dangers associated with his employment.” *Doe*, No. 812, 2011 Md. App. LEXIS 140, at \*47. As such, his injuries were not compensable under § 9-101(b)(2) of the Act.

**CONSTITUTIONAL LAW:**  
**THRESHOLD STANDING**  
**REQUIREMENTS FOR**  
**ENVIRONMENTAL**  
**ORGANIZATIONS**

*Patuxent Riverkeeper v. Md. Dep’t of the Env’t*, No. 139, 2011 Md. LEXIS 628 (Md. Sept. 30, 2011).

In an opinion authored by Judge Battaglia, the Court of Appeals of Maryland overturned a decision of the Circuit Court for Prince George’s County by holding that an environmental group had standing under § 5-204(f) of the Environment Article to challenge a decision of the Maryland Department of the Environment (MDE). *Patuxent Riverkeeper v. Md. Dep’t of the Env’t*, No. 139, 2011 Md. LEXIS 628, at \*3 (Md. Sept. 30, 2011) (citing MD. CODE ANN., ENVIR. §§ 5-204(f) (2011)). The Petitioner, Patuxent Riverkeeper, a non-profit environmental advocacy organization, filed suit on behalf of one of its members, David Linthicum. The basis of Riverkeeper’s complaint was MDE’s decision to issue a non tidal wetlands permit to a land developer, Woodmore Town Center, LLC, who was also a respondent in the case. The permit enabled Woodmore to construct a road extension and stream crossing so that its patrons could have access into

the Woodmore Town Center development.

Under §5-204(f), an individual or an organization may have standing to challenge an administrative decision of the MDE, including the issuance of permits, as long as that person or group satisfies the federal requirements for standing. MD. CODE ANN., ENVIR. §§ 5-204(f) (2011)). Prior to the enactment of § 5-204(f), Maryland courts took a more restrictive approach in allowing environmental groups to challenge MDE permitting decisions through judicial processes. *Patuxent Riverkeeper*, No. 139, 2011 Md. LEXIS 628, at \*7. Under the pre-Section 5-204(f) regime, an environmental group had to demonstrate a property interest in the matter that was separate and distinct from the property interest of one of its members. *Id.* (citing *Medical Waste Assoc., Inc. v. Maryland Waste Coalition, Inc.*, 327 Md. 596 (1992)). Furthermore, a property owner had to demonstrate that he had been “aggrieved” by an agency action. *Id.* (citing *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137 (1967)). In *Patuxent Riverkeeper*, the Court of Appeals recognized that with the enactment of § 5-204(f), Maryland courts should take a broader approach to making standing determinations by applying the federal standing requirements.

As such, the Court of Appeals looked to the various Supreme Court decisions on the standing issue to determine the appropriate federal standard. *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000)) (establishing standing requirements in an environmental action); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009) (complainant must demonstrate prior use of affected area and plans for future use); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (complainant must demonstrate a “nexus” between the conduct complained of and alleged injury). Applying this standard to the facts of the present case, the Court of Appeals determined that the road extension and steam crossing authorized under the MDE permit posed a threat to Linthicum’s enjoyment of the Patuxent River. The court extensively noted Linthicum’s affidavits and trial testimony detailing the various ways in which he spends time on the river and the negative impacts that the development would have on his enjoyment of the river. The court disagreed with the Circuit Court’s analysis that Linthicum had not established that the threat to his interest in the river was concrete enough to enable him or Riverkeeper to have standing. Instead, the court noted that Linthicum’s concern over the development’s environmental impacts were “reasonable,” and under the expanded federal standing requirements, enabled him to establish standing.

**INSURANCE LAW:**  
**COMMERCIAL GENERAL  
LIABILITY POLICIES DO NOT  
COVER REPAIR AND  
REPLACEMENT OF FAULTY  
WORKMANSHIP**

**A case and concept revisited  
by Jeffrey R. Schmieler.**

*Lords Landing Vill. Condo.  
Council of Unit Owners v.  
Continental Ins. Co.*, No. 98-  
1639, 1999 U.S. App. LEXIS  
21938 (4th Cir. June 10, 1999).

The Court of Appeals for the Fourth Circuit held that the repair and replacement cost of faulty workmanship is not covered under a commercial general liability policy.

In the matter at hand, the Council of Unit Owners at Lords Landing Village Condominium complex (“Unit Owners”) filed suit against the developer of the complex, Wellington Homes, for faulty workmanship done by its subcontractors, among of which included the failure to prime wood before painting it, causing it to rot. After a trial, the jury returned a verdict in the amount of \$1.1 million in favor of the Unit Owners and against Wellington Homes. The Unit Owners then brought an action directly against Wellington Homes’ insurer, Continental Insurance Company (“Continental”), arguing that it

was legally obligated to pay because of “property damage” caused by an “occurrence.” The district court relied on the Maryland Court of Special Appeals’ recent decision in *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634 (1996), which stated that the proper standard for determining whether an act is an accident for purposes of invoking coverage under a CGL policy is whether the damage was unforeseen or unexpected by the insured. As such, the district court held that the CGL policy covered the damages caused by the subcontractors’ faulty workmanship because the faulty workmanship was an “occurrence” as defined by the CGL policy. Specifically, the damages were neither intended nor expected by Wellington Homes and because of that and under the subjective standard set forth by the *Sheets* court, the damages were caused by an “accident” as defined by the policy. On appeal, Continental argued that the ruling in *Sheets* did not apply in this matter as the repair and replacement costs for the faulty workmanship are “economic losses resulting from failure to satisfy a contractual bargain and thus are not losses covered by the CGL policy.” *Lords Landing*, No. 98-1639, 1999 U.S. App. LEXIS 21938 at \*3-4. Continental additionally argued that CGL policies are not meant to be surety bonds to insure contractual obligations

and if the court were to force Continental to pay for the repairs, it would be tantamount to “convert[ing] its policy into a performance bond, which was never intended by the parties.” *Id.* at \*4.

The Court agreed with Continental. It explained that even though the *Sheets* court disapproved of the cases which relied on an objective viewpoint test to define “accident,” it did not intend to “undermine or fundamentally alter the established nature of CGL policies and the risks that they were meant to cover.” *Id.*

Therefore, the Court concluded that the purpose of a CGL policy is to compensate for tort liability for damage to others’ property rather than for the insured’s contractual liability.

The Court of Appeals for the Fourth Circuit ultimately held that the proper interpretation of *Sheets* was outlined by the Maryland Court of Special Appeals’ decision in *Lerner*. In *Lerner*, the court concluded that “losses occasioned by faulty workmanship” are not the result

of an “accident” as used in the CGL policy. *Lord’s Landing*, No. 98-1639, 1999 U.S. App. LEXIS 21938 at \*6. Therefore, in the matter at hand, the losses that were claimed as a result of the Wellington Homes’ subcontractors’ failure to use primer paint, as they were contractually obligated to do, were not unexpected or unforeseen. Finally, the Court concluded that because the “breach of a duty to perform construction work properly is not an ‘accident,’ as covered by a CGL policy,” there was no coverage. *Id.* at \*7.

**Jeffrey R. Schmieler was coverage counsel for Continental Insurance Company in this litigation.**