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# S&S Recent Developments in the Law<sup>©</sup>

L E T T E R

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## *Recent Developments in the Law*

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Saunders & Schmieler's *S&S  
Recent Developments in the Law*  
reports on the significance of  
current decisions of major import  
in the jurisdictions of Maryland,  
the District of Columbia, Virginia,  
and the federal Fourth Circuit.

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## Court of Special Appeals

### POLICY COVERAGE

**Whether an employee's car is covered under the employer's commercial automobile insurance policy has no bearing on who is insured. Similarly, the fact that an employee is not insured has no effect on which cars are covered.** *Continental Casualty Co. v. Kemper Insurance Co.*, 2007 Md.App. LEXIS 47

**Holding:** The policy provision excepting an employee driving his own car from coverage was unambiguous and was unaffected by the fact that the vehicle could otherwise have been covered.

**Case Summary:** In a case of first impression for both Maryland and Texas, Jeffrey R. Schmieler and Saunders and Schmieler, P.C., representing Texas-based appellant Continental Casualty Co., successfully appealed the lower court's ruling, resulting in the Maryland Court of Special Appeals finding that an employee driving an insured's covered auto is not covered himself if the policy

explicitly excepts him from coverage.

Continental insured Jani-King International, Inc., for any vehicles it owned, hired or borrowed under a business auto liability policy. The lower court found that this policy—which stated that Continental would "pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'"—covered Jani-King employee Robert Piazza, who was driving his own car while returning from visiting a client when he collided with Thelma Green's vehicle.

Green's insurer, Kemper Insurance Co., paid \$140,000 under her underinsured motorist coverage. Kemper subsequently filed a complaint for declaratory judgment against Continental, who had not been named in the original case, because Kemper argued that Continental should have covered Piazza since he was operating the vehicle in the

course of his employment. The lower court agreed, finding Continental liable to Kemper for \$140,000.

On appeal, Jeffrey Schmieler argued on behalf of Continental that the unambiguous terms of the policy clearly excluded Piazza from the definition of who was insured. Under Continental's policy, 'insureds' included Jani-King or anyone else while using a covered vehicle with Jani-King's permission. However, the crucial exception to this definition of 'insureds' was an employee operating a "covered 'auto' [that] is owned by that employee or a member of his or her household...." Since the vehicle operated by Piazza at the time of the accident belonged to him, Saunders and Schmieler argued that the policy clearly did not provide coverage for him as an insured.

The Court of Special Appeals agreed and ruled in favor of the appellant, finding that the plain language of the policy made clear that Piazza was not an insured under the policy, regardless of whether his vehicle was covered and despite Kemper's claims that the provision in question was ambiguous. This holding reversed the lower court's ruling.

Although the issue had not previously been reviewed in Maryland or Texas, many other jurisdictions, including the U.S. Court of Appeals for the Fourth Circuit, have held that the employee must be an insured *and* the vehicle involved in the

accident must be a covered auto in order to find that coverage exists under an employer's commercial automobile policy. (Saunders and Schmieler cited 15 cases from other jurisdictions with similar holdings in its Appellate Brief for Continental.) The court recognized the logic employed by these other jurisdictions and agreed that there is no alternative way to interpret the provision in question.

While the court actually applied Texas law under the *lex loci contractus* choice of law doctrine since the operative policy was delivered to Jani-King in Dallas, it noted that Texas law on insurance interpretation does not differ from that of Maryland. The final outcome of the case therefore brought Maryland in line with every jurisdiction that has decided this issue.

Finally, the court held that the policy exclusionary provision is in line with stated public policy when minimum compulsory motor vehicle insurance is complied with. Though Kemper argued to the contrary, it failed to offer any examples of how finding for Continental would violate the public policy behind Maryland's compulsory insurance laws.

#### ABSENCE OF KNOWLEDGE REQUIREMENT NOT APPLICABLE IN SLIP-AND- FALL CASES

**A recent lead-paint case holding did not eliminate the need for a showing of knowledge in slip-and-fall cases.** *Joseph v. Bozzuto*

*Mgmt. Co., et al.*, 2007 Md. App. LEXIS 41

**Holding:** Appellant, who injured his knee after slipping on an oily substance in the stairwell of his parents' apartment building, failed to show that appellees had actual or constructive knowledge of the hazard, and the court refused to adopt the holding in *Brooks v. Lewin*--that no showing of knowledge is necessary in lead-paint cases--to the slip-and-fall case at hand.

**Case Summary:** While descending the stairs in the Metropolitan apartment building, owned by Housing Opportunities Commission and managed by Bozzuto Management Company (appellees), appellant Joseph fell and injured his knee, claiming to have slipped on an oily substance. The building superintendent, employed by Bozzuto, testified that the three maintenance technicians working at the Metropolitan walked through and clean all common areas on a daily basis. He also claimed to have inspected the stairwells during the previous week. The superintendent also testified that the company that Bozzuto hired to maintain the common areas cleaned the stairwells three times a week.

In examining the case in accordance with the general principles of tort law, the court found, not only an absence of any evidence showing that the appellees had any actual or constructive knowledge of the oily substance, but also that

appellant failed to even make such an allegation in his complaint. This failure precluded the appellee from proving a basic negligence case.

However, appellant argued that *Brooks v. Lewin Realty III, Inc.* (378 Md. 70 (2003)), a lead-paint case holding that no showing of knowledge is required to find liability, should be controlling in the present case. However, the court found that *Brooks* was applicable only in lead-paint cases. The decision in *Brooks* was in response "to a unique social problem and does not purport to have any far-flung implications beyond that limited context." The court found the *Brooks* decision had "absolutely nothing" to do with the slip-and-fall case at hand. Furthermore, the court pointed out that [at the time of this case] two slip-and-fall cases had been decided since *Brooks* and they both reaffirmed the knowledge requirement appellant tried to argue against: "Neither opinion so much as mentioned *Brooks v. Lewin* or suggested that it might have any pertinence to a slip-and-fall case."

In arguing that there was no knowledge requirement, appellant intertwined the narrowly tailored *Brooks* holding with the more generalized proposition that in some circumstances, statutory violations are sufficient evidence of negligence. The court explained, however, that the qualifier "in some circumstances" is, in fact, very difficult to overcome, and the proposition is most applicable in motor tort

cases. The behavior of the tortfeasor must break the law and *at the same time* create the tort hazard: "The wet spot [is not in itself] evidence of negligence--absent something more." In order to find negligence, the landlord must fail to reasonably remedy the situation once having acquired knowledge of it.

### Maryland Court of Appeals

#### ASSUMPTION OF THE RISK

**Whether or not a woman voluntarily walked across a snow- and ice-covered parking lot was a question of law, not a question for the jury.** *Morgan State University v. Walker*, 2007 Md. LEXIS 104

**Holding:** Uncontroverted evidence showed that Walker knew of the dangerous conditions, yet voluntarily chose to cross the parking lot of her daughter's dormitory anyway, and this assumption of the risk barred her from any recovery, regardless of whether the University was negligent.

**Case Summary:** Pamela Walker slipped on the snow and ice covering the parking lot of her daughter's dormitory while returning to her car following a visit with her daughter and broke her leg, an injury she claimed resulted in \$50,000 in medical bills and lost earnings. Walker argued that MSU was negligent in its duty to clear the parking lot following the recent snow storm and that she

had no choice but to park where she did and to cross the lot.

The Circuit Court granted summary judgment for MSU in the subsequent personal injury action, ruling that as a matter of law, Walker assumed the risk of injury by walking across the snowy parking lot. The Court of Special Appeals reversed the holding, stating in an unreported opinion that the question of whether the respondent *voluntarily* made the decision to park in the lot she did and walk across the snow was a question for the jury.

The Maryland Court of Appeals reversed this ruling. It agreed with the Circuit Court that Walker's voluntariness was a question of law. Such a question is to be measured by an objective standard, and "when it is clear that a person of normal intelligence in the position of the plaintiff must have understood the danger, the issue is for the court."

In referencing the 1997 case of *ADM P'ship v. Martin*, 348 Md. 84, the Court outlined the principles of an assumption of the risk analysis, an affirmative defense: the defendant must prove that the plaintiff "(1) had knowledge of the risk of the danger; (2) appreciated the risk; and (3) voluntarily confronted the risk of danger.

Respondent made clear through her testimony that she was aware of the snow and ice on the ground and fully understood the

danger associated with crossing it. The Court recognized earlier decisions finding that this danger, along with those of "falling through unguarded openings, of lifting heavy objects...and doubtless many others," should be appreciated by adults of any age.

Once the Court concluded that Walker was fully aware of the danger, it turned to the issue of whether she voluntarily confronted the risks of that danger. The Court held that her actions would be considered involuntary only if she lacked the free will to avoid crossing the parking lot, and it found nothing in the record to suggest that the respondent was forced against her will to take such actions. It stated that Walker's argument that she had no reasonable alternative paths were ineffective because, upon becoming aware of the dangerous conditions, she had the option of returning home.

Further stating that "the assumption of risk defense exists independently of the conduct of another person," the Court determined that whether or not MSU had a duty to safely maintain the parking lot and was negligent in this duty was irrelevant. Once Walker assumed the risk of injury, she relieved the defendant of any responsibilities or obligations toward her.

**Baltimore City Circuit Court**

**AWARD FOR LEAD  
PAINT POISONING**

**Twelve-year-old girl who exhibited success in school was still entitled to damages for lead poisoning in her childhood home.**

*Greene v. N.B.S., Inc., et al.*, Case No. 24-C-02-003243

**Holding:** A Maryland girl was awarded \$2.3 million after defendant's failure to maintain her childhood home resulted in elevated levels of lead in her blood, despite the fact that she was a successful student.

**Case Summary:** Kelly Green's parents were living in an East Baltimore property they rented from landlord Stanley Rochkind when she was born in January 1995. By September 1996, her blood contained double the Center for Disease Control's "action level" of 10 micrograms per deciliter.

Following the judge's finding that Rochkind had acted negligently in maintaining the rental property, the jury was left to decide how much compensation Green should receive. The defendant claimed that the plaintiff, who had a full scale IQ of 105 and arguably no cognitive disabilities, suffered no injuries. Green's lawyers alleged that had she not suffered from lead point poisoning, her school performance would be even better. Furthermore, experts for the plaintiff stated Green may need support both academically and psychologically in the future, plus she will have to face the effects the

lead poisoning may have if transferred to her own children.

The jury returned an award of \$2.3 million to Green for pain and suffering, an award that is extremely unique for a plaintiff that shows successful performance in school. Pursuant to statute, the award will be reduced and capped at just over \$500,000.